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MILITARY LAW REVIEW

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THE U.S. POSITION ON BELLIGERENT REPRISALS UNDER THE
LAW OF ARMED CONFLICT: PAST AND PRESENT

Colonel Thomas E. Brzozowski¹

*We shall not make a man suffer because he has sinned,
but to keep him from sinning; nor shall punishment ever
have an eye to the past but to the future. It is a measure
not of anger but of precaution.*

-- Grotius, *The Law of War and
Peace*, Book Two, Chapter XX
(1625)

I. Introduction

In Shakespeare's *Henry V*, toward the end of the battle of Agincourt, French warriors kill a number of camp boys accompanying the British host. Shocked at the atrocity, one of Henry's knights cries out: "Kill the poys and the luggage! 'tis expressly against the law of arms: 'tis as arrant a piece of knavery, mark you now, as can be offer't; in your conscience, now, is it not?"¹ Henry, for his part, responds to the killings with the following command:

¹ Currently serving as the Counsel for Domestic Terrorism in the Counterterrorism Section of the U.S. Department of Justice. He received his Bachelor of Arts in International Relations from the College of William & Mary in 1996, after which he was commissioned as a Second Lieutenant in the U.S. Army. Mr. Brzozowski spent three years as an artillery officer at Fort Bragg, North Carolina before he was selected to attend William & Mary Law School. After law school, he spent six years in Europe serving as an officer in the U.S. Army JAG Corps. He then left active duty and clerked for Judge Stanley Birch, Jr. at the U.S. Court of Appeals for the Eleventh Circuit in Atlanta, Georgia. Prior to taking up his present position, Mr. Brzozowski was an Assistant General Counsel in the FBI's Office of General Counsel. He also serves as a JAG officer in the U.S. Army Reserves.

¹ WILLIAM SHAKESPEARE, *HENRY V*, act 4, sc. 7.

I was not angry since I came to France
Until this instant. Take a trumpet, herald;
Ride thou unto the horsemen on yon hill:
If they will fight with us, bid them come down,
Or void the field, they do offend our sight:
If they'll do neither, we will come to them,
And make them skirr away, as swift as stones
Enforced from the old Assyrian slings:
Besides, we'll cut the throats of those we have,
And not a man of them that we shall take
Shall taste our mercy. Go and tell them so.²

The practice of reprisal, it would seem, is at least as old as the Hundred Years' War.³ Although prohibitions on the act have gained purchase in recent years, reprisals traditionally have been viewed as one, if not the only, available sanction of the law of armed conflict. Indeed, although the 1929 Convention Relative to the Treatment of Prisoners of War (1929 POW Convention) ultimately outlawed reprisals against prisoners of war, strong arguments were made at the time in favor of the provision.⁴ They claimed no army "could reasonably be expected to renounce in war so effective and powerful a weapon for the redress or cessation of a reported intolerable wrong upon its own nationals at the hand of the enemy as immediate or threatened reprisal on enemy units in its own hands."⁵ Henry V would have agreed.

This article concerns the U.S. position on belligerent reprisals under the law of armed conflict, and argues that its current view is inconsistent with the realities of the contemporary global security environment. Part I introduces the concept of reprisal in general terms and highlights the critical distinctions between the related models of armed reprisal and belligerent reprisal. Part II charts the diminishing support for belligerent reprisal under international law. Part III outlines the legal framework relied upon by the United States in support of its continued embrace of

² *Id.*

³ *See id.*

⁴ Convention Relative to the Treatment of Prisoners of War art. 2(3), July 27, 1929, 47 Stat. 2021, 2 Bevans 932 [hereinafter 1929 POW Convention].

⁵ Andrew D. Mitchell, *Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law*, 170 MIL. L. REV. 155, 162 (2001).

belligerent reprisal as a lawful sanction under the law of armed conflict. Part III also hypothesizes why the United States clings to belligerent reprisal against civilians and the civilian population as a means of redress under the law of armed conflict in the face of a countervailing trend to outlaw it altogether. In testing those hypotheses, Part IV concludes that the current global security paradigm has rendered belligerent reprisals obsolete.

The infusion of human rights law and the corresponding state obligations to individuals into the law of armed conflict has dramatically reduced the scope for any feasible U.S. resort to belligerent reprisal against civilians to enforce adherence to the law of armed conflict.⁶

Reprisal, generally, is a “means of state self-help in the international legal system.”⁷ The concept is more narrowly defined as a “prima facie unlawful measure[] taken by one State against another in response to a prior violation by the latter and for the purpose of coercing that State to observe the laws in force.”⁸ This distinguishes reprisal from the *lex talionis*, or the law of retaliation, which “describes the rule by which one state may inflict upon the citizens of another state death, imprisonment, or other hardship, in retaliation for similar injuries imposed upon its own citizens.”⁹ International law recognizes several species of reprisal, all sharing general characteristics and operating under similar principles.¹⁰

Two classes of reprisal, commonly confused with each other, are armed reprisal and belligerent reprisal.¹¹ Armed reprisals are “those measures of force, falling short of war, taken by one State against another in response to a prior violation of international law by the latter.”¹² One example of an armed reprisal was the 1986 U.S. air strike

⁶ Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment (14 January 2000), at para. 535: The Court affirmed that “[V]iolations of IHL by one party cannot justify reprisals against the civilian population . . . reprisals against civilians are expressly prohibited under conventional and customary international law.”

⁷ See Sean Watts, *Reciprocity and the Law of War*, 50 HARV. INT’L L.J. 365, 384 (2009).

⁸ Shane Darcy, *The Evolution of the Law of Belligerent Reprisals*, 175 MIL. L. REV. 184, 185 (2003).

⁹ BLACK’S LAW DICTIONARY 913 (6th ed. 1990) (otherwise known in the Mosaic law as “an eye for an eye; a tooth for a tooth”).

¹⁰ Naulilaa Arbitration (Portugal v. Germany), Arbitral Award of 31 July 1928; see also ICRC, Rule 145, Customary IHL (“belligerent reprisals are subject to stringent conditions”).

¹¹ Mitchell, *supra* note 5, at 156-57.

¹² Darcy, *supra* note 8, at 186.

against Libya in response to its bombing of a disco in Berlin.¹³ Critically, *jus ad bellum*¹⁴ governs a state's use of an armed reprisal.¹⁵ Belligerent reprisals, on the other hand, "consist[] of ... action[s] that would otherwise be unlawful but that in exceptional cases [are] considered lawful under international law when used as ... enforcement measure[s] in reaction to unlawful acts of an adversary."¹⁶

In contrast to armed reprisals, belligerent reprisals are designed to coerce an adversary to comply with the law of armed conflict, or *jus in bello*.¹⁷ One question that has generated some debate concerns whether a state that has been the victim of aggression (implicating *jus ad bellum*) can retaliate with a belligerent reprisal (governed by *jus in bello*). In other words, does a belligerent reprisal have to answer a *jus in bello* violation, or is it available to respond to a *jus ad bellum* violation as well? Christopher Greenwood sums up the majority position on the matter as follows:

Although there have been suggestions to the contrary, to permit a State to respond to aggression by taking reprisals in the form of measures which would otherwise be contrary to the *jus in bello* would be incompatible with the principle that the *jus in bello* applies equally to all parties in a conflict regardless of the legality of their resort to force. . . The better view is therefore that belligerent reprisals may lawfully be taken only in response to a

¹³ Michael J. Kelly, *Time Warp to 1945 - Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law*, 13 J. TRANSNAT'L L. & POL'Y 1, 16 (2003).

¹⁴ *Jus ad bellum* refers to the body of international law that governs the conditions under which states may lawfully resort to war or the use of armed force, including the prohibition and exceptions outlined in the United Nations Charter, such as self-defense or Security Council authorization. *What are Jus ad Bellum and Jus in Bello?*, INT'L COMM. OF THE RED CROSS (Jan. 22, 2015), <https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0> [<https://perma.cc/EYH2-LY8C>].

¹⁵ Mitchell, *supra* note 5 ("Armed reprisals are those measures of force, falling short of war, taken by one State against another in response to a prior violation of international law by the latter. Critically, *jus ad bellum* governs a state's use of an armed reprisal.").

¹⁶ *Customary International Humanitarian Law Database, Rule 145*, INT'L COMM. OF THE RED CROSS [hereinafter ICRC IHL Database], http://www.icrc.org/customary-ihl/eng/print/v1_rul_rule145 [<https://perma.cc/AGR2-QNAB>].

¹⁷ International Committee of the Red Cross, *Customary International Humanitarian Law database, Rule 145* ("belligerent reprisals . . . are those actions, otherwise unlawful, permitted in limited circumstances to induce an adversary to comply with the law of armed conflict (*jus in bello*)").

prior violation of the law of armed conflict and not in retaliation for an unlawful resort to force.¹⁸

A belligerent reprisal, then, may occur only in the context of an existing armed conflict governed by *jus in bello* principles.

II. The Dwindling Vitality of Belligerent Reprisal Under International Law

As previously noted, the 1929 POW Convention was the first of several treaties containing express prohibitions against belligerent reprisals. In outlawing reprisals against prisoners of war, the 1929 POW Convention set in motion a trend towards the near-complete abolition of the measure as a viable sanction under the law of armed conflict.¹⁹ After the brutality of World War II, the 1949 Geneva Conventions broadened the ban on reprisals, extending it beyond prisoners of war to additional classes of persons.²⁰ Each of the four Conventions contains language forbidding reprisals. Article 46 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field (Geneva I) proscribes “[r]eprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention.”²¹ Article 47 of the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (Geneva II) bars reprisals “against the wounded, sick and shipwrecked persons, the personnel, the vessels or the equipment” protected under that Convention, and Article 13 of the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III) restates the 1929 POW

¹⁸ Christopher Greenwood, *The Twilight of the Law of Belligerent Reprisals*, 1989 NETH. Y.B. INT’L L. 35, 41 (1989).

¹⁹ 1929 POW Convention, *supra* note 4.

²⁰ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva II]; Geneva 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 III]; Geneva Convention Relative to the Protection of Civilians in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

²¹ Geneva I, *supra* note 20, art. 46.

Convention's prohibition of reprisals against prisoners of war.²² However, the most essential development regarding reprisals under the 1949 Geneva Conventions was enshrined in Article 33 of the Geneva Convention Relative to the Protection of Civilians in Time of War (Geneva IV): "Reprisals against protected persons and their property are prohibited."²³

The inclusion of protected persons as an additional class shielded by law from reprisals "represented a substantial departure from the law relating to belligerent occupation which had been in force during the Second World War."²⁴ As the civilian population of occupied territory suffered disproportionately from reprisals during WWII, many commentators viewed Article 33's mandate as a watershed development in the law of armed conflict.²⁵ It also reflected the infusion of nascent human rights law into *jus in bello* principles.²⁶ Jean Pictet celebrates this evolution in the law of armed conflict in his commentary on Article 33:

The prohibition of reprisals is closely connected with the provisions which, by ensuring that the Convention is applied in all circumstances, give it the character of a primary duty based essentially on the protection of the human person. This paragraph, like the first one, marks a decisive step forward in the affirmation and defence of rights of individuals and there is no longer any question of such rights being withdrawn or attenuated as a result of a breach for which those individuals bear no responsibility. Finally, reprisals constituted a collective penalty bearing on those who least deserved it. Henceforth, the penalty is made individual and only the person who commits the offence may be punished. The importance of this development and its embodiment in the new Geneva Convention is clear.²⁷

²² Geneva II, *supra* note 20, art. 47; Geneva III, *supra* note 20, art. 13.

²³ Geneva IV, *supra* note 20, art. 33.

²⁴ Greenwood, *supra* note 18, at 51.

²⁵ COMMENTARY ON GENEVA CONVENTION IV OF 1949, RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIMES OF WAR 228 (Jean Pictet ed., 1958) [hereinafter GENEVA IV COMMENTARY]; see also Greenwood, *supra* note 18, at 51; FRITS KALSHOVEN, BELLIGERENT REPRISALS 337-38 (2d ed. 2005).

²⁶ GENEVA IV COMMENTARY, *supra* note 25, at 228.

²⁷ GENEVA IV COMMENTARY, *supra* note 25, at 228.

Not everyone shared Pictet's sanguine view of Article 33. A.R. Albrecht, for example, writes that the provision is of "doubtful merit" and argues that "reprisals or the threat of reprisals against the local civilian population may be a vital measure in maintaining order amongst a hostile civilian population."²⁸ However, this conclusion does not represent the general consensus. Frits Kalshoven, the eminent authority on the law of belligerent reprisal, best articulates the academy's mainstream position:

The present writer accepts without reservation the correctness of the prohibitions laid down in Articles 33 and 34 of the Fourth Convention, both in their general aspects and as regards the specific issue of the taking and execution of hostages. He is convinced that it would not be possible effectively to regulate the resort to reprisals against protected persons in occupied territory, and these measures are not in his view indispensable to the occupant. Moreover, a consideration of even more fundamental concern is that no matter what name be given to particular retaliatory measures against innocent members of an occupied population, these all amount to – or at any rate are experienced as – terrorism and hence are not only ineffectual in the long run, but are even likely to achieve the opposite of their intended effect. This being so, the end is far too uncertain of achievement to justify the means, a means so inhuman as to render inadmissible any reliance on that highly questionable maxim.²⁹

Despite the considerable safeguards from reprisal afforded civilians under Article 33, Geneva IV, certain classes of civilians remained outside its protective umbrella—namely, the enemy civilian population of a party to an armed conflict located in territory still controlled by that enemy.³⁰ The new crop of prohibitions against reprisals in the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (AP I), written on 8 June 1977, addressed that apparent gap in a sweeping fashion. As distilled in the Commentary on the

²⁸ KALSHOVEN, *supra* note 25, at 336.

²⁹ *Id.* at 337-38.

³⁰ Greenwood, *supra* note 18, at 51; Darcy, *supra* note 8, at 201.

Additional Protocols, AP I outlaws reprisals against the following in international armed conflicts:

- Article 20 (*Prohibition of reprisals*) (persons and objects protected by Part II – *Wounded, sick and shipwrecked*);
- Article 51 (*Protection of the civilian population*), paragraph 6;
- Article 52 (*General protection of civilian objects*), paragraph 1;
- Article 53 (*Protection of cultural objects and places of worship*), subparagraph (c);
- Article 54 (*Protection of objects indispensable to the survival of the civilian population*), paragraph 4;
- Article 55 (*Protection of the natural environment*), paragraph 2;
- Article 56 (*Protection of works and installations containing dangerous forces*), paragraph 4.³¹

Although each article constitutes an advance on the gains made against reprisals under the 1949 Geneva Conventions, Article 51 is widely recognized as the most significant.³² Born of a compromise between two competing proposals at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977 (Diplomatic Conference) – one to ban reprisals altogether and the other to proscribe reprisals generally but subject to exceptions depending on conditions and methods³³—Article 51 is described by the *Commentary to the Additional Protocols* as “one of the most important articles in the Protocol.”³⁴ In guaranteeing protection against reprisals to all civilians, the article both “confirms the customary rule that innocent civilians must be kept outside hostilities as far as

³¹ COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST, 1949, at 986 (Yves Sandoz et al. eds., 1987) [hereinafter AP I COMMENTARY].

³² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I] (“Attacks against the civilian population or civilians by way of reprisals are prohibited.”).

³³ AP I COMMENTARY, *supra* note 31, at 982.

³⁴ *Id.* at 615.

possible and enjoy general protection against danger arising from hostilities” and radically shrinks the compass of belligerent reprisal as a means of redress under the law of armed conflict.³⁵ For the 172 states party to AP I, the scope of lawful reprisals in cases of land warfare is now limited to:

(1) members of an enemy’s armed forces actively engaged in hostilities or other persons who are participating directly in hostilities even if they are not members of an enemy’s armed forces; and (2) military objectives, meaning ‘those objects which by their nature, locations, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.’³⁶

Apart from a prohibition of reprisals against cultural property contained in the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954 (Hague Cultural Property Convention), no other treaty expressly bears on the law of belligerent reprisal.³⁷ Yet customary international law, in the form of “judicial decisions, the writings of jurists, diplomatic correspondence, and other documentary material concerning the practice of States,” also informs the current status of belligerent reprisal under international law.³⁸ Although the subject of much debate, some authorities have argued that several customary norms relating to the belligerent reprisal have matured into binding expressions of customary international law.³⁹ These include the

³⁵ *Id.*

³⁶ Mitchell, *supra* note 5, at 169; Greenwood, *supra* note 18, at 53. Some commentators have suggested that belligerent reprisals enjoy a greater field of application in the contexts of air and naval warfare. *See, e.g.*, Greenwood, *supra* note 18, at 53.

³⁷ Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240. The Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (AP II), for example, does not address reprisals at all. *See generally* AP II, June 8, 1977, U.N. Doc. A/32/144, Annex II. The general consensus is that reprisals are not available in non- international armed conflicts. *See* Darcy, *supra* note 8, at 219; Greenwood, *supra* note 18, at 67-68.

³⁸ U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 6 (1976) [hereinafter FM 27-10].

³⁹ Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A*

International Committee of the Red Cross's comprehensive *Study on Customary International Humanitarian Law (ICRC Study)*⁴⁰, the judicial opinions of international tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY), and scholarly compendiums addressing contemporary law of armed conflict issues like the *Tallinn Manual on the International Law Applicable to Cyber Warfare (Tallinn Manual)*⁴¹ and the *Manual on International Law Applicable to Air and Missile Warfare (Air & Missile Manual)*.⁴² While these sources are not universally accepted as expressions of customary international law, they do capture the trajectory of the law in this area.

The stated purpose of the *ICRC Study* was "to determine which rules of international humanitarian law are part of customary international law and therefore applicable to all parties to a conflict, regardless of whether or not they have ratified the treaties containing the same or similar rules."⁴³ Applying a detailed methodology to discern state practice and *opinio juris*, the *ICRC Study* ultimately generated 161 "customary rules of international humanitarian law."⁴⁴ Rules 145-148 all deal exclusively with belligerent reprisals, but Rules 145 and 146 are particularly relevant for the purposes of this article.⁴⁵ Rule 145 provides that "[w]here not prohibited by international law, belligerent reprisals are subject to stringent

Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict, 87 INT'L REV. RED CROSS 175, 177-212 (2005) ("The Study [on Customary International Humanitarian Law] ultimately generated 161 'customary rules' of international humanitarian law ... Several customary norms relating to belligerent reprisals have matured into binding expressions of customary international law.").

⁴⁰ JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (VOLUME I: RULES) (2005) [hereinafter ICRC STUDY].

⁴¹ TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael N. Schmitt ed., 2013) [hereinafter TALLINN MANUAL].

⁴² PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH (HPCR), MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE (2009) [hereinafter AIR & MISSILE MANUAL].

⁴³ Henckaerts, *supra* note 39, at 177.

⁴⁴ *Id.* at 198-212. The United States continues to study the ICRC's findings and has expressed reservations concerning the ICRC's methodology. See, e.g., John B. Bellinger, III & William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INT'L REV. RED CROSS 443, 443-44 (2007).

⁴⁵ Rule 147 outlaws reprisals against protected objects and Rule 148 denies parties to non-international armed conflicts the right to belligerent reprisal. See Henckaerts, *supra* note 39, at 211.

conditions.”⁴⁶ This Rule recognizes that, despite a trend towards an outright ban on belligerent reprisals, the measure still might be lawful if directed against “permitted categories of persons” and it meets five narrowly drawn circumstances.⁴⁷ The first condition requires that “[r]eprisals . . . only be taken in reaction to a prior serious violation of international humanitarian law, and only for the purpose of inducing the adversary to comply with the law.”⁴⁸ The second restricts reprisals to a “measure of last resort” available only when no other lawful measures are at hand.⁴⁹ The third condition subjects belligerent reprisals to the principle of proportionality and the fourth rule dictates that “any decision to resort to reprisals must be taken at the highest level of government.”⁵⁰ Finally, the fifth requirement commands that “reprisal action . . . cease as soon as the adversary complies with the law.”⁵¹

Of note, the *ICRC Study* also mentions burgeoning national case-law and official statements in support of the notion that “reprisals must not be inhumane.”⁵² This “humanity” principle, although falling well short of universal acceptance, is entertained by several authorities on belligerent reprisal, including Greenwood and Kalshoven.⁵³ Although both ultimately conclude that customary international law now contains no such express requirement, each recognizes its potential import in discerning the emergence of a customary norm prohibiting reprisals against an enemy’s civilian population.⁵⁴ Kalshoven best captures the impact of this emerging human rights principle on the law of belligerent reprisal:

⁴⁶ *Id.* at 210. Kalshoven characterizes these conditions under the rubric of “subsidiarity” and “proportionality”—subsidiarity meaning recourse to belligerent reprisal only should be taken as a matter of last resort and proportionality taking its established meaning. *See* KALSHOVEN, *supra* note 25, at 340-42; *see also* Greenwood, *supra* note 18, at 43-47.

⁴⁷ ICRC IHL Database, *supra* note 16.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* Despite U.S. reservations concerning the methodology used by the ICRC, U.S. policy on reprisals generally tracks the five conditions outlined in the ICRC Study. *See* FM 27-10, *supra* note 38, para. 497.

⁵² ICRC IHL Database, *supra* note 16.

⁵³ FRITS KALSHOVEN, *BELLIGERENT REPRISALS* 342-44 (2d ed. 2005) (“A number of rules of the law of war have a marginal character . . . their purpose is . . . the prevention of what is generally felt to be below the standard . . . from the viewpoint of humanity, even in the context of warfare The humanity principle is entertained by several authorities on belligerent reprisals.”).

⁵⁴ Greenwood, *supra* note 18, at 47-48; KALSHOVEN, *supra* note 25, at 342-44.

Another remark is that belligerent reprisals will obviously tend to be in conflict with elementary humanitarian considerations. A number of rules of the law of war have a marginal character, in that their purpose is not so much the realization of some kind of ideally chivalrous combat as the prevention of what is generally felt to be below the standard of what can be tolerated from the viewpoint of humanity, even in the context of warfare. Consequently, a reprisal transgressing such a marginal norm is bound to constitute an inherently inhuman act. In this light, particular importance attaches to the question of whether a rule might have developed to the effect that such sub-marginal acts would be prohibited even by way of reprisal.⁵⁵

On its face, Rule 146 merely restates the Geneva Conventions' prohibition on reprisals against protected persons.⁵⁶ The Rule, however, also addresses, albeit indirectly, whether civilians or a civilian population outside the shelter of the Geneva Conventions lawfully might be the target of a belligerent reprisal.⁵⁷ After observing that "[e]nforcement action based on attacking civilians . . . does not fit well either with the development of human rights law and the importance given to the right to life," the *ICRC Study* arrives at the following mixed conclusion regarding belligerent reprisals against civilians:

Because of existing contrary practice, albeit very limited, it is difficult to conclude that there has yet crystallized a customary rule specifically prohibiting reprisals against civilians during the conduct of hostilities. Nevertheless, it is also difficult to assert that a right to resort to such reprisals continues to exist on the strength of the practice of only a limited number of States, some of which is also ambiguous. Hence, there appears, at a minimum, to exist

⁵⁵ KALSHOVEN, *supra* note 25, at 43.

⁵⁶ ICRC IHL Database, *supra* note 16, Rule 146.

⁵⁷ *Id.* ("Reprisals against protected persons are prohibited; the Rule further discusses, albeit indirectly, the targeting of civilians or civilian populations outside the protections of the Geneva Conventions as possible subjects of belligerent reprisals.").

a trend in favor of prohibiting such reprisals.⁵⁸

The *ICRC Study* arrived at this indeterminate position after an extended consideration of Article 51(6) of AP I and its role in the evolution of a customary norm relating to belligerent reprisals against civilians.⁵⁹ On balance, the general consensus among modern commentators in the aftermath of the *ICRC Study* is that reprisals have a valuable part to play in deterring and/or preventing the recurrence of breaches of humanitarian law, on condition that they are kept within defined limits.⁶⁰ In other words, although reprisals have, during the twentieth century, been increasingly restricted and curtailed in the scope of permissible objects of such action, the doctrine as a concept remains a valid part of the law of armed conflict, particularly in response to methods and means of warfare against combatants and military objectives.⁶¹

Although still viable under international law, the space for belligerent reprisals against civilians, the *ICRC Study* submits, has become infinitesimally small.⁶² This view of the diminishing role of belligerent reprisals is presented in a more robust and, not surprisingly, controversial fashion by the ICTY in its opinion in *Prosecutor v. Kupreskic*.⁶³ Although subject to much criticism within the academy, the ICTY's opinion merits consideration not as the last word on the matter of belligerent reprisal (given its limited precedential value) but as another voice in the larger conversation on the future of that measure under the law of armed conflict.⁶⁴ In describing reprisals against civilians as an "inherently ... barbarous means of seeking compliance with international law," the ICTY struggles to reconcile an otherwise lawful sanction under the law of armed

⁵⁸ *Id.*

⁵⁹ ICRC STUDY, *supra* note 40, r. 146 cmt. ("The Study considers Article 51(6) of AP I at length in evaluating whether customary international law now prohibits belligerent reprisals against civilians, arriving at an indeterminate position.").

⁶⁰ David Turns, *Implementation and Compliance* in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 354, 367 (Elizabeth Wilmshurst & Susan Breau eds., 2007).

⁶¹ *Id.*

⁶² ICRC STUDY, *supra* note 40.

⁶³ *Prosecutor v. Kupreskic*, IT-95-16-T, Judgement (Jan. 14, 2000).

⁶⁴ See generally Christopher Greenwood, *Belligerent Reprisals in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, in INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW: CURRENT DEVELOPMENTS 539, 549 (Horst Fischer et al. eds., 2001); Turns, *supra* note 60, at 369.

conflict with a growing human rights tradition.⁶⁵ The victor, by the court's lights, is the sanctity of the individual.

[T]he reprisal killing of innocent persons, more or less chosen at random, without any requirement of guilt or any form of trial, can safely be characterized as a blatant infringement of the most fundamental principles of human rights. It is difficult to deny that a slow but profound transformation of humanitarian law under the pervasive influence of human rights has occurred. As a result belligerent reprisals against civilians and fundamental rights of human beings are absolutely inconsistent legal concepts. . .

It should be added that while reprisals could have had a modicum of justification in the past, when they constituted practically the only effective means of compelling the enemy to abandon unlawful acts of warfare and to comply in future with international law, at present they can no longer be justified in this manner . . .

Due to the pressure exerted by the requirements of humanity and the dictates of public conscience, a customary rule of international law has emerged on the matter under discussion.⁶⁶

Two additional sources with some bearing on the current status of belligerent reprisal under the law of armed conflict are the *Tallinn Manual* and the Program on Humanitarian Policy and Conflict Research's (HPCR) *Air & Missile Manual*. Although purporting to reflect customary international law concerning their respective topics, these instruments have not yet achieved that end.⁶⁷ Nevertheless, they represent some of the most current thinking on law of armed conflict issues, including

⁶⁵ *Kupreskic*, IT-95-16-T, ¶ 528.

⁶⁶ *Id.* ¶ 529-31.

⁶⁷ Michael N. Schmitt, *International Law in Cyberspace: The Koh Speech and Tallinn Manual Juxtaposed*, 54 HARV. INT'L L.J. 13, 15 (2012) ("The Tallinn Manual consists of 'rules' adopted unanimously by the International Group of Experts that are meant to reflect customary international law."); AIR & MISSILE MANUAL, *supra* note 42, at 7.

belligerent reprisal. Rule 46 of the *Tallinn Manual*, for example, provides as follows:

Belligerent reprisals by way of cyber operations against:

- (a) prisoners of war;
- (b) interned civilians, civilians in occupied territory or otherwise in the hands of an adverse party to the conflict, and their property;
- (c) those hors de combat; and
- (d) medical personnel, facilities, vehicles, and equipment are prohibited.

Where not prohibited by international law, belligerent reprisals are subject to stringent conditions.⁶⁸

Most interestingly, the *Tallinn Manual*, citing the *ICRC Study's* conclusion, states that the lack of an established rule of customary international law prohibiting belligerent reprisals against civilians, expressly allows for their use in precisely that manner (subject to existing state obligations under AP I, art. 51(6)).⁶⁹ Indeed, the *Manual* even illustrates how a belligerent reprisal against a civilian population lawfully might be executed:

Consider a situation in which the armed forces of State A are bombing military medical facilities in State B, which is not a Party to Additional Protocol I. In response and after repeated demands to desist, B's Prime Minister approves a cyber attack against a power generation facility used exclusively to provide power to the civilian population. The cyber attack is intended solely to compel State A to refrain from continuing to attack medical facilities, and the Prime Minister has issued strict orders to cease reprisal operations as soon as State A does so. State B's belligerent reprisals would comply with this Rule [although the same result will not hold for a Party to Additional Protocol I for which Article 52(1) prohibits

⁶⁸ TALLINN MANUAL, *supra* note 41, at 149-50.

⁶⁹ *Id.*, Rule 46 & commentary at 149-51.

reprisals against civilian objects].⁷⁰

On the other hand, the HPCR *Air & Missile Manual* is notable for the absence of any reference to belligerent reprisal.⁷¹ Although the *Manual*'s stated objective is "to produce a restatement of existing law applicable to air or missile operations in international armed conflict," it contemplates no means for a state to exercise a reprisal of any kind.⁷²

Moreover—and in contrast to the *Tallinn Manual*—the *Air & Missile Manual* appears to outlaw all attacks against civilians or civilian objects without reservation.⁷³ This sweeping prohibition could be interpreted as a necessary result of the principles adopted in the *Manual*'s General Framework, principles which are cast in language reminiscent of the human rights tradition: "In cases not covered by this Manual, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."⁷⁴ The disparate treatment afforded to the concept of belligerent reprisal by each *Manual* underscores the unsettled nature of the law regarding the scope and continued viability of the sanction under the law of armed conflict.

III. The United States Maintains Support for the Use of Belligerent Reprisals Against Civilians

A useful starting point for discerning the rationale behind the U.S. position on belligerent reprisal is the 1863 *Instructions for the Government of Armies of the United States in the Field*, authored by Francis Lieber and issued to the Union Army at President Lincoln's direction as General Orders No. 100 (the Lieber Code).⁷⁵ Although it has no precedential value, the Lieber Code represents one of the earliest efforts to codify the law of armed conflict and, as such, provides unique insight into how the concept of belligerent reprisal was considered in an earlier era. Reprisal, or

⁷⁰ *Id.* at 151.

⁷¹ See generally AIR & MISSILE MANUAL, *supra* note 42 ("The HPCR Air & Missile Manual is notable for its complete omission of belligerent reprisals from its text and framework.").

⁷² *Id.* at 6.

⁷³ *Id.* at 10 (Rule 11 holds that "[a]ttacks directed against civilians or civilian objects are prohibited").

⁷⁴ *Id.* at 7.

⁷⁵ Headquarters, U.S. Dep't of Army, Gen. Order No. 100 (1898) [hereinafter Lieber Code].

retaliation as characterized by the Code, was recognized as “the sternest feature of war.”⁷⁶ Yet its necessity was unquestioned: “The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage.”⁷⁷ Acknowledging the sanction’s severity, the Lieber Code imposed strict limitations on its lawful use:

Retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and moreover, cautiously and unavoidably; that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and the character of the misdeeds that may demand retribution. Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine war of savages.⁷⁸

These limitations are mirrored in Rule 145 of the ICRC Study and in the *U.S. Army’s Field Manual 27-10, The Law of Land Warfare* (FM 27-10), and have matured into an expression of customary international law.⁷⁹

As previously noted, express statements of the official U.S. position on the use of belligerent reprisal under the law of armed conflict are in short supply. Perhaps the most widely cited source of U.S. policy on the matter is FM 27-10, a U.S. Army field manual. In a section dedicated to reprisals, FM 27-10 defines the term and outlines certain limitations on its use, which are roughly in accord with those widely accepted as customary international law.⁸⁰ A few features of the field manual’s treatment of reprisals merit particular attention. After observing that “[o]ther means of securing compliance with the law of war should normally be exhausted before resort is has to reprisals,” FM 27-10 tacks on an interesting addendum to that generally recognized principle: “Even when appeal to the enemy for redress has failed, it may be a matter of policy to consider,

⁷⁶ *Id.* art. 27.

⁷⁷ *Id.*

⁷⁸ *Id.* art. 28.

⁷⁹ ICRC IHL database, *supra* note 16; FM 27-10, *supra* note 38, para. 497.

⁸⁰ FM 27-10, *supra* note 38, para. 497.

before resorting to reprisals, whether the opposing forces are not more likely to be influenced by a steady adherence to the law of war on the part of their adversary.”⁸¹ This qualification seemingly indicates an appreciation for and a hedge against “the fact that those to whom [a belligerent reprisal] is applied may have so little sense of measure that they will reply with still other violations and start down the incline that leads to a war of savagery.”⁸²

Two other facets of FM 27-10’s provisions on reprisals are significant. First, in a short paragraph addressing those persons against whom reprisals are permitted, FM 27-10 initially cabins off those persons against whom reprisals are outlawed, including prisoners of war and protected civilians.⁸³ However, the final sentence of that paragraph provides an example of persons against whom reprisals might be permitted: “[R]eprisals may still be visited on enemy troops who have not yet fallen into the hands of the forces making the reprisals.”⁸⁴ Of note is the absence of any direct reference to an enemy’s civilian population. In another section, FM 27-10 explicitly adopts proportionality as a necessary condition for the exercise of any reprisal: “The acts resorted to by way of reprisal need not conform to those complained of by the injured party, but should not be excessive or exceed the degree of violence committed by the enemy.”⁸⁵ The requirement is important when considered in the context of other quasi-official statements of the U.S. position on the use of belligerent reprisals against civilians.

In a conference at American University’s Washington College of Law, Abraham Sofaer proffered some additional insight into the rationale behind U.S. support of belligerent reprisal against civilians as a valued deterrent measure:

To take another example, article 51 of Protocol I prohibits any reprisal attacks against the civilian population, that is, attacks that would otherwise be forbidden but that are in response to the enemy’s own violations of the law and are intended to deter future violations. Historically,

⁸¹ *Id.*

⁸² E. Stowell, *Military Reprisals and the Sanctions of the Laws of War*, 36 AM. J. INT’L L. 643, 649 (1942).

⁸³ FM 27-10, *supra* note 38, para. 497.

⁸⁴ *Id.*

⁸⁵ *Id.*

reciprocity has been the major sanction underlying the laws of war. If article 51 were to come into force for the United States, an enemy could deliberately carry out attacks against friendly civilian populations, and the United States would be legally forbidden to reply in kind. As a practical matter, the United States might, for political or humanitarian reasons, decide in a particular case not to carry out retaliatory or reprisal attacks involving unfriendly civilian populations. To formally renounce even the option of such attacks, however, removes a significant deterrent that presently protects civilians and other war victims on all sides of a conflict.⁸⁶

The comments of a U.S. delegate to the Diplomatic Conference also shed some light on the rationale behind continuing U.S. loyalty to the sanction:

In the event of massive and continuing violations of the Conventions and the Protocol, this series of prohibitions of reprisals may prove unworkable. Massive and continuing attacks directed against a nation's civilian population could not be absorbed without a response in kind. By denying the possibility of a response and not offering any workable substitute, the Protocol is unrealistic and, in that respect, cannot be expected to withstand the test of future armed conflict.⁸⁷

This “public pressure” justification differs from the deterrent explanation offered by Sofaer but both ostensibly informed the U.S. view on AP I, Article 51(6) as expressed by Michael Matheson, then Deputy Legal Advisor to the U.S. State Department, in 1987: “[The United States does] not support the prohibition on reprisals in article 51 and subsequent

⁸⁶ Abraham D. Sofaer, *The Position of the United States on Current Law of War Agreements*, 2 AM. U. J. INT'L L. & POL'Y 460, 469 (1987).

⁸⁷ Greenwood, *supra* note 18 (citing VI OFFICIAL RECORD OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 224, CDDH/SR.58, Annex (1974-77)).

articles . . . and [does] not consider it a part of customary law.”⁸⁸ Although it has been suggested “that the Matheson analysis is no longer considered ‘authoritative,’” it still represents the clearest picture of U.S. policy on the status of AP I, Article 51(6) as an expression of customary international law.⁸⁹

IV. U.S. Position on Belligerent Reprisal Is Inconsistent with the Realities of the Contemporary Global Security Environment

The continued utility of this policy is best tested in the crucible of practical application. We will examine the U.S. position on belligerent reprisal in the context of two scenarios: (1) the *Tallinn Manual*’s illustration of a cyber-attack deployed as a belligerent reprisal; and (2) the use of nuclear weapons by the United States as a belligerent reprisal.

A. *Tallinn Manual* Scenario

The *Tallinn Manual*’s illustration of a belligerent reprisal presupposes a state of armed conflict between State A and B and an initial violation of the law of armed conflict by State A – the bombing of State B’s military medical facilities.⁹⁰ These facts thus neatly satisfy the established rule that “[r]eprisals . . . only be taken in reaction to a prior serious violation of international humanitarian law, and only for the purpose of inducing the adversary to comply with the law.”⁹¹ However, as many commentators have noted, this threshold determination is usually not so readily ascertainable.⁹² For example, imagine if State A flatly denied bombing State B’s military medical facilities or perhaps argued that the medical facilities were shielding some other lawful military objective. Given the lack of any independent fact-finding entity to sort out the facts, the

⁸⁸ Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 415, 426 (1987).

⁸⁹ Charles Garraway, “*England Does Not Love Coalitions*” Does Anything Change, 82 INT’L L. STUD. 233, 238 (2006).

⁹⁰ TALLINN MANUAL, *supra* note 41, at 151. For the purposes of this analysis, assume that “State B” is a placeholder for the United States.

⁹¹ ICRC IHL Database, *supra* note 16.

⁹² Darcy, *supra* note 8, at 189-90; Greenwood, *supra* note 18, at 40-43.

resulting uncertainty entitles “either of the parties . . . to act on the grounds of its own reasonable conception of the law governing the actions of both sides.”⁹³ Based on these facts, State A might view the cyber-attack not as a lawful reprisal, but as an illegal act in violation of the law of armed conflict. State A might then feel justified in conducting a reprisal against State B – and so on, and so on, as reprisal begets reprisal.

The *Tallinn Manual*’s reprisal example does appear uncontroversially to fulfill the fourth and fifth conditions for lawful belligerent reprisals, namely that “any decision to resort to reprisals must be taken at the highest level of government” and that “reprisal action . . . cease as soon as the adversary complies with the law.”⁹⁴ Equitable satisfaction of the second and third rules, however, is questionable. The second condition for lawful belligerent reprisals restricts reprisals to a “measure of last resort” available only when no other lawful measures are available.⁹⁵ Also known as the principle of subsidiarity, the rule demands that State B exhaust all means of redress before resorting to belligerent reprisals, unless it is apparent that all other possible remedies would be fruitless. In the *Tallinn Manual* scenario, the only measures State B took before its cyber-attack were “repeated demands [for State A] to desist.”⁹⁶ It is not clear, given the limited information in the example, whether State B might have successfully availed itself of other alternatives before resorting to the cyber-attack, measures like appealing to international bodies, rallying public opinion against State A, or even simply threatening a cyber-attack or other reprisal. The efficacy of other means of redress notwithstanding, it is clear that the nature of belligerent reprisal demands that the effort be made. As Greenwood observes, “the use of reprisals in an armed conflict is such a serious step and may have such disastrous consequences that the requirement that all reasonable steps be taken to achieve redress by other means before reprisals are ordered is probably one which should be strictly insisted upon, unless delay will endanger the safety of troops or civilians.”⁹⁷

Whether State B’s cyber-attack satisfies the third condition for a lawful belligerent reprisal is probably the most difficult to assess. Commanding that any reprisal be executed in accordance with the

⁹³ KALSHOVEN, *supra* note 25, at 41.

⁹⁴ ICRC IHL Database, *supra* note 16.

⁹⁵ *Id.*

⁹⁶ TALLINN MANUAL, *supra* note 41, at 151.

⁹⁷ Greenwood, *supra* note 18, at 47.

principle of proportionality, the third rule requires that the cyber-attack “not be excessive or exceed the degree of violence committed by the enemy.”⁹⁸ Although Kalshoven argues that in the context of proportionality, “belligerents are left with a certain freedom of appreciation” in terms of the form of a reprisal, he also warns that this freedom, “which in law is restricted by the requirement of reasonableness, ...in practice can lead to arbitrariness and excessive reactions.”⁹⁹ Is attacking a civilian power generation facility proportional to State A’s attacks on State B’s military medical facilities? More information is required. How many civilians rely on the power facility? Is it winter or summer? Where is State A located? Is State A developed or undeveloped? Shutting down Moscow’s power facility in February, for example, qualitatively differs from attacking the facility of a small town in southern Iran in the fall. Whatever the case may be, “the assessment of proportionality [in the context of a belligerent reprisal] may become almost impossible to achieve on anything other than a very crude scale.”¹⁰⁰ Calculations of this nature come uncomfortably close to those inherent in the *lex talionis*: an eye for an eye, a tooth for a tooth.

