



MILITARY LAW REVIEW

ARTICLES

IT IS NOT SELF-DEFENSE: DIRECT PARTICIPATION IN HOSTILITIES AUTHORITY AT THE TACTICAL LEVEL

*Colonel Randall Bagwell &
Captain Molly Kovite*

MILITARY JUSTICE INCOMPETENCE OVER COMPETENCY DETERMINATIONS

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OPERATIONALIZING THE INCENTIVE THEORY: MODERNIZING U.S. BUREAUCRACY TO EFFECTIVELY PREDICT AND PREVENT WAR

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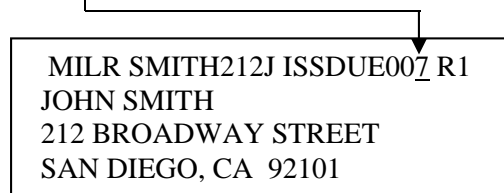
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MILITARY LAW REVIEW

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IT IS NOT SELF-DEFENSE: DIRECT PARTICIPATION IN HOSTILITIES AUTHORITY AT THE TACTICAL LEVEL

COLONEL RANDALL BAGWELL* AND CAPTAIN MOLLY KOVITE**

A U.S. soldier at a forward operating base (FOB) watches a high definition camera feed. On it, he sees a man in civilian clothing digging a hole in the road and emplacing an improvised explosive device (IED). The road is approximately eight kilometers from the FOB and there are no U.S. or coalition soldiers nearby. The soldier notifies his commander, who calls for an attack helicopter. By the time the helicopter arrives, the man has finished emplacing the IED, has mounted his motorcycle, and has traveled three kilometers from the IED site. His actions and movements have been tracked the entire time on camera. The helicopter pilot informs the commander that although there are no collateral damage concerns in the area, the man bears no visible weapons and does not appear to be doing anything threatening. The commander clears the pilot to engage the man with deadly force. The pilot, unsure if this is legal, asks the commander to state the engagement authority on the recorded audio. The commander hesitates.¹

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In this scenario, the pilot and commander identify that someone is taking part in hostilities, but are unsure of the legal authority to use force against him. Their confusion is the result of a legal framework developed for a different kind of warfare. In the context of conventional warfare, where the uniformed army of one nation fights the uniformed army of another, the Law of Armed Conflict² (LOAC) presumes that civilians can be distinguished from members of an armed force; and are therefore protected even during combat.³ The recent increase in insurgent, asymmetrical and hybrid forms of warfare has challenged this premise.⁴ As Lieutenant General H.R. McMaster succinctly put it, “There are two ways to fight the U.S. military—asymmetrically and stupid.”⁵ While

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¹ This is a fictional scenario drafted for this article, but represents a situation commonly encountered in insurgent warfare.

² INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CTR. & SCH., U.S. ARMY, JA422, OPERATIONAL LAW HANDBOOK 83 (2015) [hereinafter OPLAW HANDBOOK] The term “Law of Armed Conflict” is synonymous with the terms International Humanitarian Law and Law of War.

³ INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 4 (Niles Melzer ed., 2009) [hereinafter ICRC IG] (“Its origins, at least in terms of treaty rules, lie at a time when civilian populations were largely spared from the direct effects of hostilities and actual fighting was carried out only by combatants.”).

⁴ Although there are distinct differences in these types of warfare, each features fighters engaging in combat dressed in civilian clothing. Insurgent, asymmetrical, and hybrid warfare are collectively referred to as insurgent warfare for this paper. See, e.g., John R. Davis, *Defeating Future Hybrid Threats*, MIL. REV. (2013).

⁵ Jeff Schogol, ‘American War Generals’ A Sobering Reflection on U.S. Failures in Iraq, MIL. TIMES (Sep. 11, 2014), <http://www.militarytimes.com/story/entertainment/201409/11>

defeating the enemy's forces remains the objective of modern warfare, achieving that objective becomes more difficult when fighters engage in hostilities dressed as civilians.⁶ Complicating matters further, a vital component of success in insurgent warfare is gaining the support of the civilian population.⁷ This creates the unenviable situation where working closely with local populations has gained importance at the same time that distinguishing civilians from enemy forces has become increasingly difficult.

The legal framework the United States currently uses does not make this task any easier. Stated in the unclassified annex to the U.S. Standing Rules of Engagement (SROE), U.S. forces have two bases for using force—self-defense or mission accomplishment.⁸

Self-defense is the broader of the two authorities, applying in both times of peace and in armed conflict.⁹ At the same time, it is also the more restrained regarding the amount of force that may be applied.¹⁰ It is broad because, when acting in self-defense, a soldier may use force against anyone, including a civilian, who presents an imminent threat.¹¹ It is restrictive because once force is authorized, only as much force as is necessary to neutralize the threat may be used.¹² Additionally, force may only be used where it is not possible to mitigate the threat by other means.¹³

Though mission accomplishment sounds broad, under current U.S. policy the reality is that it is primarily limited to using force against

/american-war-generals-a-sobering-reflection-on-us-failures-iniraq/15467649/ (quoting Lieutenant General H.R. McMaster).

⁶ *St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight*, in D. Schindler & J. Toman, *THE LAWS OF ARMED CONFLICTS* 102 (1988) (“the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy”).

⁷ U.S. DEP'T OF ARMY, *FIELD MANUAL 3-24, INSURGENCIES AND COUNTERING INSURGENCIES* 1–8 (2 June 2014).

⁸ CHAIRMAN, JOINT CHIEFS OF STAFF, *INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCES FOR U.S. FORCES* enclosure A (13 June 2005) [hereinafter SROE]; *see also* OPLAW Handbook, *supra* note 2, at 84.

⁹ U.S. DEP'T OF DEF., *LAW OF WAR MANUAL 41* (June 2015) at 47 [hereinafter LAW OF WAR MANUAL].

¹⁰ *Id.* at 41. Force may be used in self-defense, but only to the extent that it is required to repel the armed attack and to restore the security of the party attacked. *Id.*

¹¹ *Id.*

¹² *Id.*; SROE, *supra* note 8, at A-3.

¹³ LAW OF WAR MANUAL, *supra* note 9, at 41; SROE, *supra* note 8, at A-3.

militaries and organized armed groups that have been declared hostile (referred to as declared hostile force authority).¹⁴ Under the LOAC, members of a hostile armed force are subject to attack based solely on their status as a member of a hostile force.¹⁵ This is true even when they do not present an imminent threat.¹⁶ However, before force may be used, a person's membership in the hostile group must be confirmed.¹⁷ This is most often accomplished by observing the person wearing an enemy uniform or other distinctive markings, or through intelligence verifying the person's membership in the group.¹⁸

Because declared hostile force authority is limited to use against fighters that can be identified as members of a particular group, it is difficult to implement against fighters whose group affiliation is hard to determine, because they engage in hostilities wearing civilian clothing.¹⁹ This results in self-defense being the default use of force authority in many tactical situations. The opening scenario emphasizes the limitations present when only self-defense or declared hostile force authority are available. Common sense tells the pilot and commander in the scenario to prevent a hard-to-identify enemy from escaping. However, under declared hostile force authority they cannot attack the person, because they do not have enough information about him to determine if he is part of a declared hostile force.²⁰ At the same time, the limitations applicable to self-defense prevent them from firing on him because he poses no imminent threat.²¹

This result is untenable. It undermines counterinsurgency campaigns and imposes restrictions on soldiers that are not required by the LOAC.²²

¹⁴ SROE, *supra* note 8, at A-2 (“Once a force is declared hostile by appropriate authority, US forces need not observe a hostile act or demonstrated hostile intent before engaging the declared hostile force.”).

¹⁵ *Id.*

¹⁶ SROE, *supra* note 8, at A-2.

¹⁷ *Id.*

¹⁸ See Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 44, June 8, 1977, U.N. Doc. A/32/144, [hereinafter AP I]; LAW OF WAR MANUAL, *supra* note 9, at 218.

¹⁹ See OPLAW HANDBOOK, *supra* note 2, at 83.

²⁰ *Id.*

²¹ See SROE, *supra* note 8, at A-3.

²² See, e.g., Michael Schmitt, *Targeting and International Humanitarian Law in Afghanistan*, 85 INT'L L. STUD. 307, 327 (2007) [hereinafter Schmitt *Targeting and IHL*]; see also LAW OF WAR MANUAL, *supra* note 9, at 229–30.

It leaves commanders and soldiers little option but to distort or ignore the rules of engagement (ROE) and self-defense requirements. This in turn erodes soldiers' respect for the ROE and the law. It paints higher headquarters and their legal advisors as being "echelons above reality" and willing to put soldiers at unnecessary risk. It also perverts the purposes of the LOAC by rewarding enemies who eschew uniforms and embrace unlawful belligerency, thus placing uninvolved civilians at greater risk by forcing soldiers to make difficult and imperfect targeting decisions.

It does not have to be this way. A third basis for use of force exists specifically to address situations such as the IED emplacer—the authority to attack any person who is directly participating in hostilities—referred to as direct participation authority.²³ Civilians who elect to take direct part in hostilities may be attacked for such time as they directly participate in hostilities.²⁴ The authority to attack civilians who take a direct part in hostilities is an exception to the general rule that civilians may not be attacked.²⁵ This authority is recognized in international law by the Geneva Conventions,²⁶ the Additional Protocols to the Geneva Conventions,²⁷ the International Committee of the Red Cross,²⁸ and a long history of customary practice.²⁹ Additionally, it is explicitly recognized by the

²³ See AP I, *supra* note 18; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 13(3), June 8, 1977, U.N. Doc. A/32/144, Annex I [hereinafter AP II]. The rule whereby civilians lose their protection against attack when and for such time as they take a direct part in hostilities is contained in article 51(3) and article 13(3) respectively. *Id.* Although the United States is not a signatory to Additional Protocol I, it does regard the principle on which this portion of the article is based as customary international law, and therefore binding. See also LAW OF WAR MANUAL, *supra* note 9, at 223 n.218 and accompanying text.

²⁴ See AP I, *supra* note 18, art. 51(3); AP II *supra* note 23, art. 13(3); see also LAW OF WAR MANUAL, *supra* note 9, at 220–33.

²⁵ See GC III, *supra* note 18, art. 3; AP I, *supra* note 18, art. 51(3); AP II, *supra* note 23, art. 13(3); LAW OF WAR MANUAL, *supra* note 9, at 222.

²⁶ GC III, *supra* note 18, art. 3.

²⁷ AP I, *supra* note 18, art. 51(3); AP II, *supra* note 23, art. 13(3).

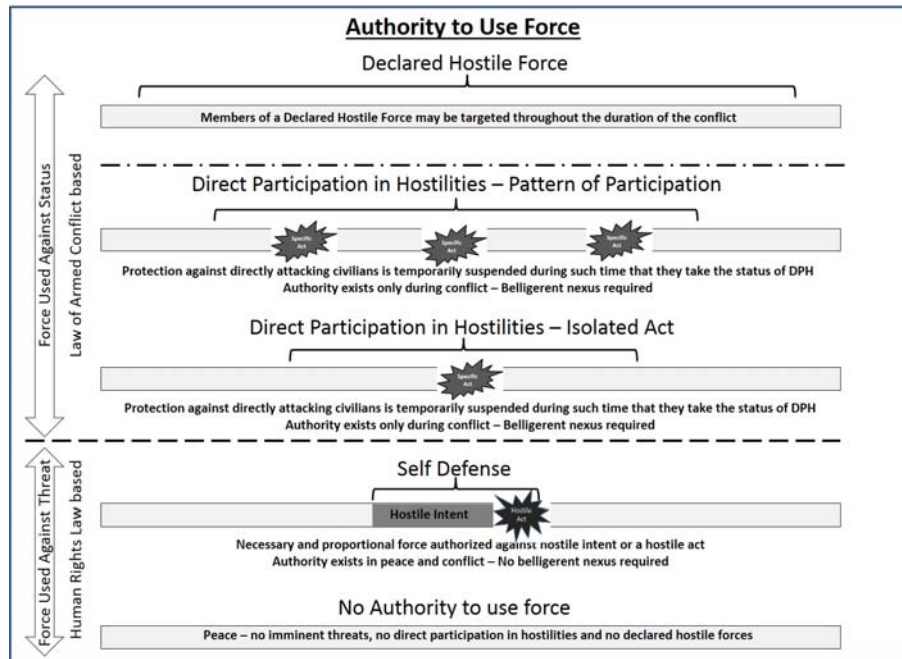
²⁸ *Customary International Humanitarian Law Database*, INT'L COMM. OF THE RED CROSS r.6, https://www.icrc.org/customary-ihl/eng/docs/v1_rul (last visited June 7, 2016) [hereinafter ICRC *Customary IHL*].

²⁹ See Emily Camins, *The Past as Prologue: The Development of the 'Direct Participation' Exception to Civilian Immunity*, 90 INT'L REV. OF THE RED CROSS 853 (2008).

United States in the new U.S. Department of Defense *Law of War Manual*.³⁰

Although direct participation authority is firmly rooted in international law and provides substantial benefits as a bridging authority between self-defense and declared hostile force authority, it is currently ignored in U.S. use of force policy at the tactical level.³¹ It is the application of direct participation authority to these tactical level situations—where individual soldiers and junior leaders encounter non-uniform wearing insurgents on the battlefield—that this paper will address.

The diagram at figure 1 illustrates how the three use of force authorities nest within one another on the battlefield. The chart at figure 2 outlines the characteristics, advantages and limitations of the three authorities.



Figure³²

³⁰ LAW OF WAR MANUAL, *supra* note 9, at 222.

³¹ See generally SROE, *supra* note 8, encl. A (lacking discussion of direct participation in hostilities authority); see also Schmitt *Targeting and IHL*, *supra* note 22, at 314–15.

³² See generally SROE, *supra* note 8, A-2–A-3; LAW OF WAR MANUAL, *supra* note 9, at 224–32 (discussing the three authorities).

Characteristics, Advantages and Limitations*					
<p style="text-align: center;">Self-Defense</p> <ul style="list-style-type: none"> • Human rights law based • Defensive/reactive by nature • Authority to use force is based on countering an imminent threat. • Authority ends when imminent threat no longer exists. • Requires attempts to deescalate, if possible • Requires use of minimum force • Authority ends when hostile act or hostile intent (imminent threat) ends • Cannot pursue and continue to use force unless the person continues to show hostile intent or commit hostile acts. 	<p style="text-align: center;">Mission Accomplishment</p> <table border="0" style="width: 100%;"> <tr> <td style="vertical-align: top; width: 50%;"> <p style="text-align: center;">Direct Participation in Hostilities</p> <ul style="list-style-type: none"> • Authority to use force is based on a person choosing to directly participate in hostilities by committing a measure preparatory to a specific act of direct participation • Authority ends when person redeploys from the site of the specific act of direct participation (ICRC approach) or when he opts out of direct participation status. </td> <td style="vertical-align: top; width: 50%;"> <p style="text-align: center;">Declared Hostile Force</p> <ul style="list-style-type: none"> • Authority to use force is based on a person being a member of an armed group that has been declared hostile. • Authority ends when the person is no longer a member of the group or the group is no longer declared hostile. </td> </tr> <tr> <td colspan="2" style="text-align: center;"> <p>Common to both DPH and DHF</p> <ul style="list-style-type: none"> • Law of Armed Conflict based • Offensive/aggressive by nature • Does not require the person to present an imminent threat • Does not require attempts to deescalate • Does not require using minimum force • Allows for pursuit even if no continuing threat presented </td> </tr> </table>	<p style="text-align: center;">Direct Participation in Hostilities</p> <ul style="list-style-type: none"> • Authority to use force is based on a person choosing to directly participate in hostilities by committing a measure preparatory to a specific act of direct participation • Authority ends when person redeploys from the site of the specific act of direct participation (ICRC approach) or when he opts out of direct participation status. 	<p style="text-align: center;">Declared Hostile Force</p> <ul style="list-style-type: none"> • Authority to use force is based on a person being a member of an armed group that has been declared hostile. • Authority ends when the person is no longer a member of the group or the group is no longer declared hostile. 	<p>Common to both DPH and DHF</p> <ul style="list-style-type: none"> • Law of Armed Conflict based • Offensive/aggressive by nature • Does not require the person to present an imminent threat • Does not require attempts to deescalate • Does not require using minimum force • Allows for pursuit even if no continuing threat presented 	
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*Based on the U.S. approach unless otherwise noted.

Figure 2³³

I. Why Self-Defense and Declared Hostile Force Authorities are Insufficient

The difficulties in applying the LOAC principle of distinction when engaging non-uniformed fighters are not new.³⁴ United States forces have fought individuals wearing civilian clothing in major conflicts throughout the nation's history.³⁵ However, the law and customs surrounding those engagements have changed over the course of the twentieth and twenty-first centuries, as has the prevalence of insurgent warfare.³⁶ While much

³³ See *supra* note 32 and accompanying sources.

³⁴ See Camins, *supra* note 29.

³⁵ *Id.* (quoting FRANCIS LIEBER, GUERRILLA PARTIES CONSIDERED WITH REFERENCE TO THE LAWS AND USAGES OF WAR, (D. Van Nostrand 1862) in LIEBER'S CODE AND THE LAW OF WAR 31, 42 (Richard Shelly Hartigan, Precedent 1983). The Civil War had its fair share of non-uniformed fighters. *Id.* Lieber even addressed how such fighters should be treated stating that if "they resort to 'occasional fighting and the occasional assuming of peaceful habits and to brigandage,' they should not be protected by the laws of war." *Id.* at 862. Vietnam and Korea are also examples of conflicts where the participation of non-uniformed fighters was prevalent. See BRUCE CUMMINGS, THE KOREAN WAR 181 (2010); see also DAVID L. ANDERSON, THE COLUMBIA HISTORY OF THE VIETNAM WAR 44 (2011).

³⁶ See Trevor A. Keck, *Not All Civilians are Created Equal: The Principle of Distinction, The Question of Direct Participation in Hostilities and Evolving Restraints on the Use of Force in Warfare*, 211 MIL. L. REV. 115, 124–25 (2012).

of the treaty law emphasizing the importance of distinction was developed in the wake of World War II, the prevalence of conventional international armed conflict declined significantly in its aftermath.³⁷ The role of civilians in armed conflict shifted dramatically as a result.³⁸ In the recent conflicts in Afghanistan and Iraq, civilian clothing has been the primary dress for enemy fighters.³⁹ This change in enemy tactics, coupled with the need to maintain the support of civilian populations, pushed commanders and their legal advisors to place a priority on identifying fighters, and on developing rules for the use of force that allow targeting of these fighters, while also protecting civilians.

In our most recent conflicts, U.S. commanders recognized that attempting to engage these non-uniformed fighters as part of a declared hostile force was of little benefit, because doing so not only required the fighters to be recognized as taking part in hostilities, it also required that they be linked to membership in a particular declared hostile group.⁴⁰ Without enemy adherence to the practice of wearing uniforms, the only way to distinguish fighters from innocent civilians was through observing their belligerent actions, or through detailed and time-consuming intelligence collection. Authorizing the use of force against someone based on their actions seemed more in line with self-defense than declared hostile force authority, so commanders and their legal advisors gravitated to self-defense when citing the authority for these engagements.⁴¹ However, time and experience would prove that neither declared hostile force authority nor self-defense provided adequate authority when fighting a counterinsurgency.⁴²

³⁷ See ICRC IG, *supra* note 3, at 4.

³⁸ See Andreas Wegner & Simon J.A. Mason, *The Civilianization of Armed Conflict: Trends and Implications*, 90 INT'L REV. OF THE RED CROSS 835, 837 (Dec. 2008) (linking the growing involvement of civilians in armed conflict to the decline of inter-state wars and the rise of intra-state wars).

³⁹ See e.g., Michael Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, 62 A.F. L. REV. 1, 15 (2008); see also Schmitt *Targeting and IHL*, *supra* note 22, at 313.

⁴⁰ CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME I, MAJOR COMBAT OPERATIONS (11 SEPT. 2001 TO 1 MAY 2003) 101 (2004) [hereinafter LESSONS LEARNED VOL. 1].

⁴¹ See, e.g., *id.* at 100–02. See, e.g., CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOL. II, FULL SPECTRUM OPERATIONS 131 (2 MAY 2003–30 JUNE 2004) (2005).

⁴² See CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, FORGED IN THE FIRE: LEGAL LESSONS LEARNED FROM 1994–2008, at 144–45; see also Schmitt *Targeting and IHL*, *supra* note 22, at 326.

A. The Inadequacy of Declared Hostile Force Authority in Insurgent Warfare

Declared hostile force authority is the broadest of any of the use of force authorities regarding duration of the authority to use force, and concerning how much force may be used.⁴³ At the same time, it is the most constrained regarding against whom force may be used.⁴⁴ Under this authority, before a person can be attacked he must first be identified as a member of a declared hostile force.⁴⁵ Once membership is verified, he may be attacked regardless of his immediate actions or his proximity to the fight, for the duration of his membership.⁴⁶ For example, under declared hostile force authority it is legal to attack a member of the hostile group even while he is sleeping.⁴⁷

While it was clear in Afghanistan during Operation Enduring Freedom (OEF) that al Qaeda and Taliban fighters were members of hostile armed groups, it was difficult to validate an individual's membership in these groups before targeting him.⁴⁸ It is also likely that some of the individuals in Afghanistan who, for example, manufactured and emplaced IEDs, were not formally affiliated with either al Qaeda or the Taliban, but had separate anti-coalition agendas.⁴⁹ Because of the difficulties in linking fighters to

⁴³ See, e.g., OPLAW HANDBOOK, *supra* note 2, at 83–84 (asserting that once a force is declared hostile, its members may be attacked at any time with lethal force).

⁴⁴ *Id.* Use of force under this authority is limited to individuals who are identified as members of the declared hostile force. *Id.* Unlike self-defense and direct participation authority, declared hostile force authority does not authorize the use of force against fighters whose group affiliation cannot be determined. *Id.*

⁴⁵ See *id.* at 83 (“Once a force or individual is identified as a [Declared Hostile Force], the force or individual may be engaged.”).

⁴⁶ See *id.* at 16 (“Combatants are lawful targets unless *hors de combat*, that is, out of combat status—captured, wounded, sick or shipwrecked and no longer engaged in hostilities.”).

⁴⁷ See LAW OF WAR MANUAL, *supra* note 9, at 216–17 (“For example, combatants who are standing in a mess line, engaging in recreational activities, or sleeping remain the lawful object of attack, provided they are not placed *hors de combat*.”).

⁴⁸ See Schmitt *Targeting and IHL*, *supra* note 22, at 313.

⁴⁹ See LESSONS LEARNED VOL. 1, *supra* note 40, at 101 (“The Taliban was an amorphously defined group comprised of the Taliban regime itself as well as their armed units, various members of which were not committed to any cause and willingly switched allegiances.”).

a particular hostile group, U.S. ROE drafters initially opted out of a declared hostile force rubric entirely.⁵⁰

As the Center for Law and Military Operations (CLAMO) *Legal Lessons Learned* manual summarizes:

Political and military concerns counseled against declaring forces hostile throughout Afghanistan on a number of counts, according to [Central Command]. First, it was difficult to determine who exactly was a hostile force in Afghanistan. The Taliban was an amorphously defined group comprised of the Taliban regime itself as well as their armed units, various members of which were not committed to any cause and willingly switched allegiances. Al Qaeda members similarly were difficult to define.⁵¹

Operation Iraqi Freedom (OIF) started out differently. In the opening days, the United States was engaged in an international armed conflict against a conventional military.⁵² Rules of Engagement drafters relied on both declared hostile force authority and self-defense for using force against the Iraqi military.⁵³ This worked well in the early weeks of the war against uniformed Iraqi forces, however, as the conflict transitioned into an insurgency, the shortcomings of this approach became apparent as recognition of enemy fighters became significantly more difficult.⁵⁴

Although some insurgent groups retained their designations as hostile forces, this was of minimal value when they could no longer be recognized as such by uniforms or other distinctive markings. Instead, “forces in effect displayed evidence of their ‘hostile’ status by committing hostile acts or displaying hostile intent.”⁵⁵ This blending of declared hostile force

⁵⁰ *Id.*; Schmitt *Targeting and IHL*, *supra* note 22, at 315 (“When the conflict began, the United States and its coalition partners declared no enemy forces hostile, to include the Taliban and Al Qaeda.”).

⁵¹ LESSONS LEARNED VOL. 1, *supra* note 40, at 101.

⁵² See Schmitt *Targeting and IHL*, *supra* note 22, at 315 (“During Operation Iraqi Freedom, by contrast, the Iraqi military was declared hostile from the outset of hostilities.”).

⁵³ *Id.*

⁵⁴ See LESSONS LEARNED VOL. 1, *supra* note 40, at 97–98.

⁵⁵ *Id.* at 107.

language (e.g. hostile status) with self-defense language (e.g. hostile acts and hostile intent) contributed to confusion as to which authority the United States was relying upon. In this complex environment, where U.S. ROE policy did not adequately address the situations commonly facing ground troops, commanders and their legal advisors explored other options.⁵⁶ This non-doctrinal and untrained use of force guidance was often documented in execute orders, fragmentary orders, fire support control measures, special instructions, and the collateral damage estimation policy methodology.⁵⁷ As one commentator noted, “the net result was a dense and often confusing normative environment, one in which [international humanitarian law] played a minor role relative to policy and operational considerations.”⁵⁸ This already confusing approach was further burdened by differing interpretation, uncertainty, and shifting discretion, resulting in an ineffective and dangerous way to conduct combat operations.

While declared hostile force authority is still used in insurgent warfare, the challenge of identifying enemy fighters by their group affiliations continues to hamstring declared hostile force designation as a useful counterinsurgency authority.⁵⁹ Frustrated by the demands of declared hostile force authority, commanders and their legal advisors turned to their other alternative, self-defense, as their primary warfighting authority.⁶⁰

B. The Shortcomings and Stretching of Self-Defense

On its surface, self-defense appears to be an adequate authority for insurgent warfare. It allows force to be used when anyone—soldier, insurgent or civilian—commits a hostile act or demonstrates hostile intent.⁶¹ Because most insurgent actions will also qualify as hostile acts or demonstrations of hostile intent, U.S. soldiers are authorized to use force against these fighters while they are engaged in their hostile act or

⁵⁶ See Schmitt *Targeting and IHL*, *supra* note 22, at 315 (discussing the development of the “Likely and Identifiable Threat” authority).

⁵⁷ LESSONS LEARNED VOL. 1, *supra* note 40, at 80.

⁵⁸ Schmitt *Targeting and IHL*, *supra* note 22, at 314.

⁵⁹ Keck, *supra* note 36, at 126–27.

⁶⁰ See e.g., Schmitt *Targeting and IHL*, *supra* note 22, at 315.

⁶¹ SROE, *supra* note 8, at A-3.

are demonstrating hostile intent.⁶² However, because self-defense is focused on eliminating a threat rather than eliminating a person, only the minimum amount of force necessary to neutralize the threat may be used.⁶³ Consider the following hypothetical scenario in which self-defense is appropriate:

A U.S. armor unit is involved in combat operations overseas. While returning from a mounted patrol, a tracked vehicle swerves to avoid debris on the road and accidentally crushes a young boy who was waiting on the shoulder for the column to pass. When the convoy stops to render aid, a small group of local men gathers to see what happened. One man pushes through the crowd to see the boy, who he recognizes as his son. The soldiers recognize the man as a local farmer who has always been friendly toward U.S. and coalition forces. Inconsolable, the man runs back to his house, and moments later reappears running toward the soldiers with what appears to be an AK-47.

This is the kind of situation for which self-defense was designed, and it illustrates its benefits and constraints. The father has in no way demonstrated membership in an organization that wishes to target U.S. or coalition soldiers. Though his current actions are threatening and potentially violent, they are not the belligerent acts of a fighter. If the soldiers use force against him in self-defense, they must follow the requirements that self-defense imposes.⁶⁴ These requirements include: (1) determining if the man presents an imminent threat, (2) warning the man (if the situation allows), and (3) affording him the opportunity to withdraw (if possible).⁶⁵ They are further required to use only the minimum force necessary to address the threat presented, they must cease using force once the threat has also ceased, and then may pursue and use force against the man only if he continues to present an imminent threat.⁶⁶ The goal in this situation is to protect the soldiers while also deescalating the situation to provide time for the man to calm down without anyone being hurt.

⁶² See LAW OF WAR MANUAL, *supra* note 9, at 229–30.

⁶³ See SROE, *supra* note 8, at A-3.

⁶⁴ *Id.* at A-3–A-4.

⁶⁵ *Id.*

⁶⁶ *Id.*

While this is a laudable goal in many situations, strict adherence to the self-defense requirements make fighting an insurgency exponentially more difficult. Forced to fight offensive operations using self-defense, U.S. forces are left with little recourse but to stretch some aspects of self-defense, while modifying or ignoring others.

The most constraining requirement, and perhaps the most systematically abused, is that U.S. soldiers may exercise self-defense only when a threat is *imminent*.⁶⁷ United States policy allows force to be used in self-defense in response to hostile acts or demonstrations of hostile intent.⁶⁸ While recognizing a hostile act is usually easy, identifying a demonstration of hostile intent is more difficult. The SROE define hostile intent as the threat of an *imminent* use of force against the United States, U.S. forces, or other designated persons or property.⁶⁹ While the SROE state what imminent is not—“does not necessarily mean immediate or instantaneous”—they do not define what it is.⁷⁰ In contrast with the U.S. definition, most nations use a version of imminence defined in the *Caroline Incident* as, “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”⁷¹ This definition forms the basis of the North Atlantic Treaty Organization (NATO) self-defense policy,

⁶⁷ *Id.* at A-4 (emphasis added)

⁶⁸ *Id.* at A-3.

⁶⁹ *Id.* at A-2–A-3 (emphasis added).

⁷⁰ *Id.* at A-3.

⁷¹ *Letter from Secretary of State Daniel Webster to Lord Ashburton* (Aug. 6, 1842) in JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW, VOL. II 412 (1906). See also Jordan J. Paust, *Use of Armed Force against Terrorists in Afghanistan, Iraq, and beyond*, 35 CORNELL INT’L L. J. 535 n.6 (2002).

Some have argued that the exchange of views concerning the *Caroline Incident* addressed and justified preemptive self-defense (before an armed attack occurs) but the incident involved a process of continual attacks on the government of Canada by insurgents operating in Canada and the United States. Lord Palmerston claimed that the particular act of destroying the *Caroline* was an act of self-defense. . . . The United States admitted that self-defense might justify the use of force, but only in “cases in which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”

Id. (quoting MOORE, DIGEST RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 905 RN 3 (3d ed. 1987)).

which states that “imminent means that the need to defend is manifest, instant, and overwhelming.”⁷²

In applying the definition of imminent from both the *Caroline Incident* and NATO self-defense policy, it is clear that the IED emplacer in the opening scenario may be a threat sometime in the future, but he is not an imminent threat. Many commanders, however, feel compelled to prevent this fighter from going free and possibly emplacing more IEDs in the future. The U.S. solution in such situations has often been to stretch the definition of *imminent* to justify using force.⁷³ Unfortunately, stretching the definition of *imminent* blurred the line between offensive use of force and use of force in self-defense, resulting in confusion on the requirements of self-defense and causing U.S. policy to diverge from those of its coalition partners.

Eric Husby highlighted this blurring of lines in his 2012 article, *A Balancing Act: In Pursuit of Proportionality in Self-Defense for On-Scene Commanders*, where he stated, “in recent conflicts, self-defense . . . involving U.S. forces have often been quasi-offensive in nature.”⁷⁴ Later in the article, he uses the phrase “a ‘true’ self-defense scenario” to distinguish a situation where threat of harm to U.S. forces is actually imminent.⁷⁵ The discussion of “quasi-offensive self-defense” and “true self-defense” highlights the confusion among military lawyers concerning self-defense and direct participation authority that is caused by the United States’ overreaching definition of imminent.⁷⁶ Husby concludes in his article that what U.S. forces are currently doing in Afghanistan is more offensive than (self) defensive; therefore, the LOAC principles should apply in these situations.⁷⁷

While Husby is correct in his conclusion that the principles of the LOAC should apply in the situations he described, his rationale in reaching

⁷² North Atlantic Treaty Organization (NATO), MC 362/1, NATO Rules of Engagement (2003) [hereinafter MC 362/1].

⁷³ This statement is derived from the author’s (Bagwell) personal experience as the senior NATO legal advisor with Regional Command-South, Kandahar, Afghanistan, August 2012–July 2013 [hereinafter Bagwell Afghanistan Experience].

⁷⁴ Eric Husby, *A Balancing Act: In Pursuit of Proportionality in Self-Defense for On-Scene Commanders*, ARMY LAW., May 2012, 6 at 11.

⁷⁵ *Id.* at 13.

⁷⁶ *Id.* at 11–12.

⁷⁷ *Id.*

that conclusion is flawed. He fails to recognize that what U.S. forces were doing in these “quasi-offensive” self-defense situations was not self-defense, but rather engaging individuals who take direct part in hostilities. Because self-defense is based in human rights law⁷⁸ and exists in times of peace as well as during armed conflict, the LOAC principles do not apply to self-defense.⁷⁹ The LOAC principles do apply, however, when using direct participation authority, an authority based on the LOAC, and that exists only during armed conflict.⁸⁰

While the vast majority of the international community defines imminent to mean, “manifest, instant, and overwhelming,” the United States stands alone in its expansive interpretation.⁸¹ These conflicting approaches have practical and dangerous impacts in a coalition fight. For example, if U.S. forces call for fire support from other NATO forces and cite self-defense as the justification, the response may be delayed while the supporting command makes an independent determination of whether

⁷⁸ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948):

Article 3: Everyone has the right to life, liberty and security of person Article 12: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Id. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ.T.S. No. 5; 213 U.N.T.S. 221 (“Article 2(2): Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence.”); see David B. Kopel et al., *The Human Right of Self-Defense*, 22 B.Y.U. J. PUB.L. 43 (2007) (providing a detailed discussion of the historical legal precedence of self-defense as a basic human right).

⁷⁹ LAW OF WAR MANUAL, *supra* note 9, at 230 (“[T]he use of force in response to hostile acts and demonstrations of hostile intent applies outside hostilities, but taking a direct part in hostilities is limited to acts that occur during hostilities.”); Michael Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT’L SECURITY J. 6, 37 (2010) [hereinafter Schmitt *Critical Analysis*] (“To the extent it is based in law, self-defense applies to civilians who are not directly participating in hostilities rather than those who are participating (as they may be attacked without any defensive purpose).”).

⁸⁰ LAW OF WAR MANUAL, *supra* note 9, at 230; ICRC IG, *supra* note 3, at 41 (“[T]he concept of direct participation in hostilities cannot refer to conduct occurring outside situations of armed conflict . . .”).

⁸¹ See Winston S. Williams, Jr., *Multinational Rules of Engagement: Caveats and Friction*, ARMY LAW., Jan. 2013, 24 at 25–26.

the threat is truly imminent based on their own national self-defense standard. This delay exposes soldiers on the ground to increased danger, makes U.S. commanders wary of relying on coalition partners, and ultimately weakens our alliances.⁸² While using direct participation authority will not solve the problem created by differing definitions of imminent in actual self-defense situations, it will eliminate this problem in situations where direct participation authority is appropriate.

The requirement of imminence is not the only element of self-defense that makes it unsuitable in offensive operations. The deescalation requirement in self-defense is also problematic. Under U.S. self-defense policy, when time and circumstances permit, soldiers are required to warn individuals before using force to allow them the opportunity to cease their threatening actions or withdraw.⁸³ In situations such as the distraught father scenario, this requirement is reasonable, but in the IED emplacer scenario, it is not. In the IED scenario, it is difficult to argue that time and circumstances do not allow the commander an opportunity to warn the IED emplacer and allow him to stop his actions or withdraw. For example, if the attack helicopter arrived while the man was still emplacing the IED, the pilot could fly low over the site or hover nearby to make his presence known. This warning would likely cause the emplacer to stop his actions and withdraw without a shot being fired. While this is the desired and intended outcome under self-defense, it is a completely unacceptable outcome in a counterinsurgency, where the emplacer is likely to return and strike again.

The requirement to use force proportional to the threat (often expressed as “minimum force”) also makes self-defense a poor tool to fight an insurgency.⁸⁴ Under U.S. policy, proportionality for self-defense means that the force used should not exceed the nature, duration, and scope required to respond decisively to the hostile act or the demonstration of

⁸² Bagwell Afghanistan Experience, *supra* note 72 (observing that this situation was so pervasive in Afghanistan that the unified NATO command issued specific Rules of Engagement (ROE) in an effort align U.S. forces and coalition partners on this critical issue).

⁸³ SROE, *supra* note 8, at A-4.

⁸⁴ The phrase “minimum force” has been used in U.S. ROE cards for several operations. See OPLAW HANDBOOK, *supra* note 2, at 105–10 (2015) (containing ROE card examples with this language). The concept of using minimum force is often expressed as the “shout, show, shove, shoot” construct. *Id.*

hostile intent.⁸⁵ Traditional escalation of force procedures, such as “shout, show, shove, shoot,” have long been used as a tool in self-defense to help regulate the amount of force applied.⁸⁶ With traditional escalation of force, the idea is “to increase the magnitude of force applied to an identified threat until the threat is deterred or, if necessary, eliminated.”⁸⁷

While a useful tool in self-defense, escalation of force is both unhelpful and unnecessary in situations where civilians directly participate in hostilities, and thus immediate offensive attack is both warranted and permitted by the LOAC.⁸⁸ Traditional escalation of force was so unhelpful to the counterinsurgency fight that in 2005 in Iraq the term “escalation of force” morphed from a term describing a tool for applying minimum force, into a term used to describe a tool for distinguishing innocent civilians from civilians participating in hostilities.⁸⁹ The 2008 article *The Threat Assessment Process (TAP): The Evolution of Escalation of Force* discusses this new use of escalation of force.⁹⁰ It asserts that “the goal in this new ‘threat assessment EOF’ is to force the insurgent to self-identify while keeping innocent civilians from being mistaken for threats.”⁹¹ “In other words, in counterinsurgency escalation of force is not being used for its traditional purpose of limiting the amount of force used against an identified threat, but rather for the far more difficult task of threat identification.”⁹² These statements regarding the new use of escalation of force are correct in part, but miss the mark by couching what was occurring in terms of identifying a threat. A more correct statement is that escalation of force now describes a process designed to force the insurgent to self-identify while keeping innocent civilians from being mistaken for *individuals directly participating in hostilities*.⁹³

⁸⁵ SROE, *supra* note 8, at A-5.

⁸⁶ See CTR. FOR ARMY LESSONS LEARNED, PUB. 07-21, ESCALATION OF FORCE HANDBOOK 1 (July 2007).

⁸⁷ Randall Bagwell, *The Threat Assessment Process (TAP): The Evolution of Escalation of Force*, ARMY LAW., Apr. 2008, at 5 [hereinafter Bagwell *TAP*].

⁸⁸ See AP I, *supra* note 18, art. 51(3); AP II, *supra* note 23, art. 13(3).; LAW OF WAR MANUAL, *supra* note 9, at 222.

⁸⁹ Bagwell *TAP*, *supra* note 86, at 5.

⁹⁰ *Id.*

⁹¹ *Id.* at 8.

⁹² *Id.* at 5.

⁹³ The argument that direct participation authority was the underpinning of the new escalation of force (EOF) is bolstered by language in the 2007 Multinational Corps-Iraq, Rules of Engagement Card (2007) [hereinafter MNC-I ROE Card]; see also David Bolgiano et al, *The Rules of Engagement*, FRONTLINE, <http://www.pbs.org/wgbh/pages/>

The self-defense constraint on pursuit is also problematic. Pursuit of, and continued use of force against a person or group that commits a hostile act or demonstrates hostile intent is allowable under U.S. self-defense policy, but only for so long as they *continue* to commit hostile acts or demonstrate hostile intent.⁹⁴ In self-defense situations, this constraint makes sense because the goal of self-defense is to have the threatening individual cease his threatening behavior and withdraw.⁹⁵ With this goal in mind, pursuing a person and using force against him if he is not continuing to present a threat makes no sense. Consider the opening scenario where the IED emplacer has finished his work and is now riding away on his motorcycle. Under self-defense, pursuit of the man with the purpose of using force against him is not allowed because he has completed his hostile act and is not continuing to commit a hostile act or demonstrating hostile intent.⁹⁶

Clearly, the requirements and limitations on self-defense are well suited for situations where the goal is to de-escalate a situation with minimum harm. However, these same requirements and limitations make self-defense extremely ill-suited as the primary authority for fighting insurgents. Strictly and collectively applied, they will likely result in allowing the insurgent to retreat to his village unharmed, enabling him to return to fight another day. This is a disturbing thought to any combat commander.

C. Neither Happy Nor Medium: A Likely and Identifiable Threat

frontline/haditha/themes/roe.html (last visited June 7, 2016) (linking a facsimile of an ROE card carried in Iraq); *see also* OPLAW HANDBOOK, *supra* note 2, at 110 (“1. You may engage the following individuals based on their conduct: Persons who are committing hostile acts. Persons who are exhibiting hostile intent 2. Escalation of Force (EOF). If time and circumstances permit, use EOF to determine whether hostile act/intent exists.”) (emphasis added).

⁹⁴ SROE, *supra* note 8, at A-4.

⁹⁵ *Id.*

⁹⁶ However, he may be subject to arrest under a law enforcement paradigm. *See generally*, INT’L COMM. OF THE RED CROSS, THE USE OF FORCE IN ARMED CONFLICTS: INTERPLAY BETWEEN THE CONDUCT OF HOSTILITIES AND LAW ENFORCEMENT PARADIGMS (2013), <https://shop.icrc.org/the-use-of-force-in-armed-conflicts-expert-meeting.html>.

In response to the shortcomings of self-defense and declared hostile force authority in the early days of the Afghanistan conflict, ROE drafters created a hybrid ROE solution referred to as “likely and identifiable threat” (LIT).⁹⁷ The LIT ROE stated, “certain enemy forces who posed a likely and identifiable threat to friendly forces could be considered hostile and engaged and destroyed.”⁹⁸ Unfortunately, the LIT ROE attempted to incorporate ROE standards that military personnel had not been trained on,⁹⁹ and did not have sound grounding in international law.¹⁰⁰ One handbook for deployed judge advocates at the time recommended avoiding the term entirely, stating, “LIT does not have a stated definition, resulting in greater ambiguity and greater risk that civilians would be targeted.”¹⁰¹

Not surprisingly, LIT did in fact immediately lead to significant confusion.¹⁰² One deployed judge advocate noted “all the subordinate

⁹⁷ Schmitt *Targeting and IHL*, *supra* note 22, at 315.

⁹⁸ LESSONS LEARNED VOL 1, *supra* note 40, at 100.

⁹⁹ *Id.* at 97, n. 61 (quoting an officer referring to the “likely and identifiable” (LIT) standard, “It cannot be stated too strongly that one of the greatest challenges early-deploying Judge Advocates had with the [Operation Enduring Freedom (OEF) ROE] was that it does not resemble any ROE with which we had previously trained.”); *see also id.* at 102 (“That said, even [Central Command] attorneys concede that injecting new, perhaps overly legalistic ROE terminology into an operation without sufficient time for operators and judge advocates to understand and train to the standard is problematic and should be avoided if at all possible.”).

¹⁰⁰ *Id.* at 100 (“Likely and identifiable threat appeared only in the OEF ROE not in the SROE or the subsequent [Operation Iraqi Freedom (OIF) ROE.”]; Schmitt *Targeting and IHL*, *supra* note 22, at 315 (“Afghanistan represented the first use of the LIT standard in an armed conflict.”). *See also* INT’L & OPERATIONAL LAW BRANCH JUDGE ADVOC. DIVISION HEADQUARTERS MARINE CORPS & CENTER FOR LAW AND MILITARY OPERATIONS, DEPLOYED MARINE AIR-GROUND TASK FORCE JUDGE ADVOCATE HANDBOOK 3–4 (2013) [hereinafter MAGTAF JA HANDBOOK].

Doctrine is now full of terminology that has no source in international law but attempts to clarify issues for the benefit of the warfighter. Terms like Positive Identification (PID), Likely and Identifiable Threats (LITs), Troops-in-Contact (TIC), and Time Sensitive Targets (TSTs) are now found and variously defined in different sources. These modern attempts to assist in the distinction of lawful targets and prevent collateral damage are only tools for the warfighter and do not reflect a consensus of approval in international law.

Id.

¹⁰¹ MAGTAF JA HANDBOOK, *supra* note 99, at 3–11.

¹⁰² LESSONS LEARNED VOL 1, *supra* note 40, at 100.

commands . . . immediately pressed for clarification from Central Command (CENTCOM) because the terms likely and identifiable are not used together in the Chairman of the Joint Chiefs of Staff (CJCS) SROE.”¹⁰³ Another noted, “when lawyers can easily argue about what [LIT] means or doesn’t mean as far as engaging targets, we have failed because the [twenty-one]-year-old corporal doesn’t have the luxury of such an academic exercise.”¹⁰⁴ Not only was LIT confusing to U.S. soldiers, its lack of a clear foundation in international law or doctrine meant high potential for interoperability issues with coalition partners.¹⁰⁵

While LIT was an attempt to address individuals or groups who dress as civilians while engaging in combat, it fell short as useful counterinsurgency ROE. Rather than shaping an offensive authority to attack fighters, the drafters considered LIT to be an aggressive self-defense-based ROE that fell between self-defense and declared hostile force authority.¹⁰⁶ This attempt at a happy medium landed far from the middle; “picture along a line spectrum, with hostile act/intent self-defense at the left end and declared hostile at the right end, LIT would fall just to the right of self-defense.”¹⁰⁷

In using self-defense as its foundational authority, the LIT ROE focused on eliminating a threat rather than eliminating a fighter or group engaging in hostilities.¹⁰⁸ This difference was subtle, but significant, and appears to have been the primary source of confusion. With no forces declared hostile, U.S. forces were to use self-defense when they observed

Likely and identifiable threat caused a great deal of confusion for deployed judge advocates who had not been exposed to the term before, and who were unsure if the new term was merely another way of stating that forces had been declared hostile, or another way of restating SROE self-defense principles, or something else entirely.

Id.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (“Likely and identifiable threat appeared only in the OEF ROE not in the SROE or the subsequent OIF ROE.”); Schmitt *Targeting and IHL*, *supra* note 22, at 315 (“Afghanistan represented the first use of the LIT standard in an armed conflict.”).

¹⁰⁶ LESSONS LEARNED VOL 1, *supra* note 40, at 102 n.80.

¹⁰⁷ *Id.*

¹⁰⁸ LESSONS LEARNED VOL 1, *supra* note 40, at 102 (“Thus, LIT was neither a declaration of hostility nor a restatement of SROE self-defense principles; it was an aggressive, self-defense-based ROE measure that fell in between the two extremes.”).

a hostile act or a demonstration of hostile intent. If they were able to recognize enemy fighters, such as the Taliban, who were not at that moment conducting a hostile act or demonstrating hostile intent, they were to use the LIT ROE against the likely and identifiable threat these forces presented. In retrospect, it is clear from their search for an authority between self-defense and declared hostile force that the drafters were actually struggling to develop ROE that would account for civilians taking a direct part in hostilities.¹⁰⁹ However, because they felt limited to using just the two use of force authorities in U.S. policy (self-defense and declared hostile force) they felt compelled to draft ROE based on one or the other.¹¹⁰ In the end, they chose to use self-defense as their basis and couch LIT ROE in terms of countering a threat.¹¹¹ Their attempt at “aggressive, self-defense-based ROE measure that fell in between the two extremes” of self-defense and declared hostile force became to many the equivalent of self-defense by another name, bringing with it the limitations and constraints of self-defense.¹¹²

In the short time LIT was used, it caused considerable confusion for U.S. forces and was ultimately abandoned in Afghanistan and never introduced in Iraq.¹¹³ With LIT unworkable, there remains a need in counterinsurgency campaigns for an authority between declared hostile force and self-defense authorities. Fortunately, the solution already exists: direct participation authority.

II. The Legal Framework for a Solution: Direct Participation Authority

¹⁰⁹ Schmitt *Targeting and IHL*, *supra* note 22, at 317 (“[Likely and identifiable threat] is a genre of the direct participation in hostilities . . .”).

¹¹⁰ *Id.* at 315.

When the conflict began, the United States and its coalition partners declared no enemy forces hostile, to include the Taliban and Al Qaeda. Instead, the “enemy” had to represent a “likely and identifiable threat” before being attacked. Those not meeting this standard could only be engaged if they had committed a hostile act or demonstrated hostile intent, the self-defense rule traditionally employed to respond to actions unconnected to the hostilities.

Id.

¹¹¹ *Id.* at 315 (quoting email comments from a Central Command (CENTCOM) ROE drafter discussing the creation of LIT, “‘Self Defense Plus’ is how I describe it.”).

¹¹² LESSONS LEARNED VOL 1, *supra* note 40, at 102.

¹¹³ *Id.* at 100; Schmitt *Targeting and IHL*, *supra* note 22, at 316–17.

The LOAC provisions prohibiting attack of civilians unless, and for such time as, they directly participate in hostilities contain both the general rule and its exception.¹¹⁴ The general rule is that “civilians may not be attacked.”¹¹⁵ The exception is, “unless, and for such time as, they directly participate in hostilities.”¹¹⁶ Restated in the affirmative, civilians who directly participate in hostilities may be offensively attacked for such time as they directly participate in hostilities.

Although the rule seems clear, the proverbial devil is in the details. Despite much contention over some parts of direct participation authority, aspects of it are well accepted. There is general agreement that: (1) direct participation authority is part of the LOAC and only exists during armed conflict;¹¹⁷ (2) that it is an offensive mission accomplishment authority allowing deliberate attack;¹¹⁸ and (3) that the authority becomes available based on the individual’s choice to directly participate in hostilities, not based on the imminent threat the person presents.¹¹⁹

While there is agreement on these aspects of direct participation authority, there is significant disagreement in other areas.¹²⁰ The three areas of dispute relevant to this paper are: (1) when direct participation begins; (2) when direct participation ends; and (3) what constitutes an act of direct participation.¹²¹ There is no clean divide in the international community on these areas, however, for purposes of this paper, they will be categorized as the U.S. approach and the International Committee of the Red Cross (ICRC) approach.¹²²

¹¹⁴ AP I, *supra* note 17, art. 51(3); AP II, *supra* note 23, art. 13(3).

¹¹⁵ *Supra* note 114 and accompanying sources.

¹¹⁶ *Id.*

¹¹⁷ See ICRC IG, *supra* note 3, at 41

¹¹⁸ Schmitt *Critical Analysis*, *supra* note 79, at 37 (Those participating in hostilities “may be attacked without any defensive purpose.”); AP I, *supra* note 18, art 51(3); AP II, *supra* note 23, art 13(3).

¹¹⁹ Schmitt *Critical Analysis*, *supra* note 79, at 37 (“Instead, the notion of ‘threat’ is one of self-defense and defense of the unit, which is a different aspect of international law.”).

¹²⁰ See generally Schmitt *Critical Analysis*, *supra* note 79.

¹²¹ See generally ICRC IG, *supra* note 3; Schmitt *Critical Analysis*, *supra* note 79, at 36; Bill Boothby, “And For Such Time As”: *The Time Dimension to Direct Participation In Hostilities*, 42 N.Y.U. J. INT’L L. & POL. 741, 741 (2010) [hereinafter Boothby].

¹²² LAW OF WAR MANUAL, *supra* note 9, at 222–32; ICRC IG, *supra* note 3.

The chart in figure 3 is a quick reference guide to the three use of force authorities and highlights their individual characteristics.

