



MILITARY LAW REVIEW

ARTICLES

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Major Elizabeth A. Walker

A NEW WAR ON AMERICA'S OLD FRONTIER: MEXICO'S DRUG CARTEL INSURGENCY

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THE TWENTY-SEVENTH GILBERT A. CUNEO LECTURE IN GOVERNMENT CONTRACT LAW

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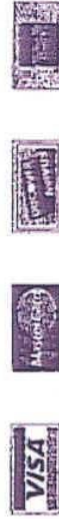
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SHAKEN BABY SYNDROME: *DAUBERT* AND MRE 702'S FAILURE TO EXCLUDE UNRELIABLE SCIENTIFIC EVIDENCE AND THE NEED FOR REFORM

MAJOR ELIZABETH A. WALKER*

Audrey Edmunds' day as a child care provider began like any other, but ended in her being accused of murdering seven-month-old Natalie Beard.¹ Natalie was fussy that morning when her mother dropped her off at approximately 7:30 a.m..² Edmunds placed Natalie in the master bedroom, gave her a bottle, and left her alone while she dressed her own daughters.³ When Audrey checked on Natalie thirty minutes later, the baby was limp and unresponsive.⁴ Audrey immediately called 911 and an

* Judge Advocate, U.S. Army. Presently assigned as a Litigation Attorney, Army Litigation Division, U.S. Army Legal Services Agency, Arlington, Va. LL.M., 2010, The Judge Advocate General's Legal Center and School, Charlottesville, Va.; J.D., 2000, Vermont Law School; B.S., 1997, University of Illinois-Urbana-Champaign. Previous assignments include Government Appellate Attorney, Government Appellate Division, U.S. Army Legal Services Agency, Arlington, Va., 2008–2009; Officer-in-Charge/Trial Defense Counsel, 4th Infantry Division Branch Office, U.S. Army Trial Defense Service, Fort Hood, Tex., 2006–2008; Senior Defense Counsel, 4th Infantry Division Field Office, U.S. Army Trial Defense Service, Camp Liberty, Iraq, 2005–2006; Trial Defense Counsel, 4th Infantry Division Branch Office, U.S. Army Trial Defense Service, Fort Hood, Tex., 2004–2005; Trial Counsel, United States Army Field Artillery Center and School, Fort Sill, Okla., 2003–2004; Administrative Law Attorney/Ethics Counselor, U.S. Army Field Artillery Center and School, Fort Sill, Okla., 2002–2003; Legal Assistance Attorney, U.S. Army Field Artillery Center and School, Fort Sill, Okla., 2001–2002. Member of the bars of Massachusetts, the Army Court of Criminal Appeals, the Court of Appeals for the Armed Forces, and the Supreme Court of the United States. This article was submitted in partial completion of the Master of Laws requirements of the 58th Judge Advocate Officer Graduate Course.

¹ *State v. Edmunds*, 598 N.W.2d 290, 293 (Wis. Ct. App. 1999); *see also* Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 WASH. U. L. REV. 1, 1–2 (2009).

² *Edmunds*, 598 N.W.2d at 293.

³ *Id.*

⁴ *Id.*

ambulance rushed the baby to the hospital; Natalie died later that night.⁵ The state charge Audrey charged with murder based upon a medical opinion that the baby died from “extremely vigorous shaking.”⁶ The baby was diagnosed with retinal and subdural hemorrhages.⁷ No witnesses testified that Audrey shook the baby and the government presented no other physical evidence of trauma.⁸ Audrey maintained her innocence, yet the court convicted her of murder and sentenced her to eighteen years in prison based on the medical examiner’s testimony that the baby suffered from shaken baby syndrome.⁹

The case of Audrey Edmunds describes the characteristic facts and prosecution of shaken baby syndrome (SBS). Shaken baby syndrome is a “diagnosis” in which doctors believe a caregiver of an infant grabs the infant by the torso and violently shakes the infant, causing the head to thrust back and forth, resulting in a whiplash effect. Studies on SBS originated in the late 1940s when an article written by Dr. John Caffey¹⁰ introduced the diagnosis of “battered infant syndrome.”¹¹ In the decades that followed, several clinical studies examined infants who presented to hospitals with subdural hematomas, retinal hemorrhaging, and long bone fractures, with no external signs of trauma and no explanation from the parents about the cause of such injuries.¹² Collectively, these clinical examinations fostered the “diagnosis” known as SBS.¹³

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 294.

⁹ *Id.*

¹⁰ Dr. Caffey was a pediatric radiologist who first wrote on the topic of “battered infant syndrome.” See *infra* note 12 (listing many of Dr. Caffey’s published articles).

¹¹ John Caffey, *Multiple Fractures in the Long Bones of Infants Suffering from Chronic Subdural Hematoma*, 56 AM. J. ROENTGEN 163 (1946). See *infra* note 12 (listing many of Dr. Caffey’s published articles).

¹² *Id.*; A.N. Guthkelch, *Subdural Effusions in Infancy: 24 Cases*, BRIT. MED. J. 233, 233 (1953); A.N. Guthkelch, *Infantile Subdural Haematoma and Its Relationship to Whiplash Injuries*, 2 BRIT. MED. J. 430 (1971); John Caffey, *On the Theory and Practice of Shaking Infants: Its Potential Residual Effects of Permanent Brain Damage and Mental Retardation*, 124 AM. J. DISEASES CHILD. 161 (1972) [hereinafter Caffey, *On the Theory and Practice of Shaking Infants*]; John Caffey, *The Whiplash Shaken Infant Syndrome: Manual Shaking by the Extremities with Whiplash-Induced Intracranial and Intraocular Bleedings, Linked With Residual Permanent Brain Damage and Mental Retardation*, 54 PEDIATRICS 396, 402 (1974) [hereinafter Caffey, *The Whiplash Shaken Infant Syndrome*].

¹³ Caffey, *Multiple Fractures in the Long Bones of Infants*, *supra* note 11, at 163.

For decades, doctors hypothesized that the forces from the shaking resulted in the brain being thrust back and forth inside the skull, causing small veins to tear and bleed inside the skull. The forces from the shaking also have been thought to result in retinal bleeding and brain swelling.¹⁴ The medical criteria for a shaken baby diagnosis eventually developed into the “triad” of symptoms: retinal hemorrhages (bleeding of the back inner surface of the eye), subdural hemorrhages (bleeding between the hard outer layer and the membranes that surround the brain), and cerebral edema (brain swelling).¹⁵ A case in which an infant who presented to a hospital with these three symptoms, but without external signs of trauma and no explanation from the caregiver as to the cause of these physical symptoms, resulted in a shaken baby diagnosis.¹⁶ The diagnosis of SBS permeated the pediatric medical community, virtually unchecked and unchallenged for years.

Biomechanical and clinical studies challenged the assumptions, science, and methodology behind the SBS diagnosis.¹⁷ Biomechanical studies demonstrated the impossibility that a human being could create enough force by shaking alone to cause brain injuries in young infants and children.¹⁸ Other studies concluded that the amount of shaking force necessary to cause brain injuries would result in neck and spinal injuries before brain injuries would occur.¹⁹ Yet, further studies demonstrated that shaking alone would not cause retinal hemorrhaging.²⁰ Collectively, these studies created a contentious debate between pediatricians and

¹⁴ *Id.*

¹⁵ See Caffey, *On the Theory and Practice of Shaking Infants*, *supra* note 12, at 167; Tuerkheimer, *supra* note 1, at 3. Hereinafter, the term “triad” will refer to subdural hemorrhages, retinal hemorrhages, and brain edema.

¹⁶ Ann-Christine Duhaime et al., *The Shaken Baby Syndrome. A Clinical, Pathological, and Biochemical Study*, 66 J. NEUROSURGERY 409 (1987); Mark N. Hadley et al., *The Infant Whiplash-Shake Injury Syndrome: A Clinical and Pathological Study*, 24 NEUROSURGERY 536 (1989); Faris A Bandak, *Shaken Baby Syndrome: A Biomechanics Analysis of Injury Mechanisms*, 151 FORENSIC SCI. INT’L 71 (2005).

¹⁷ See generally Duhaime et al., *supra* note 16; Hadley et al., *supra* note 16; Bandak, *supra* note 16; Sarah Smith et al., *Infant Rat Model of the Shaken Baby Syndrome: Preliminary Characterization and Evidence for the Role of Free Radicals in Cortical Hemorrhaging and Progressive Neuronal Degeneration*, 15 J. NEUROTRAUMA 693 (1998); Patrick D. Barnes et al., *Traumatic Spinal Cord Injury: Accidental Versus Non-accidental Injury*, 15 SEMINARS PEDIATRIC NEUROLOGY 181 (2008).

¹⁸ Duhaime et al., *supra* note 16, at 414; Smith et al., *supra* note 17, at 700–03.

¹⁹ Bandak, *supra* note 16, at 78; Panos Koumellis et al., *Spinal Subdural Hematomas in Children with Nonaccidental Head Injury*, 94 ARCHIVES DISEASES CHILD. 216–19 (2008).

²⁰ K. Ommaya et al., *Whiplash Injury and Brain Damage: An Experimental Study*, 204 J. AM. MED. ASS’N 285, 285 (1968).

other medical professionals regarding the reliability of an SBS diagnosis. In essence, biomechanical studies exposed the unreliability of the shaken baby diagnosis.

Defense counsel have used these biomechanical studies to challenge SBS expert testimony and its inability to meet several of the *Daubert* admissibility factors, such as: whether the theory or technique can be and has been tested, whether there is a known or potential rate of error, and whether the theory or technique enjoys general acceptance within a relevant scientific community.²¹ However, because Military Rule of Evidence (MRE) 702 and *Daubert* contain such liberal standards, and judges are given broad discretion in determining the admissibility of expert testimony, such challenges are often fruitless. With this frequent admissibility of unreliable scientific expert testimony, reform is necessary. The Military Rules of Evidence must be amended to require corroborating physical evidence of abuse, irrespective of the “triad” of injuries, or a voluntary confession as a prerequisite of admissibility of SBS evidence.

This article explores the history of the shaken baby diagnosis, how it proliferated the medical community, and the basic assumptions of the diagnosis. The biomechanical studies challenging the very foundation of the diagnosis are discussed in order to highlight the controversial nature of the so-called “diagnosis.” This article then applies the *Daubert* factors to the SBS diagnosis to demonstrate its inability to satisfy those admissibility factors. Lastly, this article argues for the need for reform on this issue and proposes a military rule of evidence to address SBS evidence.

I. Shaken Baby Syndrome

A. Creation of a Faulty Hypothesis and Diagnosis

In 1946, Dr. John Caffey, a pediatric radiologist from Pennsylvania, wrote an article on what he termed the parent-infant stress syndrome (PITS) or “battered baby syndrome.”²² Caffey explored the correlation

²¹ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

²² To assist the reader in understanding the significance of Dr. Caffey’s role in the creation of what became known as “SBS,” it is relevant to understand his role within the pediatric community. Dr. Caffey graduated from the University of Michigan Medical

between the occurrence of long bone fractures and chronic subdural hematomas in infants.²³ The article explored six clinical cases of infants who suffered from both injuries.²⁴ None of the cases presented a history of injury to which long bone injuries were reasonably attributable, nor was there clinical or x-ray evidence of skeletal disease which would predispose the infant to the skeletal fractures.²⁵ Caffey thus proffered, “the traumatic theory of the causation of subdural hematoma has been accepted almost to the exclusion of all other causes despite the fact that a history of injury is lacking in almost one-half of the cases.”²⁶ Dr. Caffey theorized that trauma (abuse) caused the subdural hematomas and skeletal fractures despite his lack of either circumstantial or direct evidence to support that conclusion. From these six cases he concluded that subdural hematomas, intraocular bleeding, and long bone injuries were “essential elements” in cases of identifying battered babies.²⁷ These “essential elements” later became known as the “triad” of symptoms

School in 1919. Bertram R. Girdany, *John Caffey, 1895–1978*, 132 AM. J. OF ROENTGENOLOGY 158–60 (1979). In 1929, during his tenure at the Babies Hospital of Columbia University of Physicians and Surgeons, he became interested in radiology and developed a pediatric radiology department. *Id.* Dr. Caffey was “perhaps the most eminent of the pioneers in pediatric radiology” and wrote several articles on infant injuries, cited within this article. N. Thorne Griscom, *John Caffey and His Contributions to Radiology*, 194 RADIOLOGY 513 (1995). His career became “increasingly distinguished with recognition in both pediatrics and radiology.” *Id.* at 514. “The most important of Dr. Caffey’s other contributions was his advancement of the understanding of the battered child syndrome.” *Id.* at 515.

²³ *Id.* at 163. “Chronic refers to something that continues or persists over an extended period of time. A chronic condition is usually long-lasting and does not easily or quickly go away.” A.D.A.M. MEDICAL ENCYCLOPEDIA, <http://www.nlm.nih.gov/medlineplus/ency/article/002312.htm> (last visited Apr. 21, 2011). A subdural hematoma is:

a collection of blood on the surface of the brain. Subdural hematomas are usually the result of a serious head injury. . . . Acute subdural hematomas are among the deadliest of all head injuries. The bleeding fills the brain area very rapidly, compressing brain tissue. This often results in brain injury and may lead to death.

A.D.A.M. MEDICAL ENCYCLOPEDIA, <http://www.nlm.nih.gov/medlineplus/ency/article/000713.htm> (last visited May 22, 2012). The symptoms of a subdural hematoma in infants are feeding difficulties, high-pitched cry, increased head circumference, increased sleepiness or lethargy, irritability, persistent vomiting, and bulging fontanelles (the “soft spots” of the baby’s skull). *Id.*

²⁴ Caffey, *Multiple Fractures in the Long Bones of Infants*, *supra* note 11, at 163.

²⁵ *Id.*

²⁶ *Id.* at 172.

²⁷ *Id.*

thought to be diagnostic of SBS.²⁸

While Dr. Caffey hypothesized that subdural hematomas in infants were caused by parental abuse, other researchers recognized the possibility that the subdural hematomas were largely caused by birth trauma.²⁹ In 1953, A.N. Guthkelch conducted a clinical study of twenty-four infants.³⁰ A comprehensive history was available for sixteen of the infants.³¹ Of those, eight sustained definite birth trauma.³² An additional four infants were of twin pregnancies born prematurely.³³ Thus, in Guthkelch's clinical examination of sixteen infants with subdural hematomas, 75% of the infants experienced an abnormal or difficult labor.³⁴ Guthkelch also noted the fact that the subdural hematomas manifested within the first few months of life, suggesting that the cause of the bleeding was at or near the time of birth.³⁵ This fact further supported his conclusion that the subdural hematomas were the result of birth trauma.³⁶

Nearly twenty years later, Guthkelch abandoned the conclusion that subdural hematomas in infants were largely the result of birth trauma.³⁷ He reviewed the research of professional peers and concluded that, "subdural hematoma is one of the commonest features of the battered child syndrome, yet by no means do all the patients so affected have external marks of injury on the head."³⁸ He considered a 1969 study conducted by colleagues that involved two cases of subdural hematomas in which both victims sustained whiplash injuries to the neck as a result of an automobile accident but exhibited no signs of external injuries to

²⁸ See *supra* note 15.

²⁹ One such study of subdural hematomas in infants found evidence of birth trauma in 25% of the infants. See Guthkelch, *Subdural Effusions in Infancy*, *supra* note 12, at 233. Birth trauma is a general term used to describe a difficult birth event in which an infant may sustain intracranial injury as a result of natural vaginal birth. See generally Ronald H. Uscinski, *Shaken Baby Syndrome: An Odyssey*, 46 *NEUROLOGIA MEDICO CHIRURGICA* 57, 59–60 (2006).

³⁰ Guthkelch, *Subdural Effusions in Infancy*, *supra* note 29.

³¹ *Id.* at 233.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ A.N. Guthkelch, *Infantile Subdural Haematoma and its Relationship to Whiplash Injuries*, 2 *BRIT. MED. J.* 430 (1971).

³⁸ *Id.* at 430.

the head, such as bruising, redness, or bleeding.³⁹ Brain injuries manifested several days after the accident.⁴⁰ Guthkelch proffered that the conditions that exist in battered child syndrome are favorable to the creation of subdural hematomas in infants by a similar mechanism as that of the whiplash experienced in a car accident.⁴¹ The assumption by researchers was that the force of jerking or swinging a child around would cause whiplash injuries similar to those of a car accident.⁴² Based on examining just those few cases, Guthkelch concluded that, in some cases, the repeated acceleration and deceleration of the head being whipped back and forth was the cause of the subdural hematomas in infants rather than direct violence such as a direct blow to the head.⁴³ This hypothesis also supported the fact that some of the subdural hematomas in battered children were bilateral due to the back and forth motion of the shaking.⁴⁴ He concluded that:

[i]t follows that since all cases of infantile subdural haematoma are best assumed to be traumatic unless proved otherwise it would be unwise to disregard the possibility that one of these has been caused by serious violence, repetition of which may prove fatal, simply on the basis that there are no gross fractures or other radiological bone changes in the limbs, nor any fractures of the skull.⁴⁵

Guthkelch ultimately determined that, from a medical perspective, it was simply easier to assume that all cases of infantile subdural hematomas were a result of trauma (abuse) unless the parents or care-provider proved otherwise. He also emphasized that the lack of obvious

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* Kempe and others conducted a study which noted that the battered child is pulled by the arm to jerk the reluctant child to his feet and sometimes the legs are held while the child's body is swung around. *Id.* Guthkelch studied twenty-three cases of proven or "strongly suspected" cases of battered children under the age of three years. Guthkelch discovered subdural bleeding in thirteen children (57%) with ten of the children exhibiting bilateral bleeding in the brain and six (26%) exhibiting long bone fractures. *Id.* He also discovered skull fractures in eight cases (33% of total children studied and 61% of those suffering from subdural hematomas) and six of those suffered a subdural hematoma. *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 431.

signs of trauma, such as bruising, did not preclude the assumption that an infant's brain injuries were caused by intentional and violent shaking by a caregiver,⁴⁶ as "[o]ne must keep in mind the possibility of assault in considering any case of infantile subdural hematoma, even when there are only trivial bruises or indeed no marks of injury at all, and inquire, however guardedly or tactfully, whether perhaps the baby's head could have been shaken."⁴⁷ The assumption that, in the absence of external trauma, shaking caused internal brain injuries in infants continued to permeate the medical community.

In 1972, Dr. Caffey further explored the area of child abuse in young children when he released an article in the *American Journal of Diseases of Children* on whiplash shaking of an infant.⁴⁸ He proffered that during the twenty-five years since his seminal article, substantial research had accumulated which suggested "whiplash shaking and jerking of abused infants are common causes of the skeletal and cerebrovascular lesions."⁴⁹ He further theorized that the shaking and jerking of infants are "frequently pathogenic"⁵⁰ and often results in grave permanent damage to the infantile brain and eyes.⁵¹ Caffey even speculated that there are many innocent and accepted practices that could lead to permanent brain damage in young infants, such as: "tossing the baby into the air," "riding the horse" (the infant faces the parent while sitting on his shin), "cracking the whip," or grabbing an infant by his ankles and swinging him in circles around the parent's head could lead to serious brain injuries.⁵² In Caffey's opinion, subdural hematomas were practically always traumatic in origin and found commonly in infants younger than twenty-four months with a peak incidence during the sixth month.⁵³ He concluded that the vulnerability of the infant to "traumatic intracranial bleeding is due to the combination of heavy head and weak neck muscles, which renders [the infant's] brain especially susceptible to whiplash stresses caused by shaking."⁵⁴ Caffey dismissed the possibility that the intracranial and retinal bleeding observed in infants was a result

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Caffey, *On the Theory and Practice of Shaking Infants*, *supra* note 12.

⁴⁹ *Id.* at 161.

⁵⁰ Pathogenic means "[c]ausing disease or capable of doing it." MEDICINET, <http://www.medterms.com/script/main/art.asp?articlekey=6384> (last visited May 22, 2012).

⁵¹ Caffey, *On the Theory and Practice of Shaking Infants*, *supra* note 12, at 161.

⁵² *Id.* at 165.

⁵³ *Id.* at 166.

⁵⁴ *Id.*

of impact injuries to the head. Rather, he concluded that “there were several features of the subdural hematomas that indicated they were not caused by direct impact to the head, but caused by indirect acceleration-deceleration forces” as a result of the head whipping back and forth from the infant being shaken.⁵⁵ Dr. Caffey based this conclusion on a lack of physical evidence of impact in the infants, such as bruises to the face or scalp and skull fractures.⁵⁶ The fact that a majority of the infants studied suffered from bilateral subdural hematomas and retinal bleeding supported his conclusion that the injuries were a result of the forces caused from the infant being shaken back and forth.⁵⁷ Caffey predicted that retinal bleeding caused by shaking would become a valuable sign in the future diagnosis of unexplained, chronic subdural hematomas and a productive screening test for whiplash shaking incidents.⁵⁸

A few years later in 1974, Caffey introduced the concept of “whiplash shaken infant syndrome” which became commonly known as shaken baby syndrome. Caffey postured that “manual whiplash shaking of infants is a common primary type of trauma in the so-called ‘battered infant syndrome.’ It appears to be the major cause in infants who suffer from subdural hematomas and intraocular bleeding.”⁵⁹ Dr. Caffey based his opinion on “both direct and circumstantial” evidence.⁶⁰ He hypothesized that the “essential elements of infantile whiplash shaking syndrome” were infants who exhibited bleeding within the head (subdural hematoma), bleeding in the interior linings of the eyes (retinal hemorrhages), with “no history of trauma of any kind.”⁶¹ Dr. Caffey

⁵⁵ *Id.* at 169. Caffey’s conclusion that shaking caused subdural hematomas was based upon a mere twenty-seven clinical cases in which a child inexplicably died or suffered traumatic brain injury and a parent or care-provider admitted to shaking the child in some form. *Id.* at 163. The article never addressed the forum or manner in which these “admissions” were obtained nor did it address the exact substance of the alleged admission by the care-provider. *Id.* From these twenty-seven cases, Caffey extrapolated that this small sample represented “an infinitesimal portion of the uncounted thousands of moderate and unadmitted, undetected and unrecorded whiplash-shakings which probably occur every day in the United States.” *Id.* at 167. Yet, Caffey concludes in his article that the evidence upon which he theorized that whiplash shaking of infants caused severe brain and retinal hemorrhaging does not lend itself to satisfactory statistical analysis and that “‘universal’ samples of a total population of shaken infants have not yet been obtained.” *Id.* at 168–69.

⁵⁶ *Id.* at 169.

⁵⁷ *Id.*

⁵⁸ *Id.* at 167.

⁵⁹ Caffey, *The Whiplash Shaken Infant Syndrome*, *supra* note 12, at 402.

⁶⁰ *Id.*

⁶¹ *Id.*

explained that the shaking of an infant by holding him by his trunk causes a two-phase cycle of “rapid, repeated, to-and-fro, alternating acceleration-deceleration flexions of the head” which then causes the head to strike the chin followed by the reverse forces on the head and neck when the head swings the opposite direction and strikes the baby’s back.⁶² He believed that these forces caused the subdural hematomas and retinal hemorrhages⁶³ seen in cases of infants with no history of trauma.⁶⁴ He suggested to the medical community that the concept of “whiplash shaken infant syndrome” warranted careful diagnostic consideration in infants with unexplained convulsions, projectile vomiting, irritability, and bulging fontanel.⁶⁵ Dr. Caffey proposed that routine eye examinations would provide a “superior screening method” for early detection of whiplash shakings.⁶⁶ He went on to state in the article that, “[c]urrent evidence, though manifestly incomplete and largely circumstantial, warrants a nationwide educational campaign on the potential pathogenicity of habitual, manual casual whiplash shaking of infants, and on all other habits, practices and procedures in which the heads of infants are habitually jerked and jolted (whiplashed).”⁶⁷ As a result of Dr. Caffey’s suggestion that an educational campaign be initiated, the nation began cautioning mothers, fathers, and caregivers to never shake a child. Although this was good advice, Dr. Caffey pointed out that his suggestion was not based on any type of scientific study.⁶⁸

⁶² *Id.* at 401.

⁶³ “Retinal hemorrhage is the abnormal bleeding of the blood vessels in the retina, the membrane in the back of the eye.” The Free Dictionary, <http://medical-dictionary.thefreedictionary.com/Retinal+hemorrhage> (last visited Apr. 21, 2012). “Retinal hemorrhages can be caused by injuries, usually forceful blows to the head during accidents and falls, as well as by adverse health conditions.” *Id.*

⁶⁴ Dr. Caffey noted in his article that two of the first six battered babies he studied in 1946 suffered from retinal hemorrhages and subdural hematomas. Caffey, *The Whiplash Shaken Infant Syndrome*, *supra* note 12, at 399. He also relied on the fact that similar intraocular lesions were reported in two cases by Guthkelch. *Id.* Dr. Caffey further relied on a study by Mushin, who found ocular changes in ten of twelve battered infants. *Id.*

⁶⁵ *Id.* at 403. A fontanel is the “soft spot” of the infant’s head. “A bulging fontanelle is an outward curving of an infant’s soft spot” which is believed to be caused by brain swelling. MEDLINE PLUS, <http://www.nlm.nih.gov/medlineplus/ency/article/003310.htm> (last visited Apr. 21, 2012).

⁶⁶ Caffey, *The Whiplash Shaken Infant Syndrome*, *supra* note 12, at 403.

⁶⁷ *Id.*

⁶⁸ See Caffey, *On the Theory and Practice of Shaking Infants*, *supra* note 12, at 168.

Dr. Caffey based these conclusions on a study conducted by A. K. Ommaya⁶⁹ who experimented with rhesus monkeys in 1968.⁷⁰ The Ommaya experiment studied the potential whiplash injuries of rhesus monkeys by seating them in a rigid carriage and simulating a rear-end collision by driving a piston into the back of the carriage at various force levels.⁷¹ The purpose of this research was to study whiplash on humans in automobile accidents.⁷² The researchers measured the forces on the monkey's head from being whipped back and forth.⁷³ The experiment produced injury to nineteen out of fifty monkeys.⁷⁴ Monkeys were used for the experiment, instead of humans, because the monkeys were killed in order to examine their brains for injury.⁷⁵ It was supposed to illustrate that injuries could occur to primates through sheer acceleration forces without any impact to the monkey's head.⁷⁶ Researchers in the Ommaya study produced an impact curve that predicted at what level of acceleration the monkeys would start to experience brain injuries from

⁶⁹ Dr. Ayub K. Ommaya was a neurosurgeon and an "internationally known expert on brain injuries." He "received his medical degree from King Edward Medical College in Pakistan in 1953. Joe Holley, *Ayub K. Ommaya*, 78; *Neurosurgeon and Authority on Brain Injuries*, WASH. POST, July 14, 2008, at B04, <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/13/AR2008071301791.html>. Dr. Ommaya "came to the United States in 1961 as a visiting scientist at the National Institutes of Health" (NIH). *Id.* He "began teaching at George Washington University in 1970" and served as the chief of neurosurgery of NIH from 1974 to 1979. *Id.* "In 1997, Dr. Ommaya was called as a defense expert witness in the highly publicized trial of Louise Woodward, a British au pair accused of killing an 8-month-old baby in her care." *Id.* "He maintained that the child, Matthew Eappen, could not have been killed by violent shaking, as prosecutors claimed." *Id.*

⁷⁰ Caffey, *The Whiplash Shaken Infant Syndrome*, *supra* note 12, at 401–02. This study concluded that:

[e]xperimental whiplash injury in rhesus monkeys has demonstrated that experimental cerebral concussion, as well as gross hemorrhages and contusions over the surface of the brain and upper cervical cord, can be produced by rotational displacement of the head on the neck alone, without significant direct head impact. These experimental observations have been studied in the light of published reports of cerebral concussion and other evidence for central nervous system involvement after whiplash injury in man.

Ommaya et al., *supra* note 20, at 285.

⁷¹ *Id.* at 286.

⁷² *Id.* at 285.

⁷³ *Id.*

⁷⁴ *Id.* at 286.

⁷⁵ *Id.*

⁷⁶ *Id.* at 285.

the sheer acceleration forces without any impact on the head.⁷⁷ They called this level the “threshold of injury.”⁷⁸

Many medical professionals used Ommaya’s study as a basis for the proliferation of the whiplash shaken syndrome/SBS in infants. Researchers improperly interpreted Ommaya’s study in several ways. First, researchers assumed that by extending the impact curve they could accurately predict what threshold level of injury was necessary to produce injury to infant human brains.⁷⁹ While it was possible to predict the threshold at which injuries were observed in monkeys, these results could not be extended to predict injuries to humans; although similar in structure, humans have larger heads in proportion to their bodies.⁸⁰ This determination required further research. Second, researchers failed to recognize that some of the monkeys hit their heads on the back of the seat during the acceleration process, potentially causing impact injuries.⁸¹ Additionally, whipping a head back due to acceleration forces one time in an acceleration chair is a different kind of motion than shaking a child repeatedly by holding on to the child’s torso.⁸² While this study appeared to support the SBS hypothesis, it contained many flaws which were ignored as the SBS “diagnosis” continued to permeate the medical community.

An examination of the history of the SBS diagnosis reveals that researchers based the diagnosis upon assumptions about the cause of brain injuries and retinal bleeding in infants when there were no other external physical injuries. Even Dr. Caffey admitted that he did not base his assumptions regarding the “battered infant syndrome” upon any actual direct evidence or science. These assumptions underlying the diagnosis make it unreliable, and potentially dangerous, courtroom evidence.

⁷⁷ *Id.* at 288.

⁷⁸ *Id.*

⁷⁹ Bandak, *supra* note 16, at 76–77.

⁸⁰ *Id.*

⁸¹ Testimony of Dr. Ronald H. Uscinski during Daubert hearing in Commonwealth of Kentucky v. Christopher A. Davis, No. 04 CR 205. Trial Court Opinion April 17, 2006 Greenup Circuit Court, <http://www.aapsonline.org/sbs/daubert.pdf> (last visited Apr. 21, 2012).

⁸² *Id.*

B. Core Assumptions Regarding the Mechanisms of Shaken Baby Syndrome

Within this historical framework, the SBS “diagnosis” proliferated the medical community in the 1970s as a form of child abuse whose common triad of injuries included brain edema,⁸³ subdural hemorrhages, and retinal hemorrhaging, with a complete lack of any external injuries such as bruising, skin redness from an impact, or other signs of injury.⁸⁴ A classic case of SBS also included a care provider’s explanation that seemed inconsistent with the constellation of injuries observed by medical professionals.⁸⁵ Research challenging the scientific basis of SBS recognized that there is a set of core assumptions in the medical literature regarding the mechanisms of SBS that require validation in the medical community before accusing a caretaker of SBS.⁸⁶ The core assumptions about SBS are as follows:

- (1) ‘Low’ falls in infants (less than four feet) are not likely to cause skull fractures, subdural hemorrhages, or brain injury;⁸⁷
- (2) Retinal hemorrhages in abused infants are caused directly from repetitive shaking of the head, which produces disruption of bridging veins and results in subdural hemorrhages/hematomas,⁸⁸

⁸³ “Edema means swelling caused by fluid in your body’s tissues.” A.D.A.M. MEDICAL ENCYCLOPEDIA, <http://www.nlm.nih.gov/medlineplus/edema.html> (last visited May 2, 2012).

⁸⁴ Caffey, *On the Theory and Practice of Shaking Infants*, *supra* note 12, at 169; Caffey, *The Whiplash Shaken Infant Syndrome*, *supra* note 12, at 397; Duhaime et al., *supra* note 16, at 409; Hadley et al., *supra* note 16, at 536–40; Bandak, *supra* note 16, at 72.

⁸⁵ See Caffey, *supra* note 11, at 172; *On the Theory and Practice of Shaking Infants*, *supra* note 12, at 168–69.

⁸⁶ A.K. Ommaya et al., *Biomechanics & Neuropathology of Adult & Pediatric Head Injury*, 16 BRIT. J. NEUROSURGERY 223, 227 (2002).

⁸⁷ *Id.*; Ann-Christine Duhaime et al., *Disappearing Subdural Hematomas in Children*, 25 PEDIATRIC NEUROSURGERY 116–22 (1996) [hereinafter Duhaime et al., *Disappearing Subdural Hematomas*]; Ann-Christine Duhaime et al., *Longterm Outcome in Infants with the Shaken-Impact Syndrome*, 24 PEDIATRIC NEUROSURGERY 292–98 (1996) [hereinafter Duhaime et al., *Longterm Outcome in Infants*]; Ann-Christine Duhaime et al., *Nonaccidental Head Injury in Infants—the ‘Shaken-Baby Syndrome,’* 338 NEW ENG. J. MED. 1822–29 (1998) [hereinafter Duhaime et al., *Nonaccidental Head Injury in Infants*].

⁸⁸ See Ommaya et al., *supra* note 86, at 227; M.J. Greenwald et al., *Traumatic Retinoschisis in Battered Babies*, 93 OPHTHALMOLOGY 618–25 (1986); A.C. Tongue,

(3) The time interval between the cause of the brain injury and the onset symptoms is always of short duration, i.e. the time for onset of symptoms and signs of SBS is always brief;⁸⁹ and

(4) Head-injured patients who appear normal and then quickly deteriorate or die is not caused by an asymptomatic subdural hematoma which then rebleeds following minimal head trauma.⁹⁰

Researchers who have conducted studies challenging these assumptions view them as ambiguous and incorrect.⁹¹ To fully understand the weaknesses in SBS as a diagnosis, it is critical to first understand each of these assumptions and some of the challenges to each one.

The first assumption about SBS is that “low” falls in infants (less than four feet) are not likely to cause skull fractures, subdural hemorrhages, or brain injury.⁹² This assumption is relevant to the diagnosis since it allows medical professionals to dismiss an accidental short fall as the cause of the brain injuries often seen in shaken baby

Discussion of Report on ‘Traumatic Retinoschisis in Battered Babies,’ 93 OPTHAMODOLOGY 624–26 (1986).

⁸⁹ See Ommaya et al., *supra* note 86, at 227; Duhaime et al., *Nonaccidental Head Injury in Infants*, *supra* note 87, at 1825; Marcus Nashelsky & Jay Dix, *The Time Interval Between Lethal Infant Shaking and Onset of Symptoms: A Review of the Shaken Baby Syndrome Literature*, 16 AM. J. FORENSIC MED. PATHOLOGY 154–57 (1995).

⁹⁰ See Ommaya et al., *supra* note 86, at 227; Ann-Christine Duhaime et al., *Head Injury in Very Young Children: Mechanisms, Injury Types, and Ophthalmologic Findings in 100 Hospitalized Patients Younger than 2 Years of Age*, 90 PEDIATRICS 179 (1993); Ann-Christine Duhaime et al., *The ‘Big Black Brian’: Radiographic Changer After Severe Inflicted Head Injury in Infancy*, 100 J. NEUROSURGERY 59 (1993) [hereinafter Duhaime et al., *The Big Black Brain*]; *Nonaccidental Head Injury in Infants*, *supra* note 87, at 1825–26.

⁹¹ See generally Ommaya et al., *supra* note 86, at 227; John Plunkett, *Fatal Head Injuries Caused by Short-Distance Falls*, 22 AM. J. MED. PATHOLOGY 1, 10 (2001); Bandak, *supra* note 16; Barnes et al., *supra* note 17; Duhaime et al., *supra* note 16, at 409–14; Ronald H. Uscinski, *Shaken Baby Syndrome: Fundamental Questions*, 16 BRIT. J. NEUROSURGERY 217, 218 (2002); Smith et al., *supra* note 17, at 700–03.

⁹² See D.L. Chadwick et al., *Death from Falls in Children, How Far Is Fatal?*, 31 J. TRAUMA 1353–55 (1991); R.A. Williams, *Injuries in Infants and Small Children Resulting from Witnessed and Corroborated Free Falls*, 31 J. TRAUMA 1350–52 (1991); T.J. Lyons, R.K. Oates, *Falling Out of Bed: A Relatively Benign Occurrence*, 92 PEDIATRICS 125–27 (1993); C. Swalwell, *Head Injuries from Short Distance Falls* 14 AM. J. FORENSIC MED. PATHOLOGY 171–72 (1993); F. Sheridan et al., *Head Injuries from Short Distance Falls*, 14 AM. J. FORENSIC MED. PATHOLOGY 172–73 (1993).

cases. Despite this assumption, clinical studies have demonstrated that a short-distance fall could cause serious head injury or death.⁹³ Biomechanical studies using animals, adult human volunteers, and models have shown that serious head injuries can occur from a distance as short as two feet.⁹⁴ A report conducted at a hospital of seven children treated after an accidental fall of 1.5 to 4.5 feet revealed they suffered subdural hemorrhages.⁹⁵ Another study conducted by Dr. John Plunkett included eighteen children who died of a head injury as a result of short fall.⁹⁶ In that study, most of the falls occurred at school, on a public playground, or at home.⁹⁷ In ten of the cases, the distance of the fall ranged from 1.5 feet to 9 feet.⁹⁸ These studies indicate that serious or fatal head injury can occur in short distance falls. Thus, explanation by a caretaker that a short fall caused the head injuries in an infant or young child should not be dismissed by medical professionals.

Another assumption surrounding SBS is that retinal hemorrhages in abused infants are caused directly from repetitive shaking of the head.⁹⁹ Many medical professionals assume that SBS is a correct diagnosis merely on the basis of observed retinal hemorrhages alone.¹⁰⁰ In suspected SBS cases, ophthalmologists often examine the child to

⁹³ Plunkett, *supra* note 91, at 8; *see also* J.R. Hall et al., *The Mortality of Childhood Falls*, 29 J. TRAUMA 1273 (1989); G.D. Rieber, *Fatal Falls in Childhood: How Far Must Children Fall to Sustain Head Injury: Report of Cases and Review of the Literature*, 14 AM. J. FORENSIC MED. PATHOLOGY 201 (1993); I. Root, *Head Injuries in Short Distance Falls*, 13 AM. J. FORENSIC MED. PATHOLOGY 85 (1992); B. Wilkins, *Head Injury: Abuse or Accident?*, 76 ARCHIVES DISEASES CHILDREN 393 (1997).

⁹⁴ Plunkett, *supra* note 91, at 8; *see also* E.S. Gurdjian et al., *Protection of the Head and Neck in Sports*, 182 J. AM. MED. ASS'N 509, 509–12 (1962); T.E. Reichelderfer et al., *X-ray Playgrounds*, 64 PEDIATRICS 962–63 (1979); E.S. Gurdjian et al., *Tolerance Curves of Acceleration and Intracranial Pressure and Protective Index in Experimental Head Injury*, 6 J. TRAUMA 600–04 (1966).

⁹⁵ Plunkett, *supra* note 91, at 8.

⁹⁶ *Id.* at 2. The study included children ranging in age from twelve months to thirteen years with a mean age of five years. *Id.* The falls were from horizontal ladders, swings, stationary platforms, and a retaining wall. *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Ommaya et al., *supra* note 86, at 227.