B. Nuclear Scenario

A close examination of the legality of the use of nuclear weapons by the United States against an enemy civilian population as a belligerent reprisal is subject to several stipulations regarding the current state of the law on the issue.¹⁰¹ First, on the question of whether the threat or use of nuclear weapons under any circumstances is permitted under international law, the International Court of Justice held that “[t]here is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such.”¹⁰² Second, any “threat or use of nuclear weapons should also be compatible

⁹⁸ FM 27-10, *supra* note 38, para. 497.

⁹⁹ KALSHOVEN, *supra* note 25, at 342.

¹⁰⁰ Greenwood, *supra* note 18, at 45.

¹⁰¹ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 8, ¶ 105(2)(B) (July 8) [hereinafter *Nuclear Weapons Opinion*].

¹⁰² *Id.* at *96, para. 105(2)(B) (July 8). A ruling by the ICJ can be considered persuasive authority in international law, although “[t]he decision of the Court has no binding force except between the parties and in respect to that particular case.” Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179.

with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons.”¹⁰³ Finally, and perhaps most importantly, the United States, upon signing AP I, stated two understandings, the first of which concerned nuclear weapons: “It is the understanding of the United States of America that the rules established by this Protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons.”¹⁰⁴ In sum, (1) nuclear weapons are not banned under international law and their use in an armed conflict is governed, as is any other weapon, by the principles of law of armed conflict and (2) AP I, Article 51(6)’s proscription on belligerent reprisals against civilian populations contemplates only the use of conventional arms, not nuclear weapons.¹⁰⁵

With this legal framework in place, consider the following scenario: the United States is engaged in armed conflict with State A, a nuclear state. During hostilities, State A conducts a chemical attack against U.S. forces. Might the United States respond with a belligerent reprisal in the form of a nuclear attack against State A’s civilian population? The narrow facts of this scenario expose the confused nature of the current U.S. position on belligerent reprisal. As it stands, there is no outright ban on the use of nuclear weapons in a *jus in bello* context.¹⁰⁶ Yet U.S. support for the use of belligerent reprisal against an enemy civilian population appears to center on the use of nuclear weapons in situations governed by *jus ad bellum* principles. Reserving the right to use nuclear weapons as a deterrent measure, or in response to public pressure, appears to implicate concepts other than belligerent reprisal, such as reciprocity and retaliation in kind.¹⁰⁷ Indeed, extant U.S. statements on belligerent reprisal reflect a distinctly Cold War mentality. The mutually assured destruction (MAD) model is an almost perfect example of reciprocity in action: “Actions justified by failure of reciprocal observance regard the law in question as extinguishable or entirely inapplicable in the event of breach.”¹⁰⁸ Thus, the

¹⁰³ *Nuclear Weapons Opinion*, *supra* note 101, at *97.

¹⁰⁴ George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT’L L. 1, 2 (1991).

¹⁰⁵ Darcy, *supra* note 8, at 214.

¹⁰⁶ *Nuclear Weapons Opinion*, *supra* note 101, ¶ 105(2)(B) (July 8).

¹⁰⁷ KALSHOVEN, *supra* note 25, at 347-48, 362-63.

¹⁰⁸ Watts, *supra* note 7, at 385.

first use of nuclear weapons by a state would render any existing obligation by the victim state to refrain from their use null and void. The victim state would then be free to use nuclear weapons in response, but such use would be by operation of reciprocity, not belligerent reprisal.

The U.S. “nuclear understanding” to AP I also complicates any assessment of the current U.S. view on belligerent reprisal. Given the U.S. understanding that nuclear weapons are outside AP I’s ambit, the U.S. insistence on a right to conduct a nuclear belligerent reprisal against an enemy’s civilian population is difficult to appreciate. Cold War “nuclear exceptionalism” was predicated on “[t]he assumption ... that use of nuclear weapons, or a non-nuclear attack of sufficient scale to provoke self-defense using nuclear weapons, would occasion a large-scale and reciprocal suspension of much of the law of war.”¹⁰⁹ Hence the “deterrent” and “public pressure” justifications proffered by the United States for the retention of the right to exercise a belligerent reprisal against an enemy’s civilian population. But, given the U.S. nuclear reservation, it would seem that a nuclear response by the United States to a nuclear attack by an aggressor state would not violate AP I, Article 51(6), even if the treaty bound the United States. A nuclear response outside the treaty’s compass could not be characterized as a reprisal. This drains the current U.S. position on belligerent reprisal, largely intended to safeguard its nuclear prerogative, of much of its plausibility.

Setting aside the U.S. understanding concerning nuclear weapons discussed above, any use of such arms in the course of a belligerent reprisal must satisfy the five conditions established under customary international law for use of that sanction. At first blush, proportionality would seem to be the most challenging requirement to meet, yet, in a nuclear context, the rule commanding that “reprisal action ... cease as soon as the adversary complies with the law” also likely would prove trying.¹¹⁰ Returning to the nuclear scenario set out above, any belligerent reprisal by the United States must not be “excessive or exceed the degree of violence committed by the enemy.”¹¹¹ The United States may view State A’s use of chemical weapons as such a serious violation of the law of armed conflict that only a nuclear response is appropriate. Yet this illustrates two inherent difficulties when addressing proportionality in the context of nuclear weapons. First, the “freedom of appreciation” afforded belligerents in

¹⁰⁹ *Id.* at 431.

¹¹⁰ ICRC IHL Database, *supra* note 16.

¹¹¹ FM 27-10, *supra* note 38, para. 497.

determining proportionality “implies a certain discretion for belligerents to decide that violations of the law of war committed by their opponents are so extremely grave as to make the use of nuclear weapons in reprisal permissible.”¹¹² The United States might view State A’s use of chemical weapons as deserving of a nuclear response, whereas State A might have a lesser threshold for a nuclear reprisal. This discretion invites uncertainty, and uncertainty in a nuclear exchange can quickly spiral out of control.

The second problem with proportionality concerns the actual function assigned by the United States to a nuclear belligerent reprisal against State A’s civilian population. Is the use of a nuclear weapon against a civilian population truly a proportionate response to a chemical attack? Or is the use of such a measure more of “a signal in the military-political power relations” between the United States and State A?¹¹³ Its use a message to State A that further escalation up the ladder of violence will continue if its conduct necessitates it?¹¹⁴ If so, then the United States could not couch its nuclear response as a belligerent reprisal, “the purpose of which [is] to effect a de-escalation in the level of unlawful violence on the part of the enemy.”¹¹⁵

Finally, it seems exceedingly unlikely that the United States would contemplate a nuclear strike even after sustaining a chemical attack in light of former Secretary of Defense Robert Gates’ remarks following the release of the Obama Administration’s 2010 Nuclear Posture Review (“NPR”): “[T]ry as we might, we could not find a credible scenario where a chemical weapon could have the kind of consequences that would warrant a nuclear response.”¹¹⁶

As noted earlier, the rule requiring that a reprisal cease once an adversary complies with the law would present unique difficulties in the aftermath of a nuclear strike. It is almost certain that any nuclear attack on State A’s civilian population would generate significant radioactive fallout, which could remain a potent hazard for months or years.¹¹⁷ While it could be argued that the lingering effects of a nuclear strike cannot be

¹¹² KALSHOVEN, *supra* note 25, at 549-50.

¹¹³ *Id.* at 377.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ U.S. “Negative Security Assurances” at a Glance, ARMS CONTROL ASS’N, <http://www.armscontrol.org/factsheets/negsec> [<https://perma.cc/8QWV-8XTD>].

¹¹⁷ Charles J. Moxley Jr. et al., *Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty*, 34 *FORDHAM INT’L L.J.* 595, 624-38 (2011).

considered as an ongoing assault on State A, the extended harm visited on noncombatants must be considered in any proportionality analysis.

On balance, the use of a nuclear weapon on an enemy civilian population cannot be justified as a lawful belligerent reprisal, as understood by the law of armed conflict. There is no obvious means by which such a weapon could satisfy the proportionality requirement for a lawful belligerent reprisal. Indeed, the majority of examples concerning the resort to nuclear weapons in a belligerent reprisal contemplate their use against military objectives, not civilian populations.¹¹⁸ As argued above, the only instances in which civilian populations might be subject to a nuclear attack are governed by the concepts of reciprocity or retaliation-in-kind, not belligerent reprisal. Kalshoven's conclusion on the matter is as follows:

The development of nuclear weapons . . . has brought about a state of affairs where recourse to belligerent reprisals can entail consequences so disastrous for the enemy civil population and, indeed, for humanity in general, that here the idea of law enforcement has to give way to the sheer inhumanity inherent in such reprisals.¹¹⁹

V. Conclusion

The current U.S. view on belligerent reprisal is out of step with the bulk of the international community's thinking on the issue. It ignores the advent of a new global security paradigm, in which the importance of state obligations to each other are matched by a state's obligations to its citizenry. Moreover, the notion that the United States can at once champion the application of the rule of law to the horrors of armed conflict and, at the same time, reserve the right to violate that compact by intentionally killing noncombatants is a concerning one. "The objective effectiveness of measures of retaliation against the enemy civil population," Kalshoven concludes, "is decidedly negative."¹²⁰ Indeed,

¹¹⁸ See, e.g. Nuclear Weapons Opinion, *supra* note 101, at *27 (July 8); Paula B. McCarron & Cynthia A. Holt, *A Faustian Bargain? Nuclear Weapons, Negative Security Assurances, and Belligerent Reprisal*, 25 FLETCHER F. WORLD AFFS. 203, 204 (2001).

¹¹⁹ KALSHOVEN, *supra* note 25, at 376.

¹²⁰ *Id.* at 358.

[w]eighing this dubious effectiveness against the unquestionable inhumanity of the form of retaliation under consideration leads to [the ultimate] conclusion [that] . . . retaliatory attacks on the enemy civil population as such, irrespective of the weapons with which they are carried out, are so much at variance with the fundamental concepts of the law of reprisals that they can hardly be regarded as anything but highly reprehensible.¹²¹

There is still space for belligerent reprisals under the law of armed conflict, but not against civilians or the enemy's civilian population. To recognize as much is to embrace the wisdom of Grotius and forswear the vengeful justice of Henry V.

¹²¹ *Id.* at 358-59.

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**A “CIVIL DEATH” OF THE MILITARY ACCUSED: THE VAST
IMPACTS OF COLLATERAL CONSEQUENCES OF COURT-MARTIAL
CONVICTIONS AND THE NEED TO REFORM MILITARY SENTENCING
PRACTICE**

MAJOR EMMA K. FOWLER*

The effects of these collateral consequences can be devastating. As Professor Michelle Alexander has explained, “[m]yriad laws, rules, and regulations operate to discriminate against ex-offenders and effectively prevent their reintegration into the mainstream of society and economy. These restrictions amount to a form of ‘civi[l] death’ and send the unequivocal message that ‘they’ are no longer part of ‘us.’”¹

“In our society, we just keep punishing. I’ve done my time, so why am I still being punished? . . . You can’t get a job

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¹ United States v. Nesbeth, 188 F. Supp. 3d, 179, 180 (E.D.N.Y. 2016) (quoting MICHELLE ALEXANDER, *THE NEW JIM CROW* 142 (2010)).

*because of the felonies, you can't get an apartment
because of the felonies, and it goes around and around."*²

I. Introduction

In Fiscal Year (FY) 2021, 624 Service members were convicted at general courts-martial, and 491 were convicted at special courts-martial.³ It is well-known that individuals convicted at general and special courts-martial may face a punitive discharge, resulting in a loss of benefits and attached social stigma.⁴ What is less well-known and discussed by military

² Hannah Wiley & Mackenzie Mays, "We Just Keep Punishing." *Californians with Criminal Records Still Face Housing Barriers*, LA TIMES (Aug. 2, 2022, 5:00 AM), <https://www.latimes.com/california/story/2022-08-02/californians-criminal-records-face-housing-barriers> [<https://perma.cc/5BYU-M2JY>] (quoting Cynthia Blake).

³ In Fiscal Year (FY) 2021, the Air Force convicted 111 persons at general courts-martial and 118 at special courts-martial. JUDGE ADVOC. GEN., U.S. AIR FORCE, REPORT TO CONGRESS: DEPARTMENT OF THE AIR FORCE REPORT ON THE STATE OF MILITARY JUSTICE FOR FISCAL YEAR 2021, at 18 (2021). In FY 2021, the Army convicted 321 persons at general courts-martial and 153 persons at special courts-martial. OFF. OF JUDGE ADVOC. GEN., U.S. ARMY, REPORT TO CONGRESS: U.S. ARMY REPORT ON MILITARY JUSTICE FOR FISCAL YEAR 2021, at 15 (2021). In FY 2021, the Navy convicted 79 persons at general courts-martial and 75 at special courts-martial. OFF. OF JUDGE ADVOC. GEN., U.S. NAVY, REPORT TO CONGRESS: U.S. NAVY REPORT ON MILITARY JUSTICE FOR FISCAL YEAR 2021, at 14 (2021). In FY 2021, the Marine Corps convicted 105 persons at general courts-martial and 129 at special courts-martial. JUDGE ADVOC. DIVISION, U.S. MARINE CORPS, REPORT TO CONGRESS: U.S. MARINE CORPS REPORT ON MILITARY JUSTICE FOR FISCAL YEAR 2021, at 10 (2021). In FY 2021, the Coast Guard convicted 8 persons at general courts-martial and 16 at special courts-martial. JUDGE ADVOC. GEN. & CHIEF COUNSEL, U.S. COAST GUARD, MILITARY JUSTICE IN THE COAST GUARD (FY 2021): REPORT TO CONGRESS 2 (2021).

⁴ U.S. Dep't of Army, Electronic Military Judges' Benchbook 2.42, Complete Script, sec. 2-5-23, <https://www.jagcnet.army.mil/EBB> [<https://perma.cc/RDU3-G7BJ>] (21 Apr. 2025) (choose "Scripts" drop down menu; then choose "Complete Script"; then scroll to "2-5-23. Types of Punishment") [hereinafter Electronic Benchbook] ("The stigma of a punitive discharge is commonly recognized by our society. A punitive discharge will place limitations on employment opportunities and will deny the accused other advantages which are enjoyed by one whose discharge characterization indicates that the accused has served honorably. A punitive discharge will affect an accused's future with regard to legal rights, economic opportunities, and social acceptability."). The myriad impacts of punitive and administrative discharges are outside the scope of this paper. For those interested in those impacts, see Major John W. Brooker et al., *Beyond "T.B.D.": Understanding VA's Evaluation of a Former Servicemember's Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 MIL. L. REV. 8 (2012); Hugh McClean,

counsel and courts, are the collateral consequences imposed by civilian laws and regulations that accompany a conviction once a person attempts to reenter civilian society, especially if that person was convicted of a felony.⁵ The Uniform Code of Military Justice (UCMJ) does not delineate which level of court-martial can adjudicate misdemeanor or felony convictions.⁶ However, collateral consequences are likely to follow a convicted Service member regardless of whether they were court-martialed at a general or special court-martial.

The consequences discussed in this article are those that result from the conviction itself, not from the sentence—this article does not address the impact that being sentenced to a discharge or dismissal has on

Essay: Discharged and Discarded: The Collateral Consequences of a Less-Than-Honorable Military Discharge, 121 COLUM. L. REV. 2203 (2021). See Gabriel J. Chin, *Collateral Consequences*, in 4 REFORMING CRIMINAL JUSTICE 371, 372 (Erik Luna ed., 2017).

⁵ See, e.g., *United States v. Griffin*, 25 M.J. 423, 425 (C.M.A. 1988) (Everett, C.J., concurring) (noting the difficulty for a military judge in crafting instructions on collateral consequences due to military justice practitioners’ familiarity with them in the military justice system). While each jurisdiction determines how they will delineate a felony versus a misdemeanor, felonies are commonly defined as offenses for which more than one year’s confinement may be adjudged. See 18 U.S.C. § 3156(a)(3) (“[T]he term ‘felony’ means an offense punishable by a maximum term of imprisonment for more than one year”); CAL. PENAL CODE §§ 17, 18.5 (Deering, Lexis Advance through the 2024 Regular and Special Session) (providing that felonies are offenses which may be punishable by death or confinement in state prison and misdemeanors are not punishable by more than one year; (only those convicted of felonies can go to state prison)); FLA. STAT. ANN. § 775.08 (LexisNexis, Lexis Advance through the 2025 Third Extraordinary session) (defining felony as an offense where a person is sentenced to more than one year in the state penitentiary). But see TEX. PENAL CODE ANN. §§ 1.07, 12.21, 12.31–12.35 Tex. Penal Code § 1.07 (LexisNexis, Lexis Advance through the 2023 Regular Session; the 1st C.S.; the 2nd C.S.; the 3rd C.S. and the 4th C.S. of the 88th Legislature; and the November 7, 2023 general election results) (hereinafter, the currency of the Texas Code will be annotated with Lexis Advance through the 2023 Regular Session) (defining felony as an offense punishable by confinement in a penitentiary, which includes state jail felonies which can include adjudged confinement of 180 days, and misdemeanor as an offense that may not exceed one year’s confinement in jail). See generally Chin, *supra* note 4, at 371. This is not to say that misdemeanors do not also have devastating collateral consequences—misdemeanor offenses can lead to loss of professional licenses and other impacts to employment, consequences for housing, and others. *Id.* at 393–94 (citations omitted).

⁶ UCMJ arts. 18, 19(a) (2016). Special court-martial convictions are generally viewed as misdemeanors and general court-martial convictions are viewed as felonies because individuals can be sentenced to more than twelve months’ confinement.

retirement benefits or employment prospects.⁷ Collateral consequences that result from convictions can include well-known consequences like sex offender registration and deportation, but they also can include a loss of voting rights, disqualification from public assistance and public housing, inability to secure employment, prohibitions on possessing firearms or serving on juries, and more.⁸

Military courts generally impose limitations on counsel presenting evidence and argument on collateral consequences to the sentencing authority.⁹ Even if an accused discusses collateral consequences in an unsworn statement during presentencing, military judges can instruct the sentencing authority to disregard that information when determining the sentence.¹⁰ This prevents the factfinder from creating a holistic sentence that accounts for the additional restrictions society will impose post-conviction. This practice must change to make the military justice system more just. The “civil death” that convicted persons face in civilian society divests a person of the eligibility to engage in common government programs, employment fields, civil liberties, and, really, life as they knew it. This is due to laws and regulations aimed at setting these individuals apart is significant.¹¹ These often-lifelong impacts need to be candidly discussed by commanders and counsel, in determining an appropriate

⁷ In the court-martial system, the law does allow for instruction on one type of collateral consequence: the impact of discharges on retirement benefits. *See* Griffin, 25 M.J. at 424 (holding that it was permissible for the military judge to instruct the members on the impact an adjudged discharge would have on the accused’s retirement benefits).

⁸ This article is covering the primary collateral consequences that would attach after a court-martial conviction. The Federal Government and states have wide latitude to create collateral consequences for a convicted person so long as it does not run afoul of the Constitution. *See generally* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PENN. L. REV. 1789 (2012).

⁹ Electronic Benchbook, *supra* note 4, para. 2-5-24. *See* United States v. Talkington, 73 M.J. 212 (C.A.A.F. 2014). The FY 22 National Defense Authorization Act implemented changes to military sentencing and only military judges can be the sentencing authority for non-capital offenses committed after 27 December 2023. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539E, 135 Stat. 1541, 1700 (2021). Because panels currently may have a role in sentencing and will still have a role in capital cases, this paper uses the generic term “sentencing authority.”

¹⁰ United States v. Palacios Cueto, 82 M.J. 323 (C.A.A.F. 2022); Talkington, 73 M.J. at 213.

¹¹ *See generally* Chin, *supra* note 8 (describing the historical practice of “civil death” and how the Federal and state governments created a “new civil death” in the second half of the 20th century).

disposition, and addressed by counsel and the accused in consultations and court.

This article first examines the development of collateral consequences in the United States and the policy reasons behind that development in Section II. Section III provides an overview of the primary collateral consequences faced after a court-martial conviction, providing counsel with a multi-state overview of these consequences in California, Florida, and Texas. Section IV proposes that military defense counsel advise the accused about collateral consequences and discusses how this can be accomplished. Section V examines the current state of the law on presenting evidence on collateral consequences in courts-martial, and Section VI then proposes revisions to the law. Finally, Section VII describes how defense counsel and the accused could present evidence of collateral consequences in presentencing. Military courts should follow civilian jurisdictions that do allow discussion of collateral consequences. This will benefit the accused, the government, and the military justice system as a whole.

II. Background

Collateral consequences are not unique to American society. They were utilized in ancient Rome, ancient Athens, and Medieval Europe.¹² The early United States engaged in these practices as well by “denying offenders the right to enter into contracts, automatically dissolving their marriages, and barring them from a wide variety of jobs and benefits.”¹³ These forms of criminal punishment for felons were referred to as “civil death” and commonly required a convicted person to forfeit their property to the government, forbade transferring property to others, and disabled them from having standing in court.¹⁴ In the mid-twentieth century, the

¹² Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 17 (Marc Mauer & Meda Chesney-Lind eds., 2002) (describing the history of “civil death” and collateral consequences).

¹³ *Id.* at 17–18. Even the Fourteenth Amendment “explicitly recognizes the power of the states to deny the right to vote to individuals guilty of ‘participation in rebellion or other crimes.’” *Id.* at 18.

¹⁴ Chin, *supra* note 8, at 1793–96. Scholar Gabriel Chin refers to the modern practice of collateral consequences as the “new civil death.” *Id.*

Federal and state governments made an effort to reform their laws and enable convicted individuals to be restored to their full status as citizens.¹⁵ However, that reform was not to last.

Since the “War on Drugs” of the 1980s and ‘90s, conviction and incarceration rates have steadily increased.¹⁶ This rise in convictions coincided with an increase in state legislation and rulemaking that implemented more collateral consequences for convicted individuals, and a “new civil death” began to emerge.¹⁷ In 1996, a study documented that, in the previous ten years, the number of states that implemented collateral consequences increased, impacting the right to vote, parental rights, gun possession, and more.¹⁸ During this time, states made certain convicted offenders ineligible for certain professions, criminal background checks became more accessible, and Congress created a regime that disabled certain individuals from accessing federal benefits and used its power to encourage states to enact laws that extended those prohibitions.¹⁹

This led to a surge of people who were not just convicted of crimes and formally punished, but who also continued to suffer from the secondary and tertiary effects of that original punishment.²⁰ These impacts disproportionately affect poor people and racial minorities.²¹ Depending

¹⁵ Travis, *supra* note 12, at 21; Chin, *supra* note 8, at 1790.

¹⁶ Travis, *supra* note 12, at 22.

¹⁷ *Id.* at 18. Chin, *supra* note 8, at 1799–1803.

¹⁸ Travis, *supra* note 12, at 22 (citing Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROB. 10, 11–14 (1996)).

¹⁹ *Id.* at 22–23.

²⁰ *Id.* at 18; Chin, *supra* note 4, at 373–75 (discussing the increase in mass convictions since the 1980s and the prevalence of individuals being sentenced to short or no sentences, but also being subject to the collateral consequences of their conviction).

²¹ The mass conviction and incarceration rate in America disproportionately impacts racial minorities and their families. INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 33 (Marc Mauer & Meda Chesney-Lind eds., 2002). It then follows that these individuals disproportionately feel the effects of collateral consequences:

Today a criminal freed from prison has scarcely more rights, and arguably less respect, than a freed slave or a black person living “free” in Mississippi at the height of Jim Crow. Those released from prison on parole can be stopped and searched by the police for any reason—or no reason at all—and returned to prison for the most minor of infractions The “whites only” sign may be gone, but new signs have gone up—notices placed in job applications, rental agreements, loan applications, forms for welfare benefits, school applications, and

on the offense, individuals “can be denied public housing, welfare benefits, the mobility necessary to access jobs that require driving, child support, parental rights, the ability to obtain an education, and, in the case of deportation, access to the opportunities that brought immigrants to this country.”²² Some, harkening back to a time when convicted persons were shipped off to another continent, refer to collateral consequences as “internal exile.”²³

Criminal law scholar Jeremy Travis notes that, under the current legal regime, “punishment for the original offense is no longer enough; one’s debt to society is never paid.”²⁴ He refers to collateral consequences as “invisible punishment.”²⁵ They are “invisible” because the laws and regulations that impact convicted persons “operate largely beyond the public view, yet have very serious, adverse consequences.”²⁶ Because these consequences operate outside the criminal code and are functions of civil code, in most jurisdictions, they are not considered part of the sentencing equation when determining an appropriate punishment.²⁷

Travis also discusses a third “dimension” of invisibility that makes it difficult for defense attorneys to fully advise their clients on collateral consequences: these consequences are nearly impossible to completely account for because they are not codified in the criminal code.²⁸ Instead, they are scattered throughout federal law, other states’ laws, civil laws,

petitions for licenses, informing the general public that “felons” are not wanted here.

MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 176 (2020 ed.). The judge in *United States v. Nesbeth* discusses Professor Alexander’s work and uses it to support his reasoning to incorporate collateral consequences into his sentencing. 188 F. Supp. 3d 179 (E.D.N.Y. 2016). Unfortunately, this statistic is also true in the military. Black and Hispanic Service members are more likely to be investigated and court-martialed. U.S. GOV’T ACCOUNTABILITY OFF., GAO-19-344, *MILITARY JUSTICE: DoD AND THE COAST GUARD NEED TO IMPROVE THEIR CAPABILITIES TO ASSESS RACIAL AND GENDER DISPARITIES* 40–43 (2019).

²² Travis, *supra* note 12, at 18.

²³ *See id.* at 19 (citations omitted).

²⁴ *Id.* at 19.

²⁵ *Id.* at 15–17.

²⁶ *Id.* at 16.

²⁷ *Id.*

²⁸ *Id.* at 16–17.

and civil regulations.²⁹ Under current military jurisprudence, this is the system in which convicted Service members will blindly enter without anyone to guide them. The accused become subject to these regimes of civilian laws, the most significant of which are discussed below.

III. Collateral Consequences of a Criminal Conviction

Sergeant First Class (SFC) Smith was just convicted at a general court-martial of sexual assault and acts of domestic violence against his spouse after 19 years of service. He was sentenced to three years' confinement and a dishonorable discharge. He was a military police officer and intended to enter civilian law enforcement after retiring from the U.S. Army.

First Lieutenant (1LT) Clark was just convicted at a general court-martial for possession, use, and distribution of cocaine. He was sentenced to one year's confinement and dismissal from the service. He grew up in subsidized housing, went to college on an ROTC scholarship, and commissioned as a field artillery officer. He intended to complete his service obligation and become a teacher.

As will be demonstrated with the SFC Smith and 1LT Clark vignettes, civilian laws and regulations imposing collateral consequences can reach into nearly every facet of a convicted person's life. This section provides an overview of the primary collateral consequences that are found in federal and state law.³⁰ Each collateral consequence is explained and then

²⁹ *Id.* at 17 ("These punishments are invisible ingredients in the legislative menu of criminal sanctions."); Chin, *supra* note 4, at 382–83 ("The law governing convicted persons is of inferior quality for several structural reasons. Anyone can go to the code of any state and find the title 'Securities Law,' but laws governing convicted persons are scattered throughout codes and regulations. If for some reason securities law were scattered in the same way as are collateral consequences . . . market forces would likely lead to some trade association or publishing house hiring capable lawyers to comb the laws and produce a compendium containing all relevant provisions. . . . However, 'as Robert F. Kennedy said long ago, the poor person accused of a crime has no lobby.'" (quoting Steven B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1877 (1994))).

³⁰ The laws and regulations discussed in this article are current as of submission for publication. Laws and regulations can change at any time. Readers should not assume the laws and regulations discussed herein are current at time of reading or all-encompassing of collateral consequences. These are examples of collateral consequences. This article does not serve as legal advice. For specific inquiries specific to an accused's situation, one should consult with an attorney for legal advice.

draws on the applicable federal law and the laws of California, Florida, and Texas to show how numerous former Service members will be affected based on 1) the offense of which they were convicted, and 2) where they choose to live after serving any term of confinement and discharge from the military. California, Florida, and Texas were selected because these states have the highest Veteran populations.³¹ Each section concludes by applying the law to SFC Smith’s and 1LT Clark’s convictions to demonstrate how outcomes can vary based on the offense charged and where the Service member resides. These collateral consequences include impacts on sex offender registration, immigration, voting, employment, public assistance, housing, gun possession, child custody, driving privileges, and jury service.³²

A. Sex Offender Registration

Sex offender registration is perhaps the most visible collateral consequence. It is the one consequence where federal and state laws

³¹ See Nat’l Ctr. for Veterans Analysis & Stat., *Veteran Population*, U.S. DEP’T OF VETERANS AFFS., https://www.va.gov/vetdata/veteran_population.asp [<https://perma.cc/P7K2-QX5D>] (scroll down to “Population Tables,” select the “+” symbol to expand the menu, scroll down to “The States” and select “Age/Sex” for a table of veteran populations in each state in 2023) (last visited Aug. 19, 2025).

³² Civil commitment is another collateral consequence that is discussed by scholars. See, e.g., ZACHARY HOSKINS, *BEYOND PUNISHMENT? A NORMATIVE ACCOUNT OF THE COLLATERAL LEGAL CONSEQUENCES OF CONVICTION* (2019). This paper will not discuss civil commitment as it is not a function of the military courts, nor does federal law have a mechanism where a Service member can be detained in civil commitment as a direct result of their court-martial conviction. See *United States v. Joshua*, 607 F.3d 379 (4th Cir. 2010) (holding that even where the Service member was serving his court-martial sentence to confinement in a U.S. Bureau of Prisons facility, the provisions of 18 U.S.C.S. § 4248 that allow for civil commitment did not control). However, it is worth noting that twenty states permit having individuals civilly committed, especially if they are believed to be sexual predators. See *Civil Commitment: Best Practice Informed Recommendations*, ATSA, <https://members.atsa.com/ap/CloudFile/Download/LzAKDqkP> [<https://perma.cc/9M3Z-9GY3>] (Feb. 2021; last visited Aug. 19, 2025). Traditionally, individuals with drug-related convictions were precluded from receiving federal student loans; however, the Federal Government no longer inquires about criminal history as of 1 July 2023. See BENJAMIN COLLINS & CASSANDRIA DORTCH, CONG. RSCH. SERV., R46909, *THE FAFSA SIMPLIFICATION ACT 22* (2022). Applicants were still required to answer a question regarding whether they had a drug-related conviction, but as of 2021, an affirmative response no longer impacted eligibility for federal student aid. *Id.*

require a person to provide personally identifiable information, to include a photo, for use in a searchable online database.³³ The duration of sex offender registration varies by jurisdiction and the type of offense, but it is a requirement that follows individuals for years or for a lifetime. This section first examines the federal law governing sex offender registration—The Sex Offender Registration and Notification Act (SORNA)—and then discusses how the federal requirement intersects with the laws of California, Florida, and Texas.

1. SORNA and Department of War Policy

Courts-martial for sex offenses make up a large portion of military justice practice.³⁴ Upon conviction of a qualifying sex offense, federal law requires Service members to register as sex offenders.³⁵ Congress required the then-titled Secretary of Defense to identify which Uniform Code of Military Justice (UCMJ) offenses qualify as sex offenses under SORNA.³⁶ The Secretary of Defense implemented this mandate by issuing Department of Defense Instruction 1325.07.³⁷ The UCMJ offenses requiring sex offender processing pursuant to Department of Defense Instruction 1325.07 and its referenced “covered offenses” table are numerous and include offenses such as abusive sexual contact,³⁸ sexual

³³ See *SORNA In Person Registration Requirements*, SMART, <https://smart.ojp.gov/sorna/current-law/implementation-documents/person-verification> [<https://perma.cc/FP64-PK> V9] (last visited Aug. 19, 2025).

³⁴ See U.S. DEP’T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY app. A, tbl.4 (reporting that 826 court-martial cases were initiated in FY 21 for sexual assault offenses).

³⁵ Sex Offender Registration and Notification Act, 34 U.S.C. § 20913. For an in-depth discussion of sex offender registration and collateral consequences in courts-martial, see Major Alex Altimas, *The Modern Day Scarlet Letter: Challenging the Application of Mandatory Sex Offender Registration and Its Collateral Designation on Members of the Armed Forces*, 230 MIL. L. REV. 189 (2022).

³⁶ 10 U.S.C. § 951 note.

³⁷ U.S. DEP’T OF DEF., INSTR. 1325.07, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY (21 Nov. 2024) (C1, 6 June 2025) [hereinafter DoDI 1325.07]. The “covered offenses” table referenced therein can be retrieved from <https://prhome.defense.gov/Portals/52/Documents/OED/DoDI%201325.07%20Sex%20Offender%20Registration%20Tables.pdf?ver=F3dgoBcnntnOdB2gYZ7MpW%3D%3D> [<https://perma.cc/3LDR-FPJ7>] (last visited Aug. 19, 2025).

³⁸ UCMJ art. 120(c) (2017).

assault,³⁹ rape,⁴⁰ sexual abuse of a child,⁴¹ rape of a child,⁴² indecent viewing,⁴³ child pornography offenses,⁴⁴ and others.⁴⁵

Once a person has been convicted of a sex offense, they must register before they leave confinement or, if no confinement is adjudged, not more than three business days after sentencing.⁴⁶ Sex offenders must then keep their registration current.⁴⁷ Any time an offender changes their “name, residence, employment or student status,” they must personally update their information with the relevant jurisdiction within three business days.⁴⁸ That jurisdiction then updates other jurisdictions where the offender must register.⁴⁹

The Secretary of War is required to provide sex offender registration information to the Attorney General for any Service member who is released from a military confinement facility or convicted at a court-martial but not sentenced to confinement.⁵⁰ This information goes into two national databases: the National Sex Offender Registry and the Dru Sjodin National Sex Offender Public Website.⁵¹ The Dru Sjodin National Sex Offender Public Website enables anyone with access to the internet to search “sex offender registries for all 50 states, the District of Columbia, U.S. Territories, and Indian Country.”⁵²

The information that is provided to authorities for inclusion in these databases includes: 1) the person’s name and aliases, 2) their social security number, 3) each address where they live or will live, 4) employer name and address information, 5) name and address of any school they may attend, 6) vehicle description and license plate number, 7)

³⁹ *Id.* art. 120(b).

⁴⁰ *Id.* art. 120(a).

⁴¹ UCMJ art. 120b(c) (2016).

⁴² *Id.* art. 120b(a).

⁴³ UCMJ art. 120c (2011).

⁴⁴ UCMJ art. 134 (2016).

⁴⁵ DoDI 1325.07, *supra* note 37, Sex Offender Registration Tables (providing the full list of offenses that require sex offender processing).

⁴⁶ 34 U.S.C. § 20913(b).

⁴⁷ *Id.* § 20913(c).

⁴⁸ *Id.*

⁴⁹ *Id.* Federal law requires each state to criminalize failing to register as a sex offender with a penalty that includes confinement for more than one year. *Id.* § 20913(e).

⁵⁰ 34 U.S.C. § 20931(1).

⁵¹ *Id.* § 20931.

⁵² *Dru Sjodin National Sex Offender Public Website*, U.S. DEP’T OF JUST., <https://www.nsopw.gov/> [<https://perma.cc/JC4Z-37VG>] (last visited Aug. 15, 2025).

international travel information, and 8) other information the Attorney General requires.⁵³ Each jurisdiction then ensures that the following information is included in the registry, most of which is made available to the public: 1) physical description, 2) “the text of the provision of the law defining the criminal offense for which the sex offender is registered,” 3) information related to the offender’s criminal history, 4) “a current photograph,” 5) finger and palm prints, 6) DNA sample, 7) photocopy of the offender’s driver’s license or identification card, and 8) other information the Attorney General requires.⁵⁴

These laws were passed and the databases created “[t]o protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, to promote Internet safety, and to honor the memory of Adam Walsh and other child crime victims.”⁵⁵ In seeking to promote public safety in this way, Congress and the states have ensured that all individuals convicted of a sex offense will have their status known for as long as they are required to register to anyone who has access to the Internet. This is what makes sex offender registration the most visible collateral consequence of a conviction.

2. California

In California, a sex offender must register for ten years, twenty years, or life, depending on whether they are a tier one, two, or three offender.⁵⁶

⁵³ 34 U.S.C. § 20914(a)(1)–(8).

⁵⁴ *Id.* § 20914(b)(1)–(8).

⁵⁵ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, pmbi., 120 Stat. 587, 587.

⁵⁶ CAL. PENAL CODE § 290(d) (Deering, Lexis Advance through the 2024 Regular and Special Sessions). Tier one offenders must register for at least ten years; they are persons convicted of a misdemeanor sex offense or a not-serious or violent felony sex offense. *Id.* § 290(d)(1). Violent felonies are listed in California Penal Code § 667.5(c) and include rape, sodomy, oral copulation, lewd and lascivious acts, and others. *Id.* § 290(d)(1). Other “serious felonies” include those listed in California Penal Code § 1192.7 and includes offenses similar to those listed above. *Id.* Tier two offenders must register for at least twenty years; they are persons convicted of sex offense felonies that are more serious than tier one felonies but less serious than tier three felonies. *Id.* § 290(d)(2). They include violent felonies, serious felonies, incest, certain sodomy offenses, certain acts of oral copulation, certain acts of penetration by a foreign object, and annoying or molesting a child under the age of eighteen or an adult they believe to be under the age of eighteen if it is a “second or subsequent conviction for that offense that was brought and tried

Registered sex offenders in California face several restrictions. They are prohibited from residing with another registered sex offender in a single-family residence while on parole unless related by blood, marriage, or adoption.⁵⁷ Unlike states that prohibit sex offenders from living within a certain distance of a school or park, there is no blanket restriction on where a sex offender can live in California; individualized residency restrictions are permissible “as long as they are based on, and supported by, the particularized circumstances of each individual parolee.”⁵⁸ Other examples of restrictions include not being able to work as an ambulance attendant;⁵⁹ being denied licensure to be a tow truck driver;⁶⁰ being denied licenses to be a physician assistant, vocational nurse, physician, and surgeon in most circumstances;⁶¹ and those who committed sex offenses against minors may not work or volunteer in day care or foster homes,⁶² or public schools.⁶³ The most serious and violent offenders may be designated as a “sexual predator” by a jury.⁶⁴

separately.” *Id.* Tier three offenders must register for life because they have been convicted of the most serious sex offenses. *Id.* § 290(d)(3). These offenses are numerous and include, but are not limited to, murder while attempting to rape someone, being a habitual sex offender, being sentenced to fifteen to twenty-five years to life for certain offenses, and felony possession of child pornography. *Id.*

⁵⁷ CAL. PENAL CODE § 3003.5(a) (Deering, Lexis Advance through the 2024 Regular and Special Sessions).

⁵⁸ See *In re Taylor*, 60 Cal. 4th 1019, 1023 (2015) (holding that California’s Proposition 83 that prohibited sex offenders from living within 2,000 feet of schools, parks, or where children regularly gather was unconstitutional).

⁵⁹ CAL. CODE REGS. tit. 13 § 1101(b)(1) (Lexis Advance through Register 2025, No. 13, March 28, 2025).

⁶⁰ CAL. VEH. CODE § 2431 (Deering, Lexis Advance through the 2024 Regular and Special Sessions) (requiring background checks to be a tow truck driver).

⁶¹ CAL. CODE REGS. tit. 16 §§ 1399.523.5, 2524.1 (Lexis Advance through Register 2025, No. 13, March 28, 2025); CAL. BUS. & PROF. CODE § 2221(c) (Deering, Lexis Advance through the 2024 Regular and Special Session).

⁶² CAL. PENAL CODE § 3003.6(a) (Deering, Lexis Advance through the 2024 Regular and Special Session).

⁶³ CAL. EDUC. CODE §§ 44836(a), 45123 (Deering, Lexis Advance through the 2024 Regular and Special Session). All three examples exempt denial based on a misdemeanor conviction of indecent exposure.

⁶⁴ CAL. WELF. & INST. CODE § 6600 (Deering, Lexis Advance through the 2024 Regular and Special Session).