Authorities for the Use of Force Comparison				
	Source of Law	Triggering Event	Duration	Amount of Force
Self Defense	Human Rights Law	Hostile Act or Demonstration of Hostile Intent. Threat must be imminent.	Until threat neutralized.	Minimum force necessary to eliminate threat.
Direct Participation	Law of Armed Conflict (International Humanitarian Law)	Individual directly participates in hostilities. Note: How far removed from the battlefield an act can be and still qualify as an act of direct participation is also an area of contention where the ICRC and US approach differ.	Disputed: ICRC: until participant has returned from site of the participation US: until participant opts out of direct participation.	Lethal force.
Declared Hostile Force	Law of Armed Conflict (International Humanitarian Law)	An armed force or group is declared hostile. (Individual must be identified as being a member of a hostile force before he can be targeted.)	As long as hostile force remains declared hostile. (And as long as individual can be identified as a member of the hostile force.)	Lethal Force.

Figure 3¹²³

A. Direct Participation Authority Is Recognized By International Law

Lawfully attacking civilians who directly participate in hostilities has a long history.¹²⁴ In her article *The Past as Prologue: The Development of the 'Direct Participation' Exception to Civilian Immunity*, Emily Camins makes a strong historical argument stating, “the general concept that non-combatants who engage in hostile acts may be exposed to attack . . . dates back several centuries.”¹²⁵ In support of her position, she cites Grotius: “by the law of war armed men and those who offer resistance are killed [I]t is right that in war those who have taken up arms should pay the penalty, but that the guiltless should not be injured.”¹²⁶ Camins explains that “during the late eighteenth and nineteenth centuries, the

¹²³ See generally SROE, *supra* note 8, at A-2–A-3; LAW OF WAR MANUAL, *supra* note 9, at 224–32 (discussing the three authorities).

¹²⁴ See generally, Camins, *supra* note 29.

¹²⁵ *Id.* at 855.

¹²⁶ *Id.* at 857 (citing Hugo Grotius, THE LAW OF WAR AND PEACE (1625) Book III, Chapter XI, Sec. X, reprinted in THE LAW OF WAR: A DOCUMENTARY HISTORY (Leon Friedman, ed.1972)).

practical response to non-uniformed fighters was usually ferocious” and that armed civilians were “attacked with ‘a draconian severity’ by opposing armed forces.”¹²⁷

In 1863, the U.S. military promulgated the Lieber Code, acknowledging the notion that civilians may join the fighting during armed conflict, regardless of the fact that they have no legal right to do so.¹²⁸ Article 15 of the Lieber Code states, “military necessity admits of all direct destruction of life or limb of armed enemies.”¹²⁹ Article 82 addresses direct participation, even more directly, stating,

Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.¹³⁰

The idea that civilians can lose their usual protections also has strong grounding in treaty law.¹³¹ The protections of Common Article 3 to the 1949 Geneva Conventions apply to “persons taking no active part in hostilities.”¹³² This leaves the converse unspoken, but implies that the protections are not afforded to persons who *do* take an active part in hostilities.¹³³ The exception to the general protections afforded to civilians

¹²⁷ *Id.* at 860 (citing Amedee Brenet, *LA FRANCE ET L'ALLEMAGNE DEVANT LE DROIT INTERNATIONAL, PENDANT LES OPERATIONS MILITAIRES DE LA GUERRE 1870–1871* 29 (Arthur Rousseau & Henri Charles-Lavauzelle eds., 1902)).

¹²⁸ ADJUTANT GEN.'S OFFICE, U.S. WAR DEP'T, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, Art. 82, Gen. Ord. No. 100 (Apr. 24, 1863), [hereinafter Lieber Code].

¹²⁹ *Id.* art. 15.

¹³⁰ *Id.* art. 82.

¹³¹ GC III, *supra* note 18, art 3; AP I, *supra* note 18, art. 51(3); AP II, *supra* note 23, art. 13(3).

¹³² GC III, *supra* note 18, art. 3.

¹³³ *Id.*

is more explicitly stated in Additional Protocol I, Article 51(3) which states, “civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.”¹³⁴ This same language is repeated in Additional Protocol II, confirming application of direct participation authority in non-international armed conflicts as well.¹³⁵

Writing that is more recent has also discussed authorities on direct participation. After extensive debate by international experts in 2009, the ICRC issued Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law.¹³⁶ Although this guidance lacked consensus (and is thus caveated as “an expression solely of the ICRC’s views,”) it lays out the ICRC’s position on direct participation authority and offers some insight on how the authority can be implemented at the tactical level.¹³⁷ Most recently, the Department of Defense *Law of War Manual*, published in June 2015, recognizes direct participation authority and documents the U.S. position regarding it.¹³⁸

B. Direct Participation Authority Is an Offensive Authority

As an offensive warfighting authority, direct participation authority does not contain the same constraints as self-defense. The LOAC principles related to deliberate attack: necessity; humanity; distinction; and proportionality apply, because deliberate attack is based in the LOAC.¹³⁹ These principles are different and less restrictive than the necessity and proportionality requirements of self-defense.¹⁴⁰ Under the LOAC, necessity requires only that the attack must be against legitimate military objects.¹⁴¹ Distinction requires making efforts to ensure that non-

¹³⁴ AP I, *supra* note 18, art. 51(3).

¹³⁵ AP II, *supra* note 23, art. 13(3).

¹³⁶ *See generally* ICRC IG, *supra* note 3.

¹³⁷ *Id.* at 6; *see also* Schmitt *Critical Analysis*, *supra* note 79, at 6.

¹³⁸ *See generally* LAW OF WAR MANUAL, *supra* note 9, at 157–67, 222–32.

¹³⁹ *See* LAW OF WAR MANUAL, *supra* note 9, at 11–14.

¹⁴⁰ SROE, *supra* note 8, at A-3.

¹⁴¹ *See* Regulations Respecting the Laws and Customs of War on Land, annex to Hague Convention No. IV, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. 539, *reprinted in* U.S. DEP’T OF ARMY, PAM 27-1, TREATIES GOVERNING LAND WARFARE B-7 (1956) (“Art 23(g) It is forbidden “to destroy or seize the enemy’s

participating civilians are not subject to attack.¹⁴² Proportionality requires weighing the concrete and direct military advantage anticipated by attacking the civilian who is directly participating against the expected incidental injury or damage to non-participating civilians and their property.¹⁴³

C. Direct Participation Authority is based on a Person's Choice to Participate, not on the Threat the Person Presents

Under direct participation authority, civilians lose protection against attack when they choose to engage in hostilities.¹⁴⁴ Because direct participation in hostilities is an offensive authority, it is the person who is targeted, rather than a threat or an act.¹⁴⁵ The threat the person presents at the time is irrelevant.¹⁴⁶ This is in contrast to self-defense, where force may be used only to eliminate an imminent threat, not to eliminate a person.¹⁴⁷

For many in the U.S. military, the discussion on how direct participation is triggered will generate a debate on whether targeting under direct participation authority is conduct or status based targeting. To the extent that such categorization is helpful, direct participation is status based.¹⁴⁸ A civilian acquires the status as a direct participant once he chooses to directly participate in hostilities.¹⁴⁹ He holds the status for such time as he continues his direct participation.¹⁵⁰ While he holds the status, the protections afforded civilians are suspended and he is subject to attack

property, unless such destruction or seizure be imperatively demanded by the necessities of war."); ICRC Customary IHL, *supra* note 27, r.7.

¹⁴² *Id.* at r. 1.

¹⁴³ *Id.* at r.14

¹⁴⁴ AP I, *supra* note 18, art. 51(3).

¹⁴⁵ Schmitt *Critical Analysis*, *supra* note 79, at 37.

¹⁴⁶ *Id.*

¹⁴⁷ *See* SROE, *supra* note 8, A-3.

¹⁴⁸ The authors' view is that such categorization is unhelpful and unnecessary. However, logic dictates that if a person holds the status of combatant while he meets the criteria defining a combatant, a person would hold the status of direct participant while that person meet the criteria defining direct participation; *but see* ICRC IG, *supra* note 3, at 4 (it must be noted that the Interpretive Guidance disagrees with this position, although there was not consensus on this point by the group of experts).

¹⁴⁹ *See* LAW OF WAR MANUAL, *supra* note 9, at 230.

¹⁵⁰ *Id.*

until the status terminates and the protections resume.¹⁵¹ Though there are varying interpretations as to how long direct participant status attaches to an individual, and what events terminate it, no interpretation links the status to whether the person's conduct constitutes a threat;¹⁵² that is required only under self-defense.

D. What Constitutes an Act of Direct Participation?

The phrases “active part in hostilities” and “direct part in hostilities,”¹⁵³ though used extensively in the LOAC, are undefined in treaty law, leading to much debate on which acts constitute direct participation.¹⁵⁴ At a minimum, direct participation includes acts of actual fighting traditionally performed by combatants, such as firing weapons, emplacing or detonating explosives, and spotting for artillery fire.¹⁵⁵ The more closely an act resembles an act that a combatant would normally perform in combat, the more likely it is to qualify as direct participation.¹⁵⁶

¹⁵¹ *Id.*

¹⁵² While the Interpretive Guidance contains the phrase, “It [IHL] prevents attacks on civilians who do not, at the time, represent a military threat” the use of the term military threat does not carry the same meaning as a threat under individual self-defense; see ICRC IG, *supra* note 3, at 70; Nils Melzer, *Third Expert Meeting on the Notion of Direct Participation in Hostilities: Summary Report* 66–67 (2005), <https://www.icrc.org/eng/assets/files/other/2005-09-report-dph-2005-icrc.pdf> [hereinafter *Third Expert Meeting*]; Schmitt *Critical Analysis*, *supra* note 78, at 37.

¹⁵³ See Schmitt *Critical Analysis*, *supra* note 78, at 24 (“It is well accepted in international law that the terms “active” and “direct” are synonymous . . .”).

¹⁵⁴ See *id.* at 24–25 (“Unfortunately, the phrase ‘direct part in hostilities’ is undefined in IHL.”); ICRC IG, *supra* note 3, at 43 (“Treaty IHL does not define direct participation in hostilities, nor does a clear interpretation of the concept emerge from State practice or international jurisprudence.”).

¹⁵⁵ See *Third Expert Meeting*, *supra* note 151, at 17–36; Nils Melzer, *Fourth Expert Meeting on the Notion of Direct Participation in Hostilities: Summary Report* 39–52. (2006) <https://www.icrc.org/eng/assets/files/other/2006-03-report-dph-2006-icrc.pdf> [hereinafter *Fourth Expert Meeting*]; Nils Melzer, *Fifth Expert Meeting on the Notion of Direct Participation in Hostilities: Summary Report* 53–57 (2008), <https://www.icrc.org/eng/assets/files/other/2008-05-report-dph-2008-icrc.pdf> [hereinafter *Fifth Expert Meeting*]; ICRC IG, *supra* note 3, at 48; LAW OF WAR MANUAL, *supra* note 9, at 227.

¹⁵⁶ See *Third Expert Meeting*, *supra* note 151, at 17–36; *Fourth Expert Meeting*, *supra* note 154, 39–52; *Fifth Expert Meeting*, *supra* note 154, at 53–57, ICRC IG, *supra* note 3, at 48; LAW OF WAR MANUAL, *supra* note 9, at 227.

With no international law definition, the ICRC Commentary to the Additional Protocols offers some help defining direct participation.¹⁵⁷ It states, “direct participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”¹⁵⁸ The U.S. approach documented in the *Law of War Manual* is consistent with using this definition as a baseline, stating, “at a minimum, taking a direct part in hostilities includes actions that are, by their nature and purpose, intended to cause actual harm to the enemy.”¹⁵⁹ The U.S. approach then expands beyond this minimum, explaining that engaging in actual combat is not the only action that is sufficient to meet this threshold.¹⁶⁰ Taking direct part in hostilities “also includes certain acts that are an integral part of combat operations or that effectively and substantially contribute to an adversary’s ability to conduct or sustain combat operations.”¹⁶¹ For example, under the U.S. approach, a person in a village away from actual fighting who assembles IEDs and trains people to emplace them may be considered to be taking direct part in hostilities.¹⁶²

Despite a lack of agreement on what acts may qualify as direct participation, it is widely accepted that determination of what equates to direct participation is made on a case-by-case basis, considering all of the circumstances known at the time.¹⁶³ How this analysis is made and what

¹⁵⁷ ICRC Commentary on the Additional Protocols as of 8 June 1977 to the Geneva Conventions of 12 August 1948 619 [hereinafter ICRC AP Commentary].

¹⁵⁸ *Id.*

¹⁵⁹ LAW OF WAR MANUAL, *supra* note 9, at 224.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 224–25.

¹⁶² See Kenneth Watkins, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation In Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641, 680–82 (2010) [hereinafter Watkins]; LAW OF WAR MANUAL, *supra* note 9, at 225.

¹⁶³ See U.S. DEP’T OF ARMY, NAVAL WARFARE PUBLICATION (NWP) 1-14M/U.S. MARINE CORPS WARFIGHTING PUBLICATION (MCWP) 5-12.1/U.S. COAST GUARD COMMANDANT’S PUBLICATION P5800.7A, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 8-1 (July 2007).

Direct participation in hostilities must be judged on a case-by-case basis. Combatants in the field must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person’s behavior, location and attire, and other information available at the time.

factors must be considered are again subject to varying approaches. The *Law of War Manual* lists several factors that may be relevant when determining if an act qualifies as an act of direct participation.¹⁶⁴ They are:

- the degree to which the act causes harm to the opposing party’s person or objects, such as
- whether the act is the proximate or ‘but for’ cause of death, injury, or damage to persons or objects belonging to the opposing party; or
- the degree to which the act is likely to affect adversely the military operations or military capacity of the opposing party;
- the degree to which the act is connected to the hostilities, such as
- the degree to which the act is temporally or geographically near the fighting; or
- the degree to which the act is connected to military operations;
- the specific purpose underlying the act, such as
- whether the activity is intended to advance the war aims of one party to the conflict to the detriment of the opposing party;
- the military significance of the activity to the party’s war effort, such as
- the degree to which the act contributes to a party’s military actions against the opposing party;
- whether the act is of comparable or greater value to a party’s war effort than acts that are commonly regarded as taking a direct part in hostilities;

Id. Third Expert Meeting, *supra* note 151, at 35 (“Since, currently, the qualification of a particular act as direct participation in hostilities often depends on the particular circumstances and the technology or weapons system employed, it is unlikely that an abstract definition of direct participation in hostilities applicable to every situation can be found.”); Stephen Pomper, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-international Armed Conflict: Making Progress Through Practice*, 88 U.S. NAVAL WAR C. INT’L L. STUD. 181, 189 (2012) (“Any determination that a civilian is taking part in hostilities (and thus loses immunity from being made the object of attack) will be highly situational.”).

¹⁶⁴ LAW OF WAR MANUAL, *supra* note 9, at 225–27.

—whether the act poses a significant threat to the opposing party;
—the degree to which the activity is viewed inherently or traditionally as a military one, such as,
—whether the act is traditionally performed by military forces in conducting military operations against the enemy (including combat, combat support, and combat service support functions); or
—whether the activity involves making decisions on the conduct of hostilities, such as determining the use or application of combat power.¹⁶⁵

The ICRC Interpretive Guidance agrees that the determination of participation in hostilities must analyze the circumstances of a particular situation, but takes a different approach in doing so.¹⁶⁶ The Interpretive Guidance states that direct participation has three basic elements: a threshold of harm, direct causation, and a belligerent nexus.¹⁶⁷ In more specific terms,

1. [T]he act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict, or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. [T]here must be a direct causal link between the act and the harm likely to result either from that act or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. [T]he act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).¹⁶⁸

Either approach will reach the determination that a civilian actively engaged in ongoing fighting is a direct participant.¹⁶⁹ Where the outcomes

¹⁶⁵ See *id.* at 226–27.

¹⁶⁶ ICRC IG, *supra* note 3, at 41–42.

¹⁶⁷ *Id.* at 46.

¹⁶⁸ *Id.*

¹⁶⁹ See *id.* at 46–54; LAW OF WAR MANUAL, *supra* note 9, at 225–39.

diverge is when the acts of the civilian are not part of the immediate actual fighting, but instead perform combat support functions that may be temporally or geographically remote from actual fighting.¹⁷⁰ A detailed analysis of the two approaches is necessary when assessing possible acts of direct participation that are remote from actual fighting. However, this is generally unnecessary when confronting acts of direct participation at the tactical level. At the tactical level, most often the act observed will be one that is close enough in time, distance, and function that it resembles an act a combatant would traditionally perform. In situations such as emplacing IEDs, shooting at forces belonging to a party to the conflict, maneuvering with heavy weapons, spotting for command detonated IEDs, and relaying tactical locations of forces, either approach would conclude that a civilian committing these acts is directly participating in the hostilities.

E. When Does Direct Participation Begin?

Under the ICRC approach, a person manifests his choice to engage in hostilities when he performs “measures preparatory to the execution of a specific act of direct participation.”¹⁷¹ In describing what preparatory measures are sufficient to trigger the loss of protections for a specific act of direct participation, the ICRC guidance offers the following: “[M]easures *aiming to carry out a specific hostile act* qualify as direct participation in hostilities, whereas preparatory measures *aiming to establish the general capacity to carry out unspecified hostile acts* do not.”¹⁷²

Through “preparatory measures” is a sufficient starting point for most determinations of direct participation at the tactical level, there is an argument that the ICRC approach is too restrictive and that an act of participation can begin much earlier.¹⁷³ This position is based on the duration of the chain of causation, which may begin well before the preparatory measures immediately preceding an act of direct participation.¹⁷⁴ The argument to start the period of participation earlier

¹⁷⁰ See ICRC IG, *supra* note 3, at 46–64; LAW OF WAR MANUAL, *supra* note 9, at 225–29.

¹⁷¹ ICRC IG, *supra* note 3, at 65.

¹⁷² *Id.* at 66.

¹⁷³ Schmitt *Critical Analysis*, *supra* note 78, at 36.

¹⁷⁴ *Id.* at 37, n.104.

may be beneficial for using direct participation authority in targeting at the strategic level. It is largely insignificant, however, in evaluating when participation starts for tactical level targeting, where typically the person is recognized as a direct participant by his commission of acts that fall well within the “measures preparatory” standard of the Interpretive Guidance.¹⁷⁵

F. When Does Direct Participation End?

The question of when a period of direct participation ends is significantly more problematic for implementation at the tactical level.¹⁷⁶ Under the ICRC approach, once a person commits measures preparatory to a specific act of direct participation, he temporarily loses the protected status afforded civilians, and may be attacked.¹⁷⁷ The loss of protection lasts from the initiation of the preparatory measures through deployment to the site of the act, during the commission of the specific act, and continues through return from the site.¹⁷⁸ Once the person has completed his return from the site, he regains his protected status as a civilian and may not be attacked.¹⁷⁹ The ICRC considers the return to end once the person has physically separated from the operation and resumed activities distinct from that operation.¹⁸⁰ This approach has been criticized for creating a “revolving door” for insurgents where the person can be a protected farmer by day and a targetable fighter by night.¹⁸¹

In response to the revolving door criticism, the ICRC Interpretive Guidance takes the position that non-isolated acts of direct participation may be evidence of membership in an organized armed group belonging to a party to the conflict.¹⁸² It states, “where individuals go beyond spontaneous, sporadic, or unorganized direct participation in hostilities

¹⁷⁵ See ICRC IG, *supra* note 3, at 65–67.

¹⁷⁶ *Id.* at 37; Boothby, *supra* note 120, at 759–61; Watkins, *supra* note 161, at 660; Third Expert Meeting, *supra* note 151, at 60–66.

¹⁷⁷ See ICRC IG, *supra* note 3, at 65–66.

¹⁷⁸ *Id.* at 70–73.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 67.

¹⁸¹ *E.g., id.* at 72; LAW OF WAR MANUAL, *supra* note 9, at 230–32; Schmitt *Critical Analysis*, *supra* note 78, at 33; Quinta Jurecic, *Throwback Thursday: The Lieber Code*, LAWFARE BLOG (July 23, 2015, 4:16 PM), <https://www.lawfareblog.com/throwback-thursday-lieber-code>.

¹⁸² ICRC IG, *supra* note 3, at 72.

and become members of an organized armed group belonging to a party to the conflict, international humanitarian law (IHL) deprives them of protection against direct attack for as long as they remain members of that group.”¹⁸³ Under the Interpretive Guidance, individual membership in an organized armed group hinges on whether a person assumes a continuous combat function for the group.¹⁸⁴ “Membership in an organized armed group begins in the moment when a civilian starts to *de facto* assume a continuous combat function for the group, and lasts until he or she ceases to assume such function.”¹⁸⁵

The disadvantage to this approach is that it requires linking the individual to a particular armed group belonging to a party to the conflict in the same way linking to a particular group is required under declared hostile force authority.¹⁸⁶ As previously discussed, this may be difficult to accomplish. However, once determined to be part of a group, under the ICRC approach the person loses immunity from attack for as long as he remains a member of that group as evidenced by his continued performance of a continuous combat function.¹⁸⁷ Whether a person has disengaged from their continuous combat function must be assessed based on the prevailing circumstances.¹⁸⁸ According to the ICRC, “Disengagement from an organized armed group need not be openly declared; it can also be expressed through conclusive behaviour, such as a lasting physical distancing from the group and reintegration into civilian life or the permanent resumption of an exclusively non-combat function (e.g., political or administrative activities).”¹⁸⁹

The United States takes a different approach. Under the U.S. approach, once a person opts to directly participate in hostilities, he is targetable until he opts out of direct participation.¹⁹⁰ The person can opt

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 33.

¹⁸⁵ *Id.* at 72.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 73.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Schmitt *Critical Analysis*, *supra* note 78, at 38; LAW OF WAR MANUAL, *supra* note 9, at 230–32; *see also* Schmitt *Targeting and IHL*, *supra* note 22, at 318 (discussing an alternate position raised at the ICRC expert meetings on the notion of direct participation, stating, “They proposed an alternative which locks the door after exit: once an individual has opted into the hostilities, he or she remains targetable until unambiguously opting out.”).

out in two ways: (1) he can affirmatively declare his intention to no longer directly participate in hostilities, or (2) sufficient time passes without a specific act of direct participation thus evidencing his intent to no longer participate in hostilities.¹⁹¹ “Sufficient time” may be very short or lengthy depending on the extent of the individual’s participation.¹⁹² A person who commits a single isolated act of participation would regain his protected status almost immediately upon redeployment, while a person who has habitually committed acts of direct participation would require more time to evidence his abandonment of his direct participant status.¹⁹³ Affirmatively opting-out may be difficult under this standard, but because the person chose to opt-in to his targetable status by directly participating in hostilities, it is reasonable that the burden should be on him to demonstrate that he has opted-out.¹⁹⁴

While the U.S. approach may appear to create a situation where a person who opts to become a direct participant indefinitely holds the status, in practice this is not the case. In recent years, some U.S. forces in Afghanistan operating under the North Atlantic Treaty Organization’s Rules of Engagement (NATO ROE) have targeted individuals taking a direct part in hostilities.¹⁹⁵ This ROE was based on NATO ROE MC 362/1, rules 421 and 423, which authorize attack against individuals or groups who demonstrated hostile intent (not constituting imminent attack)¹⁹⁶ and rules 422 and 424 authorizing attack against individuals and groups who commit or directly contribute to a hostile act (not constituting an actual attack).¹⁹⁷ Importantly, these ROE are explicitly offensive attack ROE, not based on self-defense.¹⁹⁸

The practical application of this ROE was twofold. When U.S. forces (operating as part of the NATO command) witnessed an act of direct participation such as a person emplacing an IED, they were authorized to

¹⁹¹ Schmitt *Targeting and IHL*, *supra* note 22, at 318.

¹⁹² LAW OF WAR MANUAL, *supra* note 9, at 230, n.245.

¹⁹³ *Id.*

¹⁹⁴ Schmitt *Targeting and IHL*, *supra* note 22, at 318 (“Although it may be difficult to determine whether a potential target has opted out, since the individual did not enjoy any privilege to engage in hostilities in the first place, it is reasonable that he or she bear the risk that the other side is unaware of withdrawal.”).

¹⁹⁵ Bagwell Afghanistan experience, *supra* note 72.

¹⁹⁶ MC 362/1, *supra* note 71, at A-19.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

attack the person.¹⁹⁹ The NATO ROE does not specifically cite direct participation as its authority, nor does it provide guidance on when the authority to attack would terminate.²⁰⁰ However, applying it as direct participation authority permitted the person to be attacked, at a minimum, until the person completed his redeployment from the site of his specific act of direct participation.²⁰¹

When actually applying the NATO ROE in combat, determining when the authority terminated did not prove to be an issue.²⁰² In the overwhelming majority of cases where ROE were employed, the identity of the person being attacked was not known (he was only recognized as an unknown person emplacing an IED), therefore as soon as he could no longer be visually identified as the person who committed the act, he could no longer be attacked.²⁰³ In this situation, it was not a unique limitation of direct participation authority that terminated authority to continue the attack.²⁰⁴ Instead, once the person blended back into the civilian population, the LOAC principle of distinction prevented him from being targeted as he could no longer be distinguished from innocent civilians.²⁰⁵ As a result, in this tactical level situation, the difference between the ICRC and U.S. approaches on when direct participation ends had no practical effect.

The second way U.S. forces, acting under NATO ROE, used direct participation authority—again without directly citing it—was by gathering intelligence over time that linked a particular individual to continuous acts of direct participation.²⁰⁶ In these situations, the nature of the acts committed and the amount of intelligence linking the individual to the acts enabled U.S. forces to determine whether the individual was directly participating in hostilities.²⁰⁷ If determined to be a direct participant, the person was placed on a list of verified targets.²⁰⁸ Attack was authorized

¹⁹⁹ Bagwell Afghanistan experience, *supra* note 72.

²⁰⁰ MC 362/1, *supra* note 70, at A-19.

²⁰¹ ICRC IG, *supra* note 3, at 67; Schmitt *Critical Analysis*, *supra* note 78, at 35; Bagwell Afghanistan experience, *supra* note 72.

²⁰² Bagwell Afghanistan experience, *supra* note 72.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* The term direct participant used here is for clarity of reading, it must be noted that it was not used at the time by U.S. forces.

against the person for such time as he remained on the list.²⁰⁹ To account for the fact that a person can indicate he is no longer a direct participant by not committing any acts of direct participation over a period of time, the person's inclusion on the list was not permanent.²¹⁰ United States forces were required to refresh his status with new intelligence evidencing the person's continued direct participation within a given timeframe.²¹¹ Otherwise, the person was removed from the list.²¹²

Under the U.S. approach, a pattern of continuous acts of direct participation does not necessarily equate to being a member of an organized armed group. "The U.S. approach has been to treat the status of belonging to a hostile non-State armed group as a separate basis upon which a person is liable to attack, apart from whether he or she has taken a direct part in hostilities."²¹³ In other words, individuals who can be linked to membership in a non-State armed group that has been declared hostile are considered targetable under declared hostile force authority. Individuals who take part in hostilities, and are not linked to membership in a particular declared hostile armed group, can be attacked under direct participation authority for as long as they hold the status of direct participant.²¹⁴ This is true even if they continuously participate in hostilities.

III. Direct Participation and Self-Defense Authorities

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ LAW OF WAR MANUAL, *supra* note 9, at 218, 224.

²¹⁴ *Id.* at 230.

In most situations, a specific act of direct participation in hostilities will also qualify as a hostile act, triggering the right of self-defense.²¹⁵ In fact, during much of the current Afghanistan and Iraq conflicts, U.S. forces have been told to use self-defense when encountering situations of direct participation.²¹⁶ As previously discussed in this paper, doing so comes at a cost. If the requirements of self-defense are followed, identified insurgents may be able to escape. If the requirements are ignored, respect for the law and the ROE are diminished. This situation can be avoided by applying direct participation authority to direct participation situations. If the acts of an individual who is not identifiable as a member of a declared hostile group qualify as direct participation, direct participation authority provides greater flexibility than self-defense to engage the individual.²¹⁷ The chart in figure 4 below illustrates the differences between self-defense and direct participation authorities.

Figure 4²¹⁸

The gray bars on the chart illustrate the duration of the various authorities. If the actions of a person qualify as an act of direct participation, the authority to use force against that person begins much

²¹⁵ *Id.* at 229.

²¹⁶ Bagwell Afghanistan experience, *supra* note 72.

²¹⁷ See figure 2, *supra*, for chart explaining the difference between self-defense and direct participation authority.

²¹⁸ The chart at figure 4 demonstrates the duration of the three use of force authorities. See generally SROE, *supra* note 8, at A-3; LAW OF WAR MANUAL, *supra* note 9, at 230-32; ICRC IG, *supra* note 3, at 70-73.

earlier (at measures preparatory) than under self-defense.²¹⁹ This is true even when applying the broader definition of hostile intent in U.S. self-defense.²²⁰ It is important to note that in situations where direct participation authority is appropriate, using it rather than self-defense eliminates the alignment problem created by the United States' and partner countries' differing definitions of imminence. With direct participation authority, under either the U.S. or ICRC approach, the person becomes targetable once he undertakes measures preparatory to an act of participation.²²¹

More importantly, direct participation authority provides clear authority to attack the person after he has completed the hostile act.²²² Both the ICRC and the U.S. approaches allow the person to be attacked while returning from the site of the act.²²³ Under the U.S. approach, this authority could extend even further.²²⁴ This represents a significant departure from self-defense where the immediate use of lethal force is generally not permitted, and the authority to use force ends as soon as the hostile act is complete.²²⁵

Returning to the IED scenario at the beginning of the paper, under self-defense, U.S. soldiers would not be permitted to use force against the IED emplacer until his hostile intent is determined.²²⁶ Hostile intent will likely not be apparent until the man starts to prepare the hole in the road in which he will bury the IED. For coalition soldiers, the determination of hostile intent will likely be later. For countries with a definition of imminence similar to NATO's, hostile intent may only become apparent when the man is actually placing the IED in the hole.²²⁷ Under either the U.S. or NATO versions of self-defense, if the man successfully completes his work and begins to depart the scene, no force may be used against him, as his act is complete and he no longer presents an imminent threat.²²⁸ Even when force is permitted, only the minimum force necessary is allowed and

²¹⁹ LAW OF WAR MANUAL, *supra* note 9, at 230–32; ICRC IG, *supra* note 3, at 70–73.

²²⁰ SROE, *supra* note 8, at A-3.

²²¹ See LAW OF WAR MANUAL, *supra* note 9, at 224; ICRC IG, *supra* note 3, at 65–67.

²²² See LAW OF WAR MANUAL, *supra* note 9, at 230–32; ICRC IG, *supra* note 3, at 67–68.

²²³ See *supra* note 222 and accompanying sources.

²²⁴ LAW OF WAR MANUAL, *supra* note 9, at 230–32.

²²⁵ See SROE, *supra* note 8, at A-3–A-4.

²²⁶ *Id.*

²²⁷ MC 362/1, *supra* note 71, at 4.

²²⁸ See *id.*; SROE, *supra* note 8, at A-3–A-4.

he should first be given the opportunity to cease his actions and withdraw.²²⁹

The outcome is different under direct participation authority. Once the man completes a preparatory measure, for example loading the IED in his bag and getting on his motorcycle, he is a direct participant and is subject to attack.²³⁰ Use of minimum force is not required, as lethal force is immediately authorized.²³¹ The person remains targetable throughout his deployment to the site, while prepping the site, while actually emplacing the IED, and most significantly, throughout his return from the site.²³² Being targetable after the conclusion of the hostile act is a significant difference from self-defense and one of the main reasons direct participation is such a useful authority in counterinsurgency.²³³

How long the person remains subject to attack is different under the U.S. and ICRC approaches, but in practice the difference will often be inconsequential. In the IED-emplacer scenario, once he redeploys back into the anonymity of the civilian population he will not be targetable.²³⁴ Under the ICRC approach, even if he could be identified later, he would not be subject to attack without further evidence of his membership in an organized armed group.²³⁵ Under the U.S. approach, the outcome will likely mirror that of the ICRC approach, as there is no evidence that this particular individual's act is anything other than an isolated instance.²³⁶ If, however, there is evidence that this particular individual is engaging in a pattern of direct participation in hostilities, he could be subject to later attack, assuming he does not affirmatively opt out of direct participation beforehand.²³⁷

²²⁹ MC 362/1, *supra* note 71, at 4; SROE, *supra* note 8, at A-3-A-4.

²³⁰ See LAW OF WAR MANUAL, *supra* note 9, at 224; ICRC IG, *supra* note 3, at 65-67.

²³¹ See AP I, *supra* note 17, art 51(3); AP II, *supra* note 23, art 13(3).

²³² See ICRC IG, *supra* note 3, at 65; LAW OF WAR MANUAL, *supra* note 9, at 224, 230-32.

²³³ *Supra* note 232 and accompanying sources.

²³⁴ *Id.*

²³⁵ See ICRC IG, *supra* note 3, at 71-73.

²³⁶ See LAW OF WAR MANUAL, *supra* note 9, at 230-32.

²³⁷ *Id.*

IV. Implementing Direct Participation Authority

With direct participation authority both legally sound and operationally necessary, the next logical step is to incorporate it into U.S. policy and training. This should be accomplished by including direct participation authority into the unclassified annex to the SROE,²³⁸ and by incorporating it into training at all levels.

A. Adding Direct Participation to the Standing Rules of Engagement

It is clear from the *Law of War Manual* that the United States already recognizes direct participation as a valid authority.²³⁹ What is currently missing in U.S. policy is inclusion of this authority in the SROE and authorization of its use at the tactical level. The unclassified annex to the SROE is a conflict-generic document that provides guidance on the United States position on use of force in the event of a conflict.²⁴⁰ It serves to document U.S. self-defense policy, provides a starting point for conflict-specific ROE, provides an unclassified summary of the United States' use of force policy on which soldiers can train, and informs coalition partners of certain aspects of U.S. ROE policy to enhance interoperability.²⁴¹ If the U.S. is going to implement direct participation authority for use at the tactical level, it should be added to the unclassified portion of the SROE. To accomplish this, the following language could be inserted into the unclassified enclosure to the SROE:

When approved by the appropriate authority, attack is authorized against individuals or groups that take a direct part in hostilities against U.S. forces or other designated persons or property.

Individuals or groups take a direct part in hostilities when they commit, or take preparatory measures to commit, a belligerent act. A belligerent act is one specifically designed to directly cause an adverse effect to the military operations or capacity of U.S. forces or other designated persons or property.

²³⁸ See SROE, *supra* note 8, encl. A.

²³⁹ LAW OF WAR MANUAL, *supra* note 9, at 222–32.

²⁴⁰ SROE, *supra* note 8, encl. A.

²⁴¹ *Id.*

The authority to use force against individuals or groups directly participating in hostilities begins when the individuals or groups take preparatory measures to commit the belligerent act and, at a minimum, extends throughout their deployment to, and return from, the location of the act's execution.

The intent of this proposed ROE is to provide direct participation authority to the soldier and the tactical-level leader. Using this wording, the earliest termination of the authority to target a direct participant is upon the individual's return from the act of direct participation. This is consistent with the ICRC approach, however, it does not represent agreement with the ICRC approach.²⁴² Instead, it offers it as a baseline minimum and recognizes that at the tactical level, once the person redeploys from the scene of the act, he will most often again become lost in the anonymity of the civilian population, and thus become untargetable.²⁴³ By using the phrase "at a minimum," the ROE recognizes that in some situations, such as those where direct participation is tracked through intelligence gathering, the authority to attack may extend further.²⁴⁴ It is important to note that most junior soldiers will never apply direct participation authority beyond the tactical level, because they will be targeting individuals based only on their immediate, observable acts of direct participation, not on intelligence. When soldiers go on missions to capture or kill a person whose direct participation was determined by intelligence, they will likely merely be told that the person is legally targetable under the ROE. The determination that the person is legally targetable under the ROE will have been made during mission planning; individual soldiers will not be required to make a personal determination regarding the authority to target.

This does not mean that the United States does not need an additional ROE provision to address individuals who exhibit a pattern of direct participation. This updated ROE should specifically address situations where intelligence indicates that an individual is committing a series of incidents of direct participation. In such cases, the ROE should allow for

²⁴² See ICRC IG, *supra* note 3, at 67–68.

²⁴³ See *id.*; LAW OF WAR MANUAL, *supra* note 9, at 230–32.

²⁴⁴ See generally LAW OF WAR MANUAL, *supra* note 9, at 230–32; Watkins, *supra* note 161, at 692.

the individual to be placed on a list of direct participants who may be attacked for an extended period.

In many ways, this intelligence-based approach to direct participation is the functional equivalent of the person being a member of a declared hostile force. The difference is that unlike declared hostile force authority, there is no requirement to link the individual to a particular armed group.²⁴⁵ Inclusion on the target list is contingent upon intelligence evidencing the individual's direct participation, not the collective acts of a particular group.²⁴⁶ Additionally, there should be a time requirement whereby new intelligence indicating continued, direct participation must be collected or the person must be removed from the list. This time requirement will account for the requirement under the U.S. approach that a person's targetable status as a direct participant ends once sufficient time has passed with no incidents of direct participation, unless they have already affirmatively opted out.²⁴⁷ Because the enemy may be able to use the knowledge of a specific time limit to his advantage, this ROE is better suited for the classified portion of the SROE.

B. Education and Training

Once the direct participation authority is incorporated into the SROE, education and training must follow. One of the primary criticisms of the LIT ROE was the difficulty and inefficiency of introducing a new ROE concept during the course of an ongoing conflict.²⁴⁸ Following the Army axiom of "we fight like we train," if we do not train the use of direct participation authority in peacetime, we will have difficulty successfully implementing it in combat.

Before training soldiers can begin, we must educate commanders and their legal advisors. For years now, commanders and legal advisors alike have essentially utilized direct participation authority in Afghanistan and

²⁴⁵ Compare OPLAW HANDBOOK, *supra* note 2, at 83 ("Once a force or individual is identified as a DHF [declared hostile force], the force or individual may be engaged . . .") with LAW OF WAR MANUAL, *supra* note 9, at 224 ("The U.S. approach as generally been to refrain from classifying those belonging to non-state groups as 'civilians' to whom this rule [direct participation authority] would apply.").

²⁴⁶ See LAW OF WAR MANUAL, *supra* note 9, at 224.

²⁴⁷ *Id.* at 230–232; Schmitt *Critical Analysis*, *supra* note 79, at 38.

²⁴⁸ See LESSONS LEARNED VOL I, *supra* note 40, at 100–03.

Iraq, but called it self-defense.²⁴⁹ This has resulted in many commanders and legal advisors failing to understand the difference between the two authorities. In Regional Command-South, where the NATO ROE allowed commanders to openly use direct participation authority, one U.S. brigade combat team commander was asked to describe the change in operations after the NATO ROE was implemented.²⁵⁰ His response summed up the issue succinctly, “this doesn’t change what we are doing; it’s just that now we can be honest about it.”²⁵¹

While commanders own the ROE, legal advisors are most often its keepers and trainers.²⁵² Legal advisors must thoroughly understand the benefits and limitations of the three use of force authorities and know when it is appropriate to use each. When training soldiers, they must be careful not to mix self-defense terminology with direct participation terminology. It may be convenient to describe “measures preparatory to a specific act of direct participation” as “hostile intent,” but they are not the same.²⁵³ Likewise, while they may look similar on the ground, a “hostile act” under self-defense is not the same as a “specific act” of direct participation in hostilities.²⁵⁴ Mixing the terminology will only blur the lines between the authorities and add to soldiers’ confusion. Instructors will need to use care when discussing the differences between self-defense and direct participation authority and use example-based training to reinforce the differences.

Educating commanders and legal advisors is important, but even more critical is training soldiers. Soldiers must be trained to recognize an act of participation in hostilities, and to distinguish it from an imminent threat meriting a response in self-defense. Rules of Engagement classes that highlight the three authorities followed by hands-on situational training is

²⁴⁹ Bagwell Afghanistan Experience, *supra* note 72.

²⁵⁰ *Id.*

²⁵¹ Personal conversation with author (Bagwell), February 2013, Kandahar Airfield, Afghanistan.

²⁵² U.S. DEP’T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO OPERATIONS 7-1 (1 Mar. 2013).

²⁵³ Compare SROE, *supra* note 8, at A-3 (“Hostile Intent. The threat of imminent use of force . . .”) with ICRC IG, *supra* note 3, at 65–66 (“Preparatory measures include acts of a military nature and so closely linked to the subsequent execution of a specific act of direct participation that they constitute an integral part of that act.”).

²⁵⁴ Compare SROE, *supra* note 8, at A-3 (“Hostile Act. An attack or other use of force . . .”) with ICRC IG, *supra* note 3, at 46 (“A specific act must meet three criteria; threshold of harm, direct causation, and belligerent nexus.”).

vital to ensuring soldiers are equipped to correctly use these authorities on the battlefield. To be effective, however, training must be accomplished before deploying to combat. Waiting until the soldier is in the conflict is too late. Incorporating direct participation authority in the SROE will enable peacetime training on all three use of force authorities, and will fully equip soldiers to implement the correct authority regardless of the type of conflict they face.

Some commanders and legal advisors may be concerned that empowering the average soldier with direct participation authority will result in higher casualties of innocent civilians due to misapplication. Recent history proves this concern is misplaced.²⁵⁵ Not only can U.S. soldiers correctly apply direct participation authority at the tactical level, a review of the actions of U.S. forces in Afghanistan and Iraq demonstrates they have been doing so since at least 2005.²⁵⁶ Perhaps they did not recognize the legal authority behind what they were doing as direct participation authority, but their instincts told them not to follow the restrictions of self-defense when they identified someone who was clearly an insurgent.²⁵⁷ As early as 2005, soldiers were applying tools such as Threat Assessment Escalation of Force to sort innocent civilians from non-uniformed insurgents.²⁵⁸ By 2007, commanders and their legal advisors had adjusted ROE cards, moving away from limiting soldiers to “defending” against hostile acts and demonstrations of hostile intent to allowing soldiers to “engage” (i.e. attack) individuals who committed hostile acts or demonstrated hostile intent.²⁵⁹ Authorized to engage the enemy, U.S. soldiers proved more than capable of knowing against whom to use minimum force under self-defense and whom to shoot immediately as an insurgent.²⁶⁰ Additionally, in Regional Command-South in Afghanistan, where direct participation authority was openly implemented at the tactical level, incidents of innocent civilians being killed actually decreased.²⁶¹

²⁵⁵ Bagwell Afghanistan experience, *supra* note 72; Bagwell TAP, *supra* note 85, at 7.

²⁵⁶ Bagwell Afghanistan experience, *supra* note 72; Bagwell TAP, *supra* note 85, at 7; MNC-I ROE card, *supra* note 92.

²⁵⁷ Personal conversation between a U.S. brigade commander and author (Bagwell), February 2013, Kandahar Airfield, Afghanistan.

²⁵⁸ Bagwell TAP, *supra* note 86, at 7.

²⁵⁹ MNC-I ROE card, *supra* note 92.

²⁶⁰ See Bagwell TAP, *supra* note 86, at 13–15 (discussing soldiers using appropriate force).

²⁶¹ Bagwell Afghanistan experience, *supra* note 72. While many factors may have contributed to this outcome, incidents of civilian deaths during the Regional Command-South (RC-S) rotation from 2012–2013 drop significantly from the previous 2011–2012 rotation that did not allow the use of direct participation authority. *Id.*

Once properly trained on self-defense, direct participation, and declared hostile force authorities, soldiers will understand how these authorities nest within one another and will be able to apply them correctly. Soldiers will know that if they encounter a civilian on the battlefield who is not committing a hostile act or demonstrating hostile intent, is not committing an act of direct participation, or is not a person whom they identify as a member of a declared hostile group, then the person is an innocent civilian who should not be attacked. If soldiers encounter a civilian who is committing a hostile act or demonstrating hostile intent rising to the level of an imminent threat, but the nature of the hostile act or hostile intent does not amount to the belligerent acts of a fighter, then they are limited to acting in self-defense, with the minimum force necessary to neutralize the threat.²⁶² If, however, soldiers encounter a civilian who is committing the belligerent acts of a fighter, the soldiers will know that this person is directly participating in hostilities and they are authorized to attack him for such time as he is a direct participant.²⁶³ Finally, if soldiers encounter either a person dressed as a civilian who they recognize to be a member of a declared hostile group, or a person wearing the uniform of enemy forces, they will know that under declared hostile force authority they have identified the enemy and may attack him.²⁶⁴

Because the nuances of direct participation authority can be easily debated in academic settings with hard-to-reconcile examples of when the authority begins, when it ends, and what remote acts can qualify, it is easy to think that junior soldiers will not be able to understand the authority or correctly apply it. The direct-participation situations faced by soldiers at the tactical level, however, tend not to be nuanced. They are usually obvious, unambiguous examples of direct participation such as a suicide-bomber approaching a checkpoint, a person maneuvering on a forward operating base with a rocket-launcher, or a person emplacing or detonating an IED.²⁶⁵ At the tactical level, the difficulty is not so much identification of the act as one of direct participation, but rather in forcing the individual to reveal himself as a direct participant while there is sufficient time and standoff distance to protect both soldiers and innocent civilians. When fighters deliberately camouflage themselves as innocent civilians, soldiers

²⁶² SROE, *supra* note 8, at A-3.

²⁶³ See LAW OF WAR MANUAL, *supra* note 9, at 224–32; ICRC IG, *supra* note 3.

²⁶⁴ SROE, *supra* note 8, at A-3; OPLAW HANDBOOK, *supra* note 2, at 83.

²⁶⁵ Bagwell Afghanistan experience, *supra* note 72.

should use techniques such as the Threat Assessment Process to sort innocent civilians from individuals warranting the use of force under self-defense or direct participation.²⁶⁶ In situations where the actions of a person in civilian clothing are ambiguous, soldiers must be trained to err on the side of determining him to be an innocent civilian, and not attack him.

V. Conclusion

Currently, in situations where direct participation authority is the more suitable authority, U.S. forces assert that they are acting in self-defense. This creates confusion and frustration with the international community as well as among U.S. commanders and soldiers.²⁶⁷ International partners are frustrated by having to adjust to the United States' strained and overreaching version of self-defense.²⁶⁸ United States commanders are frustrated by having to send soldiers out to fight the enemy with only the authority of self-defense.²⁶⁹ Soldiers, and their family members, are justly concerned that soldiers are being sent on offensive missions allowed to act only in self-defense.²⁷⁰ Complicating matters further, many commanders and their legal advisors are no longer clear exactly what self-defense really means and fail to fully understand what is required before it may be used.²⁷¹

Embracing direct participation authority will greatly reduce this confusion and frustration. Once direct participation authority is implemented, the United States will no longer need to rely on a strained and overreaching definition of imminence, and targeting based on direct participation will be in line with that of our international partners. This will not only reduce confusion, it will enhance interoperability. While fighting enemies who dress as civilians will always be frustrating, having an offensive authority that allows U.S. soldiers to attack the enemy, once identified, will reduce this frustration.

Self-defense will always have a place on and off the battlefield, but when fighting a war waged overwhelmingly by fighters dressed as

²⁶⁶ See Bagwell *TAP*, *supra* note 85.

²⁶⁷ Bagwell *Afghanistan Experience*, *supra* note 72.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

civilians, direct participation authority is more correct, more precise, and provides better protection to soldiers and innocent civilians. Self-defense should be the reason nations go to war, not the authority soldiers must use to fight one. Though self-defense allows a soldier to protect himself, it does not allow him to offensively attack the enemy. When the rules soldiers must follow fail to comport with the operational reality of their assigned mission, they become disillusioned with the law, the mission, and their leaders. A common complaint throughout both OEF and OIF is that U.S. soldiers feel the ROE forces them to fight with their hands tied.²⁷² This complaint both accurately identifies the limitations self-defense has placed on U.S. forces and masks the disheartening stretching of U.S. self-defense policy that is required to accomplish basic mission objectives.

Commanders and soldiers understand that in a counterinsurgency, fighters will dress to blend in with the civilian population and that identification of the enemy will likely remain the toughest challenge faced in these conflicts. More often than not, the only time fighters will be distinguishable from civilians is while they are actually performing an act of combat. When they finally do self-identify as fighters, U.S. use of force policy should include the authority to attack using direct participation authority, which is significantly better than using self-defense.

²⁷² See, e.g., BILLY VAUGHN, *BETRAYED: THE SHOCKING TRUE STORY OF EXTORTION 17 AS TOLD BY A NAVY SEAL'S FATHER* (2013).

MILITARY JUSTICE INCOMPETENCE OVER COMPETENCY DETERMINATIONS

MAJOR DAVID C. LAI*

*It was once said that the moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; and those who are in the shadows of life, the sick, the needy and the handicapped.*¹

I. Introduction

Current military justice procedures concerning the handling of mentally ill servicemembers is lacking. More specifically, competency determinations of an accused servicemember's capacity to stand trial are constitutionally invalid, legally illogical, unfair to the accused, and abrogate the independent judicial duties of commanders. Moreover, this poor handling serves to undermine the legitimacy of the military judicial institution.

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¹ Joe Hansen, *The Moral Test of Government*, HUFF. POST (Sept. 3, 2012), http://www.huffingtonpost.com/joe-hansen/the-moral-test-of-governm_b_1847379.html.

Historically, the military justice system has been at the forefront in providing and protecting the rights of the accused.² However, little attention has been paid to its dealings with an accused who may be incompetent to stand trial. When it comes to dealing with competency determinations and involuntary commitments, the rules for military courts-martial are outright odd and uncharacteristic from that of any other jurisdiction in the country. It is cross-breed with the federal system and something exclusively military. The current amalgamation of the federal model and commander-driven military procedures creates a forced and frustrated hybrid system that is neither fair nor just. It leaves the military process irrational in some ways and outright contradictory in others.

Part II of this article provides the general comparative framework of the different judicial models, the federal procedures, the American Bar Association (ABA) Model Rules,³ and the military justice process, and examines how each of these systems address and adjudicate the competency of a defendant to stand trial. Part III reflects upon some of the key problems and difficulties with the current military justice procedures and argues why the status quo requires change. Part IV offers a recommendation—to shift pre-referral competency determinations from convening authorities to military magistrates—and explains why such an update to the military rules can better strengthen the due process rights of the accused servicemember, and best ensure justice under military law.

II. Criminal Systems Compared

A. The Federal Procedures

When a defendant's competency to stand trial is at issue under the federal system, the U.S. Code dictates the procedures and due process requirements.⁴ Either the defense counsel or the prosecutor can make a motion to the court for a sanity or competency hearing, and the motion

² See, e.g., Douglass Calidas, *Sensitive Military "Intelligence": Reconsidering Fifth Amendment Waivers*, 19 GEO. MASON U. CIV. RTS. L. J. 133, 133 (2008). "Several years before the Court [even] decided *Miranda*, Congress enacted Article 31 of the Uniform Code of Military Justice to safeguard accused servicemembers' Fifth Amendment rights." *Id.*

³ William H. Erickson et al., *Mental Health, Mental Retardation and Criminal Justice: General Professional Obligations*, in AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE MENTAL HEALTH STANDARDS (1989).

⁴ 18 U.S.C. § 4241(a).

may be made at any time during the proceedings, from the commencement of the prosecution up until just prior to sentencing.⁵ The court can, and in certain circumstances, may be required,⁶ to act *sua sponte* and “order such a hearing on its own motion.”⁷ The court must grant the motion for a hearing if there is reasonable cause to believe that a defendant may be incompetent.⁸ Courts have further defined “reasonable cause to believe” as any “bona fide doubt” to the defendant’s ability to proceed.⁹ As a matter of practice, judges will often “order an examination when any question as to competency is raised, unless the motion is frivolous or in bad faith.”¹⁰ Additionally, the courts may, and generally will, order a psychiatric or psychological evaluation of the defendant prior to the scheduled competency hearing.¹¹

In accordance with the Supreme Court standard under *Dusky*,¹² a defendant may only be deemed incompetent to stand trial if he is “presently suffering from a mental disease or defect,” and if he is “unable to understand the nature and consequences of the proceedings against him or assist properly in his defense.”¹³ The court will decide the defendant’s

⁵ *Id.*

⁶ See *Pate v. Robinson*, 383 U.S. 375 (1966). “The court’s failure to make such inquiry thus deprived Robinson of his constitutional right to a fair trial Where the evidence raises a ‘bona fide doubt’ as to a defendant’s competence to stand trial, the judge on his own motion must impanel a jury and conduct a sanity hearing.” *Id.* at 385.