¹⁰⁰ A.B. Eisenbrey, *Retinal Hemorrhage in the Battered Child*, 5 CHILD'S BRAIN 40–44 (1979); M.J. Greenwald et al., *supra* note 88, at 618–24; N. Rao et al., *Autopsy Findings in the Eyes of Fourteen Fatally Abused Children*, 39 FORENSIC SCI. INT'L 293–99 (1988); S.G. Elner et al., *Ocular and Associated Systemic Findings in Suspected Child Abuse: A Necropsy Study*, 108 ARCHIVES OPHTHALMOLOGY 1094–1101 (1990); D.F. Williams et al., *Posterior Segment Manifestations of Ocular Trauma*, 10 RETINA 535–44 (1990); N.M. Rosenberg et al., *Retinal Hemorrhage*, 10 PEDIATRIC EMERGENCY CARE 303–05 (1994).

determine whether retinal hemorrhages exist. Ophthalmologists may even be asked to give a medical opinion as to whether the existence of the retinal hemorrhages indicates deliberate trauma or accidental trauma.¹⁰¹ Although it is possible that certain types of retinal hemorrhages are a sign of SBS, “to date there is no evidence that clearly establishes that retinal hemorrhages, be they intraretinal, subretinal, or subhyaloid, are indicative of non-accidental trauma.”¹⁰² Nevertheless, “Evidence does exist, however, that retinal hemorrhages . . . [occur] in experimental as well as clinical situations that are not related to child abuse.”¹⁰³ Retinal hemorrhaging occurs “in newborns, in some infant eyes after cataract surgery. . . . in infants with subdural or subarachnoid hemorrhages secondary to accidental trauma, and in infants with . . . hemoglobinopathies.”¹⁰⁴ The validity of the notion that retinal hemorrhages are diagnostic of SBS is undermined by the work of one expert who noted:

[T]he term ‘shaken-baby syndrome’ tends to be automatically applied to any infant with a swollen brain, subdural and retinal bleeding. This label, alleging as it does non-accidental injury, effectively precludes any further discussion of how these clinical features might have been caused, even though all of them, both singly and in combination, may be seen in conditions other than trauma.¹⁰⁵

Similarly, one researcher also observed that “retinal hemorrhages can be explained by rises in intracranial and central venous pressure, with and without hypoxia,” and “retinal bleeding might result from any event that initiated apnea or significant hypoxia, with brain swelling.”¹⁰⁶ Some

¹⁰¹ Andrea C. Tongue, *The Ophthalmologist’s Role in Diagnosing Child Abuse*, 98 *OPHTHALMOLOGY* 1009, 1009 (1991).

¹⁰² *Id.*

¹⁰³ *Id.*; see also Ommaya et al., *supra* note 86, at 227; Plunkett, *supra* note 91, at 4; Barnes et al., *supra* note 17, at 182; Duhaime et al., *supra* note 16, at 410–13; Uscinski, *supra* note 91, at 217–18.

¹⁰⁴ Tongue, *supra* note 101, at 1009.

¹⁰⁵ J.F. Geddes et al., *Dural Hemorrhage and Non-Traumatic Infant Deaths: Does It Explain the Bleeding in ‘Shaken Baby Syndrome’?*, 29 *NEUROPATHOLOGY & APPLIED NEUROBIOLOGY* 14, 14 (2003).

¹⁰⁶ *Id.* at 19–20. See also M.G.F. Gilliland, *Head Injury: Are Brain Edema and Retinal Hemorrhages Associated?*, *National Association of Medical Examiners Annual Meeting*, Oct 20–25, 1995; H.S. Hansen, K. Helmke, *Validation of the Optic Nerve Sheath Response to Changing Cerebrospinal Fluid Pressure: Ultrasound Findings During*

researchers questioned the proposition that retinal hemorrhaging “is proof of” a rotational head injury (shaking). While retinal hemorrhages are “associated with” inflicted head trauma, researchers recognized that there are various causes and mechanisms of infant retinal hemorrhaging other than shaking.¹⁰⁷ The authors of one study noted that “[t]he levels of force required for retinal bleeding by shaking to damage the eye directly is biomechanically improbable. The work of [researchers] also indicates that the role of sudden rise of ICP (increased intracranial pressure) is more likely to cause bleeding than the ‘shaken’ hypothesis.”¹⁰⁸ Medical research revealed that retinal hemorrhaging could not be caused by a rotational head injury in a case involving significant brain swelling and raised intracranial pressure.¹⁰⁹ Since there are many causes for retinal hemorrhages, there is a legitimate challenge to the assumption that they are representative solely of SBS.

Regarding the third assumption, medical professionals who diagnose SBS believe that the time interval between the cause of intentional traumatic brain injury and the onset of signs and symptoms of SBS is always brief.¹¹⁰ This assumption allows the physician to pinpoint a time

Intrathecal Infusion Test, 87 J. NEUROSURGERY 34 (1997); T.R. Walsh, *Optic Nerve Sheath Hemorrhages*, 34 AM. J. OPHTHALMOLOGY 509 (1951). Cerebral hypoxia refers to a lack of oxygen supply to the outer part of the brain. “However, the term is often used to refer to a lack of oxygen supply to the entire brain.” A.D.A.M. MEDICAL ENCYCLOPEDIA, <http://www.nlm.nih.gov/medlineplus/ency/article/001435.htm> (last visited Apr. 21, 2012).

¹⁰⁷ At least one researcher recognized that:

[T]he specificity of retinal hemorrhages for child abuse and their dating has been questioned. Such hemorrhages reportedly may be seen with a variety of conditions, including accidental trauma, resuscitation, increased intracranial pressure, increased venous pressure, subarachnoid hemorrhage, sepsis, coagulopathy, certain metabolic disorders, and other conditions.

Patrick D. Barnes, *Ethical Issues in Imaging Nonaccidental Injury: Child Abuse*, 13 TOPICS IN MAGNETIC RESONANCE IMAGING 85, 87 (2002). See also Deborah Tuerkheimer, *Science Dependent Prosecution and the Problem of Epistemic Contingency: A Study of Shaken Baby Syndrome*, 62 ALA. L. REV. 513, 516–17 (2011).

¹⁰⁸ Ommaya, *supra* note 86, at 233. The Ommaya study concluded that the biomechanics of retinal hemorrhages made it highly unlikely that retinal hemorrhaging was caused by severe shaking, and determined its most probable cause to be increased intracranial pressure. *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 227; see also Duhaime et al., *Nonaccidental Head Injury in Infants*, *supra* note 87, at 1822–29; Nashelsky & Dix, *supra* note 89, at 154–57.

of injury and thus the identity of the caregiver during that time period. Proponents of shaken baby doctrine state lucid intervals, or a period of consciousness between initial injury and death, do not exist in fatal pediatric head injuries.¹¹¹ Consequently, the legal burden of proof in SBS cases is largely lifted from the shoulders of prosecutors and transferred to the last-known caregiver. If an infant exhibits symptoms consistent with SBS, and the treating physician can come up with no other cause, the doctor presumes that the caretaker of the child at the time symptoms began is the source of the injuries.

Predicting the time interval between the injury and onset of obvious symptoms is a complicated process. One study noted, “[E]nough variability in the interval between injury and the time of severe symptoms or presentation for medical care in fatally injured children exists to warrant circumspection in describing such an interval for investigators or triers of fact.”¹¹² Another study observed:

Depth of coma does not necessarily define severity; children can be deeply unconscious after a minor head injury and display neurological signs . . . but recover over minutes to hours, or are not unconscious initially, but develop coma later in the first day with cerebral edema and intracranial hemorrhage.¹¹³

Clinical studies also show that there can be a symptom-free interval.¹¹⁴ Thus, a blow to the head through a fall may not manifest immediately.¹¹⁵ Setting a timetable for infliction of head trauma is pure speculation. Ultimately, minimal data exists substantiating the assumption of SBS proponents that the individual caring for the child when symptoms

¹¹¹ Duhaime et al., *Nonaccidental Head Injury in Infants*, *supra* note 87, at 1822–29; K.Y. William et al., *Restricting the Time of Injury in Fatal Inflicted Head Injury*, 21 CHILD ABUSE AND NEGLECT 929, 930–40 (1997); C. Jenny & K.P. Hymel, *Recognizing Abusive Head Trauma in Children*, 282 J. AM. MED. ASS’N 1421–22 (1999).

¹¹² Gilliland, *supra* note 106, at 724.

¹¹³ Barry Wilkins, *Head Injury—Abuse or Accident*, 76 ARCHIVES DISEASE CHILDHOOD 393–97 (1997).

¹¹⁴ See Christine Bonnier et al., *Outcome and Prognosis of Whiplash Shaken Infant Syndrome; Late Consequences After a Symptom Free Interval*, 37 DEVELOPMENTAL MED. CHILD NEUROLOGY 943–56 (1995); Plunkett, *supra* note 91, at 8. In this study Dr. Plunkett conducted a clinical study of eighteen children who suffered a short distance fall ranging from 1.5 feet to 9 feet and twelve of the children experienced a lucid interval before the onset of unconsciousness due to head injury. Plunkett, *supra* note 89, at 9.

¹¹⁵ Plunkett, *supra* note 91, at 8.

manifest themselves caused the injuries.

Proponents of SBS also do not believe that a subdural hematoma could spontaneously “re-bleed” without additional trauma. Medical professionals who diagnose SBS do not believe that an infant could suffer subdural bleeding from head trauma, have a period in which the infant seems normal, and then have an onset of symptoms due to a “re-bleed” of the original subdural hematoma. This assumption dovetails with the previous assumption. This scenario is often dismissed because of the belief that the onset of symptoms following head trauma is immediate.¹¹⁶ When a doctor first evaluates a child with a subdural hematoma, the child might exhibit fresh blood that is mistakenly interpreted by the doctor as evidence of a recent injury.¹¹⁷ However, doctors have observed fresh blood from old subdural hematomas in adults, indicating that there need not be a recent injury for fresh blood.¹¹⁸ Neurosurgeons are very much aware of this re-bleeding, and have observed it even when they know definitively that there has not been an accompanying second trauma.¹¹⁹ Therefore, for an infant presenting with “ostensibly unexplained intracranial bleeding with or without external evidence of injury under given circumstances, accidental injury from a seemingly innocuous fall, perhaps even a remote one, or even an occult birth injury, must be considered before assuming intentional injury.”¹²⁰

The theory of a subdural hematoma re-bleeding is an important one in the context of SBS. If a child suffers minor head trauma (fall, impact, etc.) resulting in asymptomatic subdural bleeding, the subdural hematoma could re-bleed weeks later due to a minor re-trauma. The new trauma could then cause symptoms such as unconsciousness and unresponsiveness; such subdural bleeding is not recent and not caused by SBS. In short, bleeding in the brain of infants is not necessarily caused by recent head injury due to shaking.¹²¹ Clinical cases have shown that

¹¹⁶ Ommaya et al., *supra* note 86, at 227; Duhaime et al., *Nonaccidental Head Injury in Infants*, *supra* note 87, at 1825; Nashelsky & Dix, *supra* note 89, at 154–57.

¹¹⁷ Uscinski, *supra* note 29, at 59. Dr. Uscinski, a neurosurgeon, observed, “it has also been demonstrated experimentally that chronic subdural hematomas enlarge by rebleeding from the neurovascular membrane and that this bleeding has been shown to occur without accompanying trauma.” *Id.*

¹¹⁸ *Id.* at 218.

¹¹⁹ *Id.* at 59.

¹²⁰ *Id.*

¹²¹ Ronald H. Uscinski & Dennis K. McBride, *The Shaken Baby Syndrome: An Odyssey—II Origins and Further Hypotheses*, 48 *NEUROLOGIA MEDICO CHIRURGICA* 151, 152 (2008). “Intracranial bleeding . . . has long been recognized as a complication of the

an event can cause subdural bleeding that stops and bleeds again without significant new trauma.¹²² Thus, the assumption that a new subdural hemorrhage must be caused by shaking is unreliable.

Research exposes the faulty core assumptions underlying the SBS diagnosis. Head injury research indicates there are reasonable explanations for the triad of symptoms other than shaking.

II. Biomechanical Studies and Clinical Research Challenge Shaken Baby Syndrome

An increasing number of experts in recent years have criticized SBS and raised concerns about the validity of the syndrome and the clinical studies that led to its acceptance within the pediatric community.¹²³ Researchers have conducted biomechanical studies and have shown that: (1) shaking alone could not produce enough force to cause the “triad” of SBS symptoms of brain swelling, subdural brain bleeding and retinal bleeding;¹²⁴ (2) the triad of symptoms are caused by some form of blunt impact;¹²⁵ and, (3) the shaking forces necessary to cause brain injuries would first cause neck and spinal injuries.¹²⁶ Research also has shown that, “central nervous system findings that mimic SBS have been reported in accidental trauma and in a number of medical conditions.”¹²⁷

birth process.” In fact, subdural bleeding has been found to be “a consequence of head molding at birth” as a result of the baby’s large head passing through the narrow vaginal birth canal. *Id.*

¹²² *Id.*

¹²³ Uscinski, *supra* note 29, at 59–60; Bandak, *supra* note 16, at 76–79; Duhaime et al., *supra* note 16, at 409–14; Plunkett, *supra* note 91, at 8.

¹²⁴ See Duhaime et al., *supra* note 16, at 414; Bandak, *supra* note 16, at 76–79.

¹²⁵ See Duhaime et al., *supra* note 16, at 414; Bandak, *supra* note 16, at 76–79.

¹²⁶ Bandak, *supra* note 16, at 76–79.

¹²⁷ Patrick D. Barnes et al., *Infant Acute Life-threatening Event: Dysphagic Choking Versus Nonaccidental Injury*, 17 SEMINARS IN PEDIATRIC NEUROLOGY 7, 10 (2010); see also Glenn A. Tung et al., *Comparison of Accidental and Non-accidental Traumatic Head Injury in Children on Non-contrast Computed Topography*, 118 PEDIATRICS 627–33 (2006); C.W. Christian et al., *Retinal Hemorrhages Cause by Accidental Household Trauma*, 135 J. PEDIATRICS 125–27 (1999); Paul Steinbok et al., *Early Hypodensity of Computed Tomography Scan of the Brain in an Accidental Pediatric Head Injury*, 60 NEUROSURGERY 689–95 (2007); Mattheiu Vichon et al., *Imaging of Head Injuries in Infants: Temporal Correlates and Forensic Implications for the Diagnosis of Child Abuse*, 101 J. NEUROSURGERY 44–52 (2004); P.D. McNeely et al., *Subdural Hematomas in Infants with Benign Enlargement of the Subarachnoid Spaces Are Not Pathognomic for Child Abuse*, 27 AM. J. NEURORADIOLOGY 1725–28 (2006); Kent Hymel et al., *Intracranial Hemorrhages and Rebleeding in Suspected Victims of Abuse Head Trauma:*

Some of the medical conditions that can cause the “triad” of symptoms used in shaken baby diagnosis are “infection, coagulopathy, metabolic disorders, and others.”¹²⁸

A 1987 study at the University of Pennsylvania produced some surprising results. Dr. Ann-Christine Duhaime,¹²⁹ and others, conducted a study to test the hypothesis that infants were particularly susceptible to injury from shaking due to a relatively large head and weak neck.¹³⁰ The research team concluded that “the shaken baby syndrome, at least in its most severe acute form, is not usually caused by shaking alone. Although shaking may, in fact, be a part of the process, it is more likely that such infants suffer blunt impact.”¹³¹ Ultimately, “shaking alone does not produce the shaken-baby syndrome.”¹³² This experiment demonstrated that the biomechanical forces generated by shaking fell well below the thresholds for causing concussions and subdural hematomas.¹³³ The team determined that shaking alone cannot cause SBS, and that some type of

Addressing Forensic Controversies, 7 CHILD MALTREATMENT 329–48 (2002); Patrick D. Barnes & Michael V. Krasnokutsky, *Imaging of the Central Nervous System in Suspected or Alleged Non-Accidental Injury, Including the Mimics*, 18 TOPICS MAGNETIC RESONANCE IMAGING 53–74 (2007).

¹²⁸ Barnes et al., *supra* note 17, at 181; *see also* Barnes et al., *supra* note 127, at 53–74; Hymel et al., *supra* note 127, at 329–49.

¹²⁹ To assist the reader in understanding the significance of this study, Dr. Duhaime’s education and experience are relevant: Dr. Duhaime graduated from Brown University with honors in 1977; she obtained her M.D. degree in 1981 from the University of Pennsylvania. In 1989 she took a position as Assistant Professor in Pediatric Neurosurgery at the Children’s Hospital of Philadelphia (CHOP). While at CHOP, Dr. Duhaime helped to establish the Pediatric Neurotrauma Laboratory. In 2001 Dr. Duhaime took a position as Director of Pediatric Neurosurgery and Pediatric Neuroscience at Dartmouth Hitchcock Medical Center. She is Professor of Neurosurgery at the Dartmouth Medical School. She serves as faculty member of the Dartmouth Epilepsy Program as well as the Norris Cotton Cancer Center, and is the Research Director for the Dartmouth Neurosurgery Residency Program. THE SOCIETY OF NEUROLOGICAL SURGEONS, <http://www.societyofneurologicalsurgeons.org/society/bio.aspx?MemberID=5851> (last visited May 2, 2012). Dr. Duhaime has written more than sixty papers for various professional medical journals, such as *Brain Research*, *Pediatrics*, and the *Journal of Neurosurgery*. Jennifer Durgin & Ann-Christine Duhaime, *Brain Trust*, DARTMOUTH MED., Dec. 2005, at 64.

¹³⁰ Duhaime et al., *supra* note 16, at 411–12. The researchers used models of one-month-old human babies and used both male and female experimenters to shake the models. *Id.* at 413. They replaced the model’s neck with a hinge to allow maximal angular head accelerations. *Id.* at 412. Accelerometers on the head of the model recorded the linear acceleration of the head caused by the repeated shaking. The researchers also recorded the forces to which the head was subjected. *Id.* at 412–13.

¹³¹ *Id.* at 409.

¹³² *Id.*

¹³³ *Id.*

impact or blunt-force trauma is necessary to produce the brain and retinal injuries associated with the syndrome.¹³⁴ The study also demonstrated that a baby would most likely receive a neck injury before it would receive a head injury as a result of shaking.¹³⁵

Another experiment conducted by other researchers tested the theory of whether shaking alone could cause brain injuries by using six-day-old rats.¹³⁶ The researchers subjected the rats to intermittent shaking for a period of six seconds followed by a six-second pause.¹³⁷ They repeated this method sixty times daily for a period of three days.¹³⁸ Even with repeated shaking multiple times a day, they were unable to produce subdural hemorrhages from shaking alone.¹³⁹ Only hypoxia¹⁴⁰ combined with shaking the rat in an inverted position resulted in any brain trauma, but without any subdural hemorrhaging.¹⁴¹ Further experiments with appropriate biomechanical data and neuropathology are required for development of a useful model.¹⁴² While this experiment did not measure the forces on the head of the rat while being shaken, this experiment is useful in its conclusion that shaking alone did not cause any subdural hemorrhaging. This finding is important in challenging the very foundation of the diagnosis since, for decades, subdural hemorrhages have been one of the characteristic signs of SBS.

A number of other researchers also concluded that shaking a baby could not produce the type of acceleration-deceleration forces necessary to cause the injuries associated with SBS.¹⁴³ A 2002 study analyzed the biomechanics of pediatric traumatic brain injury (TBI) and diagnostic approaches to this type of injury in young children.¹⁴⁴ This study took a multi-disciplinary approach to studying head injuries in infants and young children in that it included the Departments of Neurosurgery and Mechanical Engineering from diverse universities.¹⁴⁵ It considered the

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Smith et al., *supra* note 17, at 695.

¹³⁷ *Id.* at 695.

¹³⁸ *Id.*

¹³⁹ *Id.* at 701.

¹⁴⁰ *See supra* note 110.

¹⁴¹ Smith et al., *supra* note 17, at 701.

¹⁴² Ommaya et al., *supra* note 86, at 223.

¹⁴³ *Id.* at 220.

¹⁴⁴ *Id.* at 220–21.

¹⁴⁵ *Id.* at 220 (relying on research subjects from George Washington University Medical Center, University of California, Berkeley, and Drexel University); *see also* Bandak,

principles of biomechanics and the role those principles play in predicting the causation of head injuries in young children. The study explained that the “causation of TBI can occur either by impact or by impulsive loading (shaking) which lead to different results.”¹⁴⁶ The researchers proffered that because an infant skull is not a “rigid shell structure,” when impacted, the infant skull will become “deformed.”¹⁴⁷ The deformation would then result in “various types of skull fractures.”¹⁴⁸ The shape changes of an infant skull produce enormous strain throughout the cranium and its contents even without actual skull fractures.¹⁴⁹ In contrast, “shaking would produce minimal deformation of the infant skull” but would cause displacement of the brain, skull, spinal cord, and neck.¹⁵⁰ In addition to questioning the underlying physics of pediatric TBI, this study observed that the acceleration-deceleration forces necessary to cause a head injury by violently shaking an infant would result in severe damage to the neck and spinal cord. The study concluded:

Thus, while it is possible to produce trauma in an infant by shaking, e.g., a SDH . . . particularly when shaking is prolonged and repeated at intervals, the injuries would include the cervical cord and spine, but not the brain case, nor contusions in the cerebrum or cerebellum if no impact was also imposed. It is far more likely that impacts due to falls and other causes are more probable at producing TBI by short duration impulsive loading.¹⁵¹

In 2005, Dr. Faris A. Bandak¹⁵² conducted a biomechanical analysis

supra note 16, at 71–72 (stating that an infant head impacting on a flat, hard surface produces an indentation of the skull which then impinges on the brain causing brain deformations and pressures on the infant brain).

¹⁴⁶ Ommaya et al., *supra* note 86, at 223.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 223, 225.

¹⁵¹ *Id.* at 226.

¹⁵² Faris Bandak, Ph.D., is an expert in head injury causation & mechanisms. He served as a defense expert consultant for the author in the alleged shaken baby case of *United States v. Specialist Claude Morings*, Fort Bliss, Texas in 2008, which resulted in an acquittal. He currently serves as a research professor in the Department of Neurology at F. Edward Hebert School of at the Uniformed Services University of Health Sciences. He also has held the positions of National Expert in Injury Biomechanics and Director of Head Injury Research at the U.S. Department of Transportation. He has authored over 80

of the consequences of shaking an infant to determine if the fragile infant neck could withstand the SBS-defined forces without injury.¹⁵³ He proposed that any SBS analysis requires knowledge and training in what is known as Injury Biomechanics, a distinct discipline not taught in medical school.¹⁵⁴ He even stated that the “[I]lack of education and experience in Injury Biomechanics, amongst other factors, has led in practices to the proliferation and propagation of inaccurate and sometimes erroneous information on SBS injury in the literature.”¹⁵⁵ In evaluating the forces imposed on an infant neck caused by violent shaking,¹⁵⁶ Dr. Bandak studied the velocity levels cited in a shaken baby article written by Dr. Carol Jenny and others.¹⁵⁷ Essentially, Dr. Bandak used the study’s data, which measured the amount of force required to shake an infant hard enough to cause retinal hemorrhaging, subdural hematomas, and brain edema, and evaluated the effects such forces would have on an infant’s neck. His study resulted in several important findings regarding the injury mechanisms of SBS. Some of the most important conclusions of Dr. Bandak’s study are:

Head acceleration and velocity levels commonly reported for SBS generate forces that are far too great for the infant neck to withstand injury.

. . . .

Given that cervical spine injury is reported to be a rare clinical finding in SBS cases, the results of this study indicate an SBS diagnosis in an infant with intracerebral

publications including books and book chapters on the biomechanics of traumatic brain injury (Faris Bandak’s *curriculum vitae* is on file with author).

¹⁵³ Bandak, *supra* note 16, at 73 *Biomechanics & Neuropathology of Head Injury*, 76.

¹⁵⁴ *Id.* at 71. “[Injury] biomechanics is the subset of Mechanics that deals with the forces, motions, deformations, ruptures, fractures, [and] breaks of living tissue.” *Id.* at 79. It “is the application of Biomechanics to the understanding of causation and mechanism of injury.” *Id.* Dr. Bandak’s position is that injury biomechanics is central to the study of the mechanisms of injury in SBS. *Id.* at 71.

¹⁵⁵ *Id.* at 72.

¹⁵⁶ The forces caused in shaken baby cases is often compared to forces that are equal to a fall from a height as high as thirty feet onto a hard surface or from high speed motor vehicle crashes. *Id.* at 76; Duhaime et al., *supra* note 89, at 179–85. These assertions of Shaken Baby Syndrome have not been substantiated biomechanically with some reports refuting their validity at all. *Id.*; Duhaime et al., *supra* note 16, at 409–15; Michael Prange et al., *Anthropomorphic Simulations of Falls, Shakes and Inflicted Impacts in Infants*, 99 J. NEUROSURGERY 143–50 (2003).

¹⁵⁷ Bandak, *supra* note 16, at 78.

[injury] but without cervical spine or brain stem injury is questionable and other causes of the intracerebral injury must be considered.

....

Cervical spine and/or brain stem injury should be included amongst the factors considered in the determination of consistency of reported history in cases where infant shaking is suspected. It should be kept in mind that such injury is not exclusive to shaking as the sole mechanical cause. Traumatic shaking is just one of the causes.¹⁵⁸

Dr. Bandak's study highlighted the important fact that the amount of force necessary to cause the injuries for a shaken baby diagnosis would cause serious injury to an infant's neck before it would cause retinal hemorrhaging or subdural brain bleeding.¹⁵⁹ Yet, neck injuries are never mentioned as part of the triad of symptoms of SBS.¹⁶⁰ Ultimately, Dr. Bandak concluded that in light of his findings, the diagnostic criteria for SBS should be re-evaluated.¹⁶¹ The inference that can be drawn from Dr. Bandak's study is that before a medical professional renders a shaken baby diagnosis, a neck injury should be made part of the diagnostic criteria.

One significant biomechanical study demonstrated that the classic triad of SBS symptoms occurred in cases of accidental trauma.¹⁶² The study involved a twenty-one month old boy brought to an emergency room and diagnosed with bilateral retinal hemorrhages with retinal folds and subdural hemorrhages.¹⁶³ A computed tomography (CT) scan of the cervical spine, conducted prior to death, showed no injuries to the spine.¹⁶⁴ The caretaker's history that the young child fell onto a tiled floor from a standing position on a kitchen chair while eating was believed to be inconsistent with the physical injuries; the child died

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 73. Ommaya et al., *supra* note 86, at 76.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 79.

¹⁶² Barnes et al., *supra* note 17, at 178.

¹⁶³ *Id.* There was no other evidence of traumatic injury upon physical examination. *Id.*

¹⁶⁴ *Id.* at 179.

forty-four hours after the fall.¹⁶⁵ Treating physicians diagnosed the young boy as having suffered non-accidental injury and SBS.¹⁶⁶ The researchers considered the medical examiner's report in conjunction with a court-approved biomechanical evaluation. A post-mortem CT scan of the neck and spine revealed multilevel compression fractures of varying degrees.¹⁶⁷ The researchers noted, "[i]t is problematic, biomechanically, to conclude that such an injury can result from 'SBS', particularly in a child of this age and size."¹⁶⁸ The autopsy also revealed soft-tissue hemorrhages in the neck and shoulder regions and disruption of the central spinal cord near the medulla area of the brain.¹⁶⁹ The biomechanical examination included an investigation of the home where the injury occurred.¹⁷⁰

The biomechanics specialist analyzed a number of potential accidental scenarios to address the thoracic spinal injuries and the cervical cord injury.¹⁷¹ The biomechanical analysis assumed the caretaker's history was accurate and applied the principle of mechanics to determine whether such a history was consistent with the child's injuries.¹⁷² A biomechanical analysis determined that "[t]he gross and histological findings, as well as the imaging findings, [were] entirely consistent with the caretaker history of a household fall as corroborated by the biomechanical evaluation."¹⁷³ Unfortunately, the initiation of criminal proceedings occurred prior to the completion of a thorough medical evaluation.¹⁷⁴ The treating physicians attributed the injuries to SBS before the brain and spinal cord injuries were thoroughly evaluated.¹⁷⁵ Fortunately, upon consideration of all of the forensic

¹⁶⁵ *Id.* at 178.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 180. "Multiple anterior compression fractures of the thoracic spine, as reported in this case, are uncommon. The mechanism most consistent with this type of injury, however, would be severe flexion and/or axial compression of the spine." *Id.* at 181.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* The caretaker reported that his back was turned at the time of the incident but that the boy had been standing up on the seat of a chair. *Id.* The caretaker then heard a noise and turned to find the boy and the chair on the floor, with the chair lying on its back. *Id.* It was assumed that the boy struck the floor first with his head and then his neck and shoulder, based on the autopsy findings. *Id.*

¹⁷³ *Id.* at 182.

¹⁷⁴ *Id.* at 181.

¹⁷⁵ *Id.*

evidence at trial, the jury acquitted the child's father.¹⁷⁶

Clinical studies of children suspected to be victims of non-accidental head injuries also found that a significant number of the children exhibited neck injuries and other physical signs of abuse. One study examined the occurrence of spinal injuries, through magnetic resonance imaging (MRI), of infants with non-accidental head injuries.¹⁷⁷ The study included eighteen infants with non-accidental head injuries between 2000 and 2007 using images of the brain and the spine.¹⁷⁸ The researchers found that eight (44%) of the infants had spinal injuries coupled with subdural hematomas.¹⁷⁹ Additionally, three out of the eight children with spinal injuries also had skull fractures.¹⁸⁰ Five of the ten children without spinal injuries also suffered skull fractures.¹⁸¹ This clinical study demonstrates that spinal fractures/injuries are a well-recognized feature of children who are suspected to be victims of non-accidental head injury. However, it is not considered common manifestation and is not included within the triad of injuries presumed to be “diagnostic” of SBS.¹⁸² Spinal pathology in a brain-injured child is often difficult to recognize clinically since it is not detectable in a normal x-ray.¹⁸³ Typically, these types of injuries are only detectable through a complete spinal MRI or an autopsy. Spinal injuries may be more common than is currently believed by many in the medical community. A study in 1989 found that five of six children diagnosed with subdural hematomas, caused by non-accidental head injury, had cervical spinal hematomas; four had spinal contusions.¹⁸⁴ In another study, the post-mortem

¹⁷⁶ *Id.* at 180.

¹⁷⁷ Koumellis et al., *supra* note 19, at 216–19. The study included eleven males and seven females ranging in age from one to twelve months with a mean age of three months. All infants were referred to the local child protection services and proceeded through criminal legal proceedings. The diagnosis of all infants was confirmed as non-accidental head injury. *Id.*

¹⁷⁸ *Id.* at 216.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 217.

¹⁸¹ *Id.*

¹⁸² *Id.* at 218.

¹⁸³ *Id.*; Eilish Twomey et al., *Multiple Thoracic Vertebral Compression Fractures Caused by Non-accidental Injury: Case Report with Radiological Pathological Correlation*, 34 PEDIATRIC RADIOLOGY 665–68 (2005); R.C. Sneed, S.L. Stover, *Undiagnosed Spinal Cord Injuries in Brain-Injured Children*, 142 AM. J. DISEASES CHILDREN 965–67 (1988).

¹⁸⁴ Kenneth Feldman et al., *Cervical Spine MRI in Abused Infants*, 21 CHILD ABUSE NEGLECT 199–205 (1997). These findings were discovered during a post mortem examination of the children. *Id.*

examination of the spine was conducted on eight children.¹⁸⁵ Two of the children were suspected to be victims of non-accidental head injury and six of the children exhibited no signs of trauma.¹⁸⁶ Spinal injuries were found in the two children suspected of being victims of abuse and none were observed in the other six children.¹⁸⁷ The significance of these studies is that they demonstrate the correlation between head injuries and spinal injuries in cases of abuse. In other words, there is other physical evidence of shaking, impact, or abuse to support the diagnosis of non-accidental head injury.

The criticisms aimed at SBS question not only the underlying basis for the hypothesis, but also the scientific methodology used in the “research” which created the SBS diagnosis.¹⁸⁸ A recent article published in the *American Journal of Forensic Medicine Pathology* carefully scrutinized the quality of the evidence used in shaken baby research from 1966 through 1998, and determined that the research failed to meet accepted standards for scientific validity.¹⁸⁹ After conducting an exhaustive review of the research, the author noted the lack of quality involved in most of the research, which for years, had been used as “evidence” to support the SBS hypothesis.¹⁹⁰ Ultimately, there is a

¹⁸⁵ G.N. Ruttly et al., *Epidural Haemorrhage of the Cervical Spinal Cord: A Post-mortem Artifact?*, 31 NEUROPATHOLOGY APPLIED NEUROBIOLOGY 247–57 (2005).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Mark Donohoe, *Evidence-Based Medicine and the Shaken-Baby Syndrome, Part 1: Literature Review, 1966 Biomechanics & Neuropathology of Head Injury, 1998*, 24 AM. J. FORENSIC MED. & PATHOLOGY 239 (2003).

¹⁸⁹ *Id.*

¹⁹⁰ Donohoe concluded:

There exists major data gaps in the medical literature about SBS. There is a very obvious lack of clear definition of cases. For valid studies, some method of determining cases of actual proven shaking must be found, and appropriate control groups (trauma without shaking, other illness, health controls) must be defined and assessed blindly. This gold standard has yet to be achieved in even a single study in the field of SBS. There is a lack of useful and specific laboratory or other markers proven to identify SBS. There is poor definition and quantification of the social and family risk factors to provide guidance on the likelihood of abuse for a given set of circumstances. Last, there is a strong need for a check list or other diagnostic or management tool to assess cases and to quantify index of suspicion of shaking.

Id. at 241.

significant group of researchers who have conducted clinical and biomechanical studies on the assumptions of SBS. These studies reveal the lack of scientific basis and flawed methodology in SBS. They also expose the invalidity and unreliability of the SBS diagnosis. Those accused of SBS must struggle with the legal community's misunderstanding and ignorance of the utter lack of validity of the diagnosis. Unfortunately, the burden often falls to those accused of SBS to prove their innocence and educate the system about the unreliability of an SBS diagnosis.

III. Admissibility of Expert Testimony

A. Evolution of the Current Federal Admissibility Standard

Until the 1990s, the standard for the admissibility of scientific and other expert testimony stemmed from the case of *Frye v. United States*.¹⁹¹ Under the *Frye* standard, courts could admit expert testimony only if it was based on scientific principles "generally accepted" in the applicable scientific community.¹⁹² In *Frye*, the trial court needed to determine whether to admit evidence of a systolic blood pressure test, a novel scientific development in 1923.¹⁹³ The Court articulated the admissibility standard by stating,

Just when a scientific principle or discovery crosses the line between the experiential and demonstrable stage is difficult to define. Somewhere in this twilight zone, the evidential force of the principle must be recognized and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.¹⁹⁴

Since the systolic blood pressure test had not gained general acceptance

¹⁹¹ 293 F. 1013 (D.C. Cir. 1923).

¹⁹² *Id.* at 1014.

¹⁹³ Elaine Sutherland, *Undue Deference to Experts Syndrome?*, 16 *IND. INT'L & COMP. L. REV.* 375, 410 (2006).

¹⁹⁴ *Frye*, 293 F.1013 at 1014.

within the physiological and psychological communities, the court ruled evidence of its results inadmissible.¹⁹⁵

Decades later, the Supreme Court shifted the standard of admissibility of expert testimony in the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁹⁶ The case centered around two minor children who alleged that their birth defects were the result of their mothers ingesting an anti-nausea drug known as Bendectin during pregnancy.¹⁹⁷ The issue in *Daubert* was whether the children could prove that a link existed between Bendectin, a drug manufactured by Merrell Dow, and their birth defects. The district court granted summary judgment for Merrell Dow and held that the children failed to demonstrate the generally acceptability of the expert's opinion as a reliable technique as required by the *Frye* test.¹⁹⁸ The appeals court affirmed.¹⁹⁹ The children appealed to the Supreme Court and argued that the Federal Rules of Evidence (FRE) now controlled the standard of admissibility of expert testimony.²⁰⁰ The Supreme Court agreed with the plaintiffs and held that FRE 702 superseded *Frye*.²⁰¹ In reaching this decision, the Court found that the *Frye* standard was absent from the Federal Rules of Evidence and should not be applied in federal trials.²⁰² The Court further held that FRE 702 placed sufficient limits on the admissibility of scientific evidence, and that trial judges must ensure that an expert's testimony is both relevant and reliable.²⁰³ The Court placed upon a trial judge the role of "gatekeeper" to ensure that expert scientific testimony satisfied the standards set out in FRE 702.²⁰⁴

¹⁹⁵ *Id.*

¹⁹⁶ 509 U.S. 579 (1993).

¹⁹⁷ *Id.* at 582.

¹⁹⁸ *Id.* at 584.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 587. *Frye* predated the Federal Rules of Evidence by half a century. The *Daubert* Court noted that "[i]n *United States v. Abel*, 469 U.S. 45 (1984), we considered the pertinence of background common law in interpreting the Rules of Evidence. We noted that the Rules occupy the field." *Id.*

²⁰¹ *Id.* at 582. FED. R. EVID. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.").

²⁰² *Daubert*, 509 U.S. at 589.

²⁰³ *Id.*

²⁰⁴ *Id.*

The *Daubert* court went on to set forth various guidelines to assist the trial court in determining whether the evidence is based on “scientific knowledge.” The Supreme Court listed six factors a trial judge should consider, as the gatekeeper, in determining whether scientific evidence satisfies the requirements for reliability and relevance: (1) whether the theory or technique can be tested, (2) whether the theory or technique has been subject to peer review and publication, (3) the “known or potential” error rate, (4) the existence and maintenance of standards controlling the technique’s operation, (5) the degree of acceptance within the relevant scientific community, and (6) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.²⁰⁵ The Court specifically emphasized that the inquiry envisioned by FRE 702 is a “flexible one.”²⁰⁶ Federal Rule of Evidence 702 ensures the relevance, reliability, and scientific validity of proffered evidence by focusing on the methodology of the science.²⁰⁷

Subsequent federal court decisions seemed to construe the *Daubert* decision as having lowered the standard of admissibility for scientific evidence.²⁰⁸ In *Borawick v. Shay*,²⁰⁹ the Second Circuit wrote, “[B]y loosening the strictures on scientific evidence set by *Frye*, *Daubert* reinforces the idea that there should be a presumption of admissibility of evidence.”²¹⁰ In *United States v. Bonds*,²¹¹ the Sixth Circuit explained “that the DNA testimony easily meets the more liberal test set out by the Supreme Court in *Daubert*.”²¹² Surprisingly, in *United States v. Posado*,²¹³ the Fifth Circuit stated, “[T]he rationale underlying this circuit’s per se rule against admitting polygraph evidence did not survive *Daubert*.”²¹⁴ The *Daubert* decision established a liberal and flexible

²⁰⁵ *Id.* at 593–95.

²⁰⁶ *Id.* at 597.

²⁰⁷ *Id.* at 595. Subsequent federal court decisions seemed to construe the *Daubert* decision as having lowered the standard of admissibility for scientific evidence. See Paul C. Giannelli, *Daubert Revisited*, 41 CRIM. L. BULL. 5 (2005). In *Borawick v. Shay*, the Second Circuit wrote, “by loosening the strictures on scientific evidence set by *Frye*, *Daubert* reinforces the idea that there should be a presumption of admissibility of evidence.” 68 F.3d 597, 610 (2d Cir. 1995).