3. Florida

Florida requires individuals convicted of any qualifying sex offense to submit to lifetime registry.⁶⁵ Sex offenders in Florida are required to get a driver's license or identification card that contains the label "943.0435, F.S." (referencing the Florida sex offender registration statute) and sexual predators' cards will be labeled "SEXUAL PREDATOR."⁶⁶ Individuals who commit a sexual battery, lewd or lascivious offense, child pornography offenses, and child sex trafficking offenses on a child younger than 16 years of age are prohibited from living within 1,000 feet of a school, child care facility, park, or playground.⁶⁷ Some counties, such as Miami-Dade County, have even more restrictions on where sex offenders can live.⁶⁸ Florida has similar employment restrictions to California.⁶⁹

Florida also has a specific mechanism for designated individuals as "sexual predators," which carries even more restrictions. In Florida, a sexual predator is an individual who a court finds has committed the most serious of sexual offenses against minors, repeat offenders, or those who have engaged in sexually violent acts.⁷⁰ This designation is noted in the

⁶⁵ FLA. STAT. ANN. § 943.0435(11). Registration may be terminated earlier upon petition and consideration by a court if the individual is pardoned, the conviction is set aside, they have completed their confinement or supervision for twenty years or more without being arrested, or for some offenses committed while a juvenile subject to specific requirements. FLA. STAT. ANN. § 943.0435(11)(a)-(b).

⁶⁶ FLA. STAT. ANN. §§ 943.0435(3), 322.141(3) (LexisNexis, Lexis Advance through the 2025 Third Extraordinary session); CARLOS J. MARTINEZ, MIAMI-DADE PUBLIC DEFENDER'S OFFICE, WHAT YOU DON'T KNOW CAN HURT YOU: THE COLLATERAL CONSEQUENCES OF A CONVICTION IN FLORIDA 66 (2020).

⁶⁷ FLA. STAT. ANN. § 775.215(2)(a), (3)(a) (LexisNexis, Lexis Advance through the 2025 Third Extraordinary session).

⁶⁸ MARTINEZ, *supra* note 66, at 67 (prohibiting certain sex offenders from living within 2,500 feet of a school). Unlike the California Supreme Court in *In re Taylor*, 60 Cal. 4th 1019 (2015), a Florida court held that the Miami-Dade County restrictions were constitutional. *Doe v. Miami-Dade Cnty.*, No. 1:14-cv-23922-PCH, 2015 U.S. Dist. LEXIS 190396, *29 n.10 (S.D. Fla. Apr. 3, 2015).

⁶⁹ See generally MARTINEZ, *supra* note 66, at 69 (noting that private employers can ask about convictions, sex offenders are unable to secure employment in any state job where they would have to pass a background check, and sex offenders are required to disclose their professional licenses and will likely lose that license as a result).

⁷⁰ FLA. STAT. ANN. § 775.21 (LexisNexis, Lexis Advance through the 2025 Third Extraordinary session) ("Repeat sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to public safety.").

publicly-available sex offender registry, and, notably, requires law enforcement to notify the community in which the predator will be living and any licensed child care centers and schools within one mile of that person’s presence.⁷¹

4. Texas

Unlike Florida, Texas has two tiers of registration duration depending on the offense: ten years or lifetime registration.⁷² Generally, if an offense was committed against a child, the offender may not enter the “child safety zone” established by the parole panel.⁷³ They may not engage in any programs where minors participate in athletic, civic, or cultural activities or go within a certain distance (as determined by the parole panel) of places where children normally gather, such as schools, daycares, playgrounds, or public swimming pools.⁷⁴ Texas also has a sexual predator designation for those who are civilly committed because of their offenses, and has a community notification process similar to Florida’s.⁷⁵ Texas also places restrictions on employment, including driving a bus, taxi, or limousine and operating an amusement ride;⁷⁶ being an emergency

⁷¹ FLA. STAT. ANN. § 775.21(6)(k), (7) (LexisNexis, Lexis Advance through the 2025 Third Extraordinary session).

⁷² *Restrictions After a Criminal Conviction*, TEX. STATE L. LIBR., <https://guides.sll.texas.gov/criminal-conviction-restrictions/sex-offenders> [<https://perma.cc/NX28-4722>] (Aug. 27, 2025). For a helpful comparison chart of Texas’s registration duty duration versus the SORNA’s requirement that was current as of September 2022, see Texas Length of Duty to Register Compared to the Minimum Required Registration Period Under Federal Law (34 USC § 20911), TEXAS.GOV, <https://sor.dps.texas.gov/PublicSite/sor-public/SORNA.pdf> [<https://perma.cc/QKC9-XZ42>] (Sep. 2022).

⁷³ TEX. GOV’T CODE ANN. § 508.187 (LexisNexis, Lexis Advance through the 2023 Regular Session). These child safety zones are unique to each offender and generally preclude entering certain distances within playgrounds, public pool, daycares, etc. TEX. GOV’T CODE § 508.225.

⁷⁴ *Id.* There are caveats to the rule and the offender may request modifications. *Id.*

⁷⁵ TEX. CODE CRIM. PROC. ANN. art. 62.201 (LexisNexis, Lexis Advance through the 2023 Regular Session).

⁷⁶ TEX. CODE CRIM. PROC. ANN. art. 62.063(b) (LexisNexis, Lexis Advance through the 2023 Regular Session).

paramedic;⁷⁷ being a healthcare provider;⁷⁸ and working for school districts,⁷⁹ among others.

SFC Smith would be best served by moving to California because it places the fewest residency restrictions on sex offenders of the states surveyed, and depending on the type of sexual offense, could face a shorter registration duration requirement than Florida and Texas. Depending on which type of sexual assault he was convicted of, he may be subject to sexual predator designation in California, Florida, and Texas. 1LT Clark would not face any of these restrictions because he was not convicted of a sex offense.

B. Immigration

Immigration consequences impact numerous Service members. In FY 2024, 16,290 Service members became naturalized U.S. citizens.⁸⁰ To become a U.S. citizen, an individual must generally establish certain qualifications and meet certain timelines. Some of these include being a “lawful permanent resident . . . for at least five years,” “continuous residence in the United States . . . for at least five years immediately preceding the date of filing the application and up to the time of admission to citizenship,” “[physical presence] in the United States for at least 30 months out of the five years immediately preceding the date of filing,” and “good moral character for five years prior to filing, and during the period leading up to the administration of the Oath of Allegiance.”⁸¹ There is currently a special process in the U.S. Code that enables Service members

⁷⁷ 25 TEX. ADMIN. CODE § 157.37(e)(5)(a) (LexisNexis, Lexis Advance through the 2023 Regular Session) (including indecency with a child, aggravated sexual assault, sexual assault).

⁷⁸ TEX. OCC. CODE ANN. § 108.052(1) (LexisNexis, Lexis Advance through the 2023 Regular Session).

⁷⁹ TEX. EDUC. CODE § 22.085(a) (LexisNexis, Lexis Advance through the 2023 Regular Session).

⁸⁰ *Military Naturalization Statistics*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/military/military-naturalization-statistics> [<https://perma.cc/6GFC-RQ7W>] (Nov. 6, 2024).

⁸¹ USCIS Policy Manual, vol. 12, pt. D, ch. 1, para. B, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 29, 2025), <https://www.uscis.gov/policy-manual/volume-12-part-d-chapter-1> [<https://perma.cc/MQJ7-BWZ7>]; 8 U.S.C. § 1427.

to “fast-track” their naturalization applications, essentially waiving the five-year residency and physical presence requirements.⁸²

Pursuant to federal law, non-U.S. citizens residing in the United States and Service members naturalized through military service are subject to deportation if they commit certain criminal offenses.⁸³ To become a U.S. citizen, an individual must show that they are eligible to become citizens by a preponderance of the evidence.⁸⁴ One of the requirements includes establishing that the individual has “good moral character” for the five years before applying to be naturalized.⁸⁵ For Service members naturalized through military service during a period of hostilities, the required showing is reduced to one year.⁸⁶ A conviction may preclude a

⁸² Generally, this special process waives the five-year statutory residence and physical presence requirement for Service members during declared periods of hostilities. 8 U.S.C. § 1440(b). A period of hostility is determined by Executive Order. *Id.* On 3 July 2002, then-President George W. Bush declared that the United States was in a period of hostilities for the purposes of expedited naturalization. Exec. Order 13269, 67 Fed. Reg. 45287 (July 3, 2002). That executive order is still in effect as of the date of this writing. *Policy Manual, Chapter 3—Military Service During Hostilities (INA 329)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policy-manual/volume-12-part-i-chapter-3#footnote-18> [<https://perma.cc/TSJ6-NHVT>] (last visited Aug. 29, 2025). See generally HOLLY STRAUT-EPPSTEINER & LAWRENCE KAPP, CONG. RSCH. SERV., IF12089, U.S. CITIZENSHIP THROUGH MILITARY SERVICE AND OPTIONS FOR MILITARY RELATIVES (2022) (summarizing the current process for naturalization through military service).

⁸³ 8 U.S.C. § 1227(a)(2).

⁸⁴ Immigration and Naturalization Act, 8 U.S.C. § 1429; USCIS Policy Manual, vol. 12, pt. D, ch. 1, para. B, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policy-manual/volume-12-part-d-chapter-1> [<https://perma.cc/867W-X3MF>] (last visited Aug. 29, 2025); USCIS Policy Manual, vol. 12, pt. D, ch. 9, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policy-manual/volume-12-part-d-chapter-9> [<https://perma.cc/K6PB-AR4Y>] (last visited Aug. 29, 2025).

⁸⁵ Immigration and Naturalization Act, 8 U.S.C. § 1427(d)–(e); USCIS Policy Manual, vol. 12, pt. D, ch. 1, para. B, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policy-manual/volume-12-part-d-chapter-1> [<https://perma.cc/X3UA-NXM3>] (last visited Aug. 29, 2025); USCIS Policy Manual, vol. 12, pt. D, ch. 9, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policy-manual/volume-12-part-d-chapter-9> [<https://perma.cc/G3P C-LBLQ>] (last visited Aug. 29, 2025).

⁸⁶ USCIS Policy Manual, vol. 12, pt. I, ch. 3, para. A, U.S. CITIZENSHIP & IMMIGRATION SERVS. <https://www.uscis.gov/policy-manual/volume-12-part-i-chapter-3> [<https://perma.cc/3JLG-PPH5>] (last visited Aug. 29, 2025).

finding of good moral character.⁸⁷ Qualifying offenses that are most likely to be seen in the military justice system include crimes of moral turpitude;⁸⁸ multiple criminal convictions;⁸⁹ aggravated felonies;⁹⁰ many types of drug offenses;⁹¹ being or having a history of being a drug abuser or addict;⁹² domestic violence, stalking, violating a protective order, and crimes against children;⁹³ and engaging in acts of espionage.⁹⁴

Service members naturalized through military service face an additional concern. Though they may have been naturalized and granted citizenship, if they fail to serve five years honorably and receive an other than honorable, bad conduct, or dishonorable discharge, or if an officer is dismissed, their citizenship may be revoked and they may be deported.⁹⁵ Because immigration is under the purview of the Federal Government, state laws are not being addressed in this section.

If either SFC Smith or 1LT Clark were in a position where they were naturalized through military service and had not yet served for five

⁸⁷ Pursuant to federal law, general court-martial convictions are qualifying convictions for the purpose of the good moral character determination process. USCIS Policy Manual, vol. 12, pt. F, Ch. 2, para. C.3, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-2> [<https://perma.cc/WT9H-BBX9>] (last visited Aug. 29, 2025); *Matter of Juan Carlos Rivera-Valencia*, Respondent, 24 I. & N. Dec. 484 (BIA 2008).

⁸⁸ 8 U.S.C. § 1227(a)(2)(A)(i).

⁸⁹ *Id.* § 1227(a)(2)(A)(ii).

⁹⁰ *Id.* § 1227(a)(2)(A)(iii).

⁹¹ *Id.* § 1227(a)(2)(B)(i) (including convictions for “(or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in . . . 21 U.S.C. 802[] other than a single offense involving possession for one’s own use of 30 grams or less of marijuana . . .”).

⁹² *Id.* § 1227(a)(2)(B)(ii).

⁹³ *Id.* § 1227(a)(2)(E) (including child abuse, neglect, or abandonment). Domestic violence crimes include: any crime of violence (as defined in [18 U.S.C. § 16]) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabitating with or has cohabitated with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual’s acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

Id. § 1227(a)(2)(E)(i).

⁹⁴ *Id.* § 1227(a)(4).

⁹⁵ 8 U.S.C. § 1439(f).

years,⁹⁶ their convictions would subject them to possible revocation of their U.S. citizenship and deportation.

C. Voting

The right to vote in the United States has had a tumultuous road from the country’s founding. Perhaps surprisingly, the right to vote is not explicitly granted in the Constitution; it is cobbled together through “decades of court rulings and legislative decisions, most of them—but hardly all—slowly expanding a legal guarantee of the ability to cast a ballot.”⁹⁷ Initially, only white men over the age of twenty-one could vote.⁹⁸ Generally, states govern the “time[], place[], and manner” of elections, but those state rules are checked by federal law.⁹⁹ For example, the Fifteenth Amendment prohibits the Federal Government and states from infringing on the right to vote “on account of race, color, or previous servitude,”¹⁰⁰ the Nineteenth Amendment prohibits denying the right to vote based on sex,¹⁰¹ the Twenty-Fourth Amendment provides that failure to pay taxes cannot be used to deny the right to vote,¹⁰² and the Twenty-Sixth Amendment prohibits denying the right to vote to citizens over the age of eighteen.¹⁰³ Though treated as an explicit constitutional right afforded to most Americans, states are enabled to restrict voting rights to those convicted of crimes. These narrow prohibitions placed on states have

⁹⁶ Because officers must be U.S. citizens in order to commission, for the purposes of this vignette, 1LT Clark naturalized through prior service as an enlisted Soldier. See 10 U.S.C. § 532(a)(1).

⁹⁷ See Michael Wines, *Does the Constitution Guarantee a Right to Vote? The Answer May Surprise You.*, N.Y. TIMES (Oct. 26, 2022), <https://www.nytimes.com/article/voting-rights-constitution.html> [<https://perma.cc/34WB-BY7S>].

⁹⁸ *Elections and Voting*, THE WHITE HOUSE PRESIDENT BARACK OBAMA <https://obamawhitehouse.archives.gov/1600/elections-and-voting> [<https://perma.cc/KB54-DXA3>] (last visited Aug. 15, 2025).

⁹⁹ See Wines, *supra* note 97.

¹⁰⁰ U.S. CONST. amend. XV, § 1.

¹⁰¹ U.S. CONST. amend. XIX.

¹⁰² U.S. CONST. amend. XXIV § 1.

¹⁰³ U.S. CONST. amend. XXVI § 1.

led to varied outcomes in how states govern the way in which voting is conducted and who may vote, to include those convicted of offenses.¹⁰⁴

In California, felony offenders are prohibited from voting while serving a state or felony prison term.¹⁰⁵ Once they are released, they may apply to have their voting rights restored.¹⁰⁶ In Florida, many felony offenders may vote after they complete their sentences, to include any period of probation or parole or payment of fees or restoration.¹⁰⁷ However, those convicted of murder or a felony sex offense continue to be barred from voting even after completion of their sentence unless they are successful in petitioning the State Clemency Board for restoration of the right.¹⁰⁸ In Texas, felony offenders may vote if they have completed their sentence, to include parole or probation.¹⁰⁹ Interestingly, even the official Texas State Law Library online resource for restoration of voting rights notes that “it is not always clear as to when a sentence has been fully

¹⁰⁴ The Department of Justice has published a guide on how voting rights intersect with state laws regarding convictions. See CIV. RTS. DIV., U.S. DEP’T OF JUST., GUIDE TO STATE VOTING RULES THAT APPLY AFTER A CRIMINAL CONVICTION (2022).

¹⁰⁵ Stefanie Dazio, *California Proposal Would Reinstate Prisoners’ Voting Rights*, AP NEWS (Feb. 8, 2023), <https://apnews.com/article/politics-california-state-government-maine-vermont-67b8ca6b281fbf0304762af32633062f> [<https://perma.cc/WK8B-RQPP>].

¹⁰⁶ *Id.* *Voting Rights Restored*, CAL. SEC’Y OF STATE, <https://www.sos.ca.gov/elections/re-store-your-vote> [<https://perma.cc/TY4H-H74L>] (last visited Aug. 27, 2025). People incarcerated for misdemeanors are unaffected by these rules as they maintain their right to vote during and after confinement. *Id.* Once released from confinement for a felony conviction, an individual simply needs to fill out a voter registration card online or by mail and certify that they “[a]re not currently serving a state or federal prison term for conviction of a felony.” *Quick Guide: California Voter Registration/Pre-Registration Application*, CAL. SEC’Y OF ST., (May 2024), <https://elections.cdn.sos.ca.gov/pdfs/quick-guide-vrc.pdf> [<https://perma.cc/7BWK-CH9Q>].

¹⁰⁷ FLA. CONST. art. VI, § 4; *Constitutional Amendment 4/Felon Voting Rights*, FLA. DEP’T OF STATE (July 10, 2024), <https://dos.myflorida.com/elections/for-voters/voter-registration/constitutional-amendment-4felon-voting-rights/> [<https://perma.cc/A22C-HW2H>].

¹⁰⁸ See sources cited *supra* note 107. Those convicted of murder or a felony sex offense must apply to the State Clemency Board for restoration of their right to vote. *Constitutional Amendment 4/Felon Voting Rights*, *supra* note 107. Unlike California, Florida has made it difficult for individuals to determine if they have their voting rights restored and several people were prosecuted for trying to vote, incorrectly believing that they were qualified after completing their sentences. See *Voting Rights Restoration Efforts in Florida*, Brennan Ctr. For Just. (Nov. 18, 2024), <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-florida> [<https://perma.cc/W323-V5BZ>].

¹⁰⁹ TEX. ELEC. CODE §§ 11.002(a)(4), 13.001(a)(4) (LexisNexis, Lexis Advance through the 2023 Regular Session).

completed.”¹¹⁰ This is further complicated by that fact that some terms of parole or probation may require the payment of “fines, fees, and restitution.”¹¹¹ However, the Texas constitution explicitly bars individuals convicted of bribery, perjury, forgery, or “other high crimes” from regaining the right to vote.¹¹²

Though it may seem as if it is a straightforward process to have one’s right to vote restored, some states, like Texas and Florida, have laws and regulations that lack clarity as to when someone truly qualifies to have their rights restored based on the terms of their supervision or parole. This may be further compounded when military parole terms intersect with civilian jurisdictions’ interpretation of those terms and how a state interprets whether a special court-martial equates to a felony or misdemeanor conviction. While there are resources available online to help individuals determine if they can have their right to vote restored or not, they contain legal disclaimers that they should not be solely relied upon by users.¹¹³ There is a danger in misunderstanding when one’s right to vote has been restored, as wrongfully registering to vote can subject a person to further criminal sanctions, so it is critical that military members who have been convicted know if they are eligible to vote before voting.

SFC Smith would be allowed to vote in California after release from confinement; however, if he moved to Texas, he would need to complete any parole period or pay any fines before he could vote. He could not vote in Florida because he is a sex offender. 1LT Clark would also be allowed to vote in California after confinement, and would be allowed to vote in Florida and Texas once his sentence was complete. This is all assuming that there were no complications derived from a civilian jurisdiction interpreting any terms of military parole or military sentences, such as fines or adjudication of forfeitures.

¹¹⁰ *Reentry Resources for Former Prisoners*, TEX. ST. L. LIBR. (Aug. 27, 2025 9:58 AM), <https://guides.sll.texas.gov/reentry-resources/voting> [https://perma.cc/R2UQ-YHWY].

¹¹¹ U.S. DEP’T OF JUST., *supra* note 104, at 17.

¹¹² TEX. CONST. art. 6, § 1(b).

¹¹³ *See, e.g., Restore Your Vote: I Have a Felony Conviction. Can I Vote?*, RESTORE YOUR VOTE, <https://campaignlegal.org/restoreyourvote> [https://perma.cc/7WS7-MVTM] (last visited Aug. 27, 2025) (“[T]his toolkit is not an offer of legal services or legal advice. The website serves to provide the best information available to make restoration accessible for citizens with felony convictions. We do not guarantee that by following these steps that your voting rights will be restored; that power ultimately rests with state authorities. Also, restoration of rights processes can be complicated and unclear in some states.”)

D. Employment

When a convicted Service member's confinement is complete and their military career ends, they must find a job or risk becoming homeless. Unfortunately, this is no easy task, as many states place onerous prohibitions on criminals that prevent them from readily finding employment.¹¹⁴ This manifests in background checks conducted by prospective employers, the availability of criminal records online, and the exclusion of certain offenders from certain licensures or types of employment.¹¹⁵ The most common fields in which Veterans seek employment include government work, manufacturing, professional and business services, and education and health services.¹¹⁶ As these are the most popular areas of employment for Veterans, this section examines some of the restrictions placed on convicted persons in those fields.

1. Federal

Convicted persons can apply for federal jobs, but federal law prohibits people convicted of certain crimes from serving in some positions.¹¹⁷ When applying for most jobs, federal agencies do not ask about criminal records.¹¹⁸ Once someone receives a conditional offer of employment, they must complete the Declaration for Federal Employment form and await the results of a background check.¹¹⁹ The agency then considers criteria such as the applicant's character, the nature of the offense,

¹¹⁴ See HOSKINS, *supra* note 32, at 13–14, 170–71.

¹¹⁵ *Id.* (“This sort of stigmatization is not itself a formal legal consequence of conviction, but such hiring practices are facilitated by state policies that make criminal records easily accessible to potential employers.”).

¹¹⁶ BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., EMPLOYMENT SITUATION OF VETERANS—2021, tbl.5 (2021) (providing different breakdowns of the data by industry type and sex). According to the 2021 survey, 22.9 percent of Veterans worked for government agencies, 12.1 percent worked in manufacturing, 10.4 percent worked in professional and business services, 9.2 percent worked in education and health services, and 8 percent worked in transportation and utilities. *Id.*

¹¹⁷ *Can I Work for the Government If I Have a Criminal Record?*, USAJOBS, <https://help.usajobs.gov/faq/application/eligibility/ex-offender/> [https://perma.cc/A8LK-NRPE] (last visited Aug. 19, 2025) (for example, prohibiting federal employment if convicted of treason or disqualifying individuals convicted of misdemeanor domestic violence offenses from jobs that require the person to be involved with firearms).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

rehabilitation efforts, and how much time has passed since the conviction before making a determination.¹²⁰

2. California

In 2018, California amended its Fair Housing and Employment Act (FEHA) to include a “ban-the-box” provision, prohibiting employers with five or more employees from asking applicants if they have a criminal record.¹²¹ Employers are only permitted to ask about a person’s conviction history or run a background check once they have extended a conditional offer of employment.¹²² If an employer does learn of criminal history and intends to deny them employment, FEHA places certain requirements on the employer, including providing written notice of the intent to rescind the offer and the opportunity to respond.¹²³

Though there are these protections in place, there are still several restrictions placed on individuals who would need licenses to work in their desired career field. These restrictions are determined by each licensing board,¹²⁴ but disqualification from employment generally requires the offense to be directly related to suitability for that profession.¹²⁵ Specific

¹²⁰ *Id.*

¹²¹ CAL. GOV’T CODE § 12952(a) (Deering, Lexis Advance through the 2024 Regular and Special Session). See Sachi Clements, *California Laws on Employer Use of Arrest and Conviction Records*, NOLO, <https://www.nolo.com/legal-encyclopedia/california-laws-employer-use-arrest-conviction-records.html> [https://perma.cc/KD8H-U5RS] (last visited Mar. 12, 2023). This law does not prohibit background checks if required by law and in other specific circumstances. See CAL. GOV’T CODE § 12952(d).

¹²² *Id.* § 12952(a), (b).

¹²³ *Id.* § 12952(c).

¹²⁴ See CAL. BUS. & PROF. CODE div. 3, chs. 1–21.5 (Deering, Lexis Advance through the 2022 Regular Session) (listing over twenty professions governed by the California Business and Professions Code).

¹²⁵ *Id.* §§ 480, 490. See PAC. JUV. DEF. CTR., COLLATERAL CONSEQUENCES OF JUVENILE DELINQUENCY PROCEEDINGS IN CALIFORNIA 117 (Sue Burrell & Rourke F. Stacy eds., 2011) (citing *Hughes v. Board of Architectural Examiners*, 17 Cal. 4th 763, 788 (1998)). Clients may ask the following:

Will this affect my future career opportunities?” The answer depends on whether the client needs a license to work. If the client chooses a career in neurology, car sales, teaching, plumbing, cosmetology, pest control, or truck driving, among many others, he or she will need a

examples of employment prohibitions include: many sex and drug offenders may not be employed by public schools,¹²⁶ and individuals convicted of certain felonies are also prohibited from serving as school team coaches.¹²⁷

3. Florida

Private employers in Florida have an almost unfettered ability to deny employment based on criminal records.¹²⁸ However, Florida does prohibit its government agencies and municipalities from denying employment “solely because of a prior conviction for a crime” unless “the crime was a felony or first-degree misdemeanor and directly related to the position of employment sought.”¹²⁹ However, convictions for certain drug offenses, such as sale and trafficking of controlled substances, are exempt from this prohibition unless they meet certain conditions.¹³⁰

For individuals who hold or would want a professional license, a conviction may preclude future employment in that field.¹³¹ Generally, the Florida Department of Public Health will deny a license to an applicant if

license. If the client is an entrepreneur, he or she will face licensing requirements in fields as diverse as construction, child care, moving and storage, selling estate jewelry, and security alarm services. If the client is a chef who simply wants to open a little café, a license will still be needed to serve alcoholic beverages.

Id. at 116.

¹²⁶ CAL. EDUC. CODE §§ 44836(a)(1), 44836(b)(1). (Deering, Lexis Advance through the 2024 Regular and Special Session). Private school employment requiring student contact is contingent on a Department of Justice background check. *Id.* § 44237.

¹²⁷ CAL. CODE REGS. § 5592 (West 2025).

¹²⁸ See MARTINEZ, *supra* note 66, at 34.

¹²⁹ FLA. STAT. ANN. § 112.011(1)(a) ((LexisNexis, Lexis Advance through the 2025 Ordinary session).

¹³⁰ *Id.* Such conditions include completion of an adjudged term of confinement or “supervisory sanctions” or if under supervisory sanctions, they comply with numerous law-imposed requirements. FLA. STAT. ANN. § 775.16.

¹³¹ Some examples include: home inspectors (denial for theft, sexual battery, child or adult abuse, battery, etc.), veterinary medicine (denial for drug offenses), and nursing (anything related directly to ability to practice). FLA. ADMIN. CODE ANN. r. 61-30.102 (Lexis Advance through April 16, 2025); FLA. STAT. ANN. § 474.214(1)(c) (LexisNexis, Lexis Advance through the 2025 regular session); FLA. ADMIN. CODE ANN. r. 64B9-8.006(3)(c) (Lexis Advance through April 16, 2025); FLA. STAT. ANN. § 456.0635(2)(a) (LexisNexis, Lexis Advance through the 2025 regular session); MARTINEZ, *supra* note 66, at 75–77.

convicted for any drug offense until certain conditions are met.¹³² Other professions that require a background check include athletic coach, child care personnel, correctional officers, healthcare providers, law enforcement officers, school employees, and others.¹³³ Most individuals wishing to be employed by the State of Florida must pass a background check, which precludes employment based on convictions for offenses such as felony-level battery, felony drug offenses, domestic violence, and others.¹³⁴

4. Texas

Texas allows consumer reporting agencies to report arrest records, indictments, and convictions dating back seven years in most cases.¹³⁵ Offenders face restrictions in applying to numerous employment fields, including working as a firefighter,¹³⁶ healthcare provider,¹³⁷ medical device distributor or manufacturer,¹³⁸ and plumber.¹³⁹

SFC Smith and 1LT Clark would face similar employment restrictions in California, Florida, and Texas. However, they would both have more due process in California, where a “ban-the-box” measure was passed, and the prospective employer must meet several requirements before they could refuse employment based on a conviction.

¹³² MARTINEZ, *supra* note 66, at 76.

¹³³ *Id.* app. B.

¹³⁴ *Id.* at 35–36.

¹³⁵ TEX. BUS. & COM. CODE ANN. § 20.05(a)(4) (LexisNexis, Lexis Advance through the 2023 Regular Session) (allowing for longer periods of time in certain circumstances, e.g., where a person will earn more than \$75,000). *See generally Employment*, TEX. STATE L. LIBR., <https://guides.sll.texas.gov/reentry-resources/employment> [<https://perma.cc/3LKM-YJDB>] (Aug. 27, 2025, 9:58 AM).

¹³⁶ 37 TEX. ADMIN. CODE § 403.7 (2025).

¹³⁷ TEX. OCC. CODE ANN. § 108.052 (LexisNexis, Lexis Advance through the 2023 Regular Session).

¹³⁸ TEX. HEALTH & SAFETY CODE ANN. § 431.279 (LexisNexis, Lexis Advance through the 2023 Regular Session).

¹³⁹ 22 TEX. ADMIN. CODE § 363.15 (2025).

E. Public Assistance

The Federal Government and states provide help to families in need of financial assistance. The Federal Government enacted the Food Stamp Act of 1977 and the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996.¹⁴⁰ The Food Stamp Act of 1977 established the Supplemental Nutrition Assistance Program (SNAP).¹⁴¹ The intent of SNAP benefits (formerly referred to as “food stamps”) is to “provide[] food benefits to low-income families to supplement their grocery budget so they can afford the nutritious food essential to health and well-being.”¹⁴² The PRWORA created the Temporary Assistance to Needy Families (TANF) program.¹⁴³ The TANF program provides federal dollars to states to assist families financially and with other support services.¹⁴⁴

However, the 1996 PRWORA also provided that individuals with a felony drug conviction were ineligible for TANF and SNAP benefits.¹⁴⁵ States can opt out of this requirement and allow individuals convicted of drug-related felonies to receive the aid.¹⁴⁶ Most states have either modified the TANF ban or removed it entirely from their state code.¹⁴⁷ Only seven

¹⁴⁰ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105; Food Stamp Act of 1977, Pub. L. No. 95-113, 91 Stat. 913.

¹⁴¹ Food Stamp Act of 1977, Pub. L. No. 95-113, 91 Stat. 913.

¹⁴² *Supplemental Nutrition Assistance Program (SNAP)*, U.S. DEP’T OF AGRIC., <https://www.fns.usda.gov/snap/supplemental-nutrition-assistance-program> [<https://perma.cc/BMW8-SZYL>] (last visited Aug. 22, 2025).

¹⁴³ Pub. L. No. 104-193, 110 Stat. 2105.

¹⁴⁴ *Temporary Assistance for Needy Families*, BENEFITS.GOV, <https://www.benefits.gov/benefit/613> [<https://perma.cc/32MB-K8US>] (last visited Aug. 29, 2025).

¹⁴⁵ Pub. L. No. 104-193, § 115(a). If a felon is part of a family who receives TANF or SNAP benefits, that family’s benefit amount is reduced by the amount that person would have received. *Id.* § 115(b)(1).

¹⁴⁶ *Id.* § 115(d).

¹⁴⁷ *No More Double Punishments: Lifting the Ban on SNAP and TANF for People with Prior Felony Drug Convictions*, CLASP, <https://www.clasp.org/publications/report/brief/no-more-double-punishments/> [<https://perma.cc/UPZ7-9962>] (Apr. 2022) (describing some of the ways in which states have modified the eligibility for SNAP and TANF benefits, including requirements such as completing drug treatment, reducing the length of the ban so that it is not a lifetime ban, etc.); Ali Zane, *Remaining States Should Lift Racist TANF Drug Felony Bans; Congress Should Lift It Nationwide*, CTR. ON BUDGET & POL’Y PRIORITIES, <https://www.cbpp.org/blog/remaining-states-should-lift-racist-tanf-drug-felony-bans-congress-should-lift-it-nationwide> [<https://perma.cc/SZ5D-2GDD>] (June 30, 2021, 1:46 PM) (“Seven states—Arizona, Georgia, Missouri, Nebraska, South Carolina, Texas, and West Virginia—still maintain the full lifetime ban in TANF for all.”).

states have a full ban on TANF for convicted drug felons.¹⁴⁸ South Carolina is the only state that has a full ban on SNAP benefits.¹⁴⁹

California, Florida, and Texas differ in their eligibility criteria for TANF and SNAP. In California, individuals with drug felony convictions are eligible to receive the state’s versions of TANF and SNAP benefits.¹⁵⁰ Florida has opted out of most of the provisions of the PRWORA—the state only prohibits “temporary cash assistance” and food assistance for individuals convicted of felony drug trafficking.¹⁵¹ Florida also requires that the individual convicted of a drug felony complete substance abuse treatment.¹⁵² Texas does not have a lifetime ban on SNAP benefits for a single felony drug conviction, but does place restrictions if a person violates parole or community supervision, or if a person is convicted a subsequent time.¹⁵³ Texas prohibits those convicted of a felony drug offense from receiving TANF.¹⁵⁴

ILT Clark would be able to receive SNAP and TANF benefits in California. He would be eligible for benefits in Florida if he completed substance abuse treatment. In Texas, he could receive SNAP benefits, but he could not receive TANF because he was convicted of a drug offense at a general court-martial. Though he was convicted of assaulting his

¹⁴⁸ CLASP, *supra* note 147.

¹⁴⁹ *Id.*

¹⁵⁰ STATE OF CAL. HEALTH & HUMAN SERVS. AGENCY, TEMP 3005, CHANGES FOR PEOPLE WITH A PRIOR FELONY DRUG CONVICTION (Dec. 2014), <https://www.cdss.ca.gov/cdssweb/entres/forms/English/Temp3005.pdf>. [<https://perma.cc/59AX-MRLL>] California removed these conviction barriers to benefits in 2015. *Id.*

¹⁵¹ FLA. STAT. ANN. § 414.095(1) (LexisNexis, Lexis Advance through the 2025 regular session). *See also Supplemental Nutrition Assistance Program (SNAP)*, FLA. DEP’T OF CHILD. & FAMILIES, <https://www.myflfamilies.com/services/public-assistance/supplemental-nutrition-assistance-program-snap> [<https://perma.cc/89ZT-PWTW>] (last visited Aug. 29, 2025).

¹⁵² FLA. STAT. ANN. § 414.095(1) (LexisNexis, Lexis Advance through the 2025 regular session).

¹⁵³ 1 TEX. ADMIN. CODE § 372.501 (2025) (imposing a two-year restriction for violation of parole and a lifetime ban if there is a subsequent felony drug conviction, effective September 2015). *See also* Liz Crampton, *Relaxed Food Stamp Rules to Help Felons*, TEX. TRIB. (Aug. 30, 2015, 6:00 AM), <https://www.texastribune.org/2015/08/30/supporters-new-law-hopeful-it-will-reduce-repeat-o/> [<https://perma.cc/D2TG-C53H>] (sponsoring the Texas House bill, State Representative Senfronia Thompson stated, “It seems disproportional to punish persons for life for a mistake that might not even get them jail time.”).

¹⁵⁴ 1 TEX. ADMIN. CODE § 372.501(a)(2).

spouse, SFC Smith would be eligible for both SNAP and TANF in California, Florida, and Texas.

F. Housing

The housing of Veterans is a highly visible issue in America, with nearly 33,000 unhoused Veterans as of January 2024.¹⁵⁵ The Federal Government provides subsidized housing in several forms, and those programs are administered by local public housing authorities.¹⁵⁶ These programs include housing provided by the Federal Government, private housing that the Federal Government specifically subsidizes, and “Section 8” housing vouchers, where the tenants can live anywhere and the government subsidizes the rent.¹⁵⁷

However, obstacles remain for some persons convicted under federal and state law, including public housing authorities engaging in background checks.¹⁵⁸ There are federal and state restrictions on who is eligible for government-subsidized housing based on the kind of conviction a person has or how long ago the offense occurred. Some federal restrictions provide that individuals who are lifetime registered sex offenders are not eligible for federal subsidized housing assistance¹⁵⁹, and landlords may terminate occupancy in federally assisted housing for drug abusers.¹⁶⁰ The inability of convicted offenders, especially sex offenders,

¹⁵⁵ *Everyone Counts in the Effort to End Veteran Homelessness*, U.S. DEP’T OF VETS. AFFS., https://www.va.gov/homeless/pit_count.asp [<https://perma.cc/YJ63-WSJY>] (Jan. 17, 2025).

¹⁵⁶ PAC. JUV. DEF. CTR., *supra* note 125, at 124.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ 42 U.S.C. § 13663. Note that under Florida’s requirement that all sex offenders are lifetime registers, even less egregious sex offenses would bar Florida residents from this benefit. This also has consequences for a sex offender’s family as the prohibition precludes “admission to [federally assisted] housing for any *household* that includes any individual who is subject to a lifetime registration requirement . . .” *Id.* § 13663(a) (emphasis added). *See generally* U.S. DEP’T OF JUST., FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION 10 (2006).

¹⁶⁰ 42 U.S.C. § 13662(a). *See generally* U.S. DEP’T OF JUST., *supra* note 159, at 10. President Joseph Biden directed the Department of Housing and Urban Development to update their rules on who can apply for federal assistance in order to assist racial minorities who are subject to criminal convictions at a much higher rate than White people. Memorandum from Sec’y Marcia L. Fudge, U.S. Dep’t of Hous. & Urb. Dev., to Principal

to secure access to low-income housing makes it especially difficult for them to reintegrate into society.¹⁶¹ There are some variations on how each state’s public housing authorities run these federal programs, but California,¹⁶² Florida,¹⁶³ and Texas¹⁶⁴ are required to complete background checks and disqualify individuals who have “been convicted

Staff, subject: Eliminating Barriers That May Unnecessarily Prevent Individuals with Criminal Histories from Participating in HUD Programs (Apr. 12, 2022). *See* Romina Ruiz-Goiriena, *Exclusive: HUD Unveils Plan to Help People with a Criminal Record Find a Place to Live*, USA TODAY, <https://www.usatoday.com/story/news/nation/2022/04/12/can-get-housing-felony-hud-says-yes/9510564002/> [<https://perma.cc/B6GT-7JF6>] (Apr. 12, 2022, 11:41 AM).

¹⁶¹ MOLLY SIMMONS ET AL., VA NAT’L CTR. ON HOMELESSNESS AMONG VETERANS, RESEARCH BRIEF: VETERAN SEX OFFENDER ACCESS TO HOUSING AND SERVICES AFTER RELEASE FROM INCARCERATION: OBSTACLES AND BEST PRACTICES 1–3 (2018) (“Stakeholders reported that one of the most significant barriers to housing was the federal prohibition on using federal housing funds to assist with housing for people who were lifetime registered sex offenders. This includes Section 8 housing vouchers. This made the task of procuring housing even more difficult. The VA also does not have long-term housing for individuals convicted of a sex offense, though they do have residential substance use disorder (SUD) treatment facilities which can accept someone with a sex offense conviction.”).

¹⁶² *See generally* CalWORKs Housing Support Program, CDSS, <https://www.cdss.ca.gov/inforesources/cdss-programs/housing-programs/calworks-housing-support-program> [<https://perma.cc/8TY4-JZWC>] (last visited Aug. 27, 2025) (including programs such as CalWORKs Housing Support Program and CalWORKs Homeless Assistance). For CalWORKs eligibility, see *supra* E. Public Assistance. *See generally* CATHERINE MCKEE, NAT’L HOUS. L. PROJECT, CALIFORNIA LAW LIMITS HOUSING AUTHORITY ACCESS TO ARREST RECORDS (n.d.), <https://nhlp.org/files/California%20Law%20Limits%20Housing%20Authority%20Access%20to%20Arrest%20Records-2.pdf> [<https://perma.cc/NQF9-PBJA>] (California does not allow the use of *arrest* records in eligibility determinations).

¹⁶³ *See generally* MARTINEZ, *supra* note 66, at 28 (noting that some public housing authorities in Florida consider criminal records from the previous ten years instead of the recommended five by the Housing and Urban Development agency). In Florida, drug offenders also face housing hurdles as they are disqualified from receiving a home loan from Florida’s Department of Economic Opportunity. FLA. STAT. ANN. §§ 420.633, 420.635 (LexisNexis, Lexis Advance through the 2022 regular and extra sessions). *See* MARTINEZ, *supra* note 66, at 32.

¹⁶⁴ *See generally* TEX. PROP. CODE ANN. § 92.3515(a) (LexisNexis, Lexis Advance through the 2023 Regular Session); 40 TEX. ADMIN. CODE §819.132(c)(4)–(5) (enabling landlords to deny tenancy based on records of drug abuse or certain drug convictions so long as notice is provided) (2025).

of the manufacture of methamphetamine on the premises of federally assisted housing.”¹⁶⁵

Because they were convicted of sex offenses and drug offenses, both SFC Smith and 1LT Clark could face discrimination in applying to rent a residence and could be excluded from public housing assistance depending on the state in which they apply, and depending on whether they seek federally subsidized or state-subsidized housing programs. If facing lifetime sex offender registration, SFC Smith would be barred from federal housing subsidies in all states. Given the high rates of unhoused Veterans and coupled with difficulties in obtaining employment, federal and state policies in conducting background checks could further hinder them from rehabilitating and reintegrating into society.