⁷ 18 U.S.C. § 4241(a). “The court . . . shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect.” *Id.* (emphasis added).

⁸ *Id.*

The court shall grant the motion . . . if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

Id. (emphasis added).

⁹ See *Roberts v. Dretke*, 381 F.3d 491 (5th Cir. 2004), *cert. denied*, 544 U.S. 963 (2005). “[A] trial court must hold a competency hearing when there is evidence before the court that objectively creates a bona fide question as to whether the defendant is competent to stand trial.” *Id.* at 497 (citing *Pate v. Robinson*, 383 U.S. 375, 385).

¹⁰ JAMES MOORE ET AL, *MOORE’S FEDERAL PRACTICE: RULES AND OFFICIAL FORMS AS AMENDED* § 612.2.07(1) (2015).

¹¹ 18 U.S.C. § 4241(b).

¹² See *Dusky v. United States*, 362 U.S. 402 (1960).

¹³ 18 U.S.C. § 4241(a).

ability to proceed based upon the preponderance of the evidence.¹⁴ However, the federal circuits are split over “which party bears the burden of proof in competency hearings . . . with some circuits placing the burden on the [g]overnment and others placing it on the individual.”¹⁵

Federal sanity hearings are formal proceedings and must comport with the provisions under § 4247(b) of the U.S. code.¹⁶ The rule enumerates due process protections for the accused and it includes: the right to receive notice; to be represented by counsel; to call witnesses; to be afforded the opportunity to testify on his own behalf; to present evidence; and to confront and cross-examine testifying witnesses.¹⁷ In fact, if the defendant can demonstrate indigence, the judge may issue subpoenas for witnesses and order their presence at no expense to the defendant.¹⁸ Within federal criminal procedure, it is evident that Congress “recognized that such procedural safeguards were, at a minimum, desirable, if not constitutionally mandated.”¹⁹

In the course of conducting competency hearings, federal judges base their determinations of the defendant’s mental competency to stand trial on enumerable factors and evidence, to include the defendant’s testimony,²⁰ personal observations of the defendant’s courtroom

¹⁴ *Id.* § 4241(d).

¹⁵ Brett F. Kinney, *An Incompetent Jurisprudence: The Burden of Proof in Competency Hearings*, 43 U.C. DAVIS L. REV. 683, 686 (2009) (citing *United States v. Patel*, 524 F. Supp. 2d 107, 112–14 (D. Mass. 2007) (discussing the split of the circuits)).

¹⁶ 18 U.S.C. § 4241(c).

¹⁷ *Id.* § 4247(d).

¹⁸ MOORE, *supra* note 10, § 612.2.07(3) (citing FED. R. CRIM. P. 17(b)). “The court may order that a subpoena be issued on motion of a defendant who does not have sufficient means to pay a witness’s fees, upon a showing that the presence of the witness is necessary to an adequate defense.” *Id.*

¹⁹ *United States v. Gillenwater*, 717 F.3d 1070, 1073 (9th Cir. 2013).

²⁰ *E.g., id.*

The right to testify reaches beyond the criminal trial: the procedural due process constitutionally required in some extrajudicial proceedings includes the right of the affected person to testify.” That a person has a constitutional right to testify before his or her welfare benefits are terminated strongly supports the conclusion that a defendant has an equivalent right to testify on his own behalf before he is determined to be incompetent and is deprived of his liberty.

Id. at 1073 (quoting *Rock v. Arkansas*, 483 U.S. 44, 51 n.9 (1987) (internal citations omitted)).

behavior,²¹ medical testimony from examining witnesses, medical records and reports, proffers and opinions of defense counsels,²² other lay witnesses' observations of the defendant,²³ and even the defendant's own assertions of competency.²⁴ If, after conducting the sanity hearing, the judge finds the defendant incompetent, the proceedings are then stayed, and the court is statutorily required, without discretion, to commit the defendant to the United States Attorney General's custody.²⁵

A defendant may be committed at one of the federal facilities for treatment only for a reasonable period of time, but the initial detention cannot extend beyond four months.²⁶ The apparent intent of hospitalization is to allow doctors time to determine whether the defendant will regain competency in the near future. If after treatment the defendant is returned to competency, federal rules require the court to hold another competency hearing.²⁷ This follow-on hearing is also a full-course proceeding that demands all of the constitutional due process requirements under section 4247(b).²⁸ If the judge finds, by a preponderance of the

²¹ See, e.g., *United States v. Hems*, 901 F.2d 293 (2d Cir. 1990). "In making its assessment, the court may take account of a number of factors, including the defendant's comportment in the courtroom." *Id.* at 295 (citing *Drope v. Missouri*, 420 U.S. 162, 180 (1975) (finding evidence relevant to competency includes not only medical opinion but also the defendant's "irrational behavior" and "his demeanor at trial")); *United States v. Oliver*, 626 F.2d 254, 258–59 (2d Cir. 1980) (holding that the district court properly relied in part on its own observations in assessing defendant's mental capacity to stand trial); *United States v. Sullivan*, 406 F.2d 180, 185 (2d Cir. 1969); *McFadden v. United States*, 814 F.2d 144, 147 (3d Cir. 1987) (relying on defendant's conduct at competency hearing)).

²² See, e.g., *United States v. Widi*, 684 F.3d 216, 221 (1st Cir. 2012). "[D]efense counsel's conclusion of competence is generally given great weight because of counsel's 'unique vantage.'" *Id.* at 220 (internal citation omitted); *United States v. Muriel-Cruz*, 412 F.3d 9, 14 (1st Cir. 2005). "Given that defense counsel enjoys a unique vantage for observing whether her client is competent . . . (noting that defense counsel and defendant are often the two parties 'most familiar' with the facts pertinent to this issue), it would be untoward indeed to disqualify her from stating her opinion." *Id.* at 14 (internal citations omitted).

²³ See, e.g., *United States v. Simpson*, 645 F.3d 300, 306–07 (5th Cir. 2011). "A district court can consider several factors in evaluating competency, including, but not limited to, its own observations of the defendant's demeanor and behavior, medical testimony, and the observations of other individuals that have interacted with the defendant." *Id.* at 306 (citing *United States v. Joseph*, 333 F.3d 587, 589 (5th Cir. 2003)).

²⁴ See, e.g., *Widi*, 684 F.3d at 216. The defendant's "own insistence on his competency is also entitled to consideration." *Id.* at 220 (citing *United States v. Muriel-Cruz*, 412 F.3d 9, 13 (1st Cir. 2005)).

²⁵ 18 U.S.C. § 4241(d).

²⁶ *Id.* § 4241(d)(1).

²⁷ 18 U.S.C. § 4241(e).

²⁸ *Id.*

evidence, that the defendant has regained competency, the court will again proceed with the case. If the court determines that the defendant remains mentally incompetent, it will extend the involuntary commitment if the defendant is expected to recover in the foreseeable future,²⁹ or if not, it may process the defendant for possible civil commitment.³⁰

B. The American Bar Association's Model Rules

On August 7, 1984, the American Bar Association (ABA) formally adopted a set of ninety-six “black letter” standards on mental health and the criminal justice system.³¹ The ABA model rules regarding the necessity for competency hearings are particularly clear. “In *every* case in which a good faith doubt of the defendant’s competence to stand trial has been raised . . . the court *should* conduct a hearing on the issue.”³² The United States Supreme Court has echoed the same principle.³³ The ABA model rules not only recognize that all “[f]undamental constitutional rights afforded a defendant in criminal cases should apply to the hearing on competence to stand trial,”³⁴ but they specifically note that, “[i]n all cases, the defendant should have the right to be present at the hearing, to confront and fully cross-examine witnesses, to call independent expert witnesses, to have compulsory process for the attendance of witnesses, and to have a

When the director of the facility in which a defendant is hospitalized . . . determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense . . . *the court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant.*

Id. (emphasis added).

²⁹ 18 U.S.C. § 4241(d)(2)(A). “[I]f the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the proceedings to go forward.” *Id.*

³⁰ 18 U.S.C. §§ 4246, 4248.

³¹ Erickson et al., *supra* note 3.

³² *Id.* at 7-4.7(a) (emphasis added).

³³ Gerald Bennett, *Symposium on the ABA Criminal Justice Mental Health Standards: A Guided Tour through Selected ABA Standards Relating to Incompetence to Stand Trial*, 53 GEO. WASH. L. REV. 375, 397 (1985). *See also* Drope v. Missouri, 420 U.S. 162, 181 (1972) (finding the court should hold a hearing to determine the defendant’s competence to stand trial at any point in the proceedings at which that competence becomes doubtful); Pate v. Robinson, 383 U.S. 375, 385 (1966) (finding the court should hold a competence hearing whenever evidence raises a sufficient doubt about the defendant’s competence).

³⁴ Erickson et al., *supra* note 3, at 7-4.8(a).

transcript of the proceedings.”³⁵

While the ABA standards prefer competency hearings as a default rule, it remains flexible enough to bypass formal hearing procedures when “all parties stipulate that no hearing is necessary and the court concurs.”³⁶ Note, however, that regardless of the parties’ agreement, the court is still required to make “a separate concurrence . . . made only after it independently has reviewed the factual basis for the report.”³⁷ Additionally, the ABA re-emphasizes that “[i]n absence of stipulation by the parties and concurrence by the court, a hearing on the issues should be mandatory in all cases.”³⁸ Ultimately, the ABA model rules strive to ensure that “each party and the court [is afforded] the absolute right to force a full hearing on the issues, while providing a mechanism to avoid an unnecessary expenditure of resources in uncontested situations.”³⁹

Upon finding the defendant incompetent, the ABA model rules further list factors that the court should consider “relating to treatment or habilitation to effect competence, including its appropriateness, its availability in the geographic area, its probable duration, the likelihood of restoration to competence in the reasonably foreseeable future, and the availability of the least restrictive treatment alternative.”⁴⁰ The court must find, by clear and convincing evidence, that:

(A) there is substantial probability that the defendant’s incompetence will respond to treatment or habilitation and defendant will attain or maintain competence in the reasonably foreseeable future; (B) treatment or habilitation appropriate for the defendant to attain or maintain competence is available in a residential facility; and (C) no appropriate treatment or habilitation alternative is available less restrictive than that requiring involuntary hospitalization.⁴¹

Lastly, the ABA model rules require the court to make specific “written findings of fact setting forth separately and distinctly the findings

³⁵ *Id.* at 7-4.8(a)(i).

³⁶ *Id.* at 7-4.7(a).

³⁷ Bennett, *supra* note 33, at 398.

³⁸ Erickson et al., *supra* note 3, at 7-4.7(b).

³⁹ Bennett, *supra* note 33, at 398.

⁴⁰ Erickson et al., *supra* note 3, at 7-4.9(a).

⁴¹ *Id.* at 7-4.9(a)(ii)(A)-(C).

of the court on the issues of competence, treatment or habilitation, and involuntary confinement.”⁴²

C. The Military Justice Process

Competency determinations under military justice criminal procedures, embodied in the rules for courts-martial (RCM), are altogether different from that of any state or federal jurisdiction in the country. It is a bifurcated hybrid system of established federal procedures and something exotically fabricated.⁴³ The turn-pin to competency determinations pivot upon the convening authority’s referral of the case to court-martial.⁴⁴ Prior to referral, any questions of an accused’s mental competency are well within the sole discretion and judgment of the convening authority.⁴⁵ Commanders (a general courts-martial convening authority, or GCMCA) decide whether there is reasonable cause to evaluate an accused servicemember’s mental capacity.⁴⁶ The GCMCA alone determine if the accused is mentally capable to proceed to trial.⁴⁷ Only upon referral is the case finally before a court, and only then does a judge assume the judicial role overseeing competency determinations.⁴⁸ The referral, though not in itself that significant, demarks a critical turning point from what is uniquely military into the more recognizable conventions of federal criminal procedure.

1. Pre-Referral Procedures

The pre-referral phase of military criminal case is the period between the pre-referral of charges against the servicemember and the convening authority’s referral of the case for court-martial.⁴⁹ Statutorily, the military

⁴² *Id.* at 7-4.9(b)(i).

⁴³ David M. O’Dea, *Navigating the Restoration of Capacity and Civil Commitment of a Mentally Incompetent Accused*, ARMY LAW., June 2013, at 5 (citing *Joint Service Committee on Military Justice Report, Analysis of the National Defense Authorization Act Fiscal Year 1996 Amendment to the Uniform Code of Military Justice*, ARMY LAW., Mar. 1996, at 145).

⁴⁴ See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 706(a) (2012) [hereinafter MCM].

⁴⁵ *Id.* R.C.M. 706(b)(1).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* R.C.M. 706 (b)(2).

⁴⁹ See generally *id.* R.C.M. 307, 601.

prosecutor, or trial counsel, has 120 days to bring the case to trial.⁵⁰ This can often be much longer when accounting for the permissible tolling of excusable delays, to include, for example, the time necessary to conduct a competency evaluation of an accused.⁵¹ During this pre-referral phase, nearly everything, including criminal procedure, is purely command-driven. Convening authorities serve both prosecutorial and quasi-judicial roles by overseeing and executing certain judicial responsibilities while, at the same time, maintain responsibility for the prosecution of the case.⁵² If, within this pre-referral period, an accused's mental competency comes into doubt, all parties, including defense counsel, trial counsel, investigating officers, and subordinate commanders have an affirmative duty under the rules to report it to the chain of command.⁵³ The respective courts-martial convening authority will then consider the issue.⁵⁴ If the convening authority, upon the advice of her judge advocate, finds a bona fide doubt as to the accused's competency, she can order the accused to be examined.⁵⁵ Most often, the defense counsel is the first to raise the concern

⁵⁰ *Id.* R.C.M. 707(a).

⁵¹ *Id.* R.C.M. 707(c).

Excludable delay. All periods of time during which appellate courts have issued stays in the proceedings, or the accused is absent without authority, or the accused is hospitalized due to incompetence, or is otherwise in the custody of the Attorney General, shall be excluded when determining whether the period in subsection (a) of this rule has run.

Id.

⁵² See generally DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* (2004).

⁵³ See MCM, *supra* note 44, R.C.M. 706(a).

Initial action. If it appears to any commander who considers the disposition of charges, or to any investigating officer, trial counsel, defense counsel, military judge, or member that there is *reason to believe* that the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial, that fact and the basis of the belief or observation *shall* be transmitted through appropriate channels to the officer authorized to order an inquiry into the mental condition of the accused.

Id. (emphasis added).

⁵⁴ *Id.*

⁵⁵ *Id.* at 706(b)(1). “*Before referral.* Before referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the convening authority before whom the charges are pending for disposition.” *Id.*

and the one to request the mental evaluation of the accused.⁵⁶ The defense counsel will generally draft a military memorandum, detailing the “facts and the basis of the belief or observation,” and submit his request through the trial counsel to the convening authority.⁵⁷ At this point in the process, the accused has no rights to a hearing, to call witnesses, or to demand an audience with the commander.⁵⁸

Theoretically, the legal bar for granting competency evaluations is very low. Convening authorities should grant such requests “if it is not frivolous and is made in good faith.”⁵⁹ However, the rules do not require the convening authority to make any findings or publish any reasoning for her decision.⁶⁰ She can flatly deny the request without justification,⁶¹ and her decision is not reviewable until after referral of the case to court.⁶² In the interim, the accused is left with no recourse but to seek reconsideration, submit additional information, or simply wait until the convening authority refers the charges and the case is properly before a military judge.

If the convening authority grants the request and orders an examination per the Rules for Courts-Martial (RCM) 706, a board of one or more physicians or clinical psychologists will be convened to conduct the mental evaluation of the accused.⁶³ This is often called a “sanity board” or a “706 board.” Military rules mandate the convening authorities to always order the board to specifically and individually address four questions:

⁵⁶ This assertion is based upon the author’s professional experience serving as a Senior Trial Counsel and Trial Counsel at Fort Hood, Texas and Multi-National Division-Baghdad, Iraq [hereinafter Lai’s Professional Experience].

⁵⁷ See MCM, *supra* note 44, R.C.M. 706. “The submission may be accompanied by an application for a mental examination under this rule.” *Id.*

⁵⁸ *Id.*

⁵⁹ *United States v. Nix*, 36 C.M.R. 76, 80 (1965).

⁶⁰ *Id.* R.C.M. 706.

⁶¹ “The standard for ordering a sanity board is fairly low . . . [but despite] the low threshold, trial counsel will often oppose the defense request for a sanity board, assuming that the sanity board is intended as either a delay tactic or a fishing expedition.” Donna M. Wright, “*Though this be Madness, Yet there is Method in it: A Practitioner’s Guide to Mental Responsibility and Competency to Stand Trial*,” ARMY LAW., Sept. 1997, at 21–22.

⁶² MCM, *supra* note 44, R.C.M. 706(b)(2). “After referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the military judge.” *Id.*

⁶³ *Id.* R.C.M. 706(c)(1). “Each member of the board shall be either a physician or a clinical psychologist. Normally, at least one member of the board shall be either a psychiatrist or a clinical psychologist.” *Id.*

- (A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect?
- (B) What is the clinical psychiatric diagnosis?
- (C) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct?
- (D) Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense?⁶⁴

The convening authority can tack on additional questions in her order to the 706 board so long as the questions are appropriately related to the mental capacity or mental responsibility of the accused.⁶⁵ Note that while a 706 boards is authorized to evaluate the accused for her competency to stand trial or lack of mental responsibility independently, the rules curiously demand that the board always report on both.⁶⁶ Accordingly, sanity boards are inescapably always dual-purpose.⁶⁷

As the sanity board finalizes its RCM 706 evaluation, it will draft two separate reports, called “long-” and “short-form” reports.⁶⁸ The long-form is the board’s entire report, which will include the complete details of the examination, the test results, the evidence considered, its findings, and the basis of its conclusions.⁶⁹ Only the defense team and the appropriate

⁶⁴ *Id.* R.C.M. 706(c)(2)(A)–(D).

⁶⁵ *Id.* R.C.M. 706(c)(2).

⁶⁶ *Id.* “When a mental examination is ordered under this rule . . . the order *shall* require the board to make separate and distinct findings as to each of the following questions.” *Id.* (emphasis added).

⁶⁷ J.W. Looney, *The Arkansas Approach to Competency to Stand Trial: “Nailing Jelly to a Tree”*, 62 ARK. L. REV. 683, 707 (2009). “Dual-purpose orders may be criticized on this basis alone.” *Id.* at 707. “The [Arkansas] Practice Guidelines specifically oppose the use of joint evaluations for determining competency and mental condition at the time of the offense. This is in accord with the American Bar Association’s Criminal Justice Mental Health Standard.” *Id.* (citation omitted).

⁶⁸ See R.C.M. 706(c) (requiring two reports). “Unlike many civilian jurisdictions, two separate versions of the report are prepared as the level of disclosure is different for the defense and the trial (government) counsels.” Meredith L. Mona, Carroll J. Diebold & Ava B. Walton, *Update on the Disposition of Military Insanity Acquittees*, 34 J. AM. ACAD. PSYCH. L. 538, 540 (2006).

⁶⁹ *Id.*

medical personnel are authorized to receive the long-form report.⁷⁰ Otherwise, only a military judge can order its release and disclosure.⁷¹

The trial counsel, the investigating officer, and the convening authority are only permitted to receive the short-form.⁷² The short-form is the board's abbreviated report, which is specifically limited to "a statement consisting only of the board's ultimate conclusions as to all the questions specified in the order."⁷³ In other words, the short-form will merely identify the board's basic diagnosis of the accused's mental condition, if any, and its concluding opinions whether the accused is currently competent to stand trial.⁷⁴ In the short-form, the board will neither provide any explanation nor offer the basis for its conclusions, and it will only answer the questions submitted to it and not make additional recommendations or comments.⁷⁵

If the sanity board's conclusion is that the accused is mentally capable to stand trial, its decision is, during the pre-referral phase, undisputed, final, and automatically adopted; there are no additional proceedings or further findings required.⁷⁶ While the defense counsel may request that the convening authority re-visit the issue or apply for another RCM 706 examination,⁷⁷ there is no mechanism to force the convening authority to review the board's report and make an independent legal finding of competency.⁷⁸ The defense counsel, at this point, is otherwise impotent to

⁷⁰ MCM, *supra* note 44, R.C.M. 706(c)(3)(B).

⁷¹ *Id.* R.C.M. 706(c)(3)(C). "That neither of the contents of the full report nor any matter considered by the board during its investigation shall be released by the board or other medical personnel to any person not authorized to receive the full report, except pursuant to an order by the military judge." *Id.*

⁷² *Id.* at R.C.M. 706(c)(3)(A).

That upon completion of the board's investigation, a statement consisting only of the board's ultimate conclusions as to all questions specified in the order shall be submitted to the officer ordering the examination, the accused's commanding officer, the investigating officer, if any, appointed pursuant to Article 32 and to all counsel in the case, the convening authority, and, after referral, to the military judge.

Id. See also UCMJ art. 32 (2012).

⁷³ MCM, *supra* note 44, at 706(c)(3)(A).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See *id.* R.C.M. 909(c).

⁷⁷ *Id.* R.C.M. 706(c)(4).

⁷⁸ *Id.* R.C.M. 909(c).

challenge the finding, and the finding is presumed valid.⁷⁹ Further action is only permissible if the sanity board reports that the accused is incompetent.⁸⁰

If the sanity board finds the accused incompetent, military rules only require the convening authority to review the limited short-form report.⁸¹ She can then either concur with the board's medical findings or dismiss it.⁸² Again, the accused servicemember is not entitled to a hearing or to call any witnesses.⁸³ In fact, in most cases, the convening authority may never have personally observed the servicemember.⁸⁴ Even more, the rules do not require the convening authority to conduct any further inquiries, make any legal findings, or even provide any explanation of her decision.⁸⁵ A pre-referral competency determination is simply and purely the commander's document review of the sanity board's short-form report.⁸⁶ She is limited to either surrendering to the board's recommendation or blindly deny it.⁸⁷

If the GCMCA adopts the board's finding that an accused is incompetent (she will almost always adopt the findings of the board) she is directed by the rules, without discretion,⁸⁸ to relinquish the accused servicemember to the custody of the United States Attorney General.⁸⁹

⁷⁹ *Id.* R.C.M. 909(b). “*Presumption of capacity.* A person is presumed to have the capacity to stand trial unless the contrary is established.” *Id.*

⁸⁰ *See id.* R.C.M. 909(c).

⁸¹ MCM, *supra* note 44, at 706(c)(3)(A).

⁸² *Id.* R.C.M. 909(c).

If any inquiry pursuant to [the Rules for Court Martial, Rule] 706 conducted before referral concludes that an accused is suffering from a mental disease of defect that renders him or her mentally incompetent to stand trial, the convening authority before whom the charges are pending for disposition may disagree with the conclusion . . . [or] concurs with the conclusion.

Id.

⁸³ *Id.*, R.C.M. 909.

⁸⁴ Lai's Professional Experience, *supra* note 56.

⁸⁵ MCM, *supra* note 44, R.C.M. 909(c).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* R.C.M. 909(f). “The view that this is a non-discretionary act is consistent with federal courts examining this issue.” O’Dea, *supra* note 43, at 5 (citing *United States v. Salahuddin*, 54 M.J. 918, 920 (A.F. Ct. Crim. App. 2001)) (citations omitted).

⁸⁹ MCM, *supra* note 44, R.C.M. 909(c). “If, upon receipt of the charges, the general court-martial convening authority similarly concurs, then he or she *shall* commit the accused to

The U.S. Attorney General must then commit the accused to a medical facility with the Federal Bureau of Prisons⁹⁰ (BoP), who will then transfer the servicemember to an inpatient psychiatric center at one of five Federal Medical Centers (FMC).⁹¹ This initial commitment cannot exceed four months,⁹² and is solely intended to medically treat the accused and ascertain “whether there is a substantial probability the accused will attain the capacity to permit the trial to proceed in the foreseeable future.”⁹³ Beyond this initial four months, the convening authority may extend the commitment of the accused servicemember if she finds that the accused is expected to recover.⁹⁴ The extension can be even further prolonged, but all extensions must be only for a reasonable time.⁹⁵ The rules, however, do not provide further guidance on what constitutes a “reasonable time,” but arguably, it cannot be indefinite.⁹⁶

While the initial four-month commitment is nondiscretionary,⁹⁷ the

the custody of the Attorney General.” *Id.* (emphasis added).

⁹⁰ *Id.* R.C.M. 909(f). “Hospitalization of the accused. An accused who is found incompetent to stand trial under this rule shall be hospitalized by the Attorney General as provided in section 4241(d) of title 18, United States Code.” *Id.*

⁹¹ See generally O’Dea, *supra* note 43, at 4–5 (citing Bryon L. Hermel & Hans Stelmach, *Involuntary Medication Treatment for Competency Restoration of 22 Defendants with Delusional Disorder*, 35 J. AM. ACAD. PSYCH. L. 47, 48–50 (2007)).

⁹² MCM, *supra* note 44, R.C.M. 909(f) discussion. “Under section 4241(d) of title 18, the initial period of hospitalization for an incompetent accused shall not exceed four months.” *Id.*

⁹³ *Id.*

⁹⁴ *Id.* “[T]he accused may be hospitalized for an additional *reasonable* period of time.” *Id.* (emphasis added).

⁹⁵ *Jackson v. Indiana*, 406 U.S. 715 (1972).

[A] person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal.

Id. at 738.

⁹⁶ *Id.*

⁹⁷ O’Dea, *supra* note 43, at 5 (quoting *United States v. Ferro*, 321 F.3d 756, 761 (8th Cir. 2003) (“Even if the [General Courts-Martial Convening Authority] is of the opinion that

GCMCA may decide against extending the commitment and drop the charges against the servicemember.⁹⁸ However, if the convening authority dismisses the charges solely due to the accused's mental condition, the accused will then be automatically forced through the federal civil commitment review, where the servicemember may be committed *ad infinitum*.⁹⁹

Similarly, if the FMC director determines that the accused cannot be restored to competency and that her "release would create a substantial risk of bodily injury . . . or serious damage to property of another," a Certificate of Mental Disease or Defect and Dangerousness is filed with the federal district court where the accused is held.¹⁰⁰ The servicemember will then be automatically processed for federal civil commitment proceedings.¹⁰¹ While the GCMCA will receive a copy of the FMC's findings, federal courts will now assume jurisdiction.¹⁰² In fact, by this point, the GCMCAs "have very little ability to influence when the accused is released [T]he final decision will be made by the district court where the accused resides."¹⁰³ Such civil commitments can be

the accused will not regain capacity with treatment, the [commander] 'does not have the discretion, prior to a reasonable period of hospitalization in the custody of the Attorney General,' to make that determination.") *Id.*

⁹⁸ MCM, *supra* note 44, R.C.M. 909(f) discussion. "This additional period of time ends either when the accused's mental condition is improved so that trial may proceed, or when the pending charges against the accused are dismissed." *Id.*

⁹⁹ *Id.* "If charges are dismissed solely due to the accused's mental condition, the accused is subject to hospitalization as provided in section 4246 of title 18." *Id.* See also 18 U.S.C. § 4246.

¹⁰⁰ 18 U.S.C. § 4246(a).

If the director of a facility in which a person is hospitalized certifies that a person in the custody of the Bureau of Prisons . . . who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another . . . he *shall* transmit the certificate to the clerk of the court for the district in which the person is confined.

Id. (emphasis added).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ O'Dea, *supra* note 43, at 11 (citing 18 U.S.C. § 4246(e)).

indefinite.¹⁰⁴ Even if not indefinite, “[a]n accused subject to civil commitment due to an underlying criminal offense will likely remain in custody longer than an ordinary, civil commitment patient.”¹⁰⁵

If, however, the accused regains the capacity to stand trial and the FMC issues a certificate of competency,¹⁰⁶ the GCMCA is then instructed to “promptly take custody” of the accused.¹⁰⁷ The FMC often will hold the accused for up to an additional thirty days to facilitate transfer.¹⁰⁸ Upon returning the accused back to her unit, the convening authority again regains full command of the prosecution and “may take any action that he or she deems appropriate in accordance with RCM 407, including referral of the charges to trial” or dismissal of charges.¹⁰⁹ The RCMs do not require the GCMCA to conduct another sanity board or confirm FMC certification of competency; the accused’s mental capacity is again presumed by the rules.¹¹⁰ Note that the time that the accused was

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[T]he Attorney General shall hospitalize the person for treatment in a suitable facility, *until* . . . the person’s mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would not create a substantial risk of bodily injury to another person or serious damage to property of another.

18 U.S.C. § 4246(d)(2) (emphasis added).

¹⁰⁵ O’Dea, *supra* note 43, at 1. In a study of Arizona defendants civilly committed under this section, “mentally incompetent non-restorable defendants spent ‘twice as long’ in hospitals compared to civil patients.” *Id.* at 11 n.137 (citing Gwen A. Levitt et al., *Civil Commitment Outcomes of Incompetent Defendants*, 38 J. AM. ACAD. PSYCH. L. 349, 356 (2010)).

¹⁰⁶ 10 U.S.C. § 876(a)(4)(A).

¹⁰⁷ MCM, *supra* note 44, R.C.M. 909(f).

If notified that the accused has recovered to such an extent that he or she is able to understand the nature of the proceedings and to conduct or cooperate intelligently in the defense of the case, then the general court-martial convening authority shall promptly take custody of the accused.

Id.

¹⁰⁸ 10 U.S.C. § 876(a)(4)(B).

¹⁰⁹ MCM, *supra* note 44, R.C.M. 909(c). *See also id.* R.C.M. 706 discussion. “Based on the report, further action in the case may be suspended, the charges may be dismissed by the convening authority, [and] administrative action may be taken to discharge the accused from the service or, subject to [Military Rules of Evidence] 302, the charges may be tried by court-martial.” *Id.*

¹¹⁰ *See generally id.* R.C.M. 706.

involuntary committed, however long, is excusable delay for speedy-trial purposes.¹¹¹ Even more, the rules permit the government an additional 120 days to bring the restored accused to trial.¹¹² In other words, the prosecution's statutory speedy-trial clock resets.

2. *Post-Referral Procedures*

Once the convening authority refers the case for courts-martial before a military judge, the military criminal procedures, especially those regulating competency determinations, are then altogether altered. While the substantive legal standards (i.e. burden of proof, level of proof, *Dusky* factors¹¹³ determining incompetency) remain the same, the pre and post-referral rights, forum, and practice is distinctly different. Post-referral procedures parallel and adopt much of the conventional federal process.

When the case is referred, the military judge, as opposed to the GCMCA, assumes the full discretion, judgment, and responsibility over any issues regarding the servicemember's mental capacity to stand trial.¹¹⁴ The court has full authority to not only judge the appropriateness for an sanity board, but to also order it.¹¹⁵ Even if the convening authority had previously denied a request for a sanity board, the military judge can order it if reasonable cause is found by a preponderance of evidence.¹¹⁶

In further contrast to the pre-referral Rules, the post-referral procedures demand due process.¹¹⁷ Upon referral of the case for trial,

¹¹¹ *Id.* RCM 909(g). “*Excludable delay.* All periods of commitment shall be excluded as provided by R.C.M. 707(c).” *Id.*

¹¹² *Id.* “The 120-day time period under R.C.M. 707 shall begin anew on the date the general court-martial convening authority takes custody of the accused at the end of any period of commitment.” *Id.*

¹¹³ *Dusky v. United States*, 362 U.S. 402 (1960).

¹¹⁴ MCM, *supra* note 44, R.C.M. 706(b)(2). “*After referral.* After referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the military judge The military judge may order a mental examination of the accused *regardless of any earlier determination by the convening authority.*” *Id.* (emphasis added).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* R.C.M. 909(d).

Determination after referral If an inquiry pursuant to R.C.M. 706 conducted before or after referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the military judge *shall* conduct a

military rules require the judge to conduct a competency hearing if the accused's mental capacity to stand trial comes into doubt.¹¹⁸ Despite the 706 board's earlier findings, either party may request—or the judge *sua sponte* order—a full hearing to review the accused's mental capacity upon adequate proof.¹¹⁹

Unlike pre-referral competency determinations with a convening authority, where the only evidence is limited to the redacted, short-form 706 report, post-referral procedures require a full hearing on the matter.¹²⁰ In the hearing, the accused may submit evidence for the court's review, have medical experts testify, to include the 706 board members who examined the accused, call other witnesses for support, confront and cross-examine government witnesses, and even testify on her own behalf.¹²¹ At the hearing, the accused's defense attorney is not only permitted to make arguments to the court, but counsel can even attest to his own observations of the accused so long as it does not violate attorney-client confidentiality.¹²² In fact, "counsel will usually introduce relevant portions of the mental evaluation [long-form] report and call one or more experts who examined the accused. Counsel may also call lay witnesses with sufficient contact with the accused who can testify about incidents of bizarre or otherwise relevant behavior."¹²³ In stark distinction from the pre-referral stage, the post-referral military rules liberally and explicitly instruct that "[i]n making this [competency] determination, the military judge is not bound by the rules of evidence except with respect to privileges."¹²⁴

At the conclusion of the hearing, the judge will consider all evidence and testimony and make a formal, specific, legal finding on the issue.¹²⁵ If the court concludes that the accused is incompetent to stand trial by a

hearing to determine the mental capacity of the accused.

Id. (emphasis added).

¹¹⁸ *Id.*

¹¹⁹ *Id.* "After referral, the military judge may conduct a hearing to determine the mental capacity of the accused, either *sua sponte* or upon request of either party." *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* R.C.M. 909(e)(2)

¹²² Margaret A. McDevitt, *Trial Defense Service Note: Defense Counsel's Guide to Competency to Stand Trial*, ARMY LAW., Mar. 1988, at 37 (citing *United States v. Martinez*, 12 M.J. 801, 807 (N.M.C.M.R. 1981)).

¹²³ *Id.*

¹²⁴ MCM, *supra* note 44, R.C.M. 909(e)(2).

¹²⁵ *Id.*

preponderance of the evidence, all further proceedings, including trial, are generally stayed, and the rules instruct the judge to notify the GCMCA of his findings.¹²⁶ In turn, the convening authority is then statutorily required, as before, to surrender the servicemember to the custody of the U.S. Attorney General and involuntarily commit the accused for rehabilitation.¹²⁷ Note that while in the pre-referral phase, the convening authority can refuse the 706 board and independently find the accused competent to stand trial, after referral the convening authority must abide by the court's ruling.¹²⁸

If the servicemember is restored after treatment and the convening authority re-refers the case for trial, the military judge may still, if the accused's mental capacity remains in controversy, order another hearing to confirm continued competency.¹²⁹ In fact, if concerns over the accused's capacity to stand trial lingers, the military judge can, and in some cases is obligated, to conduct additional (if not multiple) competency hearings at any time throughout the proceedings, up to and until sentencing.¹³⁰

III. The Need for Change

The military should modify current military criminal procedure so that military magistrates, rather than commanders, conduct pre-referral competency determinations. One of the most obvious basis for this proposal is to update the military justice system to better reflect the federal legal developments and norms. This change will bring the military justice system closer in step with the federal criminal procedures and the ABA Model Rules.¹³¹ Federal criminal procedures have proven reliable, particularly considering the federal criminal court's extraordinary volume of cases, and the magnitude of judicial and peer review, to include the Supreme Court. In comparison to the military, these procedures have been more tested and refined.¹³² The ABA is undoubtedly the ultimate think-

¹²⁶ *Id.* R.C.M. 909(e)(3).

¹²⁷ *Id.* "If the military judge finds the accused is incompetent to stand trial, the judge shall report this finding to the general court-martial convening authority, who *shall* commit the accused to the custody of the Attorney General" *Id.* (emphasis added).

¹²⁸ *Id.*

¹²⁹ *See id.* R.C.M. 706(a), 909(d).

¹³⁰ *Id.*

¹³¹ *See supra* section II for further discussion.

¹³² UNITED STATES COURTS, *Official Business of the United States Court: Annual Report*

tank of the legal profession, representing the expert opinions of the industry's most respected, experienced, and renowned practitioners who specialize in the particular field and focus on the most specific, niche legal issues.¹³³ The military should not resist changing the rules to those that every other jurisdiction has already adopted. The military should likewise not insist on preserving the status-quo without the willing introspection to consider whether its methods are, in fact, serving its purpose, are legally sufficient, and, per military cliché, doing the right thing.

Are the military procedures in pre-referral competency determinations constitutionally valid, fair, and just to servicemembers? Do they make legal and logical sense? Do they best serve our commanders? Do they uphold the institutional integrity and commitment to justice? If not, then military justice becomes, in part, a misnomer.

A. Fundamentally Unfair

Appreciating the grave importance of due process during pre-referral competency reviews requires understanding why an accused would challenge such determinations. The accused may wish to contest the sanity board's examination methods or its underlying conclusions. The defense counsel, for example, may wish to dispute the 706 finding of competency when, despite the board's finding, he is convinced that his client is unable to understand the nature and consequences of the proceedings against her, or assist properly in her own defense. As

of the Director 2014, ADMIN. OFF. OF U.S. COURTS (Sept. 30, 2014), <http://www.uscourts.gov/statistics-reports/judicial-business-2014>. Just in fiscal year 2014 alone, the U.S. District Courts adjudicated 376,536 cases, of which 81,226 were criminal prosecutions. *Id.* The U.S. Court of Appeals oversaw 54,988 cases, 11,003 of which were criminal appeals. *Id.*

¹³³ As one of its primary goals, the ABA's mission is to advance the rule of law, to include a mandate to:

Increase public understanding of and respect for the rule of law, the legal process, and the role of the legal profession at home and throughout the world Hold government accountable under the law Work for just laws, including human rights, and fair legal process preserve the independence of the legal profession and the judiciary.

The American Bar Association Mission and Goals, AMER. BAR ASSOC., http://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited Apr. 13, 2016).

acknowledged by the Supreme Court and reiterated by the ABA, the defense counsel “will often have the best-informed view of the defendant’s ability to participate in [her] defense.”¹³⁴ Forensic psychology, while certainly valuable, is not an exact science. In fact, even today, there are a number of competing methods for evaluating an accused’s competency and there is no one standard or test that is universally accepted as the “key.”¹³⁵ In 1965, psychiatrist Dr. Thomas Szasz wrote, “[w]hen it comes to judging ability to stand trial . . . we seem to be at sea, with no compass to guide us.”¹³⁶ Unfortunately, it seems that “his assertion is as accurate today as when it was written.”¹³⁷

The accused may also want to challenge a sanity board’s findings because the stigma of a psychological diagnosis and involuntary hospitalization may be far worse and more damaging than the possible punishment at court-martial. Arguably, “involuntary hospitalization . . . serves the interest of justice and the accused by ensuring that the accused

¹³⁴ *Medina v. California*, 505 U.S. 437, 450 (1992). “[A]s the American Bar Association asserts, [the] defense counsel ‘may well be the single most important witness’ on the issue of the defendant’s ability to consult and interact appropriately with his or her attorney.” Grant H. Morris et al., *Health Law in the Criminal Justice System Symposium: Competency to Stand Trial on Trial*, 4 HOUSTON J. HEALTH & POLICY, 193, 236 (2004) (citation omitted).

¹³⁵ Morris, *supra* note 134, at 233–34 (citations omitted).

By and large, the legal profession has left it to the mental health professionals to develop their own competency assessment instruments to operationalize the *Dusky* standard. But those instruments are not without their limitations. Until recently, such instruments did not provide for standardized administration and objective, criterion-base scoring. The recently developed MacArthur Competence Assessment Tool—Criminal Adjudication (MacCAT-CA) broadly assess both the defendant’s cognitive and decision making capabilities and is a standardized and nationally norm-reference clinical measure. However, the MacCAT-CA has been criticized for its primary reliance on a hypothetical vignette format which limits the evaluator’s ability to assess the defendant’s competence to deal with the specific issues involved in defending his or her particular case . . . research indicates that, at least currently, the overwhelming majority of psychiatrists and psychologist do not use psychological tests in assessing defendant’s competency. Rather they rely primarily on their own forensic interview with the defendant.”

Id. See also *Dusky v. United States*, 362 U.S. 402 (1960).

¹³⁶ Morris, *supra* note 134, at 228 (quoting THOMAS SZASZ, *PSYCHIATRIC JUSTICE* 27 (1965)).

¹³⁷ *Id.*

receives care and treatment prior to trial.”¹³⁸ But this presumption may assume too much. Aside from the deprivation of liberty and forced medication, which are both in themselves injurious enough, the commitment of a servicemember to an infamous federal mental institution is exceptionally more stigmatizing than incarceration.¹³⁹ Federal mental facilities are known to be “notorious institutions for the criminally insane.”¹⁴⁰ Indeed, “ex-patients generally fare worse in the job market than ex-felons.”¹⁴¹ As such, it may be “far worse to be considered both ‘mad’ and ‘bad’ than to be considered merely one or the other.”¹⁴² Even if the convening authority subsequently dismisses charges, or if the servicemember is later acquitted, the damage from being involuntarily committed to a mental institution may be irreversible.

An accused may also contest an RMC 706 incompetency finding because the resulting delay and time spent in involuntary commitment could be longer and more onerous than her probable sentence at court-martial. Statutorily, the prosecution has 120 days to bring the accused to trial.¹⁴³ This does not include tolled excusable delay like the necessary time to convene and conduct a sanity board, or for the board to publish its reports.¹⁴⁴ If the accused is found incompetent, the convening authority is required to hospitalize the servicemember for another four months for further evaluation.¹⁴⁵ This involuntary commitment can be extended much longer if the accused is expected to regain competency.¹⁴⁶ There are also other additional logistical delays, to include the transfer of the accused to and from the custody of the Federal Bureau of Prisons that can tack on an additional month.¹⁴⁷ Adding insult to injury, the military rules then reset the statutory clock once the accused regains competency and grants the government an additional 120 days to re-prosecute the case.¹⁴⁸ All totaled, an accused may spend well over a year in legal limbo under the cloud of

¹³⁸ Jeremy A. Ball, *Solving the Mystery of Insanity Law: Zealous Representation of Mentally Ill Servicemember*, ARMY LAW., Dec. 2005, at 10.

¹³⁹ See Bruce J. Winick, *Article: Restructuring Competency to Stand Trial*, 32 U.C.L.A. L. REV. 921, 944 (1985).

¹⁴⁰ *Id.* at 944.

¹⁴¹ *Id.* (citing Ennis, *Testimony in Hearing before the Senate Subcommittee on Constitutional Rights*, 91st Cong., 2d Sess. 284 (1970)).

¹⁴² *Id.*

¹⁴³ MCM, *supra* note 44, R.C.M. 707(a).

¹⁴⁴ See *id.* R.C.M. 707(c).

¹⁴⁵ *Id.* R.C.M. 909(f) discussion.

¹⁴⁶ *Id.*

¹⁴⁷ See 10 U.S.C. § 876 (a)(4)(A).

¹⁴⁸ MCM, *supra* note 44, R.C.M. 909(g).

criminal charges, deprived of her freedom, subjected to forced medication, all without ever being convicted of a crime. To deny the accused due process rights for such consequential pre-referral competency determinations is not only unconscionable, it is unconstitutional.

B. Constitutionally Invalid

The contention that the military justice's pre-referral procedures are legally inadequate is not new. In 2005, Jeremy A. Ball argued that RCM 909 is invalid and unconstitutional, yet nothing has changed.¹⁴⁹ While the United States Supreme Court has adjudicated a number of cases regarding due process requirements in state and federal competency procedures, it has yet to specifically review the military process under RCM 909.¹⁵⁰ However, in synthesizing the significant Supreme Court opinions on the issue, it is abundantly apparent that "RCM's provisions authorizing the general court-martial convening authority to involuntarily hospitalize the accused without a hearing violate the Due Process Clause of the Fifth Amendment . . . [and] the servicemember's 'right to be free from involuntary confinement by his own government without due process of law.'"¹⁵¹

Among Supreme Court cases,¹⁵² *Vitek v. Jones* is of particular interest.¹⁵³ There, the appellee, a convicted felon, was involuntarily transferred from prison to a mental institution for treatment, but he was never afforded a hearing.¹⁵⁴ The threshold question before the Court was "whether the involuntary transfer . . . to a mental hospital implicates a liberty interest that is protected by the Due Process Clause."¹⁵⁵ The Court not only found that "commitment to a mental hospital produces 'a massive curtailment of liberty,' and in consequence 'requires due process

¹⁴⁹ Ball, *supra* note 138, at 1. "Considering the significant procedural shortcomings of R.C.M. 909, both in relation to federal criminal procedures and the Due Process Clause, and in conjunction with the lack of statutory support for involuntary hospitalization prior to referral, the only reasonable conclusion is that the provisions of R.C.M. 909(c) are invalid." *Id.* at 14.

¹⁵⁰ MCM, *supra* note 44, R.C.M. 909.

¹⁵¹ Ball, *supra* note 138, at 10.

¹⁵² See *Vitek v. Jones*, 445 U.S. 480 (1980); *United States v. Salerno*, 481 U.S. 739 (1987); and *Hamdi v. Rumsfeld*, 542 U.S. 507(2004) (containing language Ball found to be particularly convincing); see also Ball, *supra* note 138, at 13.

¹⁵³ *Vitek v. Jones*, 445 U.S. 480 (1980).

¹⁵⁴ *Id.*

¹⁵⁵ *Vitek*, 445 U.S. at 488.

protection,”¹⁵⁶ but it went further to recognize that just “the stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness, constitute the kind of deprivations of liberty that requires procedural protections.”¹⁵⁷

In *Pate v. Robinson*,¹⁵⁸ the Court considered whether due process is offended when the defendant never raised a competency objection at trial. The state contended that the defendant effectively waived the issue, but the Court decided otherwise.¹⁵⁹ In *Pate*, the Court held that evidence that sufficiently raises a bona-fide doubt of the defendant’s competence entitled him “to a hearing on this issue, [and a] court’s failure to make such inquiry thus deprived [the defendant] of his constitutional right to a fair trial.”¹⁶⁰

In *Hamdi v. Rumsfeld*,¹⁶¹ the Supreme Court, speaking more directly to the military, held that even in extreme circumstances of war where the governmental interest over enemy detentions is particularly elevated, due process is still nevertheless demanded.¹⁶² It stated that “commitment for any purpose constitutes a significant deprivation of liberty that requires due process protections.”¹⁶³ Such due process requirements must include “notice of the factual basis for his classification, and a fair opportunity to rebut the government’s factual assertions before a neutral decision-maker.”¹⁶⁴ The Court reminded the military that “[i]t is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.”¹⁶⁵ “Indeed, failure of the court to order an evaluation when reasonable grounds exist to question the defendant’s competency—even if the defense did not raise the issue—has been held to violate the defendant’s right to due process, requiring reversal of any conviction

¹⁵⁶ *Id.* at 491–92.

¹⁵⁷ *Id.* at 494.

¹⁵⁸ *Pate v. Robinson*, 383 U.S. 375 (1966).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 385 (emphasis added). “In the event a sufficient doubt exists as to his present competence such a hearing must be held.” *Id.* at 391.

¹⁶¹ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

¹⁶² *Id.*

¹⁶³ Ball, *supra* note 138, at 12 (quoting *Hamdi*, 542 U.S. at 264–48).

¹⁶⁴ *Id.*

¹⁶⁵ *Hamdi*, 542 U.S. at 532.

obtained.”¹⁶⁶

C. Lacking Legal and Logical Sense

Aside from the constitutional objection, the bifurcated military procedure over competency determinations does not make legal or logical sense. The process due an accused servicemember cannot pivot so heavily on referral of charges when the legal consequences and the possible deprivation of liberty is the same. After all, the military referral process is not so legally distinctive to justify differential rights and protections. But what is more troubling is just how divergent and disparate the competency determination processes are in the military justice system pre versus post-referral.

If the court-martial is referred for trial, military rules mandate that the judge conduct a competency determination hearing wherein both parties can contest the other’s positions, present arguments, offer evidence, and call witnesses.¹⁶⁷ In fact, military judges are not even bound by evidentiary rules in such hearings, except privileges.¹⁶⁸ The court can receive and consider hearsay, character, or propensity evidence so long as it is relevant to the mental capacity of the accused.¹⁶⁹ Post-referral, the rules ensure that the military judge has all the pertinent facts and evidence he needs to make the best and most just decision concerning the accused’s capacity to stand trial.

The competency determination prior to referral is not only substantially different from that before a military judge at courts-martial, it is arguably different from any other federal or state jurisdiction in the country. Military rules not only fail to require the convening authority to

¹⁶⁶ Winick, *supra* note 139, at 924–25.

¹⁶⁷ MCM, *supra* note 44, R.C.M. 909(d).

Determination after referral . . . If an inquiry pursuant to R.C.M. 706 conducted before or after referral concludes that an accused is suffering from a mental defect that renders him or her mentally incompetent to stand trial, the military judge *shall* conduct a hearing to determine the mental capacity of the accused. Any such hearing shall be conducted in accordance with paragraph (e) of this rule.

Id. (emphasis added).

¹⁶⁸ *Id.* R.C.M. 909(e)(2).

¹⁶⁹ *See id.*

conduct a hearing, they fail to equip commanders with opportunities for further inquiry.¹⁷⁰ Indeed, the rules only provide convening authorities with the abbreviated RCM 706 findings and the charge sheet for consideration.¹⁷¹ The rule expects that by simply reviewing these two documents, commanders can draw a fully-informed—and correct—conclusion about an accused’s mental competency to stand trial. This is neither logical nor justifiable.

How can the rules find it absolutely critical to require the military judge to conduct a full hearing, receive evidence, witnesses and arguments, and deliver legal findings on the records, but in the same ironic breath, determine that it is superfluous for the commander, who is tasked to make the same significant legal determinations? It seems safe to say that in contrast to commanders, military judges have more judicial experience, a better understanding of military justice processes, and have been specially trained as a lawyer and judge. Yet, underlying this double standard of pre- and post-referral procedures, the military rules assume that convening authorities have super-judicial insight into an accused’s mental competency that judges lack. Put simply, if the determination of an accused’s capacity to stand trial cannot be put through the same rigorous evidentiary review whether it is pre- or post-referral, or whether before a judge or a convening authority, then the military justice system is neither judicial nor logical.

¹⁷⁰ *Id.* R.C.M. 909(c).

Determination before referral. If an inquiry pursuant to R.C.M. 706 conducted before referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the convening authority before whom the charges are pending for disposition may disagree with the conclusion and take any action authorized under R.C.M. 401, including referral of the charges to trial. If that convening authority concurs with the conclusion, he or she shall forward the charges to the general court-martial convening authority. If, upon receipt of the charges, the general court-martial convening authority similarly concurs, then he or she shall commit the accused to the custody of the Attorney General. If the general court martial convening authority does not concur, that authority may take any action that he or she deems appropriate in accordance with R.C.M. 407, including referral of the charges to trial.

Id.

¹⁷¹ *Id.*

D. The Burden of Proof Paradox

Another aspect that makes RCM 909 unworkable is its treatment of burden of proof. Under military rules, accused servicemembers are always “presumed to have the capacity to stand trial unless the contrary is established.”¹⁷² As such, it places the burden to demonstrate incompetency squarely on the accused.¹⁷³ The rules further require the accused to produce proof of her lack of capacity to stand trial by a preponderance of the evidence.¹⁷⁴ This procedural framework is not extraordinary in post-referral cases in courts-martial.¹⁷⁵ If the case has already been referred to court-martial, the military judge is required to then hold a competency determination hearing that offers the accused all the usual opportunities to make arguments on the record, call witnesses to testify, and present evidence to the court.¹⁷⁶ However, the procedural framework of pre-referral cases is absolutely paradoxical. The presumption of competency remains, and the burden of proof is still placed upon the accused. Yet military rules do not grant any meaningful mechanism or forum for the accused to address the issue with the convening authority.

¹⁷² *Id.* R.C.M. 909(b).