²⁰⁸ Giannelli, *supra* note 207, at 5.

²⁰⁹ 68 F.3d 597 (2d Cir. 1995).

²¹⁰ *Id.* at 610.

²¹¹ 12 F.3d 540 (6th Cir. 1993).

²¹² *Id.* at 568.

²¹³ 57 F.3d 428 (5th Cir. 1995).

²¹⁴ *Id.* at 429.

standard of admissibility for expert scientific evidence.

A few years later, the Supreme Court expanded the *Daubert* test to non-scientific evidence in the case of *Kuhmo Tire Co. v. Carmichael*.²¹⁵ The Court concluded that “*Daubert’s* general holding setting forth the trial judge’s general ‘gatekeeping’ obligation applied not only to testimony based on ‘scientific’ knowledge, but also to testimony based on ‘technical’ and ‘other specialized’ knowledge.”²¹⁶ The Court further held that the *Daubert* factors were not an exclusive checklist, and should be applied in a flexible manner.²¹⁷ The Court also explained that the factors a court should consider in determining whether to apply the *Daubert* factors are the nature of the case, the expert’s particular expertise, and the subject of his testimony.²¹⁸ The Court found that the problem in this case was not the reliability of the expert witness’s methodology, but whether he used that methodology in a way that enabled him to reliably determine why the tire failed.²¹⁹ As a result of this decision, the Court made clear that expert opinion testimony from a non-scientist should receive the same reliability scrutiny as opinion testimony from a “scientific” expert.

B. Admissibility of Expert Testimony in Military Courts-Martial

In military courts-martial, MRE 702 dictates the factors upon which military judges must rely in determining that admissibility of expert testimony.²²⁰ Military Rule of Evidence 702, like its federal counterpart,

²¹⁵ 526 U.S. 137 (1999). A car driven by Carmichael blew a tire and the vehicle overturned, killing one passenger and injuring others. The survivors and the decedent’s representative filed a suit against the tire’s maker and distributor, claiming that the failed tire was defective. The issue in the case was the reliability of the plaintiff’s expert witness who intended to testify that a defect in the tire’s manufacture or design caused the blowout. *Id.*

²¹⁶ *Id.* at 138.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 139.

²²⁰ MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 702 (2008) [hereinafter MCM]. Military Rule of Evidence 702 replaced paragraph 138(e). MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶138(e) (rev. 1969). Paragraph 138(e) defined an expert witness as “one who was skilled in some art, trade, profession or science or who had specialized training or experience in relation to matters which are not generally within the knowledge of men of common education and experience.” *Id.* Before being allowed to express his opinion, the proponent would have to demonstrate that the witness

was amended in response to the Supreme Court's opinions in *Daubert v. Merrell Dow Pharmaceuticals Inc.* and *Kuhmo Tire Co. v. Carmichael*. The current MRE 702 has been interpreted as permitting greater admissibility of expert testimony than was the case under previous court-martial practice and the 1969 Manual.²²¹ The 2004 amendment to the Rule codifies the approach of *Daubert* and *Kumho*; it does not codify the *Daubert* factors. The drafters intentionally excluded the *Daubert* factors because the Court itself does not see the factors as exclusive or dispositive.²²² The Drafters' Analysis indicates that they did not intend for the Rule to eliminate all previous *Manual* constraints, and should not be interpreted as an indication that previously inadmissible expert or opinion testimony is now automatically admissible.²²³ Rule 702's language provides that military judges must scrutinize the principles and methods used by the expert; they must also determine whether those principles and methods were applied properly to the facts of the case.²²⁴

The Court of Appeals for the Armed Forces established that MRE 702 dictates the admissibility of expert testimony while also recognizing the "gatekeeping" role of military judges as established by the Supreme

was an expert in the specialty. The expert may be required to specify the data upon which he based his opinion and to relate the details of his observation, examination or study.

²²¹ *United States v. Kyles*, 20 M.J. 571 (N.M.C.M.R. 1985). The Navy-Marine Court of Military Review recognized that these rules were designed to broaden the admissibility of expert testimony but only when they will assist the finder of fact in understanding an important trial issue. *See also* MCM, *supra* note 220, MIL. R. EVID. 702 analysis, at A22–50 (noting that the current rule may be "broader and may supercede *Frye v. United States*").

²²² STEPHEN A. SALTZBURG ET AL., *MILITARY RULES OF EVIDENCE MANUAL* § 702.4 (6th ed. 2009).

²²³ *Id.*

²²⁴ *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 139 (1999). Military Rule of Evidence 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MCM, *supra* note 220, MIL. R. EVID. 702.

Court in *Daubert*.²²⁵ Military judges are authorized to use the four factors outlined in *Daubert* in determining the reliability of expert testimony.²²⁶ In determining if an expert is qualified to testify, military judges are encouraged to use the factors outlined in *United States v. Houser*²²⁷: (1) the qualifications of the expert, (2) the subject matter of the expert testimony, (3) the basis for the expert testimony, (4) the legal relevance of the evidence, (5) the reliability of the evidence, and (6) that the probative value of the expert's testimony outweighs the other considerations outlined in MRE 403.²²⁸ While *Houser* slightly predates *Daubert* and *Kuhmo Tire Co.*, it is "consistent with later cases, and this Court has continued to use the *Houser* factors in analyzing the admissibility of expert testimony."²²⁹ While satisfying every *Daubert* or *Houser* factor is sufficient, it is not necessary for establishing the admissibility of expert testimony.²³⁰ As the *Daubert* court stated, the test of reliability is "flexible," and the factors are not a definitive list.²³¹

The focus for military judges is on the objective of the gate-keeping requirement to ensure that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."²³² The military judge is required to determine whether his conclusions could follow from the facts known to the expert and the methodology used by the expert.²³³

²²⁵ See *United States v. Sanchez*, 65 M.J. 145, 149 (C.A.A.F. 2007); *United States v. Billings*, 61 M.J. 163, 167 (C.A.A.F. 2005).

²²⁶ See *Sanchez*, 65 M.J. at 149. The Court of Appeals for the Armed Forces (CAAF) cited the four *Daubert* factors, outlined by the Supreme Court, which a trial judge "may" use to determine the reliability of expert testimony. The CAAF also stated, "This Court has often cited the *Daubert* factors, along with those in *Houser* as firm ground upon which a military judge may base a decision." *Id.* (citation omitted).

²²⁷ 35 M.J. 392, 397 (C.M.A. 1993).

²²⁸ *Id.*

²²⁹ *Billings*, 61 M.J. at 166; see, e.g., *United States v. Dimberio*, 56 M.J. 20, 26 (C.A.A.F. 2001); *United States v. Griffin*, 50 M.J. 278, 284 (C.A.A.F. 1999).

²³⁰ *Sanchez*, 65 M.J. at 149.

²³¹ *Id.*; see also *Daubert v. Merrell Dow Pharms., Inc.* 509 U.S. 579, 593-94 (1993).

²³² *Sanchez*, 65 M.J. at 149 (citing *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999)).

²³³ *Id.*

IV. Application of *Daubert* and MRE 702 to Shaken Baby Syndrome Testimony

A medical doctor's diagnosis of a particular ailment does not, by itself, make the diagnosis reliable for purposes of admissibility under MRE 702. Such a conclusion is especially true in the area of child abuse medicine where no medical tests exist to determine the actual cause of injuries or whether those injuries are intentional, accidental, or caused by a mechanism other than accidental injury or trauma. The fundamental purpose of medicine is treatment; this purpose does not necessarily translate to the purpose of the legal process. The judicial process attempts to get to the truth for the underlying purpose of resolving societal disagreements, whether civil or criminal. Criminal law imposes upon the government the additional burden of proving guilt beyond a reasonable doubt to ensure that someone's liberty is not taken by mistake, accident, or negligence.

Medicine, on the other hand, seeks treatment of physical ailments. Medical professionals accomplish this by diagnosing an illness and applying scientific principles to treat the illness. Often, scientific approximations are accepted because it allows the doctor to try to understand the medical condition, assess a prognosis, and plan treatment. If the diagnosis is incorrect, the doctor reexamines the situation, makes a new diagnosis, and creates a treatment plan based upon the altered diagnosis. Medicine uses a scientific process of elimination to evaluate patient data in order to differentiate disorders that may have similar manifestations.²³⁴ The medical world of probabilities, and trial and error in diagnosing a patient, contradicts the burden of proof required in the legal arena. Thus, allowing expert medical testimony into a courtroom can be dangerous, especially in the area of SBS. The shaken baby diagnosis *assumes* a conclusion about a caregiver based on the lack of an explanation for an infant's injuries. Non-neutral, corroborating medical findings must exist to ensure this testimony is reliable and unambiguous to the fact-finder.

²³⁴ This process is referred to as a differential diagnosis. A differential diagnosis is the "determination of which two or more diseases with similar symptoms is one from which the patient's suffering, by a systematic comparison and contrasting of the clinical findings." *STEDMAN'S MEDICAL DICTIONARY* 428 (William R. Hensyl ed., Williams & Wilkins 25th ed. 1990) (1911). This process often involves a systematic process of exclusion in which is done by "excluding those diseases to which some of the patient's symptoms belong, leaving only one disease to which all symptoms point." *Id.*

The application of the *Daubert* factors to a triad-only case of suspected SBS exposes the unreliability of an SBS diagnosis and its lack of admissibility under MRE 702.²³⁵ A hypothetical case of a triad-only SBS case is one in which an infant presents to a hospital or emergency medical services (EMS) and is unresponsive and not breathing. Upon evaluation, the infant is diagnosed as having retinal hemorrhaging, subdural hemorrhaging, and brain edema (swelling). The infant does not exhibit any external signs of physical trauma/abuse, such as bruising, nor will the infant have any skin redness due to head impact or from being gripped around the torso and shaken. A CT scan will reveal that there are no skull fractures; x-rays will be negative for rib fractures and long bone fractures. The last known caretaker will report a history which doctors will determine is inconsistent with the injuries observed. The treating pediatrician will render a diagnosis of SBS; a criminal investigation will proceed.

Application of the *Daubert* factors to the above hypothetical SBS case demonstrates that shaken baby testimony fails to satisfy the *Daubert* factors for admissibility of expert testimony.²³⁶ The relevant factors are as follows:

- (1) Whether the theory or technique can be and has been tested;
- (2) Whether it has been subjected to peer review and publication;
- (3) Whether, in respect to a particular technique, there is even a known or potential rate of error;
- (4) The existence and maintenance of standards controlling the technique's operation;

²³⁵ While military defense counsel may challenge the admissibility of an SBS diagnosis under *Daubert*, there are no reported military cases on this issue. There are several reported cases involving a SBS diagnosis but the appellate issues in those cases do not involve a *Daubert* challenge to the admissibility of SBS expert testimony. See *infra* note 277.

²³⁶ Other authors have examined SBS in light of *Daubert* but, in doing so, relied upon different studies than this article and did not propose the creation of a new rule of evidence as a remedy to rectify the failure to SBS to satisfy the standards set out in *Daubert*. See Genie Lyons, *Shaken Baby Syndrome: A Questionable Scientific Syndrome and a Dangerous Legal Concept*, 2003 UTAH L. REV. 1109, 1126–30.

(5) Whether the theory or technique enjoys general acceptance within a relevant scientific community; and,

(6) Whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.²³⁷

The first of the *Daubert* factors is whether the theory can be tested and if so, whether the results corroborate or rebut the theory.²³⁸ While clinical studies have been conducted which support the theory of SBS, they are scientifically flawed.²³⁹ In many clinical studies, researchers chose subjects based upon the presence of subdural hematomas and retinal hemorrhages with little investigation into other possible causes of these injuries. Researchers “selected cases by the presence of the very clinical findings and test results they [sought] to validate as diagnostic.”²⁴⁰ In other words, the researchers studied cases of children with the very “triad” of injuries they sought to verify and then simply concluded that the infants were shaken.

A scientific theory may be disproved by a single correctly run experiment, no matter how many prior experiments tend to corroborate the original theory.²⁴¹ Several studies, not just one, have tested the validity of the shaken baby diagnosis and have proven it to be an incorrect theory.²⁴² The nature of SBS prevents it from being literally tested. It would be illegal and unethical for a medical professional to shake infants or young children to determine the resulting injuries. Rather, medical professionals have used clinical studies of head-injured children and whip-lashed monkeys in an attempt to study the shaken baby diagnosis.²⁴³ Recent clinical and biomechanical testing and studies

²³⁷ *Daubert*, 509 U.S. at 595.

²³⁸ According to *Daubert*, “[s]cientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.” *Id.* at 593.

²³⁹ Tuerkheimer, *supra* note 1, at 6 (recognizing the work of Patrick Barnes and Mark Donohoe in applying the “evidence-based medicine” standards to SBS methodology and exposing the flaws of the diagnosis). *See also* Donohoe, *supra* note 186.

²⁴⁰ *Id.* (quoting Donohoe, *supra* note 188, at 239).

²⁴¹ J.F. Geddes has shown that retinal hemorrhaging is not a marker of shaking a baby. J.F. Geddes et al., *Neuropathy of Inflicted Head Injury in Children I: Patterns of Brain Damage*, 124 *BRAIN* 1290 (2001); *see also* Plunkett, *supra* note 91, at 1.

²⁴² *See supra* Part III.

²⁴³ *Id.*

in this area have revealed that the basic assumptions and symptoms of SBS are scientifically flawed.²⁴⁴ Biomechanical studies established other medical explanations for subdural hematomas and retinal hemorrhages.²⁴⁵ In fact, retinal hemorrhages have been shown not to be diagnostic of SBS.²⁴⁶ Additionally, biomechanical studies in this area demonstrate that violent shaking cannot cause the triad of injuries.²⁴⁷ These studies also revealed that shaking alone does not produce enough force to cause subdural hemorrhaging.²⁴⁸ The shaking forces required to cause subdural hematomas do not result in brain injury without first causing spinal or neck injuries.²⁴⁹ Studies show that violent shaking would cause neck and spinal cord injuries in infants before resulting in subdural hematomas and retinal hemorrhages.²⁵⁰ At a minimum, an SBS diagnosis should be based upon a finding of neck and/or spinal injuries. Diagnostic criteria for SBS do not include neck and spinal cord injuries, an exclusion that demonstrates that the SBS diagnostic criteria are flawed. Testing conducted by non-pediatricians contradicts the assertion that subdural hematomas and retinal hemorrhages are diagnostic of shaking and establish this “diagnosis” is not only scientifically unverified, it is simply false. All of the biomechanical studies produced results in direct contrast to the assertions of pediatricians in this area. Biomechanical testing refutes, rather than supports, SBS theory. Since the triad of symptoms can be caused by a number of contributing factors and biomechanical studies expose the lack of scientific validity of SBS, the diagnosis fails the first factor of the *Daubert* analysis.

The second *Daubert* factor is whether the theory has been published in peer-reviewed journals. According to the *Daubert* court, “submission

²⁴⁴ See *supra* Part II.B.

²⁴⁵ There are many other explanations for the symptoms associated with SBS, including apnea, bleeding disorders, meningitis, septicemia, leukemia, galactosaemia, and hypertension. J.F. Geddes et al., *supra* note 241, at 1304–05; see also Barnes et al., *supra* note 17, at 180–83; Mark Donohoe, *Shaken Baby Syndrome (SBS) and Non-Accidental Injuries (NAI)*, § 1.2.1, Aug. 20, 2001, available at <http://www.whale.to/v/sbs.html> (listing ailments that contribute to “spontaneous subdural hemorrhage”).

²⁴⁶ Tongue, *supra* note 101, at 1009; Ommaya et al., *supra* note 86, at 227; Plunkett, *supra* note 91, at 9; Barnes et al., *supra* note 17, at 182; Duhaime et al., *supra* note 16, at 414.

²⁴⁷ Smith et al., *supra* note 17, at 693–705; Ommaya, *supra* note 86, at 223; Duhaime et al., *supra* note 16, at 412–14.

²⁴⁸ Duhaime et al., *supra* note 16, at 414; Ommaya et al., *supra* note 86, at 220; Bandak, *supra* note 16, at 78.

²⁴⁹ Bandak, *supra* note 16, at 78.

²⁵⁰ *Id.*; Koumellis et al., *supra* note 19, at 216–19.

to the scrutiny of the scientific community is a component of ‘good science,’ in part because it increases the likelihood that substantive flaws in the methodology will be detected.”²⁵¹ While studies about SBS have been published in many highly reputable journals, studies published prior to 1999 were seriously flawed.²⁵² Approximately half of all indexed medical publications on the topic of SBS were published prior to 1999.²⁵³ In recent years, the medical community has advocated for basing medical practice and opinions on the best available medical and scientific evidence,²⁵⁴ noting, “This process has been termed evidence-based medicine (EBM) and involves a review of the quality of evidence that is available in various diseases and fields of inquiry within medicine.”²⁵⁵ The turning point in acceptance of the practice of EBM was approximately 1999.²⁵⁶ Mark Donohoe, M.D., conducted a comprehensive review of the medical literature in the area of SBS published prior to 1999.²⁵⁷ He concluded “there was inadequate scientific evidence to come to a firm conclusion on most aspects of causation, diagnosis, treatment, or any other matters pertaining to SBS” based on the literature published prior to 1999.²⁵⁸ He further concluded:

Before 1999, there existed serious data gaps, flaws of logic, inconsistency of case definition, and a serious lack of tests capable of discriminating non-accidental injury cases from natural injuries. By 1999, there was an urgent

²⁵¹ *Daubert v. Merrell Dow Pharms., Inc.* 509 U.S. 579, 593 (1993).

²⁵² Donohoe, *supra* note 188, at 241 (asserting that that “1998/1999 is regarded as the turning point in acceptance of the tenets and practice of evidence-based medicine”). *Id.* at 239.

²⁵³ *Id.* at 239.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* Donohoe stressed that the aim of his review was to be neutral on the subject of SBS. *Id.* He recognized that “[n]eutrality is difficult to define in this field, in part because of the polarization of opinions on the highly emotional subject of infant injury and death and in part because of clear data deficiencies arising from difficulty in performing experiments.” *Id.* He went on to explain that [n]eutrality in this review simply means that there is no selective quotation of the available literature, and literature is not chosen to support any particular view.” *Id.*

²⁵⁸ *Id.* Donohoe searched the entire Biomednet Medline database and Internet Explorer by using the search term “shaken baby syndrome” in November 1998. *Id.* at 240. Other published articles that had not yet been indexed on MEDLINE were also included. *Id.* The following articles were excluded: articles in which SBS was only peripherally mentioned, letters and brief correspondence, and articles in non-English journals that lacked an English abstract. *Id.*

need for properly controlled, prospective trials into SBS, using a variety of controls. Without published replicated studies of that type, the commonly held opinion that the finding of subdural hematoma and retinal hemorrhages in an infant was strong evidence of SBS was unsustainable, at least from the medical literature.²⁵⁹

Clinical and biomechanical studies since 1999 disprove the assumptions upon which SBS is based. Those studies cast doubt upon the entire theory of SBS, making this a perfect example of the Supreme Court's suggestion that more recent studies may expose flaws in earlier ones. While each side of the SBS debate has published articles in peer-reviewed journals, the more recent clinical and biomechanical studies expose the flawed nature of the shaken baby diagnosis, weighing against the admissibility of shaken baby testimony.

The third factor is the "known or potential rate of error" of the scientific theory. Scientific authors of studies related to SBS acknowledge that the caretaker rarely admits to any child abuse. Even if a caretaker explains that a minor fall caused the baby's injuries, it is assumed the caretaker is lying.²⁶⁰ Medical professionals merely assume that if the triad of injuries is present with no known explanation, then shaking is the cause of the infant's injuries. This assumption that shaking occurred means that the precise error rate is not known or testable. Donohoe recognized that there were major data gaps in the medical literature published prior to 1999.²⁶¹ He recognized that there was no method for determining actual proven shaking, nor were appropriate control groups (trauma without shaking, other illnesses, healthy controls) defined and assessed blindly.²⁶² Many authors of articles published prior to 1999 failed to select an appropriate population sample and instead "repeated the logical flaw that if retinal hemorrhages and subdural hematomas are nearly always seen in SBS, the presence of retinal hemorrhages and subdural hematomas 'prove' that a baby was shaken intentionally."²⁶³ Such circular reasoning in selecting a population group

²⁵⁹ *Id.* at 241.

²⁶⁰ G. Lyons, *supra* note 236, 1120.

²⁶¹ Donohoe, *supra* note 188, at 241.

²⁶² *Id.* Dr. Donohoe reviewed fifty-four articles or abstracts. In total, his study assessed 307 shaken baby cases in the twenty-three articles in which the number of SBS patients was provided. He found that a mere two studies had appropriate control groups, three had inappropriate control groups, and twenty-one cases had no control group whatsoever. *Id.*

²⁶³ *Id.*

prevents the measurement of an error rate. On the other hand, the clinical and biomechanical studies actually highlight the fact that the potential error rate for *misdiagnosis* of SBS, if it were measurable, would be quite high since those studies have demonstrated the flawed methodology and reasoning of the shaken baby diagnosis. Thus, since there is no known error rate, and any potential error rate would be significant, SBS fails this factor of the *Daubert* analysis.

The next factor in determining the reliability of expert testimony on SBS is the existence and maintenance of standards controlling the technique's operation. There is no known set of standards to control a diagnosis of SBS other than the triad of symptoms. If those injuries are present and that last known caretaker fails to provide a reasonable explanation for the injuries, then the diagnosis of shaken baby results. The methodology of diagnosing a child with SBS is left to each treating physician with no set guidelines or techniques in reaching such a diagnosis other than the medical training and experience of the treating physician. While some may argue that the "triad" of injuries provides standards for controlling the diagnosis of SBS, such an assertion is incorrect. In Donohoe's 2003 article in which he reviewed the shaken baby literature from 1966 thru 1998, he concluded, "there is a strong need for a checklist or other diagnostic or management tool to assess cases and to quantify index of suspicion of shaking."²⁶⁴ It is very likely that some physicians may render a shaken baby diagnosis by the mere presence of one of the triad of symptoms while others may only render such a diagnosis if all of the triad injuries are present. Donohoe found that of the fifty-four articles he reviewed, selection criteria for shaken baby cases were unstated in twelve (22%) articles, and based on mere presumption or suspicion (not the triad injuries) in ten (19%) articles.²⁶⁵ Of the fifty-four articles Donohoe reviewed, there were no selection criteria given for the sample groups in 41% of the articles. In fact, some of the articles even based a shaken baby diagnosis on nothing more than mere suspicion. It is obvious that there is no set of standards to control the methodology of diagnosis of Shaken Baby Syndrome. The triad of injuries "guidelines" does not qualify as a standard when physicians fail to apply it consistently.

The fifth factor is whether the theory is "generally accepted" within the scientific community (which was the only relevant factor in the

²⁶⁴ *Id.*

²⁶⁵ *Id.*

superseded *Frye* test). *Daubert* stresses that general acceptance in the scientific community is no longer a necessary condition for admissibility, but merely a factor that a court should consider in deciding whether to admit evidence.²⁶⁶ Therefore, while SBS has been used in numerous cases, this is not the proper measure of general acceptance to use under *Daubert*. This is especially true in cases (such as the triad only cases) where no other indicia of abuse exist to support the diagnosis. The scientific studies discussed exemplify that acceptance of the theory of SBS within the medical and scientific communities is faltering, and is not nearly as strong as it was a decade ago. These studies have led a segment of the scientific community to perceive the diagnosis as illegitimate.²⁶⁷ Other medical professionals have responded to the new research by defending SBS against attack, including the American Academy of Pediatrics (AAP). Interestingly, after the publishing of studies which showed that shaking alone does not produce enough force to cause the triad of SBS symptoms, the American Academy of Pediatrics issued the following 2009 policy statement:

Shaken baby syndrome is a term often used by doctors and the public to describe abusive head trauma inflicted on infants and young children. While shaking an infant can cause neurologic injury, blunt impact or a combination of shaking and blunt impact can also cause injury. In recognition of the need for broad medical terminology that includes all mechanisms of injury, the new AAP policy statement, "Abusive Head Trauma In Infants and Children," recommends pediatricians embrace the term "abusive head trauma" to describe an inflicted injury to the head and its contents.²⁶⁸

Despite its presence in society at large, the scientific basis for SBS has deteriorated over the past decade as the medical community has deliberately discarded the diagnosis as defined by shaking and has moved to a diagnosis based on shaking and/or blunt impact.²⁶⁹ Shaken baby syndrome is no longer a generally accepted term or methodology in

²⁶⁶ *Daubert v. Merrell Dow Pharms., Inc.* 509 U.S. 579, 587 (1993).

²⁶⁷ See Bandak, *supra* note 16, at 79; Duhaime et al., *supra* note 16, at 414; Barnes et al., *supra* note 17, at 181; Uscinski, *supra* note 91, at 217-18; Donohoe, *supra* note 188, at 239-40.

²⁶⁸ AM. ACAD. OF PEDIATRICS, <http://www.aap.org/advocacy/releases/may09headtrauma.htm> (last visited May 2, 2012).

²⁶⁹ Tuerkheimer, *supra* note 1, at 11.

the general scientific community: “Doctors are now in widespread agreement that SBS is an unhelpful characterization, and that the presence of retinal hemorrhages and subdural hematoma cannot conclusively prove that injury was inflicted.”²⁷⁰ The research demonstrating that shaking alone cannot cause brain trauma has caused the medical community to change the diagnosis to Abusive Head Trauma, a diagnosis that encompasses shaking and/or impact as a cause of an infant’s head injuries.

The last *Daubert* factor is determining whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. This factor plays an important role with respect to expert witness testimony; panel members are often mesmerized by experts and may lend special reliability and trustworthiness to an expert simply based on an expert’s credentials.²⁷¹ “Science is perceived as solid, knowable, measurable: in short, science offers certainty.”²⁷² An average person who knows nothing of a particular scientific subject will naturally give deference to an individual with training and education on that topic, but “[t]he danger for the legal system is that this empowerment of the expert witness will result in undue deference to his or her opinion.”²⁷³ In the case of shaken baby testimony, deference to the expert proves dangerous and unfairly prejudicial to the defense. A shaken baby diagnosis assumes not only mechanism of injury (shaking) but it assumes the act was intentional. The fact-finder is charged with the responsibility of deciding whether an act was intentional and the cause of the infant’s injuries, not medical experts. Such testimony also comments on the accused’s veracity. Shaken baby testimony assumes the caretaker is lying about the cause of an infant’s injuries. If an accused denies shaking a baby or causing the injuries, then the shaken baby testimony essentially renders an opinion that the accused is a liar. Ultimately, this is an attempt to clothe human lie detector testimony under the guise of science. Government witnesses will try to build a case looking at sociological factors while ignoring the

²⁷⁰ *Id.* SBS has been replaced by several different terms: shaken impact syndrome, abusive head trauma, inflicted traumatic brain injury, and non-accidental head injury. Robert Reece, *What Are We Trying to Measure: The Problems of Case Ascertainment*, 34 AM. J. PREVENTATIVE MED. 116 (2008); see also Cindy Christian et al., *Abusive Head Trauma in Infants and Children*, 123 PEDIATRICS 1409, 1411 (2009).

²⁷¹ See generally *Daubert*, 509 U.S. at 595 (“[E]xpert evidence can be both powerful and quite misleading because of the difficulty of evaluating it.”).

²⁷² Sutherland, *supra* note 193, at 382.

²⁷³ *Id.*

hard scientific studies that do not support their conclusion. They reinforce their conclusion by using the accused's own story against him; they proffer he must be lying concerning his version of events since the injuries could not occur in the absence of shaking. This is especially problematic in cases with no additional indicia of abuse and no additional clinical findings to support the scientific conclusion of SBS. The military rules of evidence prevent a witness from commenting as to the truthfulness of another witness's statements.²⁷⁴ Shaken baby testimony violates the rules of evidence and is unduly prejudicial to the defense. Scientific developments in the past decade have created a strong polarization and debate within the medical community on this topic. Allowing that controversy inside the courtroom would lead to a confusion of the issues. It would create a "mini-trial" on the validity of a shaken baby diagnosis and confuse the real issues at trial. *Daubert* is meant to answer this issue. Asking a panel to decipher the validity of a diagnosis, upon which scientists and doctors vehemently disagree, is akin to asking the panel to perform heart surgery. More to the point, how can such a controversy equate to proof beyond a reasonable doubt? Where in the criminal justice system should speculation, guess, and conjecture be espoused as evidence? Hopefully, it should not be.

The theory of SBS in triad-only cases performs poorly on each of the factors identified in *Daubert*; any courtroom should exclude such testimony as unreliable scientific speculation instead of scientific knowledge as required by *Daubert*. Presentation of such evidence to a fact-finder leads to speculation about the nature and cause of an infant's injuries. Any decision a fact-finder reached, after hearing evidence of SBS, is a decision based on mere conjecture and speculation about matters in which even experts have not been able to agree. It is not the defense's burden to prove a negative, that is, that shaken baby evidence is unreliable. The government must affirmatively demonstrate its expert evidence is reliable; failure to do so mandates exclusion of the evidence. Every objective measure of reliability regarding SBS evidence fails in the "triad-only" cases.

²⁷⁴ See MCM, *supra* note 220, MIL. R. EVID. 608(a). Military Rule of Evidence 608(a) authorizes testimony about the credibility of a witness, but only "in the form of opinion or reputation" and "the evidence may only refer to character for truthfulness or untruthfulness." *Id.* It would be the rare occasion in which a medical expert would be able to render a personal opinion as to the accused's reputation or character for truthfulness or untruthfulness.

V. Proposed Military Rule of Evidence to Address Shaken Baby Evidence

Biomechanical and clinical studies over the past several years have seriously undermined the foundation of SBS as a diagnosis. These studies have crippled an SBS diagnosis to the point that judges should rule such testimony as inadmissible. The rules of evidence are premised on an adversarial system.²⁷⁵ Even the *Daubert* court believed “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”²⁷⁶ The flexibility and discretion given to a judge allows the presumption of admissibility of expert testimony to be standard practice in courts-martial. In fact, there are no reported military cases in which the judge excluded SBS testimony.²⁷⁷ Every reported case in which a military court admitted shaken baby testimony resulted in convictions ranging from assault and battery to premeditated murder.²⁷⁸ In every reported case, medical professionals testified for the government that the infant suffered from SBS demonstrating that, even as of 2009, doctors are continuing to use

²⁷⁵ Tuerkheimer, *supra* note 1, at 13.

²⁷⁶ *Daubert*, 509 U.S. at 596.

²⁷⁷ Several reported cases present facts where the court admitted SBS evidence. These triad-only cases are: *United States v. Delarosa*, 67 M.J. 318 (C.A.A.F. 2009); *United States v. Bresnahan*, 62 M.J. 137 (C.A.A.F. 2005); *United States v. Dimberio*, 56 M.J. 20 (C.A.A.F. 2001); *United States v. Davis*, 53 M.J. 202 (C.A.A.F. 2000); *United States v. Van Syoc*, 36 M.J. 461 (C.M.A. 1993). These additional reported cases contained corroboration evidence of bruising, blunt force trauma, and rib fractures: *United States v. Harrow*, 65 M.J. 190 (C.A.A.F. 2007), *cert. denied*, *Harrow v. United States*, 552 U.S. 992 (Oct. 29, 2007); *United States v. Warner*, 62 M.J. 114 (C.A.A.F. 2005); *United States v. Allen*, 59 M.J. 478 (C.A.A.F. 2004), *cert. denied*, *Allen v. United States*, 543 U.S. 877 (Oct. 4, 2004); *United States v. Winter*, 35 M.J. 93 (C.M.A. 1992); *United States v. Curry*, 31 M.J. 359 (C.M.A. 1990); *United States v. Valois*, 2009 WL 1507981 (A.F. Ct. Crim. App. 2009); *United States v. Stanley*, 60 M.J. 622 (A.F. Ct. Crim. App. 2004).

²⁷⁸ *Delarosa*, 67 M.J. at 319 (accused convicted of aggravated assault); *Harrow*, 65 M.J. at 192 (accused convicted of unpremeditated murder); *Bresnahan*, 62 M.J. at 138 (accused convicted of involuntary manslaughter); *Warner*, 62 M.J. at 115 (accused convicted of assault and battery); *Allen*, 59 M.J. at 479 (accused convicted of maiming and assault with intent to commit grievous bodily injury); *Dimberio*, 56 M.J. at 21 (accused convicted of assault with means likely to cause death or grievous bodily injury); *Davis*, 53 M.J. at 203 (accused convicted of involuntary manslaughter); *Van Syoc*, 36 M.J. at 461 (accused convicted of unpremeditated murder); *Winter*, 35 MJ at 94 (accused convicted of unpremeditated murder); *Curry*, 31 M.J. at 360 (accused convicted of premeditated murder); *Valois*, 2009 WL at 1507981 (accused convicted of murder); *Stanley*, 60 M.J. at 622 (accused convicted of involuntary manslaughter).

this faulty diagnosis.²⁷⁹ Even more concerning is the fact that military judges are continuing to allow government experts to testify about this “diagnosis.”

In order to address this problem, the military should adopt a new rule of evidence to prevent the admission of SBS testimony in triad-only cases. Opponents of such a change may argue that the debate about the validity of the SBS diagnosis is really an issue of the weight to be given the evidence by the fact-finder, and not an issue of admissibility. However, such a new rule of evidence can be closely analogized to the rule prohibiting polygraph evidence. Military Rule of Evidence 707 “serves several legitimate interests in the criminal trial”: “ensuring that only reliable evidence is introduced at trial, preserving the court members’ role in determining credibility, and avoiding litigation that is collateral to the primary purpose of the trial.”²⁸⁰ Polygraph evidence was not left to the fact-finder to determine the reliability and weight to give such evidence; SBS should be treated similarly. A new rule of evidence is needed which requires either corroborating physical evidence that the alleged SBS injuries resulted from an impact, evidence that the mechanism of injury was more than just shaking, or a voluntary confession that admits to intentional physical assault.

The current system’s permissive practice of allowing military judges to apply the *Daubert* factors when analyzing whether to admit evidence fails to prevent the admission of unreliable SBS testimony at courts-martial. One basis for this conclusion is the difficulty judges may face in understanding scientific evidence and in applying the *Daubert* factors. Such potential misunderstandings may result in the judiciary’s undue

²⁷⁹ See *Delarosa*, 67 M.J. at 321.

²⁸⁰ *United States v. Scheffer*, 523 U.S. 303, 309 (1998). The *Scheffer* Court went on to state:

These interests, among others, were recognized by the drafters of Rule 707, who justified the Rule on the following grounds: the risk that court members would be misled by polygraph evidence; the risk that the traditional responsibility of court members to ascertain the facts and adjudge guilt or innocence would be usurped; the danger that confusion of the issues “could result in the court-martial degenerating into a trial of the polygraph machine;” the likely waste of time on collateral issues; and the fact that the “reliability of polygraph evidence has not been sufficiently established.”

Id. at 309 n.5 (citations omitted).

deference to expert witnesses.²⁸¹ The synergistic effect of these elements creates an almost impossible situation for an accused to exclude SBS testimony under an MRE 702 or *Daubert* challenge. It is understandable that lawyers and judges would accept scientific expert testimony at face value since the experts are much more knowledgeable in the area. An expert's credentials and training alone can cause a judge to accept the expert's testimony as reliable without question. In the legal system, it is this empowerment of an expert witness that results "in undue deference to his or her opinion."²⁸² An expert who testifies regarding a "generally accepted" medical diagnosis can have a powerful effect on the outcome of a trial. Simply allowing the defense to challenge a SBS diagnosis with its own experts does not address the problem of admitting faulty scientific testimony at trial. The proper way to address this situation is to create a rule of evidence that would require corroboration evidence of child abuse in triad-only cases.

Another factor that renders unreliable SBS testimony admissible at trial under the current system is the lack of understanding by judges in properly applying the *Daubert* factors. A survey conducted of state judges revealed the importance judges place on *Daubert* in making expert admissibility decisions.²⁸³ The study demonstrated the importance of *Daubert* in decisions to admit expert testimony and demonstrated the lack of understanding of the error rates and falsifiability factors.²⁸⁴ The first portion of the study surveyed four hundred state judges and ninety-four percent of those who responded found *Daubert* valuable in their decisions regarding admissibility of expert testimony.²⁸⁵ Ninety-one percent of the judges said they found error rates to be helpful in assessing the quality of evidence offered.²⁸⁶ However, only four percent of the judges held an accurate understanding of error rates.²⁸⁷ Although eighty-

²⁸¹ See Sutherland, *supra* note 193, at 382.

²⁸² *Id.*

²⁸³ Sophia I. Gatowski et al., *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 LAW AND HUM. BEHAV. 433, 441 (2001). A total of four hundred judges were surveyed with a seventy-one percent response rate. The surveys were conducted by use of a structured telephone interview. *Id.* There is no known survey of military judges on this issue and the study of state judges is used for illustrative purposes.

²⁸⁴ *Id.* While this study involved surveying state judges and not military judges, these judges apply the same *Daubert* factors as military judges, allowing for one to analogize the results to the military.

²⁸⁵ *Id.* at 443.

²⁸⁶ *Id.* at 445-47.

²⁸⁷ *Id.*

eight percent reported they believed “falsifiability” to be useful in determining the reliability of scientific evidence, a mere six percent revealed a proper understanding of the concept.²⁸⁸ The second part of the study surveyed over three hundred judges and questioned them about a variety of psychological syndromes.²⁸⁹ The judges were asked to identify the aspects of each syndrome that they found most problematic in determining admissibility. Few of the judges even mentioned *Daubert* criteria.²⁹⁰ Rather, the judges most often referred to the qualification of the expert, subjectivity of the diagnostic process, and relevance as being of greater concern.²⁹¹ This part of the survey highlights the deference given to experts in trials. If judges misunderstand, misapply, or simply fail to apply the *Daubert* factors altogether, then unreliable SBS testimony will continue to permeate courtrooms.

Requiring corroborating physical evidence as the cause of the subdural hemorrhaging, retinal hemorrhaging, and brain swelling in suspected SBS cases will ensure that such testimony is reliable and satisfies the *Daubert* factors. The most reliable way to ensure that corroborating evidence is required is to create a rule of evidence. The proposed rule of evidence should read as follows:

Rule 708. Abusive Head Trauma

(a) Notwithstanding any other provision of law, the opinion by a medical professional or social worker, or any reference to, or diagnosis of, abusive head trauma/shaken baby syndrome shall not be admitted into evidence without: corroborating physical evidence that the injuries resulted from an impact or blunt force trauma, the mechanism of injury included something

²⁸⁸ *Id.* at 444.

²⁸⁹ *Id.* at 440. Part II of the study was conducted using telephone interviews or written questionnaires with an eighty-one percent response rate. Veronica Dahir et al., *Judicial Application of Daubert to Psychological Syndrome and Profile Evidence*, 11 PSYCHOL. PUB. POL'Y & L. 62, 68 (2005). Of the 325 judges who participated in part II of the study, 318 provided answers to the questions dealing with syndromes. *Id.* at 68. The syndromes on which the study focused were: battered women's syndrome; rape trauma syndrome; child sex abuse accommodation syndrome; repressed memory syndrome; and post-traumatic stress disorder. *Id.*

²⁹⁰ Dahir, *supra* note 289, at 72.