G. Gun Possession

The Second Amendment to the Constitution guarantees the freedom to bear arms.¹⁶⁶ However, this right is not without limits, which impacts many Service members who care deeply about this Constitutional right.¹⁶⁷ The Gun Control Act prohibits possession of a firearm by those convicted of an offense that is punishable by more than one year of imprisonment, illegal drug users, those convicted of misdemeanor domestic assault, and Service members who receive a dishonorable discharge.¹⁶⁸ California further restricts who may own a firearm, including persons convicted of

¹⁶⁵ Housing Choice Voucher Program Guidebook: Eligibility Determination and Denial of Assistance, para. 10.1.4 (Nov. 2019), https://www.hud.gov/sites/dfiles/PIH/documents/HCV_Guidebook_Eligibility_Determination_and_Denial_of_Assistance.pdf#page=18 [<https://perma.cc/4Z5L-QC8R>].

¹⁶⁶ U.S. CONST. amend II.

¹⁶⁷ This assertion is based on the author's recent professional experiences as Senior Defense Counsel, Fort Bragg, NC, from 2024 to 2025; Senior Trial Counsel for 7th Army Training Command from 2019 to 2020; Trial Defense Counsel, U.S. Army, at Tower Barracks, Germany, from 2017 to 2019; and Trial Counsel, 31st Air Defense Artillery Brigade from 2014 to 2016 [hereinafter Professional Experiences].

¹⁶⁸ Gun Control Act, 18 U.S.C. § 922(g). Though originally passed in 1968, The Gun Control Act has been amended to extend the prohibition on firearm possession, ownership, etc. to individuals convicted of misdemeanor crimes of domestic violence. *See generally* 1117. *Restrictions on the Possession of Firearms by Individuals Convicted of a Misdemeanor Crime of Domestic Violence*, ARCHIVES: U.S. DEP'T OF JUST., <https://www.justice.gov/archives/jm/criminal-resource-manual-1117-restrictions-possession-firearms-individuals-convicted> [<https://perma.cc/M3WP-UDL4>] (July 2013).

violent offenses¹⁶⁹ and certain misdemeanor offenses are usually restricted for ten years post-conviction.¹⁷⁰ Florida prohibits felons from possessing firearms and ammunition.¹⁷¹ Texas restricts the possession of firearms for five years after release from confinement or supervision for a felony offense, but after five years, allows possession in the person’s home.¹⁷² If a person is convicted of a Class A misdemeanor assault on a family member, they are prohibited from possessing a firearm for five years from their release from confinement or community supervision.¹⁷³ Many Veterans seek employment in law enforcement post-military service.¹⁷⁴ This prohibition on owning or possessing firearms would negatively impact such an individual from pursuing their desired employment, as there is no law enforcement exception to the Gun Control Act.¹⁷⁵

SFC Smith and 1LT Clark would be prohibited from possessing firearms under federal law because their crimes were punishable at a general court-martial by more than one year’s confinement and they were dishonorably discharged or dismissed from the service. Additionally, because 1LT Clark was convicted of illegal drug use, his Second

¹⁶⁹ CAL. PENAL CODE §§ 29900, 29905 (e.g., murder, rape, lewd acts on a child under 14, kidnapping) (Deering, Lexis Advance through the 2024 Regular and Special Session).

¹⁷⁰ CAL. PENAL CODE § 29805 (Deering, Lexis Advance through the 2024 Regular and Special Session). See BUREAU OF FIREARMS, CAL. DEP’T OF JUST., FIREARMS PROHIBITING CATEGORIES 2 (2020) (listing qualifying misdemeanors). Misdemeanor offenses normally result in a ten-year restriction on firearm possession. *Id.*

¹⁷¹ FLA. STAT. ANN. § 790.23(1) (LexisNexis, Lexis Advance through the 2025 Regular session).

¹⁷² TEX. PENAL CODE ANN. § 46.04(a) (LexisNexis, Lexis Advance through the 2023 Regular Session).

¹⁷³ *Id.* § 46.04(b).

¹⁷⁴ See McLain Brown, Sean, *5 Reasons Why Vets Should Consider Careers in Law Enforcement*, MILITARY.COM (Oct. 2, 2018), <https://www.military.com/veteran-jobs/career-advice/5-reasons-why-vets-should-consider-careers-law-enforcement.html> [<https://perma.cc/TZ88-XJPG>] (“According to the U.S. Justice Department, ‘nearly 25% of the police force in the United States has a military background, and that’s in part, because of how much these careers complement each other.’”); *Veterans*, U.S. SECRET SERV., <https://www.secretservice.gov/careers/veterans> [<https://perma.cc/4V4E-2LE9>] (“20.5% of Secret Service employees are veterans from all services . . .”). The U.S. Department of Justice even has a website dedicated to assisting Veterans transition to law enforcement. *Vets to Cops*, COMMUNITY ORIENTED POLICING SERVS.: U.S. DEP’T OF JUST., <https://cops.usdoj.gov/vetstocops> [<https://perma.cc/DA7W-DANT>] (last visited Aug. 27, 2025).

¹⁷⁵ 1117. *Restrictions on the Possession of Firearms by Individuals Convicted of a Misdemeanor Crime of Domestic Violence*, *supra* note 168.

Amendment rights may be temporarily impacted. Had SFC Smith been convicted at a special court-martial of domestic violence, he would have a misdemeanor domestic violence conviction that would similarly prohibit him from possessing firearms. SFC Smith would not be able to pursue his intended law enforcement career.

H. Child Custody

Some convictions may impact child custody. For example, under federal law, certain prison sentences may impact a person's ability to regain custody of a child after serving the confinement term: Federal law currently mandates the termination of parental rights once a parent has been imprisoned for 15 of the most recent 22 months and the children are in foster care for that time.¹⁷⁶ In California, drug convictions, child sex abuse, and domestic violence can impact a person's parental rights going through a custody proceeding regarding their child.¹⁷⁷ Florida places restrictions on child placement and custody for individuals with criminal records. This includes the loss of parental rights where a parent has killed or conspired to kill the other parent or the parent is serving confinement and meets certain criteria (e.g., was convicted of first-degree sexual battery or is determined to be a sexual predator).¹⁷⁸ Florida courts can also make the determination that, if the convicted person will remain in jail for much of the child's childhood, parental rights may be terminated.¹⁷⁹ Texas

¹⁷⁶ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, §103, 111 Stat. 2115, 2118. *But see* John Kelly, *Bill to Remove Federal Requirement to Terminate Parental Rights Resurfaces*, IMPRINT (Mar. 15, 2024 8:24 AM), <https://imprintnews.org/youth-services-insider/bill-rewrite-federal-rules-terminating-parental-rights/248136> [<https://perma.cc/VL2K-Z5TQ>] [Bill Would Rewrite Federal Rules on Terminating Parental Rights.pdf] (describing the proposed 21st Century Children and Families Act that, if enacted, would extend the foster care timeline to begin at 24 months in foster care, add an exception for children who are under the care of "kin," and remove the mandatory initiation of termination of parental rights provision); H.R. 7664, 118th Cong. (2023-2024) (referred to the Subcommittee on Work and Welfare on Dec. 17, 2024). .

¹⁷⁷ See CAL. FAM. CODE §§ 3041.5, 3118, 3044 (Deering, Lexis Advance through the 2024 Regular and Special Session).

¹⁷⁸ See generally MARTINEZ, *supra* note 66, at 41–45 (citing FLA. STAT. §§ 39.802(1), 39.806(1)(d)(1), 39.806(1)(d)(2)).

¹⁷⁹ FLA. STAT. ANN. § 39.806(1)(d) ((LexisNexis, Lexis Advance through the 2025 Regular Session).

restricts child custody where a parent is a registered sex offender for an act against a child, abuses their child, or engages in family violence.¹⁸⁰

While most accused are very concerned about how their conviction and possible confinement will impact their relationship with their child(ren), their ability to provide for them, and custody in contentious family situations, many may be unaware that federal and state laws place specific restrictions or presumptions against custody depending on confinement terms and offense type.

While SFC Smith and 1LT Clark could have their custody rights impacted in California, Florida, and Texas, 1LT Clark would likely face less risk of losing custody unless a court determined he had an addiction problem or his drug use endangered his child.

I. Driving Privileges

Certain convictions can result in suspension or revocation of a driver’s license. While this may seem like a minor inconvenience, when coupled with a need to go to job interviews, go to work, drive during work, drop children off at school, and all of the everyday things for which cars are used, not having a driver’s license only further burdens a convicted person’s ability to reintegrate into society.¹⁸¹ Pursuant to the Solomon-Lautenberg Amendment, the Federal Government withholds a percentage of highway funding for states that do not revoke or suspend the driver’s license for individuals convicted of certain drug offenses for six months.¹⁸² While most states have opted out of this requirement, Florida has not, and Texas’s opt-out is in effect only as of 25 February 2023.¹⁸³ California,

¹⁸⁰ See, e.g., TEX. FAM. CODE ANN. §§ 262.2015, 161.001 (LexisNexis, Lexis Advance through the 2023 Regular Session).

¹⁸¹ See MARTINEZ, *supra* note 66, at 21 (“In Miami-Dade County, this is a particularly serious collateral consequence. Getting around Miami using only public transportation can be a serious burden, especially during the hot summer months. Although this can lead to the temptation to drive on a suspended license, that in itself can lead to additional criminal charges.”).

¹⁸² 23 U.S.C. § 159.

¹⁸³ See MARTINEZ, *supra* note 66, at 24 (discussing the Solomon-Lautenberg Amendment’s effect in Florida). A Senate Bill was introduced in Florida to opt out of the federal requirement, but it died in committee. See *SB: 870: Driver License Suspensions*, FLA. SENATE, <https://www.flsenate.gov/Session/Bill/2022>

Florida, and Texas otherwise have similar restrictions on driving privileges that are based on driving-related offenses.¹⁸⁴

SFC Smith would not have his driving privileges restricted. 1LT Clark would lose his driving privileges for six months in Florida, even though his offenses were not related to driving.

J. Jury Service

To some, being barred from jury service may be seen as the one upside to having a felony conviction. However, this superficial view ignores the fact that it is one more way in which the law makes felons “lesser” in the eyes of society.¹⁸⁵ Federal law prohibits those convicted of an offense punishable by more than one year from serving on federal grand and petit (trial) juries unless their civil rights have been restored.¹⁸⁶ California does not allow felons to serve on grand juries, but they are allowed to serve as trial jurors so long as they are not currently confined, “on parole, postrelease community supervision, felony probation, or mandated supervision for the conviction of a felony.”¹⁸⁷ Registered sex offenders are not permitted to serve on jury duty.¹⁸⁸ Florida’s prohibitions go further: a person cannot serve on a jury if they have been convicted of “bribery, forgery, perjury, larceny, any felony, or any offense that would be a felony

/870 [https://perma.cc/6TMN-TAPE] (last visited Mar. 13, 2023). *See* TEX. TRANSP. CODE ANN. § 521.372 (effective until contingency met) (LexisNexis, Lexis Advance through the 2023 Regular Session). However, with Texas Senate Bill 181, § 3.03, the legislature provided the notice requirements to Congress to enable them to opt out of 23 U.S.C. § 2359 suspensions for drug offenses. S.B. 181 § 3.03 (Tex. 2021). This became effective 25 February 2023. *See* 47 Tex. Reg. 7937 (Nov. 25, 2022).

¹⁸⁴ *See* CAL. VEH. CODE §§ 13350–13392 (Deering, Lexis Advance through the 2024 Regular and Special Session); MARTINEZ, *supra* note 66, at 25 (summarizing driving restrictions related to criminal history); TEX. TRANSP. CODE ANN. §§ 521.341–521.377 (LexisNexis, Lexis Advance through the 2023 Regular Session).

¹⁸⁵ *See* Chin, *supra* note 8, at 1825–26.

¹⁸⁶ 28 U.S.C. § 1865(b)(5). It is also worth noting that this prohibition is often viewed as discriminating against racial minorities and violates the Constitution and Voting Rights Act. *See* U.S. DEP’T OF JUST., *supra* note 159, at 1–2.

¹⁸⁷ CAL. PENAL CODE § 893(b)(3) (Deering, Lexis Advance through the 2022 Regular Session). CAL. CODE CIV. PROC. § 203(a)(9)–(10) (Deering, Lexis Advance through the 2024 Regular and Special Session). *See* *Jury Service*, CAL. COURTS, https://www.courts.ca.gov/jury-service.htm [https://perma.cc/89WA-FAM9] (last visited May 5, 2025).

¹⁸⁸ CAL. CODE CIV. PROC. § 203(a)(11).

had it been committed in Florida.”¹⁸⁹ Texas prohibits those convicted of misdemeanor thefts and felonies from serving on a jury.¹⁹⁰

SFC Smith and 1LT Clark could not serve on federal juries. Because he is a felon and sex offender, SFC Smith could not serve on a jury in California, Florida, or Texas. 1LT Clark could serve on a trial jury in California after completing any parole; he could not serve on juries in Florida or Texas because of his felon status.

IV. Advice to the Accused

In light of these myriad consequences, it is incumbent upon the military justice system to ensure that an accused is informed of the existence of collateral consequences. While a military judge should ensure that an accused has been informed about the existence of collateral consequences—similar to their colloquy with the accused regarding immigration, sex offender registration, and firearm ownership¹⁹¹—the defense counsel is ultimately best positioned to advise on potential collateral consequences.¹⁹² This advice should be memorialized in writing and entered into the record as an appellate exhibit.

Defense counsel can have candid conversations with their clients within the protections of attorney-client confidentiality.¹⁹³ A defense attorney is able to engage with the accused in a way that a trial counsel or military judge cannot. The attorney and client can speak freely about the accused’s job, housing, family, and other concerns as they discuss the future that the accused may face if convicted. The natural difficulty for

¹⁸⁹ MARTINEZ, *supra* note 66181, at 64 (citing FLA. STAT. §40.013, FLA. R. CIV. P. FORM 1.983).

¹⁹⁰ TEX. GOV’T CODE § 62.102(8) (LexisNexis, Lexis Advance through the 2023 Regular Session). See *Jury Service in Texas*, TEX. CTS., <https://www.txcourts.gov/about-texas-courts/juror-information/jury-service-in-texas> [<https://perma.cc/BZ23-GWMH>] (last visited May 5, 2025).

¹⁹¹ DA PAM. 27-9, *supra* note 9, para. 2-2-9.

¹⁹² *But see* HOSKINS, *supra* note 32, at 31, ch. 8 (“[O]ne question no one has really asked is who should bear the central responsibility for ensuring that defendants are properly informed about the range of [collateral legal consequences] they may face. It appears to be largely assumed that this responsibility falls to defense counsel. I argue, instead, that the central responsibility for providing defendants access to relevant information about [them] should fall to prosecutors.”).

¹⁹³ U.S. DEP’T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS r. 1.6 (28 June 2018).

military defense counsel is that they do not practice state law; their expertise is in the UCMJ. However, there is an online database maintained by the National Reentry Resource Center—the National Inventory of Collateral Consequences of Conviction (NICCC)—that allows users to search for collateral consequences in the United States.¹⁹⁴ The NICCC seeks to consolidate all collateral consequences scattered throughout federal and state codes and regulations, and allow individuals to narrow their search by state, specific offenses, and specific consequences.¹⁹⁵

This is an extremely helpful tool for counsel, but depending on the query, hundreds or thousands of results may populate. For example, when searching “California” and “sex offenses,” 356 consequences result; when just searching “California,” 1,628 result.¹⁹⁶ So, while defense counsel should try to gain at least a general understanding of collateral consequences based on the offenses charged and where the accused will live in order to advise their client, it would be unrealistic to ask military defense counsel to become experts on those collateral consequences for every court-martial client. Because Service members can move to any state once discharged, it would be impossible for defense counsel to gain the expertise required to fully counsel their clients on consequences they may face. However, this difficulty should not preclude providing baseline advice such as potential impacts to the right to vote, employment, public assistance, housing, child custody, driving privileges, child custody, and jury service.

A. Defense Counsel Already Advise on Three Collateral Consequences

Military defense attorneys are already required to give basic advice to their court-martial clients about three collateral consequences: immigration, sex offender registration, and firearm restrictions, as circumstances may require, given the unique facts of the case and accused. That advice is committed to writing and entered into the record as an appellate exhibit. In Army practice, this is accomplished using Defense

¹⁹⁴ NAT’L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, <https://niccc.nationalsreentryresourcecenter.org/> [https://perma.cc/QZ8J-9P3S] (last visited Aug. 29, 2025).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* (searching “Jurisdiction” for “California” and “Offense Type” for “Sex offenses” on 5 May 2025).

Counsel Assistance Program (DCAP) forms. A similar form could meet the need of advising clients about other collateral consequences.

1. Immigration Consequences

Defense counsel with clients who are aliens or naturalized citizens through military service must advise them about immigration consequences before they can plead guilty, pursuant to *Padilla v. Kentucky*.¹⁹⁷ In *Padilla*, the U.S. Supreme Court found that it was ineffective assistance of counsel for a defense attorney to not advise their client of immigration consequences based on his plea of guilty.¹⁹⁸ The lower court previously held on appeal that this did not violate “the Sixth Amendment’s guarantee of effective assistance of counsel” because immigration consequences are a “‘collateral’ consequence of his conviction.”¹⁹⁹ The U.S. Supreme Court reasoned that changes in the law made deportation “nearly an automatic result for a broad class of noncitizen offenders” and thus it was “‘most difficult’ to divorce the penalty from the conviction in the deportation context.”²⁰⁰

Military defense attorneys are not required to go into the minutiae of whether there will actually be revocation or deportation post-conviction.²⁰¹ Because immigration law is a specialized practice area, counsel are only required to advise that a client may be subject to revocation and/or deportation based on their status and charged offense(s).²⁰² Clients are then advised to consult with an immigration law attorney.²⁰³ This advisement is committed to writing and the form is

¹⁹⁷ *E.g.*, Defense Counsel Assistance Program, U.S. Dep’t of Army, Form 2.1, Advice to Clients Who Are not U.S. Citizens or Nationals or Were Granted Their Citizenship Due to Military Service (16 Sep. 2014) [hereinafter DCAP Form 2.1]; DA PAM. 27-9, *supra* note 9, para. 2-2-9 (requiring the military judge to engage in a colloquy with a non-citizen accused about whether their defense counsel “may have an adverse impact on [their] immigration status”). While *Padilla*’s holding requires an advisal on immigration consequences prior to pleading guilty, DCAP Form 2.1 and good practice require an advisal on potential adverse immigration consequences even if the charge(s) lead to a contested trial or alternative disposition.

¹⁹⁸ *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010).

¹⁹⁹ *Id.* at 359–60.

²⁰⁰ *Id.* at 366 (citation omitted).

²⁰¹ Professional Experiences, *supra* note 167; DCAP Form 2.1, *supra* note 197.

²⁰² DCAP Form 2.1, *supra* note 197.

²⁰³ *Id.*

entered into the record as an appellate exhibit after the military judge's colloquy with the accused.²⁰⁴

2. Sex Offender Registration

In *United States v. Miller*, the Court of Appeals for the Armed Forces (CAAF) affirmed that sex offender registration is a collateral consequence “that is separate and distinct from the court-martial process.”²⁰⁵ However, unlike the Supreme Court in *Padilla*, CAAF held that it was not ineffective assistance of counsel to fail to inform the client about sex offender registration prior to pleading guilty.²⁰⁶ The court did, however, create a rule that, going forward, defense counsel would be required to advise their client of sex offender registration and to put that fact of advisement on the record at the court-martial.²⁰⁷ In Army practice, this is completed using DCAP Form 1.2, which is then admitted into the record of trial as an appellate exhibit.²⁰⁸

B. Introducing a New DCAP Form

Similar to advising on immigration, sex offender registration, and firearm restrictions, defense counsel should provide general advice that the accused may face a number of collateral consequences upon conviction and that they should seek advice from a civilian attorney from the jurisdiction to which they will move after their service.²⁰⁹ This advice

²⁰⁴ *Id.*; DA PAM. 27-9, *supra* note 9, para. 2-2-9.

²⁰⁵ *United States v. Miller*, 63 M.J. 452, 457 (C.A.A.F. 2006).

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 459.

²⁰⁸ Defense Counsel Assistance Program, U.S. Army, Form 1.2, Advice Concerning Requirements to Register as a Sex Offender (Oct. 2021) [hereinafter DCAP Form 1.2]; DA PAM. 27-9, *supra* note 9, para. 2-2-9.

²⁰⁹ *See also Miller*, 63 M.J. at 459 (“Given the plethora of sexual offender registration laws enacted in each state, it is not necessary for trial defense counsel to become knowledgeable about the sex offender registration statutes of every state. However, we do expect trial defense counsel to be aware of the federal statute addressing mandatory reporting and registration for those who are convicted of offenses within the scope of this statute. . . . In our view, the importance of this rule springs from the unique circumstances of the military justice system. More often than not, an accused will be undergoing court-martial away from his or her state of domicile. Also, the court-martial and plea may occur without the assistance of counsel from the accused’s domicile state.”).

should be captured on a DCAP form, similar to DCAP Form 1.2, DCAP Form 2.1, and DCAP Form 10.²¹⁰ This document should inform the client that military defense counsel do not have specialized training on collateral consequences, and that they may face consequences based upon their offense(s) and where they will live.²¹¹ The form should recommend that the accused consult with an attorney in the jurisdiction where they will move to learn more about consequences there. A proposed DCAP form is in Appendix A.²¹²

C. Putting the Advice on the Record

Before an accused’s plea of guilty is accepted, the military judge should engage in a colloquy with them to ensure they are aware that they may face collateral consequences from their conviction. This should occur at the same point where the military judge would engage with the accused about sex offender registration, immigration consequences, and firearm restrictions.²¹³ The DCAP form should then be entered into the record as an appellate exhibit. Proposed changes to the Army’s court-martial script are in Appendix B.²¹⁴ While defense counsel are required to advise their client about the collateral consequences of immigration, sex offender registration, and firearm restrictions, courts have generally limited their ability to present evidence of or argument about those consequences to the sentencing authority at trial.²¹⁵

²¹⁰ DCAP Form 1.2, *supra* note 208; DCAP Form 2.1, *supra* note 197; Defense Counsel Assistance Program, U.S. Army, Form 10, Acknowledgement of Federal Firearm Prohibitions in 18 U.S.C. §922(g) (July 2025).

²¹¹ See *Miller*, 63 M.J. at 459 (requiring counsel only to advise the accused of any charged offense that appears in Department of Defense Instruction 1325.7, Enclosure 27, *supra* note 37).

²¹² *Infra* Appendix A at A-1.

²¹³ DA PAM. 27-9, *supra* note 9, para. 2-2-9.

²¹⁴ *Infra* Appendix B at B-1.

²¹⁵ This does not include the accused’s nearly unfettered right to make an unsworn statement, in which the accused can say almost anything. See *United States v. Talkington*, 73 M.J. 212, 215–16 (C.A.A.F. 2014).

V. Collateral Consequences in Current Military Law and Policy

Military courts generally prohibit the presentation of evidence or argument pertaining to the collateral consequences an accused may face because of their conviction. In *United States v. Talkington*, CAAF affirmed that evidence of and arguments about collateral consequences were properly excluded from sentencing proceedings.²¹⁶ In *Talkington*, the accused told the panel during his unsworn statement that he would have to register as a sex offender because of his conviction, stating, “I will have to register as a sex offender for life . . . I am not very sure what sort of work I can find.”²¹⁷ When the military judge instructed the panel members on the accused’s unsworn statement, he told them,

. . . as a general evidentiary matter, evidence regarding possible registration as a sex offender . . . , and the consequences thereof, would be characterized as a collateral consequences [sic], and thus inadmissible outside of the context of an unsworn statement. . . . Possible collateral consequences of the sentence, beyond those upon which you are instructed, should not be a part of your deliberations²¹⁸

In finding that the military judge committed no error, CAAF reasoned that while an accused could say nearly anything in an unsworn statement, a military judge may provide limiting instructions to the members as to what they may consider in reaching a sentence.²¹⁹ The court held that “collateral consequences of a court-martial do not constitute R.C.M. 1001 material, and while they may be referenced in an unsworn statement . . . , they should not be considered for sentencing.”²²⁰ However, an accused may discuss loss of retirement benefits at sentencing if the person is discharged, and the military judge may instruct on proper consideration of such information.²²¹ The distinction here, according to CAAF, is that whether an accused loses retirement benefits is a direct result of the

²¹⁶ *United States v. Talkington*, 73 M.J. 212 (C.A.A.F. 2014).

²¹⁷ *Id.* at 213.

²¹⁸ *Id.* at 214.

²¹⁹ *Id.* at 215–16 (citations omitted).

²²⁰ *Id.* at 216 (citations omitted).

²²¹ Electronic Benchbook, *supra* note 4, sec. 2-5-23.

sentence imposed, not the *conviction* itself: if the accused is discharged, they will lose their retirement benefits.²²² The court reasoned that “nothing about the sentence has any impact on the requirement or duty to register as a sex offender. Sex offender registration operates independently of the sentence adjudged and remains a collateral consequence.”²²³

The lower military appellate courts have followed *Talkington*’s reasoning as applied to the collateral consequence of immigration. For example, the Navy-Marine Corps Court of Criminal Appeals followed *Talkington*’s reasoning in *United States v. Quezada*.²²⁴ In his unsworn statement, the accused told the panel that he would likely be deported because of his conviction.²²⁵ The military judge instructed the members to disregard the information because it was a collateral consequence of the conviction.²²⁶ Applying CAAF’s reasoning in *Talkington*, the appellate court affirmed the military judge’s ruling on the basis that

there was no action the sentencing authority could take that would influence the outcome of potential deportation [I]t is the conviction itself that influences deportation. Even if the sentencing authority gave no punishment at all, it would not change the likelihood [the accused] would be deported. As a result, it is by definition a “collateral matter” that would only serve to confuse the sentencing authority about what an appropriate sentence should be . . . even if it wanted to take account of deportation.²²⁷

In light of *Talkington*, military judges continue to prohibit consideration of most collateral consequences by the sentencing authority.²²⁸ This practice needs to change.

²²² *Talkington*, 73 M.J. at 217.

²²³ *Id.* at 216–17.

²²⁴ *United States v. Quezada*, No. 201900115, 2020 CCA LEXIS 378 (N-M. Ct. Crim. App. Oct. 26, 2020).

²²⁵ *Id.* at *15.

²²⁶ *Id.* at *14.

²²⁷ *Id.* at *17–18.

²²⁸ *See, e.g., United States v. Wassan*, No. ACM 39512, 2020 CCA LEXIS 152 (A.F. Ct. Crim. App. May 8, 2020) (prohibiting the accused from presenting documents demonstrating he would be subject to deportation and instructing members that

VI. Court-Martial Practice Must Change to Account for Collateral Consequences

Military courts miss the point when they rely on reasoning that because the sentence adjudged will not impact the collateral consequences of the conviction, they should not be considered by the sentencing authority. It is already permissible for a collateral consequence to be considered if the adjudged *sentence* triggers it.²²⁹ However, if a collateral consequence is triggered by the conviction, it must also be considered in determining the appropriate sentence because it is material to the purposes of sentencing. It is critical that the collateral consequences of an individual's conviction be openly considered by counsel, the accused, the military judge, and panel members.²³⁰ Consideration of these consequences will bring to light the very real—and sometimes lifelong—impacts an accused will face because of a conviction. It should be part of the sentencing process so that a holistic, just sentence is reached in each case. The sentencing authority needs to be educated on these collateral consequences so they understand the effects a conviction will have on an accused and take those into account. No sentencing authority should be forced to make life-altering decisions in a vacuum; they must be able to consider these consequences that may last a lifetime. There will be cases where there are no significant collateral consequences. However, for those

immigration consequences were not to be considered as part of the sentence, but allowing defense counsel to include the consequence in argument).

²²⁹ Electronic Benchbook, *supra* note 4, sec. 2-5-23.

²³⁰ See generally Travis, *supra* note 12. Travis argues:

these punishments should be brought into open view. They should be made visible as critical elements of the sentencing statutes of the state and federal governments. They should be recognized as visible players in the sentencing drama played out in courtrooms every day, with judges informing defendants that these consequences flow from a finding of guilt or plea of guilty. Finally, they should be openly included in our debates over punishment policy, incorporated in our sentencing jurisprudence, and subjected to rigorous research and evaluation.

Id., at 17. As of 27 December 2023, panel members can only be the sentencing authority for cases where a finding of guilty is returned where an offense occurred prior to 27 December 2023. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, §539E(a), 135 Stat. 1541, 1701 (2021). Panels are still the sole sentencing authority for capital cases. *Id.*

cases where a former Service member will have difficulty finding housing or employment, will likely be deported or have to register as sex offenders, and face other significant burdens and hurdles—i.e., where they will experience a “new civil death”—these consequences must be factored into a sentence.

This section first discusses the jurisprudential underpinnings as to why collateral consequences must be part of sentencing deliberations. The second section provides an overview of some jurisdictions that do consider collateral consequences in their sentencing practice to demonstrate that the military justice system would be in-line with other courts in adopting this practice. Third, it draws on Supreme Court precedent to reinforce the reality that collateral consequences do have a place in the courtroom. The fourth section acknowledges that, especially in court-martial practice, there are difficulties in ascertaining an accused’s collateral consequences and presenting that evidence in court to the sentencing authority. The final section proposes specific changes to Article 56, UCMJ, the Sentencing Parameters, Rule for Courts-Martial 1001, and court-martial instructions that will enable the sentencing authority to formulate a holistic, just sentence.

A. Punishment Principles, Collateral Consequences, and Holistic Justice

One of the primary arguments that collateral consequences should be considered at sentencing is that they are, in fact, punishment.²³¹ Legislatures often claim that these consequences are not punishment, and courts often defer to those claims.²³² However, these claims do not mean that these laws and regulations do not function as punishment, and some courts have found that sex offender registration laws are punishment.²³³ It

²³¹ HOSKINS, *supra* note 32, at 36; Travis, *supra* note 12.

²³² HOSKINS, *supra* note 32, at 34. *See infra* VI.D.1.

²³³ *See, e.g., Doe v. Snyder*, 834 F.3d 696 (6th Cir. 2016) (“[Michigan’s] SORA brands registrants as moral lepers solely on the basis of a prior conviction. It consigns them to years, if not a lifetime, of existence on the margins, not only of society, but often, as the record in this case makes painfully evident, from their own families It directly regulates where registrants may go in their daily lives and compels them to interrupt those lives with great frequency in order to appear in person before law enforcement to report even minor changes to their information. We conclude that Michigan’s SORA imposes

then follows that if they are punishment, they need to be factored into sentencing or else Constitutional protections afforded to the accused are violated.²³⁴ One of these Constitutional protections include “the prohibition against double jeopardy: being prosecuted or, more important . . . , punished more than once for the same offense. . . .”²³⁵ It is also integral to the United States’ legal system that an accused should only enter into an agreement to plead guilty if they have knowledge of the consequences of that plea, which includes the restrictions they will face as they reenter society after any confinement has been served.²³⁶ If an accused does not have at least basic knowledge of the consequences they may face, there is an argument that the plea was not made knowingly.

Another principle of punishment is that the punishment must fit the crime, i.e., a sentence must be just.²³⁷ Federal courts are required to consider the factors in 18 U.S.C. § 3553(a) in reaching a sentence. One factor includes providing “just punishment.”²³⁸ In *United States v. Nesbeth*, the judge determined that considering collateral consequences was required to reach a just punishment.²³⁹ He ordered the probation officer to update the Pre-Sentence Report to include the collateral consequences the defendant would face for her drug-related offense.²⁴⁰ In determining that the defendant should not serve any confinement, the judge reasoned,

the collateral consequences Ms. Nesbeth will suffer, and is likely to suffer—principally her likely inability to pursue a teaching career and her goal of becoming a principal . . . —has compelled me to conclude that she has been sufficiently punished, and that jail is not necessary

punishment.”); *Doe v. State*, 167 N.H. 382, 11 A.3d 1077 (2015) (finding New Hampshire’s sex offender registration statute to have a punitive effect); *Starkey v. Okla. Dep’t of Corrections*, 2013 OK 43, 305 P.3d 1004 (finding provisions of Oklahoma’s sex offender registration statute to have a punitive effect).

²³⁴ *Id.* at 36.

²³⁵ *Id.*

²³⁶ *See id.* at 37 (“If [collateral consequences] count as forms of punishment, then it follows that defendants are entitled to be informed not only about the potential range of prison terms, fines, or probation they face, but also about the various other legal restrictions—on employment, housing, and so on—to which they may be subject.”).

²³⁷ *See id.*

²³⁸ 18 U.S.C. § 3553(a)(1)–(2).

²³⁹ *United States v. Nesbeth*, 188 F. Supp. 3d 179 (E.D.N.Y. 2016).

²⁴⁰ *Id.* at 188.

to render a punishment that is sufficient but not greater than necessary to meet the ends of sentencing.²⁴¹

The judge then crafted a sentence that would impart the seriousness of the defendant’s actions and require her to educate the community about the consequences of similar actions.²⁴² The *Nesbeth* judge used his knowledge of collateral consequences to create a just sentence for the defendant based on the additional punishment she would face because of her conviction.

The final punishment principle addressed is that of deterrence. Article 56, UCMJ, and RCM 1002 require courts-martial to consider “the need for the sentence to . . . promote adequate deterrence of misconduct.”²⁴³ Bringing collateral consequences into the open at courts-martial and making it a known part of the process can only aid in deterring Service members from committing misconduct that would impose similar consequences.²⁴⁴ Many Service members may think that committing misconduct—for example, using cocaine—may be worth the risk of a reduction in grade or being sentenced to a short period of confinement, but they may not think it is worth the loss of access to housing, employment opportunities, or federal financial assistance.²⁴⁵ Many Service members likely know about sex offender registration, and that likely deters some from committing sexual assault. However, it is unlikely that they know about other collateral consequences because they are obscure and undiscussed. If these consequences are made known, the military justice system will become an even more effective tool for good order and discipline.

In the interest of good order and discipline, the Non-Binding Disposition Guidance in the *Manual for Courts-Martial* requires commanders to consider “[t]he probable sentence or other consequences to the accused of a conviction”²⁴⁶ These conversations with commanders are generally limited to discussions of sex offender

²⁴¹ *Id.* at 194.

²⁴² *Id.* at 194–96.

²⁴³ UCMJ art. 56(c)(1)(C)(iv) (2021); MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. II, R.C.M. 1002(c)(3)(D) (2024) [hereinafter MCM].

²⁴⁴ HOSKINS, *supra* note 32, at 76.

²⁴⁵ *Id.* (“For many people, the threat of, say, loss of access to housing or employment may be even more frightening than the threat of a short prison term.”).

²⁴⁶ MCM, *supra* note 243, app. 2.1, sec. 2.1(m).

registration and immigration.²⁴⁷ Military attorneys need to be aware of collateral consequences so that commanders and the Office of the Special Trial Counsel (OSTC) can meet the intent of the Non-Binding Disposition Guidance and create a more holistic view of what justice is in a particular case. Moreover, with the advent of OSTC, the military legal community has an opportunity to formally incorporate collateral consequences into its decision-making process for covered offenses.²⁴⁸ This is especially relevant now that the military justice system has seen the priority of OSTC—securing Lautenberg Amendment-qualifying convictions in domestic violence cases, regardless of how serious (or minor) the underlying offense is.²⁴⁹ It appears that OSTC’s primary driver in these cases is whether an accused will be subject to restrictions on their Second Amendment rights, regardless of whether a firearm was used in the commission of the alleged offense.²⁵⁰ If it is a driving force in their decision-making process, then it should certainly be discussed in the presentencing proceedings and used to formulate a just sentence—the same holds true for sex offender registration, immigration consequences, and all other collateral consequences.

Based on punishment principles, making all collateral consequences part of the decision-making and sentencing framework would lead to more just outcomes and would make military justice a better tool for commanders. While this may seem like a significant change for military justice, the Services would not be alone in accounting for the impacts of collateral consequences.

²⁴⁷ Professional Experiences, *supra* note 201. These conversations also include collateral consequences of the sentence, such as retirement and Department of Veterans Affairs benefits, but those collateral consequences are outside the scope of this paper. See Brooker et al., *supra* note 4.

²⁴⁸ See generally U.S. Army Pub. Affs., *Army Establishes Two New Initiatives to Combat Harmful Behaviors*, U.S. ARMY (July 14, 2022), https://www.army.mil/article/258422/army_establishes_two_new_initiatives_to_combat_harmful_behaviors[<https://perma.cc/2UDX-H6G2>].

²⁴⁹ Professional Experiences, *supra* note 167.

²⁵⁰ *Id.*

B. Military Courts Would Not Be Alone in Considering Collateral Consequences

Federal courts are split as to whether they consider collateral consequences in sentencing. While the Sixth, Seventh, Tenth, and Eleventh Circuits do not allow evidence of collateral consequences,²⁵¹ the Second and Fourth Circuits do permit such evidence.²⁵² Moreover, organizations like the American Bar Association (ABA) have updated their publications to consider collateral consequences in legal practice and advocate for their consideration in plea bargaining and sentencing.²⁵³

As discussed above, federal courts are required to consider the factors in 18 U.S.C. § 3553(a) in reaching a sentence. These factors include providing “just punishment” and to “deter[] criminal conduct.”²⁵⁴ The Second Circuit upheld a judge’s downward departure from sentencing guidelines when he took into account that the defendant could be deported from the United States, even though he had never been to the United States before standing trial.²⁵⁵ The Court of Appeals held that “[i]n determining what sentence is ‘sufficient but not greater than necessary,’ to serve the needs of justice . . . a district court may take into account the uncertainties presented by . . . deportation”²⁵⁶ Another case out of the Second Circuit, *United States v. Nesbeth*, discussed above, demonstrates the

²⁵¹ See *United States v. Morgan*, 635 F. App’x 423 (10th Cir. 2015) (unpublished) (holding the trial judge erroneously considered the collateral consequence that the appellant would likely lose his law license); *United States v. Musgrave*, 761 F.3d 602 (6th Cir. 2014) (holding the district judge erroneously considered the collateral consequence that he would lose his CPA license); *United States v. Stefonek*, 179 F.3d 1030 (7th Cir. 1999) (holding the district judge should not have considered the appellant’s service to the community as a nurse, that it was giving her a “‘middle class’ sentencing discount”); *United States v. Kuhlman*, 711 F.3d 1321 (11th Cir. 2013) (holding that it was improper to provide a “white collar” discount to appellant after committing fraud). See generally *United States v. Nesbeth*, 188 F. Supp. 3d 179 (E.D.N.Y. 2016) (discussing the other Circuits’ stances on collateral consequences).

²⁵² *Nesbeth*, 188 F. Supp. at 179; *United States v. Pauley*, 511 F.3d 468 (4th Cir. 2007).

²⁵³ See Chin, *supra* note 4, at 384–85 (“The [Uniform Law Commission’s Uniform Collateral Consequences of Conviction Act], ABA Standards and Model Penal Code all recognize the importance of counseling clients about collateral consequences generally.”).

²⁵⁴ 18 U.S.C. § 3553(a)(1)–(2).

²⁵⁵ *United States v. Thavaraja*, 740 F.3d 253, 262–63 (2d Cir. 2014).

²⁵⁶ *Id.*

importance of considering collateral consequences and how it can operate in civilian courts.²⁵⁷

The Fourth Circuit affirmed a judge's sentence where he factored into his sentence the consequences that a teacher would lose his teaching certificate and state pension.²⁵⁸ The Circuit Court reasoned that the judge was justified in departing downward from the sentencing guidelines by 36 months because consideration of these consequences was "consistent with . . . the need for 'just punishment' . . . and 'adequate deterrence.'"²⁵⁹

The ABA's *Criminal Justice Standards for the Defense Function* emphasizes collateral consequences numerous times.²⁶⁰ Pursuant to the ABA's standard, defense counsel have "a duty to consider . . . the collateral consequences of a conviction."²⁶¹ Further, defense counsel should advise clients early in the process about collateral consequences.²⁶² The ABA also places the onus on defense counsel to research the consequences that will apply to their client.²⁶³ Armed with this knowledge, defense counsel should include collateral consequences in plea negotiations and during presentencing.²⁶⁴

Military courts would be in the minority in bringing collateral consequences into the courtroom. However, in doing so, the sentencing authority would be empowered to come to more just sentences than those jurisdictions that prohibit it.