¹⁷³ McDevitt, *supra* note 122, at 37. “Because the accused is presumed to have mental capacity, defense counsel will bear the burden of proving that the accused lacks capacity.” *Id.*

¹⁷⁴ MCM, *supra* note 44, R.C.M. 909(e)(2). “Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him or her mentally incompetent” The standard of proof has been changed from beyond reasonable doubt to a preponderance of the evidence, which is consistent with the holdings of those federal courts which have addressed the issue. *See also* United States v. Gilio, 538 F.2d 972 (3d. Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); United States v. Makris, 535 F.2d 899 (5th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977).

¹⁷⁵ *See* Medina v. California, 505 U.S. 437 (1992).

Based on our review of the historical treatment of the burden of proof in competency proceedings, the operation of the challenged rule, and our precedents, we cannot say that the allocation of the burden of proof to a criminal defendant to prove incompetence ‘offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

Id. at 446 (quoting Patterson v. New York, 432 U.S. 197, 201 (1977)).

¹⁷⁶ MCM, *supra* note 44, R.C.M. 909(d). “If an inquiry pursuant to R.C.M. 706 conducted before or after referral concludes that an accused is suffering from a mental defect that renders him or her mentally incompetent to stand trial, the military judge *shall* conduct a hearing to determine the mental capacity of the accused.” *Id.* (emphasis added).

Military procedures require an accused to prove her own incompetency to a decision-maker to whom the rules fail to guarantee her access. It is a futile exercise of meaningless *non sequitur*. The only quasi-opportunity for the accused or her defense counsel to address the convening authority on this issue is limited in an initial report of concern.¹⁷⁷ Otherwise, there are no other sanctioned opportunities or designated procedures for an accused to satisfy to her burden of proof. Although an accused is always free to submit materials for the commander's consideration informally and outside the purviews of the rules, or even contact the commanding general directly, these are disingenuous alternatives. It is legally unjustifiable to place the burden on the accused to persuade a high-ranking commander with whom she cannot legally demand an audience.¹⁷⁸

E. Failing the Convening Authority

The recommendation to divest the convening authorities of competency determinations is not to question or doubt military commanders' abilities, willingness, or dedication to their justice responsibilities. Given proper procedures, convening authorities are arguably capable of deciding an accused's competency to stand trial. However, the current military justice system does not have a process for the convening authority to properly execute this duty. As discussed above, there are no formal competency determination hearings prior to the referral of the charges. The only evidence that the convening authorities have

¹⁷⁷ Under R.C.M. 706(a), the defense counsel is mandated to report, through third-party channels, any reasonable belief that the accused lacks the capacity to stand trial. *Id.* R.C.M. 709(a).

If it appears to any commander who considers the disposition of charges, or to any investigating officer, trial counsel, defense counsel, military judge, or member that there is *reason to believe* that the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial, that fact and the basis of the belief or observation *shall* be transmitted through appropriate channels to the officer authorized to order an inquiry into the mental condition of the accused.

Id.

¹⁷⁸ *See id.* R.C.M. 909(c).

before them is the charge sheet and the short-form RCM 706 finding.¹⁷⁹ As previously mentioned, they generally do not have the opportunity to personally observe the accused. Additionally, they do not have the benefit of observations of witnesses who have interacted with the accused. Finally, they often do not receive any insight from the accused's defense counsel.¹⁸⁰ They do not have the opportunity to question or learn from the medical experts who examined the accused, because there is no formal hearing. Under RCM 909, the convening authority can only blindly concur or dismiss the recommendations of the RCM 706 board.¹⁸¹ If unsatisfied, the convening authority can only order another 706 examination or push forward with the referral.¹⁸²

Commanders' reliance on sanity board findings is problematic because they effectively surrender their independent judicial judgment. An accused's competency to stand trial is a legal determination, not a medical one, and "the findings of a sanity board are not the same as a judicial determination of mental incapacity."¹⁸³ Sanity board reports are only meant "to provide for the detection of mental disorders not . . . readily apparent to the eye of the layman."¹⁸⁴ Furthermore, a medical diagnosis of mental disease may be a precursor to incompetency, but it is not dispositive.¹⁸⁵ Even more, "in some cases . . . the accepted legal approach

¹⁷⁹ *Id.*

¹⁸⁰ Lai's Professional Experience, *supra* note 56.

¹⁸¹ MCM, *supra* note 44, R.C.M. 909(c).

If an inquiry pursuant to R.C.M. 706 conducted before referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the convening authority before whom the charges are pending for disposition may disagree with the conclusion . . . [or] concurs with the conclusion.

Id.

¹⁸² *Id.* R.C.M. 706(c)(4). "Additional examinations. Additional examinations may be directed under this rule at any stage of the proceedings as circumstances may require." *Id.*

¹⁸³ Ball, *supra* note 138, at 14.

¹⁸⁴ *Id.* (quoting *Wear v. United States*, 218 F.2d 24, 26 (1954)).

¹⁸⁵ *See United States v. Nichols*, 56 F.3d 403 (2d Cir. 1995).

It is well-established that some degree of mental illness cannot be equated with incompetence to stand trial. The mental illness must deprive the defendant of the ability to consult with his lawyer "with a reasonable degree of rational understanding" and to understand the proceedings against him rationally as well as factually. Moreover, while the . . . court may consider psychiatric history in its deliberations,

does not comport with accepted psychiatric concepts . . . [while] in other cases, the accepted psychiatric approach cannot provide sufficient guidance to [authorities] vested with decision making.”¹⁸⁶ Simply put, “[t]he board’s findings are not legal conclusions, and should not be construed as such for purposes of justifying [an incompetency finding and] involuntary hospitalization.”¹⁸⁷

The convening authorities’ dependence on the short-form RCM 706 finding is even more troubling.¹⁸⁸ Their authorized copies of the findings are so abridged that its value is extremely limited. The short-form report is limited to “a statement consisting only of the board’s ultimate conclusions.”¹⁸⁹ It only identifies the board’s basic diagnosis of the accused’s mental condition and the board’s conclusory opinion of her current competency to stand trial. The convening authority cannot judge the validity of the board members’ assessments armed with nothing more than a statement of their conclusions. In effect, the rules formulate a take-it-or-leave-it dilemma that leaves the convening authority with little choice but to rubber-stamp the 706 findings wholesale without inspection, or go rogue and deny the only evidence they have before them—neither is acceptable.

It is axiomatic that the judge . . . must decide legal issues independently. Reliance on the unsupported ultimate

“the question of competency to stand trial is limited to the defendant’s abilities at the time of trial.”

Id. at 405 (quoting *United States v. Vamos*, 797 F.2d 1146, 1150 (2d Cir. 1986), *cert. denied*, 479 U.S. 1036 (1987)).

¹⁸⁶ Looney, *supra* note 67 (citing Alec Buchanan, *Competency to Stand Trial and the Seriousness of the Charge*, 34 J. AM. ACAD. PSYCH. & L., 458, 461–63 (2006)).

¹⁸⁷ Ball, *supra* note 138, at 14 (citing *United States v. Benedict*, 27 M.J. 253 (C.M.A. 1988) (“[H]olding that a sanity board report is not admissible on the issue of the accused mental capacity, in part because the court would be denied the significant benefit of cross-examination of the expert witnesses.”)).

¹⁸⁸ MCM, *supra* note 44, R.C.M. 706(c)(3)(B).

[T]he full report of the board may be released by the board or other medical personnel only to other medical personnel for medical purposes, unless otherwise authorized by the convening authority or, after referral of charges, by the military judge, except that a copy of the full report shall be furnished to the defense and, upon request, to the commanding officer of the accused.

Id.

¹⁸⁹ *Id.* R.C.M. 706(c)(3)(A).

conclusions of the expert prevents the judge from independently evaluating the factual basis for the . . . conclusions and substitutes the evaluator's decisions for those of the judge.¹⁹⁰

Lastly, the military rules' disparate treatment of convening authorities versus military judges is disquieting and very telling of just how little attention the rules give to the pre-referral competency process. On the one hand, the rules detail specific guidance to the military judge on how to adjudicate competency determinations,¹⁹¹ to include for example, the standard of proof, the reiteration of the *Dusky* legal standard, and the relaxed evidentiary rules.¹⁹² In contrast, its instruction to convening authorities, who are vested in making the same competency determinations, is wholly undeveloped and substantively lacking; it includes no determinations of law or particular facts.¹⁹³ It supplies no basis on how to judge.¹⁹⁴ The convening authority is completely left wanting. The rules do not provide convening authorities the necessary guidance, the needed evidence, or the forum to make a fully-informed and independent determination.

IV. Recommendation

The recommendation is straightforward—the general premise is to shift pre-referral competency determinations from a limited paper review by the convening authority, where there is little to no due process, to a competency hearing before a military magistrate, where a neutral and detached decision-maker can provide a forum for challenge and afford the constitutional rights owed to the accused servicemember. The following amendments should be made to RCM 909.

Rule 909. Capacity of the accused to stand trial by court-martial

(c) *Determination before referral.* If an inquiry pursuant

¹⁹⁰ Gerald Bennett, *Symposium on the ABA Criminal Justice Mental Health Standards: A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial*, 53 GEO. WASH. L. REV. 375, 397 (1985).

¹⁹¹ See MCM, *supra* note 44, R.C.M. 909(d).

¹⁹² See *id.* R.C.M. 909(e).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

to R.C.M. 706 [was] conducted before referral, [a neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned¹⁹⁵ shall review the competency of the accused and determine if the accused is, by a preponderance of the evidence, presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense.] ~~concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, [If the competency reviewing officer concludes that the accused is mentally capable to proceed,] the convening authority before whom the charges are pending for disposition may disagree with the conclusion and take any action authorized under R.C.M. 401, including referral of the charges to trial. If [the competency reviewing officer concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial] that convening authority concurs with the conclusion, the convening authority before whom the charges are pending for disposition shall forward the charges to the general court-martial convening authority. If, [U]pon receipt of the charges, the general court-martial convening authority similarly concurs, then he or she shall [then] commit the accused to the custody of the Attorney General. If the general court-martial convening authority does not concur, that authority may take any action that he or she deems appropriate in accordance with R.C.M. 407, including referral of the charges to trial.~~¹⁹⁶

Once the convening authority grants a request and orders a RCM 706 inquiry, she has effectively determined that there is cause to question the

¹⁹⁵ R.C.M. 305(i)(2). The draft language here is directly adopted from R.C.M. 305(i)(2). *Id.*

¹⁹⁶ R.C.M. 909. To specifically authorization military magistrates to judge competency determinations requires further revision and updates to Army Regulation (AR) 27-10 and the 15 March 2012 Standing Operating Procedures (SOP) for Military Magistrates. See U.S. DEP'T OF ARMY, REG. 37-10, MILITARY JUSTICE (16 Nov. 2005), and U.S. DEP'T OF ARMY, REG. 27-10, STANDING OPERATING PROCEDURES FOR MILITARY MAGISTRATES (15 Mar. 2012).

accused's competency to stand trial. Accordingly, by convening a 706 board, the convening authority will then necessarily also trigger the requirement for a competency review by a military magistrate.

Upon the publication of the board's findings, the convening authority now has two options: (1) she may dismiss the charges against the accused and process the servicemember for a misconduct chapter and/or medical separation;¹⁹⁷ or, (2) submit the accused to a military magistrate for a competency review. If the convening authority wishes to continue with its prosecution, the trial counsel will provide the military magistrate with the necessary documents, to include, at a minimum, a copy of the preferred charges, the request for the 706 examination (if any), the convening authority's memorandum ordering the 706 inquiry, and the sanity board's short-form report.¹⁹⁸ The defense counsel will also be granted an opportunity to submit any statements or documents for the magistrate's review. Once notified and in receipt of all government and defense submissions, the military magistrate will make a determination whether there is a reasonable and bona fide doubt as to the accused's current mental capacity. If the determination is negative, the magistrate will issue his decision to all parties, and the accused is again presumed competent to stand trial. After this determination, the convening authority may take any action authorized under RCM 401, including referral of the charges to trial.

If the magistrate finds reasonable cause to believe the accused's mental capacity remains at issue, the military magistrate will then schedule a competency review hearing. However, if both the trial and defense counsel agree with the sanity board's findings then a hearing is unnecessary, the military magistrate may waive the hearing on the matter and issue his findings upon the documentary evidence submitted. If either party challenges, however, the military magistrate must conduct a competency review hearing.

¹⁹⁷ R.C.M. 706 discussion. "Based on the report, further action in the case may be suspended, the charges may be dismissed by the convening authority, [and] administrative action may be taken to discharge the accused from the service or, subject to [Military Rule of Evidence] 302, the charges may be tried by court-martial." *Id.*

¹⁹⁸ Since the military magistrate is an entirely detached and neutral decision-maker (independent from command, trial and defense counsels, and even from the judge who will be presiding once the case is referred), and considering the magistrate is purely limited to reviewing the accused's competency to stand trial and not the underlying charged offenses, there is a strong argument that, under this proposal, it is legally proper and appropriate to authorize the magistrate to receive the full report from any or all of the 706 inquiries conducted in the case.

During the proposed pre-trial competency hearing, the accused will retain her due process rights and be represented by counsel. The servicemember and her defense counsel must be notified of the hearing and permitted to appear. The accused will also be afforded an opportunity to testify, to present evidence, to call witnesses on her behalf, and to confront and cross-examine witnesses who appear at the hearing.¹⁹⁹ Accordingly, any witness whose testimony is relevant to the competency review, and not cumulative “shall be produced if reasonably available.”²⁰⁰ Reasonable availability of relevant witnesses will be determined similarly to the provisions of RCM 405(g).²⁰¹ Alternately, unless defense objects, a military magistrate may take testimony under oath via telephone or similar means.

The substantive law and legal standards do not change. The presumption of competence remains;²⁰² and the required threshold of proof is still by a preponderance of the evidence.²⁰³ The legal criteria to determine competency per *Dusky* remains²⁰⁴ and the burden of proof remains with the accused. As in competency hearings before a judge and in pre-trial confinement review hearings before a magistrate, the rules of evidence for competency review hearings are relaxed.²⁰⁵ Military rules of evidence (MRE) shall not apply, except privileges under MRE Section V.²⁰⁶ Both the defense and trial counsel are permitted to submit written statements or documents for the magistrate’s consideration, so long as it is relevant to determining the accused’s mental competency.

Upon completion of the review, the military magistrate shall issue a ruling on whether or not the accused is competent to stand trial. The magistrate shall publish his conclusions, including the legal and factual

¹⁹⁹ See 18 U.S.C. § 4247(d). This section is adopted from the federal provisions in section 4247.

²⁰⁰ MCM, *supra* note 44, R.C.M. 405(g)(1)(A). This language is adopted from R.C.M. 405(g)(1)(A).

²⁰¹ *Id.*

²⁰² See *id.* R.C.M. 909(b).

²⁰³ See *id.* R.C.M. 909(e)(2).

²⁰⁴ See *Dusky v. United States*, 362 U.S. 402 (1960).

²⁰⁵ See MCM, *supra* note 44, M.R.E. 305(i)(2)(A)(ii). Pre-trial confinement hearings’ rule of evidence, “[e]xcept for Mil. R. Evid. Section V (Privileges) and Mil. R. Evid. 302 and 305, the Military Rules of Evidence shall not apply to the matters considered.” *Id.* Additionally, R.C.M. 909(e)(3) states, “During competency hearings before the court after referral,” the rule of evidence is that “the military judge is not bound by the rules of evidence except with respect to privileges.” *Id.*

²⁰⁶ See MCM, *supra* note 44, M.R.E. 501–514 (2012) (Privileges).

findings on which they are based, in a written memorandum. The magistrate may, upon request and after notice to the parties, reconsider his decision if, based upon any significant information not previously considered, reasonable doubt of the accused's mental competency again arises prior to referral.

A. The Preference for Magistrates

Admittedly, military magistrates are not required to assure due process in the pre-referral competency determination procedures. Convening authorities themselves can achieve the same result if they are willing to conduct competency hearings, which is surely impracticable. More realistically the convening authorities could designate a surrogate, much like they do when appointing preliminary investigation officers for Article 32 hearings.²⁰⁷

The recommendation to employ military magistrates to assess competency challenges is premised upon the many advantages that the magistrate program offers. It would certainly free invaluable time and effort otherwise required of convening authorities to properly and fully make such decisions. Just as important, the process for magistrate review already exists and is well institutionalized.²⁰⁸ The above recommended procedures for competency review hearings mirror that of the current pre-trial confinement practices in the Army.²⁰⁹ In fact, it is derived from the basic framework of existing pre-trial confinement reviews.²¹⁰ As such,

²⁰⁷ See *id.* R.C.M. 405 (Pretrial investigation). See also UCMJ art. 32 (2012).

²⁰⁸ See U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 8-5 (16 Nov. 2005) [hereinafter AR 27-10]; U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE 12-19 (15 Mar. 2012) [hereinafter MAG SOP] (containing the chapter *Standing Operating Procedures for Military Magistrates*).

²⁰⁹ MAG SOP, *supra* note 207.

²¹⁰ See *id.* Note that there are two differences between the proposed competency review hearing and the current pre-trial confinement review hearing. First, while neither defense nor trial counsel are generally permitted to call witnesses during pre-trial confinement reviews, the magistrate may. *Id.* For example, per the magistrate standing operating procedures, "the military magistrate may determine that witnesses are necessary to resolve a substantial factual issue materially affecting the military magistrate's ability to perform a legally sufficient review." *Id.* at 15. Additionally, "in those cases where the military magistrate, based on an initial inquiry or subsequent information, determines that there is a basis for further inquiry, additional information may be gathered from commanders, supervisors in the confinement facility, the [Staff Judge Advocate's] office, or others having relevant information." *Id.* at 17. Second, unlike the proposed competency review hearings, pre-trial confinement hearings are specifically deemed non-adversarial. *Id.*

reviewing competency cases fit squarely within the nature and form of military magistrates' existing duties.²¹¹

Army magistrates are already entrusted with great responsibilities and the authority to not only issue search authorizations to commanders and military law enforcement,²¹² but they are also entrusted to adjudicate all command pre-trial confinement orders.²¹³ Considering that both pre-trial confinement and competency hearings inexorably entail possible deprivations of significant liberties, adopting military magistrates to review pre-referral competency determinations becomes even more fitting and persuasive.

Military magistrate reviews are arguably significantly faster and much more streamlined than the notably complicated and multilayered requirements of Article 32 proceedings. With military magistrates, no investigating officers need to be vetted and appointed. There are military magistrates who are assigned to cover every possible jurisdiction of the military, including U.S. installations abroad and even in combat zones.²¹⁴ In fact, there are often multiple magistrates assigned at large installations with heavy military justice dockets.²¹⁵ Trial judges in the military are also authorized to perform magisterial duties.²¹⁶ Additionally, military magistrates do not need to be briefed or require additional legal support. They are judge advocates who are versed in the practice of law and criminal procedures, but they also practiced in holding hearings and

While both trial and defense counsel are permitted to make arguments, they are disallowed to question or cross-examine any witnesses. *Id.* The military magistrate, on the other hand, is authorized to not only call witness if desired, but they, of course, are naturally also permitted to question those witnesses. *Id.*

²¹¹ *Id.*

²¹² See AR 27-10, *supra* note 197, paras. 8-1(a), 8-3(b), 8-7. "Any military magistrate, whether assigned or part-time, is authorized to issue search and seizure and search and apprehension authorizations on probable cause." *Id.* para. 8-3(b).

²¹³ See *id.* para. 8-1(a), 8-3(a), 8-5. "A military magistrate is a [judge advocate] empowered to direct the release of persons from pretrial confinement, or to recommend release from confinement pending final disposition of foreign criminal charges, on a determination that continued confinement does not meet legal requirements" *Id.* para. 8-1(d).

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ MAG SOP, *supra* note 207, at 1. Note, a "military judge is not automatically disqualified from presiding in a case where he or she has previously reviewed the propriety of continued pretrial confinement or issued a search and seizure authorization and should recuse himself or herself only when the military judge's impartiality might reasonably be questioned." *Id.*

overseeing proper execution of the rules.²¹⁷ According to the regulation, military magistrates are specifically and individually selected because they “possess the requisite training, experience, and maturity to perform the duties.”²¹⁸ They are nominated by a staff judge advocate and appointed by The Judge Advocate General (TJAG).²¹⁹ The Chief Trial Judge of the United States Army Judiciary, as TJAG’s designee, is responsible for the supervision and administration of the magistrate program,²²⁰ and each of the magistrates are mentored and supervised by a military judge.²²¹

Even more, military magistrates, like judges, are equally bound by the Code of Judicial Conduct.²²² Accordingly, military magistrates are not only more efficient and effective at receiving witnesses, reviewing evidence, and adjudging any challenges expeditiously, but they are also more skilled at reviewing evidence. This enables them to make the necessary findings and publish a determination quickly, all to promote judicial efficiency, ensure constitutional compliance, and minimize judgment errors that can lead to grave miscarriages of justice.

B. No Change to Convening Authorities’ Prosecutorial Discretion

The prosecutorial discretion of the convening authorities is still fully intact and truly unaffected by shifting competency determinations to military magistrates. The command retains full control and the same ability to prosecute a case as before. Convening authorities are still empowered to deny unreasonable requests for RCM 706 evaluations or grant bona fide requests, and continue to order evaluations as they deem

²¹⁷ AR 27-10, *supra* note 207, para. 8-1(e).

²¹⁸ *Id.* para. 8-2(b)(2).

²¹⁹ *Id.* paras. 8-1(e), 8-2. *See also* MAG SOP, *supra* note 207, at 1–2.

²²⁰ AR 27-10, *supra* note 207 paras. 1-7, 8-4.

²²¹ MAG SOP, *supra* note 207, at 4.

Each military magistrate will be supervised in performing magisterial functions by a military judge assigned to the U.S. Army Trial Judiciary Supervising military judges should periodically review pretrial confinement memoranda and search authorizations issued by military magistrates to ensure that they contain sufficient information and are properly maintained. Supervising military judges will [also] train military magistrates upon appointment and assist military magistrate thereafter by providing advice and counsel as needed.

Id. *See also* AR 27-10, *supra* note 207, para. 8-1(g).

²²² AR 27-10, *supra* note 207, para. 5-8(b).

proper.²²³

If the sanity board members find an accused competent, the government may continue to move forward with its case, and the convening authority, as before, can “take any action authorized under RCM 401, including referral of the charges to trial.”²²⁴ Prior to an incompetency determination by an RCM 706 board, the convening authority retains the option to dismiss charges and medically chapter the servicemember.²²⁵ Once the accused is found incompetent, whether determined through a magistrate or by the convening authority, the convening authority is statutorily obligated to commit the accused to the U.S. Attorney General’s custody for treatment.²²⁶ And, as always, the government remains constitutionally barred from trying an incompetent accused.²²⁷

The proposed revision is limited to the legal determination of the accused’s competency. It does not threaten any prosecutorial powers the convening authority would otherwise have. Just as important, it in no way undercuts the command’s ability to maintain good order and discipline, or to ensure the health and welfare of servicemembers. Competency determinations have little to no policy consideration to them at all. The accused is either able to consult with her attorney and assist in her own defense or not, and the accused either has a reasonable understanding of

²²³ MCM, *supra* note 44, R.C.M. 706(b)(1). “Before referral of charges, an inquiry into the mental capacity . . . of the accused may be ordered by the convening authority before whom the charges are pending for disposition.” *Id.*; *see also id.* R.C.M. 706(b)(2). “The convening authority may order such an inquiry after referral of charges but before beginning of the first session of the court-martial (including any Article 39(a) session) when the military judge is not reasonably available.” *Id.*

²²⁴ *Id.* R.C.M. 909(c).

²²⁵ *See id.* R.C.M. 706 discussion.

²²⁶ *Id.* R.C.M. 909(c). “If, upon receipt of the charges, the general court-martial convening authority similarly concurs, then he or she shall commit the accused to the custody of the Attorney General.” *Id.*

²²⁷ *Id.* R.C.M. 909(a).

In general. No person may be brought to trial by court-martial if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against them or to conduct or cooperate intelligently in the defense of the case.

Id.

the charges and the proceedings against her or she does not.²²⁸

V. Conclusion

A competency determination “is the critical phase in the classification and disposition of criminal defendants having symptoms of mental disturbance.”²²⁹ It is legally illogical and unjustifiable to maintain a double standard of review, pre- and post-referral, when the immense consequences and the possible deprivation of liberty is the same. Change to how military justice adjudicates competency determinations prior to referral is long overdue; it requires transformation. “If this critical phase of the criminal process is bankrupt, then the process itself is bankrupt.”²³⁰

Our American soldiers, sailors, airmen, and marines deserve this justice. However horrid the crime or psychologically lost, they remain United States servicemembers, and they deserve and are entitled to be treated justly, fairly, and conscientiously. As it is our military profession, throughout history, to fight for those who cannot fight for themselves, it is our equal duty to protect those who are incapable of defending themselves.

²²⁸ *See id.*

²²⁹ Morris, *supra* note 134, at 227 (quoting ARTHUR R. MATTEWS JR., MENTAL DISABILITY AND THE CRIMINAL LAW 193 (1970)).

²³⁰ *Id.* at 227.

**OPERATIONALIZING THE INCENTIVE THEORY:
MODERNIZING U.S. BUREAUCRACY TO EFFECTIVELY
PREDICT AND PREVENT WAR**

MAJOR PATRICK WALSH*

*[W]e can predict the occurrence of war more
accurately, and intervene to control it more
effectively[.]*¹

I. Introduction

War is not an inevitable event that cannot be deterred. The majority of wars begin because the elite decision-makers of a nation choose to be aggressive, and do so in a deliberative process because they believe the incentives they would gain are worth more than the cost to their nation.² Choosing aggressive war is a rational decision, or at least a reasoned decision, weighing the costs of war and the projected benefits gained.³

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¹ JOHN NORTON MOORE, SOLVING THE WAR PUZZLE: BEYOND THE DEMOCRATIC PEACE xx–xxi (2004).

² John Norton Moore, *Beyond the Democratic Peace: Solving the War Puzzle*, 44 VA. J. INT'L L. 341, 417–18 (2004).

³ See MOORE, *supra* note 1, at 29; John Norton Moore, *Toward a New Paradigm: Enhanced Effectiveness in United Nations Peacekeeping, Collective Security, and War*

The idea that most regime leaders choose to begin wars because the incentives exceed their personal cost is a valuable understanding.

Peaceful nations can prevent war if they can influence the regime elite's decision-making process to ensure that these aggressive leaders do not perceive incentives to start a war. But for peaceful nations to implement the Incentive Theory, they must first understand it, gather the information necessary to analyze potential conflicts through the lens of the Incentive Theory,⁴ and formulate the government structures necessary to implement it. This article demonstrates how the United States can put the Incentive Theory to work to create a more peaceful world that can deter future acts of aggressive states and, perhaps, help prevent major wars.

We will begin Sections I and II with the history and development of the Incentive Theory, from the ideas suggested by Immanuel Kant,⁵ to the development of the three images by Kenneth Schulz,⁶ to the groundbreaking empirical work of Bruce Russett and others,⁷ and finally on to the development of the comprehensive Incentive Theory by John Norton Moore.⁸ Section III will explore how each of the three images discussed in the incentive theory can be implemented in practice. Many of its principles are already being implemented by parts of the U.S. government for purposes other than preventing war.⁹ Finally, Section IV will analyze how the United States must alter its government bureaucracy to implement the incentive theory and apply it to prevent unnecessary wars.

The proposal to develop governmental institutions capable of preventing war has some precedent. After September 11, 2001, the bureaucracy of the U.S. government was transformed to build agencies

Avoidance, 37 VA. J. INT'L L. 814, 834 (1997); see, e.g., JAMES M. BUCHANAN, POLITICS WITHOUT ROMANCE: A SKETCH OF POSITIVE PUBLIC CHOICE THEORY AND ITS NORMATIVE IMPLICATIONS IN THE THEORY OF PUBLIC CHOICE II 11–22 (1984).

⁴ See *infra* Section II.

⁵ IMMANUEL KANT, *Perpetual Peace*, in THE PHILOSOPHY OF KANT (Carl Friedrich ed., 1949) (1795).

⁶ KENNETH WALTZ, MAN, THE STATE, AND WAR: A THEORETICAL ANALYSIS (1954).

⁷ See BRUCE RUSSETT, GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD (1993).

⁸ MOORE, *supra* note 1.

⁹ See Mark P. Lagon, *Promoting Democracy: The Whys and Hows for the United States and the International Community*, COUNCIL ON FOREIGN RELATIONS (Feb. 2011), <http://www.cfr.org/democratization/promoting-democracy-whys-hows-united-states-international-community/p24090> (last visited May 3, 2016).

that sought to identify and disrupt terrorist threats throughout the world and to protect the United States.¹⁰ A smaller transformation to develop capabilities to prevent major war can achieve even greater results than the changes that helped defend against terrorist attacks. Putting Incentive Theory to work for the United States could prevent a major war, a war that would cause greater long-term harm to the United States than a terrorist attack. Implementing Incentive Theory will strengthen U.S. national security, help leaders understand the reasons why a regime's elite may choose to start a war, and create the necessary deterrence to prevent the conflict. It is helpful to review the history of war prevention theory to understand how Incentive Theory was developed.

II. The Development of Incentive Theory

The philosophical debate over how to prevent war is centuries old. Modern theories on war prevention were built upon the seeds of an 18th century philosopher, Immanuel Kant,¹¹ who theorized that a nation-state's tendency to start a war was linked to its form of government.¹² According to Kant, representative forms of governments are more likely to be peaceful than non-democracies.¹³

Immanuel Kant believed that democracies would not wage war because the citizens who elect the government leaders must consent to wage war.¹⁴

According to the republican constitution, the consent of the citizens as members of the State is required to determine at any time the question whether there shall be war or not. [Citizens] should be very loathe to enter upon . . . the horrors of war [In non-democracies], resolution to go to war is a matter of the smallest concern

¹⁰ See Uniting and Strengthening America By Providing Appropriate Tools Required To Intercept And Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, (2001) [hereinafter PATRIOT Act] (creating new authorities to investigate and prosecute terrorists); Intelligence Reform and Terrorism Prevention Act, 50 U.S.C. 3001, et seq (2004) [hereinafter IRTP Act](reorganizing the federal intelligence and law enforcement structure of the government to better respond to terrorism).

¹¹ See KANT, *Perpetual Peace*, *supra* note 5.

¹² IMMANUEL KANT, *Eternal Peace*, in *ETERNAL PEACE: AND OTHER INTERNATIONAL ESSAYS* (1981).

¹³ *Id.*

¹⁴ See KANT, *Eternal Peace*, *supra* note 12, at vi-vii.

in the world. For in this case the ruler . . . need not in the least suffer personally by war . . . [h]e can therefore resolve for war from insignificant reasons . . .¹⁵

Kant believed the citizens in a democracy would never consent to war because they would have to personally suffer the harm that comes from war.¹⁶ Therefore, democracies were more likely to be peaceful than non-democracies.¹⁷

The Kantian, idealistic view of the peaceful state of democracies lay dormant for almost two centuries while others developed theories on how nations decide to engage in war. In 1959, Kenneth Waltz published *Man, the State, and War*, a book that analyzed how nations choose to go to war.¹⁸ Waltz explained that a state's decision to go to war is influenced by "three levels of either individual psychology, the nature of the state, or the nature of the international system."¹⁹ Referred to as the three "images," Waltz posited that all three images combine to explain a state's decision to go to war, but focused primarily on Kant's view that the type of government was the most important factor in determining whether a state would choose to initiate a war.²⁰ Kant and Waltz set the foundational principles for modern international relations scholars who developed the ideas of Kant and Waltz into the "Democratic Peace" Theory.²¹ Over the last several decades, the Democratic Peace Theory has gained general acceptance among international relations academicians.²²

The Democratic Peace Theory relies upon two primary principles.²³ First, "major war (over 1000 total casualties) has been occurring between democracies at an extremely low rate."²⁴ Second, democracies do not initiate wars, but rather, respond in self-defense to actions by non-

¹⁵ *Id.*

¹⁶ KANT, *Perpetual Peace*, *supra* note 5.

¹⁷ *See generally* KANT, *Eternal Peace*, *supra* note 12.

¹⁸ *See* WALTZ, *supra* note 6.

¹⁹ John Norton Moore, *Solving the War Puzzle*, 97 AM. J. INT'L L. 282, 286 (2003).

²⁰ *See* WALTZ, *supra* note 6, at 1-15.

²¹ *See* RUSSETT, *supra* note 7 (outlining the general theory that democratic nations do not wage aggressive wars); MICHAEL E. BROWN, ET AL., *DEBATING THE DEMOCRATIC PEACE* (1996) (identifying the historical precursors to the democratic peace theory).

²² *See* Steven Geoffrey Gieseler, *Debate on the 'Democratic Peace': A Review*, IX AM. DIPL. 1 (2004).

²³ *See* Moore, *supra* note 19, at 282-86.

²⁴ *See* MOORE, *supra* note 1, at xviii.

democracies.²⁵ The concept relies upon the idea that in a democracy, the electorate bears the costs of any decision to engage in aggressive military behavior.²⁶ According to Democratic Peace proponents, leaders in non-democratic nations are able to externalize these costs upon the populace, so they may be more likely to start a war.²⁷

The Democratic Peace has been statistically proven to be accurate.²⁸ Professor Rudy Rummel demonstrated that “of 353 pairings of nations fighting in major international wars between 1816 and 1991, none occurred between democracies.”²⁹ Others have tried to challenge this theory, with little success.³⁰ International relations experts now overwhelmingly acknowledge that liberal, democratic states are far less likely to wage aggressive war than non-democratic states.³¹

Democratic Peace theory was an important step in the development of a framework to understand why states wage war, but it does not comprise the entire theory on how to prevent war; it merely informs the question. Transitioning democracies still tend to wage war, and non-democracies, including autocracies and totalitarian regimes, are more likely to wage war.³² The Democratic Peace Theory cannot predict when a particular state will go to war.³³ The theory cannot determine which leaders of totalitarian regimes are more likely to choose war.³⁴ The Democratic Peace Theory cannot advise on what efforts other nations can make to deter a non-democracy from choosing to start an aggressive war.³⁵ The Democratic Peace Theory is an important piece of the puzzle, but this puzzle must have other pieces if it will be used to prevent war; those pieces were completed with the Incentive Theory.

²⁵ *See id.* at 13.

²⁶ *See id.* at 11.

²⁷ *See id.* at 60–61.

²⁸ R.J. RUMMEL, *POWER KILLS: DEMOCRACY AS A METHOD OF NONVIOLENCE* 13 (1997).

²⁹ *See Moore, supra note 19* (citing RUMMEL, *supra note 28*).

³⁰ *See RUSSETT, supra note 7*.

³¹ Moore, *supra note 2*, at 342–45 (2004); *see, e.g., RUSSETT, supra note 7*, at 2–4; SPENCER WEART, *PEACE AMONG DEMOCRATIC AND OLIGARCHIC REPUBLICS* 1–2 (1994); James Earl Ray, *Does Democracy Cause Peace?*, 1 *ANNU. REV. POLIT. SCI.* 27–46 (1998); Michael Doyle, *Kant, Liberal Legacies and Foreign Affairs*, 12 *PHIL. PUB. AFF.* 205 (1983).

³² *See Moore, supra note 19*, at 283–84.

³³ *Id.* at 282–86.

³⁴ *Id.*

³⁵ *Id.*

Professor John Norton Moore offered the Incentive Theory to combine the insights of the Democratic Peace Theory with other factors to understand why a state would choose war over peace.³⁶ Calling it the “Incentive Theory,” Professor Moore combined the philosophy of Kant, the three images of Waltz, and the Democratic Peace Theory of Russett and Rummel into one comprehensive theory to identify and explain a state’s decision-making and incentives to use significant military force.³⁷ The Incentive Theory highlights the three images relevant to a state’s decision-making process: the psychology of key leaders, the type of government institution, and the relations among international institutions.³⁸

In explaining Incentive Theory, Moore first focuses on the “costs and benefits that accrue to national leaders in their decisions to wage war.”³⁹ Looking at the individuals with decision-making power, one can usually discern what the elite would gain or lose from deciding to use military force.⁴⁰ Second, Moore looks at the national government institutions to determine if the government structure is a type that is more or less likely to go to war.⁴¹ Drawing heavily on the Democratic Peace Theory, Moore analyzes the influence that either a democratic or autocratic form of government may have in the war decision.⁴² Third, Moore examines international law to determine whether the international community has set up deterrence mechanisms to create disincentives for a state to choose to go to war.⁴³ This third “image” examines what other nations have historically done to deter aggressive action.⁴⁴ Viewing all three images together, one can determine the likelihood that a particular state will choose military action in a particular dispute.⁴⁵ Here is a graphic depiction⁴⁶ of the three images:

³⁶ See MOORE, *supra* note 1, at xx.

³⁷ See *id.* at xx–xxvi; Moore, *supra* note 19, at 286.

³⁸ See MOORE, *supra* note 1, at xix.

³⁹ Ryan Goodman, Book Note, 99 AM. J. INT’L L. 507 (2005) (reviewing JOHN NORTON MOORE, *SOLVING THE WAR PUZZLE: BEYOND THE DEMOCRATIC PEACE* (2003)).

⁴⁰ See MOORE, *supra* note 1, at 66–67.

⁴¹ *Id.*

⁴² See John Norton Moore, *Toward a New Paradigm: Enhanced Effectiveness in United Nations Peacekeeping, Collective Security, and War Avoidance*, *supra* note 3, at 819–26.

⁴³ Moore, *supra* note 19, at 286; MOORE, *supra* note 1, at xx.

⁴⁴ MOORE, *supra* note 1, at 27.

⁴⁵ *Id.* at xx.

⁴⁶ See MOORE, *supra* note 1, at xix (describing the images that have been compiled in Figure 1).

Image 1 and Image 1.5	Focuses on key leaders and what causes them to choose to engage in aggressive action
Image 2	Looks at the structure of a nation's government and how it permits or restricts the ability and incentives to engage in aggressive action
Image 3	Looks at whether there is external deterrence to discourage a nation and its leaders from choosing war

Figure 1

The development of the Incentive Theory, from Kant's philosophical musings to the empirical work established in the last few decades, has created a complex yet workable framework to explain a state's decisions to go to war with another state. Using all three images, and assuming quality information, the aggressive behavior of nations can be understood, analyzed, and perhaps even predicted.⁴⁷ Logically, if a state's decision to choose war can be both understood and predicted, it may also be prevented. Therefore, incorporating Incentive Theory into government bureaucracy is essential if the United States wants to attempt to prevent major wars.

Implementing Incentive Theory is both possible and practicable, once government understands how the theory can be put into application. Government structures would need to change to create bureaucracy that uses the Incentive Theory. Before the government can do that, the United States must realize that the Incentive Theory can be used practically to predict other states' future behavior. An understanding of how the Incentive Theory can be put into practice can assist policy-makers in government as they reshape bureaucratic structures to take advantage of the theory.

III. Turning Incentive Theory into Incentive Practice

Incentive Theory can be used to predict likely behavior of nation states. Incentive Theory can also be used to help the United States determine how, when, and where to apply resources to induce states, in the

⁴⁷ *Id.* at xx-xxi.

long or short-term, to choose peaceful resolutions of conflict over aggressive resolutions. This section demonstrates how best to apply the three images of the Incentive Theory and put them into action to prevent war.

The explanation begins—somewhat counterintuitively—with Image 2, by examining the organization of state governments to determine which ones are more likely to choose the path of aggression. Next, we will look at the ability to craft effective deterrence using Image 3. Then, we discuss how Image 1 and Image 1.5 can help the United States focus the deterrence where it matters most—on the regime elite who are making the decision to start a war.

A. Implementing Image 2 of Incentive Theory

Image 2 of the Incentive Theory incorporates the philosophy of Kant that was developed into the Democratic Peace Theory. When implementing the Incentive Theory, it makes sense to start where Kant did, by examining the government structures of a state. The form of government is of great significance in political leaders' decisions to start an armed conflict.⁴⁸ Image 2 starts with this observation: “democracies very rarely, if ever, make war on each other.”⁴⁹ Stated conversely, in the last 200 years, all major international wars involved at least one non-democracy.⁵⁰ The form of a state's government is a major factor in understanding whether that state will choose aggressive military action or peaceful diplomatic action to resolve a dispute.⁵¹ Therefore, the first step in predicting the actions of a decision-making elite is to understand the government structures of Image 2 that will influence the decision-makers who have the power to resolve a conflict.

There are both long and short-term opportunities to use Image 2 to prevent further major wars. Long-term, the United States can work with other peaceful nations to encourage, cajole, and incentivize states with a

⁴⁸ John Norton Moore, *A New Paradigm in International Relations: A Reduction of War and Terror in the World through Democratization and Deterrence*, 17 *TRANSNAT'L LAW* 83, 84 (2004); MOORE, *supra* note 1, at xx.

⁴⁹ BRUCE RUSSETT & JOHN O'NEAL, *TRIANGULATING PEACE* 43 (2001); MOORE, *supra* note 1, at 1.

⁵⁰ MOORE, *supra* note 1, at 2; R.J. RUMMEL, *supra* note 28.

⁵¹ Robert J. Delahunty & John Yoo, *Kant, Habermas and Democratic Peace*, 10 *CHI. J. INT'L L.* 437, 439 (2010) (citing MOORE, *supra* note 1, at 13–25).

more aggressive type of government to slowly and surely transform non-democracies or weak democracies into strong liberal democracies.⁵² In the short-term, the United States can use the knowledge gained from Image 2 to focus intelligence efforts and diplomatic attention on conflicts and regions where war is more likely to begin. It can also focus limited government resources on developing incentives to discourage states in that region from choosing the path of aggression to resolve international disputes.

1. *Implementing Image 2 to Achieve Long-Term Peace*

Since democracies rarely, if ever, go to war with other democracies,⁵³ the world will become more peaceful if states encourage the development of more liberal democracies. Unfortunately, turning non-democracies into liberal democracies is not an easy task. Efforts to “export democracy” have been met with mixed results, and in some cases these efforts have led to a less peaceful region than when the governments were ruled by autocrats or other types of government.⁵⁴ In short, the liberal democracies of the world have a difficult time when they force democracy upon other states that are unwilling or unable to change. But there may be ways to export small parts of liberal democracies that form the building blocks of a more peaceful nation. If Image 2 is to have a role greater than its predictive effect, there must be a way to export these components that foster the peaceful nature of democracies.

Image 2 can be used to prevent war without creating full-blown democracies around the world. Before using the democratic theory to prevent war, one must first understand what it is about liberal democracies that make them peaceful. Understanding the building blocks that create a peaceful democracy is essential. Knowing the key components to peaceful democracies may allow nations to export those components to non-democratic nations. Further, liberal democracies correlate with other key diplomatic goals of the United States. The United States can incorporate

⁵² MICHAEL W. DOYLE, *Kant, Liberal Legacies, and Foreign Affairs*, in *DEBATING THE DEMOCRATIC PEACE* 3, 10 (Michael E. Brown et al., eds., 1983).

⁵³ RUSSETT & O’NEAL, *supra* note 49.

⁵⁴ CHRISTOPHER COYNE, *AFTER WAR: THE POLITICAL ECONOMY OF EXPORTING DEMOCRACY* (2006); see Catherine A. Traywick, *So Much for Exporting Democracy: Afghanistan Is as Corrupt as North Korea*, *FOREIGN POL’Y* (Dec. 3, 2013), <http://foreignpolicy.com/2013/12/03/so-much-for-exporting-democracy-afghanistan-is-as-corrupt-as-north-korea/>.

into its foreign policy a promotion of liberal democracy in general, and encouragement of these components and correlations in particular, to increase the peacefulness of international relations over the long-term.

Promoting democracy is a key component of the national security strategy of the United States, and part of the U.S. goal to export U.S. values.⁵⁵ Assisting states to become stable, liberal democracies must become more than just exporters of values. These efforts—if focused properly—could enhance international peace and security. The United States needs to supplement its values-based efforts to encourage democracies with effort that emphasizes the benefits to international peace and security. This shift in emphasis will not merely be window dressing. By underscoring the benefits to international peace and security, the United States will marshal other parts of the U.S. government to assist in the effort to strengthen democracies. If this effort prevents war, then the intelligence community and the military will have a role in the development of transitioning democracies.

This renewed and expanded government effort to encourage the development of liberal democracies can focus its efforts not on overthrowing totalitarian governments by force, but by encouraging non-democratic states to take small steps towards a more democratic government. Efforts should aim to slowly but steadily encourage this transformation. Efforts to encourage development of strong democracies can focus on two areas: (1) developing key government structures that form the foundation of liberal democracies and (2) developing other fundamental byproducts of democracy that have a strong correlation with liberal democracies. Both of these efforts will identify government programs in place for other purposes, and instead put them to use on states that have governments more likely to be aggressive.

There are many key components liberal democracies possess that form factors which cause them to be more peaceful.⁵⁶ Liberal democracies may be more peaceful than non-democracies because the nature of their government structures shape the decision-making of key leaders so as to

⁵⁵ *National Security Strategy*, WHITE HOUSE 20–21 (Feb. 2015), http://www.whitehouse.gov/sites/default/files/docs/2015_national_security_strategy_2.pdf (“American values are reflective of the universal values we champion all around the world . . .”).

⁵⁶ MOORE, *supra* note 1, at xxiii.

discourage aggressive resolution of international disputes.⁵⁷ While there is some debate among scholars regarding the exact combination of factors that make democracies more peaceful, there are some generally-recognized factors that contribute to the peacefulness of democracies.⁵⁸ They include a “government of limited powers,” operating under the “rule of law,” with “a meaningful system of check and balances,” protections for minorities and for “fundamental political, economic and religious freedoms,” and “free and fair elections.”⁵⁹ To improve a democracy’s chance at peace, government programs should work to encourage the development of each of these individually or collectively.

In addition to being peaceful, liberal democracies produce other worthwhile and noble benefits to the world.⁶⁰ Liberal democracies tend to have higher economic growth and economic freedom,⁶¹ greater human rights,⁶² better environmental protection,⁶³ less corruption,⁶⁴ less terrorism,⁶⁵ less famine,⁶⁶ and fewer refugees.⁶⁷ These are essential components of U.S. values, but the United States needs to understand that encouraging states to develop these world benefits does more than promote U.S. values. Promoting these correlations in non-democratic or democratically weak states may also encourage them to be more peaceful in their international relations.⁶⁸

⁵⁷ Bruce Bueno de Mesquita, et al., *An Institutional Explanation of the Democratic Peace*, 93 AM. POL. SCI. REV. 791 (1999); see also Bruce Bueno de Mesquita & Randolph M. Siverson, *War and the Survival of Political Leaders: A Comparative Political Analysis of Regime Types and Accountability*, 89 AM. POL. SCI. REV. 841 (1995); see Allan Dafoe, *Statistical Critiques of the Democratic Peace: Caveat Emptor*, 55 AM. J. POL. SCI. 247, 247–62 (2011).

⁵⁸ MOORE, *supra* note 1, at xxiii.

⁵⁹ *Id.* at xxii.

⁶⁰ MOORE, *supra* note 1, at 1–8.

⁶¹ *Index of Economic Freedom*, HERIT. FOUND., <http://www.heritage.org/index/about> (last visited May 3, 2016); *Economic Freedom of the World 2015 Annual Report*, Exhibit 1.11, FRASER INST., <http://www.freetheworld.com/2015/economic-freedom-of-the-world-2015.pdf> (last visited May 3, 2016).

⁶² See *Map of Freedom 2014*, FREEDOM HOUSE, <https://freedomhouse.org/sites/default/files/MapofFreedom2014.pdf> (last visited May 3, 2016).

⁶³ See Rodger A. Payne, *Freedom and the Environment*, 6 J. DEMOCRACY 41 (1995).

⁶⁴ See *Corruptions Perceptions Index 2014*, TRANSPARENCY INT’L, <http://www.transparency.org/cpi2014/results> (last visited May 3, 2016).

⁶⁵ See Moore, *Toward a New Paradigm*, *supra* note 3, at 410.

⁶⁶ AMARTYA SEN, POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION (1981); Frances D’Souza, *Democracy as a Cure for Famine*, 31 J. PEACE RES. 369, 373 (1994).

⁶⁷ See LOUISE W. HOLBORN, REFUGEES: A PROBLEM OF OUR TIME (1975).

⁶⁸ MOORE, *supra* note 1, at 9–12.

Over time, efforts to promote these correlations and key components of liberal democracies is the best long-term strategy to slowly change forms of government from non-democracies to liberal democracies. These efforts, if sustained, can create more peaceful resolution of international disputes in the long term. However, Image 2 of the Incentive Theory can also be used in the short-term, in a more tactical manner, to identify and target government resources on states more likely to be aggressive in the near future.

2. *Implementing Image 2 in a Crisis*

Image 2 can help the United States focus on nations and regions where war is most likely to occur. Understanding the significance of the Democratic Peace Theory ensures national security professionals focus on the states that are more likely to choose the path of aggression. Image 2 can ensure that intelligence resources and proper attention is paid to the conflicts that are more likely to erupt into a major war. Image 2 can ensure that the United States collects intelligence to understand the Image 1 regime elites and how they might evaluate the risk/reward for starting a war. Image 2 will also ensure the proper resources necessary to deter aggression will be available and implemented.

There are 193 countries in the world—too many for the United States to apply the Incentive Theory to all of them. Image 2 can focus efforts on the forms of government more likely to engage in an aggressive war.⁶⁹ Of the 193 countries, twenty-six are micro-states, which are, by their size, incapable of starting a major war.⁷⁰ Of the 167 remaining, twenty are “full democracies,” the statistically most peaceful category of government.⁷¹ There is no need to waste government resources applying Incentive Theory to these states. There are 147 countries that fall into three categories: flawed democracies (fifty-nine countries), authoritarian regimes (fifty-one), and hybrid regimes that are part-flawed democracies and part-authoritarian (thirty-seven).⁷² These are the states that government resources should be focused on to apply the Incentive Theory.

⁶⁹ *Democracy Index of 2015: Democracy in an Age of Anxiety 2*, THE ECONOMIST, http://www.eiu.com/public/thankyou_download.aspx?activity=download&campaignid=DemocracyIndex2015 (last visited May 3, 2016).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

These states can be ranked by the level of democratic structures, checks on regime elites, deification of their leaders, aggressive conflicts engaged in the past, the size of their military, or by many other indicators, in order to evaluate the risk they pose to the international community.⁷³ Ranking solely by level of democracy, states that should be highlighted include North Korea, Central African Republic, Syria, and Afghanistan—where conflicts already exist—justifying the need to focus on the form of government.⁷⁴ This ranking also includes other states that have the potential to start a major war, including Iran, Chad, Turkmenistan, and others.⁷⁵

The United States already spends significant time and resources on these states, but not to prepare and apply the Incentive Theory. Incentive Theory confirms that these are states and regions the United States must continue to monitor, but the Incentive Theory also provides the solution to how to prevent these states from becoming aggressive; the solution starts with examining the government structures of each state.

Understanding that these states have government structures that might not restrict aggressive decisions by regime elites would be important when the United States identifies rising potential for conflict. By identifying these states, government intelligence and diplomatic resources must be applied to develop knowledge of whether the regime has incentives to engage in aggressive war, whether there are effective deterrents to those incentives, and whether the United States has an interest in intervening to deter conflict.

Applying Image 2 analysis will ensure that the government intelligence collection and national security efforts are focused on the correct countries, and ensure that national security professionals are paying attention to states where conflicts may begin. Once these national security experts have applied Image 2 and understand which states have government structures that make them more aggressive, they can focus resources on those states and determine how best to deter aggression, which is the next step of operationalizing the Incentive Theory.

⁷³ *See id.* at 4–9.