²⁹¹ *Id.*

more than shaking alone, or a voluntary confession²⁹² by the accused that he/she intentionally physically assaulted the child. Such corroborating evidence may include evidence of a neck injury, spinal cord injury, rib fractures, skull fractures, or bruising (such list is not intended to be exclusive or exhaustive).²⁹³

(b) Nothing in this section is intended to exclude from evidence medical observations or statements made during a medical examination which are otherwise admissible, except that no reference to an abusive diagnosis is permitted unless the evidence complies with section (a) above.

This rule would require corroborating physical evidence of impact, or some other mechanism of head injury other than shaking, as a threshold matter before allowing testimony regarding Shaken Baby Syndrome/Abusive Head Trauma. The corroboration requirement could also be satisfied with a voluntary confession, not a mere admission,²⁹⁴ by the accused that he or she intentionally physically assaulted the child. The corroboration required would parallel the corroboration requirement for voluntary confessions.²⁹⁵ Just like corroboration required for confessions, the SBS independent corroborating evidence itself need not be sufficient to establish proof beyond a reasonable doubt. The corroborating evidence need only raise an inference of truth as to the essential facts admitted and the proposed shaken baby diagnosis. Corroboration evidence of abuse would ensure that there is some other

²⁹² A voluntary confession is a statement rendered admissible in accordance with the Military Rules of Evidence. *See* MCM, *supra* note 220, MIL. R. EVID. 304–305.

²⁹³ Lyons, *supra* note 236, 1120 (recognizing that “child abuse should only be assumed as a last resort: if other indicia of abuse are present such as long-bone injuries, a fractured skull, bruising, or other indications that abuse has actually occurred” but does not recommend requiring such evidence as a prerequisite to admission of SBS testimony at trial). *Id.* at 1132.

²⁹⁴ A voluntary confession is a statement rendered admissible in accordance with the MRE. *See* MCM, *supra* note 220, MIL. R. EVID. 304–305.

²⁹⁵ A confession is an acknowledgement of guilt. *Id.* MIL. R. EVID. 305(c)(1). An admission is a self-incriminating statement falling short of an acknowledgement of guilt, even if its maker intended it to be exculpatory. *Id.* MIL. R. EVID. 305(c)(2). Because caretakers often admit to shaking the child for responsiveness after the child is unresponsive, such admission is often improperly viewed as an admission of guilt. Thus, a confession should be required as opposed to a mere admission that may be improperly viewed as an inculpatory statement.

evidence of assault other than just an assumption by physicians that abuse occurred. This proposed rule also specifically requires evidence of impact or a mechanism other than shaken baby diagnosis. This rule would address the weaknesses of the SBS theory, and ensure that there is independent evidence of a mechanism of injury other than just alleged shaking.

VI. Conclusion

Shaken Baby Syndrome is a “diagnosis” which developed over several decades from the 1940s to the 1970s. The SBS diagnosis consisted of a “triad” of symptoms that the caretaker could not explain to the satisfaction of medical providers. These symptoms included subdural hemorrhaging, retinal hemorrhaging, and brain swelling. If an infant presented to a hospital with these three symptoms and no known explanation, medical personnel might diagnose shaking as the cause of the injuries. In recent years, biomechanical studies and clinical studies have challenged the assumptions, science, and methodology behind the shaken baby diagnosis. In essence, the “science” has continued to develop in this area. Studies have shown that a human being cannot create enough force, by shaking alone, to cause brain injuries in young infants and children. Other studies concluded that the amount of shaking force necessary to cause brain injuries would result in neck and spinal injuries before brain injuries would occur. Still other studies demonstrated that shaking alone would not cause retinal hemorrhaging.²⁹⁶ In essence, biomechanical studies exposed the unreliability of shaken baby diagnosis.

Military Rule of Evidence 702 and *Daubert* contain such liberal standards of admissibility of expert testimony that judges almost always admit SBS testimony despite its frequent unreliability. A close analysis of SBS evidence reveals that it does not satisfy the *Daubert* factors. SBS evidence is a troubling example of the *Daubert* factors’ and MRE 702’s failure to exclude unreliable scientific expert testimony in court. Reform is necessary. A military rule of evidence is needed which would require corroborating physical evidence of abuse, irrespective of the triad of injuries of subdural hemorrhaging, retinal hemorrhaging, and brain swelling in order for SBS testimony to be admissible at courts-martial.

²⁹⁶ Ommaya et al., *supra* note 20, at 285.

**A NEW WAR ON AMERICA'S OLD FRONTIER:
MEXICO'S DRUG CARTEL INSURGENCY**

MAJOR NAGESH CHELLURI*

*"We don't have to go overseas to see a war; there is a war on our homefront right here on the Rio Grande on the southwest border."*¹

I. Border Incursion: A Short Story

One mile from the United States–Mexican border east of Nogales, Arizona, the large green and white Border Patrol Chevy Tahoe lumbered slowly and deliberately on the bumpy, dusty unpaved trail. It was an exceptionally hot day, and Border Patrol agents Reese and Reeves knew

* Judge Advocate, U.S. Army. Presently assigned at the Kabul Military Training Center as Senior Curriculum Advisor for the Afghan National Army Legal School, NATO Training Mission–Afghanistan and Combined Security Transition Command–Afghanistan. LL.M., 2011, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; J.D., 2001, Northern Illinois University, DeKalb, Illinois; B.S., 1998, Illinois State University, Normal, Illinois. Previous assignments include Headquarters, 1st Cavalry Division, Fort Hood, Texas, 2008–2010 (Administrative and Civil Law Attorney, 2010, and Rear Detachment Deputy Command Judge Advocate, 2008–2009); International Operations Officer, Defense Institute of International Legal Studies, Naval Station Newport, Rhode Island, 2007–2008; Trial Counsel, 35th Air Defense Artillery Brigade, Osan Air Base, Republic of Korea, 2006; 1st Brigade Combat Team, 1st Cavalry Division, Fort Hood, Texas, 2004–2005 (Trial Counsel, 2005, Command Judge Advocate deployed in support of Operation Iraqi Freedom II, 2004); U.S. Army Maneuver Support Center and Fort Leonard Wood, Fort Leonard Wood, Missouri, 2003–2004 (Chief, Legal Assistance, 2004, Trial Counsel deployed to Joint Task Force Guantanamo, Guantanamo Bay, Cuba, 2003–2004, Legal Assistance Attorney, 2002–2003); Aide-de-Camp, Deputy Commanding General, 416th Engineer Command, U.S. Army Reserve, Darien, Illinois, 1999–2002; Platoon Leader, Delta Company, 1st Battalion, 123rd Infantry Regiment, Illinois Army National Guard, Pontiac, Illinois, 1998–1999. Member of the bars of Illinois, the United States Court of Appeal for the Armed Forces, and the Supreme Court of the United States. This article was submitted in partial completion of the Master of Laws requirements of the 59th Judge Advocate Officer Graduate Course. I would like to thank my wife, Karin, for her love and tireless support during the writing of this article; as well as Lieutenant Colonel (Ret.) Eric T. Jensen for his inspiration and friendship; and my advisor, Lieutenant Colonel Jeff A. Bovarnick for his leadership and intellectual acumen during the entire writing process. Finally, I'd like to thank our fantastic International Law Faculty members who graciously lent their names to the introduction of this paper: Lieutenant Colonel Jeremy Marsh, U.S. Air Force; Major Shane R. Reeves, U.S. Army; and Lieutenant Commander John B. Reese, U.S. Navy.

¹ *Border Wars* (National Geographic Channel broadcast Nov. 17, 2010) (quoting Supervisory Border Patrol Agent Joe Ramos).

that when darkness fell and the rugged landscape cooled down, the narcotics and human smugglers would more than likely make their move. With the drug cartels firmly rooted less than a mile away in Heroica Nogales, Mexico, desperate people will take desperate measures to escape, and bodies of Mexicans attempting to cross have occasionally been found. About to make a radio check, Agent Reese notices movement in a small wooded area. Reese points toward what he saw and pulls out his binoculars as Reeves drives toward the movement. The ride is jarring and Reese has a difficult time focusing. He makes out ten to twelve men in what appears to be black battle dress uniforms in the brush. Reeves stops the vehicle and reaches for the radio while Reese picks up his M4 carbine steps out to investigate.

Agent Reese walks toward the group when suddenly multiple shots are fired and two rounds pierce his open door. With years of border experience, Reese reacts quickly and returns fire as he runs toward a ditch for cover. Not fast enough, a round grazes his left leg and he tumbles into the ditch and drops his weapon. Reese quickly regains his composure, secures his weapon and assesses the situation.

Reeves drives the vehicle closer. As more rounds strike the vehicle, Reese gets into a position and returns fire at a moving black uniform that drops, but he is unsure if he hit his target. Another man carrying a hand held radio points at the vehicle and ducks for cover. To Reese's surprise, shots are fired at the vehicle from another direction. The vehicle stops: tires are flattened, the windshield is pocked with bullet holes, and blood is spattered on the passenger window. He hears the familiar voice of Supervisory Agent Marsh from Command Post reassuring him help is on the way. Reese provides him a report of his tenuous situation, including the possibility that Reeves is dead. As they talk, Reese ducks to avoid shots fired in his direction. He sees the second group bound up and over the hill as the first group fires, pinning him down in the ditch. The first group on the hill disappears over the top as the Customs and Border Patrol helicopter and ground patrol vehicles arrive. Paramedics race to the shot up vehicle as Agent Marsh helps Reese out of the ditch.

"What the hell happened?" asks Agent Marsh.

"I have no idea, but I think these guys were professionals. They had a radioman, and bounded back over the hill as the guys at the top laid suppressive fire. I couldn't return fire. What do you think, another Mexican Army incursion? Zetas?"

“Who knows, this kind of thing has been going on more frequently than we’d like. Don’t worry about Reeves, the medics are on him,” says Agent Marsh as he helps Reese toward an arriving ambulance. He continued, “The helicopter reported that they jumped in a couple Humvees and raced back across the border.”

In the ambulance, Reese sits oblivious to the paramedic attending to his wound as he listens to the traffic on his handheld radio; the area where the attackers fled yielded a cache of 500 pounds of marijuana. The best news was yet to come. Agent Reeves was alive but in critical condition and being airlifted to the nearest emergency room.²

II. Introduction

Unfortunately, the previously described attack is not merely a creative anecdote. While some specific details above are fiction, the event is a true story. Given the military-style tactics, the attackers in this story may have been Los Zetas,³ one of seven cartels battling each other and the Mexican government for supremacy in the drug trade—a struggle

² The short story is a work of fiction by the author, but based on actual reported events. See *Illegal Immigration Enforcement and Social Security Protection Act of 2009 and Rapid Response Border Protection Act of 2005: Hearing on H.R. 98 and H.R. 4044 Before the H. Homeland Security Subcomm. on Investigations*, 109th Cong. (2006) (statement of T.J. Bonner, President, National Border Patrol Counsel).

June 30, 2005, at approximately 12:30 p.m., east of Nogales, Arizona: Two U.S. Border Patrol agents encountered a group of ten to twelve men wearing black military-style uniforms about a mile north of the international border. Some of the men opened fire on the agents, and at least one of them utilized a hand-held radio to direct gunfire of several hidden shooters. A total of more than fifty high-powered rifle rounds were fired at the agents, both of whom were seriously wounded. The gunmen retreated back to Mexico using military-style cover and concealment tactics. Nearly five hundred pounds of marijuana were recovered during a search of the area. [The] . . . assault may have been perpetrated by henchmen of the drug cartels, a significant number of whom are former Mexican soldiers or law enforcement officers. One such group, Los Zetas, works for the Gulf Cartel, and many of its members received training from the U.S. military and/or law enforcement agencies while they were employed by the government of Mexico.

Id.

³ GEORGE W. GRAYSON, *MEXICO: NARCO-VIOLENCE AND A FAILED STATE?* 179 (2010) (Los Zetas is a cartel composed of former Mexican Army Airborne Special Forces Groups, or GAFE in Spanish, discussed further below.).

resulting in the deaths of 28,000 people since 2006.⁴ Some of the murders are committed in gruesome fashion and bodies are found in mass graves.⁵ Mexican officials report that most of those killed are related to the cartels themselves. However, critics argue the deaths are evidence of the government's inability to stop the cartels from enforcing their own gang "law."⁶

The cartels may not seek total destabilization of Mexican society, but they seek freedom to conduct their illicit drug trade. They battle each other for control of that very lucrative trade, and fight the Mexican security forces⁷ because of their interference. Whether or not it is their intent, the cartels' very existence and manner of operation threaten the Mexican state. The cartels control the local media and municipal and state governments through violence, corruption, and intimidation, requiring the government to resort to military force to re-establish control. Under these conditions, the government risks losing sovereignty to criminal organizations and devolving into a failed state. At this stage of the conflict, Mexico may be moving from "*Colombianization*" to "*Afghanization*."⁸ The issue is viewed seriously by the U.S. Joint

⁴ Q&A: *Mexico's Drug Related Violence*, BBC NEWS (Nov. 10, 2010), <http://www.bbc.co.uk/news/world-latin-america-10681249>.

⁵ *Id.*

⁶ *Id.*

Mass graves have been turning up increasingly frequently—some containing dozens of bodies. Beheadings and bodies hung from bridges point to a rise in gruesome attacks. The Mexican government argues that the violence shows that the gangs are turning on one another—reflecting the success of government policies. However, some observers argue that the cartels have become so powerful that, in effect, they control some parts of the country—the violence is evidence of their gang law.

Id.

⁷ The term "security forces" includes both the Mexican military and police.

⁸ Mathieu von Rohr, *A Nation Descends into Violence*, SPIEGEL ONLINE (Dec. 23, 2010), <http://www.spiegel.de/international/world/0,1518,735865,00.html>

One expert, Edgardo Buscaglia, who specialized in drug-related organized crime . . . currently working in Kandahar, Afghanistan . . . said he had stopped using the expression 'Colombianization' to describe what's happening in Mexico. 'There are now areas in some states that remind me of what I see here in Afghanistan.' . . . Narcos, or drug dealers, control about 12 percent of Mexican territory, according to some estimates.

Forces Command, which reported in a 2008 study⁹ that “two large and important states bear consideration for a rapid and sudden collapse: Pakistan and Mexico.”¹⁰

From the beginning of the conflict, the Mexican government has been treating the war as a police action with the aim of prosecuting the leadership of the cartels. However with its police forces unable to cope with the cartels’ corrupting influence and military power, the Mexican government deployed its army. The Mexican government has yet to admit the cartels pose a direct threat to the Mexican state.

Despite U.S. efforts to increase border security since 2006,¹¹ Mexican cartels have smuggled drugs and people into the United States, with weapons and profits of \$40 billion in cash being sent back to Mexico.¹² While U.S. border cities are fairly free of violence, the same

Id.

⁹ UNITED STATES JOINT FORCES COMMAND, THE JOE 2008 (2008) (JOE stands for “Joint Operating Environment” or “the JOE”); *see generally* (In the words of General J.N. Mattis, USMC, Commander of Joint Forces Command, “The Joint Operating Environment (JOE) is our historically informed, forward-looking effort to discern most accurately the challenges we will face at the operational level of war, and to determine their inherent implications.”). *Id.* at iv.

¹⁰ *Id.* at 36 (“The Mexican possibility may seem less likely, but the government, its politicians, police, and judicial infrastructure are all under sustained assault and pressure by criminal gangs and drug cartels. How that internal conflict turns out over the next several years will have a major impact on the stability of the Mexican state. Any descent by Mexico into chaos would demand an American response based on the serious implications for homeland security alone.”). *See also Mexican Collapse*, WASH. TIMES, Jan. 22, 2009, <http://www.washingtontimes.com/news/2009/jan/22/mexican-collapse/?page=all> (“Indiscriminate kidnappings. Nearly daily beheadings. Gangs that mock and kill government agents. This isn’t Iraq or Pakistan. It’s Mexico, which the U.S. government and a growing number of experts say is becoming one of the world’s biggest security risks.”).

¹¹ Steven Donald Smith, ‘Operation Jump Start’ Puts 2,500 Guardsmen on Southern Border in June, AM. FORCES PRESS SERV., June 6, 2006, <http://www.defense.gov/news/newsarticle.aspx?id=16109>. *See also* John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 1002, 120 Stat. 424, 2371(c) (Border Security—Amounts authorized to be appropriated to the Department of Defense for fiscal year 2006 in the National Defense Authorization Act for Fiscal Year 2006 are hereby adjusted, with respect to any such authorized amount, by the amount by which appropriations pursuant to such authorization are increased by a supplemental appropriation, or decreased by a rescission, or both, or are increased by a transfer of funds, pursuant to title V of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006).

¹² BBC News, *Mexican Drug Gangs ‘Spread in US,’* Mar. 3, 2010, <http://news.bbc.co.uk/1/hi/americas/8588509.stm>.

cannot be said for the Mexican border cities where violence is a daily occurrence and Mexican citizens live in constant fear of the drug cartels and the Mexican Army. In an ironic twist, El Paso, Texas, was considered the second safest city in America in 2009, while Ciudad Juarez, just across the border, suffered more than 5,000 murders in the last two years.¹³ Left unchecked by the U.S. government, it is only a matter of time before more than illegal immigrants and Mexican drugs make their way across the border. As the Mexican cartels battle each other for valuable shipping corridors, their battles could cross the border into America. In some respects, they already have.¹⁴ The cartels are already represented in the United States by various gangs.¹⁵ The lawlessness on the Mexican-American frontier could soon be reminiscent of the days of the “Wild West,” as bands of cartel enforcers assume the role of desperados operating *carte blanche* on both sides of the border.

From an international law perspective, Mexico is embroiled in a non-international armed conflict governed by Common Article 3 of the Geneva Conventions¹⁶ with the cartels acting as “criminal insurgents”¹⁷

¹³ Katie Connelly, *US Border Violence: Myth or Reality?*, BBC NEWS, Jul. 28, 2010, <http://www.bbc.co.uk/news/world-us-canada-10779151> (citing CQ Press City Crime Rankings 2009–2010, http://os.cqpress.com/citycrime/2009/Rankings2009_Population.pdf (last visited Apr. 25, 2012) (El Paso had the second lowest crime rate for a city with a population of 500,000 or more. Detroit, Michigan was listed as having the highest crime rate in that category.) (As the drug war intensifies it remains to be seen that El Paso will maintain its reputation as a safe city).

¹⁴ COLLEEN W. COOK, CONG. RESEARCH SERV., RL34215, MEXICO’S DRUG CARTELS 6 (Oct. 16, 2007); see also *Mexican Drug Gangs ‘Spread to Every Region of US,’* BBC NEWS, Mar. 6, 2010, <http://news.bbc.co.uk/2/hi/8588509.stm>.

¹⁵ *Id.*

¹⁶ There are four Geneva Convention treaties. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] (collectively referred to as ‘Geneva Conventions’). Article 3 of all four of the 1949 Geneva Conventions is referred to as “Common Article 3” because the article is verbatim in all four Geneva Conventions, and states,

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

motivated by money, but clearly affecting political ends. This article explores historical details that led Mexico to become the new front on the “War on Drugs.”¹⁸ With this historical background, the article analyzes

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Id. art. 3.

¹⁷ John P. Sullivan & Adam Elkus, *State of Siege: Mexico's Criminal Insurgency*, SMALL WARS J. 7 (2008), www.smallwarjournal.com. Sullivan and Elkus describe the criminal insurgent as

resolutely apolitical; he challenges the will of the state because he seeks to sever its regulatory arms. If the cartel insurgent has an ideal model of a Mexican state, it is a balkanized series of urban fiefs barely ruled by a supine national government that decides national and foreign policy. However we use the term ‘insurgency’ because it best describes the nature of the internal war waged by cartels against the Mexican state.

Id.

¹⁸ Claire Suddath, *The War on Drugs*, TIME, Mar. 25, 2009, <http://www.time.com/time/world/article/0,8599,1887488,00.html> (The phrase “War on Drugs” was coined by President Nixon with the creation of the Drug Enforcement Agency (DEA) in 1973. Much like what happened after World War II, the Nixon Administration was reacting to addicted American troops returning home from another war, Vietnam. Under the Nixon

how the insurgents within the context of the drug cartels are driven by economics under current counterinsurgency doctrine¹⁹ and why Common Article 3 of the Geneva Conventions should be the guiding principle of the Mexican forces in the field. The article argues that the Mexican drug cartel insurgency triggers Common Article 3 and application of the law of armed conflict. After arguing a non-international armed conflict exists in Mexico, the article concludes with a discussion of current American policy and initiatives to support the Mexican government.

Part III describes the background of the conflict, including the cartel forces, and the Mexican government response. Part IV analyses international law theories and focuses on the Mexican cartels as an insurgency, argues why the intensity of the insurgency triggers Common Article 3 of the Geneva Convention, and supports the proposition that Mexico is engaged in a non-international armed conflict.

It is important to note that this “drug war” is an ongoing conflict. More specifically, facts and outcomes presented in this article are subject to change, and are contingent on the success or setbacks of the Mexican government’s efforts to overpower the major drug cartels.

III. The Mexican War on Drugs

“The cartels don't seek a failed state. Rather they want ‘dual sovereignty’—that is, to pay off public officials in return for their closing their eyes to criminality.”²⁰

It all began with opium.²¹ In 1805, scientists refined the juice of the

Administration the DEAs purpose was to establish a single unified command to combat “an all-out global war on the drug menace.”). *See generally* Reorganization Plan No. 2 of 1973, 38 Fed. Reg. 15,932 (1973) (Section. 3 states: “The Bureau of Narcotics and Dangerous Drugs, including the Office of Director thereof, is hereby abolished, and section 3(a) of Reorganization Plan No.1 of 1968 is hereby repealed.”) (Sec. 4. Drug Enforcement Agency. “There is established in the Department of Justice an agency which shall be known as the Drug Enforcement Administration . . .”).

¹⁹ U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY (12 Dec. 2006) [hereinafter FM 3-24].

²⁰ Nacha Cattán, *Rodolfo Torre Cantu Assassination: Why Are Drug Cartels Killing Mexican Candidates?*, CHRISTIAN SCI. MONITOR, Jun. 28, 2010, <http://www.csmonitor.com/World/Americas/2010/0628/Rodolfo-Torre-Cantu-assassination-Why-are-drug-cartels-killing-Mexican-candidates>

opium poppy to create morphine.²² Morphine revolutionized battlefield medicine—ameliorating suffering from wounds and treating field related issues such as malaria, dysentery, and diarrhea.²³ Chinese immigrants arriving in the northwestern Mexican state of Sinaloa after the 1906 San Francisco earthquake brought opium with them.²⁴ Along the U.S. and Mexican border in Ciudad Juarez, just across the Rio Grande from El Paso, Texas, Chinese immigrant Sam Hing became the first drug lord of the region.²⁵ Prior to the regulation of narcotics, the use and sale of opium, morphine, and cocaine was legal in the United States and was prescribed for numerous health conditions, including baby teething syrups.²⁶

During World War II, the United States was concerned about the supply of opium used to make morphine because Japanese forces occupied opium poppy sources in Asia. Despite earlier policy to stem the illegal narcotics trade, the United States entered into an agreement with Mexico to reopen Sinaloa to poppy cultivation.²⁷ During this wartime period of officially sanctioned opium trade, many Sinaloans prospered.²⁸

The end of the war brought the end of the U.S. need for Mexican opium for morphine and the United States once again pressured the Mexican government to begin efforts to curb production and export of

²¹ P.G. Kritikos & S.P. Papadaki, *The History of the Poppy and of Opium and Their Expansion in Antiquity in the Eastern Mediterranean Area*, UNODC, BULL. ON NARCOTICS NO. 3, January 1, 1967, at 18

The first written record of the poppy is found in Hesiod (eighth century B.C.), who states that in the vicinity of Corinth there was a city named Mekonê (Poppy-town): 'For when the gods and mortal men were divided at Mekonê, even then Prometheus was forward to cut up a great ox and set portions before them, trying to beguile the mind of Zeus.' According to commentators on Hesiod, this city received its name from the extensive cultivation of the poppy in the area.

(First published in the *Journal of the Archaeological Society of Athens*, translated from the original Greek by George Michalopoulos).

²² GRAYSON, *supra* note 3 at 19.

²³ *Id.*

²⁴ *Id.* at 22.

²⁵ *Id.* at 23.

²⁶ STEVEN R. BELENKO DRUGS AND DRUG POLICY IN AMERICA 1–2 (2000).

²⁷ GRAYSON, *supra* note 3, at 24.

²⁸ *Id.*

opium.²⁹ Reversing policy was not easy. Sinaloans who enjoyed the prosperity of the war-time poppy production established smuggling networks to feed the addiction of thousands of addicted U.S. servicemembers returning from duty overseas.³⁰ In 1947, the Mexican government created the Federal Security Directorate to combat drug trafficking and assist American counter-narcotic policy.³¹

The long history of narcotics trade between the United States and Mexico is the foundation for the current drug war. However, to understand Mexico's cartels, it is instructive to look back at the cartel drug war in Colombia. Prior to their rise, the Mexican cartels were mostly conduits for the more powerful Colombian cartels, the Medellín and Cali, both named after their home cities in Colombia.³²

The first cartel to emerge was the Medellín. Headed by Pablo Escobar, it was an established and powerful organization.³³ Much like in Mexico today, they protected their enterprise with extreme violence, to include assassination of public officials.³⁴ In 1985, Colombia had the highest national murder rate in the world.³⁵ Fearing the Colombian government would relent to pressure by the United States to extradite drug traffickers, the Medellín used increasingly violent measures to force the government to pass legislation to prevent extradition.³⁶ The 1991 Colombian constitutional provision prohibiting extradition of Colombians was seen as a victory for the Medellín.³⁷ Knowing he could not be extradited, Pablo Escobar surrendered to Colombian authorities and ran his operation from inside prison.³⁸ After escaping prison in July 1992 with the assistance of prison guards,³⁹ Escobar was killed in a gun

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 25. See also Jorge Castaneda, *What's Spanish for Quagmire?*, FOREIGN POL'Y, Jan.-Feb. 2010, http://www.foreignpolicy.com/articles/2010/01/04/whats_spanish_for_quagmire (stating that the Federal Security Directorate itself had to be disbanded because it had been taken over by the drug cartels).

³² DRUG ENFORCEMENT AGENCY, DEA HISTORY BOOK pt. 1, at 62 (2003) [hereinafter DEA Part I] http://www.justice.gov/dea/pubs/history/history_part1.pdf.

³³ *Id.* at 44.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 77.

³⁷ *Id.*

³⁸ *Id.* at 78.

³⁹ *Id.*

battle with the Colombian National Police at his residence in Medellín.⁴⁰ Pablo Escobar's death, along with the surrender and arrest of other cartel leaders, marked the decline of the Medellín cartel as a major trafficking organization and security threat to the Colombian government.⁴¹

Concurrently, the Cali cartel, led by Gilberto Rodriguez-Orejuela and Jose Santacruz-Londono, rose quietly.⁴² The Cali organization was run like a tightly controlled multinational corporation generating massive profits. In 1992, the Drug Enforcement Agency (DEA) began its "Kingpin Strategy" which is credited with bringing down the Cali cartel.⁴³ The new strategy used the Cali cartel's tight control against them by targeting their finances, communications, transportation, and leadership structures.⁴⁴ With DEA's assistance on the investigation the Colombian National Police arrested Rodriguez-Orejuela and Santacruz-Londono in the summer of 1995. Other prominent Cali member arrests that summer marked the decline of the cartel.

During this period, Mexican drug traffickers assisted the Colombian cartels with the transportation of cocaine by deliberately bypassing Caribbean routes previously compromised by U.S. interdiction efforts.⁴⁵ Mexican drug traffickers transported cocaine from Colombia to Mexico, and the planes returned to Colombia laden with cash.⁴⁶ Initially, the

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 77. See also U.S. GOV'T ACCT. OFF., GAO/GGD 99-1081, DRUG CONTROL: DEA'S STRATEGIES AND OPERATIONS IN THE 1990S, at 48 (1990) (explaining how the DEA took down the Medellín and Cali cartels).

Developed in 1992, the Kingpin Strategy targeted the major Colombian cocaine . . . trafficking organizations. According to the DEA, the heads of the . . . organizations tightly controlled all aspects of their operations and telephoned subordinates directly to give directions. The DEA concluded that this was a weakness in the operations of these organizations. The DEA decided to exploit this weakness by monitoring their communications and analyzing telephone numbers called to identify the kingpins and their key subordinates for U.S. and/or foreign investigation, arrest, and prosecution and seizure of their domestic assets.

Id.

⁴⁴ *Id.* at 62.

⁴⁵ DRUG ENFORCEMENT AGENCY, DEA HISTORY BOOK pt. II, at 20 (2003) [hereinafter DEA pt. II]. See http://www.justice.gov/dea/pubs/history/history_part2.pdf.

⁴⁶ *Id.*

Colombian cartels paid the Mexican gangs in cash for the transport services, but this later evolved into payment with cocaine.⁴⁷ The Mexicans received 35 to 50 percent of each cocaine shipment.⁴⁸ Under this arrangement, the Mexican organizations began their ascendancy as the new “Cocaine Cowboys.”⁴⁹ As the Colombian cartels were brought down, the Mexican cartels rose to dominate the U.S. narcotics market.⁵⁰

Due to endemic corruption, the Mexican government remained passive toward the cartels until events in Colombia shifted the front on the American “War on Drugs” to Mexico, and specifically the U.S.-Mexico border transport corridors.

A. Executive Action

*“Do you remember the program ‘24,’ the TV show?
Well, I want all the toys, all that. All the instruments needed
to be superior to the criminals.”⁵¹*

In the late 1980s, President Carlos Salinas engaged the Mexican Army to stop the rising cartels, but his effort was weakened by his own officers colluding with the cartels.⁵² His successor, President Ernesto Zedillo, had a major setback when his senior narcotics officer, General J.J. Gutierrez Rebello, was convicted for accepting payment from the drug cartels.⁵³ When violence increased in 2000, President Vicente Fox

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ The DEA, police, and the media used the phrase “Cocaine Cowboys” when referring to the drug dealers who waged a war on the streets of Miami in the 1980s. America’s Most Wanted, <http://www.amw.com/fugitives/brief.cfm?id=61019> (last visited Apr. 9, 2012).

⁵⁰ DEA pt. I, *supra* note 31, at 100. See *Mexican Drug Gangs*, *supra* note 12.

⁵¹ CBS News, *An Exclusive Look Inside Mexico’s Drug War*, www.cbsnews.com (Nov. 12, 2010) (quoting Mexican President Felipe Calderon). See generally *24 (TV Series)*, Fox Network broadcast, [http://en.wikipedia.org/wiki/24_\(TV_series\)](http://en.wikipedia.org/wiki/24_(TV_series)) (last visited Apr. 10, 2012) (President Calderon is referring to the high-tech command center of the fictional Counter Terrorism Unit which provides, “telemetry via satellite footage, decrypting intelligence, hacking enemy computer systems, searching for leads amongst the city’s background chatter of cell-phone and e-mail traffic, looking up files on the season’s antagonists, helping with navigation or tracking, and generally trying to stay up-to-date on what has, is, or might be happening.”).

⁵² BRIAN R. HAMNETT, *A CONCISE HISTORY OF MEXICO* 300 (2d ed. 2006).

⁵³ *Id.*; see also Tim Golden, *U.S. Officials Say Mexican Military Aids Drug Traffic*, N.Y. TIMES, Mar. 26, 1998, <http://www.nytimes.com/1998/03/26/world/us-officials-say-mexican-military-aids-drug-traffic.html> (“Until his arrest, General Gutierrez Rebollo was

sent small numbers of troops to Nuevo Laredo on the U.S.–Mexican border to fight the cartels.⁵⁴ These forces met with little success. President Fox believed his more democratic regime did not need to spend large amounts of money on internal security; this lack of focus may have led to “lost years” in the war against the cartels.⁵⁵

Since 2006, President Felipe Calderon has taken a more active policy against the cartels. Calderon has deployed 45,000 troops and 5,000 federal police to 18 Mexican states in an aggressive offensive against the cartels.⁵⁶ President Calderon has demonstrated a total commitment to collaborating in joint U.S. counterdrug measures.⁵⁷ President Calderon has used the military and federal police to arrest traffickers, establish checkpoints, and eradicate marijuana and poppy fields.⁵⁸ In February 2009, he surged troop strength in Juarez where cartel violence killed 1,653 people in 2008, and ordered the military to take over all local law enforcement and prison responsibilities.⁵⁹ These operations militarizing law enforcement have garnered criticism from Mexican society and human rights organizations, and have done little to curb the violence.⁶⁰ However, due to rampant corruption throughout state and local law enforcement, coupled with the cartels’ military strength, only the Mexican military has the command and control and weapons to counter cartel combat capabilities.

one of the Mexican military's most prominent and respected commanders. . . . After he was [selected] by President Zedillo to head the National Institute for the Combat of Drugs, he was described by General McCaffrey as a soldier ‘of absolute, unquestioned integrity’ . . . two officials said the intelligence reports had turned up nothing to refute a chilling account they heard from an informant even before General Gutierrez Rebollo's arrest: that the officers were negotiating for a bribe of \$60 million or more, in return for the protection of Mr. Carrillo Fuentes's drug operations.”)

⁵⁴ STRATFOR Global Intelligence, *The Vital Role of ‘Gatekeepers’ in the Smuggling Business*, Dec. 23, 2006, reprinted in MEXICO IN CRISIS: LOST BORDERS AND THE STRUGGLE FOR REGIONAL STATUS 49 (Michael McCullar ed., 2009) [hereinafter STRATFOR].

⁵⁵ JUNE S. BEITTEL, CONG. RESEARCH SERV., R40582, MEXICO’S DRUG RELATED VIOLENCE 2 (May. 27, 2009).

⁵⁶ *Id.* at 3.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 13; see also *Killings in Juarez Increase Fivefold in 2008*, BANDARASNEWS.COM, Jan. 2009, <http://bandarasnews.com/0901/nr-juarezkillings.htm> (last visited Apr. 10, 2012).

⁶⁰ *Id.* at 14 (“Human rights watch alleges serious human rights violations by the military. They report 17 cases of disappearances, killings, torture, rapes, and arbitrary detention. In 2008 Mexico’s National Human Rights Commission reported 1,200 complaints of human rights abuses at the hands of security forces.”).

B. Regional Warlords

The Mexican cartel areas of control represented in Figure 1 are fluid throughout the country due to shifting alliances and turf battles. This section provides details of the major cartels—the primary enemy in this multi-front war facing the Mexican Government.



Mexican Cartel Areas of Influence⁶¹

Figure 1.⁶²

1. Sinaloa Cartel

Named for their home state of Sinaloa, most of Mexico, primarily along the west and southern areas, is within the sphere of the Sinaloa cartel's influence.⁶³ Previously a federation which included the Juarez Cartel and the Beltran Leyva Organization, it dissolved in 2008. The Sinaloa cartel remains strong and is headed by Joaquin "El Chapo" Guzman.⁶⁴ Guzman is a folk legend in Mexico and *narcocorridos* are

⁶¹ Legend: 1. Tijuana Cartel; 2. Sinaloa Cartel, Zetas, Beltran Leyva Organization; 3. La Familia Michoacana; 4. Sinaloa Cartel; 5. Zetas; 6. Zetas, Gulf and Sinaloa Cartels; 7. Gulf Cartel, Zetas, Beltran Leyva Organization; 8. Juarez Cartel; 9. All Cartels.

⁶² BEITTEL, *supra* note 55, at 7 (author's re-creation of a graphic). The map of Mexico contained in this figure can be found online at the U.S. Government website. CIA WORLD FACTBOOK (updated Jan. 12, 2011), https://www.cia.gov/library/publications/the-world-factbook/maps/maptemplate_mx.html (last visited Apr. 10, 2012).

⁶³ BEITTEL, *supra* note 55, at 7 (referring to legend and map in Figure 1, Mexican Cartel Areas of Influence, the Sinaloa cartel can be found in Sinaloa, Jalisco, Colima, Michoacan, Durango, Western Sonora, Oaxaca, Chiapas, Yucatan Peninsula, and the Federal District).

⁶⁴ *Id.* at 4.

sung about him.⁶⁵ He has been equated to a Mexican Osama Bin Laden. Despite being the most wanted man in Mexico, with a \$5 million bounty on his head, he is protected by the rough terrain of the Sierra Madre mountains and the strong loyalty of his people. In 2009, Forbes magazine listed him as one of the wealthiest people in the world,⁶⁶ and Time magazine named him one of the most influential people of 2009,⁶⁷ incensing Mexican government sensitivities about the glorification of a drug lord.⁶⁸ Guzman is respected by the community for creating poppy cultivation jobs, constructing hospitals, and schools, paving roads, and repairing churches.⁶⁹ Led by Guzman, the Sinaloa cartel remains the biggest threat to the Mexican government.

2. Juarez Cartel

The Juarez cartel is named for its “capital” Ciudad Juarez located in the Mexican state of Chihuahua. The cartel is also known as the Vicente Carrillo Fuentes Organization, and operates across the border from El Paso, Texas, in Juarez. The cartel controls trafficking in the state of Durango, and has a presence in the Federal District.⁷⁰ Juarez is a prime battleground for cartels seeking a lucrative transport corridor to the United States, and has suffered the most cartel violence over control of the *plaza*, a battle being fought between the Juarez cartel and with their former allies, the Sinaloa cartel.⁷¹ The Juarez cartel relies on two enforcement arms, La Linea, former Chihuahua police officers in

⁶⁵ *The Current: The Last Narco* (Canadian Broadcast Corporation Radio broadcast, Oct. 25, 2010) (downloaded using iTunes) (Interview with Malcolm Beith, author, in Los Angeles, Canada (Oct. 25, 2010)) (Malcolm Beith is the author of *The Last Narco: Inside the Hunt for El Chapo, the World's Most Wanted Drug Lord* (A *narcocorrido* is a song that mythologizes a drug lord.)).

⁶⁶ Jesse Bogan, *Cocaine King*, FORBES (Mar. 30, 2009) (“In 2008 Mexican and Colombian traffickers laundered between \$18 billion and \$39 billion in proceeds from wholesale shipments to the U.S., according to the U.S. government. Guzmán and his operation likely grossed 20% of that—enough for him to have pocketed \$1 billion over his career and earn a spot on the billionaires’ list for the first time.”).

⁶⁷ Tim Padgett, *Joaquín Guzmán*, TIME, Apr. 30, 2009, http://www.time.com/time/specials/packages/article/0,28804,1894410_1893847_1894205,00.html.

⁶⁸ GRAYSON, *supra* note 3, at 63.

⁶⁹ *Id.* at 62.

⁷⁰ BEITTEL, *supra* note 55, at 7.

⁷¹ STRATFOR, *supra* note 54, at 167 (citing *Mexico in Crisis (Addendum): 2008 Cartel Report*) (Dec. 11, 2008). See also BEITTEL, *supra* note 55, at 6 (“Plazas” are “lucrative drug smuggling routes.”).