C. The U.S. Supreme Court on the Importance of (Some) Collateral Consequences

The U.S. Supreme Court recognized the importance that collateral consequences bear on a defendant's decision to plead guilty or not guilty.²⁶⁵ In *Padilla v. Kentucky*, the Court reiterated its position that "[p]reserving the client's right to remain in the United States may be more

²⁵⁷ *United States v. Nesbeth*, 188 F. Supp. 3d, 179 (E.D.N.Y. 2016).

²⁵⁸ *United States v. Pauley*, 511 F.3d 468, 474–75 (4th Cir. 2007).

²⁵⁹ *Id.*

²⁶⁰ AM. BAR ASS'N, *CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION* (4th ed. 2017).

²⁶¹ *Id.* standard 4-1.3(h).

²⁶² *Id.* standard 4-3.3(c)(viii).

²⁶³ *Id.* standard 4-5.4.

²⁶⁴ *Id.* standard 4-5.4(c).

²⁶⁵ For more on the Supreme Court's rulings regarding collateral consequences as they intersect with the Constitution, see Chin, *supra* note 4, at 378.

important to the client than any potential jail sentence.”²⁶⁶ Though the Court did not extend this reasoning to other collateral consequences besides deportation, this reasoning still holds true for other collateral consequences. The ability to secure employment and housing, vote, and possess firearms may similarly be “more important . . . than any jail sentence.”²⁶⁷

The Court reasoned that bringing relevant collateral consequences into the light only benefits the process.²⁶⁸ Discussing collateral consequences enables the government and defense to “reach agreements that better satisfy the interests of both parties.”²⁶⁹ When both sides know about the collateral consequences of a particular offense, they can be creative in the plea discussion to create an offense- or sentence-based outcome that reduces the likelihood that the accused will be subject to one or more collateral consequences.²⁷⁰ This can also benefit the government as an accused’s knowledge of the collateral consequence “may provide . . . a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.”²⁷¹

In narrowly scoping its holding in *Padilla*, the Court discusses the importance of collateral consequences while at the same time dismissing most of them, drawing a distinction without a difference to those who endure life-altering collateral consequences. There are benefits to the accused and the justice system in considering collateral consequences, but there are practical reasons that doing so could also create a burden on the system.

D. The Arguments Against Incorporating Collateral Consequences into Practice

Most jurisdictions do not consider collateral consequences during sentencing.²⁷² A primary reason is that the Supreme Court has repeatedly

²⁶⁶ *Padilla v. Kentucky*, 559 U.S. 356, 368 (quoting *INS v. St. Cyr*, 533 U.S. 289, 322 (2001)).

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 373.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² See *supra* Section VI.B.

held that the collateral consequences imposed by law and regulation are not punishment.²⁷³ Military jurisprudence dictates that collateral consequences are “collateral administrative effects.”²⁷⁴ In addition to the prevailing jurisprudence that collateral consequences are not punishment, there are concerns that incorporating collateral consequences could also create inefficiencies in the legal system.

1. Collateral Consequences Are Not Punishment

The civil death experienced in early American history was considered punishment under the law; however, the “new civil death” is not.²⁷⁵ Federal and state legislatures have offered non-punitive justifications for their imposed collateral consequences: “sex offender registration laws . . . protect the community; voter disenfranchisement provisions . . . protect the integrity of the franchise; . . . bars to government benefits . . . prevent fraud and allocate scarce resources to the most deserving.”²⁷⁶ It is then up to the courts to decide whether these laws are, in fact, regulatory or criminal punishment, and courts generally defer to those claims.²⁷⁷ The Supreme Court has made clear that, absent a legislative intent to punish, individual collateral consequences are not punishment.²⁷⁸ The argument that collateral consequences are not punishment is based on the theory that these consequences “purport to control and restrain people not for what they have done, but for what they might do.”²⁷⁹ Even though these consequences may have harsh, enduring impacts, because they are not *intended* to punish, they are not punishment. Therefore, they have no place in the sentencing process.

²⁷³ See generally Chin, *supra* note 8, 1807–15 (providing an overview of collateral consequences jurisprudence).

²⁷⁴ *United States v. Quesinberry*, 31 C.M.R. 195, 198 (C.M.A. 1962).

²⁷⁵ Chin, *supra* note 8, at 1793–94.

²⁷⁶ Susan G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 311 (2015) (citations omitted). See HOSKINS, *supra* note 32, at 165–66, 170–71.

²⁷⁷ Mayson, *supra* note 276, at 311–12; HOSKINS, *supra* note 32, at 34.

²⁷⁸ See Chin, *supra* note 8, at 1825; Mayson, *supra* note 276, at 303, 313 n.65 (providing examples of cases where the Court held collateral consequences were not punishment). The Supreme Court also ruled that Alaska’s sex offender registration law was not punishment. *Smith v. Doe*, 538 U.S. 84 (2003).

²⁷⁹ Mayson, *supra* note 276, at 303.

Some scholars attack this reasoning, arguing that their effect is to punish those who have been convicted, so they are properly considered punishment.²⁸⁰ While an individual consequence may not properly be considered punishment (e.g., suspension of a driver’s license for a drug conviction), the fact that the regulatory regime of collateral consequences creates a “lesser” status for convicted persons on the whole makes collateral consequences punishment.²⁸¹ Even Chief Justice Earl Warren noted, “Conviction of a felony imposes a *status* upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities.”²⁸²

Military courts generally exclude evidence and argument about collateral consequences of the conviction from presentencing, as illustrated by *United States v. Talkington* and *United States v. Quezada*.²⁸³ The reasoning behind these cases is rooted in *United States v. Quesinberry*, where the Court of Military Appeals determined that collateral consequences have no place in sentencing.²⁸⁴ In holding that “the waters of the military sentencing process should [not] be so muddied,” the court reasoned that courts-martial should “concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration.”²⁸⁵ While the court did not specifically say collateral consequences were not punishment, it did note that such consideration would create difficulties for the sentencing process. Regardless of whether collateral consequences are properly considered punishment or not, there are other concerns with incorporating their existence into justice practice.

²⁸⁰ See, e.g., Travis, *supra* note 12; Chin, *supra* note 8, at 1792.

²⁸¹ Chin, *supra* note 8, at 1826 (“Whether or not any individual collateral consequence is punishment, the overall susceptibility to collateral consequences is punishment. This is the case at least when, as now, there is a vigorous, existing network of collateral consequences.”).

²⁸² *Id.* at 1825. (quoting Chief Justice Earl Warren’s dissent in *Parker v. Ellis*, 362 U.S. 574, 593–94 (1960) (Warren, C.J., dissenting) (emphasis added), *overruled by* *Carafas v. LaVallee*, 391 U.S. 234 (1968)).

²⁸³ *United States v. Talkington*, 73 M.J. 212 (2014); *United States v. Quezada*, No. 201900115, 2020 CCA LEXIS 378 (N-M. Ct. Crim. App. Oct. 26, 2020).

²⁸⁴ *United States v. Quesinberry*, 31 C.M.R. 195, 198 (C.M.A. 1962).

²⁸⁵ *Id.*

2. *The Burden on Defense Counsel*

One of the primary difficulties in implementing these changes is the burden it could place on military defense attorneys.²⁸⁶ Because they practice within the UCMJ and are unable to gain expertise in any one state's laws and regulations, it would be impossible to advise a client in any detail what collateral consequence they will face in any of the fifty states they could move to. For example, Florida alone has 48,229 collateral consequences, and that is excluding federal collateral consequences.²⁸⁷ The military justice system could not support placing a burden on military defense counsel that would require them to become well-versed in the laws of the state that their client will likely move to post-confinement.²⁸⁸

However, the proposed changes to the system would not place such a high burden on defense counsel. As discussed above, defense counsel should be required to inform their client in writing that there may be consequences to their conviction that are controlled by federal and/or state law and provide a general overview based on basic defense counsel training. Counsel would not be required to research every jurisdiction to which the accused is considering moving. Much like advice relating to sex offender registration and immigration, the client will be advised to seek

²⁸⁶ See *Padilla v. Kentucky*, 559 U.S. 356, 375–78 (2010) (Alito, J., concurring) (“[T]he collateral consequences rule expresses an important truth: Criminal defense attorneys have expertise regarding the conduct of criminal proceedings. They are not expected to possess—and very often do not possess—expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on matters that lie outside their area of training and experience.”); *HOSKINS*, *supra* note 32, at 39–40. Zachary Hoskins notes;

In particular, courts have pointed to the difficulties that would arise in attempting to inform defendants not only of the range of punishments they might face but also the full range of [collateral consequences] that might follow from a guilty plea. . . . “It is made even more complicated by the fact that collateral consequences are not centralized, but rather are scattered throughout federal and state statutes, state and local regulatory codes, local rules, and local policies.”

Id. (quoting Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 646 (2006)).

²⁸⁷ Carlos J. Martinez, Miami-Dade Pub. Def., *The Consequences Aren't Minor* (unpublished PowerPoint presentation) (on file with author).

²⁸⁸ Professional Experiences, *supra* note 201.

civilian counsel who has expertise in the jurisdiction to which they will move.

3. It Could Make Military Justice Less Efficient

Critics of treating collateral consequences as punishment argue that it “could lead scores of defendants to appeal their convictions on grounds that they pleaded guilty without being sufficiently informed of the consequences of the plea.”²⁸⁹ This would then further burden the legal system. In *Padilla*, the Supreme Court addressed “the importance of protecting the finality of convictions obtained through guilty pleas.”²⁹⁰ The Court was unpersuaded that it would open a floodgate of appellate issues for guilty pleas based on ineffective assistance of counsel claims.²⁹¹ In part, the Court reasoned that the very nature of guilty pleas limits the desire to have a conviction set aside because, in doing so, the accused would lose the benefit of their bargain.²⁹² Three years later, in *Chaidez v. United States*, the Supreme Court ruled that its holding in *Padilla* could not be applied retroactively, i.e., appellants could not seek to have their guilty pleas set aside based on ineffective assistance of counsel. *Chaidez* demonstrates that creating a requirement for defense counsel to advise on collateral consequences does not need to give rise to innumerable appeals. The system can continue to operate efficiently with an added requirement to advise an accused about collateral consequences.

Another concern is that consideration of collateral consequences may make the court-martial system less efficient because fewer accused would be willing to plead guilty.²⁹³ Fewer guilty pleas would result in more contested cases, which inherently take up more of the parties’ time and energy. However, the reverse could result. It could lead to more agreements to plead guilty to lesser offenses in order to avoid a particular collateral consequence.²⁹⁴ The Supreme Court utilized this reasoning in its

²⁸⁹ HOSKINS, *supra* note 32, at 40.

²⁹⁰ *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

²⁹¹ *Id.*

²⁹² *Id.* at 372–73.

²⁹³ Professional Experiences, *supra* note 167. For example, many accused facing courts-martial for sex offenses are unwilling to plead guilty, at least in part, because they would have to register as a sex offender. *Id.*

²⁹⁴ Chin, *supra* note 5, at 386.

holding in *Padilla v. Kentucky*.²⁹⁵ The Court reasoned that when counsel and the accused understand the potential consequences facing the accused post-conviction, two things may occur. First, the government and defense are better positioned to reach a plea agreement that would secure a conviction for the government and perhaps reduce the chances that the accused will experience the collateral consequence(s) at stake.²⁹⁶ Second, “the threat of [the collateral consequence] may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.”²⁹⁷ This has been borne out in military justice as several practitioners and accused have reached plea agreements where an accused pleads guilty to a non-sex offense in exchange for the sex offense being dismissed.²⁹⁸

Ultimately, every case will have different facts and incentives, but the military justice system has already demonstrated it can overcome these efficiency concerns. Bringing consequences into the conversation will make the system more just, and that is worth the additional effort to reform military justice practice.

E. Proposed Changes to the *Manual for Courts-Martial* and *Military Judges’ Benchbook*

Court-martial sentencing practice must change. It must account for the inequities in our society—that convicted persons, namely, felons, do experience a “civil death” that may last a lifetime, and that racial minorities, who are more likely to be court-martialed, are more likely to experience this civil death than their White counterparts.²⁹⁹ To accomplish this reform, Congress must amend Article 56, UCMJ, the Military Sentencing Parameters and Criteria Board must update the Sentencing

²⁹⁵ *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010).

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ Professional Experiences, *supra* note 201. Another common way of avoiding sex offender registration ramifications is pleading guilty to a non-penetrative sex offense at a summary court-martial and waiving the right to a board for an other than honorable discharge, known as the “Summary OTH” deal. *Id.*

²⁹⁹ See *supra* note 20 and accompanying text.

Parameters, the President must amend RCM 1001, and the trial judiciary must update its *Benchbook* instructions.³⁰⁰

1. Article 56, UCMJ, and Sentencing Parameters

With the implementation of the sentencing parameters on 27 December 2023,³⁰¹ the court-martial system has already demonstrated that it is very capable of dramatic change that impacts sentencing practice. Article 56, UCMJ, informs court-martial parties what evidence may be considered in sentencing an accused. The purpose of sentencing is to “impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces.”³⁰² In making its determination, four of the factors the sentencing authority can consider are providing “just punishment,” deterring other misconduct, protecting others from further crimes by the accused, and rehabilitating the accused.³⁰³ As of 27 December 2023, the military judge and panel members must also adhere to the newly established sentencing parameters.³⁰⁴ While the updated Article 56 does permit consideration of collateral consequences of certain *sentences* that may impact retirement, it still does not account for collateral consequences of a *conviction*.³⁰⁵ Currently, the Military Sentencing Parameters and Criteria Board is not developing sentencing guidelines that consider collateral consequences of a conviction.³⁰⁶ Article 56 and the sentencing parameters must be updated to explicitly include the consideration of collateral consequences of convictions because of the significant impact they can have on a person

³⁰⁰ See also Altimas, *supra* note 35 (arguing that Article 56, UCMJ, RCM 1001, and *Benchbook* Instruction 2-5-23 should be amended to allow for presentation of sex offender registration evidence).

³⁰¹ National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, §539E(c), 135 Stat. 1541, 1701 (2021); Manual for Courts-Martial, preface (2023 ed.).

³⁰² UCMJ art. 56(c)(1) (2021).

³⁰³ *Id.* art. 56(c)(1)(C)(iii), (iv), (v), (vi). Sex offender registration, firearms prohibitions, and employment restrictions would serve to protect others from further crimes committed by the accused.

³⁰⁴ National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, §539E(c), 135 Stat. 1541, 1701 (2021). The sentencing parameters will not be considered in capital cases. *Id.* §539E(c)(5).

³⁰⁵ *Id.* § 539E(e)(3).

³⁰⁶ UCMJ art. 56 (2021); Manual for Courts-Martial app. 12B, app. 12D (2024 ed.).

post-conviction. Because the collateral consequences of a conviction can often be harsher than a period of confinement, it will benefit the sentencing authority, the accused, and justice if all parties consider that there may be a “sentence” of sorts imposed after an accused serves any confinement. Proposed changes to Article 56(c) are in Appendix C.

2. Rule for Courts-Martial 1001

Rule for Courts-Martial 1001(d) allows the defense to present matters in mitigation during presentencing.³⁰⁷ Mitigation evidence “is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency.”³⁰⁸ The Rule does not expressly allow evidence of collateral consequences to be admitted as mitigation evidence, and, as discussed above, military courts have held that collateral consequences do not qualify as mitigation evidence. However, evidence of collateral consequences fits within the definition of “mitigation” in Rule for Courts-Martial 1001(c)(2)(C), which is “any matter that may lessen the punishment to be adjudged by the court-martial or furnish grounds for a recommendation of clemency.”³⁰⁹ Rule for Courts-Martial 1001(d) must be amended to specifically permit consideration of these consequences. The rule currently provides that mitigation evidence includes certain qualities of the accused (e.g., “particular acts of good conduct or bravery . . . or [the accused’s record of] efficiency, fidelity, subordination, temperance, courage . . .”).³¹⁰ This is not enough. It must also state that evidence of relevant collateral consequences may be considered because it could make the sentence less harsh. Amending RCM 1001(d) will enable the military judge to properly reach a just sentence or provide more holistic instructions to the panel.³¹¹

When instructing the members on what they may consider in crafting a sentence, the military judge tells them they may consider past circumstances of the accused, such as family and financial difficulties experienced by the accused, and the accused’s previous education.³¹²

³⁰⁷ MCM, *supra* note 243, R.C.M. 1001(d)(1).

³⁰⁸ *Id.* R.C.M. 1001(d)(1)(B).

³⁰⁹ MCM, *supra* note 243, R.C.M. 1001(c)(2)(C).

³¹⁰ *Id.*

³¹¹ *See* Altimas, *supra* note 35 (arguing that sex offender registration is evidence in mitigation).

³¹² *See* DA PAM. 27-9, *supra* note 9, para. 2-5-23.

However, they are not permitted to consider similar future circumstances that an accused will undoubtedly face because of his conviction.³¹³ This is evidence in mitigation, and the sentencing authority should be permitted to consider it. Proposed changes to RCM 1001 are in Appendix D.³¹⁴

3. Addition to Benchbook Instructions 2-5-23

If collateral consequences are raised during presentencing, then the military judge should instruct the members that they may consider those consequences. The concurrence in *Talkington* provides a good starting point for what that instruction should look like. In his concurrence, Chief Judge Baker provides a sample instruction on the consequence of sex offender registration.³¹⁵ The instruction informs the panel of the applicable law in general terms, that the details of the collateral consequence may differ depending on where the accused will live, that registration is not part of the sentence, and that the members may determine how much weight to give to the reference to the registration.³¹⁶ If the law and Rules for Courts-Martial were to change, Chief Judge Baker’s instruction could go even further. In addition to the content in his sample instruction, it should also explicitly state that the collateral consequence raised by the accused may factor into their sentencing determination. This will enable the sentencing authority to account for the consequences that the accused will face as a result of their conviction. A proposed update to *Benchbook* Instruction 2-5-23 is in Appendix E.

VII. Putting Collateral Consequences into Practice

In a world where Congress, the President, and the judiciary implemented the proposed changes, SFC Smith and 1LT Clark would be able to present evidence of the lasting impacts their convictions would have. Mechanically, this could easily be put into practice. In a guilty plea,

³¹³ As discussed above, some courts do not permit consideration of adverse consequences based on educational achievements, known as the “white collar discount.” *See supra* note 251 and sources cited.

³¹⁴ *Infra* Appendix D at D-1.

³¹⁵ *United States v. Talkington*, 73 M.J. 212, 219 (Baker, J., concurring).

³¹⁶ *Id.*

the parties could agree to put relevant collateral consequence(s) in the stipulation of fact. If they cannot agree upon this insertion, defense counsel would motion the court to take judicial notice of the law or regulation that will impose the consequence to the accused pursuant to Military Rule of Evidence (MRE) 202(a).³¹⁷ In reaching a decision on whether to take judicial notice and to allow evidence of a collateral consequence, the military judge would need to engage in an MRE 403 balancing test to determine whether evidence is admissible.³¹⁸ The MRE 403 balancing test requires the judge to determine if the evidence's "probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence."³¹⁹

If the probative value of the impact is low compared to any confusion that may be caused, then the evidence would not come in. This confusion could take form in uncertainty as to where the accused will reside after serving the military sentence, which profession would be pursued, and whether the way the law was written is too convoluted to piece together. Accordingly, to get over the MRE 403 hurdle, an accused must be able to present concrete evidence of where they will live and which consequence(s) will impact them, as they have no control over the way a law is written.

In *United States v. Rodriguez*, the judge denied the accused's attempts to present evidence of sex offender registration, but the defense counsel went through the steps required to present the evidence to the factfinder.³²⁰ The accused moved the military judge to take judicial notice of the sex offender law in Texas under which he would have to register.³²¹ He also submitted a memorandum stating he would have to register as a sex offender for fifteen years.³²² The defense asked the judge to give an instruction on sex offender registration that was consistent with the instruction proposed by Chief Judge Baker in the *Talkington* concurring opinion.³²³ Though the judge denied the defense's efforts, the counsel

³¹⁷ MCM, *supra* note 243, M.R.E. 202(a).

³¹⁸ *Id.* M.R.E. 403.

³¹⁹ *Id.*

³²⁰ *United States v. Rodriguez*, No. ACM 38519 (reh), 2019 CCA LEXIS 35 *28 (A.F. Ct. Crim. App. Jan. 30, 2019).

³²¹ *Id.*

³²² *Id.* at *30.

³²³ *Id.*

showed that, if the law were to change, presenting this evidence could be seamlessly accomplished.

For example, in SFC Smith’s and 1LT Clark’s vignettes, their collateral consequences would be long-lasting and significant, and therefore highly probative in crafting a just sentence. In SFC Smith’s case, it would be highly probative that he would have to register as a sex offender, may never vote again, and would find it extremely difficult to find employment and a place to live. In 1LT Clark’s case, it would be highly probative that he could be ineligible for housing assistance, SNAP and TANF, and would face difficulty finding employment. However, if there is no concrete evidence of where they would reside or what profession they would seek, that would make the probative value of consequences such as voting rights or employment restrictions lower. This would work against them in the MRE 403 balancing test. Evidence of collateral consequences can be probative and easily presented to the sentencing authority; the military justice system needs to acknowledge these facts and enable these consequences to be considered during presentencing.

VIII. Conclusion

Court-martial convictions can have lifelong, life-altering consequences, and none of them can be openly considered by the sentencing authority. In fact, military judges instruct panel members not to consider those consequences in reaching a sentence. This prevents the sentencing authority from discharging its duty: to produce a just punishment. This is especially true in cases where it is all but certain that the accused will become another starving, homeless Veteran because they cannot find a job or qualify for government financial assistance, or where they face restrictions on where they can live, leaving them with nowhere to go. The sentencing authority is allowed to consider some evidence in mitigation about the accused’s past and present, but is prohibited from considering how their past and present will alter their future once they reenter civilian society. They are prevented from considering the civil death sentence that so many accused will face because of their offenses.

Some may believe that these collateral consequences are warranted and have little sympathy for an accused. The point of this article is not to argue that collateral consequences need to go away; the point is to

demonstrate that if the military justice system is truly in the pursuit of justice and good order and discipline, then the system has failed, and will continue to fail until these consequences are brought into the discussion. Commanders should be discussing these consequences with their legal advisor, OSTC should discuss more than Lautenberg or sex offender consequences with their leaders, defense attorneys should be discussing these consequences with their clients, and the defense attorney and accused should be discussing these consequences with the sentencing authority. Only once everyone can consider the whole picture will the command, accused, and sentencing authority truly be able to come to a knowing and just outcome for this nation's Service members. Only then can military justice truly be achieved.

Appendix A³²⁵

(DCAP Form __ ([DATE]))

Advice to Clients on Collateral Consequences of a Conviction

Members of the Trial Defense Service do not have training on the collateral consequences that may be imposed by states and the Federal Government. However, based on our discussions, it appears that you have been charged with an offense or offenses that may have an effect on your ability to find employment, secure public housing or public assistance, vote, drive, maintain custody of your children, serve on a jury, or exercise other civil rights, if you plead guilty or are found guilty.

We are unable to predict if states or the Federal Government will or will not take action adverse to you as described above, but you are advised that is a very real possibility. Each state has different laws and regulations concerning what convicted persons can and cannot do, based upon the type of offense the person committed.

If you have more detailed or specific questions, you are encouraged to consult with an attorney who practices in the jurisdiction you wish to move to after your military service is complete.

Printed name of Defense
Counsel

Signature of Defense Counsel

Printed name of Accused

Signature of Accused

Date

Appellate Exhibit _____

³²⁵ This proposed form is modeled after DCAP Form 1.2, *supra* note 197.

Appendix B³²⁶Proposed Change to *Benchbook* Instruction 2-2-9

NOTE: Collateral Consequence: Sex Offender Registration. If the accused pled guilty to: (1) an offense requiring sex offender registration pursuant to DoD Instruction 1325.07, (2) an offense listed in 34 U.S.C. §20911, and/or (3) an offense similar to an offense listed in DoD Instruction 1325.07 or 34 U.S.C. 20911, then the judge must ask the following questions. If not required, skip to the next NOTE.

MJ : Defense Counsel, did you advise the accused of the sex offender reporting and registration requirements (possibly) resulting from a finding of guilty in accordance with the accused's guilty plea?

DC: (Responds.)

MJ : Did you document your discussion on this issue with the accused?

DC: (Responds.)

MJ : Please have that document marked as the next appellate exhibit.

DC: (Responds.)

MJ : _____, I have Appellate Exhibit _____. Did you sign this document?

ACC: (Responds.)

MJ : Did you read this document thoroughly before you signed it?

ACC: (Responds.)

MJ : Have you discussed this issue with your defense counsel?

ACC: (Responds.)

MJ : Do you understand your guilty plea carries with it (possible) sex offender reporting and registration requirements?

ACC: (Responds.)

NOTE: In all cases, continue below.

MJ : _____, are you a citizen of the United States?

ACC: (Responds.)

³²⁶ Electronic Benchbook, *supra* note 9, para. 2-2-9 (proposed additional language is underlined).

NOTE: Collateral Consequence: Citizenship. The judge should ask the following questions if the accused is not a citizen or there is a question as to the permanence of the accused’s citizenship status. See *Padilla v. Kentucky*, 559 US 356 (2010), *US v. Denedo*, 556 US 904 (2009). If not required, skip to the next NOTE.

MJ : Defense Counsel, did you advise the accused of the (possible) adverse impact on the accused’s immigration, naturalization, and/or citizenship status as a result of a conviction for the offense(s) to which the accused pled guilty?

DC: (Responds.)

MJ : Did you document your discussion on this issue with the accused?

DC: (Responds.)

MJ : Please have that document marked as the next appellate exhibit.

DC: (Responds.)

MJ : _____, I have Appellate Exhibit _____. Did you sign this document?

ACC: (Responds.)

MJ : Did you read this document thoroughly before you signed it?

ACC: (Responds.)

MJ : _____, do you understand that a conviction for the offense(s) to which you have pled guilty may have an adverse impact on your immigration, naturalization, and/or citizenship status?

ACC: (Responds.)

MJ : Have you discussed this with your defense counsel?

ACC: (Responds.)

MJ : Do you understand your guilty plea carries with it a risk of deportation, removal, exclusion from admission to the United States, or denial of naturalization and/or citizenship, pursuant to the laws of the United States?

ACC: (Responds.)

NOTE: Collateral Consequence: Firearms Possession. If the accused pled guilty to an offense that may criminalize firearms possession, the judge may ask the following questions. See, 18 USC 922(g). If not applicable, skip to the next NOTE.

MJ : Defense Counsel, did you advise the accused of the (possible) adverse impact on the accused's ability to legally own or possess a firearm as a result of a conviction for the offense(s) to which the accused pled guilty?

DC: (Responds.)

MJ : Did you document your discussion on this issue with the accused?

DC: (Responds.)

MJ : Please have that document marked as the next appellate exhibit.

DC: (Responds.)

MJ : _____, I have Appellate Exhibit __. Did you sign this document?

ACC: (Responds.)

MJ : Did you read this document thoroughly before you signed it?

ACC: (Responds.)

MJ : Have you discussed this issue with your defense counsel?

ACC: (Responds.)

MJ : Do you understand that a conviction for the offense(s) to which you have pled guilty (will) (may) adversely impact your ability to legally own or possess a firearm?

ACC: (Responds.)

MJ: Do you understand that a conviction for the offense(s) to which you have pled guilty may have (other) adverse collateral consequences under Federal and state law and regulations?

ACC: (Responds)

MJ: Defense Counsel, did you document your discussion on this issue with your client?

DC: (Responds.)

MJ: Please have that document marked as the next appellate exhibit.

DC: (Responds.)

Appendix C³²⁷

Proposed Changes to Article 56. Sentencing

(c) IMPOSITION OF SENTENCE.—

(1) IN GENERAL.—In sentencing an accused under section 853 of this title (article 53), a court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces, taking into consideration—

(A) the nature and circumstances of the offense and the history and characteristics of the accused;

(B) the impact of the offense on—

(i) the financial, social, psychological, or medical wellbeing of any victim of the offense; and

(ii) the mission, discipline, or efficiency of the command of the accused and any victim of the offense;

(C) the need for the sentence, after consideration of any collateral consequences of the conviction —

(i) to reflect the seriousness of the offense;

(ii) to promote respect for the law;

(iii) to provide just punishment for the offense;

(iv) to promote adequate deterrence of misconduct;

(v) to protect others from further crimes by the accused;

(vi) to rehabilitate the accused; and

(vii) to provide, in appropriate cases, the opportunity for retraining and return to duty to meet the needs of the service;

(D) the sentences available under this chapter.

³²⁷ UCMJ art. 56(c) (2021) (proposed additional language is underlined). This paper does not address the collateral consequences of sentencing (e.g., retirement and Veterans Affairs benefits), so suggested changes to the law and rules are not included.

Appendix D³²⁸

Proposed Changes to RCM 1001

Rule 1001. Presentencing Procedure

(d) Matter to be presented by the defense.

(1) In general. The defense may present matters in rebuttal of any material presented by the prosecution and the crime victim, if any, and may present matters in extenuation and mitigation regardless whether the defense offered evidence before findings.

(A) Matter in extenuation. Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense which do not constitute a legal justification or excuse.

(B) Matter in mitigation. Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency. It includes the fact that nonjudicial punishment under Article 15 has been imposed for an offense growing out of the same act or omission that constitutes the offense of which the accused has been found guilty, collateral consequences that the accused will encounter as a result of the conviction, particular acts of good conduct or bravery and evidence of the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a servicemember.

³²⁸ MCM, *supra* note 243, R.C.M. 1001(d) (proposed additional language is underlined).

Appendix E³²⁹Proposed *Benchbook* Presentencing Instruction 2-5-23

MJ: Under [DoD Instructions] [Federal law] [state law/regulation], when convicted of certain offenses, including the offenses here, the accused [must register as a sex offender with the appropriate authorities in the jurisdiction in which he resides, works, or goes to school] [will be prohibited from receiving (food stamps) (public financial assistance) (public housing assistance)] [will be prohibited from possessing a firearm] [will have his license suspended] [may face deportation] [will be prohibited from voting] [may lose custody of his children].

[Sex offender registration is required in all fifty states; however, sex offense registration requirements may differ between jurisdictions. As a result, the registration requirements and the consequences of doing so are not necessarily predictable.]

[Eligibility for (food stamps) (public financial assistance) (public housing assistance)] [Eligibility to possess a firearm [Eligibility to vote] [Eligibility to drive] [Professional licensing] [Child custody] is determined by Federal law and the laws and regulations of each state. As a result, it can be difficult to determine how the accused will in fact be impacted based on where he moves.

[Sex offender registration] [Ineligibility for (food stamps) (public financial assistance) (public housing assistance)] [The prohibition on possessing a firearm] [The loss of driving privileges] [Deportation] [Loss of voting rights] [Loss of professional licensing] [An impact to child custody] is a consequence of conviction; however, it is not a sentence adjudged at court-martial.

The consideration and weight you give the reference in Appellant's unsworn statement to [(state collateral consequence(s))] is up to you and in your discretion. It is your duty to determine the criminal sentence to adjudge in this case, and this includes considering evidence of the collateral consequences of the accused's conviction.

³²⁹ This instruction is a modification of Chief Judge Baker's sample instruction in *United States v. Talkington*, 73 M.J. 212, 219 (2014).

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**PACING CHINA: LETHAL AUTONOMOUS WEAPON SYSTEMS AND
OBJECT-BASED TARGETING**

MAJOR RILEY A. GRABER*

Detective Del Spooner: “Human beings have dreams. Even dogs have dreams, but not you, you are just a machine. An imitation of life. Can a robot write a symphony? Can a robot turn a canvas into a beautiful masterpiece?”

Robot Sonny: “Can you?”¹

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¹ I, ROBOT, Blu-ray (20th Century Fox 2004). Robot Sonny has just asserted that he has dreams, which Detective Spooner doesn’t believe, because only humans dream. *Id.* He dismisses the robot’s claim to basic human ability by describing the things robots cannot do, like write a symphony or create art. *Id.* Sonny counters that no matter how human Detective Spooner is, he may not be able to do these human things. *Id.* As you read this article, consider whether humans, people, are as capable as we believe them to be.

I. Introduction

Lethal autonomous weapon systems (LAWS)² are the future of armed conflict.³ With the rise of artificial intelligence (AI) technology,⁴ the use of machine learning algorithms to spur AI growth,⁵ and the competition of nations to stay militarily ahead of one another,⁶ LAWS will become a major contributor to armed conflict in the near future.⁷ Whether as the central pillar supporting the nuclear capabilities of today,⁸ or as a variant

² The acronym LAWS specifically encompasses “lethal” in its name. Some commentators have limited the phrase to autonomous weapons systems (AWS), but still imply the lethality of the weapon system. See Michael N. Schmitt, *Autonomous Weapon Systems and International Humanitarian Law: A Reply to the Critics*, HARV. L. SCH. NAT’L SEC. J. (Feb. 5, 2013), <https://harvardnsj.org/2013/02/05/autonomous-weapon-systems-and-international-humanitarian-law-a-reply-to-the-critics/> [https://perma.cc/9B77-D5M3]. This article will rely on the phrase “LAWS,” with a more robust definition described in Part II.A.

³ See Kai-Fu Lee, *The Third Revolution in Warfare*, THE ATLANTIC (Sept. 11, 2021), <https://www.theatlantic.com/technology/archive/2021/09/i-weapons-are-third-revolution-warfare/620013/> [https://perma.cc/UH54-8BBT] (“First there was gunpowder. Then nuclear weapons. Next: artificially intelligent weapons.”); but see KELLY M. SAYLER, CONG. RSCH. SERV., IF11294, INTERNATIONAL DISCUSSIONS CONCERNING LETHAL AUTONOMOUS WEAPON SYSTEMS 1 (2023) (“Although the pursuit of LAWS is not yet widespread, some analysts have argued that Israel’s Harpy loitering munition—which the weapon’s manufacturer, IAI, describes as being fully autonomous—qualifies.”).

⁴ See Joe McKendrick, *AI Adoption Skyrocketed Over the Last 18 Months*, HARV. BUS. REV. (Sept. 27, 2021), <https://hbr.org/2021/09/ai-adoption-skyrocketed-over-the-last-18-months/> [https://perma.cc/7TPZ-NMGY] (“Fifty-two percent of companies accelerated their AI adoption plans because of the Covid crisis . . . Just about all, 86%, say that AI is becoming a ‘mainstream technology’ at their company in 2021.”).

⁵ See *XAI: Explainable Artificial Intelligence*, DEF. ADVANCED RSCH. PROJECTS AGENCY, <https://www.darpa.mil/program/explainable-artificial-intelligence/> [https://perma.cc/C3VN-K3FB] (last visited Sep. 10, 2025) (“Dramatic success in machine learning has led to a torrent of Artificial Intelligence (AI) applications.”).

⁶ See U.S. DEP’T OF DEF., 2022 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 4 [hereinafter National Defense Strategy].

⁷ Some measure of autonomy in weapons systems already exists. See *infra* Section II.A.

⁸ See generally Lieutenant Commander Joshua M. M. Portzer, *Kanyon’s Reach: Rethinking the Nuclear Triad in the Autonomous Age*, U.S. NAVAL INSTITUTE, PROCEEDINGS (July 2020), <https://www.usni.org/magazines/proceedings/2020/july/kanyons-reach-rethinking-nuclear-triad-autonomous-age/> [https://perma.cc/R8DY-7YPU] (describing Russia’s Kanyon weapon system—an “autonomous unmanned undersea vehicle[]” (AUUV) capable of delivering a nuclear warhead—and arguing the United States should consider developing its own nuclear-capable AUUV).

of weapon in their own right,⁹ autonomous weapons—waging armed conflict at the speed of computers—will have to be developed, trained, tested, and ready for the battle of tomorrow.

There is currently a battle among legal practitioners, scholars, and non-governmental organizations (NGOs) as to whether LAWS can comply with the law of armed conflict as accurately as humans.¹⁰ The Group of Government Experts (GGE) at the United Nations Convention on Certain Conventional Weapons (CCW)¹¹ has been discussing this issue for about eleven years.¹² In 2019, the High Contracting Parties to the CCW affirmed eleven guiding principles for states developing LAWS.¹³ To adhere to those principles, states must ensure that any autonomous weapon

⁹ See generally SAYLER, *supra* note 3 (describing variants of LAWS in use or being manufactured today).

¹⁰ See *A Hazard to Human Rights: Autonomous Weapons Systems and Digital Decision-Making*, HUM. RTS. WATCH, <https://www.hrw.org/report/2025/04/28/hazard-human-rights/autonomous-weapons-systems-and-digital-decision-making> [<https://perma.cc/2E6X-97ML>] (Apr. 28, 2025) (“Autonomous weapons systems present numerous risks to humanity, most of which infringe on fundamental obligations and principles of international human rights law.”); *Autonomous Weapons Open Letter: AI & Robotic Researchers*, FUTURE OF LIFE INST. (Feb. 9, 2016), <https://futureoflife.org/open-letter/open-letter-autonomous-weapons-ai-robotics/> [<https://perma.cc/2SGJ-X47D>] (a call by “AI/Robotics Researchers,” well known business and technology leaders (like Stephen Hawking, Elon Musk, and Steve Wozniak), and “others” (including 34,378 signatures as of Aug. 19, 2025), for “a ban on offensive autonomous weapons beyond meaningful human control”); Schmitt, *supra* note 2 (countering Human Rights Watch’s argument, by “suggest[ing] that whereas some conceivable autonomous weapon systems might be prohibited as a matter of law, the use of others will be unlawful only when employed in a manner that runs contrary to international humanitarian law’s prescriptive norms”).

¹¹ Commonly referred to as the Convention on Certain Conventional Weapons (CCW), but more fully titled the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects. *Opened for signature* Apr. 10, 1981, 1342 U.N.T.S. 137 (entered into force Dec. 2, 1983).

¹² *Timeline of LAWS in the CCW*, U.N. OFF. FOR DISARMAMENT AFF., <https://disarmament.unoda.org/timeline-of-laws-in-the-ccw/> [<https://perma.cc/2SGJ-X47D>] (last visited Sep. 10, 2025).

¹³ Meeting of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, *Final Rep.*, Nov. 13-15, 2019, U.N. Doc. CCW/MSP/2019/9, ¶ 31 (Dec. 13, 2019) [hereinafter CCW, *Final Rep.*, 2019].

they develop complies with international humanitarian law (IHL).¹⁴ The GGE has reiterated these principles multiple times since, including in their work on the rolling text during the first 2025 session.¹⁵ Of course, regardless of the weapon used in armed conflict, compliance with international humanitarian law, termed the law of armed conflict (LOAC) in the United States, is required.¹⁶

Some states, such as Austria, and NGOs, such as Human Rights Watch (HRW), have called for an outright ban on the development and use of LAWS.¹⁷ They believe that these systems could never comply with the LOAC if used in armed conflict.¹⁸ The International Committee of the Red Cross (ICRC), while not calling for an outright ban, does want to make it illegal to target persons using LAWS.¹⁹ Additionally, their position includes creating “legally binding rules” on states’ use of autonomous weapons.²⁰

¹⁴ *Id.* at Annex IV ¶ (a). That principle, in full, is “International humanitarian law continues to apply fully to all weapons systems, including the potential development and use of lethal autonomous weapons systems.” *Id.*

¹⁵ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, *Chair’s Summary – First 2025 session of the GGE on LAWS*, 3-4 Mar. 2025, U.N. Doc. CCW/GGE.1/2025/WP.1, ¶ 9 (Apr. 7, 2025). The rolling text is a provisional consensus on the work of the GGE and is available at [https://docs-library.unoda.org/Convention_on_Certain_Conventional_Weapons_-_Group_of_Governmental_Experts_on_Lethal_Autonomous_Weapons_Systems_\(2025\)/CCW_GGE_LAWS_-_Revised_rolling_text_as_of_12_May_2025.pdf](https://docs-library.unoda.org/Convention_on_Certain_Conventional_Weapons_-_Group_of_Governmental_Experts_on_Lethal_Autonomous_Weapons_Systems_(2025)/CCW_GGE_LAWS_-_Revised_rolling_text_as_of_12_May_2025.pdf) [<https://perma.cc/4E7S-5SL7>].

¹⁶ See *What is International Humanitarian Law?*, INT’L COMM. OF THE RED CROSS (2004) [hereinafter *What is IHL*]; OFF. OF GEN. COUNS., U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 3.2 (12 June 2015) (C3, 31 Jul. 2023) [hereinafter *LAW OF WAR MANUAL*].