⁷⁴ *Id.*

⁷⁵ *Id.*

A. Implementing Image 3: Deterring Aggression

Putting the Incentive Theory to practical use involves more than finding states that are at risk of becoming aggressive and trying to improve their government structure to make them less aggressive (Image 2 analysis). The key value of Incentive Theory is that it can be used to identify regime elites who perceive opportunity to gain from aggressive armed conflict (Image 1 analysis), and then apply effective deterrence to change the incentive calculus to make them choose other ways to resolve a dispute (Image 3 analysis).⁷⁶ Wars begin because leaders of states choose armed conflict over other avenues to resolve a dispute.⁷⁷ Image 3 focuses on developing adequate deterrence to eliminate or counterbalance the incentives to go to war.⁷⁸

Image 3 encompasses efforts at deterring aggression: when applied in the proper amount in the proper time with clear communication, these efforts have proven effective in preventing war. International organizations like the North Atlantic Treaty Organization,⁷⁹ the United Nations Security Council,⁸⁰ and arguably the International Criminal Court,⁸¹ can serve to deter aggressive action through defensive military action, international and unilateral sanctions, military force, and even criminal prosecution for the decision-making elites.⁸² Incorporating this use of deterrence through the lens of the Incentive Theory will make efforts to deter certain actions more focused, timely, and effective.

The key to implementing Image 3 is to focus on the specific states identified as likely to be aggressive through Image 2 analysis and then develop regime-specific, effective deterrence. Effective deterrence is “the aggregate of external incentives understood by a potential aggressor as adequate to prevent an aggressive action.”⁸³ The “external incentives” used to deter aggression can be positive or negative, and include military action, economic trade, diplomatic action, alliances, collective security,

⁷⁶ MOORE, *supra* note 1, at 27.

⁷⁷ *Id.* at 27–38.

⁷⁸ *Id.*

⁷⁹ *See generally* NORTH ATLANTIC TREATY ORGANIZATION, <http://www.nato.int/> (last visited Mar. 13, 2016) [hereinafter NATO].

⁸⁰ *See generally* UNITED NATIONS SEC’Y COUN., <http://www.un.org/en/sc/> (last visited Mar. 13, 2016).

⁸¹ *See generally* INT’L CRIM. COURT, https://www.icc-cpi.int/en_menus/icc/Pages/default.aspx (last visited Mar. 13, 2016).

⁸² Moore, *Beyond the Democratic Peace*, *supra* note 2, at 425–28.

⁸³ MOORE, *supra* note 1, at 27.

and use of international organizations.⁸⁴ This external deterrence can work both to achieve long-term goals and in the short-term, prevent a crisis from developing into an armed conflict.

3. Long-Term Deterrence

It is arguably in the United States's national security interest to create a more peaceful world where states resolve their disputes using means other than armed conflict.⁸⁵ The United States can create long-term and enduring deterrence by joining and supporting international relationships that have a deterrent effect.⁸⁶ The United States can also seek economic interconnectedness and new trade partners to strengthen ties and reduce the likelihood of conflict between states.⁸⁷ When these efforts are targeted toward states that Image 2 indicates are more likely to be aggressive, these Image 3 deterrent efforts can truly reduce the long-term likelihood of conflict.

International organizations can deter aggression.⁸⁸ The largest and most prominent international organization that seeks to deter aggression is the United Nations (UN).⁸⁹ The UN was created in the aftermath of two world wars with the stated purpose of "saving succeeding generations from the scourge of war."⁹⁰ The first article of the UN Charter outlines the primary goal behind the formation of the organization:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international

⁸⁴ *Id.*

⁸⁵ *National Security Strategy*, *supra* note 55.

⁸⁶ MOORE, *supra* note 1, at 27–33.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See generally *U.N. Charter*, UNITED NATIONS, <http://www.un.org/en/documents/charter> (last visited May. 3, 2016); see also 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (Bruno Simma ed., 2d ed., 2002).

⁹⁰ *U.N. Charter*, *supra* note 89, preamble.

law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.⁹¹

The Charter binds every member-nation to “refrain in their international relations from the threat or use of force”⁹² The Charter, enacted decades before the Incentive Theory was articulated, demonstrates the effectiveness of focused deterrence. This language in the Charter is clear recognition of the value of states working together to deter aggression.⁹³

The UN Security Council (UNSC) should be the primary mechanism to develop and implement Image 3 deterrence.⁹⁴ The UNSC has the authority to order states to cease acts of aggression, levy sanctions on aggressive countries, and even authorize other states to use force to respond to acts of aggression.⁹⁵ This can be an extremely effective way to respond to aggression, such as when the Security Council authorized force to remove Iraqi troops from Kuwait.⁹⁶ Unfortunately it is rarely used, in part because any of the five members of the UNSC can individually veto any action, and it is difficult for states like Russia, the United States, and China to agree on using force.⁹⁷

The UNSC has only rarely authorized the use of force against states, making its ability to deter aggressive action limited.⁹⁸ An aggressive state would likely be extremely reluctant to start an armed conflict if it knew the UNSC would authorize a broad international coalition to respond to aggressive acts. Unfortunately, it is rarely clear before conflict begins that the UNSC would choose to act to respond to a future instance of aggression, or that it would garner enough votes to pass a resolution approving force, or that states would marshal the resources to deploy

⁹¹ *Id.* art. 1.

⁹² *Id.* art. 2 ¶ 4.

⁹³ *U.N. Charter*, *supra* note 89, art. 1 ¶ 1.

⁹⁴ *Id.* arts. 39–42.

⁹⁵ *Id.*

⁹⁶ S.C. Res. 678 (1990).

⁹⁷ *U.N. Charter*, *supra* note 90, arts. 23, 27 ¶ 3. The other two states with veto power are the United Kingdom and France. *Id.*

⁹⁸ *See U.N. Charter*, *supra* note 89, ch. VII (discussing action with respect to threats to the peace, breaches of the peace, and acts of aggression).

forces to deter aggression.⁹⁹ When an aggressive state is considering whether to act, a UNSC resolution seems unlikely to serve as a deterrent.¹⁰⁰

The same logic applies to sanctions other than force in response to a state's aggression. At the time a regime elite makes the decision to use force, there is rarely international consensus that sanctions would be appropriate, so the decision to start an armed conflict is not likely limited by the risk of future sanctions.¹⁰¹ Further, sanctions have typically been imposed against states as a whole and are not directed solely at the regime elites.¹⁰² Regime elites of totalitarian or autocratic governments may not value economic harm to their citizens at the same level as do democracies.¹⁰³ Democratic leaders are responsible to their citizens and can be removed from office through elections,¹⁰⁴ not so with leaders of non-democratic regimes.¹⁰⁵

Harm to the populace may likewise not deter regime leaders from taking aggressive action that may have significant personal benefit to them.¹⁰⁶ The UNSC has a role in responding to acts of aggression, but its structure and membership does not readily allow it to be used for either preventative action to deter aggression or focused sanctions calculated to alter the decision-making of a state's regime elite.¹⁰⁷ Therefore, the UNSC is not the complete answer to prevent armed conflict, and other options are needed.

States can use regional collective security agreements to deter aggression if the states have the unity and cohesiveness to be able to act quickly before armed conflict starts.¹⁰⁸ These types of regional collective

⁹⁹ Evan Stephenson, *Note: Does United Nations War Prevention Encourage State-Sponsorship of International Terrorism? An Economic Analysis*, 44 VA. J. INT'L L. 1197, 1205 (2004).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 1205–06; *see also* Louise Frechette, *An Address by the UN Deputy Secretary-General*, 93 AM. SOC'Y INT'L L. PROC. XIV xviii (1999).

¹⁰³ MOORE, *supra* note 1, at 29.

¹⁰⁴ *Id.* at xxii. *See also* Mesquita, et. al., *supra* note 57; Dafoe, *supra* note 58, 247–62.

¹⁰⁵ *See supra* note 104 and accompanying sources; Dafoe, *supra* note 58, at 247–62.

¹⁰⁶ *See supra* note 104 and accompanying sources.

¹⁰⁷ MOORE, *supra* note 1, at 36 (noting that a UN Security Council Resolution did not cause Saddam Hussein to withdraw from Kuwait in 1990).

¹⁰⁸ Walter S. Surrey, *The Emerging Structure of Collective Security Arrangements: The North Atlantic Treaty*, 44 Proc. Am. Soc'y Int'l L. 9 (1950); *see also* Joseph C. Egebullem, *The Failure of Collective Security in the Post World Wars I and II International System*, 2 TRANSCIENCE 24 (2011).

security organizations can be an effective Image 3 deterrent.¹⁰⁹ The North Atlantic Treaty Organization (NATO) is perhaps the most well-known—and arguably the most effective—regional collective security organization.¹¹⁰ Notably, NATO is effective because its founding treaty¹¹¹ requires that all members respond to and assist any member state who is the victim of an armed attack.¹¹² Unlike the UNSC, which must affirmatively choose whether to assist a state who has been attacked, NATO members are required to do so collectively after reaching a consensus to act.¹¹³ This provision ensures that an attack against even the smallest NATO member constitutes an attack on all NATO members collectively—a powerful deterrent that exists in advance of any armed attack and that must be weighed in the cost-benefit analysis of a regime elite who may want to attack a NATO member state for some perceived advantage.¹¹⁴

In this way, NATO proved an effective way to deter aggression against Europe during the Cold War.¹¹⁵ This type of regional organization, if enacted by like-minded states facing similar aggression from a non-democracy, could prove to be an effective long-term deterrent to states that have the political structure to make them potentially aggressive.¹¹⁶ But the regional stability of NATO did not prevent all armed conflicts, therefore, other methods of deterrence must be available to be implemented when crises arise.

4. *Deterrence to Stop Imminent War*

The UN, NATO, and other regional collective security organizations¹¹⁷ can provide long term deterrence against potentially

¹⁰⁹ *Id.*

¹¹⁰ *Id.*; MOORE, *supra* note 1, at 33–34.

¹¹¹ NATO, *supra* note 79.

¹¹² *Id.* art. 5.

¹¹³ Compare U.N. Charter, *supra* note 89, arts. 39–42 with NATO, *supra* note 79, art. 5; see Brian H. Brady, *The North Atlantic Treaty Organization Legal Advisor: A Primer* 4–25, THE ARMY LAW., Oct. 2013.

¹¹⁴ NATO, *supra* note 79, art. 5; MOORE, *supra* note 1, at 33–34.

¹¹⁵ MOORE, *supra* note 1, at 33–34.

¹¹⁶ *Id.*

¹¹⁷ Other regional alliances include the European Union, the African Union, ANZAC (between Australia, New Zealand and the United States, the Arab League, the U.S.–Japan Security Alliance and the Organization of American States). See *U.S. Collective Defense Agreements*, U.S. DEPT. OF STATE, <http://www.state.gov/s/1/treaty/collectivedefense/> (last

aggressive states.¹¹⁸ But crises can arise despite these structures that require quick and effective action to deter aggression that is imminent. The UN has not proven particularly effective in responding quickly to imminent signs that a state is about to start an armed conflict.¹¹⁹ Regional organizations may not be able to act in a rapid and unified manner to prevent aggression as it is occurring.¹²⁰ Individual states, like the United States, must also be prepared to act independently to prevent an imminent armed attack.

Regional organizations can be an effective, imminent deterrent to an armed attack if they can act quickly to provide military force or sanctions—or provide convincing threats of force or sanctions.¹²¹ The strength and diversity of these regional collective security groups are also their weakness in responding to imminent threats. The size of these organizations may make it impracticable for many states to agree on immediate action to deter an attacking state.¹²² While the military force behind combined NATO action would be an effective deterrent to an aggressive state, the size and complexity of the organization makes it truly difficult to get joint action approved quickly, before aggression occurs, so as to prevent an armed attack.¹²³ Therefore, individual states must be ready to respond to provide deterrence to aggressive states, and they must be capable of quickly deploying that deterrence (and quickly communicating they are doing so) to the regime elite of an attacking state.

The United States must be ready to act to deter aggression before an armed attack because collective security organizations like NATO and the UNSC have institutional barriers that make it difficult for them to immediately act in response to imminent threats.¹²⁴ This response requires the United States to have: (1) the capability to deploy force and sanctions quickly in response to threats, (2) the intelligence capability to identify potential aggressors and predict the potential of an armed conflict before

visited May 3, 2016); *see also* JOHN NORTON MOORE & ROBERT F. TURNER, NAT'L SEC'Y L. 291–320 (2d ed. 2005).

¹¹⁸ MOORE, *supra* note 1, at 33–34.

¹¹⁹ *Id.* at 33–37.

¹²⁰ Steven Erlanger, *Russian Aggression Puts NATO in Spotlight*, N.Y. TIMES (Mar. 18, 2014), <http://www.nytimes.com/2014/03/19/world/europe/russias-aggression-in-crimea-brings-nato-into-renewed-focus.html>.

¹²¹ *See* Surry, *supra* note 108.

¹²² MOORE, *supra* note 1, at 33–36.

¹²³ BELINDA HELMKE, UNDER ATTACK: CHALLENGES TO THE RULES GOVERNING THE INTERNATIONAL USE OF FORCE 66 (2010).

¹²⁴ *Id.*

it begins, and (3) the ability to communicate the deterrence quickly to the regime elites of the aggressor state who can alter the decision regarding starting an armed conflict.

The United States has significant capability to deploy both military and non-military force, but its capability is not infinite.¹²⁵ The work done by Image 2 can help allocate these finite resources. The United States will need its military might and other capabilities to be available at the right moment and in the right location. Image 2 analysis can provide guidance to the executive branch to know where to place its military might and its tools of economic and diplomatic deterrence.¹²⁶ This will give it more immediate and less costly capability to respond to deter an imminent threat of attack around the world, and to prioritize potentially aggressive states based on the national interest of the United States.

Image 3 deterrence to prevent imminent armed conflict will require the United States to develop the capability to identify potential aggressors and predict when a state is about to make the decision to start an armed conflict. Identifying potentially aggressive states is mostly accomplished in the Image 2 analysis, but to be effective, the calculus must go beyond identifying states with government structures that do not deter aggression. The United States must also identify what specific factors will make that state choose to begin an aggressive war.¹²⁷ Further, the United States must also be prepared with intelligence that will guide the executive in creating effective deterrence options designed to deter that particular state (or, more specifically, that state's regime elites) from choosing aggressive military action in a crisis situation.

This is a key component to operationalizing the Incentive Theory—the United States needs to have effective deterrence ready to deploy (or even prepositioned) against specific states to deter specific aggressive acts. This will require an effective intelligence capability that can identify the potential sources of conflict, determine the likely aggressors, evaluate the U.S. interest in avoiding conflict, and develop effective deterrence options to reduce the likelihood that a state will choose to start an armed conflict.

¹²⁵ See generally JAMES H. LEBOVIC, *THE LIMITS OF U.S. MILITARY CAPABILITY: LESSONS FROM VIETNAM AND IRAQ* (2010).

¹²⁶ See MOORE, *supra* note 1, at 2, 83–88.

¹²⁷ See Mesquita & Siverson, *supra* note 57, at 55.

The United States will also need the ability to communicate its capability and willingness to respond to acts of aggression to the aggressive state. This is a key component necessary to implement the Incentive Theory.¹²⁸ Saddam Hussein did not know the UNSC would approve an international coalition to liberate Kuwait, nor did North Korea know the United States (under a UNSC Resolution) would defend South Korea against invasion.¹²⁹ If leaders of these nations had known that their invasions would cause significant military responses, they might not have chosen to start a war because of the increased risk of failure that may have altered their perceived incentives to choose war. Deterrence can prevent war only if communicated in an effective manner and in time to affect the decision-making process of the aggressive state.

Image 3 deterrence can be used to prevent major wars.¹³⁰ Increased international trade and international organizations aimed at collective deterrence can reduce the long-term risks of war. Regional organizations and individual states must also be prepared in the short-term to have readily available and effective deterrence options to deploy against potential aggressive states. Image 2 analysis can help the United States focus its resources on states that are more likely to be aggressive.¹³¹ Image 3 analysis can ensure that effective deterrence is available in the region where conflict can arise and be ready to be deployed. Image 3 can also tailor deterrence to focus on key conflicts where aggression may occur.

Deterrence must be narrowly tailored in order to be effective. It must focus on the conflict that is about to start, be available in the area needed, and be communicated effectively.¹³² But deterrence must be more than amassing troops on the border of a potentially aggressive state. In fact, calling up forces may actually increase the likelihood of war, not decrease it.¹³³ To know what type of deterrence will be effective to stop imminent war, the United States must have detailed knowledge of the aggressive government and its leaders. Ultimately, to make deterrence most effective,

¹²⁸ MOORE, *supra* note 1, at 28.

¹²⁹ *See id.* at 47–48.

¹³⁰ *Id.* at 27–28.

¹³¹ *See* MOORE, *supra* note 1, at 2.

¹³² *Id.* at 27–29.

¹³³ Although there is debate over its historical accuracy, Germany had a World War I “Schlieffen Plan” which would have required immediate war with France if Russia started calling up military forces. JOHN KEEGAN, *THE FIRST WORLD WAR* 28 (2000). Thus, a show of force by Russia would increase the risk of armed conflict with Germany prior to World War I, not decrease it.

it must be tailored to the specific regime elites who hold power in their state to choose war over an alternate path.

A. Implementing Image 1 and 1.5: Ideology and Psychology

The decision to go to war is made by individuals who hold the power to decide and direct the state and its army.¹³⁴ In totalitarian and autocratic governments, a handful of key leaders often make decisions about what path the state will choose to take.¹³⁵ The Incentive Theory refers to these key leaders who have the ability to influence decisions about whether the state will choose to use military force as Image 1.5.¹³⁶ These regime elite have fewer checks and balances on their power than do leaders of democracies.¹³⁷ They are also more likely to have risen to power through violence, and thus may prize the potential benefits to choosing armed conflict more than potential risk to their citizens.¹³⁸ Image 1 focuses on these regime elite to ensure that Image 3 deterrence is shaped to influence decisions and alter views of the incentives to go, or not to go, to war.¹³⁹

Image 1 and Image 1.5 focus on the leaders that can make the decisions to go to war.¹⁴⁰ The ideology and psychology of individual leaders matter.¹⁴¹ A study into the psychology of elite decision-makers can determine their incentives to use military force; then nations, working alone or collectively, can use their resources to provide disincentives that are carefully tailored to the particular decision-maker's belief system.¹⁴² Before deterrence can be structured to stop war from starting, intervening states must understand the incentives regime elites perceive for starting an armed conflict.

Image 1 and Image 1.5 focus on understanding the individual leaders and their key advisors, and also understanding the cost/benefit calculus these elites face in their decision to start an armed conflict.¹⁴³ Image 1

¹³⁴ RUSSETT, *supra* note 7, at 97–98.

¹³⁵ *Id.*

¹³⁶ *See* MOORE, *supra* note 1, at xx–xxii, 64.

¹³⁷ RUSSETT, *supra* note 7, at 97–98.

¹³⁸ R.J. RUMMEL, *POWER KILLS: DEMOCRACY AS A METHOD OF NON-VIOLENCE* 21 (1997).

¹³⁹ John Norton Moore, *Solving the War Puzzle*, *supra* note 19, at 284.

¹⁴⁰ MOORE, *supra* note 1, at 34–37.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 27–28.

includes learning about regime elites and their ideology, their rise to power, and their individual psychology.¹⁴⁴ Understanding the current conflict as seen through their eyes will help states determine the perceived benefits to regime elites and their perceived risks to engaging in war. This analysis is essential in order to focus deterrence on the decision-makers to alter their own personal cost/benefit calculus. Put another way, effective deterrence “requires *understanding* by the potential aggressor of an aggregate of incentives sufficient to prevent the aggression.”¹⁴⁵ Incentive Theory requires one to understand a leader’s ideology in order to determine what kind of deterrence is effective in influencing a leader’s decision-making.

Ideology matters¹⁴⁶—leaders with extreme ideology will require significantly more military force to deter them, whether that ideology is rooted in religious fervor or in some type of personal deification.¹⁴⁷ Alternatively, states may want to employ more creative types of external deterrence, either to systematically attack the foundation of the ideology, or focus deterrence against the individual leaders themselves, or create some positive inducement in addition to military deterrence.¹⁴⁸ Understanding the ideology of regime elites is essential to understanding the level and type of deterrence that will impact aggressive leaders’ decisions. Understanding the ideology is important, but it is also important to understand leaders’ individual psychology.

Psychology also matters.¹⁴⁹ In autocratic and totalitarian governments, the decision to go to war is often made by a key leader and his or her regime elites.¹⁵⁰ Therefore, it is essential for intervening states to completely understand the psyche of those elites to better fashion deterrence that will affect their individual incentives, motivations, and thinking. External deterrence must take into account the key individuals whom the intervening state is attempting to deter.

¹⁴⁴ *Id.* at 34–37.

¹⁴⁵ *Id.* at 28.

¹⁴⁶ *Id.* at 37.

¹⁴⁷ *Id.* at 28, 37.

¹⁴⁸ *Id.* at 27.

¹⁴⁹ See Michael Mott, PowerPoint presentation presented to Professor John Norton Moore’s War and Peace Seminar at the University of Virginia Law School (on file with the author) [hereinafter Mott PowerPoint].

¹⁵⁰ MOORE, *supra* note 1, at xx.

The psychology of regime elites can be important in fashioning effective deterrence because psychology can affect both the decision-making of the regime elites and their risk perception.¹⁵¹ War is aggressive and risky, so analysts can trust that key leaders who have demonstrated a tendency to act aggressively and take significant risks are more likely to do so again in the future.¹⁵² Similarly, leaders of states who perceive lower risk to themselves are more likely to choose war than those who perceive increased risk.¹⁵³ Understanding the psychology of a regime elite will help intervening states choose external deterrence focused on increasing the perceived risk to the elite—thereby decreasing the perceived incentive—and communicating a strong response to any act of aggression.

B. Putting the Three Images Together

The Incentive Theory can be incorporated into government and used to analyze current risk levels of the outbreak of major war, predict where that war may occur, and develop effective external deterrence to prevent major war. Image 2 analysis can narrow the world to key regions and states where war is more likely to occur. Image 2 analysis can focus government resources on those governments that do not have internal checks on power and that create incentives for regime elites to engage in risky war for personal gain. Image 2 analysis will narrow the focus on key regions where war may occur and help focus resources to prevent the occurrence of war.

Image 3 will help identify options for both long and short-term deterrence to prevent major war. Long-term deterrence can include working to make states more democratic, increasing economic trade and interdependence, developing collective security agreements, and improving the rule of law. Short-term deterrence can include shows of military force, location of military bases, threat and use of sanctions, threat of war crime prosecution, diplomatic efforts, and positive inducements for refraining from war.

Image 1 analysis can inform states that wish to intervene what deterrence will be most effective given the ideology and psychology of

¹⁵¹ See Mott PowerPoint Presentation, *supra* note 149.

¹⁵² *Id.*

¹⁵³ *Id.*

regime elites.¹⁵⁴ Knowing how these regime leaders think can insure that the deterrence is delivered in a manner and time to change the perceived incentives and risks of regime elites. All three images, if put into operation, can create a workable model for deterring aggressive states.

Incentive Theory can work if it is incorporated into government structures to assist U.S. leaders in understanding the risk of imminent armed conflict, knowing the decision-making process of the regime elite who may start a war, and developing and communicating a strong and effective deterrence to prevent war. The bureaucracy of the United States must change to institutionalize the Incentive Theory and put it into use to prevent future wars.

III. Building Government Capacity to End War

After the September 11, 2001 terrorist attacks, the United States undertook a massive reorganization of its bureaucracy to develop the capability to identify, predict, respond to, and prevent terrorist attacks.¹⁵⁵ This was a necessary change to government to protect the United States from a new and challenging threat to national security. A much smaller modification to the executive branch of the United States could help prevent the outbreak of major war. It is in the national security interest of the United States to incorporate Incentive Theory into government and use it to deter major war.

The three images can be operationalized if the United States includes two new, separate organizations within the executive branch. To use Incentive Theory, the United States must first collect the intelligence necessary to analyze all three images. This intelligence function will both aggregate intelligence that already exists in the government and create intelligence requirements for the intelligence apparatus to collect more information. Once the intelligence is collected, it must be organized into products that are useable by the rest of government to understand the risk of war, understand the regime elite, and develop options to deter war.

The second new organization will implement Incentive Theory by taking available intelligence and formulating a long and short-term deterrence plan to prevent war. This operations function can create

¹⁵⁴ MOORE, *supra* note 1, at 37.

¹⁵⁵ See PATRIOT Act, Pub. L. No. 107-56 (2001); IRTP Act, 50 U.S.C. § 3001 (2004).

deterrence options before crises occur, ensure that the necessary resources are in place to execute those options, and present the proposed plans as recommendations to U.S. leaders to deploy when faced with an imminent threat of war. Understanding these new organizations is key to building an effective capability to implement Incentive Theory into practice.

A. Operationalizing the Incentive Theory—Building the Intelligence Function

In order to craft effective external deterrence to stop aggressive states from choosing war, the United States must first understand the threat of war, understand the motivations behind the regime elite that have the power to start a war, and analyze what incentives will deter the regime elite from choosing war.¹⁵⁶ The United States must have an agency focused on collecting and organizing the specific intelligence needed to fully understand the three images of the Incentive Theory. This agency should be in a position where it can collect the necessary information from the entire intelligence community, as well as request the necessary intelligence requirements from the varied intelligence agencies, to ensure that the best possible information is being used to input into the Incentive Theory. This agency should be placed in the Office of the Director for National Intelligence (ODNI).

The ODNI was created after September 11, 2001 to address perceived failures in the sharing and aggregation of intelligence to identify and prevent terrorist attacks.¹⁵⁷ The ODNI has three national centers.¹⁵⁸ These include: (1) the National Counterterrorism Center, focused on integrating and analyzing all intelligence pertaining to terrorism,¹⁵⁹ (2) the National Counter-Proliferation Center, focused on countering “the threats caused by the proliferation of chemical, biological, radiological, and nuclear weapons”;¹⁶⁰ and (3) the National Counterintelligence and Security Center, focused on leading the nation’s efforts in counterintelligence and

¹⁵⁶ MOORE, *supra* note 1, at xxii–xxiv.

¹⁵⁷ IRTP Act, 50 U.S.C. § 3001 (2004).

¹⁵⁸ See generally OFF. OF THE DIR. OF NAT’L INTEL., <http://www.dni.gov/index.php/about/organization/national-counterproliferation-center-who-we-are> (last visited Mar. 13, 2016).

¹⁵⁹ See generally NAT’L COUNTERTERRORISM CENT., <http://www.nctc.gov> (last visited Mar. 13, 2016).

¹⁶⁰ See NAT’L COUNTER-PROLIFERATION CENT., <http://www.dni.gov/index.php/about/organization/national-counterproliferation-center-who-we-are> (last visited Mar. 13, 2016).

security.¹⁶¹ The United States needs a fourth national center in ODNI—the National War Prevention Center (NWPC)—which must focus on integrating and analyzing all intelligence necessary to implement the Incentive Theory, and prepare products for use by the operational function.

The NWPC will benefit from being located in and having equal status with the other three ODNI national centers. The NWPC will have the ability to use the entire intelligence community of the United States to develop the three images necessary to operationalize the Incentive Theory. Equally important, the NWPC will be in the ODNI, thus having bureaucratic supervision over all of the intelligence agencies. While it is developing the current Incentive Theory, it can further analyze the effectiveness of the theory and improve it as needed.

The NWPC can use Image 2 to focus the collection efforts on the states that are more susceptible to be aggressive. There is likely to be much intelligence available because other parts of the government are already collecting intelligence on the totalitarian and autocratic regimes for other purposes.¹⁶² The NWPC could then gather the same intelligence, and seek more when necessary, to analyze for the purposes of evaluating the likelihood of imminent armed conflict.

The NWPC can collect intelligence on the aggressive nature of the regime elites and the types of deterrence that can be most effective to curb aggression. The analysts in the NWPC can learn specifics about the leaders, determine if sanctions would be effective, assess whether sanctions can be levied solely on the elite (e.g., freezing bank accounts or prohibiting travel), and assess what type and amount of military force would be most effective in deterring aggression.

The NWPC can also be a central location to receive notice from the rest of the intelligence community of an impending armed attack. If an intelligence analyst learns of troops preparing to attack, he or she can reach out to the NWPC to alert the key executive branch leaders to prepare to respond. This will allow key information to flow quickly to the highest levels of the intelligence community, then to the U.S. national security

¹⁶¹ See NAT'L COUNTERINTELLIGENCE AND SEC'Y CENT., <http://www.ncsc.gov/> (last visited Mar. 13, 2016).

¹⁶² The mission of the C.I.A. is to “[p]reempt threats and further U.S. national security objectives by collecting intelligence . . .” C.I.A., <https://www.cia.gov/about-cia/cia-vision-mission-values> (last visited Mar. 17, 2016).

decision-makers for action. That action will occur in the operational function.

B. Operationalizing the Incentive Theory—Building the Operations Function

The United States should have an agency focused on creating options that can be presented to U.S. leaders during a crisis to produce effective, rapid deterrence.¹⁶³ This operations function can take the intelligence collection from the NWPC and develop possible courses of action to deter present and future aggression. To be useful, this operations function must be located in an agency with access to U.S. decision-makers in the executive branch, and it must have the resources available to implement that action. This operations function must be located within the National Security Council to ensure maximum effectiveness.¹⁶⁴

To understand how the operations function would fit within the National Security Council, one must first understand how the NSC currently works. The National Security Council is the President's "principal forum for considering national security and foreign policy matters" and should be the "principal forum for consideration of national security policy issues requiring Presidential determination."¹⁶⁵ The National Security Council has both statutory and advisory members, and others as the President prescribes.¹⁶⁶ The National Security Advisor is co-designated as the Assistant to the President for National Security Affairs.¹⁶⁷ There is an Assistant to the President and Deputy National Security Advisor, as well as specific-issue Deputy Assistants to the President and Deputy National Security Advisors for International Economics, for Strategic Communications and for Homeland Security and

¹⁶³ Currently, the U.S. National Security Council is the organization that assists the President in responding to crises, but there is no corresponding component in the various intelligence agencies that is charged with preparing intelligence to create options. *See* NAT'L SEC'Y COUN., <https://www.whitehouse.gov/administration/eop/nsc/> (last visited Mar. 13, 2016). Each agency may do their part independently, but not by analyzing the Incentive Theory. *See generally* National Security Act, 50 U.S.C. § 401 (1947).

¹⁶⁴ *See* Moore, *supra* note 2, at 428 (reiterating the idea which was originally proposed by Professor John Norton Moore).

¹⁶⁵ *See* National Security Act, 50 U.S.C. § 401 (1947); Presidential Policy Directive 1, at 2 (Feb. 14, 2009).

¹⁶⁶ *See* 50 U.S.C. § 402 (1947); Presidential Policy Directive 1, at 2.

¹⁶⁷ *Id.* at 2.

Counterterrorism.¹⁶⁸ Having deputies focused on international economics and counterterrorism with close access to the President is essential, and the same level of authority and access is necessary for war prevention. The National Security Council must add a Deputy Assistant to the President and Deputy National Security Advisor for War Prevention, with appropriate staff, to implement the operations function of the incentive theory.

This new Deputy National Security Advisor for War Prevention could assist in crises to ensure that the President of the United States has direct access to the intelligence gathered by the National War Prevention Center and has appropriate, practicable, and deployable options to quickly act in the face of aggression. Such capability will give the President the maximum possible options to act swiftly to respond to threats of aggression. Moreover, adding a DNSA for War Prevention with equal status as the experts on counterterrorism and international economic issues will give the President options from all agencies of the government, and, combined with the intelligence products generated by the ODNI's War Prevention Center, will give the best information and the best tools to the President in time for action to prevent war.

The National Security Council and its staff can also work with the staff at the Office of the Director of National Intelligence to evaluate the strengths and weaknesses of the Incentive Theory.¹⁶⁹ Over time, the practical effects of the Incentive Theory will be demonstrated. These two staffs, looking at the theory from both an intelligence and an operations function, can find ways to improve upon it and ensure that the theory adjusts to modern circumstances. This improvement of Incentive Theory will be of lasting importance, ensuring that the Incentive Theory will develop from a promising theory into a proven method to analyze and deter aggressive states on the eve of potential armed conflict.

The Incentive Theory can be put into operation by adding an intelligence component and an operations component at a level of the executive branch of the U.S. government, where it can have the necessary resources to gather the intelligence and craft the operations plans. The theory can be used to develop, over the longer term, international relationships, collective defense treaties, economic interdependence, and rule of law efforts that will reduce the likelihood that a future dispute

¹⁶⁸ *Id.* at 4.

¹⁶⁹ *See* 50 U.S.C. § 402 (1947).

between states will end in war. The United States must act to implement this theory and incorporate it into the U.S. government bureaucracy and national security decision-making.

V. Conclusion

The Incentive Theory is the culmination of two centuries of thought and application on why states choose to go to war. Applied retrospectively, the theory has been proven to explain why states chose to start an aggressive war. The Incentive Theory can craft, again in retrospect, strong deterrence that would have been focused on the incentives for war and likely could have prevented major wars in the past. It is time to put Incentive Theory into operation—not to explain the past—but to solve the problems that may lead to future wars.

The three images can be carefully applied to current and future conflicts to understand why a state may choose war and develop effective deterrence to discourage armed conflict. Image 2 can be used to identify which states have government structures that increase the probability that regime elites would choose to pursue armed conflict, and focus government resources on those potentially aggressive states. Image 3 will help develop effective external options to deter potentially aggressive leaders. Image 1 will insure that deterrence is effective in influencing the decisions of key regime leaders in order to ensure that they do not perceive advantages to starting an armed conflict. These three images combined can be used by the United States to help prevent war.

The United States must create the bureaucracy necessary to incorporate Incentive Theory and put it into operation. This addition to the executive will be a minor alteration of government bureaucracy when compared to the changes following the September 11, 2001 terrorist attacks, but will have greater potential benefit to national security. The United States must develop the intelligence capability to collect and analyze information that includes the three images of analysis. Further, the United States must have an operational function that takes this intelligence and develops practical options that can be used to deter aggressive states.

The Incentive Theory is the best theory to understand, predict, and deter war. Incorporating the knowledge that can be gained from this

between states will end in war. The United States must act to implement this theory and incorporate it into the U.S. government bureaucracy and national security decision-making.

V. Conclusion

The Incentive Theory is the culmination of two centuries of thought and application on why states choose to go to war. Applied retrospectively, the theory has been proven to explain why states chose to start an aggressive war. The Incentive Theory can craft, again in retrospect, strong deterrence that would have been focused on the incentives for war and likely could have prevented major wars in the past. It is time to put Incentive Theory into operation—not to explain the past—but to solve the problems that may lead to future wars.

The three images can be carefully applied to current and future conflicts to understand why a state may choose war and develop effective deterrence to discourage armed conflict. Image 2 can be used to identify which states have government structures that increase the probability that regime elites would choose to pursue armed conflict, and focus government resources on those potentially aggressive states. Image 3 will help develop effective external options to deter potentially aggressive leaders. Image 1 will insure that deterrence is effective in influencing the decisions of key regime leaders in order to ensure that they do not perceive advantages to starting an armed conflict. These three images combined can be used by the United States to help prevent war.

The United States must create the bureaucracy necessary to incorporate Incentive Theory and put it into operation. This addition to the executive will be a minor alteration of government bureaucracy when compared to the changes following the September 11, 2001 terrorist attacks, but will have greater potential benefit to national security. The United States must develop the intelligence capability to collect and analyze information that includes the three images of analysis. Further, the United States must have an operational function that takes this intelligence and develops practical options that can be used to deter aggressive states.

The Incentive Theory is the best theory to understand, predict, and deter war. Incorporating the knowledge that can be gained from this

theory is an important national security interest of the United States. It is time to put Incentive Theory into operation.

THE CASE FOR STRATEGIC U.S. DETENTION POLICY

MAJOR ELISABETH GILMAN*

*There is surprisingly little discussion in the policy or academic realms of precisely how detention fits within a broader U.S. and allied strategy to combat terrorism, or more specifically at Qaeda.*¹

I. Introduction—Capturing Osama bin Laden

On May 15, 2011, the United States launched a covert military operation to capture or kill Osama bin Laden.² Just after midnight,

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¹ Matthew C. Waxman, *Administrative Detention of Terrorists, Why Detain, and Detain Whom*, 3 J. of Nat'l. Sec. Law and Pol'y 12 (2009).

² This purely fictional scenario is based in part on the following article: Nicholas Schmidle, *Getting Bin Laden*, NEW YORKER, (Aug. 8, 2011), <http://www.newyorker.com/magazine/2011/08/08/getting-bin-laden>. See generally *Osama bin Laden Biography (1957-2011)*, BIOGRAPHY, <http://www.biography.com/people/osama-bin-laden-37172#> synopsis (last visited June 8, 2016).

Osama bin Laden was born in Riyadh, Saudi Arabia, in 1957. When the Soviet Union invaded Afghanistan in 1979, bin Laden joined the Afghan resistance. After the Soviet withdrawal, bin Laden formed the al-Qaeda network which carried out global strikes against Western interests, culminating in the September 11, 2001, attacks on the World Trade Center and the Pentagon. On May 2, 2011, President Barack Obama announced that bin Laden had been killed in a terrorist compound in Abbottabad, Pakistan.

twelve elite military special operators boarded two MH-60 Blackhawk helicopters heading from eastern Afghanistan into neighboring Pakistan. Intelligence suggested bin Laden was living in a three-story home located in a middle-class neighborhood a mile from the entrance to a prestigious military academy in Abbotabad, Pakistan.

One of the operators, referred to here as “John,” boarded his helicopter feeling uneasy. Notwithstanding dozens of kill/capture missions, pre-mission jitters never went away. That said, this mission was different; it felt more like a suicide mission than a capture/kill mission. Briefing the mission, even his troop commander seemed wary of the chances of success, never mind the chances of survival. If things went sideways, there was no quick reaction force to send in as back-up. John and the rest of his team knew if they were captured, the United States would deny the mission in an effort to preserve diplomatic relations with Pakistan and save face around the world. Sixteen Americans—twelve operators and four pilots—risked their lives during the early hours of May 15th to finally get the mastermind of 9/11. Dead or alive.

After a short and surprisingly uneventful flight across the border into Pakistan, under the cover of darkness, the two helicopters landed just a few blocks from the target compound seemingly undetected. Using ladders to scale the high walls of the compound, the special operators infiltrated. They were as prepared as they could be, but had no idea what to expect. Would the entire compound be rigged with explosives, ready to implode once the walls were breached? Would men with suicide vests hurl themselves at John and his teammates? Would snipers be waiting on the rooftop to pick them off one by one?

Luckily, the answer to those questions was “no.” Instead the house was dark and quiet; so much so, he was skeptical they were in the right place—bin Laden would not let his guard down like this—or would he? Maybe bin Laden became complacent, or maybe the ambush would occur once they entered the house.

See also Press Briefing by Senior Administration Officials on the Killing of Osama bin Laden, THE WHITE HOUSE (May 2, 2011, 12:03 AM), <http://www.whitehouse.gov/the-press-office/2011/05/02/press-briefing-senior-administration-officials-killing-osama-bin-laden>.

After breaching the walls, John and his team entered the house through the rear entrance as the second team pulled security outside the compound leaving a small element behind to protect the helicopters. John was the second inside and was immediately confronted by a middle-aged man carrying an AK-47. As soon as the man raised his weapon, John knew they were in the right place. Instantly, John shot and killed him. Now the adrenaline was pumping and the jitters were gone. Room by room, John and his team cleared the first floor. On to the second floor, they found three young children sleeping. One more floor to go—John knew bin Laden was up there. His heart was pounding so hard, it felt like it was going to jump out of his chest. Positive that bin Laden would not be taken alive, John was expecting a fight.

The pre-mission briefing just prior to take-off was the first time John and his teammates were told that Osama bin Laden was the target. Rumors were floating around camp that it was bin Laden, but there were always rumors. After ten years of hunting for the most wanted terrorist in the world, John did not get his hopes up. The operators all received photos of bin Laden as well as the other individuals believed to be occupying the compound. The troop commander's order during the pre-mission briefing was to capture or kill Osama bin Laden.

John was the first man up the stairs to the third floor. As he began to scan and clear the room he saw an older, bearded man resembling Osama bin Laden in the left corner of the room next to a bed, crouching behind a young woman wearing a burka. John was sure she was loaded with explosives. Immediately, bin Laden began to stand; as he stood and got taller and taller, John knew it was him. Bin Laden was yelling something in Arabic as he began raising his hands. "He has a weapon," John thought. In a flash, John raised his weapon and aimed it at bin Laden. As he was about to fire, he heard his translator, Amil, yelling "stop" and "surrender." As John processed these words he saw that bin Laden was not holding a weapon, instead, he was raising his arms in an effort to surrender, along with the young woman he was using as a shield. John removed his finger from the trigger, keeping his weapon aimed center-mass at bin Laden.

Once the chaos subsided, John and his team gathered and searched all the occupants in the house. It turned out there were several men, women, and children hiding behind a false door underneath the stairwell. Neither bin Laden nor any of the other occupants were wearing suicide

vests, nor was the house rigged with explosives. Aside from a small arsenal of AK-47s and a few knives, no other weapons were recovered.

After quickly gathering anything of potential intelligence value, bin Laden was loaded onto John's helicopter. A few members of John's team briefly questioned the remaining occupants before leaving them behind. The two teams got out of there just in time. Locals were beginning to become curious and started surrounding the helicopters and asking questions.

As the aircraft lifted off the ground in Abbotabad, Pakistan, carrying all of the original passengers, plus one very important additional passenger, the sun began to peak behind the mountains. John looked over at bin Laden, his eyes blindfolded and his hands cuffed. For the first time, it really hit him: "We captured Osama bin Laden!" Then he paused and thought, "Now what the hell are we going to do with him?"

This fictional scenario illustrates the critical need for a strategic U.S. detention policy to temporarily detain and interrogate high-value Unprivileged Enemy Belligerents (UEBs).³ The closure of detention

³ The terms Unprivileged Enemy Belligerent (UEB) and Unlawful Enemy Combatant (UEC) are synonymous. For continuity and to reflect the current terminology used by Congress and the Department of Defense (DoD), this paper will use the term Unprivileged Enemy Belligerent. The Military Commissions Act of 2009, Pub. L. 111-84, div. A, title XVIII, Oct. 28, 2009, 123 Stat. 2574, § 948a [hereinafter MCA 2009]. The Military Commissions Act of 2009 defines UEB as

[A]n individual (other than a privileged belligerent) who—(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense under this chapter.

Id.; See also JOINT CHIEFS OF STAFF, JOINT PUB. 3-63, DETAINEE OPERATIONS, at I-4 (13 Nov. 2014) [hereinafter JP 3-63]. Joint Publication 3-63 defines Unprivileged Enemy Belligerent as:

[B]elligerents who do not qualify for the distinct privileges of combatant status (e.g., combatant immunity). Examples of unprivileged belligerents are:

(a) Individuals who have forfeited the protections of civilian status by joining or substantially supporting an enemy non-state armed group in the conduct of hostilities, and

facilities in Iraq and Afghanistan, combined with restrictions on sending detainees to Guantánamo Bay, make it imperative for the United States to establish a workable, cohesive structure for detaining and interrogating terrorists and other dangerous foreign fighters who qualify as high-value UEBs, through policies consistent with the Law of Armed Conflict (LOAC).⁴

Part I of this article explores the development of detention operations under the LOAC in the United States since September 11, 2001 (9/11) and advocates for establishing a world-wide strategic detention capability. Part II of this paper examines why the United States needs a formal detention and interrogation policy.⁵ Part III discusses the

(b) Combatants who have forfeited the privileges of combatant status by engaging in spying, sabotage, or other similar acts behind enemy lines.

Id.; but see DEP'T OF ARMY, FIELD MANUAL 3-63, DETAINEE OPERATIONS (Apr. 2014) [hereinafter FM 3-63]; DEP'T OF ARMY FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS paras. 34-52 (2006) [hereinafter HUMAN INTEL. OPER.] (utilizing the term "enemy combatant").

⁴ U.S. DEP'T OF THE ARMY FIELD MANUAL 27-10, THE LAW OF WAR paras. 2, 4 (18 July 1956) [hereinafter LAW OF WAR].

The conduct of armed hostilities on land is regulated by the law of land warfare which is both written and unwritten. It is inspired by the desire to diminish the evils of war by:

- a. Protecting both combatants and noncombatants from unnecessary suffering;
- b. Safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians; and
- c. Facilitating the restoration of peace.

The law of war is derived from two principal sources:

- a. Lawmaking Treaties (or Conventions), such as the Hague and Geneva Conventions.
- b. Custom. Although some of the law of war has not been incorporated in any treaty or convention to which the United States is a party, this body of unwritten or customary law is firmly established by the custom of nations and well defined by recognized authorities on international law.

Id.

⁵ Although this paper focuses on the need to create a strategic detention and interrogation capability with respect to the armed conflict between the United States and al-Qaeda and associated forces, the proposed detention paradigm could also apply to other non-

evolution of detention and interrogation operations since 9/11. Finally, Part IV analyzes the legal framework that allows for a meaningful and effective detention and interrogation program and Part V provides a proposed LOAC detention and interrogation paradigm.

II. The Problem—Nowhere to Go

In the thirteen years since the United States declared a global “war on terror,”⁶ the U.S. government has neglected to develop a cohesive national detention and interrogation policy capable of facilitating the detention and interrogation of terrorists and hostile foreign fighters.⁷ Despite a stated preference for detention of UEBs,⁸ the United States has failed to create a LOAC detention policy or designate an actual detention site. As a result of this inaction, detention is currently not a viable option

international armed conflicts between the United States and non-state actor terrorist organizations such as the Islamic State in the Levant (ISIL). There is currently a proposal for a new Authorization for Use of Military Force (AUMF) against ISIL. *See generally Joint Resolution to Authorize the Limited Use of the United States Armed Forces Against the Islamic State of Iraq and the Levant*, THE WHITE HOUSE, http://www.whitehouse.gov/sites/default/files/docs/aumf_02112015.pdf (last visited June 8, 2016).

⁶ *See generally Transcript of President Bush’s Address to a Joint Session of Congress on Thursday Night, September 20, 2001*, CNN, (Sept. 21, 2001, 2:27 AM), <http://edition.cnn.com/2001/US/09/20/gen.bush.transcript/> (quoting President Bush declaring a “war on terror” before Congress on September 20, 2001, stating “Our war on terror begins with al Qaeda, but it does not end there.”). *But see* Al Kamen, *The End of the Global War on Terror*, WASH. POST (Mar. 24, 2009), http://voices.washingtonpost.com/44/2009/03/23/the_end_of_the_global_war_on_t.html. The Obama administration has replaced use of the term Global War on Terror (GWOT) with Overseas Contingency Operation (OCO). *Id. See also Remarks by the President at the National Defense University*, WHITE HOUSE (May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> (“Beyond Afghanistan, we must define our effort not as a boundless global war on terror, but rather as a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America.”).

⁷ *See, e.g.*, Enemy Belligerent, Interrogation Detention and Prosecution Act of 2010, S.3081, 111th Cong. (2010) (referred to the Committee on the Judiciary Mar. 4, 2010). This failed bill was never voted on by Congress. *Id.* It was “[A] bill to provide for the interrogation and detention of enemy belligerents who commit hostile acts against the United States, to establish certain limitations on the prosecution of such belligerents for such acts, and for other purposes.” *Id.*

⁸ *Remarks by the President at the National Defense University*, *supra* note 6 (“And that brings me to my final topic: the detention of terrorist suspects. I’m going to repeat one more time: As a matter of policy, the preference of the United States is to capture terrorist suspects. When we do detain a suspect, we interrogate them.”).

for commanders conducting military operations. This status quo is untenable. Military commanders have the authority⁹ and deserve the ability to detain under the LOAC. More importantly, the U.S. government should be afforded the opportunity to benefit from the strategic intelligence that can be gained through interrogating high-value UEBs.¹⁰

A. The Stigma

Unfortunately, the topics of detention and interrogation are taboo among Americans today. Since the fall-out over post-9/11 detainee abuses at Abu Ghraib,¹¹ CIA black sites,¹² and Guantánamo Bay,¹³

⁹ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (recognizing the importance of detention in an armed conflict:

The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by “universal agreement and practice,” are “important incident[s] of war.” The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again.

Id. (internal citations omitted). See also Bruce “Ossie” Oswald & Thomas Winkler, *The Copenhagen Process on the Handling of Detainees in International Military Operations*, *The Copenhagen Process: Principles and Guidelines* 16 AMER. SOC. INT’L L. 39 (2012) (“Participants recognised that detention is a necessary, lawful and legitimate means of achieving the objectives of international military operations.”).

¹⁰ *Remarks of John O. Brennan, Strengthening our Security by Adhering to our Values and Laws*, WHITE HOUSE (September 16, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> (“Intelligence disrupts terrorist plots and thwarts attacks. Intelligence saves lives. And one of our greatest sources of intelligence about al-Qa’ida, its plans, and its intentions has been the members of its network who have been taken into custody by the United States and our partners overseas.”).

¹¹ See generally *Iraq Prison Abuse Scandal Fast Facts*, CNN (November 7, 2014, 12:41 PM), <http://www.cnn.com/2013/10/30/world/meast/iraq-prison-abuse-scandal-fast-facts/> (“Abu Ghraib prison was a U.S. Army detention center for captured Iraqis from 2003 to 2006. The prison was located [twenty] miles west of Baghdad on 280 acres.”). See also James R. Schlesinger et al., *Final Report of the Independent Panel to Review DoD Detention Operations* 11 (2004), <http://www.defense.gov/news/aug2004/d20040824> finalreport.pdf (“Of the seventeen detention facilities in Iraq, the largest, Abu Ghraib, housed up to 7000 detainees in October 2003, with a guard force of only about [ninety] personnel from the 800th Military Police Brigade. Abu Ghraib was seriously overcrowded, under-resourced, and under continual attack.”); see also Antonio M. Taguba, Army Regulation 15-6 Report of Investigation of the 800th Military Police Brigade (26 Feb. 2004) [hereinafter Taguba, AR 15-6 Investigation] (on file with author) (“[B]etween October and December 2003, at the Abu Ghraib Confinement Facility

Congress and the American people have largely ignored the need to create a LOAC detention capability because it is such an emotionally charged and politically divisive topic.

1. Abu Ghraib

Congress's reluctance to meaningfully address LOAC detention is understandable. In 2004, in the wake of the Abu Ghraib scandal, vivid images of horrific detainee abuses were plastered across television screens and newspapers around the world.¹⁴ The photographs said it all:

In one, Private England, a cigarette dangling from her mouth, is giving a jaunty thumbs-up sign and pointing at the genitals of a young Iraqi, who is naked except for a sandbag over his head, as he masturbates. Three other hooded and naked Iraqi prisoners are shown, hands reflexively crossed over their genitals. A fifth prisoner has his hands at his sides. In another, England stands

(BCCF) [The BCCF (Baghdad Central Confinement Facility) was also known as Abu Ghraib], numerous instances of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees.”)

¹² See generally *Committee Releases Study of the CIA's Detention and Interrogation Program* (Dec. 9, 2014), <http://www.intelligence.senate.gov/study2014.html>.

¹³ See generally *Guantánamo Bay Naval Station Fast Facts*, CNN (Feb. 20, 2015), <http://www.cnn.com/2013/09/09/world/Guantánamo-bay-naval-station-fast-facts/>.

In response to the 9/11 attacks in 2001, and subsequent military operations in Afghanistan, existing migrant detention facilities at Guantánamo were re-purposed to hold detainees in the “war on terror.” During the administration of President George W. Bush (2001–2009), the [United States] claimed that Guantánamo Bay detainees were not on U.S. soil and therefore not covered by the U.S. [C]onstitution, and that “enemy combatant” status meant they could be denied some legal protections. Shortly after his inauguration in 2009, President Barack Obama signed an executive order to close the detention facilities within one year. However, the facilities are still open as of 2015. There are 122 detainees at Guantánamo Bay as of February 2015. The number of detainees held at Guantánamo since it opened exceeds 750. At least seven detainees have died in custody.