Mexico; and the street gang Barrio Azteca, operating in Texas.⁷² The original leader, Armando Carrillo Fuentes, died in 1997 while undergoing plastic surgery to alter his appearance.⁷³ The residents of Guamuchilito held an elaborate funeral for Fuentes, as he was respected as a local “Robin Hood” figure who was known to donate generously to the Catholic Church “in what are known in Mexico as narco-alms or *narcolimosnas*.”⁷⁴ The Juarez cartel is now headed by its namesake, the flamboyant Vincente “The Viceroy” Carrillo Fuentes, the brother of the late Amando Fuentes.⁷⁵

3. Tijuana Cartel

This cartel operates in the cities of Tijuana, Ensenada, and Mexicali and in western areas of the Mexican state of Sonora.⁷⁶ Also called the Arellano Felix Organization, the last member at large, Eduardo “El Doctor” Arellano Felix, was arrested in October 2008.⁷⁷ The leadership vacuum after Felix’s arrest split the organization into factions fighting for control of the Tijuana plaza in deadly battles that left more than 100 people dead in 2008.⁷⁸ It is believed one of the Tijuana cartel factions receives support from the Sinaloa cartel, providing the Sinaloa with a lucrative plaza in Tijuana to conduct trafficking into the United States.⁷⁹ The government’s hope that the cartel’s fracture would lead “to smaller and more manageable [cartels],” had been described as just leading “to smaller and violent [ones].”⁸⁰

⁷² STRATFOR, *supra* note 54, at 167 (citing *Mexico in Crisis (Addendum): 2008 Cartel Report*) (Dec. 11, 2008)).

⁷³ GRAYSON, *supra* note 3, at 76.

⁷⁴ *Id.* at 77.

⁷⁵ *Id.* at 78 (“The flamboyant Viceroy, wanted for multiple crimes in southeast Texas . . . continued to indulge his taste for strong rum, luxurious automobiles, gaudy mansions, platoons of bodyguards, and sexy women.”).

⁷⁶ BEITTEL, *supra* note 55, at 7.

⁷⁷ STRATFOR, *supra* note 54, at 169 (citing *Mexico in Crisis (Addendum): 2008 Cartel Report*) (Dec. 11, 2008)).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ GRAYSON, *supra* note 3, at 85 (quoting David Shirk, Dir. of the University of San Diego’s Trans-Border Inst.).

4. Los Zetas

The Zetas operate in northeastern Mexico, the Gulf Coast, Yucatan Peninsula, and along the southern Mexican border, but their contract services take them everywhere.⁸¹ The most lethal of the cartels, Los Zetas is a group of former members of the Mexican military's Special Air Mobile Force Group (*Grupos Aeromoviles de Fuerzas Especiales* or GAFE).⁸² Originally linked to the Gulf Cartel,⁸³ Los Zetas "contract" out to other organizations but have allied themselves with the Beltran Leyva Organization.⁸⁴ They control much of southern Mexico taken from the Gulf Cartel and have come to operate as their own independent cartel.⁸⁵ They also engage in kidnapping, extortion, and human smuggling operations.⁸⁶ The Zetas maintain their military readiness standards by training and inducing government troops to defect.⁸⁷ North of the border, the Zetas have been recruiting Latino gangs in Laredo, Texas, to expand their activities in the United States.⁸⁸ In 2010, the Zetas were responsible for an attack on an American couple, Tiffany and David Hartley, who were jet skiing on Falcon Lake in Texas.⁸⁹ Rolando Flores Villegas, a Mexican police official investigating the case, was later beheaded by the cartel.⁹⁰ The Zetas have further international reach—they are also active in Guatemala and threaten instability to the government of that nation.⁹¹

⁸¹ BEITTEL, *supra* note 55, at 7.

⁸² STRATFOR, *supra* note 54, at 160 (citing *Mexico in Crisis (Addendum): 2008 Cartel Report*) (Dec. 11, 2008)).

⁸³ *See infra* note 96.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ GRAYSON, *supra* note 3, at 184 ("[Los Zetas] have set up at least six camps . . . to train young recruits aged 15 to 18 years old, as well as ex-federal, state, and local police officers. Los Zetas allegedly conduct training at locations . . . across the border from Brownsville [TX]. . . . In March 2009 Guatemalan police discovered a Zeta instructional compound 155 miles north of Guatemala City."). *See also* STRATFOR, *supra* note 54, at 95 ("There are also reports of Israeli mercenaries visiting these camps to provide tactical training.") (citing *The Fallout from Phoenix*, STRATFOR GLOBAL INTELLIGENCE, July 2, 2008).

⁸⁸ GRAYSON, *supra* note 3, at 187.

⁸⁹ *Border Wars*, *supra* note 1 (David was killed in the attack).

⁹⁰ Lynn Brezosky, *Policeman Possibly Linked to Falcon Lake Case Beheaded*, SAN ANTONIO EXPRESS NEWS, Oct. 12, 2010, <http://www.chron.com/disp/story.mpl/metro-politan/7243583.html>. *See also supra* note 1.

⁹¹ *See infra* Part III.C.

5. Other Cartels

The Beltran Leyva Organization (BTO), La Familia Michoacana, and Gulf Cartel were once three major cartels that are now in decline. The BTO was once one of the most powerful trafficking groups in Mexico until its leader, Arturo Beltran Leyva, was killed in a battle against the Mexican marines on December 11, 2009.⁹² In that same year, the organization is credited that same year with the high-profile assassination of Edgar Millan Gomez, the acting federal police director.⁹³

In 2006, La Familia Michoacana was described by the DEA as an “emerging cartel”⁹⁴ when they burst into a nightclub in Uruapan, Michoacan, on September 6, 2006, and lobbed five human heads onto the dance floor in the name of “divine justice.”⁹⁵ La Familia is a cartel which resembles a religious cult-like organization through their spiritual leader Nazario Moreno González, also known as “El Mas Loco” or “The Craziest One,” La Familia was dealt a severe blow when “El Mas Loco” was killed on December 9, 2010, fighting Mexican troops.⁹⁶

As its name implies, the Gulf Cartel is located in northeastern Mexico, along the Gulf Coast and the Yucatan peninsula.⁹⁷ Until 2007, the Gulf Cartel was viewed as the most powerful criminal organization in Mexico, but has been consistently targeted by the Mexican government.

⁹² Tracy Wilkinson, *Mexico Drug Hero's Family Slaughtered*, L.A. TIMES, Dec. 23, 2009, <http://articles.latimes.com/print/2009/dec/23/world/la-fg-mexico-revenge-attack23-2009dec23> (It appears that the BTO is not yet out of the fight yet. The same night of a state funeral for a marine also killed in the December 11th battle, gunmen believed to be Los Zetas, allied to the BTO, stormed the house of his grieving family and opened fire, killing the marine's mother, sister, brother, and an aunt).

⁹³ STRATFOR, *supra* note 54, at 162 (citing *Mexico in Crisis (Addendum): 2008 Cartel Report*) (Dec. 11, 2008)).

⁹⁴ BEITTEL, *supra* note 55, at 5.

⁹⁵ Steven Fainaru & William Booth, *A Mexican Cartel's Swift and Grisly Climb*, WASH. POST, Jun. 13, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/12/AR2009061203829.html> (stating that the La Familia leave macabre public displays of headless bodies, and hacked-off limbs, “La Familia members have killed rivals by driving ice picks through their skulls and boiling them to death”).

⁹⁶ *La Familia Drug Gang: Mexico Says Cartel 'in Retreat'*, BBC NEWS, Jan. 26, 2011, <http://www.bbc.co.uk/news/world-latin-america-12284210> (The Cartel is in retreat after their leader was killed on December 9, 2010.) (“Banners purportedly signed by La Familia Michoacana were hung from bridges on 25 January, announcing that the gang was dissolving itself.” A new organization called the South Pacific Cartel may be supplanting La Familia.).

⁹⁷ BEITTEL, *supra* note 55, at 7.

Their leader, Osiel Cardenas Guillen, was arrested in 2003 and extradited to the United States in 2007. It is believed his brother Antonio Ezequiel “Tony Tormenta” Cardenas Guillen is now head of the cartel. The organization was further weakened by the loss of its paramilitary arm, Los Zetas, the source of most of their power in the region.⁹⁸

C. International Reach

The worldwide scope of narcotics cultivation and traffic is a massive front for counter-narcotics efforts. From coca leaf in the Andes and poppy for heroin in Central and South East Asia, the draw of cash for the poor farmer is great. Large-scale cocaine trafficking to Europe has been a problem in West Africa since 2004.⁹⁹ The small, impoverished nation of Guinea-Bissau is reputed to be Africa’s first narco-state.¹⁰⁰ The weak infrastructure and instability of West African governments make them even more susceptible to cartel influence.¹⁰¹ In the Pacific, Australian authorities recently disrupted the operations of the Sinaloa cartel.¹⁰² When the Australians made their arrests in June 2010, they seized 240 kilograms of cocaine worth \$83 million.¹⁰³ Even in Afghanistan, after 10 years of conflict, with coalition troops present, only small eradication efforts have been made.¹⁰⁴ The United States, with Afghan government support, has engaged in multiple eradication programs with limited success as they have been hampered by some of the same socio-political

⁹⁸ STRATFOR, *supra* note 54, at 158 (citing *Mexico in Crisis (Addendum): 2008 Cartel Report*) (Dec. 11, 2008)).

⁹⁹ U.N. OFFICE OF DRUGS & CRIME, WORLD DRUG REPORT 27 (2010).

¹⁰⁰ Arthur Brice, *Latin American Drug Cartels Find Home in West Africa*, CNN.COM, Sep. 21, 2009, <http://edition.cnn.com/2009/WORLD/africa/09/21/africa.drug.cartels/>.

¹⁰¹ *Id.*

¹⁰² Dylan Welch, *Killer Cocaine Cartel Has Sydney in Sights*, SYDNEY MORNING HERALD, Jan. 2, 2011, <http://www.smh.com.au/nsw/killer-cocaine-cartel-has-sydney-in-sights-20110101-19ciw.html>.

¹⁰³ *Id.*

¹⁰⁴ *See generally* U.S. DEP’T OF STATE, INT’L NARCOTICS CONTROL STRATEGY REPORT 94-102 (2010) [hereinafter INCSR] (claiming decrease in opium cultivation and Afghan government counternarcotics activities). *Contra* Joel Brinkley, *Afghanistan Turns into a Narco-State*, KOREA HERALD, Jan. 27, 2011, <http://www.koreaherald.com/opinion/Detail.jsp?newsMLId=20110127000811> (Brinkley claims Afghanistan is becoming a narco-state, as President Karzai repeatedly pardons traffickers who return to business. The U.N. “Afghanistan Opium Survey” states that the total area of poppy cultivation has increased ninety percent in northeastern Afghanistan, notably, not traditional poppy growing regions.).

issues seen in Mexico.¹⁰⁵ Closer to Mexico, the small nation of Guatemala is feeling the pressure of Mexican cartel influence, where Los Zetas have made credible threats to assassinate Guatemalan President Alvaro Colom and were involved in the massacre of 27 Guatemalan farm workers.¹⁰⁶ Los Zetas are believed to have established an offshoot, the New Zetas, recruited from Guatemala's notorious Special Forces unit, the Kaibiles.¹⁰⁷ Members claiming to be Los Zetas have threatened a war in the northern Guatemalan province of Alta Verapaz where the government has declared a "state of siege."¹⁰⁸ The province is a corridor

¹⁰⁵ INCSR, *supra* note 104, at 95. See also Dione Nissenbaum, *Afghan Opium Output Surges*, WALL ST. J., Oct. 12, 2011, <http://online.wsj.com/article/SB10001424052970204450804576625003263984480.html>

Opium production surged 61% this year in Afghanistan, as rising demand and worsening security helped the reversal of three years of progress in antidrug efforts, the United Nations reported. . . . The country's drug industry isn't the exclusive realm of the insurgency. A network of Afghan power brokers, warlords, military commanders and politicians also conspire to keep the profitable business alive, according to analysts Military commanders argue that . . . eradication efforts punish ordinary farmers, many of whom have borrowed money to plant opium. Destroying the crops, they say, gives these farmers and their families no choice but to join the insurgency.

Id.

¹⁰⁶ Jeremy McDermott, *Mexican Cartel Threatens Guatemala President*, TELEGRAPH, Mar. 2, 2009, <http://www.telegraph.co.uk/news/worldnews/centralamericaandthecaribbean/guatemala/4928428/Mexican-cartel-threatens-Guatemala-President.html>; see also *Suspect in Slaying of 27 Workers Arrested in Guatemala*, CNN.COM, May 25, 2011, <http://edition.cnn.com/2011/WORLD/americas/05/24/guatemala.massacre> ("The killing spree was one of the nation's worst since the end of the civil war in 1996. The killers decapitated several victims and left their body parts strewn across the terrain . . . the group that attacked the farm consisted of more than 50 armed men, dressed in fatigues, who had Mexican accents.").

¹⁰⁷ See *infra* notes 108, at 117. See also GRAYSON, *supra* note 3, at 185 ("Los Zetas have recruited into their ranks ex-troops from Guatemala known as Kaibiles. Reviled as 'killing machines,' these tough-as-nails jungle warriors and counter-insurgency specialists train in an isolated camp . . . 260 miles north of Guatemala City. . . . One reporter compared the Kaibiles to a combination of 'U.S. Rangers, British Gurkhas, and Peruvian Commandos.'").

¹⁰⁸ Herbert Hernandez, *Outgunned Guatemala Army Extends Battle with Drug Gangs*, REUTERS, Jan. 18, 2011, <http://www.reuters.com/article/2011/01/19/us-guatemala-drugs-idUSTRE70H5KT20110119> ("Organized crime is not just infiltrating us, it pains me to say it but drug traffickers have us cornered," [President] Colom told Congress last week. "Just the weapons seized in Alta Verapaz are more than those of some army brigades.").

for smuggling from Honduras to Mexico.¹⁰⁹ With the pressure of U.S. and Mexican interdiction efforts on the border, cartels are now considering reopening the Caribbean routes, including in earthquake-devastated Haiti.¹¹⁰

IV. Civil War, “Mere Act Of Banditry,” Or Both?

The Mexican cartels are an insurgency embroiled in a non-international armed conflict with the Mexican government.¹¹¹ As presented above, the situation in Mexico, particularly in the border areas, appears dire. The cartels have the ability to shut down local government at will,¹¹² and even close off ingress and egress through their “narco-blockades.”¹¹³ Ciudad Juarez, situated across the Rio Grande from El Paso, Texas, is a city under siege. Seven thousand Mexican troops are fighting for control and have assumed the role of law enforcement.¹¹⁴ The fighting is not without its costs. As military operations mount, the numbers of civilians caught in the crossfires grow, as do the allegations of human rights abuses by Mexican forces.¹¹⁵

¹⁰⁹ *Drug Gang ‘Threatens Guatemala War,’* ALJAZEERA.NET, Dec. 29, 2010, <http://english.aljazeera.net/news/americas/2010/12/2010122941020654735.html>.

¹¹⁰ *The Last Narco*, *supra* note 64.

¹¹¹ The terms “internal armed conflict” and “non-international armed conflict” are used interchangeably in this paper.

¹¹² *Ciudad Mier Evacuates After Zetas Threaten to Kill Residents*, MONITOR, Nov. 9, 2010, <http://www.themonitor.com/articles/mier-44352-residents-tamps.html> (A former Ciudad Mier resident notes, “The authorities do not go there. There are no soldiers there. There is nobody. The mayor is not there anymore, there is no police, no traffic authority—nobody. It’s a ghost town. All the businesses are closed. . . . They have strangled my town.”). *See generally* von Rohr, *supra* note 8.

¹¹³ *Drug Gang Blockades Mexican City*, ALJAZEERA.NET, Dec. 10, 2010, <http://english.aljazeera.net/news/americas/2010/12/2010121021336922450.html> (“Armed men have blockaded a western Mexican city, torching stolen cars and busses. . . . The burnt out vehicles were used to block the roads into the city Such blockades have become a common tactic used by the cartels in Mexico’s drug war.”).

¹¹⁴ *Mexico Sending More Emergency Troops to Ciudad Juarez*, NACIONALPRESS, Jan. 27, 2011, <http://www.nacionalpress.com/mexico-sending-more-emergency-troops-to-ciudad-juarez/> (5000 to reinforce 2000 troops already there.).

¹¹⁵ Jose Miguel Vivanco, *Time to Speak Up on Military Abuse in Mexico*, FOREIGN POL’Y, May 17, 2010, http://www.foreignpolicy.com/articles/2010/05/17/time_to_speak_up_on_military_abuse_in_mexico. *See also infra* Part Part IV.E.

As described above, there are diverse types of cartels of varying degrees of dangerousness,¹¹⁶ but all cartels are feasible threats to the Mexican state, Mexican sovereignty on the U.S. border regions, and possibly a threat to Mexican sovereignty on the Guatemalan border.¹¹⁷ For the purpose of the following analysis, the various Mexican cartels will be referred to as a singular group “the Cartel,” with individual examples highlighted where necessary. As the Mexican drug war moves on into its sixth year, consideration of the Mexican government’s guiding principles in fighting the drug war will be the focus of the next section.

A. Toward Governing Conflict

Prior to World War I, armies fought their wars in mass formations in contests of size, speed, and strength of will. Even in those times, rules were necessary to conduct wars to alleviate suffering and prevent participants from devolving into barbarism.¹¹⁸ As technology turned modern armies into efficient killing machines, as evidenced by the slaughters of World War II, nations came together in 1949 to devise rules to prevent the unnecessary suffering of civilians. These rules we commonly refer to as “the Geneva Conventions.”¹¹⁹ Within the Geneva Conventions, there are two articles common to all four of the conventions. The third article common to all four of the conventions is referred to as “Common Article 3.”¹²⁰ While the entire body of the Geneva Conventions applies in times of war between states, Common Article 3 is specifically drafted to provide minimum protections to conflicts, “not of an international character occurring in the territory of

¹¹⁶ *E.g.*, The Zetas with their military background, or the sophisticated Sinaloa cartel with their money and local support. *See supra* Part III.B. (discussing details of the major cartels).

¹¹⁷ Rory Carroll, *Drug Gangs Seize Parts of Northern Guatemala*, GUARDIAN.CO.UK, Jan. 7, 2011, <http://www.guardian.co.uk/world/2011/jan/07/narco-gangs-guatemala> (“These individuals were not just preparing to confront the security forces, they were preparing to take control of the country,” Guatemala’s president, Alvaro Colom, told reporters. Drug gangs were “invading” central America to move contraband from Colombia to Mexico and the United States, he said.)

¹¹⁸ LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 19 (2002) (“The first real attempt at the codification of the laws of land warfare was drawn up during the American Civil War by Dr. Francis Lieber, in the form of a military manual for the forces in the field which became known as the ‘Lieber code.’”) (The codification of rules for conflict continued with the Geneva Convention of 1864, and the Hague Convention.).

¹¹⁹ Geneva Conventions, *supra* note 16.

¹²⁰ *Id.* (providing a full text of Common Article 3).

one of the High Contracting Parties.” Common Article 3 has been referred to as a “convention in miniature,”¹²¹ applicable to these non-international, or internal, armed conflicts.

In 1977, two protocols to the Geneva Convention were created. These protocols, referred to as Additional Protocols I and II, were meant to supplement, rather than replace, the four 1949 Geneva Conventions. Additional Protocol I concerns the protection of victims of international armed conflict, whereas Additional Protocol II provides supplementary protection for those suffering during non-international armed conflicts.¹²² State sovereignty is a paramount factor in international law and the rules of armed conflict are no different.¹²³ The vast majority of the laws of war focus on conduct between state actors participating in the armed conflict. The actions of the United Nations, established to maintain global peace and security, are also bound by the respect for state sovereignty.¹²⁴ For the most part, states are able to conduct their internal affairs with little scrutiny.¹²⁵ However, since the 1949 convention, most armed conflicts in

¹²¹ COMMENTARY ON THE GENEVA CONVENTION I, at 49 (Jean S. Pictet, ed. 1952) [hereinafter COMMENTARY ON THE GENEVA CONVENTION I]; see also COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, general introduction, at 1321 (Yves Sandoz, Christophe Swinarski, Bruno Zimmerman eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOL II].

¹²² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 81, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, art. 5, Dec. 12, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II] (Both Protocols can be found in their entirety online at: <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView>). See also COMMENTARY ON THE ADDITIONAL PROTOCOL II, *supra* note 121, at 1350.

¹²³ See generally RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201(1987) (A State defined as “a state is an entity that has a defined territory and permanent population, under the control of its own government, and that engages in, or had the capacity to engage in, formal relations with other such entities.”). See also INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR & SCH., U.S. ARMY, JA 422, LAW OF WAR DESKBOOK 2 (Jan. 2010) (“Inherent to sovereignty is the notion that a State should be free from outside interference; international law, however, seeks to regulate State conduct. States ‘trade’ aspects of sovereignty in order to reap the benefits of the international legal system.”).

¹²⁴ UN Charter art. 2, sec. 1 (“The Organization is based on the principle of the sovereign equality of all its Members.”).

¹²⁵ See generally Zhang Weiwei, *Western Concept of Human Rights Too Rigid*, EMBASSY OF THE PEOPLE’S REPUBLIC OF CHINA IN THE UNITED STATES OF AMERICA (Oct. 30, 2010), <http://us.china-embassy.org/eng/gdxw/t765321.htm> (presenting the Chinese view of Western human rights diplomacy as interference in sovereignty and claiming that the Western hegemony in human rights is in decline).

the modern age have been internal in nature. These armed conflicts may at times involve international state actors,¹²⁶ but predominantly the armed conflicts are often referred to as rebellions and civil wars that are governed by Common Article 3.

The *Tadić* case of 1995 is an important evolutionary step in the development of international law concerning international and non-international armed conflict.¹²⁷ Dusko Tadić was a Bosnian Serb charged with violating international humanitarian law, including “grave breaches” under the fourth Geneva Convention of 1949.¹²⁸ In *Prosecutor v. Tadić*, one of the defense issues raised before the International Criminal Tribunal for the former Yugoslavia (ICTY) concerned lack of jurisdiction of the tribunal over internal armed conflicts.¹²⁹ The Appeals Chamber ruling was a pivotal moment in the recognition and application of International Humanitarian Law in all facets of armed conflict, stating:

Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals,

¹²⁶ E.g., During the Vietnam War, the United States provided support to the South Vietnamese government; similarly the Soviet Union provided support to the communist regime in Afghanistan. See also *Background Note: Vietnam, American Assistance to the South* (Jan. 5, 2012), <http://www.state.gov/r/pa/ei/bgn/4130.htm>; Hans Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 AM. UNIV. L. REV. 145, 148 (1983), <http://www.wcl.american.edu/journal/lawrev/33/gasser.pdf>.

¹²⁷ *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

¹²⁸ Geneva Convention IV, *supra* note 16, art. 147 states that

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Id.

¹²⁹ See *Tadić*, Case No. IT-94-1-I (Part IV. Lack of Subject Matter Jurisdiction).

churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted “only” within the territory of a sovereign State?¹³⁰

The ICTY Appeals Chamber went further in its Jurisdiction Decision in the *Tadić* case, summarizing four reasons supporting the concept of merging international humanitarian law to cover internal armed conflicts, notably the frequency and cruelty of civil wars, scale and globalization invariably involve a third state, and the advent of international humanitarian law since the Universal Declaration of Human Rights in 1949.¹³¹

¹³⁰ *Id.* ¶ 97.

¹³¹ *Id.* See generally *id.* In pertinent part: Since the 1930s . . . the . . . distinction has gradually become more and more blurred, and international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflict. There exist various reasons for this development:

First, civil wars have become more frequent, not only because technological progress has made it easier for groups of individuals to have access to weaponry but also on account of increasing tension, whether ideological, inter-ethnic or economic; as a consequence the international community can no longer turn a blind eye to the legal regime of such wars.

Secondly, internal armed conflicts have become more and more cruel and protracted, involving the whole population of the State where they occur: the all-out resort to armed violence has taken on such a magnitude that the difference with international wars has increasingly dwindled [.]

Thirdly, the large-scale nature of civil strife, coupled with the increasing interdependence of States in the world community, has made it more and more difficult for third States to remain aloof: the economic, political and ideological interests of third States have brought about direct or indirect involvement of third States in this category of conflict, thereby requiring that international law take greater account of their legal regime in order to prevent, as much as possible, adverse spill-over effects.

Fourthly, the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-

What is the legal status of the parties in Mexico? The Mexican government is fighting several large and highly armed groups, but these groups do not have an obvious political aim. These cartel groups are internationally recognized as criminal organizations, yet in many respects have the military and economic power in their respective regions characteristic of an insurgent group.¹³²

B. The Cartel Insurgency

*“These drug cartels are showing more and more indices of insurgencies, it’s looking more and more like Colombia looked 20 years ago, when the narcotraffickers controlled certain parts of the country.”*¹³³

The Mexican government was quick to repudiate the remarks above made by Secretary of State Hillary Clinton. Out of sensitivity to Mexico, and so close in time to President Calderon’s visit to the United States,¹³⁴ President Obama relieved the diplomatic furor by issuing his own Spanish language statement. Countering Secretary Clinton’s statement, the President declared that Mexico is a vast, progressive democracy with a growing economy that cannot be compared to Colombia of twenty years ago.¹³⁵ Unfortunately, being a progressive democracy with a growing economy has not saved Mexico from either violence on a scale of brutality exceeding Colombia’s or drug cartel attacks on its

sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned.

Id.

¹³² See generally Håvoll, *infra* note 175, at 11–13.

¹³³ Clinton: Mexico Drug Cartels Like ‘Insurgency,’ FOXNEWS.COM, Sep. 9, 2010, <http://www.foxnews.com/world/2010/09/08/mexican-mayor-killed-marines-arrest-suspects-massacre-migrants/> (quoting Secretary of State Hillary Clinton).

¹³⁴ Mexico Drug War Not Comparable to Colombia: Obama, REUTERS, Sep. 9, 2010, <http://www.reuters.com/article/2010/09/09/us-usa-mexico-obama-idUSTRE6885TH20100909>.

¹³⁵ *Id.*

government institutions.¹³⁶ As in Colombia, the attacks on Mexico's government come from both destabilizing corruptive practices and physical violence.

Secretary Clinton's remarks may not have been diplomatically sensitive, but they were not baseless. The State Department travel warning for Mexico is twice as long as the travel warning for Pakistan, and describes much more specific threats such as kidnappings, assassinations, and killings at unauthorized cartel checkpoints.¹³⁷ Putting the situation into perspective, the same day Secretary Clinton made her remarks, gunmen burst into the office of El Naranjo's mayor, Alexander Lopez Garcia, and shot him to death.¹³⁸ Just over a week before, 72 migrants were massacred 100 miles from Brownsville, Texas, allegedly by members of Los Zetas drug cartel.¹³⁹ The state prosecutor leading the investigation also went missing, and in the same town a car bomb exploded outside a television station.¹⁴⁰

These events, presumably orchestrated by the militarily trained Zetas, make the reality of war south of the border difficult to ignore. For the average American familiar with on-going insurgencies in Iraq and Afghanistan, these events near the Mexican border should be of similar concern as they are so close to home. Car bombs, kidnappings, torture, beheadings, and a take-no-prisoners mentality are the modus operandi of the Taliban and Al Qaeda. Now this similar violence on our southern border is creeping closer. Just across the river from El Paso, Texas, in Ciudad Juarez, as well as other locations in Mexico, some of the violence

¹³⁶ *Id.* Mexico is worse and more brutal. ("When it comes to justice and the social dynamic, we are losing against criminal organizations," says Javier Oliva Posada, a drug expert at the National Autonomous University of Mexico. "It is not just in the number or murders, but the cruelty in each one of them.") Sara Miller Llana, *Mexico Massacre: How the Drug War Is Pushing Cartels into Human Trafficking*, CHRISTIAN SCI. MONITOR, Aug. 30, 2010.

¹³⁷ See U.S. DEP'T STATE TRAVEL WARNING, BUREAU OF CONSULAR AFF., MEXICO, www.state.gov (Sep. 10, 2010); see also U.S. DEP'T STATE TRAVEL WARNING, BUREAU OF CONSULAR AFF., PAKISTAN, www.state.gov (July 22, 2010).

¹³⁸ *Clinton: Mexico Drug Cartels Like 'Insurgency,' supra* note 133; see also *supra* note 136.

¹³⁹ *Id.* (The lone survivor, an Ecuadorian man, describes how the Zetas captured the group by Ciudad Victoria and wanted to recruit them; when they refused, the shootings began. The group was blindfolded and shot one by one, including teenagers and a pregnant woman.).

¹⁴⁰ *Id.*

is directed against U.S. sovereignty itself.¹⁴¹ Even tourist destinations such as Acapulco and Puerto Vallarta, touted as safe from the drug war, are not immune.¹⁴² These events illustrate the ‘indices’ of insurgency to which Secretary Clinton referred.

1. What Is an Insurgency?

Classical international law categorizes armed challenges to the authority of the State into three stages, with each growing more violent in its intensity: rebellions, insurgencies, and belligerencies.¹⁴³ At the lowest level, disaffected sections of society may rebel against the government for a number of grievances.¹⁴⁴ These rebellions are localized and not sufficiently strong to overthrow state power.¹⁴⁵ In other words, a rebellion is considered a small uprising that the state has little difficulty suppressing.¹⁴⁶ A rebellion was seen as a passing challenge to the government and was dealt with swiftly by its internal security forces in modern times, often a local or national police force.¹⁴⁷ In these cases, the conflict maintains a purely domestic flavor. A rebellion does not require international restraints on the conduct of parties, and apprehended rebels are subject to the state’s domestic laws.¹⁴⁸

Elevation to an insurgency is evidenced by an escalation of violence against the parent state government.¹⁴⁹ The insurgency is sufficiently organized to present a significant challenge to the state’s authority and legitimacy.¹⁵⁰ Third-party states may acknowledge the presence of the insurgency to protect their own interests, though foreign recognition of

¹⁴¹ von Rohr, *supra* note 8. See e.g., Nicholas Casey, *U.S. Mexican Consulate Attacked*, WALL ST. J., Apr. 11, 2010, <http://online.wsj.com/article/SB10001424052702304168004575177250573251946.html> (stating that attacks on U.S. Consulates, the first attack in Ciudad Juarez, on March 13, 2010, killed three people, and stating that there were no casualties on the second attack April 9, 2010, in Neuvo Laredo).

¹⁴² The implication is not that tourists are targeted, but that even popular getaways may not be safe. See also *Mexico Violence: Headless Bodies Found in Acapulco*, BBC NEWS, Jan. 8, 2011, <http://www.bbc.co.uk/news/world-latin-america-12143227>.

¹⁴³ MOIR, *supra* note 118, at 4.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

an insurgency does not connote any special status on the insurgent.¹⁵¹ Instead, the foreign state concedes it must enter into a relationship with an insurgency for economic reasons, humanitarian concerns, or both.¹⁵²

The final stage of conflict against the State is recognition of the insurgent movement as a belligerent party.¹⁵³ Recognizing the belligerent party entitles both the state and the insurgent movement to recognition as parties of an international armed conflict.¹⁵⁴ This recognition could be granted by the government or by a third-party state.¹⁵⁵ Recognition does not mean the insurgent movement is a government in its own right. The recognition merely points to a state of war between two competing powers, thereby invoking the customary protections in the conduct of war.¹⁵⁶

2. *How Are the Cartels an Insurgency?*

The cartel threat to Mexican state power is a sum of their parts. The Mexican government is fighting multiple ongoing insurgencies amalgamated as “the cartels.” Having provided the legal concept of insurgency in international law, this section defines how the cartels are an insurgency under U.S counterinsurgency doctrine.

¹⁵¹ *Id.* at 5.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* See also ANTHONY CULLEN, THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW 15 (2010) (citing the *Prizes Cases* of 1862).

Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government. . . . When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence, have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerent, and the contest a war.

E.g., id. at 16 (citing *Williams v. Bruffy*, 96 U.S. 176, at 186 (1877) (“When a rebellion becomes organized, and attains such proportions as to be able to put a formidable military force in the field, it is usual for the established government to concede to it some belligerent rights.”)).

a. Elements of an Insurgency

The elevation of a rebellion to an insurgency is in part based on application of violence, but there are other factors that support the proposition that the cartels are in fact insurgencies. The elements of insurgency from the U.S. Army Field Manual 3-24, *Counterinsurgency*,¹⁵⁷ reveals a direct correlation between insurgents and cartels.

Field Manual 3-24 explains that one of the goals of the insurgency is to break away from state control and form an autonomous entity or ungoverned space that it controls.¹⁵⁸ The cartels are motivated in part by a similar goal. The cartels may not seek the overthrow of the Mexican government, but they do seek to break away from state control and operate as autonomous entities. To achieve that end, the cartels resort to assassinating local political officials and law enforcement who stand in the way. By breaking down the social order provided by government, the cartels fill the vacuum and maintain a system of order supporting their own interests.

For the parent government, providing security is the key to reducing the insurgency. However, particularly in Mexico's case, maintaining security in an unstable environment requires vast resources, and a small number of motivated insurgents with simple weapons and limited mobility can still undermine security over a large area.¹⁵⁹ Mexico does not have vast resources to combat the enemy. In contrast, the insurgents have a wide range of available weapons, from simple assault rifles to sophisticated weapons like rocket-propelled grenades, machine guns, and car bombs.¹⁶⁰ They also have wide-ranging mobility, possess their own aircraft, intersperse among the general population and conduct their illegal activities across the country.¹⁶¹

An insurgent organization normally consists of five elements: movement leaders, combatants, political cadre, auxiliaries, and a mass base.¹⁶² Addressing these in turn will demonstrate these elements are present in Mexico.

¹⁵⁷ FM 3-24, *supra* note 19, para. 1-5.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* para. 1-10.

¹⁶⁰ BEITTEL, *supra* note 55, at 2, 8, 12.

¹⁶¹ *E.g.*, GRAYSON, *supra* note 3, at 64.

¹⁶² FM 3-24, *supra* note 19, para. 1-59.

Cartels are centrally managed. The Mexican government has identified the heads of these tightly held organizations.¹⁶³ Men like “El Chapo” are the movement leaders who provide leadership.¹⁶⁴ These leaders are like corporate heads, running a large enterprise underground. Similar to military commanders, the cartels have thousands of “soldiers” under arms.¹⁶⁵ Combatants are the fighters and security of the cartel.¹⁶⁶ These soldiers “protect and expand the counterstate”¹⁶⁷ by battling the Mexican government and other cartels to expand their zone of control. Additionally, much like government officials, the cartel leaders also make economic decisions such as providing jobs and building infrastructure for the local population—which can result in reverence by the local population for the cartel leaders, who are perceived as being able to make local improvements when elected officials cannot.¹⁶⁸

Political cadres are those people engaged in achieving political goals.¹⁶⁹ The term cadre is a throwback to communist insurgencies.¹⁷⁰ Modern non-communist insurgencies do not use the term but nonetheless have personnel dedicated to shaping the political battlefield.¹⁷¹ In Mexico, the cartels are in a position to have a heavy impact on Mexican politics with their money and weaponry.¹⁷² The kidnapping and murder of public officials, police officers, and the influencing of elections with drug money is the means the cadre use to manipulate the political

¹⁶³ STRATFOR, *supra* note 5, at 77 (citing *Organized Crime in Mexico*) (May 11, 2008) (“Drug cartels in Mexico have a hierarchical structure, with some of the largest cartels controlled by members of a family. The leadership structure in most Mexican organized crime groups shows sophistication and efficiency.”).

¹⁶⁴ *The Last Narco*, *supra* note 64.

¹⁶⁵ *100,000 Foot Soldiers in Mexican Cartels*, WASH. TIMES, Mar. 3, 2009, <http://www.washingtontimes.com/news/2009/mar/03/100000-foot-soldiers-in-cartels/> (“The U.S. Defense Department thinks Mexico’s two most deadly drug cartels together have fielded more than 100,000 foot soldiers—an army that rivals Mexico’s armed forces and threatens to turn the country into a narco-state.”).

¹⁶⁶ FM 3-24, *supra* note 19, para. 1-12.

¹⁶⁷ FM 3-24, *supra* note 19, para. 1-62.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*; *id.* para. 1-63.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² BEITTEL, *supra* note 55, at 9. See generally Renato Busquets, *Drug Money in Mexican Elections? Political Financing Rules Might Help*, GLOBAL INTEGRITY COMMONS (Jan. 20, 2010), <http://commons.globalintegrity.org/2010/01/drug-money-in-mexican-elections.html> (translating proposed reforms from the Mexican newspaper *Reforma*. Martha Martínez, *Narco Poder: Tema para la Reforma Política*, REFORMA, Jan. 10, 2010).

dialogue. While the cartels may not have a political “cadre” in the traditional sense of the term, their impact on politics is unquestionable.

The mass base of the cartel insurgency in the broadest sense are the drug consumers of the world fueling the insurgency with vast amounts of money. Simple access to weapons in the United States also contributes to the arming of the insurgency.¹⁷³ In a more narrow sense, the base of the cartel insurgency is those Mexicans who directly or indirectly support the insurgency. These base members include those who take bribes from the cartels in order to facilitate their business. These members can also be defined as auxiliaries.¹⁷⁴ The links between the base and the auxiliaries, at least in the doctrinal sense, are wholly intertwined. Auxiliaries likely form the bulk of the cartels composition. The auxiliary are sympathizers who perform supporting efforts for the cartel.

b. Transnational Organized Crime and the ‘Criminal Insurgent’

The traditional view characterizes insurgencies as groups challenging local authority with the objective to topple the government and seize power.¹⁷⁵ To achieve this objective, the insurgency must have a strategy, defined political objectives, and the means to achieve it.¹⁷⁶ Organized crime in relationship to an insurgency is “parasitic” to the state and opportunistic in suiting its agenda, while the traditional insurgency is more politically based.¹⁷⁷ The focal point is the “political goal” of the insurgent. Twenty-first century examples include the Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de*

¹⁷³ Mathieu von Rohr, *Ciudad Juarez Takes on Drug Cartels*, SPIEGEL ONLINE, Sep. 23, 2009, <http://www.spiegel.de/international/world/0,1518,650553,00.html> (The mayor of Ciudad Juarez “talks of American women on welfare smuggling Kalashnikovs over the border for \$100 a piece.”).

¹⁷⁴ FM 3-24, *supra* note 19, para. 1-65 (Auxiliaries are active sympathizers who provide important support services. They do not participate in combat operations. Auxiliaries may do the following: Run safe houses; store weapons and supplies; act as couriers; provide passive intelligence collection; give early warning of counterinsurgent movements; provide funding from lawful and unlawful sources; provide forged or stolen documents and access or introductions to potential supporters.).