¹⁷ SAYLER, *supra* note 3; FEDERAL MINISTRY EUROPEAN AND INTERNATIONAL AFFAIRS REPUBLIC OF AUSTRIA, AUTONOMOUS WEAPONS SYSTEMS (AWS) <https://www.bmeia.gv.at/en/european-foreign-policy/disarmament/conventional-arms/autonomous-weapons-systems> [<https://perma.cc/X6AJ-K4VC>] (last visited Aug. 24, 2025); Bonnie Docherty, *Losing Humanity: The Case Against Killer Robots*, HUMAN RIGHTS WATCH, (Nov. 19, 2012), <https://www.hrw.org/report/2012/11/19/losing-humanity/case-against-killer-robots> [<https://perma.cc/K7V6-WELN>] [hereinafter *Losing Humanity*].

¹⁸ See SAYLER, *supra* note 3; *Losing Humanity*, *supra* note 17.

¹⁹ *Submission on Autonomous Weapon Systems to the United Nations Secretary-General*, INT’L COMM. OF THE RED CROSS (Mar. 19, 2024), https://www.icrc.org/sites/default/files/wysiwyg/war-and-law/icrc_submission_on_autonomous_weapons_to_unsg.pdf [<https://perma.cc/BL9F-MW94>] [hereinafter ICRC SUBMISSION ON AWS].

²⁰ *Id.*

In contrast, this article will argue that, at a minimum, LAWS built specifically for object-based targeting can comply with the LOAC, and their use in armed conflict would be lawful. In addition, slowing the ongoing development of LAWS—or ending that development altogether—will place the United States at a strategic disadvantage in competition with China.

Part II of this article identifies the differing definitions of LAWS, including the Department of War's (DoW) definition as articulated in its directives. It will describe some of the legal objections to LAWS put forth by NGOs like the ICRC and Human Rights Watch. Finally, it will argue the strategic imperative for creating and utilizing LAWS, especially considering China's development of such technology.

Part III discusses weapon reviews conducted on new weapons before they are fielded, along with LOAC compliance as applied to object-based targeting. It will discuss some applications and technologies that are already developed, or in development now, which can comply with these requirements.

Part IV concludes that the DoW must be prepared for the wave of autonomy that is coming to defense systems and weapons.²¹ DoW attorneys cannot be luddites in the face of AI and its application to weapons. Not only must attorneys understand how AI and autonomy work, they must also be fluent in domestic, treaty, and customary international law to analogize old rules to this new technology. Old rules cannot be roadblocks to new technology when compliance with LOAC principles is possible.

²¹ See Edward Graham, *DoD Official: AI and Autonomy are Critical to the Future of War*, NEXTGOV/FCW (Feb. 23, 2023), <https://www.nextgov.com/emerging-tech/2023/02/dod-official-ai-and-autonomy-are-critical-future-war/383263/> [<https://perma.cc/8KEW-HJQY>]; Charles Pope, *Kendall Details 'Seven Operational Imperatives' & How They Forge the Future Force*, AIR FORCE (Mar. 3, 2022), <https://www.af.mil/News/Article-Display/Article/2953552/kendall-details-seven-operational-imperatives-how-they-forge-the-future-force/> [<https://perma.cc/JC3L-LE5A>] (one imperative being “[d]efining the Next Generation Air Dominance (or NGAD) System of Systems,” which will include autonomy in its design. *Id.*). See also Stephen Losey, *US Air Force Eyes Fleet of 1,000 Drone Wingmen as Planning Accelerates*, DEFENSENEWS (Mar. 8, 2023), <https://www.defensenews.com/air/2023/03/08/us-air-force-eyes-fleet-of-1000-drone-wingmen-as-planning-accelerates/> [<https://perma.cc/9SDV-QCZG>] (former U.S. Air Force Secretary Frank Kendall noted that the Air Force would be asking for fiscal year 2024 funds for “the CCA [collaborative combat aircraft] program,” one version of an autonomous wingman.).

II. Lethal Autonomous Weapon Systems, Objections, and Strategic Imperatives

A. What Are Lethal Autonomous Weapon Systems (LAWS)?

Before discussing the legal issues involved with utilizing LAWS, we must first understand what is encapsulated by that term. While many definitions exist for LAWS,²² this article will focus on the DoW's definition. In *Autonomy in Weapon Systems*, which the DoW updated in 2023, an autonomous weapon system is defined as:

A weapon system that, once activated, can select and engage targets without further intervention by an operator. This includes, but is not limited to, operator-supervised autonomous weapon systems that are designed to allow operators to override operation of the weapon system, but can select and engage targets without further operator input after activation.²³

²² See Michael C. Horowitz, *Why Words Matter: The Real World Consequences of Defining Autonomous Weapons Systems*, 30 TEMP. INT'L & COMP. L.J. 85, 86-87 (2016) (noting at least six different definitions between the DoW, the United Nations, and other researchers).

²³ U.S. DEP'T OF DEF., DIR. 3000.09, AUTONOMY IN WEAPONS SYSTEMS 21 (25 Jan. 2023) [hereinafter DoDD 3000.09]. When discussing LAWS, landmines are usually brought up as an example of LAWS which is already in use today. *Compare ICRC Position and Background Paper: ICRC Position on Autonomous Weapon System*, INT'L COMM. OF THE RED CROSS 5 (12 MAY 2021), <https://www.icrc.org/en/document/icrc-position-autonomous-weapon-systems> [<https://perma.cc/2FUD-GJ7U>] [hereinafter ICRC POSITION ON AWS] ("Mines have also been described as crude AWS."), with Horowitz, *supra* note 22, at 86 ("This definition adds the processing of information to the definition to describe what the machine is doing, along with the word 'independent' (in the attempt to distinguish AWS from 'automatic' weapons, like landmines, that are merely triggered)."). The distinction is that a landmine does not "select" targets. DoDD 3000.09, at 21. Instead, the operator emplaces a mine and the device "exists in only two states: off or on." Frank Sauer, *An Ethical Mine Field? On Counter-Mobility and Weapon Autonomy*, WAR ON THE ROCKS (Oct. 8, 2024), <https://warontherocks.com/2024/10/an-ethical-mine-field-on-counter-mobility-and-weapon-autonomy/>. The device "cannot discriminate between legitimate and illegitimate targets, civilians and combatants." *Id.*

Importantly, this definition encompasses systems where a human is “on-the-loop”²⁴ to override the action of the weapon system if deemed necessary.²⁵

When discussing LAWS, it is necessary to understand where the human or operator exists with regard to “the loop.” In a traditional weapon system, a human is *in-the-loop*.²⁶ In its most simplistic terms, for instance, a Soldier aiming and firing their rifle is *in-the-loop* of the rifle.²⁷ A remote pilot flying a drone over a battlespace, selecting a target, and then deciding to fire a missile to destroy the target is very much *in-the-loop*.²⁸ Even though the operator might fire a precision-guided munition, which flies itself to the target, the human selected the target, selected the munition, and told it to fire.²⁹

In a human *on-the-loop* weapon, the human has the opportunity, no matter how minuscule, to intervene in the operation of the weapon.³⁰ This could include a system like the Super aEgis II, “a gun turret that’s able to identify, track and shoot targets,” which “will not fire without first

²⁴ “The-loop” refers to the decision-making cycle used to search for, select, and engage targets. See *Losing Humanity*, *supra* note 17. One way to visualize such a loop is through John Boyd’s “OODA Loop,” which stands for “Observe, Orient, Decide, Act.” William C. Marra & Sonia K. McNeil, *Understanding “The Loop”: Regulating the Next Generation of War Machines*, 36 HARV. J.L. & PUB. POL’Y 1139, 1144-45 (2013). In the OODA Loop, the actor “*observes* the world around her, gathering data . . . *orients* herself, or interprets the information she has gathered . . . *decides* how to act . . . [and] she *acts*, or executes the decision.” *Id.* at 1145 (emphasis in original).

²⁵ DoDD 3000.09, *supra* note 23.

²⁶ Paul Scharre & Michael C. Horowitz, *An Introduction to Autonomy in Weapon Systems* 8 (Ctr. for New Am. Sec., Working Paper, 2015) (“Weapon systems that use autonomy to engage individual targets or specific groups of targets that a human has decided are to be engaged.”).

²⁷ See Gregory P. Noone & Diana C. Noone, *The Debate Over Autonomous Weapons Systems*, 47 CASE W. RES. J. INT’L L. 25, 28 (2015).

²⁸ See Noone & Noone, *supra* note 27 (most commonly recalling “Predator or Reaper UAVs” *Id.* at 28).

²⁹ *Id.*; see Schmitt, *supra* note 2.

³⁰ Scharre & Horowitz, *supra* note 26 (“Weapon systems that use autonomy to select and engage targets where a human has not decided those specific targets are to be engaged, but human controllers can monitor the weapon system’s performance and intervene to halt its operation if necessary.”).

receiving an OK from a human,” after selecting its target.³¹ Or it could be the intervention by a human to prevent a weapon system from carrying out an attack based on its target selection, such as in the U.S. Patriot and Phalanx anti-missile systems.³² As mentioned above, this aligns with the DoW’s definition for an autonomous weapon system.³³ The DoW’s use of autonomy in weapons systems is currently limited to defense-postured weapons.³⁴

A human *out-of-the-loop* weapon requires no human intervention once activated or engaged.³⁵ These systems “use autonomy to select and engage targets where a human has not decided those specific targets are to be engaged, and human controllers cannot monitor the weapon system’s performance and intervene to halt its operation if necessary.”³⁶ Autonomous loitering munitions, such as Israel’s Harpy, are currently in use in armed conflict.³⁷ The Harpy is an unmanned aerial vehicle (UAV)

³¹ Simon Parkin, *Killer Robots: The Soldiers That Never Sleep*, BBC (July 16, 2015), <https://www.bbc.com/future/article/20150715-killer-robots-the-soldiers-that-never-sleep> [https://perma.cc/QTN6-TZ9C]. “The Super aEgis II can “identify, track and destroy a moving target from a great distance.” *Id.* While the manufacturer designed the system to operate without human intervention, in its current configuration, a human operator must give the go-ahead for the weapon to fire on its target. *Id.*

³² Kenneth Anderson & Matthew C. Waxman, *Law and Ethics for Autonomous Weapon Systems: Why a Ban Won't Work and How the Laws of War Can*, STAN. UNIV., THE HOOVER INST. JEAN PERKINS TASK FORCE ON NAT’L SEC. & LAW ESSAY SERIES 1 (2013).

³³ See DoDD 3000.09, *supra* note 23.

³⁴ For instance, the U.S. Navy has employed the MK 15 Phalanx Close-In Weapon System (CIWS) since 1980 on many of its ships at sea. *MK 15 - Phalanx Close-In Weapon System (CIWS)*, UNITED STATES NAVY (Sept. 20, 2021), <https://www.navy.mil/resources/fact-files/display-factfiles/article/2167831/mk-15-phalanx-close-in-weapon-system-ciws/> [https://perma.cc/HCD2-HDG3]. The Phalanx automatically engages missiles, aircraft, and other ships, all without a human in the loop. *Id.* The autonomous system discovers, tracks, and engages the enemy munition. *Id.* A land version, called Counter-Rocket, Artillery, Mortar (C-RAM) Intercept Land-Based Phalanx Weapon System (LPWS), is used by the U.S. Army for similar, autonomous defense on land. *Phalanx Weapon System*, RAYTHON, <https://www.rtx.com/raytheon/what-we-do/sea/phalanx-close-in-weapon-system> [https://perma.cc/KY8U-GXPY] (last visited Sep. 17, 2025).

³⁵ Scharre & Horowitz, *supra* note 26.

³⁶ *Id.*

³⁷ See Stuart Russell, *AI Weapons: Russia’s War in Ukraine Shows Why the World Must Enact a Ban*, NATURE (Feb. 23, 2023), <https://www.nature.com/articles/d41586-023-00511-5> [https://perma.cc/3XXY-AAXP].

which loiters in an area programmed into the UAV before launch.³⁸ Once loitering, it can “seek targets in a designated area, locate and identify their frequency, and autonomously pursue a strike from any direction,” without human input or intervention.³⁹

Finally, two addenda on humans and “the loop.” Throughout the development of LAWS, humans will be involved in the creation and programming of the weapon system.⁴⁰ During development is the time to ensure attorneys are engaged with developers and programmers to ensure LOAC compliance.⁴¹ Waiting for a complete system before involving attorneys will likely lead to failure.⁴²

Additionally, while LAWS “can select and engage targets without further intervention by an operator,”⁴³ they must also receive “high-level mission tasking” from the commander or Soldier responsible for the

³⁸ HARPY: ANTI RADIATION LOITERING MUNITION, IAI, <https://www.iai.co.il/p/harpy> [<https://perma.cc/6GFC-XAQU>] (last visited Feb. 26, 2023) (advertising itself as “Fully Autonomous” on the manufacturer’s website).

³⁹ *Id.* Expectedly, specific data on the successfulness of the Harpy is not present on the manufacturer’s website. *See id.* However, the manufacturer, Israel Aerospace Industries, has previously marketed the Harpy as having “up to 9 hours” endurance, a range of 200 km, and “high hit accuracy.” ISRAEL AEROSPACE SYSTEMS HARPY LOITERING MUNITION, Automated Decision Research, <https://automatedresearch.org/weapon/israel-aerospace-systems-harpy-loitering-munition/> [<https://perma.cc/H57W-HMS9>] (last visited Aug. 20, 2025). By contrast, articles have been written about the Harpy being used in conflict, but nothing about a specific instance of a wrongful strike. *See* Matthew Anzarouth, *Robots that Kill: The Case for Banning Lethal Autonomous Weapon Systems*, HARV. POL. REV. (Dec. 2, 2021), <https://harvardpolitics.com/robots-that-kill-the-case-for-banning-lethal-autonomous-weapon-systems/> [<https://perma.cc/5QMB-9TYQ>].

⁴⁰ Schmitt, *supra* note 2 (“Either the system designer or an operator would at least have to program the system to function pursuant to specified parameters.”); Marco Sassóli, *Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified*, 90 INT’L L. STUD. 308, 309 (2014) (“Despite the system’s autonomy, human beings will inevitably be involved . . . at least in producing and programming the weapon systems.”).

⁴¹ *See infra* Section IV.

⁴² *Id.*

⁴³ DoDD 3000.09, *supra* note 23.

system.⁴⁴ Thus, at stages prior to the autonomous weapon's use, humans will very much be designing the loop.⁴⁵

As noted above, regardless of where the human is with respect to the loop, compliance with LOAC in armed conflict is mandatory.⁴⁶ In the next section, this article will discuss current objections to LAWS.

B. Major Objections to LAWS

The ICRC is a leading advocate on international humanitarian law issues.⁴⁷ They focus on two main prohibitions which they recommend placing in an international agreement regarding LAWS: (1) LAWS must allow for human users to “understand, predict and explain how the AWS will function,” specifically when it “will trigger the system to apply force,” and (2) LAWS should be prohibited from being “designed or used in such a manner to be triggered by the presence, proximity or contact of one or more persons.”⁴⁸ The ICRC also calls for restricting the types of targets

⁴⁴ RONALD C. ARKIN, GOVERNING LETHAL BEHAVIOR IN AUTONOMOUS ROBOTS 150 (2009) (such tasking allows an autonomous weapon system to act commiserate with a commander's intent). The DoW has been working on a networked approach to command and control called Joint All-Domain Command and Control (JADC2). Joseph M. McGiffin, *Mission (Command) Complete: Implications of JADC2*, JOINT FORCE Q. 113, 2nd Quarter 2024 at 86, 87; see also JOHN R. HOEHN, CONG. RES. SERV., IF11493, JOINT ALL-DOMAIN COMMAND AND CONTROL (JADC2) 1 (2022). “DoD envisions a ‘system of systems’ network” which integrates “joint force C4ISR [Command, Control, Communications, Computers, Intelligence, Surveillance, and Reconnaissance] . . . to create a connected battlespace.” *Id.*, at 88.

⁴⁵ Schmitt, *supra* note 2; Sassóli, *supra* note 40.

⁴⁶ See *What is IHL*, *supra* note 16; LAW OF WAR MANUAL, *supra* note 16.

⁴⁷ See *International Committee of the Red Cross*, INT'L COMM. OF THE RED CROSS, <https://www.icrc.org/en> [<https://perma.cc/8HGM-XFJ2>] (last visited Sep. 16, 2025).

⁴⁸ ICRC SUBMISSION ON AWS, *supra* note 19, at 5-6. Because this article does not deal with person-based targeting, it does not rule out that it may one day be possible for LAWS to target persons in an armed conflict. The ICRC has argued in the past that it is unethical to use an autonomous system to target persons: “most agree that an algorithm—a machine process—should not determine who lives or dies.” ICRC POSITION ON AWS, *supra* note 23 at 8. However, that position is not grounded in international humanitarian law which considers who is and is not a valid military target, a status essentially, chosen by the actor who is himself a target: someone who chooses to be a Soldier or who directly participates in hostilities chooses to be targetable. See LAW OF WAR MANUAL, *supra* note 16, at § 5.5.1 & § 5.8. Thus, the algorithm does not create a person's status, it assesses it. “To target a person is, however, definitely not to render justice or more precisely, it is not a

(“to only those which are military objectives by nature”), limiting locations and times of operation, and “the number of engagements that the AWS can undertake,” among others.⁴⁹ They have been active in the CCW’s talks on LAWS and have presented these proposed restrictions to that forum.⁵⁰

The ICRC has previously stated that using LAWS “actually weaken[s] precision and accuracy” in targeting.⁵¹ They rely on the fact that the armed force using LAWS would not necessarily know which targets it will select and destroy.⁵² However, others argue the exact counterpoint: that using LAWS will increase precision on the battlefield.⁵³ The United States has already faced multiple issues of errant strikes with humans in-the-loop.⁵⁴

determination that the person deserves the death penalty, but involves exclusively a categorization of the person (as a combatant) or their conduct (direct participation in hostilities) without any determination of fault or culpability.” Sassóli, *supra* note 40, at 332-33. Military necessity, the “justifi[cation] [for] the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war,” determines whether a particular person’s targeting is of benefit to the military mission. LAW OF WAR MANUAL, *supra* note 16, § 2.2. So, once a person chooses their status, it is inherent on the LAWS to be able to assess that status and then move through the rest of the LOAC principles to determine if a strike would be lawful.

⁴⁹ ICRC SUBMISSION ON AWS, *supra* note 19, at 6.

⁵⁰ ICRC POSITION ON AWS, *supra* note 23.

⁵¹ *Id.*

⁵² *See id.*

⁵³ *See* The United States of America, Humanitarian Benefits of Emerging Technologies in the Area of Lethal Autonomous Weapon Systems, Group of Governmental Experts of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, U.N. Doc. CCW/GGE.1/2018/WP.4, ¶ 5 (Apr. 9-13, 2018) [hereinafter CCW, U.S. Comments on Humanitarian Benefits of LAWS, 2018] (“This is especially the case because ‘smart’ weapons that use computers and autonomous functions to deploy force more precisely and efficiently have been shown to reduce risks of harm to civilians and civilian objects.”); Kenneth Anderson, *Why the Hurry to Regulate Autonomous Weapon Systems-but not Cyber-Weapons?*, 30 TEMP. INT’L & COMP. L.J. 17, 30-31 (2016) (“But it is also true that advances in the precision of weapons that might translate into increased discrimination on the battlefield is almost certainly only available through advances in robotics, automation, and machine programming.”).

⁵⁴ *See* Paul Szoldra, *US Strike that Killed 10 Civilians in Kabul Relied on Intel Search for Ubiquitous ‘White Toyota Corolla’*, TASK & PURPOSE (Sept. 17, 2021, 8:44 PM), <https://taskandpurpose.com/news/afghanistan-toyota-corolla-kabul-strike/> [https://perma.cc/BN7X-QZEQ] (humans, relying on “‘60 pieces of intelligence’” and 8 hours of overhead surveillance, struck a car suspected of being “an imminent threat to U.S.

A desire to improve accuracy, leading to a reduction of harm to civilians who are affected by armed conflict, will drive states to invest heavily in the creation of such technology.⁵⁵ Currently, the United States is relying on human-centric processes to reduce civilian harms,⁵⁶ whereas human-led design of autonomous weapons will allow for appropriate control of LAWS while adding computer-enabled accuracy to warfare.⁵⁷

Human Rights Watch (HRW), a leading international human rights organization,⁵⁸ appeared to go further than the ICRC in 2012 by calling for a complete ban on “the development, production, and use of fully autonomous weapons,” among other restrictions.⁵⁹ This would prohibit not just those LAWS which are built to target humans, like the ICRC’s position,⁶⁰ but also LAWS which are designed and operated to conduct object-based targeting.⁶¹

forces” which actually resulted in the death of “as many as 10 civilians”); Peter Margulies, *CENTCOM Report on the Kunduz Hospital Attack: Accounting for a Tragedy of Errors*, LAWFARE (May 2, 2016, 3:48 PM), <https://www.lawfareblog.com/centcom-report-kunduz-hospital-attack-accounting-tragedy-errors> [<https://perma.cc/MW85-V8EB>] (when trying to provide air support to ground forces, an AC-130U crew mistakenly fired on a civilian hospital in Kunduz, Afghanistan; the error occurred due to miscommunication between personnel on the ground and in the aircraft).

⁵⁵ Anderson, *supra* note 53, at 34 (for instance, investment has already occurred in multiple defensive autonomous weapon systems, such as the Iron Dome over Israel, which demand precision and accuracy to be effective).

⁵⁶ See generally, U.S. DEP’T OF DEF., CIVILIAN HARM MITIGATION AND RESPONSE ACTION PLAN (CHMR-AP) (Aug. 25, 2022) (establishing committees and personnel positions aimed at mitigating civilian harm).

⁵⁷ See Schmitt, *supra* note 2; Sassóli, *supra* note 40.

⁵⁸ Human Rights Watch, MACARTHUR FOUNDATION (last visited Sep. 10, 2025), <https://www.macfound.org/grantee/human-rights-watch-2172/> [<https://perma.cc/2NYB-F8AH>].

⁵⁹ Compare ICRC SUBMISSION ON AWS, *supra* note 19 (“While these obligations do not necessarily demand direct human control over the weapon system itself at all stages of its deployment and use and therefore do not prohibit all AWS in all circumstances”), with *Losing Humanity*, *supra* note 17 (these restrictions include “laws and policies to prohibit the development, production, and use of fully autonomous weapons”).

⁶⁰ This article does not deal with person-based targeting. Such targeting involves different complications than object-based targeting and its issues have been highlighted by many scholars, including those who appear to lean in favor of utilizing LAWS. See Austin Wyatt & Jai Galliot, *Proposing a Regional Normative Framework for Limiting the Potential for Unintentional or Escalatory Engagements with Increasingly Autonomous Weapon Systems*, in *LETHAL AUTONOMOUS WEAPONS* 259, 264 (Jai Galliot, Duncan MacIntosh & Jens David Ohlin, eds., 2021).

⁶¹ See *Losing Humanity*, *supra* note 17.

HRW's more recent paper, *A Hazard to Human Rights*, appears to be more in line with ICRC's position, calling for a prohibition against "weapons systems that inherently operate without meaningful human control or that target people."⁶² Since they base their discussion on "human rights," the paper does not directly discuss object-based targeting, which this article advocates.⁶³

Additionally, HRW has declared that once a state has autonomous weapons, it will be required to employ those weapons to comply with the LOAC principle of necessity, as they will be superior to any other weapon.⁶⁴ This is a misapplication of the law and a poor representation of the principle of necessity, which does not require an armed force to utilize a particular weapon in its arsenal.⁶⁵ Instead, it allows for "destroying . . . property"⁶⁶ by "us[ing] all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war."⁶⁷ Thus, it does not *require* the use of a particular weapon; it *allows* for the use of a weapon that has not already been prohibited by the law of war.⁶⁸

The ICRC's position that LAWS will lead to imprecision in targeting is simply unsupported.⁶⁹ The call for regulation by the ICRC and HRW is unnecessary because there is a requirement for all weapons to abide by

⁶² Human Rights Watch & International Human Rights Clinic, *A Hazard to Human Rights: Autonomous Weapons Systems and Digital Decision-Making* 1 (Apr. 2025), https://www.hrw.org/sites/default/files/media_2025/04/arms0425%20web.pdf [<https://perma.cc/34AZ-PARP>] [hereinafter *A Hazard to Human Rights*].

⁶³ See generally *A Hazard to Human Rights*, *supra* note 62.

⁶⁴ *Losing Humanity*, *supra* note 17 (Again quoting Armin Krishnan, "'Once [autonomous weapons] are widely introduced, it becomes a matter of military necessity to use them, as they could prove far superior to any other type of weapon.' He argues such a situation could lead to armed conflict dominated by machines, which he believes could have 'disastrous consequences.'").

⁶⁵ Compare LAW OF WAR MANUAL, *supra* note 16, at § 2.2; with *id.* at § 14.9.2.

⁶⁶ *Id.* at § 2.2.1.

⁶⁷ *Id.* at § 2.2. The *Law of War Manual* specifically addresses this issue in the chapter on *Air and Space Warfare*. *Id.* at Ch. XIV. There it states, "there is no law of war requirement to use precision-guided weapons when non-precision-guided weapons may be used in compliance with the law of war." *Id.* at § 14.9.2 (internal citations omitted).

⁶⁸ *Id.* at § 2.2. "The selection of weapons may be among the available precautions that a commander could take in order to reduce the risk of harm to the civilian population." *Id.* at § 14.9.2.

⁶⁹ Compare ICRC POSITION ON AWS, *supra* note 23, with CCW, U.S. Comments on Humanitarian Benefits of LAWS, 2018, *supra* 53, at ¶ 5.

IHL.⁷⁰ The United States has not adopted these viewpoints, and both the ICRC and HRW fail to make legal arguments that should halt the United States' development of LAWS.⁷¹ Object-based targeting, as this article addresses, is possible within the bounds of the LOAC. Signing a legally binding agreement that would restrict the development of LAWS would put the United States at a disadvantage in its strategic competition with China.

C. The Strategic Imperative to Create LAWS

According to at least one China scholar, China's rise and its goal of challenging the United States has been going on for many years, but the United States, at least since President Richard Nixon's administration, has been blind to the potential challenge.⁷² However, "by 2014, U.S. government officials were telling Congress there was just such a new pattern of assertiveness" by China.⁷³

President Donald Trump has "committed to ensuring that the United States military possesses the most lethal warfighting capabilities in the world."⁷⁴ This is in response to "adversaries like China . . . rapidly advancing their own military technologies," with the president calling for "cutting-edge capabilities [for] our Armed Forces."⁷⁵

⁷⁰ See *What is IHL*, *supra* note 16; LAW OF WAR MANUAL, *supra* note 16, at § 3.2.

⁷¹ See Bureau of Arms Control, Deterrence, and Stability, *Political Declaration on Responsible Military Use of Artificial Intelligence and Autonomy*, U.S. DEPARTMENT OF STATE (Feb. 16, 2023), <https://www.state.gov/political-declaration-on-responsible-military-use-of-artificial-intelligence-and-autonomy/> [<https://perma.cc/8KA5-9FT2>].

⁷² See generally MICHAEL PILLSBURY, *THE HUNDRED YEAR MARATHON* (2015).

⁷³ *Id.* at 209; see also U.S. DEP'T OF DEF., *QUADRENNIAL DEFENSE REVIEW 2014*, at 6 ("In the coming years, countries such as China will continue seeking to counter U.S. strengths using anti-access and area-denial (A2/AD) approaches and by employing other new cyber and space control technologies.").

⁷⁴ Exec. Order No. 14265, 90 Fed. Reg. 15621 (Apr. 9, 2025).

⁷⁵ *Fact Sheet, President Donald J. Trump Modernizes Defense Acquisitions and Spurs Innovation in the Defense Industrial Base*, WHITE HOUSE (Apr. 9, 2025), <https://www.whitehouse.gov/fact-sheets/2025/04/fact-sheet-president-donald-j-trump-modernizes-defense-acquisitions-and-spurs-innovation-in-the-defense-industrial-base/> [<https://perma.cc/48NW-N9TB>]. Former-President Joseph Biden's National Security Strategy was similarly focused on China as a challenge to domestic security and international stability. WHITE HOUSE, *NATIONAL SECURITY STRATEGY* (Oct. 2022).

Secretary of War Pete Hegseth has focused his Department on “deter[ing] aggression in the Indo-Pacific by Communist China,”⁷⁶ referring to ““our pacing threat in the Indo-Pacific.””⁷⁷ While directing his Department to draft a National Defense Strategy,⁷⁸ Secretary Hegseth has spoken about the President’s budget request to Congress, comparing the Department’s request for funds to rebuild the Department’s advantage against a China that has “carried out an unprecedented military buildup.”⁷⁹ To rebuild and face the “threats . . . in the Indo-Pacific,”⁸⁰ the President is seeking funding for “rapidly fielding emerging technology and new weapons to warfighters,”⁸¹ including “autonomous weapons [and] long range drones.”⁸²

The DoW has previously worked to ensure that the United States is prepared for the next fight, so our adversaries understand that the benefits of aggression are outweighed by the potential detriments of aggression (*i.e.*, the juice isn’t worth the squeeze).⁸³ This is similar to current DoW efforts to achieve “Peace Through Strength.”⁸⁴

China has been developing autonomous weapons of its own.⁸⁵ They are “the world’s largest exporter of military drones,” and are working on

⁷⁶ Memorandum from Sec’y of Def. to All Dep’t of Def. Personnel, subject: Message to the Force (Jan. 27, 2025) (on file with the author).

⁷⁷ C. Todd Lopez, *Hegseth says Shipbuilding, Golden Dome, Nuclear Deterrence Make up DoD Budget Request for Billions in Funding*, DoD NEWS (Jun. 12, 2025) (quoting Secretary Hegseth’s statement to Congress), <https://www.defense.gov/News/News-Stories/Article/Article/4213571/hegseth-says-shipbuilding-golden-dome-nuclear-deterrence-make-up-dod-budget-req/> [https://perma.cc/44GK-S59G].

⁷⁸ *Statement on the Development of the 2025 National Defense Strategy*, U.S. DEP’T OF DEF. (May 2, 2025), <https://www.defense.gov/News/Releases/Release/Article/4172735/statement-on-the-development-of-the-2025-national-defense-strategy/> [https://perma.cc/7SWC-8T77].

⁷⁹ DEP’T OF DEF., *Defense Secretary Pete Hegseth Provides Testimony Before the Senate Appropriations Committee*, at 40:15-40:20 (YouTube, June 11, 2025), <https://www.youtube.com/watch?v=XqTb4VyeKD8> [https://perma.cc/926S-EHU] [hereinafter *SECDEF Senate Testimony*].

⁸⁰ *Id.* at 1:03:34-1:05:57.

⁸¹ Lopez, *supra* note 77.

⁸² *SECDEF Senate Testimony*, *supra* note 79, at 41:12-41:23.

⁸³ U.S. DEP’T OF DEF., 2022 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA at 1 [hereinafter *NATIONAL DEFENSE STRATEGY*].

⁸⁴ *Statement on the Development of the 2025 National Defense Strategy*, *supra* note 78.

⁸⁵ U.S. DEP’T OF DEF., MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE’S REPUBLIC OF CHINA 2024 at 26.

a system “where an autonomous aircraft flies in a team alongside a crewed aircraft.”⁸⁶ Although China has been the Pentagon’s focus,⁸⁷ past wargames playing out a Chinese invasion of Taiwan are unclear on whether the United States could repel such an invasion, and do not indicate that a victory for the United States would be quick.⁸⁸ These exercises highlight the need for the United States to develop technologically advanced weapons, including LAWS, to level the battlefield.⁸⁹

In a fight with China, it is reasonable to conclude that communications will be degraded, and UAV pilots will not be able to pilot their drones from far away.⁹⁰ Autonomous drones can work alongside a traditional

⁸⁶ Jacob Stokes, *Military Artificial Intelligence, the People’s Liberation Army, and U.S.-China Strategic Competition*, CENTER FOR A NEW AMERICAN SECURITY 4 (Feb. 1, 2024), <https://www.cnas.org/publications/congressional-testimony/military-artificial-intelligence-the-peoples-liberation-army-and-u-s-china-strategic-competition> [<https://perma.cc/9Y5X-U59V>].

⁸⁷ See NATIONAL DEFENSE STRATEGY, *supra* note 83.

⁸⁸ See generally Helen Davidson, *Malfunctions, Overreactions and a Steep Learning Curve: Wargaming a Chinese Attack on Taiwan*, THE GUARDIAN (June 17, 2025, at 21:08 ET), <https://www.theguardian.com/world/2025/jun/18/taiwan-war-games-china-attack> [<https://perma.cc/XB7B-53QT>]; Ritu, Sharma, *China Scores 8 Victories Against US, Japanese Troops; US-Held Wargames Give Decisive Edge to Beijing*, THE EURASIAN TIMES (Mar. 4, 2024), <https://www.eurasiantimes.com/12-us-china-wargames-over-taiwan-give-decisive-edge/> [<https://perma.cc/7URE-8X9M>]; MARK F. CANCLAN, MATTHEW CANCLAN & ERIC HEGINBOTHAM, THE FIRST BATTLE OF THE NEXT WAR: WARGAMING A CHINESE INVASION OF TAIWAN, (2023); STACIE PETTYJOHN, BECCA WASSER & CHRIS DOUGHERTY, DANGEROUS STRAITS: WARGAMING A FUTURE CONFLICT OVER TAIWAN (2022).

⁸⁹ One exercise, held in 2018, relied on the Next Generation Air Dominance (NGAD) fighter. Valerie Insinna, *A US Air Force War Game Shows What the Service Needs to Hold Off—Or Win Against—China in 2030*, DEFENSE NEWS (Apr. 12, 2021), <https://www.defensenews.com/training-sim/2021/04/12/a-us-air-force-war-game-shows-what-the-service-needs-to-hold-off-or-win-against-china-in-2030/> [<https://perma.cc/Y6FN-5M8M>]. The NGAD is still in development, with a U.S. Air Force contract for development going to Boeing in 2025, with hopes of developing the aircraft “in the next decade.” Thomas Newdick, *Boeing Wins F-47 Next Generation Air Dominance Fighter Contract (Updated)*, TWZ (Mar. 22, 2025), <https://www.twz.com/air/boeing-wins-air-forces-next-generation-air-dominance-fighter-contract> [<https://perma.cc/R58V-VCBK>]. The NGAD is expected to be the centerpiece of a system of aircraft with “high degrees of autonomy.” *Id.*

⁹⁰ See Paul Scharre, *Centaur Warfighting: The False Choice of Humans vs. Automation*, 30 TEMP. INT’L & COMP. L.J. 151, 163 (2016) (“The current ‘remotely piloted’ model where high-definition full motion video is streamed from uninhabited systems forward in the battlespace back to remote human controllers is both impossible in contested environments and unnecessary.”).

aircraft, like the Next Generation Air Dominance (NGAD) fighter, which still has a human at the controls.⁹¹

To ensure the United States is ready for a future fight, as stated by the most recent National Defense Strategy, the DoW must engage “militarily-relevant capabilities in trusted artificial intelligence and autonomy . . . and speed their delivery to the warfighter.”⁹² The DoW’s own research arm (and those of its Services) should be developing these technologies on their own, or partnered with industry, to ensure they are fielded before or on par with China, which has called for a ban on using fully autonomous weapon systems, but not on developing them.⁹³

III. Applying the Law of Armed Conflict to LAWS via Object-Based Targeting

As mentioned above, all armed forces must comply with the LOAC when in armed conflict.⁹⁴ Article 36 of Additional Protocol I (AP I) to the 1949 Geneva Conventions requires that, prior to fielding a new weapon, states must ensure those weapons will not “be prohibited by [AP I] or by any other rule of international law.”⁹⁵ The United States, which is not a

⁹¹ See Newdick, *supra* note 89.

⁹² NATIONAL DEFENSE STRATEGY, *supra* note 83, at 19.

⁹³ Brian Stauffer, *Stopping Killer Robots: Country Positions on Banning Fully Autonomous Weapons and Retaining Human Control*, HUMAN RIGHTS WATCH (Aug. 10, 2020), <https://www.hrw.org/report/2020/08/10/stopping-killer-robots/country-positions-banning-fully-autonomous-weapons-and/> [https://perma.cc/BD4Q-6G3Z]. China has called for developing “ethical norms” for technology development in this area. CHINA, WORKING PAPER OF THE PEOPLE’S REPUBLIC OF CHINA ON LETHAL AUTONOMOUS WEAPONS SYSTEMS 4 (Jul. 2022), available at <https://documents.unoda.org/wp-content/uploads/2022/07/Working-Paper-of-the-Peoples-Republic-of-China-on-Lethal-Autonomous-Weapons-Systems-%EF%BC%88English%EF%BC%89.pdf> [https://perma.cc/77Q9-G4MR] (implying that China does not intend to stop its own development of AI technology, to include lethal autonomous weapons).

⁹⁴ See *What is IHL*, *supra* note 16; LAW OF WAR MANUAL, *supra* note 16.

⁹⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) art. 36, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]. (“In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.”).

party to AP I, reviews its new weapons in accordance with its own internal regulation,⁹⁶ which was established prior to the adoption of AP I.⁹⁷ This ensures a weapon, by its nature, will not violate the LOAC.⁹⁸ Once a weapon is fielded, it is incumbent on the user (and the commander directing the weapon's use) to ensure compliance with the LOAC by

⁹⁶ U.S. DEP'T OF DEF., DIR. 2311.01, DOD LAW OF WAR PROGRAM para. 1.2(d) (July 2, 2020) [hereinafter DoDD 2311.01] ("It is DoD policy that: . . . The intended acquisition, procurement, or modification of weapons or weapon systems is reviewed for consistency with the law of war.").

⁹⁷ W. Hays Parks, *Means and Methods of Warfare*, 38 GEO. WASH. INT'L L. REV. 511, 516 (2006) ("Although the United States is not a State Party to Additional Protocol I, its weapons review program preceded by three years the requirement, adopted in Article 36.") (some scholars have stated that Article 36 is recognized as customary international law by the United States); Wing Commander Duncan Blake & Lieutenant Colonel Joseph S. Imburgia, *"Bloodless Weapons"? The Need to Conduct Legal Reviews of Certain Capabilities and the Implications of Defining Them as "Weapons"*, 66 A.F. L. REV. 157, 157 (2010); Major Graham H. Todd, *Armed Attack in Cyberspace: Deterring Asymmetric Warfare with an Asymmetric Definition*, 64 A.F. L. REV. 65, 80 (2009); LAW OF WAR MANUAL, *supra* note 16, at § 6.2.3 (The DoW's Law of War Manual, the "(DoD)-wide resource for DoD personnel . . . on the law of war," only states that the "DoD policy and practice of conducting legal reviews of weapons preceded this AP I provision."); in a memorandum directed to the Secretary of Defense, the Joint Chiefs of Staff reviewed AP I in 1985 and provided comments on each article. Memorandum from Joint Chiefs of Staff to Sec'y of Def., subject: Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949 (3 May 1985) [hereinafter JCS Review of AP I Memo]. Regarding Article 36, the memo simply states, "The United States already conducts such reviews, and this article would cause no problems for this country." *Id.* at app. 26. In other areas, however, the memo describes whether the law or requirement already exists elsewhere; for instance, for Article 37, the memo states, "The clarification of existing law in Article 37 is both accurate and helpful from a military standpoint." *Id.* at app. 27. Thus, it could be concluded that if Article 36 were customary international law by 1985, the memo would have said as such. Finally, even W. Hays Parks, a well-regarded U.S. attorney on law of war issues, in an 88-page analysis of weapons reviews never concluded that Article 36 was customary international law. *See* W. Hays Parks, *Conventional Weapons and Weapons Reviews*, 8 YEARBOOK OF INT'L HUMAN L. 55 (2005). Instead, his article provides an analysis of the obligations to be considered in a weapons review, stemming all the way back to "Article 1 of Hague Convention II with Respect to the Laws and Customs of War on Land of 29 July 1899." *Id.* So, it is this author's opinion that Article 36 has not yet become customary international law.

⁹⁸ Parks, *Means and Methods of Warfare*, *supra* note 97, at 517 n.25 (While the weapon may not, by its nature, violate the LOAC, this tenet does not mean that a combatant could not use the weapon in a way that violates the LOAC. As Parks describes, "In determining legality, a State is not required to foresee or anticipate all possible uses or misuses of a weapon, for almost any weapon can be misused in ways that might be prohibited. A soldier armed with a handgun may murder an innocent civilian or a prisoner of war in his or her custody.").

applying the principles of necessity, humanity, proportionality, distinction, and honor.⁹⁹

A. Legal Reviews of New Weapons

Before the United States employs a new weapon in armed conflict, the weapon must first pass a legal review.¹⁰⁰ The DoW requires that “[t]he intended acquisition, procurement, or modification of weapons or weapon systems is reviewed for consistency with the law of war.”¹⁰¹ Each of the military services has implemented this requirement via regulations that require the submission of new weapon acquisitions (or acquisitions of modifications to weapons) to legal review.¹⁰² The services require the same review for weapons being developed within the service.¹⁰³

Weapons reviews should cover three main issues: whether the weapon or weapon system complies with international law (ensuring there is no specific prohibition on the weapon or weapon system), whether the weapon or weapon system employs “projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering,” and whether the weapon is “of a nature to be indiscriminate.”¹⁰⁴ Since there are currently no obligations under treaty or domestic law to refrain from using LAWS, the first question is not stalled due to the

⁹⁹ See *What is IHL*, *supra* note 16 (describing restrictions on the use of weapons and tactics); LAW OF WAR MANUAL, *supra* note 16.