Id.

¹⁴ Schlesinger et al., *supra* note 11, at 13. (“Concerning the abuses at Abu Ghraib, the impact was magnified by the fact the shocking photographs were aired throughout the world in April 2004.”).

arm in arm with Specialist Graner; both are grinning and giving the thumbs-up behind a cluster of perhaps seven naked Iraqis, knees bent, piled clumsily on top of each other in a pyramid Yet another photograph shows a kneeling, naked, unhooded male prisoner, head momentarily turned away from the camera, posed to make it appear that he is performing oral sex on another male prisoner, who is naked and hooded.¹⁵

These images shocked the conscious and are forever embedded in the minds of Americans. They brought shame on the United States and rallied enemies abroad.¹⁶ The abuses were the subject of thorough and comprehensive investigations into the events leading up to and causing the detainee abuse,¹⁷ resulting in the criminal prosecution of the soldiers responsible,¹⁸ and the Department of Defense (DoD) overhauling the detainee treatment program.¹⁹ Yet, the stigma from Abu Ghraib persists.²⁰

¹⁵ Seymour Hersh, *Torture at Abu Ghraib*, NEW YORKER (May 10, 2004), <http://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib>.

¹⁶ See Cheryl Benard et al., *The Battle Behind the Wire*, NAT'L DEF. RES. INST. 12 (2011), http://www.rand.org/content/dam/rand/pubs/monographs/2011/RAND_MG934.pdf ("The Abu Ghraib prisoner abuse scandal and its successful use by insurgents in propaganda against the United States is a powerful example of how detention operations are not a coincidental product of a conflict but are a central part of shaping the ongoing counterinsurgency campaign and post-conflict outcomes."); see also *12 Dead in Attack on Paris Newspaper Charlie Hebdo*, N.Y. TIMES (Jan. 7, 2015, 11:09 PM), <http://www.nytimes.com/aponline/2015/01/07/world/europe/ap-eu-france-newspaper-attack.html>. Cherif Kouchi, one of the terrorists responsible for the attack on the Charlie Hebdo office in Paris was inspired in part by the Abu Ghraib prison abuse scandal. *Id.*

¹⁷ See, e.g., Schlesinger et al., *supra* note 11, at 11; Taguba AR 15-6 Investigation, *supra* note 11; Anthony R. Jones, Army Regulation 15-6 Report of Investigation of the Abu Ghraib Detention Facility and 20th Military Intelligence Brigade (n.d.) [hereinafter Jones AR 15-6 Investigation] (on file with author); George R. Fay, Army Regulation 15-6 Report of Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade (n.d.) [hereinafter Fay AR 15-6 Investigation] (on file with author).

¹⁸ *Iraq Prison Abuse Scandal Fast Facts*, *supra* note 13. Eleven soldiers were convicted at courts-martial. *Id.* Staff Sergeant Ivan "Chip" Fredrick II received eight years confinement, Private First Class Lynndie England received three years confinement and Specialist Charles Graner received ten years confinement. *Id.*

¹⁹ Four pivotal documents established a new foundation for conducting U.S. detention operations: Detainee Treatment Act of 2005, Public Law No. 109-163, title XIV [hereinafter DTA 2005] (prohibiting "cruel, inhuman, or degrading treatment or punishment" and creating uniform interrogation standards); HUMAN INTEL. OPER., *supra* note 4 (providing "doctrinal guidance, techniques, and procedures governing the employment of human intelligence (HUMINT) collection . . . the only interrogation approaches and techniques that are authorized for use against any detainee . . . are those

2. Central Intelligence Agency “Black Sites”

More recently, the release of the Senate Select Committee on Intelligence’s study of the CIA’s Detention and Interrogation Program²¹ forced America and the world to relive the dark days following 9/11.²² The report found that “[Central Intelligence Agency] (CIA) personnel, aided by two outside contractors, decided to initiate a program of indefinite secret detention and the use of brutal interrogation techniques in violation of U.S. law, treaty obligations, and values.”²³ The study covers the CIA’s detention and interrogation program from late 2001 through 2009²⁴ and details abuse of detainees including water-boarding, sleep-deprivation, nudity, slamming detainees against walls, sensory deprivation, solitary confinement, and rectal rehydration.²⁵

This report substantiated what many Americans and the rest of the world suspected about the CIA’s treatment of detainees in the wake of

authorized and listed in this Field Manual”); U.S. DEP’T OF DEF., DIR. 2311.01E, LAW OF WAR PROGRAM (9 May 2006) [hereinafter LAW OF WAR PROGRAM] (mandating DoD compliance with the Law of War); and U.S. DEP’T OF DEF., DIR. 2310.01E, THE DEPARTMENT OF DEFENSE DETAINEE PROGRAM (5 Sept. 2006) [hereinafter DETAINEE PROGRAM] (requiring humane treatment of detainees “in accordance with U.S. law, the law of war and applicable U.S. policy”).

²⁰ See Benard et al., *supra* note 16, at xiii.

²¹ *Committee Releases Study of the CIA’s Detention and Interrogation Program*, *supra* note 13.

²² See also Mark Mazzetti, *Panel Faults C.I.A. Over Brutality and Deceit in Terrorism Interrogations*, N.Y. TIMES (Dec. 9, 2014), <http://www.nytimes.com/2014/12/10/world/senate-intelligence-committee-cia-torture-report.html>.

Taken in its entirety, the report is a portrait of a spy agency that was wholly unprepared for its new mission as jailers and interrogators, but that embraced its assignment with vigor. The report chronicles millions of dollars in secret payments between 2002 and 2004 from the [Central Intelligence Agency (CIA)] to foreign officials, aimed at getting other governments to agree to host secret prisons.

Id.

²³ *Committee Releases Study of the CIA’s Detention and Interrogation Program*, *supra* note 12, forward.

²⁴ *Id.* (finding the majority of the abuse discussed throughout the report occurred before 2004).

²⁵ *Id.* at Executive Summary 3.

9/11.²⁶ Allegations of rampant abuse, enhanced interrogation techniques, and extraordinary renditions were verified.²⁷ The report also called into question the effectiveness of the enhanced interrogation techniques and cast doubt as to whether they were successful in gathering actionable intelligence.²⁸ Unfortunately, this report also reinforced the misconception that U.S. detention operations are nefarious by nature and detainees in U.S. custody are treated in a manner that is both legally and morally reprehensible.

3. *Guantánamo Bay Naval Base*

Finally, detention at the Guantánamo Bay Naval Base²⁹ has raised serious concerns about both the legal protections afforded to detainees

²⁶ See generally *Reaction to the CIA Report*, USA TODAY (Dec. 10, 2014, 6:15 AM), <http://www.usatoday.com/story/news/nation/2014/12/09/cia-torture-report-reaction/20153623/> (responding to the Senate Select Committee Report, President Obama reaffirmed his commitment against using enhanced interrogation techniques). “[T]hese techniques did significant damage to America’s standing in the world and made it harder to pursue our interests with allies and partners. That is why I will continue to use my authority as President to make sure we never resort to those methods again.” *Id.*; See also Ray Sanchez, *World Reacts to U.S. Torture Report*, CNN (Dec. 11, 2014, 4:43 PM), <http://www.cnn.com/2014/12/10/world/senate-torture-report-world-reaction/>. (The CIA’s actions were condemned by various nations around the world, to include leaders in Russia, China, Pakistan, and North Korea. *Id.* There were also calls for criminal prosecutions of the individuals responsible for the activities detailed in the report).

[United Nations] Special Rapporteur on Counter Terrorism and Human Rights Ben Emmerson called on the [United States] to prosecute those responsible for crimes outlined in the report. Emmerson said the program was “a clear policy orchestrated at a high level within the Bush administration, which allowed . . . systematic crimes and gross violations of international human rights law.”

Id.

²⁷ *Committee Releases Study of the CIA’s Detention and Interrogation Program*, *supra* note 12.

²⁸ Mazzetti, *supra* note 22 (“The Intelligence Committee’s report . . . present[s] [twenty] case studies that bolster its conclusion that the most extreme interrogation methods played no role in disrupting terrorism plots, capturing terrorist leaders, or even finding Bin Laden.”).

²⁹ The debate over the proper disposition of the remaining detainees currently held at Guantánamo Bay is beyond the scope of this article. The purpose of this article is to advocate for the establishment of a strategic detention policy that will avoid the myriad of legal and ethical issues the United States is currently facing concerning what to do with the detainees held at Guantánamo Bay. See Robert Chesney, *Leaving Guantánamo: The*

and the treatment of detainees.³⁰ One detainee recently published a diary detailing the abuses he suffered at the hands of his interrogators.³¹ In the diary, he recounted systematic abuses that included extended sleep deprivation, detention in a freezing cell, beatings, threats against his safety, and threats that his mother would be gang-raped.³² Mistreatment of detainees at Guantánamo Bay,³³ combined with the failure to implement an effective long-term strategy for what to do with detainees held there, has undermined U.S. credibility³⁴ and soured Americans against the idea of military detention.³⁵

4. Necessary Changes

Since 2005, the United States has significantly reformed its detention policies and practices.³⁶ One of the most important pieces of legislation pertaining to detention operations is the Detainee Treatment Act (DTA) of 2005³⁷ (DTA). This law prohibits “cruel, inhuman, or degrading treatment or punishment” of detainees “in the custody or physical

Law of International Detainee Transfers, SOCIAL SCI. RES. NETWORK (Oct. 25, 2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=

³⁰ *Guantánamo Bay Naval Station Fast Facts*, *supra* note 13.

³¹ MOHAMEDOU OULD SLAHI, *GUANTÁNAMO DIARY* (Larry Siems ed., 2015).

³² *From Inside Prison, a Terrorism Suspect Shares His Diary ‘Guantánamo Diary’ by Mohamedou Ould Slahi*, N.Y. TIMES, (Jan. 25, 2015), <http://www.nytimes.com/201501/26/arts/Guantánamo-diary-by-mohamedou-ould-slahi.html>.

³³ *Report on Torture and Cruel, Inhuman, and Degrading Treatment of Prisoners at Guantánamo Bay, Cuba*, CENT. FOR CONST’L RIGHTS 15 (July 2006), http://ccrjustice.org/files/Report_ReportOnTorture.pdf (“Prisoners in Guantánamo have reported being exposed to extraordinary psychological and physical abuse. In addition to abusive interrogation practices, prisoners report harsh disciplinary measures.”).

³⁴ Alyssa Fetini, *A Brief History of Gitmo*, TIME (Nov. 12, 2008), <http://content.time.com/time/nation/article/0,8599,1858364,00.html> (quoting Scott Silliman, a law professor at Duke University and director of the Center on Law, Ethics and National Security stating, “Guantánamo Bay, for most people, is a lightning rod for everything that’s wrong with the United States.”).

³⁵ Benard et al., *supra* note 16, at 1. (“‘Guantánamo Bay’ and ‘Abu Ghraib’ became provocative shorthand terms for examples of how detainee operations could go wrong if clear and current doctrine did not exist.”).

³⁶ *See supra* note 19 and accompanying sources. *See also Executive Order 13,491—Ensuring Lawful Interrogation*, WHITE HOUSE (Jan. 2009), http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/ (requiring closure of all CIA detention sites, limiting interrogation techniques for all detainees held in U.S. custody to those listed in Field Manual 2-22.3, and guaranteeing to the International Committee of the Red Cross (ICRC) “timely” access to all detainees in U.S. custody). *See also* HUMAN INTEL. OPER., *supra* note 19.

³⁷ 2005 DTA, *supra* note 19.

control” of the U.S. Government and requires compliance with the *Army Field Manual on Intelligence Interrogations* (essentially outlawing the use of enhanced interrogation techniques).³⁸

As a result of the 2005 DTA, all individuals in U.S. custody regardless of status are treated humanely in accordance with Common Article 3 to the Geneva Conventions.³⁹ In fact, detainees in U.S. custody often receive treatment superior to the standards required under international law.⁴⁰ Despite undergoing a complete overhaul to ensure

³⁸ See *supra* note 19 and accompanying sources.

³⁹ Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Common Article 3]. Common Article 3 states:

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

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

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

(2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Id.

⁴⁰ See, e.g., Rebecca Mopper & Jacqueline Pimpinelli, *Confirmed U.S. Detention Facilities in Afghanistan*, N. Y. L. SCH., http://www.detainedbyus.org/detention/confirmed-sites/#_edn25 (last visited Mar. 17, 2016).

U.S. detention operations fully comply with both domestic and international law, LOAC detention outside a declared theater of active armed conflict (ODTAAC) remains nearly impossible, due to the failure of the U.S. government to enact a detention policy. If the United States is serious about its national security and keeping America and its allies safe, this must change.⁴¹

B. The Threat

Present day threats to the United States are real.⁴² Al-Qaeda, its affiliates, and other transnational terrorist organizations⁴³ make the

The Detention Facility in Parwan [DFIP] features certain amenities for the detainees to use. There are recreation areas, a family visitation center for families to use when they visit a detained family member, toys and a playground for children of families visiting detainees, a state of the art infirmary, and vocational training areas. Additionally, detainees can participate in Afghan Civics classes to learn about the Afghanistan government, the constitution and special reintegration programs. Detainees have more access than they had in the past to military tribunals. These military tribunals are “open to outsiders, including nonprofit groups and journalists.” Moderate religious leaders are also present at the DFIP to “help refute insurgents” calls to violence couched in Islamic terms.

Id.

⁴¹ Schlesinger et al., *supra* note 14, at 31.

Today, the power to wage war can rest in the hands of a few dozen highly motivated people with cell phones and access to the internet. Going beyond simply terrorizing individual civilians, certain insurgents and terrorist organizations represent a higher level of threat, characterized by an ability and willingness to violate the political sovereignty and territorial integrity of sovereign nations. Essential to defeating terrorists and insurgents threats is the ability to locate cells, kill or detain key leader, and interdict operational and financial networks.

Id.

⁴² *Remarks by the President at the National Defense University, supra* note 6.

Unfortunately, Bin Laden's death, and the death and capture of many other al-Qa'ida leaders and operatives, does not mark the end of that terrorist organization or its efforts to attack the United States and other countries. Indeed, al-Qa'ida, its affiliates and its adherents remain the preeminent security threat to our nation.

United States, its allies, and its interests both domestically and abroad vulnerable to attack.⁴⁴ Since 9/11, there have been at least sixty attempted terror attacks against the United States⁴⁵ and four successful attacks.⁴⁶

In October 2003, then Secretary of Defense Donald Rumsfeld recognized that “we lack metrics to know if we are winning or losing the global war on terror. Are we capturing, killing or deterring and dissuading more terrorists every day than the madrassas and the radical clerics are recruiting, training and deploying against us?”⁴⁷ Twelve years later, these concerns persist. There remains an on-going armed conflict with al-Qaeda,⁴⁸ while new threats from splinter terrorist organizations

Id.

⁴³ See, e.g., Patrick Cockburn, *Who are Isis? The rise of the Islamic State in Iraq and the Levant*, THE INDEPENDENT (16 June 2014), <http://www.independent.co.uk/news/world/middle-east/who-are-isis-the-rise-of-the-islamic-state-in-iraq-and-the-levant9541421.html>.

⁴⁴ See generally James R. Clapper, *Statement for the Record, Worldwide Threat Assessment of the [U.S.] Intelligence Community*, OFF. OF THE DIR. OF NAT’L INTEL. (Feb. 9, 2016), <http://www.dni.gov/index.php/newsroom/testimonies/217-congressional-testimonies-2016/1313-statement-for-the-record-worldwide-threat-assessment-of-the-u-s-ic-before-the-senate-armed-services-committee-2016>; See also Michael N. Schmitt, *Bellum Americanum Revisited: U.S. Security Strategy and the Jus ad Bellum*, 176 MIL. L. REV. 374 (2003) (“Unfortunately, the world with which we will remain engaged is a dangerous one. Weak and failed States present fertile breeding grounds for transnational terrorists and criminals who may turn to destructive technologies in an asymmetrical struggle against the United States and other advanced States.”).

⁴⁵ Jessica Zuckerman et. al., *60 Terrorist Plots Since 9/11: Continued Lessons in Domestic Counterterrorism*, HERITAGE FOUND. (July 22, 2013), <http://www.heritage.org/research/reports/2013/07/60-terrorist-plots-since-911-continued-lessons-in-domestic-counterterrorism> (“In each of these plots, the number one target was military facilities, followed closely by targets in New York City. The third most common target was mass gatherings . . .”).

⁴⁶ *Id.* The other successful attacks were:

- (1) [T]he intentional driving of a [sport utility vehicle] into a crowd of students at the University of North Carolina-Chapel Hill in 2006;
- (2) the shooting at an army recruitment office in Little Rock, Arkansas, in 2009;
- (3) the shooting by U.S. Army Major Nidal Hasan at Fort Hood, also in 2009; and
- (4) the bombings in Boston.

Id.

⁴⁷ Bernard et al, *supra* note 16, at 77.

⁴⁸ See *Remarks by the President at the National Defense University*, *supra* note 6.

like the Islamic State of Iraq and the Levant (ISIL)⁴⁹ are emerging and thriving by using increasingly sophisticated recruiting efforts.⁵⁰

Detention and interrogation are legitimate tools to neutralize and potentially eliminate these threats because they provide a non-lethal mechanism for removing enemies from the battlefield, while simultaneously providing the opportunity to gain valuable intelligence. This intelligence could assist in thwarting future attacks, disrupting terrorist networks, and gaining valuable insight into effectively countering extremist ideologies.⁵¹ Currently, LOAC detention on a global scale is not an option for the DoD; there is simply nowhere to place individuals captured ODTAAC. This limitation makes detention operations virtually impossible and forces military commanders to resort to other means of neutralizing enemies such as drone strikes,⁵² ad hoc detention,⁵³ or worse, no action at all. The ability to detain and interrogate UEBs pursuant to the LOAC fills a critical gap that currently exists in the U.S. National Security Strategy.⁵⁴ Although the 2015 National Security Strategy recognizes the “persistent threat posed by terrorism” and the need to prioritize defeating organizations like al-

⁴⁹ Cockburn, *supra* note 43.

⁵⁰ Laurie Goodstein, *U.S. Muslims Take on ISIS' Recruiting Machine*, N.Y. TIMES (Feb. 19, 2015), http://www.nytimes.com/2015/02/20/us/muslim-leaders-in-us-look-to-counter-act-extremist-recruiters.html?hp&action=click&pgtype=Homepage&module=first-column-region®ion=top-news&WT.nav=top-news&_r=1; *see also* Ian Fisher, *In the Rise of ISIS, No Single Missed Key but Many Strands of Blame*, N.Y. TIMES (Nov. 18, 2015), <http://www.nytimes.com/2015/11/19/world/middleeast/in-rise-of-isis-no-single-missed-key-but-many-strands-of-blame.html?rref=collection%2Fnewseventcollection%2Fattacks-in-aris&action=click&contentCollection=europe®ion=rank&module=package&version=highlights&contentPlacement=2&pgtype=collection>.

⁵¹ Benard et al., *supra* note 16, at 81 (“Effective detainee operations can help degrade the enemy’s ability to regenerate forces, disrupt his battle rhythm, attack his motivation and morale, and control information about the conflict.”).

⁵² Michelle Mallette-Piasecki, *Comment: Missing the Target: Where the Geneva Conventions Fall Short in the Context of Targeted Killing*, 76 ALB. L. REV. 262, 265 (2013). (“[U]nder the Obama administration, the number of [United States] drone strikes has steadily increased—122 were launched in Pakistan in 2010 alone—and show no sign of diminishing anytime soon.”).

⁵³ *Ad hoc*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/ad%20hoc> (defining ad hoc: “for the particular end or case at hand without consideration of wider application,” (last visited Mar. 17, 2016)). Here, the term “ad hoc detention” refers to the idea that a detention operation is created for the limited purpose of detaining one specific individual.

⁵⁴ *National Security Strategy*, WHITE HOUSE (Feb. 2015), http://www.whitehouse.gov/sites/default/files/docs/215_national_security_strategy.pdf.

Qaeda and ISIL, it lacks any discussion about developing a LOAC detention capability to assist in this fight.⁵⁵

C. The Need for a Strategic Detention Policy⁵⁶

The United States' detention operations in conflicts both of an international⁵⁷ and non-national character,⁵⁸ from World War II, to Korea, Vietnam, Iraq, and Afghanistan were largely reactionary.⁵⁹ Even today, after decades of conflict, the United States refuses to apply valuable lessons learned concerning detention operations.⁶⁰ What works? When? And why is it effective? How can the United States develop a detention and interrogation policy that will further U.S.

⁵⁵ *Id.* at 7; see also Charlie Savage & Benjamin Weiser, *How the U.S. Is Interrogating a Qaeda Suspect*, N.Y. TIMES (Oct. 7, 2013), <http://www.nytimes.com/2013/10/08/world/africa/q-and-a-on-interrogation-of-libyan-suspect.html> (“The Obama administration lacks a clear place to house newly captured Qaeda detainees for intelligence interrogations.”).

⁵⁶ One example of the national security implications of the failure of the United States to implement a Law of Armed Conflict (LOAC) detention paradigm is the current conflict with the Islamic State in the Levant (ISIL) also commonly referred to as ISIS. See also Jeff Stein, *What will U.S. Forces do with ISIS Prisoners?*, NEWSWEEK (Sept. 19, 2014, 5:10 PM), <http://www.newsweek.com/what-will-us-forces-do-isis-prisoners-271850>.

“It’s a mess,” said Dan O’Shea, a former counterinsurgency advisor to Marine Corps [General] John Allen, appointed last week to lead the charge against the Islamic State [(IS)]. “Special operations peers are voicing frustrations that they’ve gotten limited to no guidance from higher authorities” for degrading, much less destroying ISIS “If you can’t hunt down, capture or interrogate IS captives, your options are limited. So for now, their hands are completely tied.”

Id.

⁵⁷ Geneva Convention Relative to the Treatment of Prisoners of War (GC III) art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Common Article 2] (defining an international armed conflict (IAC) as “[A]ll cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”). It also includes “partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.” *Id.*

⁵⁸ Common Article 3, *supra* note 39 (defining a non-international armed conflict (NIAC) as “an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”).

⁵⁹ See generally Benard et al, *supra* note 16.

⁶⁰ See Waxman, *supra* note 1, at 12 (“At least within the public domain there appears to be no comprehensive effort by the U.S. government to review lessons learned to date about the strategic appropriateness of *whom* it has detained.”).

security interests, comply with domestic and international law, and gain legitimacy from both the American public and the international community?⁶¹ Despite the current lack of a strategic-detention paradigm, there are three mechanisms for detention that the United States has generally used that continue to evolve.

D. Three Primary Mechanisms for Detention

Post-9/11, the United States utilized three primary non-lethal mechanisms for handling terrorists: civilian criminal detention; military detention with an eye toward prosecution by military commission; and LOAC detention.⁶² Each mechanism has its strengths and weakness.

Federal prosecutions of terrorists have resulted in high conviction rates and significant sentences but are criticized as posing a security risk, providing too many rights to accused terrorists, and being ineffective in

⁶¹ *Remarks of John O. Brennan, supra* note 10.

[W]hen we uphold the rule of law, governments around the globe are more likely to provide us with intelligence we need to disrupt ongoing plots, they're more likely to join us in taking swift and decisive action against terrorists, and they're more likely to turn over suspected terrorists who are plotting to attack us, along with the evidence needed to prosecute them. When we uphold the rule of law, our counterterrorism tools are more likely to withstand the scrutiny of our courts, our allies, and the American people. And when we uphold the rule of law it provides a powerful alternative to the twisted worldview offered by al-Qa'ida. Where terrorists offer injustice, disorder and destruction, the United States and its allies stand for freedom, fairness, equality, hope, and opportunity.

Id.

⁶² Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 *STAN. L. REV.* 1079, 1079 (2008).

The Bush administration has used three different mechanisms—traditional civil trials, military commissions, and military detentions—to justify the detention of terrorists, and not always in an obviously principled or coherent fashion . . . despite numerous reform proposals, Congress has declined to address . . . the proper relationship among the three detention mechanisms.

Id.

cases involving classified information.⁶³ Military commissions were supposed to cure the concerns with federal prosecutions,⁶⁴ however, prosecutions by military commissions have had minimal success.⁶⁵ The Commissions are rife with challenges to the legality of the proceedings and saddled with a public perception of unfairness.⁶⁶ Military detentions under LOAC removes the enemy from the battlefield and serves the legitimate and lawful purpose of gaining valuable intelligence through interrogation.⁶⁷ However, implementation has been significantly flawed—as evidenced by the current obstacles the United States faces concerning the remaining detainees held at Guantánamo Bay.⁶⁸ Perhaps the most fundamental weakness of all three detention mechanisms is the failure of the United States to adequately plan and employ a cohesive and

⁶³ Matt Apuzzo, *A Holder Legacy: Shifting Terror Cases to the Civilian Courts, and Winning*, N.Y. TIMES (Oct. 21, 2014), <http://www.nytimes.com/2014/10/22/us/a-holder-legacy-shifting-terror-cases-to-the-courts-and-winning.html>.

In recent years, the Justice Department has won a guilty plea from a Somali national who admitted supporting the terrorist group the Shabab; sent Osama bin Laden's spokesman, Sulaiman Abu Ghaith, to prison for life; begun criminal proceedings against a Libyan suspect from Al-Qaeda; and, most recently, set a death penalty case in motion against Mr. Khattala.

Id.

⁶⁴ See generally OFF. OF THE MIL. COMM'NS, <http://www.mc.mil/ABOUTUS.aspx> (last visited Mar. 17, 2016).

⁶⁵ *Hicks's Military Commission Terrorism Conviction Overturned on Appeal*, HUMAN RIGHTS FIRST (Feb. 18, 2015), <http://www.humanrightsfirst.org/press-release/hicks-s-military-commission-terrorism-conviction-overturned-appeal>.

[F]ederal courts have completed nearly 500 cases related to international terrorism since 9/11. Of those, at least [sixty-seven] cases have involved individuals captured overseas Meanwhile military commissions have convicted only eight individuals since 9/11 and, as of today, half of those convictions have been overturned on appeal.

Id.

⁶⁶ Devon Chaffee, *Military Commissions Revived: Persisting Problems of Perception*, 9 U. N.H. L. REV. 237 (2011).

⁶⁷ Benard et al, *supra* note 16, at 81. See also *supra* note 51 and accompanying text.

⁶⁸ Deb Riechmann, *Obama administration defends effort to close Guantánamo Bay prison, GOP senators wary*, U.S. NEWS AND WORLD REP. (Feb. 5, 2015, 6:01 PM), <http://www.usnews.com/news/politics/articles/2015/02/05/dod-official-bill-would-block-effort-to-close-guantanamo>.

deliberate long-term detention strategy designed to further U.S. interests from both a national security and rule of law perspective.⁶⁹

III. An Overview of LOAC Detention Operations Since 9/11

Rather than develop a comprehensive approach to detention through deliberate and strategic planning, detention operations post-9/11 were largely implemented out of dire necessity.⁷⁰ As a result, the United States encountered several disastrous detention-related scandals that hurt its credibility and compromised its security.⁷¹ The U.S. military operations in both Afghanistan and Iraq were riddled with systemic detention failures during the early phases of each operation.⁷² These issues, detailed below, were the result of a lack of sound detention policies, combined with a lack of adequate resources and training.

A. Afghanistan

On September 11, 2001, al-Qaeda, a terrorist organization operating from a Taliban-enforced safe-haven in Afghanistan, attacked the United States.⁷³ In response, the United States invaded Afghanistan and declared war against al-Qaeda and associate forces.⁷⁴ Almost immediately, U.S. forces began capturing enemy fighters.⁷⁵

⁶⁹ See Waxman, *supra* note 1.

⁷⁰ *Id.* at 12. See *supra* notes 47, 56 and accompanying text. See also Benard et al, *supra* note 16, at 81.

⁷¹ See, e.g., *supra* sections II.A.1–3 (discussing Abu Ghraib, CIA Black Site, and Guantánamo Bay).

⁷² See CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, *THE TIP OF THE SPEAR, 2010 SUPPLEMENT LEGAL LESSONS LEARNED DURING MILITARY OPERATIONS 1994–2008* (Sept. 2010) [hereinafter *THE TIP OF THE SPEAR*] (providing an in-depth analysis of the operational lessons learned from Operation Enduring Freedom (OEF), Operation Iraqi Freedom (OIF), and the development of detention operations during these respective conflicts).

⁷³ Thomas H. Kean et al., *The 9/11 Commission Report*, <http://www.9-11commission.gov/report/911Report.pdf> (last visited June 8, 2017).

⁷⁴ See generally *The Authorization for the Use of Military Force*, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter 2001 AUMF].

⁷⁵ Matthew C. Waxman, *The Law of Armed Conflict and Detention Operations in Afghanistan*, 85 INT'L L. STUD. 346 (2009).

The Bush administration extensively debated the legal status of individuals captured in Afghanistan.⁷⁶ On February 7, 2002, President Bush issued a memorandum concerning the status and treatment of captured members of al-Qaeda and the Taliban.⁷⁷ The memorandum stated that none of the provisions of the Geneva Conventions⁷⁸ applied to al-Qaeda because al-Qaeda was not a high contracting party to Geneva.⁷⁹ Furthermore, members of the Taliban were not entitled to Prisoner of War (POW) status because they were “unlawful combatants.”⁸⁰ Finally, the President determined that Common Article 3 was not applicable to members of either the Taliban or al-Qaeda, asserting Common Article 3 applied only in non-international armed conflicts.⁸¹ The memorandum concluded by stating that although not legally required, “[A]s a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.”⁸²

This memorandum put the world on notice that the United States would not apply the Geneva Conventions in the conflict with the Taliban and al-Qaeda but the United States would treat detainees humanely.⁸³ In addition to failing to define “unlawful combatant,” the memorandum failed to provide a definition for “humane treatment.”⁸⁴ What followed was a period of muddled detention and interrogation policies and confusion concerning the legal status of detainees captured in the “war on terror”⁸⁵ leading to both aberrant and systematic abuses of detainees.⁸⁶

While ostensibly protective, this directive also opened holes in the law of armed conflict's barriers. First, it

⁷⁶ *The Interrogation Documents: Debating U.S. Policy and Methods*, THE NAT'L SEC'Y ARCH. (July 13, 2004), <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/>.

⁷⁷ *See Humane Treatment of Taliban and al Qaeda Detainees*, WHITE HOUSE (Feb. 7, 2002), http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf.

⁷⁸ *See* Common Article 3, *supra* note 39.

⁷⁹ *Id.*

⁸⁰ *Id.* *See also* *Humane Treatment*, *supra* note 77.

⁸¹ *Humane Treatment*, *supra* note 77.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Transcript of President Bush's Address to a Joint Session of Congress*, *supra* note 6.

⁸⁶ Schlesinger et al, *supra* note 11. *See also* *The Road to Abu Ghraib*, HUMAN RIGHTS WATCH, <http://www.hrw.org/reports/2004/usa0604/2.htm> (last visited Mar. 17, 2016). (“There was a before-9/11 and an after-9/11 After 9/11 the gloves came off.”) (quoting Cofer Black's testimony to congress as the former director of the CIA's counterterrorist unit).

applied by its terms only to armed forces, hinting that intelligence services might not be similarly constrained. Second, by emphasizing humane treatment as a matter of policy, it suggested that humane treatment was not required as a matter of law. And, third, it suggested that the Geneva Conventions' principles could validly be compromised in pursuit of security requirements.⁸⁷

The Bush administration's blanket status-determinations and the decision not to apply the 1949 Geneva Conventions drew criticism.⁸⁸ Allies of the United States, the United Nations, and non-governmental organizations expressed concern and outrage over the United States' policy.⁸⁹ Opponents suggested this policy "could undermine U.S. military culture which emphasizes maintaining the highest standards of conduct in combat, and could introduce an element of uncertainty in the status of adversaries."⁹⁰ The idea that the United States would suspend application of the Geneva Conventions to the conflict in Afghanistan was so controversial that then Secretary of State, Colin Powell, requested

⁸⁷ Waxman, *The Law of Armed Conflict*, *supra* note 75 at 346.

⁸⁸ *Id.*

Many critics have attributed detainee abuses in Afghanistan to these foundational legal decisions. Critics of the [United States'] position consistently rejected the notion that unlawful combatants fall into a "legal gap" in protection. They asserted a range of alternatives, including that captured fighters (at least Taliban) were entitled to prisoner of war status; that all captured fighters are entitled at least to minimum protections of Common Article 3, Article 75 of the first Additional Protocol to the Geneva Conventions, and the customary law of armed conflict; and/or that any detainees are protected by international human rights law, including prohibitions on "cruel, inhuman and degrading" treatment.

Id.

⁸⁹ See, e.g., JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL31367, REPORT FOR CONGRESS: TREATMENT OF "BATTLEFIELD DETAINEES" IN THE WAR ON TERRORISM (2002) ("The U.N. High Commissioner on Human Rights . . . and some human rights organizations argue that all combatants captured on the battlefield are entitled to be treated as Prisoners of War (POW) until an independent tribunal has determined otherwise.").

⁹⁰ Memorandum from Jay S. Bybee, Assistant Attorney General to Alberto R. Gonzales, Counsel to the President, U.S. Dep't of Justice (Jan. 22, 2002), [hereinafter Bybee Memo] <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-laws-taliban-detainees.pdf> (regarding the "Application of Treaties and Laws to al Qaeda and Taliban Detainees").

President Bush reconsider.⁹¹ Despite all of these concerns and criticisms, the Bush administration maintained its position that the Geneva Conventions did not apply to detainees in Afghanistan.⁹²

As a result of the decision not to apply the Geneva Conventions to detainees in Afghanistan, interrogation techniques initially employed in Afghanistan included the use of stress positions, isolation for long periods of time, and sleep and light deprivation.⁹³ Over time, as U.S. detention policies evolved, conditions of confinement and treatment of detainees improved.⁹⁴ The Detention Facility in Parwan (DFIP) replaced the Bagram Theater Internment Facility⁹⁵ (BTIF). Unlike the BTIF, the DFIP operations were transparent with regular access by the International Committee of the Red Cross (ICRC) and the media.⁹⁶ Detainee Review Boards (DRBs) provided more extensive reviews to

⁹¹ Draft Memorandum from Colin L. Powell, Secretary of State, to Alberto Gonzalez, Counsel to the President, (Jan. 25, 2002), <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.26.pdf> (arguing that declaring the Geneva Convention inapplicable would “reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general”).

⁹² See generally Neil A. Lewis, *A Guide to the Memos on Torture*, N.Y. TIMES, http://www.nytimes.com/ref/international/24MEMO-GUIDE.html?_r=0 (last visited June 8, 2016).

⁹³ See Schlesinger et al, *supra* note 11, at 68. See also TAXI TO THE DARK SIDE (ThinkFilm 2007). *Taxi to the Dark Side* is a film “examination into the death of an Afghan taxi driver at Bagram Air Base from injuries inflicted by U.S. soldiers”. *Overview: Taxi to the Dark Side*, TURNER CLASSIC MOVIES, <http://www.tcm.com/tcmdb/title/684315/Taxi-to-the-Dark-Side/> (last visited Mar. 17, 2016).

⁹⁴ Charles Babington & Michael Abramowitz, *U.S. Shifts Policy on Geneva Conventions*, WASH. POST (July 12, 2006), <http://www.washingtonpost.com/wpdyn/content/article/2006/07/11/AR2006071100094.html>.

⁹⁵ Alan Gomez, *How the U.S. Reshaped an Afghan Prison’s Image*, USA TODAY (Aug. 5, 2010, 9:41 AM), http://usatoday30.usatoday.com/news/world/afghanistan/2010-08-04-1Aafghanprison04_CV_N.htm.

Prison life at Bagram is far different today than the initial years of the war, say military officials Before Parwan, suspected Taliban militants, sympathizers and abettors were squeezed into a windowless Soviet airplane hangar known as Bagram Theater Internment Facility. The Red Cross complained about the rudimentary conditions. Groups such as the American Civil Liberties Union likened it to the infamous Abu Ghraib prison in Iraq, where inmates were abused by several U.S. troops.

Id.

⁹⁶ *Id.* See also Mopper & Pimpinelli, *supra* note 40.

determine whether continued detention was appropriate for each individual detainee.⁹⁷

In December 2014, as combat operations concluded, the United States transferred all of the Afghan detainees housed at the DFIP to the Government of the Islamic Republic of Afghanistan (GIROA).⁹⁸ Before giving full control of the facility to GIROA, the United States transferred a Russian detainee, Irek Hamidullin, to the U.S. for prosecution in Federal District Court for leading a Taliban attack against U.S. forces.⁹⁹

Unlike the debacle involving Ali Musa Daqduq detailed in section III. C. below, the United States successfully executed a strategic plan to ensure this high-value detainee faced prosecution for his crimes against the United States. The transfer of Hamidullin is an important example of how the United States can learn from past mistakes to further national security interests and the rule of law.¹⁰⁰ The detention facility in Guantánamo also provides a myriad of valuable lessons concerning how the United States can improve future LOAC detention operations.

B. Guantánamo Bay, Cuba¹⁰¹

The Guantánamo Bay detention facility is perhaps the most glaring example of the dangers associated with conducting ad hoc detention operations without establishing a comprehensive, long-term, strategic plan. The United States government began sending detainees from

⁹⁷ See Waxman, *The Law of Armed Conflict*, *supra* note 75, at 346. See also, Jeff A. Bovarnick, *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy*, ARMY LAW., June 2010, at 9.

⁹⁸ Frank Jack Daniel, *U.S. Closes Bagram Prison, Says No More Detainees Held in Afghanistan*, REUTERS (Dec 11, 2014), http://www.reuters.com/article/2014/12/11/us-usa-cia-torture-bagram-idUSKBN0JO2B720141211?nl=nytnow&em_pos=large&emc=edit_nm_20141211.

⁹⁹ Larry O'Dell, *Russian Detainee from Afghanistan Pleads Not Guilty in Va.*, MILITARY TIMES (Nov. 7, 2014), <http://www.militarytimes.com/story/military/pentagon/2014/11/07/russian-afghanistan-pleads-not-guilty/18646697/> (“Irek Hamidullin was arraigned on [twelve] counts, including providing material support to terrorists and trying to destroy U.S. military aircraft and conspiring to use a weapon of mass destruction.”).

¹⁰⁰ See *supra* section III.C. It appears that the United States learned from the failures that resulted in the release of Daqduq and transferred Hamidullin to the United States to ensure he would be prosecuted.

¹⁰¹ See Mark P. Denbeaux et al., *Guantánamo: America's Battle Lab*, SETON HALL UNIV. (Jan. 2015), <http://law.shu.edu/policy-research/upload/guantanamo-americas-battle-lab-january-2015.pdf> (analyzing detention operations at Guantánamo Bay, Cuba).

Bagram, Afghanistan, to Guantánamo Bay in January 2002.¹⁰² Fierce debate ensued about both the detention and treatment of enemy combatants at Guantánamo Bay.¹⁰³ Thirteen years later, despite a dramatic improvement in the conditions of confinement, America still grapples with the moral, ethical, legal, and national security implications of what to do with both the facility and the detainees it houses.¹⁰⁴

Initially, the United States characterized the detainees held at Guantánamo Bay as “the worst of the worst.”¹⁰⁵ In 2003, then Secretary of Defense Donald Rumsfeld, authorized the use of enhanced-interrogation techniques for those held at Guantánamo Bay; these techniques were more severe than those allowed in the *Army Field*

¹⁰² See generally ELSEA, *supra* note 89. See also Denbeaux et al, *supra* note 101, at 4. “The stated intended purpose of the Guantánamo Bay Detention Center (GTMO) was to house the most dangerous detainees captured in the course of the Global War on Terrorism.” *Id.*

¹⁰³ Denbeaux et al, *supra* note 101, at 4. “The decision to transfer the prisoners to Guantánamo Bay has also been criticized as an effort to keep them ‘beyond the rule of law.’” *Id.*

¹⁰⁴ See Reichmann, *supra* note 68. See also *Review of Department of Defense Compliance with President’s Executive Order on Detainee Conditions of Confinement*, DEP’T OF DEF., http://www.defense.gov/Portals/1/Documents/pubs/REVIEW_OF_DEPARTMENT_COMPLIANCE_WITH_PRESIDENTS_EXECUTIVE_ORDER_ON_DETAINEE_CONDITIONS_OF_CONFINEMENTa.pdf.

While we conclude that conditions at Guantánamo are in conformity with Common Article 3, from our review, it was apparent that the chain of command responsible for the detention mission at Guantánamo consistently seeks to go beyond a minimalist approach to compliance with Common Article 3, and endeavors to enhance conditions in a manner as humane as possible consistent with security concerns.

Id. at 4.

¹⁰⁵ Denbeaux et al., *supra* note 101, at 3 (quoting Thomas Berg, Staff Judge Advocate for Joint Task Force (JTF)160).

I can understand why a lot of people were scraped up from the battlefield and brought to Gitmo, because we didn’t know what we had, but we didn’t have any real mechanisms to sort them out. And I think once we started sorting them out, we’d already stated publicly that we had “the worst of the worst.” And it was a little hard to go against that and say, well, maybe some of them aren’t quite the worst of the worst, and some of them are just the slowest guys off the battlefield.

Id.

Manual for interrogation operations.¹⁰⁶ As a result of a lack of guidance and cross-pollination of detention and interrogation personnel between the theaters, many of the enhanced interrogation techniques only intended for use at Guantánamo were also used in Iraq and Afghanistan.¹⁰⁷

The decision to hold detainees in Guantánamo was seemingly made in an effort to create a permissive detention environment where detainees were afforded no rights and given no legal status or protections.¹⁰⁸ As enemy combatants detained outside the United States, the United States claimed they were not entitled to protections under Common Article 3, nor were they entitled to challenge their status or their detentions in federal court through petitions of writs of habeas corpus.¹⁰⁹ The Supreme Court held otherwise.¹¹⁰

One of the first significant cases concerning the rights afforded to detainees held at Guantánamo Bay was *Rasul v. Bush*.¹¹¹ In this landmark Supreme Court decision, the Court ruled that U.S. courts have jurisdiction to hear challenges to the legality of detention on behalf of foreign nationals held at Guantánamo Bay in connection with the war on terror.¹¹² This holding opened the floodgates for petitions challenging

¹⁰⁶ Compare Donald Rumsfeld, *Counter-Resistance Techniques in the War on Terrorism*, AIR UNIV. (Apr. 16, 2003), <http://www.au.af.mil/au/awc/awcgate/dod/d20040622doc9.pdf> with HUMAN INTEL. OPER., *supra* note 19.

¹⁰⁷ Schlesinger et al., *supra* note 11, at 68.

¹⁰⁸ Raha Wala, *What the Detention Policy Debate Really Is About*, LAWFARE (Jan. 26, 2015, 2:16 PM), <http://www.lawfareblog.com/2015/01/what-the-detention-policy-debate-really-is-about/#more-42970> (“Guantánamo is importantly symbolic because it is a detention facility that was specifically designed to put a category of human beings beyond the rule of law.”).

¹⁰⁹ See Bybee Memo, *supra* note 90; see also Waxman, *Administrative Detention*, *supra* note 1, at 7.

¹¹⁰ Waxman, *Administrative Detention*, *supra* note 1, at 8.

In *Hamdi* the Court held that due process requires a citizen detainee be given adequate notice of and opportunity to contest the claims against him, and in *Rasul* it held that statutory habeas rights (i.e., an opportunity to bring before a federal judge a challenge to detention) apply to detainees at Guantánamo. *Boumediene* then went a step further in holding that constitutional habeas rights also apply to Guantánamo detainees.

Id. See also *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

¹¹¹ *Rasul v. Bush*, 542 U.S. 466 (2004).

¹¹² *Id.*

detention at Guantánamo Bay. The Supreme Court also acknowledged that the United States could legally detain narrowly-defined “enemy combatants,” but ruled that a U.S. citizen-detainee is entitled to meaningfully challenge his detention.¹¹³ Partially in response to these decisions, Congress passed, and President Bush signed the 2005 DTA,¹¹⁴ establishing guidelines for treatment and interrogation of detainees.

In addition to creating significant protections for detainees held in U.S. custody, the 2005 DTA also limited a petitioner’s ability to file a writ of habeas rights.¹¹⁵ In 2006, the Supreme Court decided *Hamdan v. Rumsfeld*.¹¹⁶ In *Hamdan*, the Supreme Court determined that detainees captured in Afghanistan pursuant to the global war on terror were entitled to the minimum protections afforded by Geneva Convention Common Article 3 and that the detainee review process established in the 2005 DTA was insufficient because it violated both the Uniform Code of Military Justice and Common Article 3.¹¹⁷ Following this decision, the Deputy Secretary of Defense, Gordon England, issued a policy requiring treatment of detainees, including members of al-Qaeda, to comply with Common Article 3.¹¹⁸

In an effort to comply with the due process requirements established in *Hamdi*, the administration established Combatant Status Review Tribunals (CSRTs), providing detainees a forum to challenge their status as enemy combatants outside of federal court.¹¹⁹ Next, Congress passed the Military Commissions Act (MCA) of 2006¹²⁰ creating military commissions intended to comply with the requirements established in *Hamdan*, but also limiting the right to challenge detention in Federal Court.¹²¹ In response, the Court held in *Boumediene v. Bush* that

¹¹³ *Hamdi*, 542 U.S. at 507.

¹¹⁴ See 2005 DTA, *supra* note 19.

¹¹⁵ *Id.*

¹¹⁶ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

¹¹⁷ *Id.*

¹¹⁸ See Memorandum from Deputy Secretary of Defense Gordon England, *Application of Common Article 3 of the Geneva Conventions to the Treatment of detainees in the Department of Defense*, DEF.GOV (July 7, 2006), <http://www.defense.gov/news/Aug2006/d20060814comm3.pdf>; see also Babington & Abramowitz, *supra* note 94.

¹¹⁹ See Memorandum from Deputy Secretary of Defense, *Order Establishing Combatant Status Review Tribunals*, LAW UNIV. TORONTO (July 7, 2004), https://www.law.utoronto.ca/documents/Mackin/MuneerAhmad_ExhibitV.pdf.

¹²⁰ The Military Commissions Act of 2006, Pub. L. 109-366, Oct. 17, 2006, 10 USC § 948a [hereinafter MCA 2006].

¹²¹ *Id.*

prisoners held at Guantánamo Bay do have a constitutional right to habeas corpus and that the Military Commissions Act of 2006, insofar as it restricts that right, is unconstitutional.¹²² It further held that the CSRTs were insufficient substitutions for habeas petitions.¹²³

In early 2009, when President Obama took office, he initially sought to end military commissions.¹²⁴ He soon reversed this position and Congress passed, and President Obama signed, the Military Commissions Act (MCA) of 2009. The 2009 MCA amended the rules for conducting commissions in an effort to increase procedural protections for an accused and improve the perception of fairness.¹²⁵

Despite efforts to reform conditions¹²⁶ and close the facility, the stigma associated with Guantánamo Bay persists.¹²⁷ President Obama has pledged to permanently close the Guantánamo Bay confinement facility,¹²⁸ while Congress has placed significant prohibitions on transferring detainees from the facility.¹²⁹ Since its establishment as a prison in 2002, approximately 780 individuals have been transferred to Guantánamo Bay. As of February 2015, approximately 122 remain in detention.¹³⁰ Although President Obama remains committed to closing

¹²² *Boumediene v. Bush*, 553 U.S. 723 (2008).

¹²³ *Id.*

¹²⁴ Matthew Weaver, *Obama orders halt to Guantánamo Bay tribunals*, *GUARDIAN* (Jan. 21, 2009), <http://www.theguardian.com/world/2009/jan/21/barack-obama-guantanamo-bay-tribunals>.

¹²⁵ See MCA 2009, *supra* note 3. See also OFFICE OF THE MILITARY COMMISSIONS, *supra* note 64.

¹²⁶ *Review of Department of Defense*, *supra* note 104.

¹²⁷ Fentini, *supra* note 34.

¹²⁸ Michelle A. Vu, *Obama State of the Union 2015 Text Transcript and Full Video*, *CHRISTIAN POST* (Jan. 20, 2015), <http://www.christianpost.com/news/obama-state-of-the-union-2015-text-transcript-and-full-video-132859/pageall.html>.

Americans, we have a profound commitment to justice—so it makes no sense to spend three million dollars per prisoner to keep open a prison that the world condemns and terrorists use to recruit. Since I've been President, we've worked responsibly to cut the population of GTMO in half. Now it's time to finish the job. And I will not relent in my determination to shut it down. It's not who we are.

Id.

¹²⁹ National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1027, 125 Stat. 1298, 1566–67 (2011) [hereinafter 2012 NDAA].

¹³⁰ Human Rights First, *Guantánamo by the Numbers* (June 3, 2016), <http://www.human>

the facility, he faces significant opposition from some members of Congress.¹³¹ If the United States permanently closes the facility, the question remains, “What does the United States do with the detainees who pose a threat to the nation but whom the United States cannot prosecute?”¹³²

Unfortunately, the systematic failures and outright atrocities associated with LOAC detention at the Baghram Theater Internment Facility and at Guantánamo Bay were not isolated to those theaters.¹³³ Instead, these issues quickly migrated to Iraq.¹³⁴

C. Iraq

During the invasion and initial occupation of Iraq, detention operations were poorly planned, disorganized and under-resourced.¹³⁵ On the ground, confusion existed over how to treat detainees. A lack of training on proper treatment of detainees and minimal oversight from leaders compounded the confusion.¹³⁶ These factors set the conditions for detainee abuse.¹³⁷

Despite the fact the United States was engaged in an International Armed Conflict with Iraq, detainees were not always treated in accordance with Geneva Convention Relative to the Treatment of Prisoners of War (GC III).¹³⁸ Rather than affording detainees the rights

rightsfirst.org/sites/default/files/gtmo-by-the-numbers.pdf (“[One hundred and five] detainees have been detained for more than [ten] years without a trial. There are currently [fifty-four] detainees approved for release. One detainee has been transferred to the U.S. for prosecution and [thirty-three] have been designated for trial or military commission by the Obama Administration”).

¹³¹ David Jackson, *Obama Faces Challenges in Closing Gitmo*, USA TODAY (Dec. 30, 2014), <http://www.usatoday.com/story/news/nation/2014/12/30/obama-guantanamo-bay-prison-terrorism/21043489/>.

¹³² *Id.*

¹³³ Schlesinger et al., *supra* note 12, at 107

¹³⁴ *Id.*

¹³⁵ Benard et al., *supra* note 17, at 28 (“The problems U.S. forces encountered conducting detainee operations in Iraq stemmed from two principal shortfalls: the lack of appropriate technical competencies and the lack of clear policy and doctrine. These problems were not unique to operations in Iraq.”).

¹³⁶ Schlesinger et al., *supra* note 12.

¹³⁷ *Id.*

¹³⁸ *Id.* at 82–83.

and protections of POW status, they were often treated inhumanely.¹³⁹ The confusion over detention policies and the rules that applied to interrogation operations, combined with a failure to adequately plan and resource detention operations in Iraq, all contributed to set the conditions for the abuses at Abu Ghraib prison.¹⁴⁰

Over time, detention operations in Iraq improved and the United States implemented a sophisticated warrant-based detention program in Iraq that complied with both Iraqi domestic law and international law.¹⁴¹ However, this evolution did not come easy. Instead, it was a lengthy process involving significant U.S. and Iraqi resources¹⁴² as well as difficult lessons learned.¹⁴³

One prime example of the national security implications of the failure to conduct strategic detention operations in Iraq is the release of Ali Musa Daqduq, a “senior Hezbollah operative who confessed to the torture and murder of American soldiers . . . Daqduq masterminded an ambush in Karbala, Iraq, kidnapping and killing five American soldiers. Captured later in 2007, by U.S. forces, Daqduq confessed to the raid and murders.”¹⁴⁴ As the United States closed detention facilities in Iraq during its withdrawal, authorities transferred Daqduq to the Iraqi government for prosecution in an Iraqi court.¹⁴⁵ In November 2012, the

Operation Iraqi Freedom is wholly different from Operation Enduring Freedom. It is an operation that clearly falls within the boundaries of the Geneva Conventions and the traditional law of war. From the very beginning of the campaign, none of the senior leadership or command considered any possibility other than that the Geneva Conventions applied. The message in the field, or the assumptions made in the field, at times lost sight of this underpinning

Id.