¹⁷⁵ Harald Håvoll, *COIN Revisited: Lessons of the Classical Literature on Counterinsurgency and Its Applicability to the Afghan Hybrid Insurgency*, NORSK UTENRIKSPOLITISK INST. 6 (2008).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

Colombia, or FARC), an insurgent group seeking a Marxist regime,¹⁷⁸ or the Al Qaeda terrorist group that seeks reestablishment of a Caliphate.¹⁷⁹ Both are examples of violent movements with a political aim. With the end of the Cold War, there has been a rise in new threats along ethnic and religious lines, but the significance of the international global crime threat cannot be discounted. These criminal organizations are parasitic and conjure up images of the fictional shadowy underworld of Don Corleone or Tony Soprano,¹⁸⁰ and gangsters who sit in dark bars trying to influence the system, but not necessarily “rocking the boat.” Mexican cartels are different. They are like these fictional characters, but with more money and a strong private army. In a developing nation like Mexico, “parasitic” criminal organizations would actually be preferable; however, the cartels are a cancer, and a significant threat to stability and security of the state.

In 2001, Peter Andreas and Richard Price published an article¹⁸¹ astutely describing a growing shift in security policy due to the decline of violent geopolitical conflicts. Their theory is that security policies focus more on *crimefighting* than *warfighting*. The article was written before the advent of the Global War on Terror, but the concepts of a security agenda-shift from *warfighting* to *crimefighting* fit the Mexico paradigm.

¹⁷⁸ *Profiles: Colombia's Armed Groups*, BBC NEWS, Feb. 17, 2011, <http://www.bbc.co.uk/news/world-latin-america-11400950> (“The group was founded in 1964, when it declared its intention to use armed struggle to overthrow the government and install a Marxist regime.”).

¹⁷⁹ See also DAVID KILCULLEN, *COUNTERINSURGENCY* 168 (2010).

[T]he first stage of the campaign would reestablish the caliphate, the historical source of spiritual and temporal authority for all Muslims, which existed from the death of Muhammed (in A.D. 632) until A.D. 1924, when it was dissolved by the Turkish Republic after the fall of the Ottoman Empire. . . . The second stage of the strategic plan would use the ‘restored’ caliphate as a launchpad for jihad against the West, in order to remake the world order with the Muslim world in a dominant position.

Id.

¹⁸⁰ Don Corleone, mafia family boss in *The Godfather*. *THE GODFATHER* (Paramount Pictures 1972), Tony Soprano, head of a crime syndicate in *The Soprano's* (Home Box Office broadcast 1999–2007).

¹⁸¹ Peter Andreas, a professor at Brown University, and Richard Price from the University of British Columbia are published experts in the emergence of national security and transnational crime studies. Peter Andreas, http://www.brown.edu/Departments/Political_Science/faculty/facultypage.php?id=1106969919; Richard Price, <http://www.politics.ubc.ca/index.php?id=2509>.

In 1995, Deputy U.S. Attorney General Jamie Gorelick told the Senate Select Committee on Intelligence:

The end of the Cold War has changed the nature of the threats to our national security. No longer are national security risks exclusively or predominately military in nature. Transnational phenomena such as terrorism, narcotics trafficking, alien smuggling, and the smuggling of nuclear material all have been recognized to have profound security implications¹⁸²

A name for this threat is *transnational organized crime*. The Center for Strategic and International Studies has called organized crime the “New Evil Empire” and concluded that global organized crime was a greater international security threat than anything the West had to cope with during the cold war.¹⁸³ There is much truth in this assertion. First it was Colombia, but Guinea-Bissau, Guatemala, and Mexico, are among nations falling under organized crime’s control. Even Russia is often viewed as a mafia-controlled state.¹⁸⁴

Transnational organized crime has a political agenda to meet an economic goal: production and distribution of illegal commodities and management of the wealth derived from sales. From this perspective, the Mexican cartels are in reality a business, or a multinational corporation, whose product happens to be illegal, but is in very high demand and generates massive revenue. To sustain their businesses over the years, the cartels invested in public officials through corruption and intimidation.¹⁸⁵ The cartels also invest in capital equipment, like methamphetamine labs, aircraft, and vehicles, as well as infrastructure such as roads and a tunnel

¹⁸² Peter Andreas & Richard Price, *From War Fighting to Crime Fighting: Transforming the American National Security State*, 3 INT’L STUD. REV. 31, 31–52 (2001).

¹⁸³ Linnea P. Raine & Frank J. Cilluffo, eds., *Global Organized Crime: The New Evil Empire* (Ctr. for Strategic and Int’l Studies, Wash. D.C. (1994)).

¹⁸⁴ *Wikileaks: Russia Branded 'Mafia State' in Cables*, BBC News, Dec. 2, 2010, <http://www.bbc.co.uk/news/world-us-canada-11893886>; see also *US Embassy Cables: Russia Is Virtual 'Mafia State', Says Spanish Investigator*, GUARDIAN.CO.UK, Dec. 2, 2010, <http://www.guardian.co.uk/world/us-embassy-cables-documents/247712> (providing text of cable) (“Grinda stated that he considers Belarus, Chechnya and Russia to be virtual “mafia states” and said that Ukraine is going to be one. For each of those countries, he alleged, one cannot differentiate between the activities of the government and [Organized] [Crime] groups.”).

¹⁸⁵ See generally Peter Andreas, *The Political Economy of Narco-Corruption in Mexico*, CURRENT HISTORY 160 (1998).

under the U.S.-Mexican border to transport their illegal products.¹⁸⁶ Cartels raise armies and spread violence as they compete for plazas while simultaneously protecting themselves from the Mexican government. Under these conditions the cartels represent a criminal insurgency based on economics.¹⁸⁷

The criminal insurgent differs from other insurgents by lack of political goal, but the pursuit of an economic goal, the unencumbered ability to conduct business without interference from the government.¹⁸⁸ The economic insurgent is the ultimate capitalist, willing to take up arms to advance a business agenda. The insurgency happens to result in large political effects and displacement of the government—not to create a counter-state, but to create a semi-anarchic environment from which to conduct business unhindered.¹⁸⁹ To remain “de-regulated,” the insurgent bribes officials, and selectively assassinates authority figures who get in the way.

Mexican cartels are distinguished from groups referred to as “narcoterrorists.” The term narcoterrorism is often used to define armed groups involved in drug trafficking as a means of advancing political goals. The FARC and Irish Republican Army (IRA)¹⁹⁰ are noted examples. The term is problematic in the Mexican context; it is unclear

¹⁸⁶ E.g., Sara A. Carter, *Feds Say Border Patrol Vehicles Being ‘Cloned’ by Mexican Smugglers*, WASH. EXAMINER, Apr. 4, 2010, <http://washingtonexaminer.com/news/feds-say-border-patrol-vehicles-being-039cloned039-mexican-smugglers>; see e.g., *Drug Catalyst Discovered on Mexico Border*, MSNBC.COM, Jan. 26, 2011, http://www.msnbc.msn.com/id/41282726/ns/world_news-americas/. See also e.g., Jennifer Medina, *Drugs Seized in Tunnel Near Border*, N.Y. TIMES, Nov. 3, 2010, <http://www.nytimes.com/2010/11/04/us/04tunnel.html>.

¹⁸⁷ See *supra* note 17.

¹⁸⁸ *Id.*

¹⁸⁹ See generally *id.*; see also von Rohr, *supra* note 8; see also *No Police in Mexico Town After Last Officer Kidnapped*, BBC NEWS, Dec. 28, 2010, <http://www.bbc.co.uk/news/world-latin-america-12085405>; Randal C. Archibold, *Bit by Bit, a Mexican Police Force Is Eradicated*, N.Y. TIMES, Jan. 11, 2011, <http://www.nytimes.com/2011/01/12/world/americas/12mexico.html>.

¹⁹⁰ See generally *supra* note 186 (E.g., *FARC's Cocaine Sales to Mexico Cartels Prove Too Rich to Subdue*, BLOOMBERG NEWS, Jan. 20, 2010, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aQfKk3ykBBes>; see also Jeremy McDermott & Toby Harnden, *The IRA and the Colombian Connection*, TELEGRAPH, Aug. 15, 2001, <http://www.telegraph.co.uk/news/uknews/1337467/The-IRA-and-the-Colombian-connection.html> (“Although very few IRA members are directly involved in drug dealing in Northern Ireland, [Royal Ulster Constabulary] RUC and Army intelligence officers state that the organisation “licenses” drug dealers in nationalist areas and takes a portion of their profits.”).

whether to emphasize the “*narco*” aspect or the “*terrorism*” aspect.¹⁹¹ The FARC and IRA are groups with noted political agendas that supersede their desire to become rich from trafficking in narcotics, but this is not so in the case of the Mexican cartel insurgent who seeks personal enrichment and prestige.

During the period of the Mexican cartel assistance to the Colombians, the cartels were merely a criminal enterprise haphazardly attacked by the Mexican police forces. As the Colombian cartels collapsed, the Mexican cartels transformed into the formidable forces described above and have developed into an insurgency in their own right.¹⁹² As the insurgency has evolved and its security system has become a potent military force, Mexico must be prepared to fight this criminal insurgent who relies on creating an anarchic environment for the promotion of their criminal business enterprise.

C. Is This a Non-International Armed Conflict?

There is great danger to states admitting to the imbroglio of internal armed conflict. States do not wish to have the appearance of lack of control for political and economic reasons. States may not want to have political ties with a faltering government for the sake of their standing with a possible successor government. Foreign business may not want to invest in an area seen as unstable and damaging to their enterprise. Application of Common Article 3 by a State is a tacit admission of loss of control, and therefore rarely ever applied.¹⁹³

Internal armed conflict derives from conventional and customary international law.¹⁹⁴ For conventional sources, Common Article 3 and Additional Protocol II govern internal armed conflict. Common Article 3 provides humanitarian standards to conflicts within a state’s sovereign territory. The article does not provide for combatant immunity—that is,

¹⁹¹ John Holmberg, *Narcoterrorism* (May 11, 2009) (on file with the Terrorism, Transnational Crime and Corruption Center at George Mason University) (citing Emma Bjornehed, *Narco-Terrorism: The Merger of the War on Drugs and the War on Terror*, 6 GLOBAL CRIME 306 (2004), available at http://www.silkroadstudies.org/new/docs/publications/2005/Emma_Narcoterror.pdf).

¹⁹² See *supra* Part III.B.

¹⁹³ Major Alex G. Peterson, *Order Out of Chaos: Domestic Enforcement of the Law of Internal Armed Conflict*, 171 MIL. L. REV. 15, 20 (2002).

¹⁹⁴ *Id.* at 26.

an insurgent (state agent or otherwise) who kills can be subject to domestic law as a murderer.¹⁹⁵ Modernization of the 1949 Geneva Conventions led to the 1977 Additional Protocols, specifically Additional Protocol II, for internal armed conflicts. Additional Protocol I, applicable to international armed conflicts, also applies where the insurgents have reached belligerency status. However, as discussed above, this is not the situation in Mexico. It must be noted that at the other end of the conflict spectrum, Additional Protocol II does “not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.” Mexico is somewhere in between; however, Additional Protocol II applies to the internal conflict in Mexico, both in fact and as customary international law.

1. Elements of Internal Armed Conflict

There are two main elements of an internal armed conflict. First, is an armed conflict taking place; and second, is it taking place “in the territory of one of the High Contracting Parties?”¹⁹⁶ Mexico is a signatory of the Geneva Convention, and there is an obvious conflict of some nature taking place within its territory. The question arises as to what extent the first element is met, defining an armed conflict. It is here that Mexican officials, from both past and present, will argue that their war is not an armed conflict as envisioned by Common Article 3, but is instead a police action against criminals.¹⁹⁷

There is no concrete definition of what constitutes a conflict in the 1949 Geneva Conventions.¹⁹⁸ For international armed conflict the process is easy: an armed conflict between two states is all that was required.¹⁹⁹ The level of intensity is not an issue when it is clear State

¹⁹⁵ *Id.* at 19.

¹⁹⁶ Geneva Conventions, *supra* note 16.

¹⁹⁷ MOIR, *supra* note 118, at 68–74. *See generally id.* (France was less willing to admit application of Article 3 in the conflict in Algeria, though France implicitly acted within the provisions of the Article.).

¹⁹⁸ COMMENTARY ON THE GENEVA CONVENTION I, *supra* note 120, at 32, 49.

¹⁹⁹ This Common Article of the Geneva Conventions states,

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or

parties are involved.²⁰⁰ For an internal armed conflict, other issues arise due to the paramount view of state sovereignty, as well as the unintended consequence of giving legitimacy to those who may be deemed criminals by the parent state.²⁰¹ The members of the Diplomatic Conference for the Geneva Conventions were unable to establish the criteria for the definition of an internal armed conflict due to genuine concerns that broad application of Common Article 3 would apply to any act of anarchy, rebellion, or even banditry.²⁰² In the end, the delegates abandoned defining armed conflict.²⁰³ Jean Pictet's commentaries on the Geneva Conventions²⁰⁴ provide limited guidance from which one can create specific "elements" for the purpose of this analysis.

On the surface, establishing that an insurgency exists may appear to establish a state of internal armed conflict; but the next step is to apply

more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

See supra note 16, art. 2.

²⁰⁰ COMMENTARY ON THE GENEVA CONVENTION I, *supra* note 120, at 32.

Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2 It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims. Nor, incidentally, does the application of the Convention necessarily involve the intervention of cumbersome machinery. It all depends on circumstances. If . . . only at single wounded person as a result of the conflict, the Convention will have been applied as soon as he has been collected and tended

Id.

²⁰¹ *Id.* at 34.

²⁰² *Id.* at 43.

²⁰³ *Id.* at 49.

²⁰⁴ *See generally* COMMENTARY ON THE GENEVA CONVENTIONS, *supra* note 120.

the elements of an internal armed conflict to the factual situation in Mexico.²⁰⁵ The elements are as follows: a “party in revolt against the de jure Government;”²⁰⁶ government recourse to the use of military force; recognition of the insurgents as belligerents; and the insurgent organization having the characteristics of a state.²⁰⁷ These elements are meant to be guidelines in determining the applicability of Common Article 3, not the hard and fast rule.²⁰⁸ The purpose is to demand respect for rules of civility in combat, not to usurp the state’s inherent police powers. As such, in fulfilling much of the criteria of armed conflict for an apolitical insurgency, Common Article 3 and Additional Protocol II apply to the drug war in Mexico as both conventional and customary international law.²⁰⁹

²⁰⁵ MOIR, *supra* note 118, at 35 (deriving elements from Commentary on the Geneva Convention I). COMMENTARY ON THE GENEVA CONVENTION I, *supra* note 120, at 49:

- (1) That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
- (2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
- (3) (a) That the de jure Government has recognized the insurgents as belligerents; or
 - (b) that it has claimed for itself the rights of a belligerent; or
 - (c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
 - (d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.
- (4) (a) That the insurgents have an organisation purporting to have the characteristics of a State.
 - (b) That the insurgent civil authority exercises de facto authority over persons within a determinate territory.
 - (c) That the armed forces act under the direction of the organized civil authority and are prepared to observe the ordinary laws of war.
 - (d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.

The above criteria are useful as a means of distinguishing a genuine armed conflict from a mere act of banditry or an unorganized and short-lived insurrection.

²⁰⁶ See *supra* note 207, para. (1).

²⁰⁷ MOIR, *supra* note 118, at 35.

²⁰⁸ *Id.* See also COMMENTARY ON THE GENEVA CONVENTION I, *supra* note 120, at 50.

²⁰⁹ Peterson, *supra* note 197, at 29.

2. A “Catch All?” *Tadić* Revisited

Although there is no internationally accepted definition of internal armed conflict, the *Tadić* case provides a singular element, a catch all, to show “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized groups or between such groups within a State.”²¹⁰ Under the *Tadić* ICTY Appeal Chamber definition, these two factors are present: a six-year protracted conflict between the cartels and the government and the use of military force. Based on these factors, it is clear there is an internal armed conflict in Mexico.

D. Legal Status for Cartel Fighters

In a conventional Common Article 2 conflict, states may capture members of the armed forces of the opposing state. In those situations, the third Geneva Convention on Prisoners of War provides guiding principles on combatant protections.²¹¹ Article 4 of the third Geneva

²¹⁰ Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

²¹¹ See Geneva Convention III, *supra* note 16. Article 4 states,

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

(1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

(2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without

Convention lists the categories of persons eligible for POW status.²¹² In situations arising where there is a need to determine the status of a combatant, Article 5 prescribes that “such persons shall enjoy the protection of the present convention until such time as their status has been determined by a competent tribunal.”²¹³ These tribunals assist a belligerent state in determining who is worthy of their protection under the convention or who are criminals to be punished under the law of the capturing state. For example, the U.S. Army governs these Article 5 tribunals under Army Regulation (AR) 190-8 and establishes procedural measures for composition of the tribunal and the conduct of the hearing.²¹⁴ Importantly, the regulation also provides rules and protections for those denied POW status.²¹⁵

prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.

²¹² *Id.*

²¹³ Geneva Convention III, *supra* note 16, art. 5.

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Id.

²¹⁴ U.S. DEP'T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES para. 1-6 (1 Oct. 1997) [hereinafter AR 190-8]. The following paragraphs pertain to tribunals:

c. A competent tribunal shall be composed of three commissioned officers, one of whom must be of a field grade. The senior officer shall serve as President of the Tribunal. Another non-voting officer, preferably an officer in the Judge Advocate General Corps, shall serve as the recorder.

d. The convening authority shall be a commander exercising general courts-martial convening authority.

....

In viewing the situation of the United States at the Guantanamo Bay detention center, there are enemy fighters held who belong to no state armed force and are considered “unlawful combatants”²¹⁶ and therefore not afforded the protections of the Geneva Convention other than as provided by government policy. These personnel are presented before a Combatant Status Review Tribunal (CSRT). The Tribunal is modeled after the AR 190-8 tribunal for POWs.²¹⁷

g. Persons who have been determined by a competent tribunal not to be entitled to prisoner of war status *may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts they have committed and what penalty should be imposed.* The record of every Tribunal proceeding resulting in a determination denying EPW status shall be reviewed for legal sufficiency when the record is received at the office of the Staff Judge Advocate for the convening authority.

(emphasis added).

²¹⁵ AR 190-8, *supra* note 214, para. g.

²¹⁶ The Term unlawful combatants was introduced into law by *Ex parte Quirin*, 317 U.S. 1 (1942) (“By universal agreement and practice the law of war draws a distinction between . . . those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.”). In the case of the Guantanamo detainees, the term was changed to “unprivileged enemy belligerent” through the Enemy Belligerent Interrogation, Detention and Prosecution Act of 2010. Senate Bill 3081, 111th Cong. (2009–2010). Senate Bill 3081 as defined in section 6, “Definitions (9) UNPRIVILEGED ENEMY BELLIGERENT.—The term ‘unprivileged enemy belligerent’ means an individual (other than a privileged belligerent) who—(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposely and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of capture.”

²¹⁷ Combatant Status Review Tribunal Fact Sheet, at <http://www.defense.gov/news/Jul2007/CSRT%20Fact%20Sheet.pdf> (last visited May 22, 2012).

Detainees at Guantanamo are not held as “Prisoners of War.” The President has determined that those combatants who are a part of al-Qaeda, the Taliban or their affiliates and supporters, or who support such forces do not meet the Geneva Convention’s criteria for POW status. Accordingly, there was no need to convene tribunals under Article 5 of the Geneva Convention. International law, including the Geneva Conventions, has long recognized a nation’s authority to detain unlawful enemy combatants without benefit of POW status. The U.S. Government treats unlawful combatants in accordance with Common Article 3 of the Geneva Conventions . . . CSRTs offer many of the procedures contained in U.S. Army Regulation 190-8, which

In contrast, the cartels are criminal organizations by their nature. They kidnap, murder, and traffic drugs and people, but should they be afforded combatant status? Assuming the cartels are insurgent groups, it is evident that not all members of the insurgency are the leaders, such as El Chapo, the Beltran Leyva brothers, or special militarily trained Zetas.²¹⁸ Amongst the cartel, there are foot soldiers—young men and teens—some of whom have been forced into the cartel, or brainwashed by a charismatic convincing adult figure. There may also be cases of child soldiers.²¹⁹

By applying the POW standard under the Geneva Convention to all combatants, the detaining state is entitled to hold the insurgent indefinitely as a POW for the duration of hostilities.²²⁰ From the Mexican judicial perspective, given the threat to the system by the cartels and the rampant corruption of the current police forces, it may serve the Mexican government to detain captured cartel fighters in POW-type camps within Mexico or coordinate with international partners for use of more secure detention facilities resistant to cartel corruptive practices compared to Mexico's less effective Puente Grande maximum security prison.²²¹

From an internal armed conflict perspective, the Mexican government could treat and hold cartel criminal insurgents as “unlawful

the Supreme Court has cited as sufficient for U.S. citizen-detainees entitled to due process under the U.S. Constitution.

Id.

²¹⁸ See *supra* Part III.B (background of Mexican cartels).

²¹⁹ E.g., *Mexican Drug Cartels Hire Teens, Children for Smuggling, and Murder*, CATHOLIC ONLINE, Dec. 20, 2010, http://www.catholic.org/international/international_story.php?id=39660 (Mexico is in shock learning of a fourteen-year-old boy who was “known as ‘Ponchi’ [and] began killing for the cartels at age 11”). See also Ioan Grillo, *Mexico's Lost Youth: Generation Narco*, TIME, Nov. 7, 2010, <http://www.time.com/time/world/article/0,8599,2028912,00.html> (There is a growing concern about “*los ni nis* or “neither nors”—young people who neither work nor study” and are turning to the cartels for career opportunities. Execution videos have involved young people as the killers.).

²²⁰ EMILY CRAWFORD, *THE TREATMENT OF COMBATANTS AND INSURGENTS UNDER THE LAW OF ARMED CONFLICT* 161 (2010).

²²¹ GRAYSON, *supra* note 3, at 58, 146 (Puente Grande maximum security prison is where Sinaloa Cartel leader “El Chapo” Guzman escaped after his “electronically controlled cell door inexplicably flew open during a period when video cameras temporarily went dark A federal investigation led to the arrest of seventy-one prison officials, and comedians began calling Puente Grande (the ‘Big Bridge’) Puerta Grande (the ‘Big Door’),” notorious for accommodating cartel inmates.) (The judiciary is lax toward the drug traffickers, and on some occasions freed traffickers executed the police official and judge involved in their cases.). See generally Andreas, *supra* note 189.

combatants” until the cartels are dismembered or the Mexican government determines that the cartels cease being a threat to the state.²²² Indefinite incarceration for the duration of the war against the cartels may be as unpalatable to the Mexican government as the detention of detainees in the Global War on Terror has been to the U.S. public. The war against the cartels is going on six years and could last much longer. In this situation, an Article 5 or CSRT-type tribunal would be useful. These hearings will sift out petty dealers and cartel foot soldiers with societal rehabilitative potential from high-value cartel targets for extradition to the United States or special jurisdiction Mexican military or civilian courts to hear cartel criminal cases. This method will satisfy the requirements of Common Article 3, to have “judgment pronounced by a regularly constituted court.”²²³

E. A Multinational Response

The Mexican cartels are more than mere criminal organizations, but are destabilizing insurgent forces turning parts of Mexico into ungoverned areas similar to Pakistan’s Federally Administered Tribal Area (FATA).²²⁴ This lawlessness is firmly rooted in Mexico’s history of instability and corruption. Without increased overt action from the United States, that violence and corruption will surely bleed over into the United States. Some say it already has, with blatant cartel hits being carried out in American cities,²²⁵ and the rise in corruption of our own

²²² The proposition is based on customary international law because Articles 4 and 5 of Geneva Convention III only apply to international armed conflict.

²²³ Geneva Conventions, *supra* note 16, art. 3, para. (1)(d); *see also id.* para. (2) (“shall not affect the legal status” of the armed group). *See also* Dawn Steinhoff, *Talking to the Enemy: State Legitimacy Concerns with Engaging Non-State Armed Groups*, 45 TEX. INT’L L. J. 297, 315 (2010) (“When a state captures an opponent in an internal conflict, the state can still treat the individual according to its laws of treason, even if the individual did not violate the laws of war. Consequently, many insurgent fighters forfeit significant humanitarian protections in lieu of domestic criminal prosecution or indefinite military detention.”).

²²⁴ INT’L CRISIS GROUP, PAKISTAN: COUNTERING MILITANCY IN FATA, ASIA REPORT NO. 178 (Oct. 21, 2009) (“Pakistani Taliban groups have gained significant power in the tribal agencies, seven administrative districts bordering on Afghanistan. While state institutions in [Federally Administered Tribunal Area] FATA are increasingly dysfunctional, the militants have dismantled or assumed control of an already fragile tribal structure.”).

²²⁵ STRATFOR, *supra* note 54, at 93 (citing *The Fallout from Phoenix*, STRATFOR GLOBAL INTELLIGENCE, July 2, 2008). *E.g.* On June 22, 2008, a heavily armed tactical team approached a house in Phoenix, Arizona, to serve a warrant. The team members were outfitted in the typical gear: boots, black battle dress uniforms (BDU), Kevlar

security and law enforcement personnel.²²⁶ Unfortunately the Federal Bureau of Investigation (FBI), with its mandate to pursue corruption, is stretched thin with its other responsibilities in counterterrorism and financial criminal investigations.²²⁷

The serious effort against drug trafficking has been a long struggle for close to forty years since the formation of the DEA. Since that time the United States has attacked drug trafficking by training and assisting foreign police forces and providing military assistance with equipment and training. The International Narcotics Control Strategy Report details the great efforts in capacity-building by the DEA, Customs and Border Patrol, and United States Coast Guard to assist Mexican law enforcement in combating drug trafficking.²²⁸ What is notably missing, or understated, is the Department of Defense role, and its ability to assist in those efforts. Through ten years of combat in Iraq and Afghanistan, the Department of Defense now has considerable counterinsurgency experience in dealing with similar low intensity conflict, corruption, and criminal organizations in order to support those new, less stable, democratic governments.

helmets, body armor covered by Phoenix Police Department (PPD) raid shirts. They were armed with pistols and AR-15 assault rifles equipped with Aimpoint sights for use during low light operations. Unlike normal PPD procedure, this team unleashed a barrage of fire into the windows of the residence while a second element entered to serve the warrant. In this case, it was a death warrant signed by a Mexican drug lord, intended for the target, Andrew Williams, a Jamaican drug dealer.). *See also* Amanda Lee Myers, *Arizona Beheading Raises Fears of Drug Violence*, ASSOCIATED PRESS, Oct. 29, 2010, available at http://azstarnet.com/hnews/local/crime/article_c93bd79-e887-59e5-868a-a8179cfe830b.html.

²²⁶ STRATFOR, *supra* note 54, at 223–28 (citing *A Counterintelligence Approach to Controlling Cartel Corruption*) (May 20, 2009)) (“As border security has tightened, the number of border officials charged with corruption has risen. Twenty-one CPB officers were arrested in fiscal year 2008, in contrast to four the year before.”).

[T]he problem of corruption extends further In recent years, police officers, state troopers, county sheriffs, National Guard members, judges, prosecutors, deputy U.S. marshals and even the FBI special agent in charge of the El Paso office have been linked to Mexican drug-trafficking organizations. Significantly, the cases being prosecuted against these public officials of all stripes are just the tip of the iceberg. The underlying problem of corruption is much greater.

Id.

²²⁷ *Id.* at 224.

²²⁸ *See generally* NATIONAL DRUG CONTROL STRATEGY (2010), available at <http://www.whitehousedrugpolicy.gov/publications/policy/ndcs10/ndcs2010.pdf>.

Moving away from a “war on drugs” concept to a counterinsurgency perspective in accordance with military doctrine will better enable the United States to assist Mexico in controlling the problem. As the United States winds down commitments in Afghanistan and Iraq, it is time to start focusing on a conflict which literally hits closer to home.

During the Colombian government’s multi-front war on the cartels and the FARC insurgency, the United States provided assistance in the form of the Andean Counterdrug Initiative (ACI).²²⁹ Andean Counterdrug Initiative supported then-President of Columbia Andres Pastrana’s *Plan Colombia*.²³⁰ The goal of Plan Colombia was to end the conflict with the FARC, eliminate drug trafficking and promote development.²³¹ Plan Colombia is touted as a success in saving Colombia. The current situation in Colombia is not idyllic, but due to Plan Colombia it is by no means dire.²³² Colombia has successfully

²²⁹ See generally CONNIE VEILETTE, CONG. RESEARCH SERV., RL32337, ANDEAN COUNTERDRUG INITIATIVE (ACI) AND RELATED FUNDING PROGRAMS: FY2005 (May 10, 2005).

The Andean Counterdrug Initiative is the primary U.S. program that supports Plan Colombia, a six year plan developed by President Andres Pastrana (1998-2002) of Colombia. . . . The countries considered a part of the ACI include Bolivia, Brazil, Colombia, Ecuador, Panama, Peru and Venezuela, with most funding allocated for programs in Colombia. Funds are divided between programs that support eradication and interdiction efforts, as well as those focused on alternative crop development and democratic institution building.

Id.

²³⁰ See generally CONNIE VEILETTE, CONG. RESEARCH SERV., RL32774, PLAN COLOMBIA: A PROGRESS REPORT (June 22, 2005).

The objectives of Colombia and the United States for Plan Colombia differ in some aspects, although there is a significant overlap of goals. The primary U.S. objective is to prevent the flow of illegal drugs into the United States, as well as help Colombia promote peace and economic development because it contributes to the regional security in the Andes. The primary objectives of Colombia are to promote peace and economic development, and increase security. Addressing drug trafficking is considered a key aspect of those objectives.

Id.

²³¹ *Id.*

²³² *The Current: Plan Colombia for Mexico*, Canadian Broadcast Corporation Radio broadcast (July 22, 2010) (downloaded using iTunes) (Interview by Jim Brown with

eluded capitulation to drug cartels. Cartels are no longer assassinating government officials and waging war against the national police or the military, and there is a marked improvement in government services across the country in the twelve years since the inception of Plan Colombia.²³³

The United States' response to the Mexico crisis is the Merida Initiative, which has also been described as a sort of Plan Colombia for Mexico.²³⁴ The Merida Initiative as a subset of the ACI is a "security cooperation initiative with Mexico and the countries of Central America in order to combat the threats of drug trafficking, transnational crime, and terrorism in the Western Hemisphere."²³⁵ Under the three-year program Congress approved \$400 million for Mexico the first year, \$300 million with a supplemental \$450 million in 2009, and \$450 million in 2010.²³⁶ The initiative will provide not only military aid, but also other institutional capacity-building needs such as rule of law, drug treatment, and education.²³⁷

Success of the Merida Initiative and the ACI must be viewed as a major front in the war against the Mexican drug cartels. As the Mexican government increases pressure on the cartels who are fighting over the trade routes, American and South American efforts to drastically reduce the amount of drugs coming from the Andean region may provide the

Robert Bonner, Adm'r DEA 1990–1993, then 2001–2005, Comm'r of U.S. Customs and Border Protection in Los Angeles, Ca.) (Bonner states, "It is a success story if you're Colombian because there are no organizations that threaten the legitimate institutions of the government. Colombia is hugely successful if the goal is to destroy these major criminal organizations.").

²³³ *Id.*

²³⁴ *Id.*

²³⁵ COUNCIL ON FOREIGN RELATIONS, JOINT STATEMENT ON THE MERIDA INITIATIVE, DEP'T STATE (Oct. 22, 2007), <http://www.cfr.org/mexico/joint-statement-merida-initiative/p14603>.

²³⁶ U.S. DEP'T STATE, MERIDA INITIATIVE: MYTH VS. FACT, WWW.STATE.GOV (Jun. 23, 2009), <http://www.state.gov/j/inl/rls/fs/122395.htm>.

²³⁷ *Id.* ("Transnational organized crime has a corrosive impact on all levels of society. A primary goal of the Merida Initiative is to help strengthen a broad spectrum of institutions engaged in combating criminal organizations by equipping and training police, supporting judicial reform plans, building prosecutorial capacity, and cooperating with other key agencies—including border security, corrections, customs, and when appropriate, the military. The Initiative also addresses a broad range of needs outside of law enforcement and the judiciary—including funding drug treatment centers, gang prevention activities, education, and public outreach.").

financial death blow to the major Mexican cartels that the people of Mexico so desperately need for the cartels to begin crumbling.

Recognizing there is an insurgency in Mexico, increased vigilance is necessary to prevent more armed groups from crossing the border and for the United States to make appropriate accommodation for the refugees coming across the border in accordance with our laws and international treaty obligations. To the extent the United States must put more troops in the southwest for border protection as in the late 19th and early 20th century, it should.²³⁸

Robert Bonner, former DEA Administrator, stated, "There is hope for Mexico especially if Mexico understands and applies the critical lessons from Colombia that go back 15 to 20 years ago," and follows four steps necessary to successfully defeat the cartels:

[First] Need to have an understood and shared goal. Not just in Mexico . . . President Calderon and the political leadership do understand the most important objective here is to dismantle and destroy these major drug cartels in Mexico that are a threat to the state itself . . . through corruption and intimidation seek to . . . operate with impunity and beyond the rule of law. It is important that the US understand this goal, sometimes we get caught up on the goal of eradicating drug trafficking. . . . The real goal and the U.S. needs to share this goal, is to destroy and dismantle the major drug cartels.

[Second] Need to use a proven strategy. Use the Kingpin Strategy, not just identifying locating and apprehending the kingpins, top lieutenants and potential successors . . . but also understands how you weaken these organizations by attacking vulnerabilities (cash flow and so on).

²³⁸ Arguments concerning posse comitatus are beyond the scope of this paper; however, for a good article on this issue, see Major Craig T. Trebilcock, *The Myth of Posse Comitatus*, U.S. Army Reserve, (Oct. 2000), at <http://florida.tenthamentendmentcenter.com/2011/12/the-myth-of-posse-comitatus-the-feds-have-not-felt-bound-by-this-for-years> ("The Posse Comitatus Act was passed in the 19th century when the distinction between criminal law enforcement and defense of the national borders was clearer, the rise of militant transnational organized criminal groups like Mexican drug cartel insurgency is a clear example of how this distinction is now blurred, or even irrelevant.").

[Third] Can't just do it using the military, [but the military has] a role because the cartels have highly, heavily armed paramilitary enforcement groups . . . [the Mexicans must] Develop evidence, confidential informants, electronic surveillance, that's principally a law enforcement job.

[Fourth] In longer term, Mexico needs to reform its police, prosecutorial, judicial, and even penal institutions to make them more resistant to corruption, professionalize them, so that ultimately on a sustained basis, eliminate these very large and powerful drug organizations. This is a very daunting challenge for Mexico because it is a large problem, and it takes time to do these transformations, it can be done, in fact it has to be done.²³⁹

Reforming Mexico is as much a human rights issue as it is a law enforcement issue. Mexico has the laws, treaty obligations, and even the funding, but has not yet been successful in fully implementing redress of human rights abuses by the Mexican military.²⁴⁰ As the United States assists Mexico in fighting the war, the United States must also maintain its own values and position on human rights in order to better develop Mexico's. In light of the current war the United States must strike a balance between adhering to the basic protections of Additional Protocol II, and being unencumbered by U.S. human rights laws when assisting troubled nations like Mexico.²⁴¹

²³⁹ *Plan Colombia for Mexico*, *supra* note 232.

²⁴⁰ See generally Human Right Watch, *Uniform Impunity: Mexico's Misuse of Military Justice to Prosecute Abuses in Counternarcotics and Public Security Operations* (Apr. 2009), <http://www.hrw.org/en/reports/2009/04/28/uniform-impunity> (E.g., "Military investigations into grave human rights abuses committed by the military over the past few decades have routinely failed to hold perpetrators accountable, contributing to a culture of impunity."). In this report the Mexican military attorney general and human rights director were unable to provide any examples of cases where serious human rights violation committed by the military that were dealt with by military courts resulting to convictions.

²⁴¹ E.g., Military Construction Appropriations Act, Pub. L. No. 106-246, § 3201, 114 Stat. 511 (2000) (providing provisions of human rights requirements); see Department of Defense Appropriations Act, Pub. L. No. 106-259, § 8092, 114 Stat. 656 (2000) ("None of the funds made available by this Act may be used to support any training program involving a unit of the security forces or a foreign country if the Secretary of Defense has received credible information from the Department of State that [a member of such] unit has committed a gross violation of human rights, unless all necessary corrective steps

The assistance effort cannot be America's burden alone, and the United Nations can play an important role in a post conflict Mexico as it has in other regions around the world.²⁴² The UN brings expertise in disarmament, demobilization, reinsertion and reintegration, which will be helpful to bring the many young Mexicans who were seduced by the drug cartels back into a rule-of-law-based society,²⁴³ and it is incumbent upon the Mexican government to ensure that it is a reformed and promising society with prospects for a future without the allure of drug cartels.

V. Conclusion

*Continued success forces the U.S., Colombia, Mexico, and other regional partners to think about how to take on the challenge regionally and how we implement a truly holistic hemispheric policy. Because if not, all we will be doing is playing Whack-A-Mole.*²⁴⁴

The Mexican Ambassador has fittingly described the solution to the drug war in Mexico. This is not just their war, but a regional issue that

have been taken.”). See also MERIDA INITIATIVE, *supra* note 252. The Merida Initiative also provides for human rights accountability in Mexico and Central America:

Further professionalize their law enforcement agencies; Improve the effectiveness of citizen participation councils to help oversee law enforcement agencies and improve the effectiveness of community policing; Establish or strengthen offices of accountability and oversight within government agencies; Conduct ethics and human rights training at law enforcement academies; and Establish links between bar associations and law schools across our borders as part of law school curriculum development and continuing legal education development.

Id.

²⁴² The United Nations is and has been involved in many post conflict zones, such as Bosnia, Rwanda, The Democratic Republic of the Congo, and East Timor. See *List of Peacekeeping Missions 1948-2011*, available at <http://www.un.org/en/peacekeeping/documents/operationslist.pdf>.

²⁴³ See generally, U.N. OPERATIONAL GUIDE TO INTEGRATED DISARMAMENT, DEMOBILIZATION AND REINTEGRATION STANDARDS (2010), available at http://unddr.org/docs/Operational_Guide_REV_2010_WEB.pdf.

²⁴⁴ R.M. Schneiderman, *Mexico Fights Back*, NEWSWEEK, Nov. 8, 2010, <http://www.newsweek.com/2010/11/08/mexican-ambassador-speaks-out-on-drug-war.html> (quoting Arturo Sarukhan, Mexican Ambassador to the United States).

requires a regional solution. The supremacy of these criminal organizations will destabilize the hemisphere if not checked.

This article argues that recognition of an internal armed conflict in Mexico will assist the region in reducing violence. The solution to the violence lies in breaking down the cartels from major “armed groups” to “mere banditry.” That goal of breaking down the cartels into minor street gangs can only be achieved with concerted military force rather than just law enforcement measures.

Under the framework of Common Article 3 of the Geneva Convention, Mexico suffers from an internal armed conflict, and as a party to the convention, Mexico incurs legal obligations. Within that analysis, a review of the background of the conflict, thresholds for non-international armed conflict, and the legal status of criminal organizations operating in the conflict zones has demonstrated that all the cartels are an insurgency. By their own actions, the cartels meet the criteria as an armed group and criminal insurgency party to an internal armed conflict, thereby placing the Mexican government as a “High Contracting Party” under a *de facto* Common Article 3 conflict. In recognizing this state of insurgency, the Mexican government must use whatever means within international law standards to prosecute the war against the cartels as a military, rather than law enforcement, operation.