¹⁰⁰ DoDD 2311.01, *supra* note 96.

¹⁰¹ *Id.* at 4.

¹⁰² See generally U.S. DEP’T OF ARMY, REGUL. 27-53, LEGAL REVIEW OF WEAPONS AND WEAPON SYSTEMS, para. 1 (23 Sept. 2019) [hereinafter AR 27-53]; U.S. DEP’T OF NAVY, SEC’T OF NAVY INSTR. 5000.2G, DEPARTMENT OF THE NAVY IMPLEMENTATION OF THE DEFENSE ACQUISITION SYSTEM AND THE ADAPTIVE ACQUISITION FRAMEWORK enclosure 18 (8 Apr. 2022) [hereinafter SECNAVINST 5000.2G]; U.S. DEP’T OF AIR FORCE, INSTR. 51-401, THE LAW OF WAR 9-10 (3 Aug. 2018) [hereinafter AFI 51-401].

¹⁰³ AR 27-53, *supra* note 102, para. 4.f.(1); SECNAVINST 5000.02G, *supra* note 102, enclosure 18, para. 2.a.; AFI 51-401, *supra* note 102, para. 2.1.2.1.

¹⁰⁴ William H. Boothby, *Regulating New Weapon Technologies*, in NEW TECHNOLOGIES AND THE LAW OF WAR AND PEACE 16, 18-22 (William H. Boothby, ed., 2019.; see also AFI 51-401, *supra* note 102, para. 7 (laying out the contents of a U.S. Air Force legal review of a weapon, which includes consideration of international and domestic law, whether the weapon “is calculated to cause unnecessary suffering or unnecessary injury,” and “whether the weapon . . . is capable of being directed against a specific military objective”).

autonomous nature of the weapon.¹⁰⁵ This remains true as long as LAWS are not incorporated into to a weapon which is already banned by treaty, such as chemical weapons.¹⁰⁶ Provided that a previously banned weapon is not coupled with autonomy, the review can move on to the next question.

The second issue is the requirement that states not use weapons that will “cause superfluous injury or unnecessary suffering.”¹⁰⁷ While states have not agreed to a particular definition of unnecessary suffering, the United States looks at whether “the injury caused is considered . . . disproportionate to the military necessity for it, that is, the military advantage to be gained from its use.”¹⁰⁸ However, as an autonomous weapon system is not likely to be a new weapon itself, but rather the application of autonomy and artificial intelligence to a preexisting weapons system, the weapon should continue to not inflict “superfluous injury or unnecessary suffering” (that is, it is likely that a weapon which is already approved for use in armed conflict will be added to LAWS or have autonomy applied to the weapon).¹⁰⁹ So, where an autonomous system “can select and engage targets without further intervention by an operator,”¹¹⁰ the restriction on unnecessary suffering is not violated due to the autonomy.¹¹¹

The third issue is whether the weapon is indiscriminate.¹¹² Distinction, one of the LOAC principles, requires that belligerents “distinguish

¹⁰⁵ See Bonnie Docherty & Mary Wareham, *Latin America and Caribbean Nations Rally Against Autonomous Weapons Systems*, JUST SEC. (Mar. 6, 2023), <https://www.justsecurity.org/85369/latin-america-and-caribbean-nations-rally-against-autonomous-weapons-systems/> [https://perma.cc/QGZ8-76CX] (discussing a 2023 meeting of Latin American and Caribbean States which ended with a “push to prohibit and regulate autonomous weapons systems” adopted by “over 30 States”).

¹⁰⁶ See generally Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction art I, *opened for signature* Jan. 13, 1992, 97 T.I.A.S. 525, 1975 U.N.T.S. 45 (setting forth the obligations of state parties to refrain from chemical weapon development and use in wartime).

¹⁰⁷ Boothby, *supra* note 104, at 19.

¹⁰⁸ Parks, *Means and Methods of Warfare*, *supra* note 97, at 517 n.25.

¹⁰⁹ See Schmitt, *supra* note 2; see also Anderson & Waxman, *supra* note 32, at 5-8, 10.

¹¹⁰ DoDD 3000.09, *supra* note 23.

¹¹¹ The requirement to refrain from causing superfluous injury or unnecessary suffering cannot be applied to objects. See Boothby, *supra* note 104, at 20. When a weapon designed to attack object may cause second- and third-order effects which may cause superfluous injury or unnecessary suffering to persons, those issues are analyzed under the LOAC principle of humanity; see *infra* Section III.B.2.

¹¹² Boothby, *supra* note 104, at 20.

principally between the armed forces and the civilian population, and between unprotected and protected objects.”¹¹³ Essentially, civilians are not to be made the “object of [an] attack,”¹¹⁴ only the armed forces and objects that qualify as military objects based on their “nature, location, purpose, or use.”¹¹⁵ Thus, an autonomous weapon that cannot distinguish between valid military objectives (or targets) would fail on this issue, and it would not be permissible to field the weapon.¹¹⁶ But if it can, the weapon would pass the legal review.¹¹⁷

During development and before fielding, DoW policy will require a legal review of LAWS.¹¹⁸ So long as the weapon used is not already banned by treaty, it does not cause superfluous injury, and is able to comply with distinction, the LAWS will pass the legal review in the United States. Once fielded, it is incumbent on the commander employing that LAWS to ensure that the system continues to comply with the LOAC.¹¹⁹

B. The Principles of the Law of Armed Conflict

When a new weapon passes the legal review requirement, its use in armed conflict is still governed by the LOAC.¹²⁰ The principles of necessity, humanity, proportionality, distinction, and honor “provide the

¹¹³ LAW OF WAR MANUAL, *supra* note 16, at § 2.5; see Boothby, *supra* note 104, at 20 (“The latter principle requires parties to the conflict at all times to . . . direct their military operations against combatants and military objectives.”).

¹¹⁴ LAW OF WAR MANUAL, *supra* note 16, at § 2.5.2.

¹¹⁵ *Id.* at § 5.6.3 (citation omitted).

¹¹⁶ Boothby, *supra* note 104, at 21 (failure could occur “either because they cannot be directed at a specific military objective or because their effects cannot be limited, essentially do not distinguish as required by the principle of distinction”).

¹¹⁷ The issue of LAWS distinguishing between valid military objectives is discussed *infra* III.B.4.

¹¹⁸ DoDD 3000.09, *supra* note 23.

¹¹⁹ See Schmitt, *supra* note 2, at 33-34 (arguing that concerns regarding lack of accountability for commanders employing fully autonomous weapons are assuaged by U.S. military policy); Boothby, *supra* note 104, at 21 (“The indiscriminate weapons principle [in the weapon review] is concerned with the inherent nature or characteristics of the weapon and not with its use on a particular occasion.”); LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 309-10 (3d ed. 2008).

¹²⁰ See *What is IHL*, *supra* note 16 (detailing how restrictions on weapons and tactics are continuous under international humanitarian law); LAW OF WAR MANUAL, *supra* note 16, at § 3.2 (listing situations to which the law of war applies).

foundation for the specific law of war rules.”¹²¹ These principles assist in analyzing whether an engagement complies with the LOAC.¹²² Each principle will be discussed below alongside a discussion of how an object-based targeting LAWS could comply, within certain parameters, with those principles, starting with necessity.¹²³

1. Necessity

Necessity, sometimes referred to as “military necessity,” is “the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war.”¹²⁴ This does not mean that any action whatsoever which might lead to a military advantage for one side is permissible in armed conflict.¹²⁵ For instance, in *The Hostage Case* from the post-World War II tribunals, it was noted that “[d]estruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces.”¹²⁶ States in armed conflict are obligated to “consider[] military factors” when deciding what to target.¹²⁷ Another way to look at necessity is that the targeting of the object must “offer[] a definite military advantage.”¹²⁸ So,

¹²¹ LAW OF WAR MANUAL, *supra* note 16, at § 2.1.2.

¹²² *Id.* (“Legal principles, however, are not as specific as rules, and thus interpretations of how principles apply to a given situation may vary.”).

¹²³ Importantly for the argument in favor of LAWS, a given weapon system does not have to be able to operate ethically in all environments, against all enemies, so long as it is not programmed or designed to violate the LOAC at the outset. *See* Anderson & Waxman, *supra* note 32, at 6. “It is a mistake, when imagining legal or ethical issues of autonomous weapons, to start with the most difficult operational environment, for which a lawful fully autonomous weapon would be the hardest (if even possible) to design.” *Id.*, at 6. Rather, LAWS analysis should start where designers are capable of programming compliance and commanders can ensure they abide by the LOAC and work towards more difficult operating environments in the future. *Id.*, at 7.

¹²⁴ LAW OF WAR MANUAL, *supra* note 16, at § 2.2.

¹²⁵ *See* Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT’L L. 795, 796-98 (2010).

¹²⁶ *Id.* at 797 (quoting *United States v. List (The Hostage Case)*, Case No. 7 (Feb. 19, 1948), *reprinted in* 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1230 (1950)).

¹²⁷ *Id.* at 799.

¹²⁸ *Id.* at 803 (quoting AP I, *supra* note 95, art. 51(3)).

LAWS must be able to find a target and then assess whether its destruction provides an advantage to its side.¹²⁹

In object-based targeting, there already exist limitations on the LAWS' autonomy based on its programming.¹³⁰ The weapon system is not permitted to go anywhere and destroy anything; it still must operate within the confines of what its programming allows. So, a commander could decide that a specific area includes targets which, if destroyed, would help to "defeat the enemy as quickly and efficiently as possible."¹³¹ Then, they could authorize the LAWS to operate within a geographic footprint that is specific to that area (say, an enemy military base). Additionally, such LAWS could be designed to only target and destroy objects that, by their nature, are military objects.¹³² Thus, the commander would have evaluated the military necessity for destroying targets within a certain geographic area, satisfying this principle.

2. *Humanity*

Humanity can be considered "the logical inverse of the principle of military necessity."¹³³ It "seeks to limit the suffering and destruction incident to warfare," countering necessity's implication that suffering and destruction are part of warfare.¹³⁴ Not only the suffering of civilians, but also the suffering of the armed forces of a state.¹³⁵

For instance, it may be within the bounds of military necessity to shoot an enemy combatant on sight to prevent him from shooting at an

¹²⁹ See Benjamin Kastan, *Autonomous Weapons Systems: A Coming Legal "Singularity"?*, 45 J. L., TECH. & POL'Y 45, 58 (2013) ("The destruction of enemy forces and materiel generally would meet this test; therefore, the question of whether an AWS could meet the requirements of military necessity becomes a question of whether it can meet the requirements of discrimination.").

¹³⁰ See Schmitt, *supra* note 2; Sassóli, *supra* note 40, at 309.

¹³¹ LAW OF WAR MANUAL, *supra* note 16, at § 2.2.

¹³² See *id.* at § 5.6 ("Certain classes of persons and objects are categorically recognized as military objectives.").

¹³³ *Id.* at § 2.3.1.1; see Schmitt, *supra* note 125, at 798 ("Rather, IHL represents a carefully thought out balance between the principles of military necessity and humanity.").

¹³⁴ Schmitt, *supra* note 125, at 796 ("In this central role, military necessity exists in equipoise with the principle of humanity.").

¹³⁵ *Id.* at 799. "The principle of humanity, which operates to protect the population (whether combatants or noncombatants) and its property, advances this imperative." *Id.*

infantry platoon making their way to an objective. Because he is identified as a member of the enemy armed force, he is a legitimate target in the initial shooting.¹³⁶ However, if he is not killed by the shot, but instead is injured and unable to continue the fight (making him *hors de combat*), he cannot then be shot again.¹³⁷ This is inherent in the principle of humanity.¹³⁸

Additionally, humanity prohibits purposely causing the unnecessary suffering of an enemy,¹³⁹ as well as the use of weapons that are indiscriminate.¹⁴⁰ As discussed above, both of these issues must first be addressed in the weapon review before fielding a new or altered weapon.¹⁴¹ However, a weapon could pass the review stage as not causing unnecessary suffering or being indiscriminate but still be used in violation of the LOAC, such as when a combatant purposefully uses a pistol against a civilian.¹⁴² Thus, the commander ordering an attack and the combatant using the weapon must still ensure compliance with the LOAC.¹⁴³ Finally, those weapons that are generally designed to attack objects and not persons are not likely to cause unnecessary suffering.¹⁴⁴

With this in mind, LAWS should not have an issue complying with the LOAC principle of humanity. As this article speaks to specifically, creating LAWS that only target military objects rather than persons will remove much of the concern of unnecessary suffering.¹⁴⁵ When a strike intends to destroy enemy tanks or parked aircraft, the weapon employed,

¹³⁶ LAW OF WAR MANUAL, *supra* note 16, at § 4.4 (stating “combatants . . . are liable to being made the object of attack by enemy combatants.”).

¹³⁷ *Id.* at § 5.9.4. “*Hors de combat* is a French phrase that means ‘out of the battle.’ It is generally used as a term of art to mean persons who may not be made the object of attack because they are out of the fighting and who therefore must be treated humanely.” *Id.* at § 5.9.1.

¹³⁸ *Id.* at § 2.3.1. While wrapped in the principle of humanity, attacking an enemy combatant who is placed *hors de combat* also fails the necessity test: it is no longer militarily necessary to continue to injure or to kill a combatant who is out of the fight. *Id.*

¹³⁹ *Id.* at § 2.3.

¹⁴⁰ *Id.* at § 2.3.2 (“Humanity animates certain law of war rules, including . . . prohibitions on weapons that are inherently indiscriminate.”).

¹⁴¹ See *supra* Section III.A.

¹⁴² See Parks, *Means and Methods of Warfare*, *supra* note 97, at 517 n.25 (“‘The fact that a pistol was used to perpetrate the crime does not transform an otherwise lawful weapon into an illegal weapon.’”).

¹⁴³ See Schmitt, *supra* note 2.

¹⁴⁴ See Boothby, *supra* note 104, at 20.

¹⁴⁵ See *id.*

whether a precision-guided munition or even an unguided bomb, is not “of a nature to cause superfluous injury or unnecessary suffering.”¹⁴⁶

3. Proportionality

Proportionality is about weighing the costs or harms to civilians against the gains to be had by the attacking military.¹⁴⁷ Militaries must “refrain from attacks in which the expected [civilian] harm incidental to such attacks would be excessive in relation to the concrete and direct military advantage anticipated to be gained.”¹⁴⁸ Said another way, “it is not permissible to do ‘any mischief which does not tend materially to the end [of victory], nor any mischief of which the conduciveness to the end is slight in comparison with the amount of the mischief.’”¹⁴⁹ Does the military advantage to be gained outweigh the loss of civilian life or infrastructure?

When considering proportionality, a commander or combatant determines that there is a military necessity to destroy¹⁵⁰ the object in question.¹⁵¹ However, proportionality restricts which weapon or what type of weapon the combatant can use against the target, based on its effect.¹⁵² Certainly, a nuclear weapon could destroy any target, and a bullet from a rifle would likely not harm any building; but the calculus must be made as to which weapon will have the right effect on the target with no greater effect on civilians or civilian objects (collateral damage) than the

¹⁴⁶ *Id.* at 19

¹⁴⁷ LAW OF WAR MANUAL, *supra* note 16, at § 2.4.

¹⁴⁸ *Id.* at § 2.4.1.2.

¹⁴⁹ MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 128-29 (5th ed. 2015) (quoting HENRY SIDGWICK, THE ELEMENTS OF POLITICS 254 (1891)).

¹⁵⁰ Or to capture the object. LAW OF WAR MANUAL, *supra* note 16, at §2.2.1.

¹⁵¹ See *supra* Section III.B.1.

¹⁵² Michael Press, *Of Robots and Rules: Autonomous Weapon Systems in the Law of Armed Conflict*, 48 GEO. J. INT’L L. 1337, 1350-51 (2017) (“For example, in an urban environment, certain indirect weapons, such as artillery, may be restricted because the damage that would result from destroying an enemy target in a populated area could also include the excessive death and destruction of civilians and civilian infrastructure.”).

destruction of the target is worth.¹⁵³ This determination must be made regardless of the delivery system, human or LAWS.¹⁵⁴

To avoid excessive civilian harm, militaries must take “feasible precautions” during their attack.¹⁵⁵ This can start with the type of weapon selected to conduct an attack,¹⁵⁶ which is referred to as “weapon engineering” and also includes using appropriate “aimpoints” and “fusing.”¹⁵⁷ The time of the attack can be adjusted to when there would be less danger to civilians.¹⁵⁸ Warnings could be put out in the vicinity of the attack in a variety of ways to inform civilians to stay away.¹⁵⁹ The attack could be planned in an area where civilians are unlikely to be present (such as in an active military area of operations),¹⁶⁰ or only categorically military objectives could be selected (instead of objects which began as civilian objects, but due to their use have become military objectives).¹⁶¹

LAWS could apply some or all of these feasible precautions in various ways that would ensure proportionality in the attack. First, as this article

¹⁵³ See *id.* “This idea is encapsulated in the U.S. justification for unleashing the atomic bomb over Hiroshima and Nagasaki in 1945.” *Id.* “[T]he considerable advantage the United States sought—notably the unconditional surrender of the Empire of Japan . . . justified, in its view of LOAC, the dropping of both bombs despite the considerable civilian casualties that resulted from the decimation of the cities.” *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ LAW OF WAR MANUAL, *supra* note 16, at § 5.11. Crucial to the analysis here is the word “feasible.” Not all precautions are feasible. *Id.* at § 5.2.3.2. “A wanton disregard for civilian casualties or harm to other protected persons and objects is clearly prohibited,” but that does not mean doing “everything possible.” *Id.* The circumstances ruling at the time of the attack must be taken into account, including “the effect . . . on mission accomplishment,” “risk to one’s own forces,” “likelihood and degree of humanitarian benefit,” “cost[s] of taking the precaution,” or “whether taking precaution forecloses alternative courses of action.” *Id.* Feasibility must be assessed before taking precautions and it could be determined that there are no precautions to take. *Id.*

¹⁵⁶ *Id.* at § 5.11.6. See Press, *supra* note 152, at 1350 (“For example, in an urban environment, certain indirect weapons, such as artillery, may be restricted . . . [y]et, in an unpopulated area where a reasonable individual would not think civilians live, an artillery barrage or airstrike would be allowed.”).

¹⁵⁷ JOINT CHIEFS OF STAFF, JOINT PUB. 3-30, JOINT AIR OPERATIONS, at III-21 (Apr. 28, 2025).

¹⁵⁸ LAW OF WAR MANUAL, *supra* note 16, at § 5.11.3.

¹⁵⁹ *Id.* at § 5.11.5.

¹⁶⁰ *Id.* at § 5.11.2.

¹⁶¹ *Id.* at § 5.11.7. By way of example in this situation, a farmhouse owned by a civilian is a civilian object. See *id.* at § 5.5.2. However, if the farmhouse is taken over by enemy combatants, such as for billeting, then the farmhouse is now a military objective. *Id.* at § 5.6.6.1.

argues most fervently, LAWS can be limited to only engaging military objects.¹⁶² Researchers from China published a paper describing the ability of a simulated UAV with a camera being able to identify simulated tanks on the ground with a mean average precision of 99.2 percent.¹⁶³ Though commanders may demand even higher accuracy from LAWS, this research shows that object recognition, specific to military objects, is possible.¹⁶⁴ Keep in mind, however, that the LOAC only requires a “good faith” determination that the object in question is a military object.¹⁶⁵

Second, the U.S. Armed Forces already have capabilities to broadcast advanced warning messages to civilians in the areas of attack.¹⁶⁶ The EC.

¹⁶² What exactly qualifies as a military object is discussed further along, *infra* Section III.B.4.

¹⁶³ Huanhua Liu et al., *A Military Object Detection Model of UAV Reconnaissance Image and Feature Visualization*, MDPI 15 (2022) (the simulation was created with scale tanks and scale camera speeds to replicate what a UAV would see from low altitudes). Drones used in Ukraine have been utilizing a form of automatic target recognition employed by ZIR System which “can identify various target types—including infantry, civilian automobiles, minivans, trucks, air defense systems, artillery, armored vehicles, and tanks.” Kateryna Bondar, *Ukraine’s Future Vision and Current Capabilities for Waging AI-Enabled Autonomous Warfare*, CTR. FOR STRATEGIC & INT’L STUD., 24 (Mar. 2025), https://csis-website-prod.s3.amazonaws.com/s3fs-public/2025-03/250306_Bondar_Autonomy_AI.pdf?VersionId=E2h8uqROea77udoc_og82HWsrfgfJRTZ [https://perma.cc/9ZLD-2EP3]. No information was presented about the accuracy of such target recognition systems. *Id.*

¹⁶⁴ *Id.* The current DoW AI Ethical Principles, upon which the DoW is building its strategy to acquire and employ AI across multiple domains, speaks only to the AI being “responsible.” U.S. DEP’T OF DEF. RESP AI WORKING COUNCIL, U.S. DEPARTMENT OF DEFENSE RESPONSIBLE ARTIFICIAL INTELLIGENCE STRATEGY AND IMPLEMENTATION PATHWAY at 5 (June 2022). Ultimately, a decision will have to be made as to what “responsible” means and how it is applied to LAWS.

¹⁶⁵ LAW OF WAR MANUAL, *supra* note 16, at § 2.5.2. Regardless of the baseline standard under the LOAC, states can decide to apply a higher standard via policy. For instance, under then-President Barack Obama, when conducting a strike against a terrorist outside “areas of active hostilities,” there must have been “near certainty that the individual being targeted is in fact the lawful target and located at the place where the action will occur.” *Presidential Policy Guidance on Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities*, 1 (May 22, 2013), https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/dl?inline. [https://perma.cc/R2YH-6CUE]

¹⁶⁶ See JOINT CHIEFS OF STAFF, JOINT PUB. 3-53, MILITARY INFORMATION SUPPORT OPERATIONS, at IV-12 (XXX); see also JOINT CHIEFS OF STAFF, JOINT PUB. 3-13.2, MILITARY INFORMATION SUPPORT OPERATIONS, at B-5 (Nov. 21, 2014) (this previous

130J Commando Solo aircraft “conducts airborne Information Operations via digital and analog radio and television broadcasts” and was upgraded in 2018 to be able to modify “broadcast formats” including “AM, FM, TV, [and] Cellular.”¹⁶⁷ The Israeli Defense Force has sent out text message alerts prior to attacks in Gaza.¹⁶⁸ In the ongoing Russia-Ukraine conflict, Russia has been able to send text messages to Ukrainian soldiers on the battlefield.¹⁶⁹ Finally, as of at least 2022, some of the United States’ adversaries were “us[ing] AI to craft messages.”¹⁷⁰ Thus, it is foreseeable that LAWS could carry with it the capabilities to craft and disseminate an advanced warning message prior to initiating an attack. Messages,

iteration of the Joint Publication on Military Information Support Operations went into more detail on specific capabilities, including the use of the “EA-18G Growler . . . [to] transmit MISO messages on a wide range of frequencies”).

¹⁶⁷ *EC-130J Commando Solo*, AIR FORCE (Mar. 2021), <https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104535/ec-130j-commando-solo/> [<https://perma.cc/W2N5-8ALS>] (“[T]he EC-130J has the capability to conduct live broadcasts. In the last two deployments, the live broadcast option has gained considerable popularity.”).

¹⁶⁸ Geoff Corn, *Civilian Risk Mitigation: Why Context Matters*, ARTICLES OF WAR (Sept. 27, 2022), <https://lieber.westpoint.edu/civilian-risk-mitigation-why-context-matters/>.

¹⁶⁹ Lucas Scarasso, *Text Messages from Hell: Restraint and Information Warfare*, MODERN WAR INSTITUTE (Apr. 21, 2020), <https://mwi.westpoint.edu/text-messages-hell-restraint-information-warfare/>; see also Henning Lahmann, *Should States Use Social Media to Warn Civilians in Armed Conflict?*, ETHICS & INTERNATIONAL AFFAIRS (Feb. 3, 2025), <https://www.ethicsandinternationalaffairs.org/online-exclusives/should-states-use-social-media-to-warn-civilians-in-armed-conflict> [<https://perma.cc/Q6JE-XG4F>]. During the 2014 Russian invasion of Ukraine, Russia was utilizing cell tower simulators “allowing them to intercept or even fake data.” Associated Press, *Sinister Text Messages Reveal High-tech Front in Ukraine War*, VOA (May 11, 2017), <https://www.voanews.com/a/sinister-text-messages-high-tech-frony-ukraine-war/3848034.html> [<https://perma.cc/KY8Q-F6W6>]. That same article stated that the United States had been using similar technology in Iraq and Afghanistan. *Id.*

¹⁷⁰ Stew Magnuson, *U.S. Still Playing Catch Up in Information Operations*, NATIONAL DEFENSE (Feb. 11, 2022), <https://www.nationaldefensemagazine.org/articles/2022/2/11/still-playing-catch-up-in-information-operations/> [<https://perma.cc/W6VL-9A7C>] (this article was unclear about which “adversary” was using AI in crafting their messages, but did discuss “China, Russia, [and] Iran”). AI enabled chatbots like ChatGPT “interact[] in a conversational way” allowing it to “answer followup [sic] questions, admit its mistakes, challenge incorrect premises, and reject inappropriate requests.” *Introducing ChatGPT*, OPENAI, <https://openai.com/blog/chatgpt> (last visited Sep. 10, 2025). As of August 2025, ChatGPT is trained to read and respond in “most major languages, including . . . English, Spanish, French, German, Italian, Portuguese, Dutch, Russian . . . Chinese . . . and Korean.” Internet Chat Interview with ChatGPT, OpenAI (Aug. 21, 2025) (transcript on file with the author). With current technology, AI can already create messages, in a number of languages, which can then be used as advanced warnings for armed attacks.

disseminated to cellular phones in the area of attack, which stated the location to be attacked and an estimate of the time of attack (or an attack window), would allow civilians in the area to evacuate before the attack.

Third, loitering munitions like Israel's Harpy are already being programmed to loiter in a specific geographic area.¹⁷¹ Though the manufacturer does not describe fully what technology is responsible for this, many commercial-off-the-shelf drones are designed to be able to "fence" the drone out of areas via Global Positioning System (GPS) coordinates and software that comes pre-installed in the drones.¹⁷² These systems, called geofences, allow airports or prisons to restrict compliant drones from coming within the bounds of their geo-fence.¹⁷³ Thus, LAWS drones could be programmed in a similar fashion, with specifics on where the commander wants the system to loiter or where attacks are permissible, along with fences that tell the LAWS where it cannot attack, regardless of what type of military object the system detects.

Fourth, weaponeering has already been programmed into computer software.¹⁷⁴ Software used as early as 2003 could "take[] account of the dynamics of specific munitions as well as the characteristics of the terrain or objects being struck to predict an often irregular pattern of damage."¹⁷⁵ U.S. Joint Chiefs of Staff doctrine references the "Joint Targeting Toolbox," which is a suite of software used in the targeting process,

¹⁷¹ HARPY: AUTONOMOUS WEAPON FOR ALL WEATHER, IAI, *supra* note 38 ("HARPY is equipped to hunt—seek targets in a designated area . . .").

¹⁷² Keith Davis, *Geofencing on Drones (All You Need to Know)*, DRONEBLOG, <https://www.droneblog.com/geofencing-on-drones/> [<https://perma.cc/K3X8-L7DZ>] (last visited Sep. 10, 2025).

¹⁷³ *Id.* DJI, a leader in consumer drones, has recently removed the automatic restrictions from their drones. DJI VIEWPOINTS TEAM, *DJI Updates GEO System in U.S. Consumer & Enterprise Drones* (Jan. 13, 2025), <https://viewpoints.dji.com/blog/geo-system-update> [<https://perma.cc/8WWZ-GPSW>]. Instead, the drone operator will receive a warning message about flying into a restricted area. *Id.* While the technology has been removed from DJI drones, they have proven capable, and the technology could still be reapplied to consumer drones or to military drones. *See id.*

¹⁷⁴ Press, *supra* note 152, at 1359.

¹⁷⁵ Bradley Graham, *Military Turns to Software to Cut Civilian Casualties*, WASH. POST (Feb. 20, 2003), <https://www.washingtonpost.com/archive/politics/2003/02/21/military-turns-to-software-to-cut-civilian-casualties/af3e06a3-e2b2-4258-b511-31a3425bde31/> [<https://perma.cc/JD9B-SXGG>].

including “weaponeering.”¹⁷⁶ With the information programmed into such targeting software (like estimated bomb damage outside of the aim point),¹⁷⁷ LAWS could at least determine that a person is within the blast zone of a weapon and not attack the target.¹⁷⁸ Additionally, coupling this precaution with the previous one of loitering in a specified geographic area, if the LAWS were to go undetected, it could presumably loiter for an extended period of time and continue to monitor for when an attack could be mounted. LAWS, being a machine, does not get tired or bored like a human might; it does not lose focus, but instead keeps its sensors trained on the potential object of attack.¹⁷⁹ Its ability to remain within the loitering zone is more reliant on fuel availability.¹⁸⁰

Finally, before concluding the discussion on how LAWS will comply with proportionality, it is necessary to consider that the U.S. interpretation of LOAC is that “[t]he law of war rules on conducting attacks . . . impose obligations on persons,” not on weapons.¹⁸¹ “Rather, it is persons who

¹⁷⁶ JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, JOINT TARGETING at B-2 (20 Sept. 2024) (This software was discussed in the 2018 version of the Joint Publication as well. JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, JOINT TARGETING at B-3 (28 Sept. 2018)).

¹⁷⁷ Graham, *supra* note 175.

¹⁷⁸ See Press, *supra* note 152, at 1359. In this article, the LAWS is directed via its internal programming not to attack when a person is in the area. Nothing in this article articulates a capability to distinguish between civilians and combatants. Should LAWS be capable of determining that a person is within the blast zone of an attack on a military object, but that the person is a combatant and, thus, a lawful target, the attack could continue. See LAW OF WAR MANUAL, *supra* note 16, at § 5.5.1. Separately, the U.S. Air Force has recently contracted for the use of facial recognition software with live video feeds coming into UAVs. Sascha Brodsky, *The Air Force’s Drones Can Now Recognize Faces. Uh-Oh. What Could Go Wrong?*, POPULAR MECHANICS (Feb. 24, 2023), <https://www.popularmechanics.com/military/a43064899/air-force-drones-facial-recognition/> [<https://perma.cc/76WZ-FUYS>]. Before the UAV can analyze a face though, it must first determine that a face exists, which would imply a human’s presence. *Id.* Thus, the capability to find persons, despite not knowing their status, exists. Furthermore, Future of Life Institute, another advocacy group calling on a ban on LAWS, produced a video called “Slaughterbots – if human: kill().” *Slaughterbots – if human: kill()*, FUTURE OF LIFE INST. (Nov. 30, 2021), <https://futureoflife.org/video/slaughterbots-if-human-kill/> [<https://perma.cc/EEL7-H3VH>]. The title implies programming language whereby if something is determined to be a human, then the “slaughterbot” would kill it. *Id.* In fact, the inverse could be used in the programming of LAWS built for object-based targeting. See ARKIN, *supra* note 44, at 128. If a human is discovered, *do not* kill.

¹⁷⁹ See Kastan, *supra* 129, at 54 (describing the trifecta of “dull, dirty, and dangerous” missions which LAWS could take from humans in combat).

¹⁸⁰ See *id.*

¹⁸¹ LAW OF WAR MANUAL, *supra* note 16, at § 6.5.9.3.

must comply with the law of war.”¹⁸² However, a person’s choice to design and employ LAWS with the above-referenced feasible precautions is the human operator’s way of complying with LOAC.¹⁸³ A precision-guided munition does not make a choice not to attack a civilian object; it attacks wherever the human operator tells it to via its aim-point parameters.¹⁸⁴ Similarly, the limits discussed above, imposed upon LAWS, cause them to act in a manner that ensures compliance with proportionality.

4. *Distinction*

Distinction “obliges parties to a conflict to distinguish principally between the armed forces and the civilian population, and between unprotected and protected objects.”¹⁸⁵ Armed forces are not permitted to use “weapons that are of a nature to be indiscriminate.”¹⁸⁶ This is meant to protect civilians and civilian objects in warfare.¹⁸⁷ As mentioned previously, this article establishes that LAWS could comply with LOAC when conducting object-based targeting; it will not discuss the rules of person-based targeting.¹⁸⁸

¹⁸² *Id.*

¹⁸³ Afonso Seixas-Nunes, *Autonomous Weapons Systems and the Procedural Accountability Gap*, 46 BROOK. J. INT’L L. 421, 428-29 (2021). Here, Seixas-Nunes quotes a Congressional Research Service primer which is quoting an August 2018 U.S. government white paper. *Id.* In its current edition, that primer says: “Furthermore, ‘human judgment over the use of force’ does not require manual human ‘control’ of the weapon system, as is often reported, but rather broader human involvement in decisions about how, when, where, and why the weapon will be employed.” KELLEY M. SAYLER, CONG. RES. SERV., IF11150, DEFENSE PRIMER: U.S. POLICY ON LETHAL AUTONOMOUS WEAPON SYSTEMS 1 (2022).

¹⁸⁴ See NATHAN J. LUCAS, CONG. RES. SERV., IF11353, DEFENSE PRIMER: U.S. PRECISION-GUIDED MUNITIONS 1 (2022). Precision-guided munitions (PGMs) “typically use the global positioning system (GPS), laser guidance, or inertial navigation systems to improve a weapon’s accuracy to reportedly less than 3 meters (approximately 10 feet).” *Id.*

¹⁸⁵ LAW OF WAR MANUAL, *supra* note 16, at § 2.5.

¹⁸⁶ Boothby, *supra* note 104, at 20.

¹⁸⁷ See LAW OF WAR MANUAL, *supra* note 16, at § 2.5.

¹⁸⁸ While not the point of this article, others have written about the possibility of LAWS complying with the requirements to conduct person-based targeting. See Schmitt, *supra* note 2.

When it comes to targeting objects, some are “categorically military objectives, [while] other objects are assessed as to whether they meet the definition of ‘military objective.’”¹⁸⁹ The definition describes an object “which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”¹⁹⁰

Categorical military objectives are where LAWS will make their money.¹⁹¹ For instance, in “air-to-air missile engagements,” a person is not spotting another airplane, circling it to determine whether it is friend or foe, and then maneuvering behind it for a shot.¹⁹² “Instead, the pilot is relying on information fed from a computer, typically based on radar.”¹⁹³ With that, along with other computer-fed information, the pilot then decides whether to engage the target.¹⁹⁴ These same inputs could all be programmed for LAWS, allowing the LAWS to understand whether it could engage the other aircraft.¹⁹⁵

As of 2009, there were already “various computer analysis methods possible for matching targets to available target data.”¹⁹⁶ By 2013, newer sensors were able to “assess the shape and size of objects, determine their speed, identify the type of propulsion being used, determine the material of which they are made, listen to the object and its environs, and intercept associated communications or other electronic emissions.”¹⁹⁷ Other systems trained to identify objects in the environment, as opposed to specific military objectives, have reached success levels above 80 percent

¹⁸⁹ LAW OF WAR MANUAL, *supra* note 16, at § 5.6.

¹⁹⁰ *Id.* at § 5.6.3 (quoting PROTOCOL ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF MINES, BOOBY-TRAPS AND OTHER DEVICES, as Amended on 3 May 1996 (Amended Protocol II) art. 2(6), May 3, 1996, 2048 U.N.T.S. 93).

¹⁹¹ *See* Sassóli, *supra* note 40, at 327.

¹⁹² *See* Scharre & Horowitz, *supra* note 26, at 11.

¹⁹³ *Id.* (information like “altitude, airspeed, identification friend or foe (IFF) signals and an understanding of the overall situation”).

¹⁹⁴ *Id.* That other information includes “altitude, airspeed, identification friend or foe (IFF) signals and an understanding of the overall situation,” such as whether they are in or near an area of combat. *Id.*

¹⁹⁵ *See id.*

¹⁹⁶ ARMIN KRISHNAN, KILLER ROBOTS: LEGALITY AND ETHICALITY OF AUTONOMOUS WEAPONS 56 (2009).

¹⁹⁷ Schmitt, *supra* note 2.

as of 2013,¹⁹⁸ further implying that recognition of military objects by machine learning is possible.

As discussed above, researchers have trained a system to recognize certain tanks based on camera inputs with a mean average precision of 99.2 percent.¹⁹⁹ At least one company has described its ability to distinguish between civilian vehicles and military vehicles.²⁰⁰ By deploying LAWS only to “clear war zones and with limited geographic scope,” these systems could be prepared to engage only those categorical military objectives that the LAWS is trained to recognize.²⁰¹

5. Honor

Honor, sometimes compared to chivalry,²⁰² is the last of these five principles. “Honor demands a certain amount of fairness in offense and defense and a certain mutual respect between opposing military forces.”²⁰³ Relating back to the previous four principles, honor creates an obligation to abide by those principles.²⁰⁴ Soldiers “must accept that the right of belligerents to adopt means of injuring the enemy is not unlimited.”²⁰⁵ As such, the parties must adhere to the laws of war to limit their own war-making potential.²⁰⁶ In addition, “honor . . . forbids resort to means, expedients, or conduct that would constitute a breach of trust with the

¹⁹⁸ Tom Simonite, *A Google Glass App Knows What You’re Looking At*, MIT TECH. REV. (Sept. 30, 2013), <https://www.technologyreview.com/2013/09/30/176280/a-google-glass-app-knows-what-youre-looking-at/> [<https://perma.cc/S863-UHYP>] (this recognition can happen with “photos taken by a person wearing Glass, or [can] constantly grab images from the device’s camera” while it is active).

¹⁹⁹ See Liu et al., *supra* note 163, at 15.

²⁰⁰ See Bondar, *supra* note 163.

²⁰¹ Horowitz, *supra* note 22, at 96.

²⁰² See LAW OF WAR MANUAL, *supra* note 16, at § 2.6 n.107.

²⁰³ *Id.* at § 2.6.

²⁰⁴ See *id.* at § 2.6.2.1.

²⁰⁵ *Id.*

²⁰⁶ *Id.* (“Thus, *honor* may be understood to provide a foundation for obligations that help enforce and implement the law of war.”).

enemy.”²⁰⁷ While not specific to autonomous weapons, this would include actions like using protected symbols on a weapon.²⁰⁸

However, honor is not about equality in the fight; a combatant may still bring overwhelming power against the enemy.²⁰⁹ Thus, the question of whether to field LAWS against an opponent who is unable to field them himself will not be answered by the LOAC.²¹⁰ It might appear chivalrous to show up to a sword fight with a sword; but as Indiana Jones showed, there is nothing wrong with showing up to a sword fight with a gun—it usually means you’ll win.²¹¹

The use of LAWS against an opponent who is unable to field them themselves would not violate honor. Using LAWS that breach the trust, such as by being marked with the enemy’s vehicle markings, would.²¹² Flying a LOAC-compliant LAWS UAV into battle simply means that the pilot is digital, instead of being kept in a communications terminal back in the United States.²¹³ It will have to be defended against in the same manner as any other UAV in armed conflict. Of course, the issue of facing an opponent without weapons of equal capabilities is likely not to be the case in a conflict with China.²¹⁴

Within certain parameters (like object-based targeting), LAWS can comply with LOAC.²¹⁵ Judge advocates must be able to explain these principles and their application to those responsible for building and fielding LAWS to ensure the United States stays competitive with China and other adversaries. Where situations exist for LOAC compliance to be assured, it is imperative that the United States moves out on the development and procurement of LAWS swiftly, to ensure that it has the tools necessary to face its adversaries.

²⁰⁷ *Id.* at § 2.6.2.2.

²⁰⁸ *Id.* at § 5.24. Those symbols include symbols of neutrality, those protected under the Geneva Conventions (like the Red Cross and Red Crescent), or symbols designating prisoner of war camps, to name a few. *Id.*

²⁰⁹ See W. Hays Parks, *Air War and the Law of War*, 32 A.F. LAW REV. 1, 170 (1990).

²¹⁰ See *id.*

²¹¹ INDIANA JONES: RAIDERS OF THE LOST ARK, Blu-ray (Lucasfilm Ltd. 1981).

²¹² LAW OF WAR MANUAL, *supra* note 16, at § 2.6.3.