¹³⁹ *Id.* at 68.

¹⁴⁰ *See id.* at 68–69. *See also* Benard et al., *supra* note 17, at 28.

¹⁴¹ *See* Kevin H. Govern, *Warrant Based Targeting: Prosecution-Oriented Capture and Detention as Legal and Moral Alternatives to Targeted Killing*, 29 ARIZ. J. INT’L & COMP. L. 3 (2012) (published 2013) (providing an overview of warrant-based detention operation in Iraq).

¹⁴² Robert Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003–2010*, 51 VA. J. INT’L L. 549 (2011).

¹⁴³ Schlesinger et al., *supra* note 12.

¹⁴⁴ *The Daqduq Fiasco*, WALL ST. J. (May 11, 2012), <http://www.wsj.com/articles/SB10001424052702304203604577393883518448946>.

¹⁴⁵ *Id.*

Iraqi court dismissed the case and released Daqduq.¹⁴⁶ Upon his release, Daqduq fled to Lebanon.¹⁴⁷

This colossal failure on the part of the United States to ensure the successful prosecution of Daqduq, a confessed killer of American Soldiers, exemplifies the dangers associated with the U.S. government's inability to establish a comprehensive and effective detention policy. Despite the fact that there is still no U.S. detention policy, the Department of Defense and the Department of Justice are leaning forward and finding ways to detain and interrogate high-value UEBs.

D. The Current State of Detention Operations

As of 2015, LOAC detention operations remain very difficult to conduct, notwithstanding the ongoing, armed conflict with al-Qaeda and associated forces.¹⁴⁸ Since there is no established policy or facility, members of the DoD must conduct ad hoc detainee operations in order to capture and detain a UEB.¹⁴⁹

One example of how the United States is presently conducting LOAC detention operations, in spite of a lack of both policy and a detention facility, is the detention of Ahmed Abdulkadir Warsame.¹⁵⁰ On April 19, 2011, the United States captured Warsame, a Somali, in the Gulf of Aden, travelling from Yemen back to Somalia.¹⁵¹ Warsame, a member of the terrorist organization al Shabaab,¹⁵² went to Yemen to receive weapons and explosives training from members of al-Qaeda in

¹⁴⁶ Suadad al-Salhyat al., *Iraq Releases Suspected Hezbollah Operative Daqduq*, REUTERS (Nov. 16, 2012), <http://www.reuters.com/article/2012/11/16/us-iraq-daqduq-release-idUSBRE8AF0SS20121116>.

¹⁴⁷ *Id.*

¹⁴⁸ See 2001 AUMF, *supra* note 74. See also Savage & Weiser, *supra* note 55.

¹⁴⁹ See *Guilty Plea Unsealed in New York Involving Ahmed Warsame, a Senior Terrorist Leader and Liaison Between al Shabaab and al Qaeda in the Arabian Peninsula, for Providing Material Support to Both Terrorist Organizations*, FED. BUR. OF INV. (Mar. 25, 2013), <http://www.fbi.gov/newyork/press-releases/2013/guilty-plea-unsealed-in-new-york-involving-ahmed-warsame-a-senior-terrorist-leader-and-liaison-between-al-shabaab-and-al-qaeda-in-the-arabian-peninsula-for-providing-material-support-to-both-terrorist-organizations>. See also Ad hoc, *supra* note 53.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

the Arabian Peninsula (AQAP) to share with members of al Shabaab.¹⁵³ The United States held Warsame on a boat and questioned him for more than two months for intelligence purposes before transferring him to the Southern District of New York where federal authorities questioned him for law enforcement purposes.¹⁵⁴ Reports indicate while held at sea, the ICRC visited Warsame.¹⁵⁵ According to Preet Bahara, the U.S. Attorney for the Southern District of New York,

The capture of Ahmed Warsame and his lengthy interrogation for intelligence purposes, followed by his thorough questioning by law enforcement agents, was an intelligence watershed. The handling of Warsame represents a seamless orchestration by our military, intelligence, and law enforcement agencies that significantly furthered our ability to find, fight and apprehend those who wish to do us harm. Warsame's capture, cooperation, and prosecution is a major victory for the United States, for its citizens[,] and for justice.¹⁵⁶

Warsame entered into a plea agreement with authorities in which he pled guilty to a nine-count indictment.¹⁵⁷ The charges included providing material support to two terrorist organizations.¹⁵⁸

The Warsame model illustrates the potential for successful integration of LOAC detention and civilian-criminal detention.¹⁵⁹ By

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Peter Finn & Karen DeYoung, *In Somali Terror Suspect's Case, Administration Blends Military, Civilian Systems*, WASH. POST (July 6, 2011), http://www.washingtonpost.com/national/national-security/in-somali-terror-suspects-case-administration-blends-military-civilian-systems/2011/07/06/gIQAQ4AJIH_story.html (quoting Tom Malinowski, head of the Washington office of Human Rights Watch stating, "If the ICRC [International Committee of the Red Cross] was notified and given access, then this was not the kind of secret detention or disappearance that the Bush administration engaged in, and Obama's executive order requiring such access was respected.").

¹⁵⁶ *Guilty Plea Unsealed*, *supra* note 146.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Peter Finn, *Somali's Case a Template for U.S. as it Seeks to Prosecute Terrorism Suspects in Federal Court*, WASH. POST (Mar. 30, 2013), http://www.washingtonpost.com/world/national-security/somalis-case-a-template-for-us-as-it-seeks-to-prosecute-terrorism-suspects-in-federal-court/2013/03/30/53b38fd0-988a-11e2-814b-063623d80a60_story.html. "For an administration that is determined not to add to the

using the two systems in concert, the United States accomplished both LOAC detention and intelligence questioning as well as criminal prosecution.¹⁶⁰ From start to finish, those involved executed the process seamlessly and skillfully to further both national security interests and the rule of law.¹⁶¹

A model whereby a terrorist is detained and questioned under the LOAC and then transferred to law enforcement, resulting in both intelligence gathering and criminal prosecution should be the goal. However, the problem with the Warsame model is that U.S. authorities had to create both the structure for detention and the actual detention facility.¹⁶² The lack of both an existing detention policy and a standing facility forces U.S. authorities to create both the system and structure every time they capture a high-value UEB. More concerning, this system, or lack thereof, inevitably serves as a deterrent to LOAC detention, because it is difficult to patch together and because of the perception—fair or not—of unnecessary secrecy.¹⁶³ Congress can resolve this issue by passing meaningful legislation creating a LOAC detention policy and designating a detention facility. Fortunately, there is already an existing legal framework that allows for effective LOAC detention and interrogation that can be partnered with civilian-criminal prosecution.

III. The Legal Framework

A. Types of Detention

Criminal detention¹⁶⁴ and LOAC detention are the two primary mechanisms for detaining UEBs.¹⁶⁵ The main goals of criminal

detainee population at Guantanamo, the handling of the Somali's case has become something of a template for other terrorism suspects captured overseas." *Id.*

¹⁶⁰ Finn & DeYoung, *supra* note 155.

¹⁶¹ Finn, *supra* note 159.

¹⁶² *Id.*

¹⁶³ John Bellinger, *Do the Geneva Conventions Apply to the Detention of Al-Libi?*, LAWFARE (Oct. 7, 2013), <http://www.lawfareblog.com/2013/10/do-the-geneva-conventions-apply-to-the-detention-of-al-libi/> ("As with its drone program, if the Administration wants domestic critics and U.S. allies to support unprecedented counter-terrorism policies, it should explain the legal rules it is applying, and why the combined law-of-war/criminal law enforcement model is permissible under international law.").

¹⁶⁴ There are both civilian criminal prosecutions and prosecutions by military tribunals however, this paper focuses on prosecutions by civilian criminal courts.

detention are prosecution and punishment, while the main goals of LOAC detention are security and intelligence gathering.¹⁶⁶

1. Criminal Detention

Criminal detention involves the traditional arrest and detention of individuals accused of violating domestic criminal law. The criminal justice system provides defendants significant rights, including the right of confrontation, due process of the law, rules of evidence, an open and public trial and the right to counsel.¹⁶⁷ Criminal prosecutions play a vital role in combating terrorism by promoting the rule of law and punishing terrorists for their crimes.¹⁶⁸ By using existing federal crimes related to supporting terrorism¹⁶⁹ and the Classified Information Procedures Act¹⁷⁰ (CIPA), criminal prosecutions are effective and capable of keeping UEBs off the battlefield, while upholding U.S. values, the rule of law, and maintaining international legitimacy.¹⁷¹ Since 9/11 there have been over 2,934 arrests and 2,568 convictions in the United States for terrorism-

¹⁶⁵ See *supra* notes 4–5 and accompanying text.

¹⁶⁶ See Chesney & Goldsmith, *supra* note 62 (discussing the goals of both detention models).

¹⁶⁷ *Id.* at 5.

¹⁶⁸ Apuzzo, *supra* note 63.

¹⁶⁹ See, e.g., 18 U.S.C. § 2339A, Providing Material Support in Furtherance of a Terrorist Act; 18 U.S.C. § 2339B, Providing Material Support to Designated Terrorist Organizations; 18 U.S.C. § 2339C, Providing or Collecting Funds to Be Used in an Act of Terrorism; and 18 U.S.C. § 2339D, Receiving Military Training from a Designated Foreign Terrorist Organization.

¹⁷⁰ Classified Information Procedures Act, 18 U.S.C. §1–16 Appendix 3.

¹⁷¹ Finn & DeYoung, *supra* note 155.

[O]ther high-profile cases have followed, including that of Osama bin Laden's son-in-law Sulaiman Abu Ghaith, who was arrested in Jordan last month and proceeded to speak at length with U.S. investigators. European allies have also extradited suspects to the United States on the express condition that they be tried in federal court. These include Abu Hamza al-Masri, the radical preacher, who was extradited from Britain in 2012, and al-Qaeda veteran Ibrahim Suleiman Adnan Adam Harun, who has been held secretly in New York for months and has been cooperating with U.S. investigators since before he was extradited from Italy in October.

Id.

related crimes.¹⁷² Moreover, federal prosecutors have successfully prosecuted sixty-seven terrorists captured overseas, many of whom cooperated with authorities.¹⁷³

Although there are many virtues to the traditional criminal detention and prosecution model, there are also several limitations.¹⁷⁴ Using the criminal justice system as the sole mechanism to fight terror falls short in many respects; the most glaring are the abilities to capture and conduct intelligence questioning.¹⁷⁵ The criminal detention model is significantly limited in regards to its ability to actually gain physical custody of UEBs.¹⁷⁶ Currently, if an individual is located outside the territory of the United States and the United States is unable to negotiate extradition, the UEB may remain free to wage war against the United States if the United States is relying solely on the criminal detention model. Furthermore,

¹⁷² Martha Mendoza, *Global Terrorism: 35,000 Worldwide Convicted For Terror Offenses Since September 11 Attacks*, WORLD POST (Sept. 3, 2011, 2:52 PM), http://www.huffingtonpost.com/2011/09/03/terrorism-convictions-since-sept-11_n_947865.html.

¹⁷³ Finn & DeYoung, *supra* note 155.

In the same period, there have been only seven convictions in the military commissions at Guantanamo Bay. Two of those have been overturned on appeal. Moreover, in military commissions, unlike federal courts, there is serious doubt about the viability of two of the charges most commonly used against terrorists—material support and conspiracy—as law-of-war charges in cases in which suspects cannot be tied to a specific act of violence.

Id.

¹⁷⁴ Chesney & Goldsmith, *supra* note 62, at 1096.

The traditional criminal approach has several deficiencies besides its obvious failure to deter. It is often hard to apprehend individuals outside the United States. When the United States seeks to prosecute an individual located overseas, its practical alternatives for securing the defendant are limited. It may seek extradition if a treaty basis for doing so exists (though other states may be unwilling to comply in cases involving terrorism, as illustrated by Italy's cold reception to an American extradition request in connection with the Achille Lauro hijacking); it may persuade the host country to render the individual into U.S. custody without formal extradition procedures; or it may use trickery or force to seize the individual directly.

Id.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

questioning in the context of a criminal investigation is conducted with different goals and for a different purpose than intelligence questioning.¹⁷⁷ Relying purely on criminal detention unnecessarily restricts the United States, leaving the nation vulnerable to attacks by al-Qaeda and other dangerous terrorist organizations because it limits the options for gaining custody of UEBs and does not allow for intelligence interrogations.

However, these limits certainly do not render criminal detention obsolete. Despite some limitations, the criminal justice system is a critical tool in the ongoing armed conflict between the United States and al-Qaeda and associated forces.¹⁷⁸ However, LOAC detention is also needed in this fight. Law of armed conflict detention compliments criminal prosecutions by providing more permissive capture options and allowing for intelligence interrogations.

2. Law of Armed Conflict Detention

Determining what laws of war apply in LOAC detention requires a determination of the type of armed conflict (international or non-international).¹⁷⁹ After establishing the type of armed conflict, officials can determine the status of the participants (i.e., combatant v. civilians).¹⁸⁰ This status determination is critical because it determines rights and protections under international law.¹⁸¹

B. Authority to Detain Under LOAC

1. Is There an Armed Conflict? If So, with Whom and What Kind?

In order for the LOAC to apply and be a basis for detention, an “armed conflict”¹⁸² must exist. Under the LOAC, there are two types of

¹⁷⁷ Christian A. Meissner et al., *Criminal Versus HUMINT Interrogations: The Importance of Psychological Science to Improving Interrogative Practice*, 38 J. PSY. & L. 215, 249 (2010).

¹⁷⁸ Apuzzo, *supra* note 63.

¹⁷⁹ GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 186 (2010).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

armed conflicts: international armed conflicts (IAC); and non-international armed conflicts (NIAC).¹⁸³

International armed conflicts exist whenever there is [a] resort to armed force between two or more States. Non-international armed conflicts are protracted[,] armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organisation.¹⁸⁴

The United States is currently engaged in an armed conflict with al-Qaeda and associated forces.¹⁸⁵ Pursuant to the right to self-defense under Article 51 of the Charter of the United Nations, the United States is authorized to use force against al-Qaeda and associated forces.¹⁸⁶ In addition to the international legal basis to use force, the 2001 Authorization for the Use of Military Force (AUMF) provides the President domestic authority to use force against al-Qaeda and associated forces.¹⁸⁷

¹⁸³ See *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, INT'L C. RED CROSS (Mar. 2008), <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

¹⁸⁴ See *id.* at 5. See also *supra* notes 57–58, and accompanying text.

¹⁸⁵ See 2001 AUMF, *supra* note 74. The debate concerning whether the United States is still engaged in a non-international armed conflict (NIAC) with al-Qaeda after the end of combat operations in Afghanistan is beyond the scope of this paper.

¹⁸⁶ U.N. Charter art. 51 (stating "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.").

¹⁸⁷ See 2001 AUMF, *supra* note 74. The 2001 AUMF authorizes the president:

[T]o use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Id. See also *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (finding that the use of force includes the authority to detain).

2. *Detention Authority in a Non-International Armed Conflict*

There are two main bodies of international law within the Geneva Conventions governing NIACs; Common Article 3 and the Additional Protocol II.¹⁸⁸ Both bodies of law are silent on the issue of whether detention is authorized in a NIAC.¹⁸⁹

Opponents of detention in a NIAC argue for a plain-language reading of the governing bodies of law and claim that because there is no *explicit* authority for the taking of detainees, detention is not authorized during a NIAC.¹⁹⁰ Proponents of detention in a NIAC argue the omission of explicit detention authority does not foreclose detention because, by virtue of being engaged in an armed conflict, some form of detention authority may be necessary.¹⁹¹ Taken to its logical conclusion, if the contrary view prevails and detention is prohibited during a NIAC,

¹⁸⁸ Although there is some limited discussion on the authority to detain in an international armed conflict (IAC), this paper is primarily focused on the legal authority to detain in a NIAC.

¹⁸⁹ Robert M. Chesney, *Who May be Held? Military Detention through the Habeas Lens*, 52 BOSTON. COLL. L. REV. 769, 795 (2011).

The 1949 Geneva Conventions broke new ground by including a single article—so-called Common Article 3—imposing a handful of baseline humanitarian protections for persons in the hands of the enemy during such conflicts. Additional Protocol II (APII) subsequently expanded upon those protections (though the United States is not party to that instrument). Neither instrument explicitly confers substantive detention authority, nor does either purport to limit or deny such authority. The resulting opportunities for disagreement are considerable. Some construe the silence as fatal for any effort to rest the existence of detention authority on LOAC, let alone to use LOAC to define the scope of that authority Others, however, contend that the absence of affirmative constraint is equivalent to an authorization by omission, on the theory that LOAC on the whole is best understood to be a restraining body of law. On this view, anything that can be done in an international armed conflict *a fortiori* can be done as well during non-international armed conflict—including use of the detention principles noted above. Alternatively, some might take the position that some form of affirmative LOAC authority is needed, and that *customary* LOAC supplies it (again by analogy to the forms recognized by treaty in the international setting).

Id. (emphasis added).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

killing is the only means permissible to defeat the enemy. This defies the stated goal of the LOAC; to promote humanity in war.¹⁹² Notwithstanding, there is a strong argument that detention during a NIAC is Customary International Law, because both state actors and non-state actors commonly detain individuals during NIACs.¹⁹³ Additionally, there appears to be domestic legal support for the position that detention is authorized in a NIAC.¹⁹⁴ For these reasons, although Common Article 3 and AP II do not explicitly authorize detention, detention in a NIAC is a generally accepted practice.¹⁹⁵

3. *Detainee Status in an IAC and a NIAC*

Status determinations of individuals detained by the United States pursuant to the LOAC are critical. Status determines the rights and treatment afforded to the individual.¹⁹⁶ According to the ICRC, there are two main categories of detainees in an IAC: Prisoners of War and civilians.¹⁹⁷ The ICRC asserts in an NIAC, there is only one status—civilian.¹⁹⁸

¹⁹² See LOAC, *supra* note 5.

¹⁹³ Chesney, *supra* note 189.

¹⁹⁴ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 519–20 (2004). The court ruled that detention pursuant to the AUMF in an armed conflict is authorized without making a distinction between an IAC and a NIAC. *Id.* “[W]e understand Congress’ grant of authority for the use of ‘necessary and appropriate force’ to include the authority to detain for the duration of the relevant conflict, and our understanding is based on long standing law-of-war principles.” *Id.*

¹⁹⁵ Chesney & Goldsmith, *supra* note 62, at 1131.

Some have questioned whether the laws of war also provide for military detention or preventive internment during non-international armed conflicts (NIACs). We think it clear that they do . . . state practice in the post-1949 era provides numerous examples in which international armed conflict-style detention frameworks have been used during NIAC.

Id.

¹⁹⁶ SOLIS, *supra* note 179.

¹⁹⁷ See Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, INT’L COMM. OF THE RED CROSS (May 2009), [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report res/\\$File/direct-participation-guidance-2009-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report-res/$File/direct-participation-guidance-2009-icrc.pdf) [hereinafter *Interpretive Guidance*].

¹⁹⁸ *Id.*

The U.S. position is that there is also a third category: Unprivileged Enemy Belligerent (UEB).¹⁹⁹ A UEB is essentially a combatant who is not entitled to the protections of POW status because they do not meet the requirements of GC III for Prisoner of War status under Article 4(2).²⁰⁰ Under the U.S. view, UEBs can exist in both an IAC and a NIAC.²⁰¹ Under the position of the ICRC, this third category, UEB, is actually just a civilian who is directly participating in hostilities (DPHing).²⁰² A civilian loses protected status while DHPing.²⁰³ The ICRC claims the loss of protected status can be either temporary or more permanent (if the individual is performing a continuous combat function).²⁰⁴

In the context of an IAC, one status is a Combatant Prisoner of War.²⁰⁵ The terms POW and combatant are synonymous²⁰⁶ in the sense they refer to lawful fighters entitled to specific protections under international law.²⁰⁷ The United States recently adopted the term “belligerent” (lawful) in place of the term “combatant.”²⁰⁸ Generally, belligerents are members of an armed force of a party to an international armed conflict (also referred to as an “Article 2” conflict) under the Geneva Conventions and receive POW status.²⁰⁹ One purpose of POW status is to incentivize compliance with the laws of war by granting combatant immunity for lawful acts of war.²¹⁰

¹⁹⁹ See LAW OF WAR, *supra* note 4. See also SOLIS, *supra* note 179, at 206–07.

²⁰⁰ Common Article 3, *supra* note 39.

²⁰¹ LAW OF WAR, *supra* note 4.

²⁰² *Interpretative Guidance*, *supra* note 195.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ See Common Article 3, *supra* note 39, art. 4A. (2)–(6). See also Solis, *supra* note 76 at 195.

In common Article 2 conflicts, a combatant is a member of the armed force of a party to the conflict, wearing a uniform or other distinguishing sign. Although lawful combatants make up the greater number of POWs . . . the 1949 POW convention specifies six other groups that are also entitled to those protections.

²⁰⁶ *Id.*

²⁰⁷ SOLIS, *supra* note 179, at 187 (“The defining distinction of the lawful combatant’s status is that upon capture he or she is entitled to the protections of POWs.”).

²⁰⁸ Common Article 3, *supra* note 4.

²⁰⁹ See *id.* art. 4A(2)–(6). See also SOLIS, *supra* note 176, at 195.

²¹⁰ SOLIS, *supra* note 76, at 188 (“A lawful combatant enjoys the combatant’s privilege, but is also a continuing lawful target.”).

For purposes of this article, the status of combatants and POWs is relevant only to provide context. The individuals contemplated under this article's proposed detention regime would not enjoy the protection of POW status for two reasons. First, the armed conflict between the United States and al-Qaeda, and associated forces is not a Common Article 2 IAC, it is a Common Article 3 NIAC.²¹¹ Second, even if the armed conflict were a Common Article 2 conflict, the members of al-Qaeda and its associated forces do not meet the criteria for combatant status established under GC III Article 4(2).²¹² Like POWs, civilians also receive special protections under the Geneva Conventions.²¹³

"Civilian" is another protected status under the LOAC.²¹⁴ Civilians are never lawful targets during armed conflict.²¹⁵ Furthermore, in an IAC, civilians in the hands of the enemy are "protected persons"²¹⁶ afforded special protections under GC IV.²¹⁷ However, in a NIAC, since only Common Article 3 applies, civilians²¹⁸ are not entitled to GC IV "protected person" status; instead, they only receive the protections of Common Article 3 and Article 75 of Additional Protocol I.²¹⁹

Unlike the United States, which recognizes the status of UEBs in a NIAC, the ICRC asserts that in a NIAC, "civilian" is the only legal

²¹¹ *How Is the Term "Armed Conflict" Defined?*, *supra* note 183.

²¹² Common Article 3, *supra* note 39, art. 4A (2)–(6).

²¹³ Convention IV relative to the Treatment of Civilian Persons in Time of War, Geneva, Aug. 12, 1949 [hereinafter GC IV].

²¹⁴ *Id.*

²¹⁵ SOLIS, *supra* note 176, at 232.

²¹⁶ GC IV, *supra* note 213, art. 4 (defining protected person as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals").

²¹⁷ GC IV, *supra* note 213, art. 27.

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Id.

²¹⁸ SOLIS, *supra* note 176, at 202 ("In a non-international armed conflict, the term, 'civilian' takes on its usual meaning, a person not associated with the military.").

²¹⁹ *Id.* at 234. The United States is not a signatory to the Additional Protocol I, but considers certain provisions customary international law. *Id.*

status.²²⁰ Under the ICRC view, the protected status of civilians is not absolute.²²¹ According to the ICRC, when civilians directly participate in hostilities²²² they forfeit their protected status and become lawful targets.²²³ However, the loss of protection is not absolute. Under the ICRC view, civilians only lose their protections “for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a non-State party to an armed conflict cease to be civilians and lose protection against direct attack, for as long as they assume their continuous combat function.”²²⁴ The ICRC asserts that it is not until civilians engage in a “continuous

²²⁰ See *Interpretive Guidance*, *supra* note 197, at 24.

For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (“continuous combat function”).

Id.

²²¹ *Id.*

²²² *Id.* part I, section V.

In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).

Id.

²²³ *Id.* section IV (“The notion of direct participation in hostilities refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.”).

²²⁴ *Id.* section VII.

combat function”²²⁵ that they become persistent lawful targets.²²⁶ Under the U.S. view however, these individuals are not civilians who have lost their protected status, they are UEBs, and they are always legitimate and lawful targets.²²⁷

The terms unlawful enemy combatant²²⁸ (UEC) and UEB are synonymous.²²⁹ The former was used by the United States in the early days following 9/11, the latter is now the preferred terminology.²³⁰ Although the term UEB does not appear in any written LOAC body of law,²³¹ it is arguably gaining acceptance under international law.²³²

There are traditionally two types of unlawful belligerents: combatants who may be authorized to fight by a legitimate party to a conflict but whose perfidious conduct disqualifies them from the privileges of a POW, and civilians who are not authorized as combatants but nevertheless participate in hostilities, but who do not thereby gain combatant status.²³³

Although the ICRC and the United States use different terms (DPHing or continuous combat function versus UEB) to describe unlawful combatants, both parties agree that these individuals, regardless of their monikers are, at a minimum, entitled to protections under Common Article 3.²³⁴

²²⁵ *Id.*

²²⁶ Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 5, 44 (2010). There are several critics of the ICRC's interpretative guidance. “[I]t repeatedly takes positions that cannot possibly be characterized as an appropriate balance of the military needs of states with humanitarian concerns”. *Id.*

²²⁷ LAW OF WAR, *supra* note 4.

²²⁸ Thomas E. Ayres, “Six Floors” of Detainee Operations in the Post-9/11 World PARAMETERS 32, 34 (2005), <http://strategicstudiesinstitute.army.mil/pubs/parameters/Articles/05autumn/ayres.pdf> (“U.S. classification of detainees in Afghanistan and Guantánamo Bay as ‘unlawful combatants’ has aroused voluminous and vociferous academic debate, complicated because there is no internationally accepted, clearly delineated detention and interrogation standard for treating unlawful combatants.”).

²²⁹ DETAINEE PROGRAM, *supra* note 19.

²³⁰ *Id.*

²³¹ SOLIS, *supra* note 176, at 206–07.

²³² *Id.*

²³³ ELSEA, *supra* note 89, at 11.

²³⁴ DETAINEE PROGRAM, *supra* note 20.

4. Duration of Detention

As detailed earlier, there is limited guidance outlining the detaining party's responsibilities in conducting detention operations during a NIAC. Common Article 3, AP II, and CIL are the main bodies of law governing detention during a NIAC.²³⁵ However, none of these authorities specifically address the issue of duration of detention in a NIAC.²³⁶ During IACs, there are much more robust and comprehensive international laws concerning detention.²³⁷ Under the law of armed conflict, in an IAC the authority to detain combatants lasts for the duration of the conflict.²³⁸ This position is rooted in a traditional understanding of how conflicts operate and an assumption that there will be a conclusion to hostilities.²³⁹ However, the protracted nature of the current conflict between the United States and al-Qaeda calls into question the modern applicability of this detention principle.²⁴⁰ As a result, Detainee Review Boards (DRBs) were designed to safeguard against arbitrary indefinite detentions.²⁴¹

²³⁵ Common Article 3, *supra* note 39 and accompanying sources.

²³⁶ See *supra* note 39 and accompanying sources.

²³⁷ Common Article 3, *supra* note 39; GC IV, *supra* note 213 (providing detailed requirements for the treatment of POWs, retained persons and civilian internees).

²³⁸ Common Article 3, *supra* note 39.

²³⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 519–20 (2004) (finding “If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.”).

²⁴⁰ See Waxman, *Administrative Detention of Terrorists*, *supra* note 1, at 5.

We are confronted not with a hostile foreign state whose fighters wear uniforms and abide by the laws of war themselves, but rather with a dispersed group of non-state terrorists who wear no uniforms and abide by neither laws nor the norms of civilization. And although wars traditionally have come to an end that is easy to identify, no one can predict when this one will end or even how we'll know it's over.

Id. See also SOLIS, *supra* note 176, at 106 (“In the ‘war on terrorism’ the Geneva Conventions are not an entirely comfortable fit.”).

²⁴¹ Bovarnick, *supra* note 97.

5. *Detainee Review*

There is ongoing debate over the appropriate level of due process to afford detainees wishing to challenge their detention.²⁴² Views differ on the specific safeguards required to ensure only those individuals meeting detention criteria are held, and only for as long as necessary.²⁴³ In an IAC, the Geneva Conventions provides some limited guidance concerning detainee review requirements.²⁴⁴ However, in a NIAC, the LOAC is largely silent on the requirements for detainee review.²⁴⁵

Under U.S. domestic law, the Supreme Court established various rights afforded to LOAC detainees in U.S. custody through habeas

²⁴² See, e.g., Daphne Eviatar, *Detained and Denied in Afghanistan, How to Make U.S. Detention Comply with the Law*, HUMAN RIGHTS FIRST (May 2011), <http://www.humanrightsfirst.org/wp-content/uploads/pdf/Detained-Denied-in-Afghanistan.pdf>.

²⁴³ Waxman, *The Law of Armed Conflict*, *supra* note 75, at 449.

The [ICRC] has developed a set of principles and safeguards that it argues should govern security detention in all circumstances, i.e., both in armed conflicts and outside of them. The guidelines are based on law of armed conflict and human rights treaty rules as well as on non-binding standards and best practice and are to be interpreted on a case-by-case basis. According to the ICRC guidelines detainees are entitled—among other things—to challenge the lawfulness of their detention and to have an independent and impartial body decide on continued detention or release.

Id.

²⁴⁴ Chesney & Goldsmith, *supra* note 62, at 1089.

[L]aw of war treaties mandate very few procedural protections for military detention. GC III and GC IV do not address the question of how to determine whether a captured person is in fact someone subject to detention rather than an innocent civilian detained by mistake. The closest they come is in GC III Article 5, which specifies that a “competent tribunal” must resolve “doubt” as to whether a person who has committed a “belligerent act” warrants POW status, but does not explain what constitutes a “competent tribunal” or what procedures the tribunal must employ. Additional Protocol I (API) also requires a “competent tribunal” to resolve POW status doubts, and additionally creates a rebuttable presumption that the detainee is in fact a POW. But it says nothing about the tribunal or (with the exception of the rebuttable presumption) its procedures.

Id.

²⁴⁵ Chesney, *supra* note 189.

petitions, mainly stemming from detention at Guantánamo Bay.²⁴⁶ While the United States has the domestic authority to detain under the 2001 AUMF,²⁴⁷ that authority is subject to challenge on a case by case basis.²⁴⁸ The Supreme Court has not detailed the exact requirements for what it considers adequate detention review.²⁴⁹ During the latter part of the conflict in Afghanistan, the United States implemented a robust detainee review process it called detainee review boards (DRBs).²⁵⁰

The DRB process regularly reviewed LOAC detention and provided significant procedural protections for detainees to challenge their detention.²⁵¹ The process provided for an initial review conducted within sixty days of detention and subsequent reviews every six months by a three-officer panel to determine if the detainee met the criteria for continued detention.²⁵² Although not without its critics,²⁵³ many perceive the DRB process as “a new model for security detention review processes for the world.”²⁵⁴ Through increased transparency and due process, the DRB process managed to achieve the goals of security detention discussed below while maintaining legitimacy.²⁵⁵

C. Goals of Detention

The main goal of LOAC detention is prevention.²⁵⁶ In terms of prevention, the primary goal for detaining a UEB is to stop the individual

²⁴⁶ Waxman, *Administrative Detention*, *supra* note 1, at 8.

²⁴⁷ *Hamdi v. Rumsfeld*, 542 U.S. 507, 519–20 (2004).

²⁴⁸ Waxman, *Administrative Detention*, *supra* note 1, at 8.

²⁴⁹ *Id.*

²⁵⁰ See Bovarnick, *supra* note 97 (analyzing the Detainee Review Boards (DRBs)).

²⁵¹ *Id.* at 32. Detainee rights at the DRB include:

[T]he right to be present at open sessions; the right to be represented by a personal representative; the right to testify or provide a written statement; and the right to present all reasonably available evidence related to whether the detainee meets the criteria for detention and whether continued detention is required.

Id.

²⁵² *Id.* at 27–28.

²⁵³ *Id.* at 35–41.

²⁵⁴ *Id.* at 12.

²⁵⁵ *Id.*

²⁵⁶ Waxman, *Administrative Detention*, *supra* note 1, at 14.

from causing harm by removing him or her from the battlefield.²⁵⁷ Notwithstanding, detention also serves other strategic goals related to prevention. For example, incapacitation by removing a critical element of an organization; deterrence by demonstrating to other members that if they continue to engage in armed conflict against the United States they will be deprived of liberty; and information-gathering by questioning detainees to help thwart future attacks and better understand the enemy.²⁵⁸

Detention fulfills all of these goals, which is why it is such an important tool for military commanders. Although the use of lethal force against enemies is effective, and often appropriate, it cannot and should not be a commander's only option for removing UEBs from the battlefield.²⁵⁹ Detention and interrogation provide commanders the chance to neutralize the enemy while gaining insight into the enemy's operations through intelligence interrogations.²⁶⁰ Information gathered through detention and interrogation is critical to dismantling future

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ Matthew C. Waxman, *9/11 Lessons: Terrorist Detention Policy*, COUN. ON FOREIGN RELATIONS (Aug. 26, 2011), <http://www.cfr.org/911-impact/911-lessons-terrorist-detention-policy/p25665>.

An important lesson since the 9/11 attacks is that detention decisions and practices have legal, political, diplomatic, operational, and other ripple effects across many aspects of counterterrorism policy, and across U.S. foreign policy more broadly. Those concerned that the United States is too aggressive in its detention policy should beware that constraining this tool adds pressure to rely on other tools, including lethal drone strikes or proxy detention by other governments.

Id.

²⁶⁰ See also Waxman, *Administrative Detention*, *supra* note 1, at 15.

Thwarting terrorist plots requires getting inside the heads of network members, to understand their intentions, capabilities, and modes of operations. Detention can facilitate such intelligence collection through most obviously interrogation, but also through monitoring conversations among prisoners or even "turning" terrorist's agents and sending them back out as government informants.

Id.

operations and defeating the enemy.²⁶¹ Commanders lose this capability if they simply kill the enemy. Creating and implementing a strategic detention policy will allow commanders to reap the operational benefits afforded by LOAC detention.²⁶²

IV. Striking a Balance—A Strategic Detention Paradigm

In the days following 9/11, the United States created a permissive LOAC detention regime focusing on indefinite detention and utilizing enhanced interrogation techniques to gain actionable intelligence to thwart future attacks.²⁶³ This approach undermined U.S. credibility throughout the world, compromised its ability to successfully prosecute terrorists and has resulted in the quandary that is Guantánamo Bay.²⁶⁴ Nevertheless, there is a real danger in completely abandoning LOAC detention in the fight against al-Qaeda and other associated forces. Detention for the sole purpose of criminal prosecution jeopardizes national security interests and forfeits critical intelligence.²⁶⁵

If the United States is serious about national security and defeating al-Qaeda and associated forces, Congress must enact a strategic detention policy that allows LOAC detention and criminal detention to work in concert. As illustrated by the capture, interrogation, and prosecution of Warsame,²⁶⁶ this hybrid approach to detention is effective.

²⁶¹ Schlesinger et al., *supra* note 12, at 31 (“In sum, human intelligence is absolutely necessary, not just to fill these gaps in information derived from other sources, but also to provide clues and leads for the other sources to exploit.”).

²⁶² Benard et al., *supra* note 17, at 83 (“[United States forces have generally treated POW and detainee operations as an afterthought, a perhaps inevitable but largely inconvenient collateral effect of military conflict. Such operations would be better considered as a central part of the successful prosecution of a conflict, particularly a counterinsurgency.”).

²⁶³ See, e.g., Schlesinger et al., *supra* note 12; Rumsfeld, *supra* note 106; Wala *supra* note 108.

²⁶⁴ See *supra* Section III.B.

²⁶⁵ Apuzzo, *supra* note 63 (“If there is another terrorist attack, that’s when this becomes very important,” Mr. Graham said, “When we look back and say, ‘Did we miss the opportunity to gather intelligence by criminalizing the war?’”).

²⁶⁶ *Guilty Plea Unsealed*, *supra* note 149.

A. A Holistic Hybrid Approach to LOAC Detention

1. Purpose

A holistic, hybrid approach paradigm enables the United States to further the legitimate goals of LOAC detention without compromising the future possibility of criminal prosecution. Importantly, this model strikes a critical balance between the competing interests and goals of the LOAC and criminal detention.²⁶⁷ A short-term detention facility, to detain and question high-value individuals like Osama bin Laden, accomplishes these objectives without falling prey to the dangerous practice of indefinite detention.²⁶⁸ Under this proposed paradigm, decisions to detain would be highly scrutinized. Authority to detain would be withheld to the Secretary of Defense or his designee. The goal of this proposed facility is to allow the United States to capitalize on the strategic benefits of LOAC detention and interrogation while promoting the rule of law through criminal prosecutions. This facility would allow the United States to defend itself from attack while maintaining legitimacy both domestically and internationally. This facility would be called the U.S. Strategic Detention Facility (SDF).

²⁶⁷ Chesney & Goldsmith, *supra* note 62, at 1081.

Potential models for terrorist detention span from the pure model of military detention at one extreme to the pure model of civilian criminal trial at the other Neither model in its traditional guise can easily meet the central legal challenge of modern terrorism: the legitimate preventive incapacitation of uniformless terrorists who have the capacity to inflict mass casualties and enormous economic harms and who thus must be stopped before they act. The traditional criminal model, with its demanding substantive and procedural requirements, is the most legitimate institution for long-term incapacitation. But it has difficulty achieving preventive incapacitation. Traditional military detention, by contrast, combines associational detention criteria with procedural flexibility to make it relatively easy to incapacitate. But because the enemy in this war operates clandestinely, and because the war has no obvious end, this model runs an unusually high risk of erroneous long-term detentions, and thus in its traditional guise lacks adequate legitimacy.

Id.

²⁶⁸ *Id.*

2. Process

With the approval of the President, and in accordance with domestic and international law, individuals classified as high-value UEBs could be captured and brought to the SDF for initial screening to determine whether they meet specific criteria.²⁶⁹ Once screened, the individual would be released if he does not meet the criteria for detention. If he meets the criteria, detention would continue. The detainee would be interrogated in accordance with the *Human Intelligence Operations* field manual.²⁷⁰ The restricted interrogation technique of separation may be also authorized, since only UEBs will be held at the facility.²⁷¹

The purpose of separation is to deny the detainee the opportunity to communicate with other detainees in order to keep him from learning counter-resistance techniques or gathering new information to support a cover story; decreasing the detainee's resistance to interrogation. Separation, further described in paragraphs M-2 and M-28, is the only restricted interrogation technique that may be authorized for use. Separation will only be used during the interrogation of specific unlawful enemy combatants for whom proper approvals have been granted in accordance with this appendix.²⁷²

Because of the strategic nature of detainees held at the SDF, and the likelihood that they will provide critical intelligence, the United States would likely employ the restricted interrogation technique of separation on all of the detainees housed at the SDF.

Once intelligence questioning is complete, or the individual no longer meets criteria for detention, he will be transferred to the Department of Justice for criminal prosecution, to another nation for criminal prosecution, or be released. By design, the SDF is a short-term LOAC detention facility that only houses high-value UEBs. As such, the detainee population would be very limited. Only a very small number of

²⁶⁹ See *infra* Section 3 for a discussion of the criteria suggested. Discussion of the legal basis for capturing specific UEBs is beyond the scope of this paper.

²⁷⁰ See HUMAN INTEL. OPER., *supra* note 4.

²⁷¹ *Id.* Appendix M.

²⁷² *Id.*

individuals would face detention and based on operational factors, it is likely that the holding cells would often remain vacant.

3. *Detention Criteria*

Generally, the authority to detain is similar to the justification to target—status, conduct or a hybrid of both status and conduct.²⁷³ The detention criteria²⁷⁴ at the SDF would be a hybrid approach; it would allow for detention based on conduct (for example, engaging in hostilities against the United States), status (for example, membership in al-Qaeda) or a combination of both conduct and status. For example, Osama bin Laden could be detained based on his leadership role in al-Qaeda (status) or for his role in planning the attacks against the United States on 9/11 (conduct) or for both (a hybrid). History has shown that in the current asymmetrical conflict, a hybrid detention criteria that allows for detention based on both status and conduct is most effective.²⁷⁵

Establishing restrictive detention criteria is critical to ensure the strategic goals of this detention program are achieved.²⁷⁶ The current

²⁷³ *Id.* at 1082 (“Associational status and individual conduct each play some role as detention criteria in both the criminal and military contexts. Military detention traditionally emphasizes status more than conduct, however, while the reverse is true in the criminal justice system”).

²⁷⁴ Chesney & Goldsmith, *supra* note 62, at 1086–1087 (“It does not follow that the laws of war contemplate the use of any particular detention criteria during NIAC. On that issue, the laws of war seem silent, leaving the matter in the discretion of the state subject to any other applicable legal considerations.”).

²⁷⁵ *Id.* at 1099.

The traditional model’s emphasis on associational status as a detention trigger is difficult to apply to an amorphous clandestine network such as al Qaeda. Beyond the leadership core, it is difficult to determine what degree of association with al Qaeda suffices to warrant status-based detention even if the facts can accurately be determined. The difficulty drops away if the suspect can be shown to have acted for al Qaeda on particular occasions, and where the person concedes his membership.

Id.

²⁷⁶ Waxman, *Administrative Detention*, *supra* note 1, at 26 (“Historically, detention practices—especially those viewed as overbroad—have sometimes proven counterproductive in combating terrorism and radicalization, and consideration of administrative detention’s strategic utility should weigh these dangers.”).

conflict with al-Qaeda and associated forces does not support a mass detention program. Instead, the United States needs a worldwide detention capability to temporarily detain and interrogate select high-value UEBs.²⁷⁷ The term “high-value” refers to individuals like Osama bin Laden but it also refers to other more innocuous UEBs deemed to have strategic importance by virtue of their placement or access in an organization or based on the particular threat they pose.²⁷⁸ The Rules of Engagement (ROE), utilized by military forces in the particular operation would contain a more specific definition of “high-value.” Although the SDF would remain transparent in many respects, not all of the operating procedures would be available to the public because that would compromise the effectiveness of the operation, by allowing the enemy to develop tactics, techniques and procedures (TTPs) to counter the detention program.

The proposed detention criteria at the SDF are: the detainee²⁷⁹ engaged in hostilities against the United States or its coalition partners; has purposefully and materially supported hostilities against the United States or its coalition partners; or is a member of al-Qaeda or associated forces;²⁸⁰ meets the definition of a “high-value” target; and reasonable grounds exist to believe the detainee possesses operationally significant intelligence.²⁸¹ Individuals would not be detained based solely on perceived intelligence value.

4. Location

The proposed facility would be located on the island of Guam, a U.S. territory located in the Pacific.²⁸² This location is ideal because there is

²⁷⁷ Chesney & Goldsmith, *supra* note 62, at 1122 (“[T]he first, most fundamental, and in some senses most difficult task is to define the set of persons who are so dangerous that they ought to be detained in the first place.”).

²⁷⁸ See, e.g., *supra* Section III.D. (discussing Warsame’s detention).

²⁷⁹ Although the criteria uses the term “he,” both males and females could be detained at the secure detention facility (SDF).

²⁸⁰ Another organization such as ISIL could be substituted for al-Qaeda to create a detention capability for a different NIAC. See also *supra* notes 6, 56 and accompanying sources.

²⁸¹ This criteria is based in part on the criteria established in the Military Commissions Act of 2009. MCA 2001, *supra* note 3.

²⁸² GUAM ON-LINE, <http://www.guam-online.com/> (last visited June 8, 2016) (“Located approximately 3300 miles West of Hawaii, 1500 miles east of the Philippines and 1550

already a significant U.S. military presence on the island and the United States has a very strong relationship with Guam. At first glance this might resemble Guantánamo Bay. However, this facility would be vastly different from the Guantánamo Bay Confinement Facility. Applying the lessons learned from the past decade-and-a-half of conducting LOAC detention operations should avoid the legal and ethical issues associated with the detention operations at Guantánamo Bay.²⁸³ Unlike Guantánamo Bay, placing the facility in Guam is not meant to skirt the laws of the U.S. but rather to establish a fixed facility in a location that provides transparency and security.

Guam's location in the Pacific provides geographic security. Furthermore, placing the facility outside the United States avoids the inevitable domestic political fallout that would occur if it were placed in the United States.²⁸⁴ The goal is not to place the detainees beyond the rule of law.²⁸⁵ To the contrary, the goal is to promote the rule of law—the SDF is designed for short-term LOAC detention, with built-in procedural protections, and full compliance with both domestic and international laws concerning detainee treatment. Therefore, the SDF would not be Guantánamo Bay II; it would be a means to facilitate strategic, short-term LOAC detention.

5. *The Facility*

The detention facility would be a fixed structure, continuously staffed by the DoD at all times, to house at least three detainees. The overall maximum capacity of the facility should be ten detainees and the facility could be fully staffed with as little as one week's notice. A joint command (meaning representatives from all of the military services) headed by an O-6 commander would operate the facility.

A military police company would serve as the guard force and a military intelligence company would serve as intelligence analysts. Several permanent-party interrogators and at least two judge advocates

miles South of Japan, the Island of Guam is the Western most territory of the United State.”).

²⁸³ See *supra* Section III.B.

²⁸⁴ While there is no legal difference between a site on the mainland or a United States territory per se, location on a territory may be more politically tolerable, as well as more tactical from a security perspective.

²⁸⁵ ELSEA *supra* note 89. See *supra* note 102 and accompanying text.

would also be assigned to the facility, along with a medical team replete with a doctor and a mental health care provider to treat the detainees. Since detainees would most likely be separated²⁸⁶ while in the facility, there would be single cell units and several interrogation booths. Significant security would ensure the safety of both the detainees and the military personnel operating the facility.

6. *Treatment*

It is imperative that the United States apply the lessons learned since 9/11 and comply with both domestic and international law concerning the treatment of detainees.²⁸⁷ At the facility, both detention and interrogations must comply with U.S and international law.²⁸⁸ All interrogations must comply with field manual for human intelligence operations²⁸⁹ and detainees would be treated in accordance with the requirements established in the *Human Intelligence Collector Operations Directive*.²⁹⁰ Additionally, in accordance with the special status afforded to the ICRC, it would have access to detainees and have regular access to the facility in accordance with *Law of War Program*.²⁹¹ The facility would make religious accommodations as appropriate and operationally feasible.²⁹² All detainees would be notified that they are entitled to Common Article 3 protections.

7. *Duration of Detention*

This proposed detention facility is designed for temporary LOAC detention. As a matter of policy, indefinite detention would not be

²⁸⁶ HUMAN INTEL. OPER., *supra* note 4, Appendix M.

²⁸⁷ Solis, *supra* note 176, at 186 (stating that although the enemy may not follow Geneva, “one does not observe or disregard LOAC according to the enemy’s conduct We respect [the] LOAC and customary law because they are the law, and because it is the right and honorable thing to do.”).

²⁸⁸ *Id.*

²⁸⁹ HUMAN INTEL. OPER., *supra* note 4.

²⁹⁰ DETAINEE PROGRAM, *supra* note 19.

²⁹¹ LAW OF WAR PROGRAM, *supra* note 19 at 7 (“The ICRC will be given access to all DoD detention facilities and the detainees housed therein, subject to reasons of imperative military necessity.”).

²⁹² *Id.* at 2. Humane treatment includes “[f]ree exercise of religion, consistent with the requirements of detention.” *Id.* For example, providing a Koran, a prayer rug and the direction to Mecca to Muslim detainees, or a Bible to Christian detainees. *Id.*

permissible at this facility.²⁹³ Instead, strict and finite timelines governing the duration of detention directly overseen by the Secretary of Defense or his designee would be established. Although international law allows for LOAC detention until the end of hostilities, as a matter of policy, the United States should employ a more limited approach to the current conflict with al-Qaeda. Because of the indefinite quality of this conflict, and the desire to promote the rule of law through criminal prosecution once the goals of LOAC are met (namely prevention and intelligence gathering), a more limited approach is more likely to accomplish U.S. goals.

For operational reasons, the specific timelines for detention would not be publically disclosed. However, the ICRC would be privy to this information²⁹⁴ and the total length of detention at the SDF could not exceed six months.²⁹⁵ The Secretary of Defense or his designee would be the approval authority for initial detention as well as all extensions. Interrogation plans would be approved by the facility commander.

8. *Procedural Protections—Detention Review*

²⁹³ *Boumediene v. Bush*, 553 US 723 (2008).

Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury. This result is not inevitable, however. The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism.

Id. at 69.

²⁹⁴ See *Confidentiality: Key to the ICRC's Work but Not Unconditional*, ICRC RESOURCE CENT. (Sep. 20, 2010), <https://www.icrc.org/eng/resources/documents/interview/confidentiality-interview-010608.htm> (ICRC communications are confidential).

²⁹⁵ The six-month cap provides enough time to gain actionable intelligence through interrogations and also gives authorities time to coordinate the next step: federal prosecution, transfer to another nation for prosecution or release. The cap also ensures that detention at the facility is temporary. The six-month limit is based in part on the Geneva Convention Relative to the Treatment of Prisoners of War IV (GC IV) six-month detention review requirements. See GC IV, *supra* note 210.

The temporary nature of the detention facility limits the need for an extensive detention review structure. Individuals detained fewer than forty-five days would not be entitled to review because of the limited nature of the infringement on individual liberty. A panel of three military officers would review the status of any detainee held longer than forty-five days in the SDF. These detainees would be notified of the general nature of the basis for detention, and may provide a statement to the panel for consideration. The panel would make a recommendation to the Secretary of Defense whether to release the detainee, transfer him, or continue detention. The Secretary of Defense or his designee would make the final decision on all extensions, transfers and releases.²⁹⁶

9. Rules for Transfer and Release

Once intelligence questioning is complete, the detainee is assessed to no longer meet criteria, or six months is up, the detainee would be transferred²⁹⁷ to either the Department of Justice, another country for criminal prosecution or released.²⁹⁸ Generally, only individuals assessed as low or no threat would be released.²⁹⁹ Although prosecution in U.S. federal court is most ideal, not every UEB can or should be prosecuted by the United States. Therefore, each detainee, along with the evidence

²⁹⁶ The due process rights afforded a detainee at this facility would not be as robust as those provided at DRBs in Afghanistan because of the limited duration of detention.

²⁹⁷ See DETAINEE PROGRAM, *supra* note 20, at 6. The Department of Defense's Instruction 2310.01E, *Land of War Program*, would govern all detainee transfers. *Id.* "No detainee will be transferred to the custody of another country when a competent authority has assessed that it is more likely than not that the detainee would be subjected to torture." *Id.*

²⁹⁸ Critics will argue that a long-term, indefinite detention facility is needed in order to detain individuals that are a security threat to the United States, but whom it cannot effectively prosecute. Indefinite detention is not an option under this proposed model. Ideally, because the information gained through intelligence questioning will be in accordance with both domestic and international law, the United States will not encounter the suppression issues that it has encountered based on evidence obtained through enhanced interrogation techniques in Guantánamo Bay. See, e.g., *Torture's Blowback*, N.Y. Times (Jan. 14, 2009, 9:42 PM), http://roomfordebate.blogs.nytimes.com/2009/01/14/tortures-blowback/?_r=0.

²⁹⁹ Using the hybrid model of LOAC detention with an eye toward criminal prosecution would force authorities to build a criminal case in addition to building the case for LOAC detention. This would enable authorities to prosecute through the development of admissible evidence. Unfortunately, there may be some cases in which a detainee is assessed to be a continued threat but cannot be prosecuted. After six months of detention, he would be released.

available for prosecution, would be evaluated on a case-by-case basis to determine which of the three avenues is most appropriate.