**THE TWENTY-SEVENTH GILBERT A. CUNEO LECTURE IN
GOVERNMENT CONTRACT LAW***DANIEL I. GORDON[†]

Thank you very much. I very much appreciate the honor of giving the Cuneo Lecture. To be invited to give a lecture named after Gil Cuneo is a huge honor for me as a long-time procurement lawyer. It is also a pleasure to stand before so many friends and colleagues today. As I think many of you know, I am a supporter of The JAG School and, in particular, a fan of this symposium. The symposium is a unique

* This article is based on the transcribed and edited lecture delivered by the Honorable Daniel I. Gordon to members of the staff and faculty and students attending the 2010 Contract and Fiscal Law Symposium on November 19, 2010, at The Judge Advocate General's Legal Center and School, U.S. Army, located in Charlottesville, Virginia.

The Cuneo Lecture is named in memory of Gilbert A. Cuneo, who was an extensive commentator and premier litigator in the field of government contract law. Mr. Cuneo graduated from Harvard Law School in 1937 and entered the United States Army in 1942. He served as a government contract law instructor on the faculty of The Judge Advocate General's School, then located at the University of Michigan Law School, from 1944 to 1946. For the next twelve years, Mr. Cuneo was an administrative law judge with the War Department Board of Contract Appeals and its successor, the Armed Services Board of Contract Appeals. He entered the private practice of law in 1958 in Washington, D.C. During the next twenty years, Mr. Cuneo lectured and litigated extensively in all areas of government contract law, and was unanimously recognized as the dean of the government contract bar.

[†] Daniel I. Gordon was confirmed as the Administrator for Federal Procurement Policy, at the Office of Management and Budget's (OMB) Office of Federal Procurement Policy (OFPP) on November 21, 2009, where he served until the end of 2011. Mr. Gordon currently serves as the Associate Dean for Government Procurement Law at the George Washington University Law School. As the OFPP Administrator, Mr. Gordon was responsible for developing and implementing acquisition policies supporting over \$500 billion in federal spending annually. Prior to joining the OFPP, he spent seventeen years at the Government Accountability Office (GAO) and served as Assistant General Counsel in the Legal Services Division, and Managing Associate General Counsel in the Procurement Law Division before being appointed Deputy General Counsel in 2006 and Acting General Counsel in 2009.

Before his time with GAO, Mr. Gordon worked in private practice, handling acquisition-related matters, white collar crime cases, and bid protests before both GAO, the Armed Services Board of Contract Appeals, and the General Services Administration Board of Contract Appeals. Mr. Gordon holds a B.A. from Brandeis University, a M.Phil. from Oxford University, and a J.D. from Harvard Law School. He has also studied in Paris, France; Marburg, Germany; and Tel Aviv, Israel.

Mr. Gordon has been an active member in the Public Contract Law Section of the American Bar Associations and earlier served as a member of the adjunct faculty at the George Washington University Law School. He is the author of articles on procurement law and the bid protest process at GAO.

opportunity to spend a week listening and learning and networking with our other government procurement lawyers. It's a really important institution that I very much support. I was honored to speak here two years ago, while I was still at GAO, and, at that time, I raised a number of concerns about developments in our acquisition system that I will be returning to in my remarks today.

Some of you with longer memories may know that, in my GAO days, my favorite way of speaking at the symposium was to have butcher block paper up here on an easel and let you set the agenda. Today, we'll do it a little bit more formally, but I hope we'll still manage to maintain that back and forth. For that reason, I will reserve time at the end so that you can raise any question you want, and I will do my best to answer your questions and respond to your comments on any topic.

I should tell you that today is a very happy day in the Office of Management and Budget (OMB). Our nominee for OMB director, Jack Lew, was finally confirmed last night in the Senate. The hold was lifted, a hold that Senator Landrieu had in place for reasons that baffle some of us. We are delighted that we're going to have Jack Lew on board. It is a tough time at OMB, because we're already well into budget season. We need a director in place, and it is, for our agency, a very important thing to have a confirmed director.

Speaking of confirmations, I was confirmed, as you heard, on November 21st, last year. It has been quite a year. It is a dramatic change for me, particularly, since, as you'll hear once we turn to substance, most of what I do is not in the area of law. It is much more policy than law. I'm the Administrator for Federal Procurement Policy, not Procurement Law. Obviously, law is woven into our policy, just as policy is woven into our procurement law, so there's lots for us to talk about together even though I am, at least in theory, not practicing law in my current job, but am working on policy instead.

If I were to think of highlights of the past year, those highlights would probably be my sessions with the acquisition workforce. It is so interesting, refreshing, educational, and enlightening to actually talk with our 1102s, our contracting officers and contract specialists, and have them say what's on their mind, what drives them crazy, what their frustrations are, but also what their accomplishments are. One of the things that I did between being nominated and being confirmed was meet with former OFPP administrators and asked them what they thought I

should do, what I should focus on, and what I should be sure not to do, and I heard lots of good advice. One of the pieces of advice that I adopted was from Steve Kelman, who, as many of you know, was the administrator early in the Clinton administration. He said, “Revive the Frontline Forum,” and that was one of the first things that I did. We just had this past Monday the third session of the Frontline Forum. It is about thirty-eight 1102s—not all of the attendees were contracting officers or contract specialists, but most of them are—from across the government: from DoD, from civilian agencies, including small ones, such as the National Science Foundation. We meet from 9 in the morning until 2 in the afternoon. We bring two items to the agenda, so we can have an in-depth discussion, typically an hour per topic, and then we have time for them to raise topics that weren’t on the agenda in advance. For example, we talked about large IT procurements this last Monday. They have been a talkative group, and that is good. I have benefited from understanding the challenges that they see, such as the roles of our contracting officers’ representatives.

While the Front Line Forum may be the quintessential example of my interaction with the federal acquisition workforce, it is not the only instance. In fact, whenever I visit an agency, which I spend a lot of my time doing, I tell people, “I do need to meet with the senior managers—they are very important. But if I come to your agency, I’d like to have a separate session with your frontline contracting people.” It is the meetings with the frontline staff that I often find most illuminating. In one of those sessions at a civilian agency, a woman stood up and said, “Dan, they told me they hired me to be a business advisor. They said they wanted me for my brain, but all they have me do is do data input. I spend all of my time putting in data into FPDS and these other databases.” Her one comment helped me understand the real-world impact of all our data-input requirements. It’s the sort of thing that you won’t hear if you’re not talking to the people who are actually on the front lines. It lets you find out how all these noble things coming out of Congress and OMB get translated to the people on the front line.

That said, let me now turn to the goals of our work. We have three priorities in OFPP. Priority number one is our acquisition workforce. It is not a partisan issue. The fact is that we ran down the acquisition workforce under both Democratic and Republican administrations. We failed to invest in them. We failed to hire enough people, whether it’s procurement lawyers, contracting officers, contract specialists, or contracting officers’ representatives. We did not invest in hiring or in

training nearly adequately. We badly need to build up our acquisition workforce. The good news is in this area, as in almost every one of the areas I'll be talking about, I do think that we've turned a corner. I cannot say that we have made huge progress, but we're no longer running down the numbers. There is an uptick in terms of hiring at DoD, at VA, DHS, and a good number of the other civilian agencies, although there are agencies that are not making enough progress. The President's budget for 2011 included, for what is I think the first time in history, 158 million dollars exclusively for the civilian agency acquisition workforce (DoD has its own funding stream under DAWIA). I can tell you, having spent months in meetings on the Hill with the appropriators, that there is bipartisan, bicameral support for this. The challenge we face now in obtaining the funding is not based on opposition to supporting the acquisition workforce. The 2011 budget is very much up in the air, and the overall budget battles are impeding our ability to get additional funding for the acquisition workforce—unlike the 1990s, when there were focused efforts to reduce funding for that workforce. We are also working on improving training, not only for our contracting officers and the contract specialists, but also for the contracting officer's representatives, because we view the acquisition workforce, as I hope you all do, very broadly. We are particularly concerned about the contracting officer's representatives, because they so frequently do not receive enough training. Moreover, we don't train our people as an integrated team, so that the contracting officer's representatives learn to work together with the CO and the program team. We've got a long, long way to go. There are, however, some bright spots. FEMA has put together a good training curriculum for contracting officer's representatives that I've been briefed on, and DAU has been working this area. FAI and the VA Acquisition Academy in Frederick have been working on this, too, but we have a long way to go. Overall, with respect to strengthening the acquisition workforce, I feel like we've moved the ship so at least we're not going in the wrong direction, but we've only begun to make progress.

Priority number two is demonstrating fiscal responsibility; that means buying less and it means buying smarter. The "buying less" part is usually not anything that the contracting office has much to do with, because it typically involves a program decision. It is, however, extremely important that we slow the increase in procurement spending.

I often draw two lines to represent the core challenge that we face. We have the acquisition workforce whose numbers have gone down

dramatically from where they were in the early 1990s, so that the line representing those numbers has trended down. Yet after the September 11, 2001, terrorist attacks and the beginning of the war in Iraq, procurement spending skyrocketed. The result was an absolutely impossible pair of lines. Declining numbers of acquisition people doing the work, but a huge increase in the amount of work. Essentially our procurement spending doubled in less than eight years, which was absolutely unsustainable for the workforce and for the country. We just couldn't keep increasing the amount of money we spend on contracts.

The good news is we've slowed the spending increases. From 2001 to 2008, year-on-year increases in procurement spent averaged twelve percent, which explains how cumulatively spending doubled in those eight years. In fiscal year 2009, there was still an increase of about 4 percent, which is better than twelve percent. While we don't have final figures for fiscal year 2010 yet, we expect them to show an increase less than 4 percent, and they may not show an increase at all. What that means is that we've slowed the procurement spending increases, but that really doesn't get to buying smarter; that's only buying less.

Buying smarter has two parts. One is what we call "strategic sourcing," which means essentially leveraging the government's buying power. You may have heard that we've had a significant initiative with respect to office supplies that my office has been very closely involved in, together with GSA. There are a series of innovative things we've done, with GSA, of course, taking the lead. Some of them have legal implications that we can talk about if you want. The bottom line is that GSA awarded fifteen blanket purchase agreements (BPAs) for office supplies, and they have changed the paradigm from what we've seen since the mid 1990s. In those years, we shifted from focusing on a government-wide contract, which is what the GSA schedules were meant to be, and which were supposed to leverage government-wide buying power, to focusing on agency-specific, and sometimes component-specific, BPAs. Whatever advantages those agency-specific BPAs had, they did not reflect the benefits of government-wide purchasing. In the area of office supplies, we said: No more. These BPAs are going to be open to every federal employee government-wide. Not only that, the vendors are going to have to agree to a point-of-sale arrangement where the government employee, as long as she or he uses a government purchase card, automatically gets the discounts. You don't need to know the BPA number. At one point during a hearing when I was trying to explain this, Senator McCaskill interrupted me and said something along

the lines of, “Mr. Gordon, I don’t even know what a BPA is.” I said, “The good news, Senator, is that our employees don’t need to know what a BPA is. As long as they pay with a purchase card, they will automatically get the government’s discounts.”

I can tell you, since we track the sales at every one of the agencies, and at every one of the vendors, week by week, that we’re making progress. The Army, the Navy, and the Air Force are all doing pretty well in terms of having their employees use these BPAs. Government-wide, ten agencies have issued agency-specific direction calling on their employees to use these BPAs to meet their office supply needs. We don’t want to do it from OMB and we certainly don’t want GSA dictating this, but agency-specific mandates to their employees saying that they should be using these vehicles are a good way to go, and they’re working. We’ve started getting complaints from some vendors, which is, in a sense, evidence of our success. We’re getting complaints from small businesses, saying, “We’re on the Schedules and we’ve been selling to the government for years and suddenly our government customers are saying, ‘You don’t have one of the fifteen BPAs. We won’t buy from you anymore.’” The word has obviously gotten out. Our answer to the complaints is this: GSA ran a competition. Thirteen of the fifteen winners are small businesses, and two of them are service-disabled, veteran-owned small businesses. When you lose a competition, it means something. The days of GSA having everything open to everyone all the time, so no one ever loses, are over. The fact is, in any case, that, while there are thousands of Schedule contractors, many of them never get any sales; they simply sit on the contract, without benefit to the government, and only add work for our people

There’s another part of buying smarter that gets much closer to the legal area, and that is reducing risk to the government. It means getting away from sole-source contracts. I recognize that it’s a perennial challenge. It didn’t begin 5 years ago; it didn’t begin twenty years ago. But that doesn’t make it any less important. We need to reduce our reliance on sole-source contracts. We need to focus on increasing competition. Incidentally, this is one of the many issues in which GAO reports have been helpful as we think through where we need to improve our performance in procurement.

In addition to sole-source contracts, there are too many procurements where a competition is conducted, but only one bid is received. In my opinion, every one of those should be a red flag. While we obviously

don't have the resources to track them all down, wherever we can, particularly with the larger procurements, we should follow up and ask, "Why did we get only one bid?" In addition, when we talk about reducing the risk to the government, we need to worry about the cost risk for the government—for the taxpayers—arising from the pricing arrangement. That's why we are pushing very hard to get agencies to decrease their use of time-and-materials contracts and cost-reimbursement ones. Unless, that is, a cost-reimbursement arrangement actually protects the government's risk better than a fixed-price arrangement would, in which case, we should use cost-reimbursement, of course. We are very pleased to see that our colleagues in the Department of Defense are pushing in the same direction as we are, in terms of increasing competition and reducing use of time-and-materials contracts

Along with strengthening the acquisition workforce and increasing fiscal responsibility, we have the third priority, which in some ways is the most challenging. That is rebalancing our relationship with contractors. It certainly has political aspects, and it has legal aspects as well. I appreciate that it is a sensitive topic, but I'll tell you that my strong sense is that we went too far in outsourcing. We've been outsourcing for bad reasons, such as a lack of "slots" for federal employees. Ironically, the efficiency of our procurement system was one of the reasons people liked to outsource, because if you're buying services and the choice is spending months and months trying to hire one federal employee or getting on the GSA schedule and obtaining the services almost overnight, the answer can seem obvious. The procurement system delivers, and fast, but that can be a challenge, because we've gotten in the habit, almost a reflexive habit, of using contractors, including for very sensitive things. We need to pull back and rebalance that relationship. Our office issued, as many of you know, a draft policy letter in March called "Work Reserved for Performance by Federal Employees." In it, we talk about "inherently governmental" and "critical functions," and we state very clearly in that draft that inherently governmental functions have to be staffed one hundred percent by federal employees; critical functions do not. We can use contractors in critical functions on one condition: that we have enough internal capacity—federal employees with enough knowledge, experience, and numbers—that we can maintain control of our mission and operations. I have to tell you that, as I've gone around the country and listened to federal employees, I've been told that we have agencies where there is no federal employee who understands the IT operations in the agency. As a result, I've been told, when they need to write statements of work for

upcoming contracts, they use contractors to write the statements of work. When they're evaluating proposals, they use contractors. There's no federal employee who understands the subject matter enough to evaluate the proposals. That is unacceptable. It means that we have lost control. I have also heard that similar situations arise in our contracting shops, and that many of our contracting shops are heavily dependent on contractor support.

This is not a "global war on contractors," as some people have said. Even more important, insourcing is not our goal. Let me say it again. Insourcing is not a goal for us. That is not what we're about. We're talking about small numbers of positions insourced, and only where they matter. Where we've outsourced something that was inherently governmental, it had to be brought back in, but those situations, in the final analysis, do not involve that many positions. Where we've lost control of a critical function, we need to strengthen our in-house capacity. Again, though, that does not involve large numbers, and in any event, insourcing is often not the appropriate solution. In many cases, improving training and staffing up the contracting officer's representative function have been all that we need to do. The appropriate action depends on the specific function and the particular circumstances. There was one agency where I heard recently that they had shifted something like 2 or 3 percent of the slots from contractor to federal employees over the past year, and they said that it had made an extraordinary difference—and they don't think that they need any more federal employees there. Small changes, strategically placed, can make a significant difference. I know that there are some people who would like us to do massive insourcing. That has never been on the agenda for us, which frankly makes life somewhat easier with the new Congress coming in, in January, but our position has not changed, at least not since I joined last year.

Let me say a few words about legal issues and then open up the discussion for your comments and questions. There are a couple of FAR rules pending. One is on personal conflicts of interest on the part of contractor employees, but it is limited to those in acquisition offices. Another concerns organizational conflicts of interest, where I confess I've been doing some further thinking, and this is one of these instances where moving from GAO to OMB may have slightly changed my perspective on matters. We can talk about either one of those if you'd like.

The hottest topic right now is the question, and it came up in 2008 in my remarks at the symposium that year, is the question of setting aside task and delivery orders for small businesses, the *Delex* question, if you will. We have been in a very unhealthy situation. We know the rules for setting aside contracts; they are well established. We have no clear rules for setting aside orders, either under the schedules or under multiple award ID/IQs. GAO has said that the Rule of Two does not apply to GSA schedules (they said that earlier this year), but they said in *Delex* two years ago that the Rule of Two does apply to multiple award ID/IQ contracts. Many people have told me that GAO was wrong as a matter of law with respect to this because FASA requires that all multiple award contract holders have a fair opportunity to compete for those orders. I usually don't engage in the specifics of whether GAO was right as a matter of law because I recall having some role in the Office of General Counsel back then, but I can say that it is not healthy to have a legal dispute like that. It is not healthy for our procurement staff not to have guidance. We need clear guidance for our acquisition professionals about whether (and, if so, how) they can set orders aside for small businesses. Many of you probably know that Subpart 8.4 of the FAR has somewhat cryptic language that says that agencies can consider socio-economic status in awarding schedule orders. When I ask contracting officers and contract specialists if they know what that means, the answer I get is along the lines of, "I haven't got a clue." That is simply not a healthy situation.

We were directed both by Congress in the Small Business Jobs Act and, earlier, by the President's interagency taskforce on small business contracting to come up with clear rules and clear policies. We've started a series of outreach sessions with agencies, with small businesses, with large businesses, and with professional associations to hear what people think the rules should be. It is a very challenging area. Just as I said two years ago, the multiple award ID/IQ system and the schedules give us speed, flexibility, and efficiency in contracting. I'll tell you, when I ask contracting officers what they think about adding small business set-aside rules, they're worried that we're going to be losing a good deal of that efficiency, that we're going to be destroying the most efficient part of our procurement system, a part accounting for something on the order of 200 billion dollars every year. On the other hand, small businesses are, I think, understandably frustrated that we have a legal requirement for set-asides of acquisitions and yet something like 30 percent of the procurement dollars are walled off, so that set-aside rules don't apply.

We need to reconcile those two policy challenges, although it is not going to be easy.

Let me raise one more issue and then stop to allow you time to raise comments and questions. My boss, Jeff Zients, who has been the acting OMB director and who I'm sure will be very happy to return today to his position of deputy director for management at OMB, is giving a speech later today in which he's going to be talking about large IT projects and how we want to improve them. Let me share with you a few things that he's going to be saying that relate to acquisition. They resonate with what I said here on this stage two years ago. We need to improve requirements definition, and we need to improve contract management. One way that we can make progress in that is to have an integrated, cross-functional team of our contracts people, our program people, our IT people, and our lawyers. From the beginning of acquisition planning, that team needs to be in place and stable. We want to avoid constant churning on that team, so that they can remain engaged and active through the stage of contract management. In addition, that team needs to have support from the top of the agency. We also need to be realistic in our time horizons and our demands. That is a central point that I hear from my colleague Vivek Kundra, who is the head of e-gov. We need to have more modest and shorter term IT projects, and they often talk about "chunking" a large project into shorter, smaller bits. Both Vivek Kundra and Jeff Zients have heard concern from us, though, about the impact of "chunking" on the procurement process and on the acquisition offices. When you start saying you want to "chunk," we begin to have questions. Are you going to do separate contracts? Are you going to have one contract with separate task orders? If the latter, are you going to be competing those task orders? There are a lot of procurement challenges, including legal issues, when you start chunking, so we will need to work our way through that.

Let me stop there. I'm happy to hear your comments and your insights. I'd like to know if the points I raised resonate with you, if you think that we're on the right track, but I also welcome any question you want to ask.

Thank you.

**LAW IN WAR, WAR AS LAW: BRIGADIER GENERAL
JOSEPH HOLT AND THE JUDGE ADVOCATE GENERAL'S
DEPARTMENT IN THE CIVIL WAR AND EARLY
RECONSTRUCTION, 1861–1865¹**

**LINCOLN'S FORGOTTEN ALLY: JUDGE ADVOCATE
GENERAL JOSEPH HOLT OF KENTUCKY²**

REVIEWED BY FRED L. BORCH III*

While very different in approach and scope, these two books about Major General Joseph Holt, who served as the Judge Advocate General (JAG) from 1862 to 1875, are important additions to American military legal history.

Joshua E. Kastenberg, an Air Force judge advocate now serving as a military judge, has written a unique study of Holt and his role in the development of military law during the Civil War era. *Law in War, War as Law* examines how then-Brigadier General (BG) Joseph Holt,³ and the

* Mr. Borch is the Regimental Historian and Archivist for the U.S. Army Judge Advocate General's Corps. He graduated from Davidson College (A.B., 1976), from the University of North Carolina (J.D., 1979), and from the University of Brussels, Belgium (LL.M, *magna cum laude*, International and Comparative Law, 1980). Mr. Borch also has advanced degrees in military law (LL.M, The Judge Advocate General's School, 1988), National Security Studies (M.A., *highest distinction*, Naval War College, 2001), and history (M.A., University of Virginia, 2007).

Mr. Borch was recently awarded a Fulbright for the Netherlands for 2012–2013 and will be a Visiting Professor at the University of Leiden.

Fred Borch is the author of a number of books and articles on legal and non-legal topics, including *Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti (2001)*, and *Judge Advocates in Vietnam: Army Lawyers in Southeast Asia (2004)*. His latest book, *For Military Merit: Recipients of the Purple Heart* was published by Naval Institute Press in 2010.

¹ JOSHUA E. KASTENBERG, *LAW IN WAR, WAR AS LAW: BRIGADIER GENERAL JOSEPH HOLT AND THE JUDGE ADVOCATE GENERAL'S DEPARTMENT IN THE CIVIL WAR AND EARLY RECONSTRUCTION, 1861–1865* (2011).

² ELIZABETH D. LEONARD, *LINCOLN'S FORGOTTEN ALLY: JUDGE ADVOCATE GENERAL JOSEPH HOLT OF KENTUCKY* (2011).

³ When Congress created the position of Judge Advocate General (JAG) on July 17, 1862, it provided that the JAG would have the "rank, pay and emoluments of a colonel of cavalry." Consequently, Joseph Holt began his career as the JAG as a colonel but, when Congress authorized the JAG to be a brigadier general (BG) on June 20, 1864, he became BG Holt. After the death of Lincoln, Secretary of War Edwin Stanton promoted Holt to the rank of brevet major general as a reward for Holt's superb wartime. This explains

military lawyers serving under him, used the law to enhance President Abraham Lincoln's political goal of preserving the Union and ultimately, to destroy slavery. Consequently, while Kastenbergh devotes some energy to examining the Articles of War, and the use of courts-martial to preserve good order and discipline in the Army, the principal theme of *Law in War, War as Law* is that BG Holt and his judge advocates – in the newly formed Bureau of Military Justice – expanded military law to “crush all enemies of the [Lincoln] administration and its goals, including internal enemies.”⁴

Born in 1807, Holt was a prominent civilian lawyer and politician who served as Commissioner of Patents, Postmaster General and Secretary of War in the Buchanan administration.⁵ Although he had been a Democrat, and supported Stephen Douglas for president in 1860, Holt soon found that he had much in common with Republican Abraham Lincoln after the latter's election. As the Civil War unfolded after the outbreak of hostilities in April 1861, Lincoln realized that civilians actively assisting the rebels must be arrested and imprisoned if the Union were to be preserved, and the president “turned to Holt to promote his policy of military control over civilian political prisoners or civilians accused of non-military crimes.”⁶ Consequently, although Holt had no military background, his acumen as a lawyer and his loyalty to the Union were the chief reasons that Lincoln selected Holt to fill the newly created position of Army Judge Advocate General (JAG) in 1862. Then, as the Army's top lawyer, Holt “masterminded” an “extreme expansion of military law.”⁷ Under Holt, for the first time in history, U.S. civilians who were not previously subject to military jurisdiction were now tried by a military commission for various offenses harmful to the Union war effort, including making public speeches inciting Union soldiers to desert from their units, and aiding the Confederacy by providing intelligence or materiel.⁸

why *Law in War, War as Law* refers to Holt as a BG in examining his activities during the Civil War and early Reconstruction.

⁴ KASTENBERG, *supra* note 1, at 8.

⁵ *Id.* at 19, 21.

⁶ THE JUDGE ADVOCATE GENERAL'S CORPS, THE ARMY LAWYER 52 (1975).

⁷ KASTENBERG, *supra* note 1, at 8.

⁸ *Id.* at 103–15; Gideon M. Hart, *Military Commissions and the Lieber Code: Toward a New Understanding of the Jurisdictional Foundation of Military Commissions*, 203 MIL. L. REV. 1, 10–21 (2010).

When Holt began serving as the Judge Advocate General on September 3, 1862, he inherited a military legal system that had been designed for an Army of 10,000 soldiers and had limited jurisdiction even over uniformed personnel.⁹ As Kastenberg shows, by the end of the Civil War, Holt and his judge advocates had transformed military law into a system that not only had unlimited jurisdiction over military personnel, but also could prosecute civilian enemies of the Union.¹⁰ During this period, Holt also started the Army on the path to developing a corps of lawyers to assist the Judge Advocate General, with the Bureau of Military Justice being the forerunner of today's Judge Advocate General's Corps. Holt also broke new ground in military law by overseeing the development and enforcement of the law of armed conflict in the Union army.

Law at War, War as Law is organized chronologically and thematically and, although the book is not a biography of Joseph Holt, he is the focal point of each chapter because of his preeminent role in the development of military law between 1862 and 1866. After an introductory biographical chapter about Holt,¹¹ the book covers a variety of topics, including the development of courts-martial and military commissions;¹² Holt's role in three prominent military trials, one of

⁹ Until Congress revised the Articles of War in 1863, courts-martial did not have jurisdiction over common law crimes like rape, robbery, burglary, murder, and manslaughter unless they were prejudicial to "good order and military discipline." Consequently, when the Civil War Draft Law of March 3, 1863 amended the Articles of War to give courts-martial jurisdiction over these offenses "in time of war, insurrection, or rebellion," this was a significant expansion in military jurisdiction. THE ARMY LAWYER, *supra* note 6, at 62.

¹⁰ Army commanders gained express authority to prosecute civilians when the War Department promulgated General Orders No. 100 (the "Lieber Code") on 24 April 1863. Prior to this time, no military tribunal had *in personam* jurisdiction over civilians but, after civilians sympathetic to the Confederate war effort began acting as spies and couriers, and also carried out guerilla activities against Union forces, Major General Henry Halleck, then serving as the Army's General-in-Chief, decided that such civilians must be subject to trial by a military commission if their activities were to be suppressed and the Lincoln administration victorious in preserving the Union. With General Orders No. 100 in force, commanders in the field—aided by Holt and his judge advocates—began convening military commissions to try civilian enemies of the Union. By the end of the Civil War, hundreds of civilians had been prosecuted for violations of the Law of War—and more than a few for making public pronouncements that undermined the Union effort. War Dep't, Gen. Orders No. 100 (1863) (Articles 13, 26, 149–157); Hart, *supra* note 8, at 3–4.

¹¹ KASTENBERG, *supra* note 1, at 13–41.

¹² *Id.* at 43–75.

which involved the infamous Clement Vallandigham;¹³ the work done by judge advocates in the Union forces in the field;¹⁴ and the involvement of Holt and his lawyers in the Lincoln assassination trial.¹⁵ *Law at War, War as Law* also contains a unique section on the role played by BG Holt and the Bureau of Military Justice in the presidential election of 1864.¹⁶

Kastenberg is especially adept at explaining the importance of Joseph Holt in the development of military law when he details Holt's participation in the *Vallandigham* case. The accused in the case was a prominent anti-war Democrat politician who had served two terms in the House of Representatives and was a Confederate sympathizer. On May 1, 1863, Vallandigham made a public speech in Ohio that railed against the "wicked, cruel and unnecessary war" being waged by "King Lincoln" and insisted that the war was being "fought for the freedom of the blacks and the enslavement of the whites."¹⁷ This incendiary language violated a general order published by Major General Ambrose E. Burnside, then serving as commanding general of the Department of Ohio, who had made it a crime to declare "sympathies for the enemy."¹⁸ Since Vallandigham's speech had violated Burnside's order, Vallandigham was arrested and tried by a military commission for making statements with the express intent to aid the Confederacy. The commission convicted him and sentenced him to be imprisoned "for the duration of the war."¹⁹

When Vallandigham's case reached the U.S. Supreme on a writ of certiorari, Holt *personally* appeared before the U.S. Supreme Court on behalf of the government and achieved a great constitutional victory.²⁰ When the Court unanimously ruled in February 1864 that it could not review Vallandigham's conviction because the commission that had tried him was not a court for purposes of jurisdiction, this decision "empowered" Holt and his judge advocates "with almost the final word as to whether a military arrest or trial of a civilian was justified."²¹ There

¹³ *Id.* at 77–115.

¹⁴ *Id.* at 193–28.

¹⁵ *Id.* at 357–90.

¹⁶ *Id.* at 315–54.

¹⁷ *Id.* at 104.

¹⁸ *Id.* at 105.

¹⁹ *Id.* at 108. Vallandigham was not confined for long; Lincoln released him and had him sent across Union lines into the Confederacy.

²⁰ *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864).

²¹ KASTENBERG, *supra* note 1, at 113.

was no longer any impediment to using military law to combat civilian dissidents who sought to undermine the Union war effort or otherwise support the Confederacy. By the time the Supreme Court reversed course in *Ex parte Milligan* in 1866, the Civil War was over and the Union had been preserved.

While Kastenbergh correctly focuses primarily on the expansion of military jurisdiction orchestrated by Holt during the Civil War, he does not overlook the birth of the American Army's interest in the law of armed conflict.²² In particular, when the War Department published *The Instructions for the Government of the Armies of the United States in the Field* as General Orders No. 100 in 1863, this unique codification of the customary laws of war became the foundation for the conduct of U.S. troops in military operations. Known as the "Lieber Code"—named after its author, Columbia law professor Francis Lieber—it would later have a direct impact on the Hague Conventions of 1899 and 1907, and the Geneva Conventions of 1929.²³ Kastenbergh also shows how Holt was involved in this important development in the law of armed conflict. Holt was not content, however, to simply codify the laws of war. Rather, as Kastenbergh illustrates when discussing the military commission that tried Andersonville camp commandant Captain Henry Wirz, one of the reasons that Judge Advocate General Holt insisted that Wirz must be prosecuted was to "ensure that the law of war would permanently become a part of the nation's military law."²⁴

While *Law in War, War as Law* is a masterpiece of scholarly research, the book is a difficult read—not due to any deficiency in the author's writing style, but rather because the author's research resulted in abundant detail. Consequently, *Law in War, War as Law* is for the expert

²² *Id.* at 229–74.

²³ THE ARMY LAWYER, *supra* note 6, at 62.

²⁴ KASTENBERGH, *supra* note 1, at 257. In 1864, reports reached the North that Union prisoners of war were suffering cruel treatment and dying from a lack of food and water at the Andersonville prison camp. Thousands died while imprisoned; the Andersonville National Cemetery holds 12,912 graves but actual deaths were greater. Since this maltreatment of prisoners was a violation of customary international law—and the Lieber Code—Holt insisted that Wirz must be tried for war crimes. Wirz was charged with conspiracy to "impair and injure the health and to destroy the lives . . . of large numbers of federal prisoners at Andersonville" and with "murder, in violation of the law and customs of war." He was found guilty by a military commission and hanged on 10 November 1865. Holt, in his report on the Wirz trial to President Andrew Johnson, insisted that there was "at no time a darker field of crime than that of Andersonville." THE ARMY LAWYER, *supra* note 6, at 66.

who wants to drink deeply at the well of military legal history; this is not a book for those who want an easy-to-read introduction to Joseph Holt and his impact on the development of military law.

Elizabeth D. Leonard, a professor of history at Colby College, has written the first full-length biography of Holt, and her book, *Lincoln's Forgotten Ally*, is important for this reason alone. In a thoroughly researched narrative, Leonard shows that Lincoln selected Joseph Holt to be his Judge Advocate General for two reasons: first, Holt was “brilliant, rational, stunningly articulate, [and] a painstakingly careful attorney;”²⁵ second, “he was a fearlessly determined supporter of the Union and the Lincoln administration, including Lincoln’s policies on civil liberties, slave emancipation, and the need for a hard-war approach to crush the Confederate rebellion.”²⁶

Professor Leonard succeeds in capturing a wealth of personal detail about Holt that makes him three-dimensional. In particular, Leonard should be commended for her exploration of the difficult relationships that Holt had with members of his family. His brother, Robert, who had moved from Kentucky to Mississippi, was a die-hard slaveholder who believed fervently that his adopted state and the Confederacy must be free to secede, and *Lincoln's Forgotten Ally* shows how Holt’s unswerving loyalty to Lincoln and to the Union caused a permanent rupture between the brothers.²⁷ This sort of family discord was a frequent result of the Civil War, and it is instructive to see that relationships in the Holt family were as strained as those in many other American families. Leonard also should be commended for including a discussion of Joseph Holt’s domestic life, including his romantic and intimate relationships with women, in this biography.²⁸ These sort of personal aspects are often overlooked, if not ignored, by biographers, so Leonard’s exploration of them ensures that a well-rounded portrait of Holt emerges in her book.

As *Lincoln's Forgotten Ally* shows, Holt had many things in common with Lincoln. Both were from Kentucky, both were lawyers, and both ultimately became so committed to the Union that they jettisoned any sympathies they might have once had with slave-owning Southerners and embraced completely the idea that only emancipation

²⁵ LEONARD, *supra* note 2, at 171.

²⁶ *Id.*

²⁷ *Id.* at 141–42; 197–98.

²⁸ *Id.* at 193–94.

could defeat the Confederacy and preserve the Union.²⁹ Additionally, after Lincoln's death, Joseph Holt remained very much in the same camp as the radical Republicans who favored hard reconstruction of a recalcitrant South, as opposed to the soft policies favored by President Johnson and others.³⁰ Since Holt continued to serve as Judge Advocate General until 1875, his views on how the federal government should reconstitute the Southern States—and the role of the Army and military law in Reconstruction—continued to be important.

Professor Leonard devotes an entire chapter to the Lincoln assassination and BG Holt's role in prosecuting the seven men and one woman who conspired to murder Lincoln, Vice President Andrew Johnson, Secretary of State William H. Seward and perhaps also General Ulysses S. Grant on April 14, 1865.³¹ One of the strengths of her prose is the way that she explains how Holt and those prosecutors assisting him in the trial were convinced that John Wilkes Booth and his co-conspirators were a small part of a larger Confederate plot to throw the Union into chaos by decapitating its leaders. As Leonard shows, Holt believed wholeheartedly that President Jefferson Davis and other Confederate leaders were part of the plot to kill Lincoln, Johnson and Seward, and as a result he devoted considerable time and energy at the trial to introducing evidence of this larger conspiracy.³² But, as Leonard shows, Holt's steadfast belief in the involvement of Davis and other high-ranking Confederates led him to make a number of errors of judgment that later harmed his reputation as Judge Advocate General.³³

While *Lincoln's Forgotten Ally* is a good book, it could be better. Leonard provides little linkage between Holt's tenure as the Judge Advocate General and the dramatic evolution of military law that occurred during the years that he served as Lincoln's top military lawyer. Prior to Holt's service, the senior Army judge advocate did not have supervisory authority over judge advocates in the field, much less the

²⁹ *Id.* at 171.

³⁰ *Id.*

³¹ *Id.* at 200–44.

³² *Id.* at 202–06; 212–13.

³³ *Id.* at 214–16. For example, one of Holt's errors in judgment was to use the perjured testimony from Sanford Conover, who testified at the military commission that Confederate agents in Canada "had discussed the assassination conspiracy and other dastardly plans" to harm Union leaders. This testimony was later revealed to be a fabrication, and some believed that Holt had known this testimony was false but nevertheless presented it as true so as to incriminate Jefferson Davis and other Confederate leaders. *Id.* at 215.

power to review their legal work. This changed when Congress created the office of “Judge Advocate General” and gave the JAG powers of both supervision and review.³⁴ This is why both Holt and Lincoln were so busy reviewing courts-martial, and why they developed such a close working relationship—because Holt now was *required* to exercise authority over Army legal operations in the field, to include reviewing serious courts-martial.³⁵

Similarly, *Lincoln’s Forgotten Ally* should have explained the real importance of the Bureau of Military Justice in the Army, and why it was such a unique departure from the past. For the first time in history, Congress gave the Judge Advocate General a professional staff of uniformed lawyers to assist him. The existence of this legal staff—and Holt’s role in hiring its members, organizing it, and deciding what it would do—was the genesis of the modern Corps of judge advocates that exist in all the U.S. Armed Forces today.³⁶

A final point: *Lincoln’s Forgotten Ally* would be a better book if it explained that Holt was important to Lincoln because of the way in which Holt used the law, and his powers as Judge Advocate General, to achieve the Union’s victory. For example, at the end of her discussion of the well-known military commission that tried Clement Vallandigham, Leonard concludes by writing that the Supreme Court “ruled against the defendant.”³⁷ But she misses the two most important points about *Ex parte Vallandigham* and Holt’s role in the case: that this was the only time in history that a JAG argued a case before the Supreme Court; and that he won not on the facts but on jurisdictional grounds. This latter point is critical because Holt’s victory in the Supreme Court meant that, in convincing the Court that it did not have the authority to review what occurred at a military commission, the Union was now able to convene these military tribunals—and prosecute civilian dissidents—without any judicial oversight.³⁸ When Leonard discusses the 1866 *Milligan* case, in which the Court reversed its holding in *Vallandigham*, she should have mentioned that Holt did not argue the case before the Court (although it was a 5-4 vote and arguably might have made a difference if he had) and her claim that that the *Milligan* decision “by implication revived

³⁴ THE ARMY LAWYER, *supra* note 6, at 49.

³⁵ *Id.* at 51.

³⁶ *Id.* at 50.

³⁷ *Id.* at 184.

³⁸ KASTENBERG, *supra* note 1, at 113.

questions about the jurisdiction of other military commissions”³⁹ is not accurate. One only needs to look at the hundreds of military commissions that Holt’s judge advocates convened in the occupied southern states after 1866.

As Pulitzer Prize winning historian James McPherson correctly observes, “Elizabeth Leonard has rescued Joseph Holt from undeserved historical obscurity,”⁴⁰ and for that rescue, judge advocates owe her a debt of gratitude. *Lincoln’s Forgotten Ally* is valuable because it is the only window we have into Holt as both the Judge Advocate General and a man with human flaws and personal challenges similar to the rest of us. Those with an interest in military legal history will want to read this good book.