²¹³ See *MQ-9 Reaper*, AIR FORCE (Mar. 2021), <https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104470/mq-9-reaper/> [<https://perma.cc/HPX9-WYAM>] (“[T]he crew based in continental United States executes command and control of the remainder of the mission via beyond-line-of-sight links.”).

²¹⁴ See NATIONAL DEFENSE STRATEGY, *supra* note 6, at III.

²¹⁵ See *supra* Section III.

IV. The DoW's Future in Autonomy

The DoW is updating policies and creating offices around the idea of implementing autonomy throughout the force.²¹⁶ In preparing for the United States to utilize autonomy in weapon systems, judge advocates of the various services must become intimately familiar with the LOAC and the underlying domestic, treaty, and customary international law to be able to analogize old rules to new technology. Practitioners must not be wary of technology and must educate themselves to understand areas of technology outside of the law to better apply the law to new tech.²¹⁷ They must be capable of understanding what a technologist is telling them, while explaining international law back in a way that can be digested by a non-legal practitioner.²¹⁸

The Strategy of the U.S. Army's Judge Advocate General's (JAG) Corps mandates that attorneys provide "principled counsel," via a "mastery of the law."²¹⁹ This mastery prepares them to apply legal knowledge and skill to the "evolution of capabilities[] and compression of decision cycles."²²⁰ The U.S. Air Force's *JAG Corps Flight Plan* speaks to providing "professional, full-spectrum legal support, at the speed of relevance, for mission success in joint and coalition operations."²²¹ Autonomy in weapon systems is that evolution and is already relevant to today's DoW.²²²

²¹⁶ See Graham, *supra* note 21 ("Michael Horowitz, director of the Pentagon's Emerging Capabilities Policy Office . . . said that the updates to the directive [DoDD 3000.09], as well as the Pentagon's growing focus on autonomous weaponry and artificial intelligence as components of the future of warfare, also align with the national defense strategy issued last year."); DoDD 3000.09, *supra* note 23 (updated as of Jan. 25, 2023).

²¹⁷ See Linell A. Letendre, *Lethal Autonomous Weapon Systems: Translating Geek Speak for Lawyers*, 96 INT'L L. STUD. 274, 274-75 (2020).

²¹⁸ See *id.*

²¹⁹ *The Strategy of The Judge Advocate General's Corps 2022*, THE UNITED STATES ARMY JUDGE ADVOCATE GENERAL'S (JAG) CORPS 1-2, https://tjagcls.army.mil/Portals/0/Resources/LEAPP/TJAG%20Corner/JAGC%20Strategy%202022.pdf?ver=N4sN8_6lKundj_QpnHg6QQ%3d%3d [<https://perma.cc/AZ84-SJUT>] (last visited Sep. 16, 2025) [hereinafter *Army JAGC Strategy*].

²²⁰ *Id.*

²²¹ *JAG Corps Flight Plan 2023: Bridging the Strategic to the Tactical and Back*, AIR FORCE JUDGE ADVOCATE GENERAL'S CORPS, Mar. 2023, at 2 (on file with the author).

²²² See Losey, *supra* note 21.

These issues require deep thought and thorough analysis.²²³ Analysis that cannot wait until the end of the development of a weapon, but must coincide with the designer's actions to create the weapon.²²⁴ By engaging early in the development process, the attorney can help shape the design of the weapon in a way that ensures compliance with the law.²²⁵ The technologist cannot design a weapon in a vacuum, hoping it complies with the law or can be word-smithed by the attorney's legal review.²²⁶

By the same token, an attorney cannot review a new weapon without a thorough understanding of past practice and a history of warfare.²²⁷ Judge advocates must be ready to work in this area by preparing now to understand what the technology can and cannot do, and what the law allows or forbids. By doing so, they can be ready to provide "principled counsel" at "the speed of relevance."²²⁸

V. Conclusion

Lethal autonomous weapon systems are coming. Whether they are developed first by the United States²²⁹ or adversaries like China,²³⁰ states are working now to design and build these systems. The United States must continue to push back against an outright ban on LAWS at the GGE to the CCW, and any other international forum.²³¹ Articulating sound operating principles, as it has done since at least 2019, will reinforce the

²²³ Kenneth Anderson, Daniel Reisner & Matthew Waxman, *Adapting the Law of Armed Conflict to Autonomous Weapon Systems*, 90 INT'L L. STUD. 386, 409 (2014).

²²⁴ *Id.*

²²⁵ *See id.*

²²⁶ *See* Colonel Linell A. Letendre, *Lethal Autonomous Weapon Systems: Translating Legal Jargon for Engineers*, 2016 INT'L CONF. UNMANNED AIRCRAFT SYS. (ICUAS) 795, 795 (June 7-10, 2016).

²²⁷ *See* Letendre, *supra* note 217.

²²⁸ *Army JAGC Strategy*, *supra* note 220, at 1; *JAG Corps Flight Plan 2023*, *supra* note 221, at 2.

²²⁹ *See* Losey, *supra* note 21.

²³⁰ *See supra* note 93 and accompanying text.

²³¹ CCW, U.S. Comments on Humanitarian Benefits of LAWS, 2018, *supra* note 53, at 6 ("Rather than trying to stigmatize or ban such emerging technologies in the area of lethal autonomous weapon systems, States should encourage such innovation that furthers the objectives and purposes of the Convention.").

requirement that LAWS must comply with existing LOAC and other treaties and customary international law.²³²

Compliance with LOAC will be a requirement, whether the system is built to target persons or objects.²³³ This article has not addressed the issues of person-based targeting; regardless of the ICRC's and HRW's positions, compliant LAWS for either type of target should not be ruled out at this time.²³⁴ It is foreseeable that in the near future, LAWS that conduct object-based targeting will be built that meet a commander's standard for following the LOAC. The programming used on such systems will give the commander the ability to create limitations or precautions in an attack to ensure no more destruction than is necessary occurs. Object-recognition research has already reached a point where the capability can be measured—the question left open is how “sure” is sure enough. The DoW's Law of War Manual requires that commanders make decisions in “good faith.”²³⁵ Commanders and combatants, working with their legal advisors, will need to determine how to apply good faith to LAWS.

²³² See CCW, Final Rep., 2019, *supra* note 13.

²³³ See *What is IHL*, *supra* note 16; LAW OF WAR MANUAL, *supra* note 16, at § 3.2.

²³⁴ It is incumbent on technologists and attorneys, both, to understand the LOAC as it pertains to person-based targeting and to work on developing controls which can ensure compliance with such rules.

²³⁵ See LAW OF WAR MANUAL, *supra* note 16, at § 5.3 (“Even when information is imperfect or lacking (as will frequently be the case during armed conflict), commanders and other decision-makers may direct and conduct military operations, so long as they make a good faith assessment of the information that is available to them at that time.”); *see also id.* at § 2.6.2.1 (“For example, *honor* may be understood to provide the foundation for the requirement for persons to comply with the law of war in good faith.”).

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**THE EIGHTEENTH GEORGE S. PRUGH LECTURE IN MILITARY
LEGAL HISTORY***

**THE UNIFORM CODE OF MILITARY JUSTICE AT 75:
REFLECTIONS ON THE TRANSFORMATION OF THE AMERICAN
MILITARY JUSTICE SYSTEM**

PROFESSOR DAVID A. SCHLUETER[†]

I. Introduction

Good morning. It's good to be with you here this morning for two reasons. First, I knew General Prugh. When I came on active duty in January of 1972, he had been The Judge Advocate General (TJAG) for about a year, so I had an opportunity, having been assigned to the Washington, D.C., area at the Government Appellate Division, to interact with him a number of times.

* This is an edited transcript of a lecture delivered on April 24, 2025, by Professor David A. Schlueter to the 73d Graduate Course at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. The chair lecture is named in honor of Major General George S. Prugh (1920-2006).

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I was appointed to the Captain's Advisory Council (a creation of General Prugh), and one of the first projects we did was a two-day Continuing Legal Education (CLE) program at Fort Meade, Maryland. General Prugh showed up for the first day. He was anxious to make the junior members of the law firm feel very welcome, and I admired him for that. The CLE went fine, and shortly thereafter, I got word from his office that he wanted me to come and address the Worldwide Conference here in Charlottesville.³ At that point I had been on active duty for about two years and was probably twenty-seven or twenty-eight years old. To say the least, it was a little bit intimidating. But afterwards, I got word from his office that he was very pleased with how things had gone, and I figured an attaboy from TJAG was about as good as it gets.

Now, the second reason is that Charlottesville is like home for me and my family. We spent five years here. I did my LL.M., and it was while I was here that I developed a love of academia. I started writing on my own time, books and articles, and I was fortunate enough to have support and mentors at the University of Virginia (UVA) and here at The Judge Advocate General's Legal Center and School (TJAGLCS) who promoted that.

Now, let's dive right in. I've identified several of what I consider to be significant benchmarks in the realm of military justice in the last seventy-five years. I've been part of it for fifty-three of those years. While I was a senior at Texas A&M, in the spring semester of 1968, we did a mock trial using the old 1950 Uniform Code of Military Justice (UCMJ), where there were no military judges. Cadets served as the court members. The fact pattern was an assault case, and I was assistant defense counsel. So, I've even had a little bit of experience with the old system.

After we discuss those significant benchmarks, I want to talk about players in the transformations that have taken place. And then lastly, I want to identify five trends I believe are present in the transformation of military justice.

I know that many in the audience will be leaving the Graduate Degree Program to go practice military justice in the field. To that end, I'm going to share some historical thoughts, some personal experiences, and, hopefully, give you an idea of what the future might hold.

³ This talk was later published in *The Army Lawyer*. Captain David Schlueter, *Captain's Advisory Council Notes*, ARMY LAW., Nov. 1974, at 21. The December 1974 issue of *The Army Lawyer* contained the after-action report on the conference. See *Captain's Advisory Council Notes*, ARMY LAW., Dec. 1974, at 19.

II. Significant Benchmarks

A. Adoption of the UCMJ

The first benchmark was the adoption of the UCMJ. In the 1950s, there were what were called the red books. That's what we used when I came on active duty. That early iteration of the UCMJ created a court of three civilian judges to review court-martial convictions, known as the Court of Military Appeals. Those early years were really tough because the Pentagon had been opposed to the establishment of a civilian court. I think it's vital for our current military justice practitioners to at least think about and understand the significance of what it meant for those three civilian judges to face serving as an obstacle to what the military wanted to do.

Chief Judge Robert Quinn wrote about it.⁴ He wrote that he got assurances from the Pentagon hierarchy that they would do everything they could to support him,⁵ and he made a comment in one of his early law

⁴ Robert Quinn, *The Role of Criticism in the Development of Law*, 35 MIL. L. REV. 47 (1967). The author, Robert E. Quinn, the Chief Judge of the Court of Military Appeals, notes that the UCMJ evolved out of massive complaints to the military justice system during World War II, and that as a judge on the civilian court reviewing military justice issues, he and his colleagues recognized that they would need help from the legal profession, both inside and outside the system, to provide alternatives of law available to the court.

⁵ *Id.* at 49. He wrote:

How few or how many in the armed services remained adamantly opposed to the Code and unalterably attached to the pre-code law and practice could not, of course, be determined. However, when the judges of the Court took the oath of office at the Pentagon in June 1950, George C. Marshall, then Secretary of Defense, assured me that he would do all he could to get the military establishment to cooperate, fully and imaginatively, with the Court in the administration of the Uniform Code. The Secretary's assurance of cooperation provided a solid foundation for the hope that all ranks in the armed services would eventually accept the letter and spirit of the Uniform Code, and express its disagreements or approbations within the framework thereof. About a year later, at a symposium on military justice at Vanderbilt Law School, I extended an invitation to the American Bar to scrutinize the work of the Court and to weigh its decisions "against the dichotomous concept of military justice and tell the public, the services and us, the

review articles in the '50s about the "old timers", grumbling about the new system.⁶ Those early years were important for the development of what we consider to be military justice.

B. The 1968 Military Justice Act

The 1968 Military Justice Act was the first major amendment to the UCMJ,⁷ and a significant portion of that change was the addition of

judges [of the U.S. Court of Military Appeals], whether we are performing properly our task of enunciating principles worthy of existence in this relatively new field of law."

Id.

⁶ *Id.* at 48. Chief Judge Quinn observed that in the early years of the UCMJ, the "old timers" demonstrated resistance to change, but that military justice had improved. The author notes that criticism can be both helpful or vituperative and offers a number of examples where commentators had suggested helpful resolutions of military justice issues. He observes that with the possible exception of theses in the Service schools, military commentators had not been particularly helpful in offering solutions or new approaches.

As late as May 1952, the Special Committee on Military Justice of the prestigious Association of the Bar of the City of New York reported that it was "abundantly clear that the Armed Forces have not essentially changed their attitude toward military justice, although this attitude resulted in the abuses" which led to the adoption of the Uniform Code. By that time, however, there had been distinct indications that the resistance to change prevailed largely among the "old-timers," who seemed to be too deeply embedded in the worn grooves of ancient, and to them irreproachable, practices; as a group, these *traditionalists* found it difficult to accommodate themselves to the more legally-oriented, and less command-dominated, provisions of the Uniform Code. Even a captious critic, however, could justifiably conclude, on the basis of records of trial in major cases, that "the [S]ervices . . . [had] made excellent progress in improving the caliber of courts-martial trials and in carrying out the spirit of the Code."

Id. (emphasis added).

⁷ Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968). This Act became law on October 24, 1968. It was the first major amendment to the Uniform Code of Military Justice Act of June 24, 1948, ch. 625, tit. II, § 203, 62 Stat. 604, 628 (1948). *See also* Fred Borch, *A Courts-Martial Revolution: How the Military Justice Act of 1968 Turned Military Criminal Law Upside Down*, ARMY LAW. Sept–Oct. 2018, at 7; Cath. Univ. L. Rev., *The*

military judges.⁸ When I came on active duty in January of 1972, military judges had only been around for a few years.

C. The Military Rules of Evidence (1980)

Then, in 1980, the Military Rules of Evidence (MRE) were adopted. Now, this was not an actual amendment to the UCMJ, but I want to note that the adoption of the MRE was a significant benchmark. It didn't result in any amendments to the UCMJ itself, but it was really carrying out the President's prerogative under Article 36 to establish rules of procedure and evidence that, to the extent practicable, were consistent with Federal criminal practice.

D. The 1983 Military Justice Act

Next was the 1983 Military Justice Act.⁹ Two things were really important in that act. First, it did away with or simplified what judge advocates had come to fear as the pre-trial advice and the post-trial review. I was a prosecutor at Fort Belvoir, Virginia, and the one thing we feared was getting a case kicked back from the appellate court because there was something wrong with the post-trial review by the staff judge advocate. These were not simple documents. They went on for pages. They listed all the results of trial, all the awards. And finally, Congress decided that it was getting too complex, so they cut it out.

Military Justice Act of 1968: Congress Takes Half-Steps Against Unlawful Command Influence, 18 CATH. U. L. REV. 429 (1969); Francis T. McCoy, *Due Process for Servicemen—The Military Justice Act of 1968*, 11 WM. & MARY L. REV. 66 (1969); Jacob Hagopian, *The Uniform Code of Military Justice in Transition*, ARMY LAW., July 2000, at 1.

⁸ See UCMJ art. 26 (1968) ("A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State . . ."); see also Colonel Timothy P. Hayes Jr. & Lieutenant Colonel Christopher E. Martin, *Independent but Invested*, ARMY LAW., no. 3, 2019, at 76 (discussing creation of position of military judge in 1968 Military Justice Act).

⁹ The Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393, became law on December 6, 1983, and took effect on August 1, 1984. Iowa Senator Roger W. Jepsen sponsored the bill (S. 974) that became this major amendment to the UCMJ. Act of June 24, 1948, ch. 625, tit. II, § 203, 62 Stat. 604, 628.

One of the other big changes in the 1983 act that I want to touch on briefly was establishing direct review to the U.S. Supreme Court. Before this act, any military case making it to the Court was done by collateral review.

E. The 1984 Manual for Courts-Martial

The 1984 Manual for Courts-Martial (MCM) was a *major* rewrite. That's where we developed the Rules of Court Martial (RCM). Before that, it had all been paragraphs. And with each iteration of the MCM, it became lengthier and more complex.

F. Expansion of the Court of Military Appeals (1989)

In 1989, there was an expansion of the Court of Military Appeals from three members to five members. I was the reporter for the advisory committee. The question was, should the court be an Article III court? The answer was no for a variety of reasons, although there was pressure to do just that. But one of the things that the committee recommended was expanding the membership to five members, because if there were just three, and one judge retired or left the court, then you had tie-votes, and it was slowing down the process.

F. Sexual Assault Amendments to the UCMJ (2013, 2014, 2015)

The next significant benchmarks were the sexual assault amendments, starting in 2013. It started in San Antonio. There was a lot of attention at Lackland Air Force Base, where trainers were taking advantage of trainees.

G. The 2016 Military Justice Act

After that came the 2016 Military Justice Act. Chief Judge Andrew Effron and his committee, the Military Justice Review Group, compiled a 1,300-page report.¹⁰ I recommend to anyone who's doing research on the articles of the UCMJ to take a look at that document. It's available online. The 2016 act was a very significant development, and there were a lot of changes made to the UCMJ because of it.¹¹

H. *Ortiz v. United States*

Next was the Supreme Court's decision in *Ortiz*, which was decided in 2018.¹² The Court was reviewing a question about whether a judge on one of the Service courts of criminal appeals could also serve as a judge on the U.S. Court of Military Commissions. But a professor here at the University of Virginia wrote an amicus brief, challenging the jurisdiction of the Supreme Court to even review decisions from the Court of Appeals for the Armed Forces.¹³ The Supreme Court spent a considerable amount of time addressing that jurisdiction issue, and in the process, I think they blessed the military justice system. In effect, they recognized that virtually all the protections that are available to civilian accused are also available to the military accused. In my view, it was a turning point, at least in Supreme Court jurisprudence, of how the Court viewed what we do.

¹⁰ MIL. JUST. REV. GRP., REPORT OF THE MILITARY JUSTICE REVIEW GROUP PART I: UCMJ RECOMMENDATIONS (2015), https://ogc.osd.mil/Portals/99/report_part1.pdf [<https://perma.cc/QNR6-V3G8>].

¹¹ See generally David A. Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 ST. MARY'S L.J. 1 (2017).

¹² *Ortiz v. United States*, 585 U.S. 427 (2018).

¹³ Brief for Professor Aditya Bamzai as Amicus Curiae in Support of Neither Party, *Ortiz v. United States*, 585 U.S. 427 (2018) (No. 16-1423).

I. The 2022 National Defense Authorization Act

The 2022 National Defense Authorization Act made major changes to the practice of Military Justice.¹⁴ We're going to talk about this as a trend from command-centric to lawyer-centric practice. The creation of the Office of Special Trial Counsel was certainly a significant event.

J. Summary

What, in summary, can you read from these benchmarks? While it's true that these are only selected benchmarks, I think it's clear to anyone who's looked at this history, the attitudes, and the people involved, that these changes are going to continue to occur.

III. Players in the Transformation of the Military Justice System

Who are the players in this transformation? Let's identify and discuss the organizations and individuals who were responsible for, or played key roles in, the transformation of the military justice system.

A. Congress and the President

First, Congress is a player; it has the primary authority for determining how we run the military justice system. They're the bosses. The President gets involved in the sense that the President, from time to time, may make public statements, but most of the President's actions are carried out by the folks in the Pentagon—the Secretary of Defense,¹⁵ or the Joint Service Committee—which drafts suggested changes for comment and sends legislative packages over to Congress for enactment.

¹⁴ David A. Schlueter & Lisa Schenck, *Transforming Military Justice: The 2022 and 2023 National Defenses Authorization Acts*, 231 MIL. L. REV. 1 (2023).

¹⁵ For example, the Independent Review Commission on Sexual Assault in the Military was created by Secretary of Defense Lloyd Austin to conduct a ninety-day review of sexual assaults in the military. THE INDEP. REV. COMM. ON SEXUAL ASSAULT IN THE MIL., *HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY* (Feb. 2021) [hereinafter *HARD TRUTHS*]. It issued report on four areas: accountability; prevention; climate and culture; and victim care and support. *See id.*

B. The Public

What about the public? The public has become very involved from time to time. For example, after World War II, Service members came back from fighting and expressed concern about the way they had been treated by the pre-UCMJ military justice system. While I don't know that the public is a direct player, certainly public pressure on Congress and the President can have an impact.

C. Lawyers, Commissions, and Advisory Committees

Lawyers, commissions, and advisory committees have all been players as well. Going back to 1960, what I think was probably the first comprehensive review of the UCMJ was published: the Powell Report.¹⁶ One of their main concerns was that they wanted the system to remain efficient. And one of that committee's recommendations was to modify non-judicial punishment so that it was easier for commanders to carry out their disciplinary punishment.¹⁷

¹⁶ THE COMM. ON THE UNIF. CODE OF MIL. JUST. GOOD ORD. AND DISCIPLINE IN THE ARMY, REPORT TO HONORABLE WILBER M. BRUCKER, SECRETARY OF THE ARMY 11–12 (18 Jan. 1960) [hereinafter THE POWELL REPORT]. In October 1959, Secretary of the Army Wilber M. Brucker appointed a committee of senior officers to study the administration of military justice in the Army. The committee, which was chaired by Lieutenant General Herbert B. Powell, was tasked to: study the effectiveness of the UCMJ on discipline within the Army; “analyze any inequities or injustices that accrue to the Government or to individuals from the application of the Code and judicial decisions stemming therefrom;” and consider legislative or other improvements to the Code. *Id.* at 1. The committee's report, which is known as the Powell Report, was approved by Secretary Brucker in October 1960. Many of the recommendations of this report regarding the authority of military judges and The Judge Advocate General in courts-martial proceedings and reviews were subsequently adopted by the Army.

¹⁷ The following is a list of various advisory committees that have addressed the military justice system: The Morgan Committee, which was responsible for drafting the original UCMJ, Felix Larkin, *Professor Edmund M. Morgan and the Drafting of the Uniform Code*, MIL. L. REV. (noting difficulties of reconciling Army and Navy Procedures into one code); The 1960 Powell Report, THE POWELL REPORT, *supra* note 16 (noting that the role of military justice is justice; discipline follows); Committee for the Evaluation of the Effectiveness of the Administration of Military Justice, COMM. FOR THE EVALUATION OF THE EFFECTIVENESS OF THE ADMIN. OF MIL. JUST., REPORT TO GENERAL WILLIAM C.

In 1989, there were two reports on the Court of Military Appeals, one from the then-Department of Defense and one from the Committee formed by the Court of Military Appeals. They were competing reports, in terms of what changes, if any, should be made.

D. Legal Commentators

What about legal commentators? While attending the Twenty-Fifth Advanced Class—the precursor to the Graduate Course—I opted to write a thesis. My wife was pregnant with our son, but I had a burning desire to write because I was unhappy with some of the decisions from the Court of Military Appeals about recruiter misconduct and its impact on court-martial jurisdiction. So, I spent a lot of time here at the library, writing

WESTMORELAND CHIEF OF STAFF OF THE U.S. ARMY (1 June 1971); The 1983 Commission (also called the Hemingway Commission), THE MIL. JUST. ACT OF 1983 ADVISORY COMM., ADVISORY COMMISSION REPORT (14 Dec. 1984); The U.S. Court of Military Appeals Committee, U.S. CT. OF MIL. APPEALS COMM., UNITED STATES COURT OF MILITARY APPEALS COMMITTEE REPORT (27 Jan. 1989); Department of Defense Study Group on the U.S. Court of Military Appeals, DEP'T OF DEF. STUDY GRP. ON THE U.S. CT. OF MIL. APPEALS, REPORT OF DEPARTMENT OF DEFENSE STUDY GROUP ON THE UNITED STATES COURT OF MILITARY APPEALS (25 July 1989); Committee on the 50th Anniversary of the UCMJ (also known as the Cox Commission, this report was sponsored by the National Institute of Military Justice), COMM. ON THE 50TH ANNIVERSARY OF THE UNIF. CODE OF MIL. JUST., REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (May 2001); Judicial Proceedings Panel (JPP), which was created in section 576 of the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112–239, sec. 576, 126 Stat. 1632, 1637 (Jan. 2, 2013); 2013–2015 Military Justice Review Group, MIL. JUST. REV. GRP., *supra* note 10 (multi-service group of dedicated lawyers under the leadership of Judge Andrew Effron, who completes a comprehensive review of the UCMJ); Military Justice Review Panel, which was created in the 2016 Military Justice Act, Article 146, Military Justice Act of 2016, Pub. L. No. 114–328, sec. 5001, 130 Stat. 2894, 2894 (2016); The Sexual Assault Accountability and Investigation Task Force Report (SAAITF), SEXUAL ASSAULT ACCOUNTABILITY AND INVESTIGATION TASK FORCE, SEXUAL ASSAULT ACCOUNTABILITY AND INVESTIGATION TASK FORCE REPORT (30 Apr. 2019); The Independent Review Commission on Sexual Assault in the Military, HARD TRUTHS, *supra* note 15; Defense Advisory Committee for the Prevention of Sexual Misconduct (DAC-PSM), National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116–92, sec. 550B, 133 Stat. 1998, 1381 (2019) (required to report annually to Secretary of Defense as well as House and Senate Armed Services Committees; holds public meetings); The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD), Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113–291, sec. 546, 128 Stat. 3292, 3374 (2014).

commentary, and when I finished it up, I showed it to my thesis advisor. He looked at me and said, “So what?” I said, “What do you mean, so what? It’s on the enlistment contract, and I think what the court has done is wrong.” He said, “You need to come up with a recommendation.”

So I went back to the library, and I worked up a recommendation that the UCMJ be amended to adopt the Constructive Enlistment Doctrine. I didn’t think much of it beyond being pleased with my grade. But two years later, someone from Congress came down to visit me in my office here at TJAGLCS and wanted to talk to me about my proposal. I found out later that the Pentagon used my recommendation to draft an amendment to the UCMJ. If you look at Article 2(c), you can see the direct result of legal commentators.

I always encourage people to write. And when I talk to my students, I always give them the same advice: come up with a recommendation. You never know who will read it or the impact you will have.

E. The Courts

The courts have certainly had a role to play. The Supreme Court, for a number of years—and those of us who are on active duty in the ‘70s and ‘80s remember Justice Douglas’s comment that “courts-martial are singularly inept at deciding nice subtleties of constitutional law”¹⁸—was dismissive of military justice. Those of us on active duty knew that we were deciding issues of constitutional law, but we couldn’t seem to convince the Supreme Court that we knew what we were doing. They gave the military a lot of deference, but they generally would agree with whatever Congress decided to do.

I want to comment briefly about the role of the U.S. Court of Appeals for the Armed Forces. In the 1970s, we had the so-called Fletcher Court. Judge Albert Fletcher, from Kansas, became chief judge. The court at that time was an activist court, to say the least. Every week, there was a new decision from the court making changes. These were troubling times for

¹⁸ O’Callahan v. Parker, 395 U.S. 258, 265 (1969).

folks on active duty because they felt like they were getting push back from the court. And to some extent, that was true.¹⁹

F. Civilian Interest Groups and Blogs

What about the role of civilian interest groups and blogs? Those organizations, at one time or another, all had something to say about military justice.²⁰ Starting with the American Bar Association. I served on several committees in the American Bar, where we had the opportunity to provide some input on proposed legislation. You also have publications like *CAAFlog* and *Lawfare*. Now, I wouldn't say that they have a direct impact on amendments, but they certainly can sway public opinion, and they can sway members in Congress.

IV. Trends in the Transformation of Military Justice

Next, I would like to address five trends that I think you can see from where we've gone in the last seventy-five years.

A. Trend: Moving from Discipline to Justice

The first one was moving from discipline to justice. So let me briefly explain the chart below. When I was doing my LL.M., I was writing a paper for a professor called A.E. Dick Howard, and he was a well-known national expert on the Burger Court. In my research, I ran across a law review article by Professor Herbert Packard, who came up with a competing model's theory. He wrote that every criminal justice system has

¹⁹ For those of us teaching here in the Criminal Law Department, we were continually changing our teaching outlines to reflect the court's latest changes to the military justice system.

²⁰ The following organizations have at one point or another been involved in proposed changes to the military justice system: The American Bar Association, the Federal Bar Association, NYC Bar Association, National Institute of Military Justice, Judge Advocates Association, the American Legion, *CAAFlog*, and *Lawfare*.

two competing models.²¹ One is the crime control/discipline model,²² which is on the left, against the due process/justice model²³ on the right. Years later, I developed this chart to apply these principles to military justice:

Crime Control-Discipline	Due Process--Justice
Efficient and Speedy	Efficiency Not Critical
Factual Guilt	Legal Guilt
Nonadversarial Procedures	Adversarial Procedures
Trust Government to Screen	Limits on Government Screening
Primacy of Public Interest	Primacy of the Individual

Starting at the very top, if you're in a crime control system, if that's your primary motivation, you want to be efficient and speedy. If you're on the due process side, then speed is not nearly as important. If you go to the bottom, the primacy of the public interest is on the bottom left, if you're a crime control model. On the right, it's the primacy of the individual. And what this chart encouraged me to do was to think more clearly about what the real purpose and function of military justice is. And I concluded that it always has been good order and discipline. That's the purpose.

About a week ago, I Googled the question, "What is the primary purpose of a criminal justice system?" The answer was crime control and protection of the citizenry. It wasn't due process for the accused. Now, that's an equal part of it, certainly. What I concluded is that while the primary *purpose* is good order and discipline—although that's not reflected in the MCM preamble—the primary *reason* for military justice is promote justice.²⁴ And so, I think we may have moved from a discipline

²¹ Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964) [hereinafter *Two Models*]; see also Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 209–13 (1983) (providing a critique and reconstruction of Professor Packer's models); HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968). Professor Packer's law review article, and later book, were an attempt to provide some perspective on the Supreme Court decisions under Chief Justice Warren. Professor Arenella's work "reconstructed" Packer's two models in addressing the decisions of the Court under Chief Justice Burger.

²² *Two Models*, *supra* note 22, at 9–13.

²³ *Id.* at 13–23.

²⁴ See David A. Schlueter, *The Military Justice Conundrum*, 215 MIL. L. REV. 1 (2013).

model to a due process model. I'll leave that to you whether that's good or bad.

B. Trend: Command-Centric to Lawyer-Centric

The next trend is command-centric to lawyer-centric, and I think it's one of those trends that slowly but surely crept in. And that's not necessarily a bad thing. When I was on active duty, I had no shame in saying, "I'm a lawyer, and I represent a client who's the commander. I give my best advice to the commander, and then I let the commander decide whether or not to go forward with charges or not." Sometimes it was an ongoing debate. Sometimes I recommended the charge not go forward, because I said, "Sir or ma'am, you're going to lose this case. The facts aren't there, the witnesses aren't there. I think you ought to consider administrative discharge." And because we had a legal center, I could take the commander from my office, as chief of justice, down the hallway to the admin board section, and they would take care of it. We could then get the problem taken care of without actually going to trial.

I don't know that you can identify a specific time in the last seventy-five years where we moved from command-centric to lawyer-centric, but there's no doubt in my mind that the role of the commander has been substantially diminished. And to some extent, now, most of the decisions are not in the commanders' hands, but in the lawyers' hands.

C. Trend: The Troublesome Hangnail—Unlawful Command Influence.

Next is the trend involving unlawful command influence (UCI). I don't live and breathe military justice. It tends to come in spurts. I read the advanced sheets. I try to keep it up. I keep supplements for the various books. But then I read a UCI case, I just have this adverse reaction in my body, and I'm asking: why? Doesn't anybody ever learn the lesson? Why did the sergeant major decide to talk to potential defense witnesses? It seems like we just can't get rid of that hang nail. No matter how hard you try, no matter how many opinions you write as an appellate court, it just seems to linger.

And here's the problem. You talk to the critics and they say, "See, UCI was one of the primary reasons we have the UCMJ." People came back

from World War II and talked about how they'd been railroaded, or they were unjustly convicted by a court-martial, and the public and members of Congress were upset.

Clearly UCI was one of the motivating factors for the UCMJ. So why do we still have it? Why can't we get rid of it? The Court of Military Appeals said that UCI "is the mortal enemy of military justice."²⁵ I couldn't agree more. Here's my idea. I think we need more reversals. I think we need to say if there's even a hint of UCI that you're going to reverse the case. That won't solve the problem, but it will make me feel better. The problem is that people are not going to learn the lesson.

Then, somebody says, "Well, I'll tell you what, then let's take it to a civilian system," or "Let's go with only lawyers." You think lawyers are immune to UCI? If you're a captain and the majors in charge say, "You know, I think we really need to take this to trial," and you respond, "Sir, I don't think we should. I don't think the evidence is there, and we just can't go forward with this case." And then somebody higher up says, "No, take it to trial." I don't have a solution. I'm sorry. But UCI is a trend.

D. Trend: The Growing Complexity of the Military Criminal Justice System.

Another trend I want to address is complexity. About four or five years ago, I ran across a law review article in which someone had used software to establish the complexity of the U.S. Code.²⁶ I was really fascinated by the concept in this article. I also knew the tax code was complicated. Anybody think the tax code is complicated? How many of you think hearsay is complicated? Another commentator has said that the subject of complexity is a complex subject.²⁷ You're not going to get rid of it.²⁸

So, here's my point. Is there a trend for military justice to become more complex? I've certainly seen it. When the new MCM amendments came out in December of 2024, I groaned. Thirty-seven pages of changes

²⁵ *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

²⁶ William Li et al., *Law Is Code: A Software Engineering Approach to Analyzing the United States Code*, 10 J. BUS. & TECH. L. 297 (2015).

²⁷ R. George Wright, *The Illusion of Simplicity: An Explanation of Why the Law Can't Just Be Less Complex*, 27 FLA. ST. U. L. REV. 715, 718 (2000).

²⁸ *Id.*

to the manual. If I were only interested in this in passing, I would say, "Thirty-seven pages, okay, I don't care." But my job is to take those changes and then put them into some written form that would help active-duty judge advocates practice law better. And for some of these amendments, I scratched my head. There's no drafter's analysis accompanying it, and I'm looking to see what has actually been changed. In some cases, we're glad to have changes. But in some of those changes, there are potential traps for the unwary, due to increased complexity.

Another example: For seventeen years, I was the reporter for the Federal Rules of Criminal Procedure Advisory Committee. I wrote the agendas, and I drafted proposed amendments to the Federal Rules of Criminal Procedure. That committee was composed of distinguished judges, defense counsel, and representatives from the Department of Justice, who were all appointed by the Chief Justice. Sometime in 1988, there was a proposal to change a rule. There was discussion in a smoke-filled room, and someone said, "I move to table it." "Second." "It's tabled." I dutifully took my yellow pad, and I wrote down, "Tabled."

Five months later, getting ready to go to our next meeting, I sent the chair of the committee a copy of the agenda, which included the tabled item. He told me, "Dave, you don't understand. When we table an item, it's dead." The reason proposals were tabled is that the committee didn't see a real need for the change. Someone thought a rule should be changed, and the conversation would go something like this: "Has anybody seen this in their courtroom?" "Nope." These were judges with twenty to thirty years' experience. They were careful about adding any changes to the Federal Rules that would result in further complexity.

Complexity can arise in several ways. One is ambiguity, another is in sheer number, and the other is the inner relationship between the rules. For me, character evidence is more complex than hearsay. I asked my students the other day, which is more complex: hearsay or character evidence? Very few of them said character evidence. During the break, one of the students came up and said, "Professor, you don't understand. We have outlined character evidence. We have figured it out. You showed us how to 'keep it simple, stupid,' but we're still learning hearsay."

Another example is in sentencing. This is one area where I disagree with my colleagues and friends who, over the years, promoted sentencing parameters. I thought it was a mistake to adopt them. I knew enough from the Federal Sentencing Guidelines that this was creating traps for the unwary. You have to be really careful with your math. You need to get out

your calculator. You need to compare your chart. You need somebody to look over your work and make sure that you haven't made a mistake in where you draw that line. I'm not suggesting that it's bad. I'm just recognizing that it creates more complexity.

The other area of complexity is the creation of the Office of Special Trial Counsel. In a recent report by the Military Justice Review Panel, they commented that the new system, which was intended to create transparency, had actually not done that, but that it had created problems of communication and efficiency.²⁹ While I have proposed reforms, I've also been opposed to reforms, and one of them I was opposed to was a special track, a bifurcated system of military justice.

Let me explain a little bit why. How many of you have ever heard of the service-connection requirement? It's the requirement that before you can court-martial the Service member, you have to show subject matter jurisdiction. You have to show that what they did was service-connected. That's the 1969 decision by the U.S. Supreme Court.³⁰

I was on active duty when we struggled with dealing with service connection. I know because I had a case reversed at Fort Belvoir. We tried a young man at a general court-martial for using marijuana at a bar, just thirty feet off post. He was convicted, and the Army Court of Military Review, as it was known at that time, reversed and said there was an insufficient service connection. There was no showing that he bought the marijuana from another Service member. There was no showing that it impacted his duties. In effect, that was an early version of what we have now.

In other words, if you didn't have service connections, the commander's hands were tied. It meant you had to go to the local prosecutor, and you think the local prosecutor's going to want to try a simple marijuana case? No. Which means that you had Service members who were violating the law, but they were getting out of jail free. We had that system that was somewhat bifurcated, and I anticipated that we might run into the same problem with the Office of Special Trial Counsel. Now I wish them the best. I understand one of the problems that you're going to run into is that everything slows down because you have all that extra communication, and then commanders are frustrated that they're not

²⁹ THE MIL. JUST. REV. PANEL, COMPREHENSIVE REVIEW AND ASSESSMENT OF THE UNIFORM CODE OF MILITARY JUSTICE 1-2 (2024).

³⁰ O'Callahan v. Parker, 395 U.S. 258 (1969).

getting efficient justice. This is what I mean when I talk about it being a complex subject.

E. Trend: The Search for Respect

The final topic I want to talk about is the search for respect. How many of you believe that you're practicing law? For years, my colleagues and I were asked to speak at the Homer Ferguson Conference at Georgetown Law School in Washington, D.C., every May on the Military Rules of Evidence. During one such conference, one of those colleagues and I were in a classroom waiting to go on stage, going over our notes, and I asked him, "Are we practicing law?" He asked me what I meant, and I clarified that there were a lot of people out there in the civilian community who don't see us as practicing law. They see military justice as something foreign or as the stuff they did back in the Civil War. He hit me back with, "I don't know whether you're practicing law or not, but I am." And I agree. I would say, yes, we are practicing law. It's a different type of law, but that doesn't mean it's a lesser quality of law.

When I came on active duty in the '70s and worked at the Government Appellate Division at the NASA building in Falls Church, Virginia, we didn't wear uniforms. I had to go to the PX and buy some more polyester sport coats and white shoes. Why? Because there was a concern about a military presence.

There has always been a search for respect. I saw it when I went into academia. In the 1980's someone had written a law review article about the process of law schools hiring faculty. The author noted that if a retired judge advocate is looking for a teaching job, they're looking for a place to hang up their spurs and just take the retirement pay and not do much.³¹ And I thought that was insulting. I went into academia with the full idea of writing and teaching. I thank God that he has given me those two gifts. I wasn't going to retire in place.

In 1991, when I addressed the audience in this room for the Twentieth Hodson Lecture, I talked about the military justice system's search for respect. At that time, they were changing the court's names, from the Army Court of Military Review to the Army Court of Criminal Appeals, and changing the name from the Court of Military Appeals to the U.S. Court

³¹ Jon W. Bruce & Michael I. Swygert, *The Law Faculty Hiring Process*, 18 HOUS. L. REV. 215, 236 (1981).

of Appeals for the Armed Forces.³² Why? Why change the name? To civilianize it, to make it look more legitimate. I am privileged to have worked in the military justice system. And yes, working in military justice is practicing law.

V. Conclusion

When I was a young captain, Major General Lawrence Williams, who was the Assistant Judge Advocate General to General Prugh, had a saying. He said, “Just cut the wood put in front of you.” He was referring to people who were constantly looking down the road from a career standpoint of hitching their wagon to a rising star. But I always took it as just keep your head down and do the job that’s been assigned to you and do the best job you possibly can. And when you finish your stack of wood, say, “Sir, may I have another? Ma’am, may I have another?” And then you saw that wood put in front of you. That’s how I approached it.

I’ve been blessed. I’ve had some great opportunities. But my suggestion to you is whatever comes your way, whether it’s military justice, cyber security, or any other type of work, just cut the wood put in front of you because you are the future. And perhaps in twenty-five years, one of you will be standing here talking about the good ole’ days, and what it was like to practice law back in 2025.

³² David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990’s—A Legal System Looking for Respect*, 133 MIL L. REV. 1 (1991).