³⁹ LEONARD, *supra* note 2, at 244.

⁴⁰ *Id.* back cover.

THE RELUCTANT COMMUNIST: MY DESERTION, COURT-MARTIAL, AND FORTY-YEAR IMPRISONMENT IN NORTH KOREA¹

REVIEWED BY MAJOR CLAY A. COMPTON*

I did not understand that the country I was seeking temporary refuge in was literally a giant, demented prison; once someone goes there, they almost never, ever get out.²

I. Introduction

In *The Reluctant Communist*, Sergeant Charles Robert Jenkins, with the assistance of Jim Frederick,³ recounts his desertion from the U.S. Army and the nearly half-century of captivity he spent in the most secretive, totalitarian, and militarized state in the world.⁴ Jenkins weaves a compelling story of desperation, survival, and regret. Many fundamental truths of life are to be found throughout this story, most

* Judge Advocate, U.S. Army. Student, 60th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

¹ CHARLES ROBERT JENKINS WITH JIM FREDERICK, *THE RELUCTANT COMMUNIST: MY DESERTION, COURT-MARTIAL, AND FORTY-YEAR IMPRISONMENT IN NORTH KOREA* (2008).

² *Id.* at 21.

³ Jim Frederick is the Managing Editor of Time.com and the author of *Black Hearts: One Platoon's Descent into Madness in Iraq's Triangle of Death* (2010). He served as Time's Senior Editor in London from August 2006 to January 2008. Before that, he worked as Time's Tokyo Bureau Chief for four years. It is during his time in Tokyo that he met Jenkins and co-authored *The Reluctant Communist*. While Frederick is listed as a co-author of the book, based on the prose from the *Prelude* onward, it is highly likely that Frederick wrote the *Foreword*, but Mr. Jenkins was the primary author for the remainder of the book. JIM FREDERICK, <http://jimfrederick.com/Site/about.html> (last visited Apr. 16, 2012).

⁴ See U.S. DEP'T OF STATE (Apr. 29, 2011), <http://www.state.gov/r/pa/ei/bgn/2792.htm#> (The North Korean military accounts for 20% of men between the ages of seventeen and fifty-four, for a total of 1.2 million people. Military spending accounts for a quarter of the nation's gross national product. Due to North Korea's extreme isolationism, much of what is known about the state is based upon estimates from the U.S. Central Intelligence Agency.). See also U.S. DEP'T OF STATE, http://www.travel.state.gov/travel/cis_pa_tw/cis/cis_988.html (last visited Apr. 16, 2012) (The United States does not have an embassy or consulate in North Korea and continues to strongly advise against travel to North Korea.). See generally *North Korea Country Profile*, BBC NEWS http://news.bbc.co.uk/2/hi/asia-pacific/country_profiles/1131421.stm (last visited Apr. 16, 2012).

notable being “the choices we make dictate the life that we lead.”⁵ How we handle the adversity of life, whether self-imposed or not, is often determined by our resiliency.⁶

II. A Desertion of Desperation

Resilience is defined as “an ability to recover from or adjust easily to misfortune or change.”⁷ According to the American Psychology Association (APA), many factors contribute to resilience, with the most important being the existence of supportive and caring relationships.⁸ Other factors that contribute to resilience include the ability to make realistic plans and carry them out; the capacity to maintain positive self-esteem and confidence in oneself; the aptitude to exercise good communication and problem-solving skills; and the ability to manage one’s impulses and emotions.⁹ In late 1964 and early 1965, Jenkins’s resilience, or his ability to “bounce back from adversity,”¹⁰ was virtually nonexistent.¹¹

Jenkins’s journey across the demilitarized zone (DMZ) and into what he calls a “demented prison”¹² was merely a means to an end¹³: an escape

⁵ THE RENAISSANCE MAN (Touchstone Pictures 1994).

⁶ *The Road to Resilience*, AM. PSYCHOL. ASS’N, <http://www.apa.org/helpcenter/road-resilience.aspx> (last visited Apr. 16, 2012). The American Psychology Association is a professional organization based in Washington, D.C., consisting of more than 154,000 psychologists, the largest association of psychologists in the world. The purpose of this organization is to advance the field of psychology through research and education.

⁷ MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/resilience> (last visited Apr. 16, 2012).

⁸ *The Road to Resilience*, *supra* note 7. Though cultural differences may reflect different factors that affect resilience, the most important factor involves having “caring and supportive” relationships. These relationships promote strong bonds based on love and trust.

⁹ *Id.*

¹⁰ See Dorothy E. Hill, *How Do We Bounce Back from Adversity?*, PSYCHOL. TODAY, <http://www.psychologytoday.com/articles/200201/how-do-we-bounce-back-adversity> (last visited Apr. 16, 2012). See also Joshua D. Margolis & Paul G. Stoltz, *How to Bounce Back from Adversity*, HARV. BUS. REV., <http://www.scribd.com/doc/34245448/How-to-Bounce-Back-From-Adversity> (last visited Apr. 16, 2012). The concept of bouncing back from adversity and training for resiliency has also become important in the business community to increase productivity.

¹¹ JENKINS, *supra* note 1, at 17–25.

¹² *Id.* at 21.

¹³ *Id.* at 20.

from fear and depression.¹⁴ Jenkins's circumstances were not that different from those of many Soldiers, both past and present. What makes his story unique and heartbreaking is his response to those circumstances.

In September 1964, Jenkins found himself stationed at a remote guard post, close to the DMZ, where he led a squad of twelve men. He was a rather young, inexperienced non-commissioned officer who had very few adequate coping mechanisms to deal with major life crises. Soon after his arrival to the DMZ, he learned of his impending deployment to Vietnam and, with no one to confide or trust in, he began "looking for a way out." Seeing no other alternatives, he decided to abandon his men and desert the Army.¹⁵

Jenkins claims that he never intended to defect to North Korea, but rather sought "diplomatic exchange for passage" back to the United States from the Russians.¹⁶ This is a clear indication that he did not have the ability to make realistic plans or control his impulses, which are two important factors effecting resiliency.¹⁷ Jenkins would quickly learn that the North Korean regime, unlike other communist regimes, did not take diplomatic orders from the Soviet Union.¹⁸ Thus began Jenkins's forty-year existence of survival and regret.¹⁹

Jenkins's story of desperation and hopelessness is not lost on today's Soldiers. Multiple combat tours and countless hardships have caused the U.S. Army to focus more aggressively on the overall concept of mental fitness, and resilience skills specifically.²⁰ The Army has implemented the Comprehensive Soldier Fitness program in an effort to raise mental

¹⁴ *Id.* at 19.

¹⁵ *Id.* at 16–24.

¹⁶ *Id.* at 20.

¹⁷ *The Road to Resilience*, *supra* note 7.

¹⁸ JENKINS, *supra* note 1, at 50.

¹⁹ *Id.* at 24–25.

²⁰ Jessica Reed & Stefanie Love, *Army Developing Master Resiliency Training*, ARMY.MIL (Aug. 5, 2009), <http://www.army.mil/article/25494/army-developing-master-resiliency-training/>.

fitness to the same level of importance as physical fitness²¹ and provide Soldiers effective tools to adapt to adversity.²²

III. “As Water Moulds Itself to the Pitcher”²³

The ability to adapt to adversity depends on the individual’s ability to adopt an effective strategy that promotes resilience. The APA provides several ways in which an individual can build resilience, including establishing positive and supportive relationships, avoiding a fatalistic mindset, developing realistic goals, taking decisive actions in response to the adversity, looking beyond the adversity, and maintaining a positive outlook.²⁴ Jenkins’s failure to adopt an effective resilience strategy resulted in his desertion and ultimately led him to become bitter and filled with rage, often turning that anger inward.²⁵

Jenkins recognized early in his captivity that in order to simply survive, he had to learn to adapt to his new, alien world.²⁶ The one saving grace for Jenkins was the fact that he was not alone. There were three other American deserters with whom he lived. Though their lives were deplorable by any international standard, they lived better than most in North Korea because they were considered cold war trophies. However, Jenkins still suffered from beatings, hunger, and mental torture on a regular basis.²⁷ Food was so scarce that he would often go days without eating.²⁸ Necessities in the developed world, like running water, heat, and electricity, were luxuries north of the DMZ.²⁹ His condition was so deplorable that he often wished he were dead.³⁰

²¹ Will King, *Comprehensive Soldier Fitness: Army Leaders See Program as a New Way to Build Soldiers’ Resilience*, FORT LEAVENWORTH LAMP (July 30, 2009), <http://www.army.mil/article/25223/comprehensive-soldier-fitness-army-leaders-see-program-as-way-to-build-soldiers-resiliency/>.

²² *Resilience: Build Skills to Endure Hardships*, MAYO CLINIC (July 19, 2011), <http://www.mayoclinic.com/health/resilience/MH00078>.

²³ The full quotation reads as follows: “The wise adapt themselves to circumstances, as water moulds itself to the pitcher.” *Famous Chinese Proverbs*, INSPIRING QUOTES AND STORIES, <http://www.inspiring-quotes-and-stories.com/chinese-proverbs.html> (last visited Apr. 16, 2012).

²⁴ *The Road to Resilience*, *supra* note 7.

²⁵ JENKINS, *supra* note 1, at 65.

²⁶ *Id.* at 39.

²⁷ *Id.* at 40.

²⁸ *Id.* at 49.

²⁹ *Id.* at 43 and 124.

³⁰ *Id.* at 40.

Jenkins and his fellow deserters were forced to fend for themselves in order to survive. They became experts in “backwoods fishing wisdom” and learned to improvise. They scavenged nylon from automobile tires for netting and lead from car batteries for weights. They used pig’s blood to toughen the netting and pine bark as floats.³¹ Jenkins recounts an entertaining story where they were able to acquire a small boat which would not stay afloat due to the amount of holes in it. He and his rag tag deserters snuck into a local power plant and stole a bag of coal tar to repair the boat.³² Stealing from the North Korean government is an offense punishable by death. Jenkins and the other deserters often did dangerous things because they felt like they were already dead.³³

However, Jenkins’s ability to develop positive, supportive relationships was hampered by the fact that he now lived in a world surrounded by enemies,³⁴ and a world where no one could be trusted, not even his closest friends.³⁵ The North Koreans tried to drive a wedge between the Americans from the beginning by encouraging them to turn against one another. One of the four American deserters, James Dresnok, often took advantage of this to gain favor with the North Koreans. Eventually the four American were split into two groups, leaving Jenkins to deal with Dresnok alone. Over the next seven years Jenkins would receive dozens of beatings at the hands of Dresnok on behalf of the North Koreans. Jenkins recalls that Dresnok chose his path of self-preservation by pleasing the North Koreans rather than joining Jenkins in a “desperate fight of us versus them.”³⁶ By 1966, Jenkins gave up any hope of escaping North Korea and resigned himself to the fact that he would die in North Korea.³⁷ In an act of sheer desperation, Jenkins, like so many Soldiers today, attempted to take his own life.³⁸

³¹ *Id.* at 50–51.

³² *Id.* at 47.

³³ *Id.* at 41.

³⁴ *Id.* at 65.

³⁵ *Id.* at 35.

³⁶ *Id.* at 65.

³⁷ *Id.* at 50.

³⁸ *Id.* at 66.

IV. “While There Is Life There Is Hope”³⁹

Resilience training is all the more vital given the suicide epidemic that currently plagues the Department of Defense and the U.S. Army specifically.⁴⁰ Despite the U.S. Army’s recognition of the suicide epidemic, and its subsequent awareness campaign, suicide continues to persist.⁴¹ In fact, more servicemembers have been lost to suicide than to combat in the past two years.⁴² Sadly, the U.S. Army recently saw its worst month in terms of numbers of Soldiers lost to suicide.⁴³ In an attempt to more effectively combat suicide, the U.S. Army, in conjunction with the National Institute of Mental Health, has initiated a study to assess risk and resilience in Soldiers.⁴⁴ Additionally, Fort Hood, one of the hardest hit installations regarding Soldier suicide,⁴⁵ has built a “Resiliency Campus” to help build mentally stronger Soldiers.⁴⁶

Protective factors that promote resilience, such as establishing and fostering positive personal relationships, can help reduce the likelihood of suicide. Additionally, the Centers for Disease Control recognize that risk factors such as isolation and hopelessness reduce resilience and are often associated with suicide.⁴⁷ The ultimate objective in suicide

³⁹ Quoting Marcus Cicero. See Kate Le Page, *Anti-Suicide Quotes—Help for Suicidal or Depressed at Christmas*, PSYCHOL.@SUITE101, <http://kate-le-page.suite101.com/anti-suicide-quotes---help-for-suicidal-or-depressed-at-christmas-a323825> (last visited Apr. 16, 2012).

⁴⁰ *Family Suicide Prevention and Awareness Training*, ARMY.MIL (Dec. 3, 2009), <http://www.army.mil/article/31298/family-suicide-prevention-and-awareness-training/>.

⁴¹ Karen Parrish, *DOD, Services Work to Prevent Suicide*, DOD LIVE, <http://www.dodlive.mil/index.php/2011/09/dod-services-work-to-prevent-suicides/> (last visited Apr. 16, 2012).

⁴² John Donnelly, *More Troops Lost to Suicide*, CONGRESS.ORG, http://www.congress.org/news/2011/01/24/more_troops_lost_to_suicide (last visited Apr. 16, 2012).

⁴³ Greg Jaffe, *Army Suicides Set Record in July*, WASH. POST (Aug. 12, 2011), http://www.washingtonpost.com/world/national-security/army-suicides-set-record-in-july/2011/08/12/gIQAfGIBJ_story.html.

⁴⁴ *The Making of Army STARRS: An Overview*, NAT’L INST. OF MENTAL HEALTH, <http://www.nimh.nih.gov/health/topics/suicide-prevention/suicide-prevention-studies/the-making-of-army-starrs-an-overview.shtml> (last visited Apr. 16, 2012).

⁴⁵ Yochi J. Dreazen, *Base Hit by Stress Disorder*, WALL ST. J., Nov. 6, 2009, at A4.

⁴⁶ Heather Graham-Ashley, *Suicide Prevention: Resiliency Campus Helps Soldiers Build Strength to Handle Stress, Battle Suicide*, FORT HOOD SENTINEL (Sept. 30, 2010), <http://www.forthood.sentinel.com/story.php?id=4920>.

⁴⁷ *Suicide: Risk and Protective Factors*, CTR. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/ViolencePrevention/suicide/riskprotectivefactors.html> (last visited Apr. 16, 2012).

prevention is to increase an individual's protective factors, while at the same time reducing the risk factors.⁴⁸

Jenkins's outlook on life changed dramatically when he met his soon-to-be wife, Hitomi,⁴⁹ and even more so with the birth of their children.⁵⁰ Soon after Jenkins and Hitomi were married, the North Korean government moved the Americans and their expanding families back together.⁵¹ By the early 1990s, the other American deserters were either dead or had developed serious health conditions, leaving Jenkins to carry most of the weight for the families' survival.⁵² Foremost in this endeavor was to ensure their apartment building was heated and food was on the table. Their building was heated by a coal-burning furnace and they received twenty tons of coal each winter. Heating the building was a monumental task. Jenkins had to first sift rock out of the coal and then move the coal into their basement for storage. He would then have to stabilize the coal to make sure it would burn slowly. This was done by mixing the coal with clay and forming bricks. It would take at least half a day to build a good fire for the boiler and, if left extinguished for more than a few hours during the winter, the water would freeze, bursting the pipes.⁵³ Thus, maintaining a proper fire was of significant importance beyond simply keeping the winter cold at bay. Three times a day, he would stoke and attend to the fire. Even still, the apartment would remain intolerably cold.⁵⁴ Additionally, all drinking water had to be boiled⁵⁵ and much of their food had to be grown and harvested.⁵⁶ Without electricity most of the time, Jenkins was forced to find creative solutions for survival. Candles were extremely hard to find and were of extremely poor quality. Jenkins learned to make his own using paraffin and stubs of crayons.⁵⁷

Jenkins truly lived "a life of quiet desperation,"⁵⁸ and, although his life did not get any easier, he now had something to live for besides

⁴⁸ *Suicide Prevention*, CTR. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/ViolencePrevention/suicide/index.html> (last visited Apr. 16, 2012).

⁴⁹ JENKINS, *supra* note 1, at 90–94.

⁵⁰ *Id.* at 121–35.

⁵¹ *Id.* at 104 and 108.

⁵² *Id.* at 122.

⁵³ *Id.*

⁵⁴ *Id.* at 123.

⁵⁵ *Id.* at 125.

⁵⁶ *Id.* at 128–29.

⁵⁷ *Id.* at 126.

⁵⁸ *Id.* at xxxi.

himself. He now had a purpose in life: to care for and protect his family.⁵⁹ As a holocaust survivor and psychiatrist once wrote, “A man who becomes conscious of the responsibility he bears toward a human being who affectionately waits for him, or to an unfinished work, will never be able to throw away his life. He knows the ‘why’ for his existence, and will be able to bear almost any ‘how.’”⁶⁰

V. Conclusion

The Reluctant Communist is a fascinating tale of a Soldier’s desertion, his forty-year captivity behind the lines of the world’s most isolated and totalitarian regimes, and the love that saved his life. It is a tale of inspiration that is compelling, truly meaningful, and a pleasure to read. Many lessons can be gleaned from this account, but from a Soldier’s point of view, the importance of resilience cannot be understated. In today’s Army, where adversity abounds and suicide plagues our ranks, the concept of resilience is vital to mission success.

As an organization, the U.S. Army has highlighted the importance of physical fitness, but today’s Soldier and today’s adversities require a more holistic approach to fitness. We must equip Soldiers to adapt to their adversity and build resilience so that they do not become just another statistic. Jenkins shows us that, even in the most dire of circumstances, survival is not the end-state, but the daily commitment to overcome adversity.

⁵⁹ *Id.* at 121–35.

⁶⁰ VIKTOR E. FRANKL, *MAN’S SEARCH FOR MEANING* 101(1997).

ON CHINA¹

REVIEWED BY LIEUTENANT COMMANDER TODD KLINE*

*We cannot enter into alliance with neighboring princes
until we are acquainted with their designs.*²

I. Introduction

On July 9, 1971, in the midst of the Cold War and the latter days of the Vietnam Conflict, a delegation of American officials arrived in Beijing on a secret mission. The goal: to explore the opening of formal diplomatic ties with the People's Republic of China.³ As National Security Advisor to President Richard Nixon and leader of the team, Henry Kissinger⁴ was in a unique position to directly observe and participate at the inception of the United States' formal relationship with the most populous communist country on the planet.⁵

In *On China*, Kissinger applies his version of *realpolitik*⁶ to U.S.–Chinese political relations; a subject made timely by China's more recent economic and military ascendancy. He asserts that China's foreign policy is based on pragmatic self-interest and that any effort to gain insight into China's modern and future diplomatic strategy must “begin with a basic

* Judge Advocate, U.S. Navy. Student, 60th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

¹ HENRY KISSINGER, *ON CHINA* (2011).

² SUN TZU WU, *THE ART OF WAR* (The Military Service Publishing Co., 1957).

³ KISSINGER, *supra* note 1, at 236–37; WALTER ISAACSON, *KISSINGER* 339–45 (1992).

⁴ WALTER ISAACSON, *KISSINGER* 135–53, 502–10 (1992) (Kissinger served as National Security Advisor to President Richard Nixon from January 20, 1969, to November 3, 1975, and Secretary of State under President Nixon and President Gerald Ford from September 22, 1973, to January 20, 1977.); ROBERT DALLECK, *NIXON AND KISSINGER* 515–16 (2007) (Kissinger won the Nobel Peace Prize in October 1973 for his role in ending the Vietnam Conflict).

⁵ KISSINGER, *supra* note 1, at 236–37.

⁶ HENRY KISSINGER, *DIPLOMACY* 137 (1994). The author defines *realpolitik* as “foreign policy based on calculations of power and the national interest.” As the most well-known adherent of *realpolitik*, Kissinger's application eschews national strategy based wholly or in part on philosophical, ideological, or ethical principles in favor of practical considerations of national security and projection of State power. “In paraphrasing Goethe, Kissinger states that ‘If I had to choose between justice and disorder, on the one hand, and injustice and order, on the other, I would always choose the latter,’ as ‘Moral crusaders . . . made dangerous statesmen.’” ISAACSON, *supra* note 4, at 653.

appreciation of its traditional context.”⁷ Kissinger combines a digestible survey of China’s ancient cultural history⁸ with a first-hand account of the interaction between Chinese and U.S. leaders from 1971 to the present.⁹ He succeeds in illustrating China’s attempts to separate itself from its more than two thousand year history through violent revolution and country-wide intellectual purges,¹⁰ only to be drawn inexorably back to its original cultural foundations.¹¹

Considering China’s unique culture to be its greatest strength,¹² Kissinger argues that its approach to foreign policy is grounded in its own unique development. However, as the author transitions his narrative into the modern era, when the majority of China’s purges occur,¹³ what began as a seemingly objective and incisive first-person view of American–Chinese diplomatic history is marred by a progressively simplistic approach, fawning praise of China’s 20th century leaders, and Kissinger’s own adherence to a *realpolitik* worldview. Mr. Kissinger’s extended coverage and emphasis solely on perceived Chinese political triumphs—without providing any meaningful discussion or analysis of its failures—ultimately detracts from Mr. Kissinger’s overarching goal of providing a compelling strategy for future U.S. relations with China.

⁷ KISSINGER, *supra* note 1, at 3.

⁸ *Id.* at 5–32.

⁹ *Id.* at 202–13, 306–20, 322–27, 396–407, 428–34.

¹⁰ JONATHAN SPENCE, *THE GATE OF HEAVENLY PEACE* 341–51 (1981). Many of the government-instituted purges resulted in the forced removal of so-called intellectuals (teachers, administrators, scientists, military officials of all ranks, etc.) from public positions in China’s primarily urban centers. Those that were not killed outright were transported into China’s rural hinterlands so that they could learn a more proletarian trade from the farmers and peasants who worked the land by hand. The purges resulted in extensive and widespread violence as the Chinese government’s policy fostered an extreme prejudice within the worker class toward members of the intellectual group. Ultimately, Mao’s efforts created a disastrous lack of specialized expertise in essential industries, particularly food production.

¹¹ KISSINGER, *supra* note 1, at 107, 181, 193–94, 196, 209–10.

¹² *Id.* at 2–32.

¹³ JOHN KING FAIRBANK, *THE UNITED STATES AND CHINA* 369–75, 392–400 (1971).

II. “Those Who Cannot Remember the Past Are Condemned to Fulfill It”¹⁴

Kissinger opens *On China* by describing a 1962 strategy meeting between Mao Zedong (Mao), China’s Communist leader, and his primary military and political heads.¹⁵ In proposing a specific course of action, Mao cites a war that China fought with India over 1300 years earlier.¹⁶ Only in China, argues Kissinger, could a speaker refer to such an ancient historical event and expect such to not only be instantly understood by his listeners, but also considered highly relevant.¹⁷ China’s history, its cultural tradition, is completely ingrained in its social fabric. Often stated as a negative, Kissinger attempts to repurpose Satayana’s frequently misquoted maxim – those who cannot remember the past are condemned to fulfill it—as China’s core strength. He is persuasive in stating that China’s cultural history is simply too pervasive and long-lasting for one man to stand up against, even one who was responsible for enormous social, cultural, and political upheaval.¹⁸ Despite Mao’s explicitly stated efforts¹⁹ to violently separate China from its historical

¹⁴ GEORGE SATAYANA, REASON IN COMMON SENSE 284 (Dover Publ’ns, Inc., 1980).

¹⁵ KISSINGER, *supra* note 1, at 1. At the time, “Chinese and Indian troops were locked in a standoff over the two countries’ disputed border. The dispute arose over different versions of history: India claimed the frontier demarcated during British rule, China the limits of imperial China.” Desiring to end the dispute, “Mao told his commanders . . . [that China and India] had previously fought ‘one and a half’ wars.” The fact that “[t]he first war had occurred over 1,300 years earlier. . .” signified that “China and India were not doomed to perpetual enmity.”

¹⁶ *Id.*

¹⁷ *Id.* at 2 (Mr. Kissinger fails to note that another aspect of Mao’s audience’s rapid acceptance of his strategy could be ascribed to their general fear of the often unpredictable leader. The author’s tendency to ascribe the positive to China’s leaders rather than the negative continues throughout the book.).

¹⁸ *Id.* at 111–12.

An ambivalent combination of faith in the Chinese people and disdain for its traditions enabled Mao to carry out an astonishing tour de force: an impoverished society just emerging from a rending civil war tore itself apart at ever shorter intervals and, during that process, fought wars with the United States and India; challenged the Soviet Union, and restored the frontiers of the Chinese state to nearly their maximum historic extent.

Id.

¹⁹ ANDRE MALRAUX, ANTI-MEMOIRS (Terence Kilmartin trans., American ed. 1968) (Malraux quotes Mao: “The thought, culture, and customs which brought China to where we found her must disappear. . . . Thought, culture, customs must be born of struggle, and the struggle must continue for as long as there is still danger of a return to the past.”).

traditions through bloody revolution and savage cultural purges,²⁰ in Mao's personal view, he is unsuccessful.²¹

III. Do Not Pass *Go*, Do Not Collect Two Hundred Dollars

Additionally, Kissinger argues the key to understanding and predicting the actions of this resilient culture may be found in the rules of one of its ancient board games.²² In 2004, Dr. David Lai²³ authored *Learning from the Stones: A Go Approach to Mastering China's Strategic Concept, Shi*.²⁴ Per Dr. Lai, *Go* is a micro-physical extension, in the form of an ancient Chinese board game, of the principles espoused by Sun Tzu.²⁵ Mr. Kissinger heavily relies on Dr. Lai's premise that the rules of *Go* provide insight into Chinese strategic thinking²⁶ as they serve as "a living reflection of Chinese philosophy, culture, strategic thinking, warfare, military tactics, and diplomatic bargaining."²⁷ Mr. Kissinger uses Dr. Lai's premise to bolster his argument of Chinese culture as supreme. While Dr. Lai writes that *Go* should be used as one tool among

²⁰ KISSINGER, *supra* note 1, at 93–94.

²¹ *Id.* at 110 (In response to a compliment by President Nixon during a February 1972 meeting that he had changed an ancient civilization, Mao stated, "I haven't been able to change it. I've only been able to change a few places in the vicinity of Beijing.").

²² *Id.* at 23–25.

²³ Dr. David Lai is a Research Professor of Asian Security Studies at the Strategic Studies Institute at the United States Army War College. At the time of publication, Lai served as faculty of the International Security Studies Department at the US Air War College.

²⁴ David Lai, *Learning from the Stones: A Go Approach to Mastering China's Strategic Concept, Shi* (U.S. Army War Coll. Strategic Stud. Inst.) (2004).

²⁵ *Id.* at 3–8. Per Lai, *Go* represents "a concept, shi, putatively a strategy China uses to exploit the 'strategic configuration of power' to its advantage and maximize its ability to preserve its national independence and develop its comprehensive national power." The primary principle in *Go* concerns strategically surrounding one's opponent. It may be described as overwhelming encirclement. Lai writes, "Indeed, *shi* is such an important concept that Sun Tzu . . . uses it for the title of a chapter in his *Art of War*, the world's oldest military treasure." As Sun Tzu puts it, "those skilled at making the enemy move do so by creating a situation to which he must conform." *Id.* at 1–3.

²⁶ KISSINGER, *supra* note 1, at 23–25, 89, 103–04, 131, 156, 188, 309, 342, 345–46, 354–55, 367.

²⁷ Lai, *supra* note 24, at v. The author writes: "The basic objective of the game is to secure more space on the board (or more territory). The players do so by encircling more space on the board. The competition for more territory thus leads to invasion, engagement, confrontation, and war fighting. Sun Tzu's thoughts and the essential features of the Chinese way of war are all played out in the game. As the game unfolds, it becomes a war with multiple campaigns and battlefronts. Or in terms of international affairs, it is a competition between two nations over multiple interest areas." *Id.* at 8.

several when analyzing Chinese strategic thinking,²⁸ Mr. Kissinger posits that *Go* strategy is the secret key to the analysis and on a fundamental level, informs and motivates all Chinese policy, foreign and domestic. Equating *Go* strategy with Sun Tzu, Kissinger goes so far as to state that “[O]ne could argue that the disregard of [these] precepts was importantly responsible for America’s frustration in its Asian wars.”²⁹ While an interesting proposition, he provides little justification or rationale for such a sweeping opinion.

Kissinger’s application of *Go* is surprisingly simplistic for someone of his stature and professional experience. He argues that just as the Chinese operate along the rules of *Go*, America functions along the rules of chess.³⁰ His argument is very attractive at first read—that a board game may hold the secret key to Chinese thinking.³¹ However, instead of approaching the idea critically, he accepts it de facto and expects the reader to do the same through the selective use of historical events.³² To bolster this absolute view of *Go* as the key, Kissinger applies it to his own personal experiences with Chinese leadership.³³

IV. Mao and Me³⁴

Notably pleased with his own role, Kissinger is at his best when detailing his first-hand involvement in diplomatic efforts between the United States and China.³⁵ These summits, beginning with the secret meeting in 1972, provide a fascinating internal view into historical diplomatic process in action. His vivid description of the global political environment in which these discussions took place creates a necessary context in which the reader must consider them. Kissinger’s depiction of

²⁸ *Id.* at 27–31.

²⁹ KISSINGER, *supra* note 1, at 25–26.

³⁰ *Id.* at 23–25, 103 (Kissinger states, “The chess player aims for total victory. The [*Go*] player seeks relative advantage.”).

³¹ *Id.* at 23–26.

³² *Id.* at 89 (Chinese civil war 1945–1949), 103–04 (Cold War), 131 (Korean War), 345–46 (Vietnam conflicts).

³³ *Id.* at 103–04, 309.

³⁴ While it is traditional in many Western cultures for an individual’s surname to follow their given name, in many East Asian countries such as Japan, Vietnam, and China, the order is reversed.

³⁵ *Id.* at 202–478.

Chinese diplomatic processes is quite effective at illuminating the overwhelmingly nuanced world of inter-governmental relations.³⁶

Comprised of diplomatic nuances so subtle as to appear practically unintelligible to the outside observer, Kissinger portrays a world that redefines notions of modern court intrigue.³⁷ He serves as both guide and translator for the reader as he describes meetings with Mao³⁸ and subsequent Chinese leaders, Deng Xiaoping (Deng)³⁹ and Jiang Zemin (Jiang).⁴⁰ Kissinger's respect for these men is unequivocal as he describes the various political and personal challenges that each faced during their tenure as China's leader.⁴¹

Previously only lurking in the background, Kissinger's *realpolitik* world view intrudes more obviously as he transitions from observation to analysis. Often referring to leaders such as Mao, Deng, and his personal favorite, Zhou Enlai (Zhou),⁴² in a state of naked awe, he praises the political successes of each leader. This praise is unlimited even when their successes came at great cost in international diplomatic capital or human lives.⁴³

This one-sided tendency begins during his coverage of Mao's largest revolutionary efforts, the Great Leap Forward and the intellectual purges of the Cultural Revolution. By some estimates, these two events cost China up to fifteen million lives,⁴⁴ yet Kissinger spends little time critiquing the leadership decisions that led to such enormous loss of life. First assumed to be purposeful for brevity's sake, what began as an

³⁶ *Id.* at 13, 160, 356, 365–66, 383, 426 (discussing the necessity of ambiguity in diplomacy, the importance of form in ambassadorial talks, and the impact of effective statesmanship).

³⁷ *Id.* at 13, 160, 356, 365–66, 383, 426.

³⁸ *Id.* at 257–62, 283–85, 306–17.

³⁹ *Id.* at 301, 338–39, 399–400, 430–44.

⁴⁰ *Id.* at 430–34, 451–56, 483–84.

⁴¹ *Id.* at 342 (describing Deng, Kissinger writes, “As time went on, I developed enormous respect for this doughty little man with the melancholy eyes who had maintained his convictions and sense of proportion in the face of extraordinary vicissitudes and who would, in time, renew his country.”).

⁴² *Id.* at 241–42.

⁴³ *Id.* at 195–96, 422–27, 500.

⁴⁴ JUDITH BANNISTER, *CHINA'S CHANGING POPULATION* 85 (1984) (“[T]he official data imply that those four years [1958–1961] saw 15 million excess deaths attributable to the Great Leap Forward.”); *but see also* MAURICE J. MEISNER, *MAO'S CHINA AND AFTER: A HISTORY OF THE PEOPLE'S REPUBLIC* 237 (1999) (noting that some scholars place the total death figure at thirty million).

unsettling theme in his analysis evolves into a truly frightening approach to incidents at Tiananmen Square in 1989.⁴⁵

V. Televised for All the World to See

Kissinger's reluctance to judge or criticize certain decisions made by Chinese leaders is exemplified in his treatment of the 1989 Tiananmen Square crisis.⁴⁶ Despite devoting thirty-one pages to a chapter titled "Tiananmen," Kissinger obstinately refuses to pass any level of judgment upon the Chinese government's response to the civilian demonstrations.⁴⁷ In a book where the author takes great care to explain the potentially hidden meaning behind each action or gesture of Mao,⁴⁸ in his treatment of Tiananmen, an event that had enormous geo-political consequences for China,⁴⁹ he provides only the following concerning the event itself:

This is not the place to examine the events that led to the tragedy at Tiananmen Square; each side has different perceptions depending on the various, often conflicting, origins of their participation in the crisis. The student unrest started as a demand for remedies to specific grievances. But the occupation of the main square of a country's capital, even when completely peaceful, is also a tactic to demonstrate the impotence of the government, to weaken it, and to tempt it into rash acts, putting it at a disadvantage.⁵⁰

⁴⁵ KISSINGER, *supra* note 1, at 408–39.

⁴⁶ *Id.*

⁴⁷ *Id.* at 410–13.

⁴⁸ *Id.* at 256–57. Kissinger recounts his first meeting with Mao,

[W]e were taken directly to Mao's study, a room of modest size with bookshelves lining three walls filled with manuscripts in a state of considerable disarray. Books covered the tables and were piled up on the floor. A simple wooden bed stood in a corner. The all-powerful ruler of the world's most populous nation wished to be perceived as a philosopher-king who had no need to buttress his authority with traditional symbols of majesty.

Id.

⁴⁹ *Id.* at 411–22.

⁵⁰ *Id.* at 411.

He cold-bloodedly describes the event exclusively as “a harsh suppression of the protest”⁵¹ with no further description or elaboration, except “Over Tiananmen, the Chinese leaders had opted for political stability.”⁵² A reader who may be unfamiliar with the events of June 4, 1989, will have to look outside of *On China* for the facts.⁵³ In this book, Kissinger writes extensively on the international political repercussions that China encountered following the event. He notes that China was very surprised at the international reaction, as it viewed the event as a wholly internal affair.⁵⁴ China’s leaders were not interested in how other nations maintained order within their respective borders; they expected the same indifference in return. Kissinger focuses solely on how the Chinese leadership addressed the aftermath of Tiananmen and moved past it.⁵⁵ While certainly relevant, this one-sided approach, to include the purposeful omission of even the most basic recitation of the facts, is inexcusable. Kissinger’s entire analysis is colored irrevocably by his chilling advocacy of a *realpolitik* world view.

VI. Future “Co-Evolution”⁵⁶

Throughout the book, Kissinger highlights instances in which China exercised a disciplined and forward-thinking pragmatism.⁵⁷ From its

⁵¹ *Id.*

⁵² *Id.* at 422.

⁵³ See JAMES A. R. MILES, *THE LEGACY OF TIANANMEN: CHINA IN DISARRAY* (1997) (The Chinese government’s internationally televised forceful removal of protesters from Tiananmen square resulted in approximately five thousand deaths across Beijing.). In the spring of 1989, Chinese students began conducting democracy-oriented protests in and around Tiananmen Square in Beijing. By early June, after being joined by a significant number of non-students (workers and teachers), the student protesters numbered in the tens of thousands. Chinese Government efforts to forcibly remove the protesters with the Chinese military rapidly escalated into the violence on both sides. United States diplomatic cables describe Chinese troops shooting indiscriminately into crowds to include shooting fleeing civilians in the back. The cables estimate the civilian death toll at “500 to 2600 deaths, with injuries up to 10,000.” <http://www.gwu.edu/~nsarchiv/NSAEBB16/documents/index.html#d12>.

⁵⁴ KISSINGER, *supra* note 1, at 411–16.

⁵⁵ *Id.* at 408–39.

⁵⁶ *Id.* at 526 (“The appropriate label for the Sino-American relationship is less partnership than ‘co-evolution.’ It means that both countries pursue their domestic imperatives, cooperating where possible, and adjust their relations to minimize conflict. Neither side endorses all the aims of the other or presumes a total identity of interests, but both sides seek to identify and develop complementary interests.”).

⁵⁷ *Id.* at 227–28, 335–36, 456, 508–13.

historical reluctance to enter into treaties⁵⁸ to Mao's references to mutual interests—state to state cooperation that falls short of formal alliance—⁵⁹ Kissinger seems to imply China will be an asset to the United States as long as it is in China's national interest. It is difficult to separate the factual accuracy of this assertion from Kissinger's view of China through the *realpolitik* lens, but it does warrant consideration. Kissinger does provide examples in China's relationship with its neighboring states of its tendency to shift international priorities when it deems such opportune.⁶⁰ He advocates the potential for China as a strong strategic partner, yet provides evidence that this may be untenable over the long term due to the United States' emphasis on international human rights.⁶¹ Kissinger notes that "The United States and China have been not so much nation-states as continental expressions of cultural identities. Both . . . have assumed a seamless identity between their national policies and the general interests of mankind."⁶² In international cooperation with China, ideology must be "relegated to domestic management,"⁶³ and, he argues, should remain fully exempt from foreign policy. Kissinger asserts that "ideological slogans" concerning such issues as human rights and democracy should always be subordinate to pragmatic needs for international cooperation.⁶⁴

VII. Conclusion

Ultimately, Kissinger cannot separate his world view from his own experiences. The extent to which this world view impacts Kissinger's ability to analyze geo-political events, even events in which he participated personally, renders *On China* a book best reserved for those who are specifically interested in the author's application of his personal political philosophy, which is one that highly prizes the practical over the

⁵⁸ *Id.* at 283 ("Mao suggested that each side develop a clear concept of national interest and cooperate out of its own necessity. . . . In other words, each side could arm itself with whatever ideological slogans fulfilled its own domestic necessities, so long as it did not let them interfere with the need for cooperation against the Soviet danger.").

⁵⁹ *Id.* at 306–17.

⁶⁰ *Id.* at 113–18, 392–94, 434–35.

⁶¹ *Id.* at 414–39.

⁶² *Id.* at 520.

⁶³ *Id.* at 284.

⁶⁴ *Id.* (referencing a personal discussion with Mao regarding setting aside philosophical differences between the United States and China in order to oppose the "Soviet danger").

ideological. While China remains a topic of immediate relevance to the military officer, those expecting a balanced recitation and explanation of the creation and development of foreign relations between the United States and China will ultimately be disappointed.