B. Legal Authority under the LOAC and Domestic Law

Under domestic law, the United States is authorized to detain members of al-Qaeda and associated forces in accordance with the 2001 AUMF.³⁰⁰ Additionally, under the War Powers Resolution, the President has the inherent authority to detain threats to the United States.³⁰¹ Under international law the United States is entitled to use force to defend itself against threats pursuant to the U.N. Charter.³⁰² A legal and legitimate exercise of that force is detention.³⁰³ As such, detention of UEBs under the criteria discussed is authorized under both domestic and international law.

C. Policy—Transparency, Legality, and Legitimacy

Enacting a cohesive and clearly articulated U.S. LOAC detention paradigm will promote transparency and increase the perceived legitimacy of U.S. LOAC detention operations.³⁰⁴ For operational reasons, some portion of the policies would not be publically available (such as certain detention timelines). However, the vast majority of the information about the general nature of the program would be publically available. By taking LOAC detention operations out of the shadows, publically acknowledging that they are conducted, that they are lawful, and are strategically critical to national security, the United States will garner support for LOAC detention operations and finally begin to regain the confidence lost by both the American people and the international community in the early days after 9/11.

³⁰⁰ 2001 AUMF, *supra* note 74.

³⁰¹ 50 U.S.C. §§ 1541–48.

³⁰² *See* U.N. Charter art. 51. *See also* Michael Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. 513, 535 (2003) (“[I]t is appropriate and legal to employ force preemptively when the potential victim must immediately act to defend itself in a meaningful way and the potential aggressor has irrevocably committed itself to attack.”).

³⁰³ *See generally* Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

³⁰⁴ Bellinger, *supra* note 163.

D. Dissenting Views

It is important to acknowledge critics. In light of the controversial nature of detention operations there will be opponents of this proposal. Some may claim this paradigm violates U.S. domestic law, the LOAC and IHL, human rights law, or maybe even all four bodies of law. It does not. This proposed detention policy is born of a recognition of past mistakes, a desire to lawfully utilize detention to defeat enemies engaged in armed conflict against the United States, and to end an armed conflict that all seemingly agree has endured for far too long.

VI. Conclusion

As the fictitious scenario concerning the capture of Osama bin Laden illustrates, it is imperative the United States implement a detention paradigm. The United States has been engaged in an armed conflict with al-Qaeda and associated forces for almost a decade and a half, and there is no end in sight.³⁰⁵ Although indefinite detention through the duration of hostilities is arguably allowable, in the present NIAC with al-Qaeda and its associated forces, this position is untenable.

Establishing a comprehensive, thoroughly planned, and strategically-executed detention policy will provide the United States with a valuable mechanism to remove enemies from the battlefield, question them for intelligence purposes and then have them prosecuted for their crimes in civilian court. This holistic approach to detention operations provides a realistic, workable paradigm for removing UEBs from the battlefield to prevent attacks against the United States while gaining valuable intelligence critical to defeating the enemy. It is time for the United States to move past the stigma surrounding the dark days following 9/11 and implement a LOAC detention policy that keeps America safe and promotes our values.

³⁰⁵ Chesney & Goldsmith, *supra* note 62, at 1100 (“The war against al-Qaeda and affiliates has an endless quality in the sense that there is little or no prospect for negotiations leading to an agreed end to hostilities or an unconditional surrender.”).

**ALWAYS ON DUTY: CAN I ORDER YOU TO REPORT
CRIMES OR TO INTERVENE?**

MAJOR MATTHEW E. DYSON*

It is, indeed, most highly desirable that men should not merely abstain from doing harm to their neighbors, but should render active services to their neighbors. In general, however, the penal law must content itself with keeping men from doing positive harm, and must leave to public opinion, and to teachers of morality and religion, the office of furnishing men with motives for doing positive good. It is evident that to attempt to punish men by law for not rendering to others all the service which it is their duty to render to others would be preposterous. We must grant impunity to the vast majority of those omissions which a benevolent morality would pronounce reprehensible, and must content ourselves with punishing such omissions only when they are distinguished from the rest by some circumstance which marks them out as peculiarly fit objects of penal legislation.¹

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¹ 7 THOMAS BABINGTON MACAULAY, THE WORKS OF LORD MACAULAY COMPLETE 497 (Lady Trevelyan ed., 1866).

I. Introduction

On an early Monday morning at Joint Base Lewis-McChord, Washington, the first E-mail message your commander reads is the blotter from the Provost Marshal's Office (PMO) detailing the lack of good order and discipline in his formation. It is another weekend of an unacceptably high rate of drunken driving and sexual assault offenses in the barracks. You hear your commander running down the hallway toward your office and you brace for a rant about the incessant misconduct of his soldiers. The commander is disgusted seeing the same misconduct occur every weekend. He asks you what can be done about it, and you rattle off what you think is a pretty convincing recitation of how the Army utilizes the military justice system to enforce good order and discipline. You tell the commander that the legal team will thoroughly investigate the crimes and swiftly pursue courts-martial. You even manage to discuss how aggressive courts-martial prosecution serves as specific and general deterrence for his formation. Before you have a chance to finish, the commander cuts you off and says "I've been court-martialing these guys for two years now and nothing's changed. Courts-martial have utterly failed to deter my soldiers from committing crimes. You need to come up with better ideas!"

Thirty minutes later you take your seat in the back of the room at the command update brief and start mentally preparing for a public tongue lashing from the commander. You think you have a decent idea if put on the spot. You notice units are failing to administratively reduce soldiers in rank pursuant to Army Regulation (AR) 600-8-19² for drunk driving convictions in the local criminal court. You are positive your idea to administer administrative reductions will be well received as a forgotten tool to enforce good order and discipline.

Sure enough, the commander enters the meeting and the first thing he mentions to the entire staff is his disgust with the weekend's blotter. You speak up thinking your administrative reduction idea is going to save the day, only to see the commander's blood pressure rise. The commander responds and says, "Judge, you're not getting it. All of your courts-martial, non-judicial punishment, administrative reductions, and administrative separations are doing nothing to solve my problem. You keep talking about deterrence, but I want to talk about prevention. What

² U.S. DEP'T. OF ARMY, REG. 600-8-19, ENLISTED PROMOTIONS AND REDUCTIONS (18 Dec. 2015).

can we do to prevent these crimes?” The Intelligence Officer (G-2) suggests we use his shop to perform intelligence operations on our soldiers. Before you have a chance to speak up to explain the obvious illegality of the G-2’s bad idea, the chief of staff shoots a death stare at the G-2 and says, “We don’t even need the lawyer to tell us that idea is going nowhere. But, when I was at Fort Drum, we ordered our soldiers to intervene and stop drunken soldiers from driving. We can do a similar order to stop sexual assaults in the barracks.” The commander enthusiastically jumps out of his seat and says, “That’s what I’m talking about. That’s prevention. Judge, get me a draft order by the end of the day.”

It is perhaps the question most often presented by commanders to junior judge advocates and seasoned staff judge advocates with decades of experience: I want to order my soldiers to do X—can I do it? Is it lawful? A judge advocate’s typical immediate internal reaction is, “Of course you can do it sir, that’s pretty elementary. Your authority is nearly limitless as the commander. You’re the king of this castle!” However, a deliberate analytic approach to the question reveals that many proposed orders are not lawful, and in some instances, even if lawful, would have horrible practical application if implemented.

Proactive commanders break down data and evaluate trends attempting to find new approaches to reduce crime. In the endless quest to improve good order and discipline, many commanders ask if it is lawful to create affirmative duties for soldiers to report crimes they have witnessed, or to intervene to stop crimes when they are merely bystanders.

Commanders are not acting in a vacuum when they ask their judge advocates about ways to implement prevention strategies. Sexual assault prevention as an institutional mission is now firmly rooted in the Army. The Department of Defense (DoD) Sexual Assault Prevention and Response Program (SAPR) expressly requires the Army to train its soldiers on prevention strategies to include bystander intervention.³ The DoD’s official prevention strategy states prevention messaging and initiatives must influence soldiers “to promote protective factors, *intervene* safely, and support victims.”⁴ The strategy also states

³ U.S. DEP’T OF DEF., INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES enclosure 10, para. 2.d (28 Mar. 2013) (C2, 7 Jul. 2015).

⁴ U.S. DEP’T OF DEF., 2014–2016 SEXUAL ASSAULT PREVENTION STRATEGY, at 5 (30 Apr. 2014) (emphasis added).

individuals shall use “[e]ducation, skills building and training on personal responsibility, empathy, healthy relationships, military core values, and *bystander intervention*” as means to reach the end state of “[i]dentify[ing], act[ing], and interven[ing] to prevent inappropriate behavior of any kind, including sexual harassment and assault.”⁵

This article will argue it is lawful to create an order for all soldiers to report crimes they have witnessed. However, for practical reasons, such an order is not advisable. Using the most often requested fact patterns from commanders—drunk driving and sexual assault—this paper will also argue that duties to physically intervene are generally unlawful, and for practical reasons ill-advised. Although the Army has adopted bystander intervention as a piece of its sexual assault prevention model, it would be unlawful to create a general legal duty of intervention. Instead, the Army should rely on the general moral obligation to act and the promotion of a culture founded in dignity and respect.

Part I of the article will discuss the background of the common law. In Part II, the article will examine the historical reluctance in American jurisprudence to criminalize acts of omission, or more specifically, duties to report crimes or to intervene to stop crimes. Part II will also provide a survey of current duty to report and assist laws in civilian jurisdictions. In Part III, the article will analyze whether duties to report and assist are lawful under Uniform Code of Military Justice (UCMJ) Articles 90 and 92, and military case law.⁶ Concluding that duties to intervene are generally unlawful, Part IV examines the practical concerns a commander should consider if he decides to assume risk and create an affirmative obligation to report or intervene. The practical concerns overwhelmingly cut against creating such duties.

II. Background

A. Ancient Common Law

Interestingly, there is evidence, contrary to the majority of contemporary scholarship, that ancient common law did in fact impose a duty of intervention to stop a felony of violence when one had the power

⁵ *Id.* at figure 5 (emphasis added).

⁶ UCMJ arts. 90, 92 (2012).

to prevent such an offense.⁷ Reaching as far back as the thirteenth century, according to Bracton, one had a duty to rescue a man from death.⁸ Similarly, in the 1700s, Matthew Hale stated in *Historia Placitorum Coronae*,

And the reason seems to be, because every man is bound to use all possible means to prevent a felony, as well as to take the felon, and if he doth not, he is liable to a fine and imprisonment, therefore if *B.* and *C.* be at strife, *A.* a bystander, is to use all lawful means that he may, without hazard of himself to part them⁹

If *A.* sees *B.* commit a felony, but consents not, nor yet takes care to apprehend him, or levy hue and cry after, or upon hue and cry levied doth not pursue him this is a neglect punishable by fine and imprisonment; but it doth not make *A.* an accessory after.¹⁰

William Hawkins in *A Treatise of the Pleas of the Crown* stated a similar rule to that of Hale:

Also those who by Accident are barely present when a Felony is committed, and are merely passive, and neither any Way encourage it, nor endeavor to hinder it, nor to apprehend the Offenders, shall neither be adjudged by Principals nor Accessaries [sic]; yet if they be of full Age, they are highly punishable by Fine and Imprisonment for their Negligence, both in not endeavoring to prevent the

⁷ Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673, 677, 682 (1994) (citations omitted).

⁸ 2 HENRY DE BRACON, BRACON ON THE LAWS AND CUSTOMS OF ENGLAND 342 (George E. Woodbine ed., Samuel E. Thorne trans., 1968) (n.d.). Bracton states, "Not only is he who strikes and slays liable, but he who orders him to strike and slay, for since they are not free of guilt, they ought not be free of punishment; *nor ought he to be free who though he could rescue a man from death, failed to so.*" *Id.* (emphasis added) (citations omitted).

⁹ 1 MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 484 (W.A. Stokes et al. eds., Philadelphia, Robert H. Small, 1st American ed. 1847) (1736).

¹⁰ *Id.* at 618 (citations omitted).

Felony, and in not endeavoring to apprehend the Offender.¹¹

Moreover it was understood that ordinary citizens had the authority to step into the shoes of law enforcement. According to Hale,

[I]f A. commits a felony and flies, or resists the people, that come to apprehend him, so that he cannot be taken without killing him, such killing is not felony, nor does the person, that did it, forfeit any thing, tho A. were not indicted, nor the person, that did it, had any warrant of any court of justice, for in such case the law makes every person an officer to apprehend a felon.¹²

B. Historical American Aversion to Duties to Aid

Despite some evidence of an ancient duty to intervene, American law has traditionally declined to impose criminal or civil liability for one's general failure to provide assistance without an existing specific legal obligation to render aid.¹³ Consequently, a moral obligation may exist to provide aid when there is no corresponding legal obligation to do so.¹⁴

This concept is best illustrated in the case of *People v. Beardsley*.¹⁵ In that case, the respondent engaged in an affair with a woman who overdosed on morphine at his residence. Instead of providing aid to the woman, the respondent, who was intoxicated at the time, arranged for an acquaintance to take the woman to another room in the house. The woman subsequently died, and the respondent was convicted of manslaughter.¹⁶ At trial, the government argued the facts and circumstances of the woman's death "were such as to lay upon him a duty to care for [the

¹¹ 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN: OR, A SYSTEM OF THAT SUBJECT, DIGESTED UNDER THEIR PROPER HEADS 313 (London, W. Strahan & M. Woodfall 5th ed. 1771) (1716) (citations omitted).

¹² HALE, *supra* note 9, at 489 (citations omitted).

¹³ Jennifer Bagby, *Justifications for State Bystander Intervention Statutes: Why Crime Witnesses Should Be Required to Call for Help*, 33 IND. L. REV. 571, 572 (2000).

¹⁴ Natalie Perrin-Smith Vance, *Comment, My Brother's Keeper? The Criminalization of Nonfeasance: A Constitutional Analysis of Duty to Report Statutes*, 36 CAL. W. L. REV. 135, 139 (1999) (citing *Yania v. Bigan*, 155 A.2d 343 (Pa. 1959); *Depue v. Flateau*, 111 N.W. 1 (Minn. 1907); *Union P.R. Co. v. Cappier*, 72 P. 281 (Kan. 1903)).

¹⁵ *People v. Beardsley*, 113 N.W. 1128 (Mich. 1907).

¹⁶ *Id.*

woman], and the duty to take steps for her protection, the failure to take which, was sufficient to constitute such an omission as would render him legally responsible for her death.”¹⁷ The Supreme Court of Michigan disagreed and set aside the conviction, holding that no general duty existed for the respondent to aid the woman and no special relationship duty such as husband toward wife extended to the facts of the case.¹⁸ The court concluded,

In the absence of such obligations, it is undoubtedly the moral duty of every person to extend to others assistance when in danger; . . . and if such efforts should be omitted by any one when they could be made without imperiling his own life, he would, by his conduct, draw upon himself the just censure and reproach of good men; but this is the only punishment to which he would be subjected by society.¹⁹

Moreover, early American common law valued individual freedom and feared judicial intervention in social and economic dealings.²⁰ It is society’s respect for autonomy and individual freedom that serves as the basis for the following principle of law:

[D]efendants are liable according to what *they* do, not what others do and they might prevent; correspondingly, they should be left free to live their own lives and pursue their own goals without having legal duties to act or intervene constantly thrust upon them, unanticipated, unpredictable, and unwanted, because of the actions of others. This is why there is no general duty to prevent crime.²¹

In tort law, the principles of misfeasance and nonfeasance highlight the general requirement for active misconduct rather than passive

¹⁷ *Id.* at 1129.

¹⁸ *Id.* at 1131.

¹⁹ *Id.* at 1131 (quoting *United States v. Knowles*, 26 F. Cas. 800, 801 (N.D. Cal. 1864) (No. 15,540)).

²⁰ Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 WM. & MARY L. REV. 423, 424–25 (1985).

²¹ A.P. Simester, *On the So-called Requirement for Voluntary Action*, 1 BUFF. CRIM. L. REV. 403, 427 (1998).

inaction.²² Increasingly, however, some jurisdictions have moved away from the general reluctance to impose affirmative duties on individuals to aid crime victims. Fourteen states now have statutes that criminalize either the failure to report crimes or failure to aid crime victims.²³

C. State Duties

1. *Duties to Report Crimes*

Relevant to Army military justice practitioners, Washington, Hawaii, Alaska, Colorado, and California have enacted statutes requiring eyewitnesses to report certain crimes.²⁴ In Washington, an eyewitness to the commission of certain types of sexual assault and other specifically defined violent crimes must, as soon as reasonably possible, notify the prosecuting attorney, law enforcement, medical assistance, or other public officials.²⁵ Failing to report in accordance with the statute is a gross misdemeanor.²⁶ However, reporting is excused when a person has a

²² Bagby, *supra* note 13, at 573.

²³ See ALASKA STAT. ANN. §§ 11.56.765, 11.56.767 (West, Westlaw through 2014 2d Reg. Sess. of 28th Leg.); CAL. PENAL CODE § 152.3 (West, Westlaw through 2014 Reg. Sess. laws, Res. ch. 1 of 2013–2014 2d Ex. Sess., and all propositions on 2014 ballots); COLO. REV. STAT. ANN. § 18-8-115 (West, Westlaw through 2015 ch. 2 of 1st Reg. Sess. of 70th Gen. Assemb.); FLA. STAT. ANN. § 794.027 (West, Westlaw through Ch. 255 of 2014 2d Reg. Sess. and Sp. “A” Sess. of 23d Leg.); HAW. REV. STAT. ANN. § 663-1.6 (West, Westlaw through Act 235 of 2014 Reg. Sess. of Leg.); MASS. GEN. LAWS ANN. ch. 268, § 40 (West, Westlaw through ch. 1-505 of 2014 Ann. Sess.); MINN. STAT. ANN. § 604A.01 (West, Westlaw through 2015 Reg. Sess. Ch. 3); NEV. REV. STAT. ANN. § 202.882 (West, Westlaw through 28th Spec. Sess. 2014); OHIO REV. CODE ANN. § 2921.22 (LexisNexis through 130th Gen. Assemb. 2014); R.I. GEN. LAWS ANN. §§ 11-1-5.1, 11-56-1 (West, Westlaw through ch. 555 of Jan. 2014 Sess.); TEX. PENAL CODE ANN. § 38.17 (West, Westlaw through 2013 3d Called Sess. of 83d Leg.); VT. STAT. ANN. title 12, § 519 (West, Westlaw through Adjourned Sess. of 2013–2014 Gen. Assemb.); WASH. REV. CODE ANN. § 9.69.100 (West, Westlaw through ch. 4 of 2015 Reg. Sess.); WIS. STAT. ANN. § 940.34 (West, Westlaw through 2013 Act 380).

²⁴ Trial counsel at installations in Washington, Hawaii, Alaska, Colorado, and California should gain familiarity with the state duty to report laws. These laws provide an existing legal framework for commanders to punish soldiers for failing to report some crimes. The state statutes may be properly assimilated under Article 134, UCMJ, and prosecuted at courts-martial. See generally UCMJ art. 134 (2012).

²⁵ Wash. Rev. Code Ann. §§ 9.69.100, 9.94A.030, 9A.44.040, 9A.44.050, 9A.44.060, 9A.44.100 (West, Westlaw through ch. 4 of 2015 Reg. Sess.).

²⁶ Wash. Rev. Code Ann. § 9.69.100(4) (Westlaw).

reasonable belief that making a report would place that person or another family member in danger of immediate physical harm.²⁷

In Hawaii, “Any person at the scene of a crime who knows that a victim is suffering from serious physical harm shall obtain or attempt to obtain aid from law enforcement or medical personnel if the person can do so without danger or peril to any person.”²⁸ Violation of the Hawaii statute is a petty misdemeanor.²⁹

In Alaska, it is illegal to fail to report as soon as reasonably practicable to a peace officer or law enforcement agency, what an eyewitness knows or reasonably should know is the attempted sexual penetration or sexual penetration of a person without the consent of the person or while the person is incapacitated, among other enumerated offenses.³⁰ It is an affirmative defense to not report in a timely manner if the eyewitness did not report because he reasonably believed that doing so would have exposed the eyewitness or others to a substantial risk of physical injury.³¹ A violation of the Alaska duty to report law is a misdemeanor.³²

In Colorado, “It is the duty of every corporation or person who has reasonable grounds to believe that a crime has been committed to report promptly the suspected crime to law enforcement authorities.”³³ California’s Child Victim Protection Act requires any person who reasonably believes that he has observed the commission of murder, rape, or other sex crimes against a child under the age of fourteen years to notify a peace officer.³⁴ The California statute carves out a broad exception to the reporting mandate. Notably, a “person who is related to either the victim or the offender, including a husband, wife, parent, child, brother, sister, grandparent, grandchild, or other person related by consanguinity or affinity” is not required to report.³⁵ The exception renders the purpose

²⁷ *Id.*

²⁸ HAW. REV. STAT. ANN. § 663-1.6 (West, Westlaw through Act 235 of 2014 Reg. Sess. of Leg.).

²⁹ *Id.*

³⁰ ALASKA STAT. ANN. §§ 11.56.765, 11.56.767 (West, Westlaw through 2014 2d Reg. Sess. of 28th Leg.)

³¹ *Id.* §§ 11.56.765(b), 11.56.767(b).

³² *Id.* § 11.56.765(d).

³³ COLO. REV. STAT. ANN. § 18-8-115 (West, Westlaw through 2015 ch. 2 of 1st Reg. Sess. of 70th Gen. Assemb.)

³⁴ CAL. PENAL CODE § 152.3 (West, Westlaw through 2014 Reg. Sess. laws, Res. ch. 1 of 2013–2014 2nd Ex. Sess., and all propositions on 2014 ballots).

³⁵ *Id.* § 152.3(e)(1).

of the statute virtually meaningless as many victims of child sexual abuse are abused by parents.³⁶ Such a sweeping exception destroys the efficacy of the statute. Similar to other state statutes, the Child Victim Protection Act permits a person to not report based on a reasonable fear for his own safety or the safety of his family.³⁷ A violation of the statute is a misdemeanor punishable by a term of imprisonment not more than six months and a fine of not more than \$1500.³⁸

Several states have reporting statutes that apply only to sexual battery cases. In Florida, state law requires an eyewitness to report to law enforcement when the person has reasonable grounds to believe he observed a sexual battery and has the present ability to seek assistance for the victim by immediately reporting.³⁹ An eyewitness is not required to report when reporting would expose the person to threat of physical violence.⁴⁰ Similar to California, the Florida statute does not mandate reporting if the eyewitness is the husband, wife, parent, grandparent, child, grandchild, brother or sister of the offender or victim, by consanguinity or affinity.⁴¹ The plain language of the Florida statute makes clear the purpose of the law is to seek immediate assistance for the victim of a sexual battery. Presumably, the assistance envisioned is law enforcement intervention of an ongoing crime, or facilitation of medical assistance to a victim in the time period immediately following an assault. It does not appear the statute was enacted with a primary purpose to aid in prosecution. A violation of the statute is a misdemeanor.⁴²

Rhode Island's duty to report statute states:

A person who knows that another person is a victim of sexual assault, murder, manslaughter, or armed robbery and who is at the scene of the crime shall, to the extent that the person can do so without danger of peril to the

³⁶ Sonya Negriff et al., *Characterizing the Sexual Abuse Experiences of Young Adolescents*, 38 CHILD ABUSE & NEGLECT 261, 262 (2014) (citations omitted). According to one study, "37% of abused children were abused by a biological parent and 23% by a non-biological parent or parent's partner." *Id.*

³⁷ CAL. PENAL CODE § 152.3(e)(3) (Westlaw).

³⁸ *Id.* § 152.3(d).

³⁹ FLA. STAT. ANN. § 794.027 (West, Westlaw through Ch. 255 of 2014 2d Reg. Sess. and Sp. "A" Sess. of 23d Leg.).

⁴⁰ *Id.* § 794.027(4).

⁴¹ *Id.* § 794.027(5).

⁴² *Id.* § 794.027(6).

person or others, report the crime to an appropriate law enforcement official as soon as reasonably practicable.⁴³

Violation of the statute is subject to a term of imprisonment not to exceed six months.⁴⁴ Massachusetts' reporting statute is nearly identical to Rhode Island's and imposes as punishment a fine of not less than \$500 or more than \$2500.⁴⁵

Pursuant to Nevada law, a "person who knows or has reasonable cause to believe that another person has committed a violent or sexual offense against a child" twelve years old or younger must report the crime to law enforcement and make the report as soon as reasonably practicable.⁴⁶ A person "[h]as 'reasonable cause to believe' if, in light of all the surrounding facts and circumstances which are known or which reasonably should be known to the person at the time, a reasonable person would believe, under those facts and circumstances, that an act, transaction, event, situation or condition exists, is occurring or has occurred."⁴⁷

A strict reading of the statute suggests the reporting requirement extends beyond eyewitnesses and creates a duty on individuals who lack personal knowledge of the crime, but receive information from a credible source. Additionally, the statute requires the report to include if known, the names of the victim and offender, the location of the offense, and the facts and circumstances of the offense.⁴⁸ The specificity of the reporting requirement indicates the primary purpose of the Nevada statute is prosecution of the offender and not providing immediate assistance to the victim. Violation of the statute is a misdemeanor.⁴⁹

Ohio law states "No person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law

⁴³ R.I. GEN. LAWS ANN. §§ 11-1-5.1 (West, Westlaw through ch. 555 of Jan. 2014 Sess.).

⁴⁴ *Id.*

⁴⁵ MASS. GEN. LAWS ANN. ch. 268, § 40 (West, Westlaw through ch. 1-505 of 2014 Ann. Sess.).

⁴⁶ NEV. REV. STAT. ANN. § 202.882 (West, Westlaw through 28th Spec. Sess. 2014).

⁴⁷ *Id.* § 202.879. The statute also states a person "Acts 'as soon as reasonably practicable' if, in light of all the surrounding facts and circumstances which are known or which reasonably should be known to the person at the time, a reasonable person would act within approximately the same period under those facts and circumstances." *Id.*

⁴⁸ *Id.* § 202.882.

⁴⁹ *Id.*

enforcement authorities.”⁵⁰ Violation of the Ohio statute is a misdemeanor.⁵¹ A plain reading of the statute appears to make punishable the failure to report a felony by a person whose knowledge of the alleged crime was founded on hearsay. Surprisingly, the statute survived a constitutional void for vagueness challenge. Providing scant analysis, the Court of Appeals of Ohio held the statute not to be void for vagueness, concluding the statute “gives a person of ordinary intelligence fair notice that the conduct of failing to report a serious crime about which a person has knowledge is forbidden by statute.”⁵² Incredibly, the statute fails to state to what degree a person need be satisfied a felony has occurred to trigger the law’s obligation to report. Is it some evidence, reasonable grounds, probable cause, a preponderance of evidence, clear and convincing evidence, or some other standard of proof? On its face, the statute seems to require a person to report an alleged felony despite subjectively doubting to an extent that a crime actually occurred.

2. Duties to Rescue

In addition to the states requiring duties to report, five states have taken the uncommon and substantial step of imposing duties to rescue or assist. Wisconsin, Rhode Island, Vermont, Minnesota, and Texas mandate a witness to rescue or assist a victim when the witness is aware the victim is exposed to physical harm.⁵³ Rhode Island requires:

Any person at the scene of an emergency who knows that another person is exposed to, or has suffered, grave physical harm shall, to the extent that he or she can do without danger or peril to himself or herself or to others, give reasonable assistance to the exposed person.⁵⁴

⁵⁰ OHIO REV. CODE ANN. § 2921. 22 (LexisNexis through 130th Gen. Assemb. 2014). The statute’s legislative history reveals the “rationale for requiring that serious crimes be reported is that effective crime prevention and law enforcement depend significantly on the cooperation of the public. The section covers, for example, the situation where bystanders ignore a murder victim’s pleas for help because they do not want to ‘become involved.’” *Id.* at cmt. (citing 1974 Comm. Cmt. to H 511).

⁵¹ *Id.* § 2921. 22.

⁵² *State v. Wardlow*, 484 N.E.2d 276, 279 (Ohio Ct. App. 1985).

⁵³ Breanna Trombley, Note, *Criminal Law—No Snitches for Snitches: The Need for a Duty-to-Report Law in Arkansas*, 34 U. ARK. LITTLE ROCK L. REV. 813, 818 (2012).

⁵⁴ R.I. GEN. LAWS ANN. § 11-56-1 (West, Westlaw through Ch. 555 of Jan. 2014 Sess.).

A violation of the Rhode Island statute is a petty misdemeanor and will subject the violator to a prison term not to exceed six months and/or a fine not to exceed \$500.⁵⁵ Unfortunately, the statute fails to define “emergency” or “reasonable assistance,” and there are no reported criminal cases applying the duty to a bystander at the scene of a crime. Moreover, in *State v. McLaughlin*, the Supreme Court of Rhode Island stated, in dicta, the statute’s affirmative duty to provide reasonable assistance imposes a “very limited duty on the part of citizens at large to render aid to one another”⁵⁶

In Wisconsin, any “person who knows that a crime is being committed and that a victim is exposed to bodily harm shall summon law enforcement officers or other assistance or shall provide assistance to the victim.”⁵⁷ In essence, the statute does not strictly mandate a person to rescue a victim, as a person can satisfy his statutory obligation by merely reporting to law enforcement. The Wisconsin statute also carves out exceptions not requiring compliance when compliance would place a person in danger or would interfere with duties the person owes to others.⁵⁸ Violation of the statute is a Class C misdemeanor.⁵⁹

Interestingly, in *State v. LaPlante*, the statute survived a challenge as unconstitutionally vague.⁶⁰ LaPlante hosted a party at her house and stood idly by as seven other guests beat a partygoer.⁶¹ She was subsequently convicted of failing to aid the victim or notify law enforcement.⁶² On appeal, LaPlante argued, *inter alia*, that the statute was unconstitutionally vague because it was not clear what level of knowledge was required in order to impose a duty to aid, and whether or not a person witnessing a crime actually had to believe a crime was being committed.⁶³ The Court of Appeals of Wisconsin held that the statute is not unconstitutionally vague stating,

A plain and reasonable reading of the statute reveals that any person who knows that a crime is being committed

⁵⁵ *Id.*

⁵⁶ *State v. McLaughlin*, 621 A.2d 170, 175 n.5 (R.I. 1993).

⁵⁷ WIS. STAT. ANN. § 940.34 (West, Westlaw through 2013 Act 380).

⁵⁸ *Id.* § 940.34(2)(d).

⁵⁹ *Id.* § 940.34(1).

⁶⁰ *State v. LaPlante*, 521 N.W.2d 448 (Wis. Ct. App. 1994).

⁶¹ *Id.*

⁶² *Id.* at 449.

⁶³ *Id.* at 450.

and knows that the victim is exposed to bodily harm must either call for a law enforcement officer, call for other assistance or provide assistance to the victim To prove a case then, the state must convince the fact-finder that an accused believed a crime was being committed and that the victim was exposed to bodily harm.⁶⁴

Under the Minnesota statute titled the *Good Samaritan Law*,

A person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that the person can do so without danger or peril to self or others, give reasonable assistance to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel.⁶⁵

Much like the Wisconsin statute, the Minnesota statute allows a person to comply simply by summoning help rather than providing direct aid.⁶⁶ Additionally, “scene of an emergency” is not defined. However, there are no reported cases interpreting the statute as to require the physical intervention of a crime. Violation of the Good Samaritan Law is a petty misdemeanor.⁶⁷

Texas requires a person to assist a child sexual assault victim, or alternatively, to report to law enforcement the commission of an offense. A person commits an offense if:

- (1) [T]he actor observes the commission or attempted commission of an offense . . . under circumstances in which a reasonable person would believe that an offense of a sexual or assaultive nature was being committed or was about to be committed against the child;
- (2) the actor fails to assist the child or immediately report the commission of the offense to a peace officer or law enforcement agency; and

⁶⁴ *Id.* at 451.

⁶⁵ MINN. STAT. ANN. § 604A.01 (West, Westlaw through 2015 Reg. Sess. ch. 3).

⁶⁶ *Id.*

⁶⁷ *Id.*

(3) the actor could assist the child or immediately report the commission of the offense without placing the actor in danger of suffering serious bodily injury or death.⁶⁸

A violation of the Texas law is a misdemeanor.⁶⁹ Notably, the Texas statute incorporates a reasonable person standard.

Finally, under the Vermont Duty to Aid the Endangered Act,

[A] person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.⁷⁰

Significantly, the Supreme Court of Vermont has stated in dicta that the law does not stretch as far as requiring physical intervention in a fight. In *State v. Joyce*, the court stated the “statute does create a duty to aid endangered persons under some circumstances. It does not create a duty to intervene in a fight, however. Such a situation must present the ‘danger or peril’ to the rescuer which under the statute prevents a duty from arising.”⁷¹ Violating the Vermont statute is a fine of not more than \$100.⁷²

In sum, the Alaska, Colorado, California, Florida, Nevada, and Texas statutes commendably prescribe reasonable person standards to determine when duties to report or assist are triggered. However, in Rhode Island, Hawaii, Ohio, Massachusetts, Washington, Vermont, Wisconsin, and Minnesota, bystanders are in the unenviable position of guessing how certain they must be that what they observe requires reporting or assistance. Moreover, the penalties are uniformly soft, ranging from small fines to relatively short prison terms. None of the statutes qualify as felonies.

⁶⁸ TEX. PENAL CODE ANN. § 38.17 (West, Westlaw through 2013 3d Called Sess. of 83d Leg.).

⁶⁹ *Id.*

⁷⁰ VT. STAT. ANN. title 12, § 519 (West, Westlaw through Adjourned Sess. of 2013–2014 Gen. Assemb.).

⁷¹ *State v. Joyce*, 433 A.2d 271, 273 (Vt. 1981) (quoting VT. STAT. ANN. title 12, § 519(a)).

⁷² VT. STAT. ANN. title 12, § 519 (Westlaw).

D. Military Duties to Report Crimes

Within the Department of Defense, all Naval personnel have a duty pursuant to United States Navy Regulations Article 1137 to report crimes.⁷³ Article 1137 states, “Persons in the Naval Service shall report as soon as possible to superior authority all offenses under the Uniform Code of Military Justice which come under their observation, except when such persons are themselves already criminally involved in such offenses at the time such offenses first come under their observation.”⁷⁴ Article 1137 only covers those offenses that a sailor or marine personally observes and carves out an exception for self-reporting of one’s own criminal behavior in violation of his or her privilege against compelled self-incrimination.⁷⁵

Unlike the Navy, the Army has not established a general duty for all soldiers to report crime. However, the Army has imposed on commanders, leaders, and other personnel under special circumstances, regulatory duties to report crimes. Army Regulation (AR) 600-20, Army Command Policy states that, “ensuring the proper conduct of soldiers is a function of command. Commanders and leaders in the Army, whether on or off duty or in a leave status, will . . . [t]ake action consistent with Army regulations in any case where a soldier’s conduct violates good order and military discipline.”⁷⁶ On public conveyances, leaders are required to request the assistance of military police or local police.⁷⁷ In cases not on public conveyances, when military police are not available, leaders will request the assistance of civilian police.⁷⁸ When military police are not present, officers, warrant officers, and noncommissioned officers will obtain the

⁷³ U.S. DEP’T OF NAVY, U.S. NAVY REGULATIONS, 1990, art. 1137 (14 Sept. 1990) [hereinafter U.S. NAVY REGULATIONS] amended by All Navy Message, 049/10, 211456Z Jul 10, Sec’y of Navy, subject: Change to U.S. Navy Regulations in Light of U.S. v. Serianne [hereinafter ALNAV Message 049/10].

⁷⁴ *Id.*

⁷⁵ For a detailed discussion and analysis of the self-incrimination implications of the Navy’s separate requirements under Article 1137 mandating self-reporting of civilian arrests and criminal charges, see *United States v. Serianne*, 68 M.J. 580 (N-M. Ct. Crim. App. 2009); *United States v. Serianne*, 69 M.J. 8 (C.A.A.F. 2010); Lieutenant Randall Leonard & Lieutenant Joseph Toth, *Failure to Report: The Right Against Self-Incrimination and the Navy’s Treatment of Civilian Arrests After United States v. Serianne*, 213 MIL. L. REV. 1 (2012).

⁷⁶ U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-4a. (6 Nov. 2014) [hereinafter AR 600-20].

⁷⁷ *Id.* para. 4-4b.

⁷⁸ *Id.* para. 4-4c.

soldier's name, social security number, organization and station, and send the information and a statement describing the incident to the soldier's commander.⁷⁹ Importantly, these duties to report only apply to incidents personally observed by leaders.⁸⁰

Separate from the duty of leaders to generally report crime as discussed above, commanders are required to report all incidents of sexual assault to law enforcement, the Sexual Assault Response Coordinator (SARC), and the Office of the Staff Judge Advocate.⁸¹ If a victim consents, chaplains are required to report incidents of sexual assault to the SARC.⁸² Judge advocates are required to report incidents of sexual assault to law enforcement if law enforcement has not been previously notified.⁸³ The special reporting requirements of commanders, chaplains, and judge advocates require reporting of all incidents of sexual assault known to the personnel and not merely those incidents personally observed.⁸⁴

With respect to reporting crimes to civilian law enforcement, AR 600-20 states soldiers may report crimes to "civilian authorities in their civilian capacities as private citizens."⁸⁵ This provision of the regulation does not establish a duty; rather, it provides discretionary latitude for all soldiers to make case-by-case reporting decisions.

E. Commission by Omission

The Model Penal Code states criminal liability requires conduct that includes either a voluntary act or the omission to perform an act of which a person is physically capable.⁸⁶ Significantly, "liability for the commission of an offense may not be based on an omission unaccompanied by action unless: (a) the omission is expressly made sufficient by the law defining the offense; or (b) a duty to perform the

⁷⁹ *Id.* para. 4-4d.

⁸⁰ *Id.*

⁸¹ *Id.* para. 8-5o. It is important to note a commander's duty to report under this authority is not limited to incidents that are personally observed by a commander. To the contrary, the regulation also requires a commander to report incidents that come to his attention but were not personally observed. *Id.*

⁸² *Id.* para. 8-5f.

⁸³ *Id.* para. 8-5g.

⁸⁴ *Id.* para. 8-5.

⁸⁵ *Id.* para. 4-10b.

⁸⁶ MODEL PENAL CODE § 2.01 (West, Westlaw through 2013 Ann. Meeting of American Law Institute).

omitted act is otherwise imposed by law.”⁸⁷ Some jurisdictions have statutorily created special relationships that trigger special duties for a class of person to affirmatively act.⁸⁸

These duties are separate from the general duties created by some of the state laws discussed above. It is the special duties that the Model Penal Code speaks to as allowing an omission to form the basis for liability. Some examples of special relationships creating duties to protect against reasonable risk of physical harm are a common carrier to its passenger, an innkeeper to a guest, and a store owner to a patron.⁸⁹ In a tort context, a court has declined to recognize a special relationship between the military and servicemembers.⁹⁰

⁸⁷ *Id.* The section’s explanatory note goes on to state:

There are some cases where an omission is expressly made sufficient by the law defining the offense, as in the failure to file an income tax return. An omission will also suffice in cases where a duty to perform the omitted act is otherwise imposed by law. Laws defining the obligation of parent toward infant children provide an illustration.

Id. at explanatory note.

⁸⁸ See Melody J. Stewart, *How Making the Failure to Assist Illegal Fails to Assist: An Observation of Expanding Criminal Omission*, 25 AM. J. CRIM. L. 385 (1998).

⁸⁹ *Id.* at 398.

⁹⁰ See *Rodrigue v. United States*, 788 F. Supp. 49 (D. Mass. 1991). In *Rodrigue*, the United States District Court for the District of Massachusetts held the Air Force owed no affirmative duty of rescue to Airman Rodrigue. *Id.* at 52. While stationed at Kadena Air Base, Okinawa, and on leave, Airman Rodrigue went swimming twenty-five miles from base at approximately 4:00 PM. *Id.* at 50. The currents carried Airman Rodrigue out to sea, and at 6:30 PM, Airmen on the beach made calls for help to the base. *Id.* For various reasons, an Air Force helicopter did not arrive until 10:15 PM and Airman Rodrigue’s body was found the next day. *Id.* at 50–51. Airman Rodrigue’s father filed a claim under the Military Claims Act which the Air Force denied concluding that the Air Force had no legal duty to rescue the Airman. *Id.* at 51. The District Court analyzed the Air Forces’ duty owed to airman Rodrigue and pointed largely to the *Restatement (Second) of Torts* to answer the question. *Id.* As a general rule, the court stated there is no duty in tort to rescue another unless the first person is responsible for the second person’s danger. *Id.* (citation omitted). As an exception to the general rule, when the first person stands in a special relationship with the person in distress, an affirmative duty to aid does exist. *Id.* (citation omitted). However, “no special relationship based solely on the relationship of the military to its servicemen has ever been recognized.” *Id.* at 52. The court pointed to the *Restatement’s* principle that “an employer only owes a duty to aid and protect an employee when the employee is endangered while ‘acting within the scope of his employment.’” *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 314B(2)). Because Airman Rodrigue was off-base, off-duty, and engaged in non-military activities when he drowned, the court reasoned he was acting outside the scope of his employment and the Air Force did not owe him an affirmative duty to rescue. *Id.*

II. Lawfulness of Order

Moving from the historical and contemporary civilian treatment of duties to report and intervene, this section examines the legality of orders to report crime or to intervene under military law and the UCMJ. As a practical matter, before jumping to an analysis of lawfulness, it is important to understand how an order violation is enforced. Order violations are punished under Article 92 of the UCMJ.⁹¹ A commander's authority is not infinite. Consequently, Article 92 does not punish all behavior that is contrary to a commander's direction. To properly form the basis of an Article 92 violation, an order must be lawful.⁹² If an order is lawful, Article 92 provides three distinct offenses: (1) failure to obey a lawful general order or regulation; (2) failure to obey any other lawful order; and (3) dereliction of duty.⁹³

A lawful general order or regulation is an order or regulation that is generally applicable to the command of the officer issuing the order.⁹⁴ The order must be issued by an officer that is either: (1) an officer exercising general court-martial jurisdiction; (2) a general or flag officer in command; or (3) a commander superior to the first two categories.⁹⁵ Other lawful orders, as contemplated under Article 92, are those written regulations which are not general regulations.⁹⁶ Dereliction of duty under Article 92 is generally characterized as willfully or negligently failing to perform duties.⁹⁷ "A duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure or custom of the service."⁹⁸ In sum, Article 92 is the enforcement mechanism for any hypothetical violations of orders to report crimes or to intervene to stop crimes.

⁹¹ UCMJ art. 92 (2012).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 16.c.(1)(a) (2012) [hereinafter MCM].

⁹⁵ *Id.* pt. IV, ¶ 16.c.(1)(a)(i)–(iii).

⁹⁶ *Id.* pt. IV, ¶ 16.c.(2)(a).

⁹⁷ *Id.* pt. IV, ¶ 16.c.(3)(c).

⁹⁸ *Id.* pt. IV, ¶ 16.c.(3)(a).

A. The General Test

A general order or regulation is lawful unless it is contrary to the Constitution, the laws of the United States, or lawful superior orders or for some reason is beyond the authority of the official issuing it⁹⁹

The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. The order may not, without such a valid military purpose interfere with private rights or personal affairs. . . .¹⁰⁰ [Moreover,] [t]he order must not conflict with the statutory or constitutional rights of the person receiving the order.¹⁰¹

Additionally, an order is presumed to be lawful as long as it has a valid military purpose and is a clear, specific, narrowly drawn mandate.¹⁰²

1. Military Purpose

It is a long-established principle that a commander's order cannot reach as far as regulating the personal affairs of a soldier. In the seminal case of *United States v. Milldebrandt*, the Court of Military Appeals stated, "We do not believe the authority of a commanding officer extends to the point that an accused can be ordered to make all facets of his personal dealings public."¹⁰³ In *Milldebrandt*, a court-martial convicted the appellant of disobeying an order of a superior officer in violation of Article 92, UCMJ.¹⁰⁴ Appellant's command granted him leave for a month to seek civilian employment to supplement his income in order to improve his personal financial problems.¹⁰⁵ The leave was conditioned on the

⁹⁹ *Id.* pt. IV, ¶ 16.c.(1)(c).

¹⁰⁰ *Id.* pt. IV, ¶ 14.c.(2)(a)(iv).

¹⁰¹ *Id.* pt. IV, ¶ 14.c.(2)(a)(v).

¹⁰² *United States v. Moore*, 58 M.J. 466, 468 (C.A.A.F. 2003) (citing *United States v. Womack*, 29 M.J. 88, 90 (C.M.A. 1989)).

¹⁰³ *United States v. Milldebrandt*, 25 C.M.R. 139, 141 (C.M.A. 1958).

¹⁰⁴ *Id.* at 140.

¹⁰⁵ *Id.*

appellant providing weekly progress reports concerning his personal finances.¹⁰⁶ The appellant subsequently failed to provide the reports.¹⁰⁷ The court held that the order was so all-inclusive that it was unenforceable.¹⁰⁸ According to the court, the order “was not necessary to the successful pursuit of any military mission, and it was not required to maintain the morale, discipline, or good order of the unit or to keep the military free from disrepute.”¹⁰⁹

However, there are many instances where commanders may lawfully regulate the personal conduct of soldiers. It is well settled that an order protecting others from injury at the hands of a soldier is a valid military purpose. In *United States v. Dumford*, the appellant, who was infected

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 141.

¹⁰⁹ *Id.* at 142. However, the court does seem to suggest that the order would have been lawful if the command was to “contact the creditor and thus improve the civilian-service relationship.” *Id.* The Chief Judge’s opinion concurring in the result is particularly insightful.

Persons in the military service are neither puppets nor robots. They are not subject to the willy-nilly push or pull of a capricious superior, at least as far as trial punishment by court-martial is concerned. In that area they are human beings endowed with legal and personal rights which are not subject to military order. Congress left no room for doubt about that. It did not say that the violation of any order was punishable by court-martial, but only that the violation of a lawful order was.

The legality of an order is not determined solely by its sources. Consideration must also be given to its content. If an order imposes a limitation on a personal right, it must appear that it is “reasonably necessary to safeguard and protect the morale, discipline and usefulness of the members of a command and . . . directly connected with the maintenance of good order in the services.” I suppose that no one would doubt the invalidity of an order which directs military personnel who purchase an automobile to buy only from a particular manufacturer or the illegality of an order which requires military personnel who telephone family or friends by long distance to call on a person to person basis, instead of station to station. In cases of this kind, we must look closely to the connection between the personal act required by the order, and the needs of the military service. As the principal opinion points out, the order here is completely unrelated to any requirement of the military service. On that basis it is not a “lawful order” within the meaning of Article 92 of the Code.

Id. at 143 (citations omitted).

with Human Immunodeficiency Virus (HIV), was ordered to warn servicemembers and civilian sex partners that he was HIV positive before engaging in sexual activity, and to take precautions against spreading the virus.¹¹⁰ The Court of Military Appeals held, “We are certain that, when a servicemember is capable of exposing another person to an infectious disease, the military has a legitimate interest in limiting his contact with others, including civilians, and otherwise preventing the spread of that condition.”¹¹¹

In *United States v. McDaniels*, the Court of Appeals for the Armed Forces held as lawful an order prohibiting a marine diagnosed with narcolepsy from driving his personal vehicle.¹¹² The marine’s commander testified at trial that he issued the order to protect other marines and civilians in the event the appellant fell asleep while driving.¹¹³ Despite the order’s clear interference with appellant’s private right to drive a vehicle, the order was permissible because of its valid military purpose.¹¹⁴ The court concluded that it agreed with the following statement of the Navy-Marine Corps Court of Criminal Appeals:

We can imagine few situations more likely to result in fatal or serious injury, to both the driver and anyone who happens to be in the path of his automobile, than a driver who is subject to falling asleep at any moment. Just as our superior court upheld the “safe sex” orders issued in the case of an HIV-positive servicemember . . . we have no difficulty finding that, under the circumstances of this case, the order not to drive a [privately owned vehicle] had a valid military purpose and was neither overly broad

¹¹⁰ *United States v. Dumford*, 30 M.J. 137, 138 (C.M.A. 1990).

¹¹¹ *Id.* at 138 (citation omitted). The *Dumford* court went on to state,

We have absolutely no doubt that preventing a servicemember who has [Human Immunodeficiency Virus] from spreading it to the civilian population is a public duty of the highest order and, thus, is a valid military objective. It is clear to us that such conduct could be found to be service-discrediting.

Id. at n.2 (citations omitted).

¹¹² *United States v. McDaniels*, 50 M.J. 407, 408 (C.A.A.F. 1999).

¹¹³ *Id.*

¹¹⁴ *Id.*

nor did it impose an impermissible burden on his personal rights.¹¹⁵

Additionally, in *United States v. Padgett*, the Court of Appeals for the Armed Forces, citing *Dumford*, held that an order for a coastguardsman to terminate a romantic relationship with a fourteen year-old had a valid military purpose because the military had a legitimate interest in protecting civilians from injury by servicemembers.¹¹⁶ In *United States v. Moore*, a galley in Virginia Beach employed military and civilian workers.¹¹⁷ The majority of the civilian workers were either physically or mentally disabled.¹¹⁸ Because of the unique working environment, local standing policy prohibited military employees from, among other things, ordering civilians to do tasks.¹¹⁹ Instead, if military employees wanted the civilians to do anything work-related, they were to request permission through military channels.¹²⁰ The court concluded that the valid military purpose of the policy “was to promote the good order and discipline in an environment in which civilian employees—the vast majority of whom had physical or mental disabilities—were at an increased risk of abuse and injury by non-disabled military personnel.”¹²¹

2. *Military Purpose As Applied to Orders to Intervene and Stop Sexual Assault or Drunk Driving*

A straight-forward application of *Dumford*, *McDaniels*, *Padgett*, and *Moore* convincingly establishes that orders to intervene to stop sexual assault or to prevent a soldier from driving drunk contain a valid military purpose of protecting civilians and other servicemember victims from physical injury. In the drunken-driving context, the order protects both the inebriated soldier and innocent bystanders on the road. In cases of sexual assault, an order to intervene obviously aims to protect the physical well-

¹¹⁵ *Id.* at 408–09 (citations omitted) (quoting *United States v. McDaniels*, No. 9700570, 1998 WL 238586, at *1 (N-M. Ct. Crim. App. Apr. 24, 1998).

¹¹⁶ *United States v. Padgett*, 48 M.J. 273, 277–78 (C.A.A.F. 1998). The court buttressed its conclusion by providing a separate independent reason for holding that the order had a valid military purpose. *Id.* Citing to Article 134, UCMJ and *Milldebrandt*, the court stated that the order also had a valid military purpose of protecting the reputation of the military. *Id.*

¹¹⁷ *United States v. Moore*, 58 M.J. 466 (C.A.A.F. 2003).

¹¹⁸ *Id.* at 467.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 469.

being of a victim. However, a finding of a permissible military purpose is not the sole requirement to find an order lawful. For reasons discussed in subsequent sections, many orders to intervene are likely unlawful.

3. Military Purpose as Applied to Duties to Report

Duties to report crimes contain two major military purposes: (1) it effectively aids law enforcement and consequently the command in ensuring the maintenance of good order and discipline; and (2) it increases the ability of law enforcement and medical professionals to provide assistance to crime victims.

B. Duty to Report Case Law

The first military case to provide a detailed discussion analyzing a duty to report crime was the 1986 decision of the Court of Military Appeals, *United States v. Heyward*.¹²² In *Heyward*, the appellant, a noncommissioned officer in the Air Force, was convicted of dereliction of duty for failing to report the marijuana use of fellow airmen.¹²³ Additionally, the appellant was convicted of using marijuana during the same time period. The lower court determined that appellant had a duty to report drug use of other airmen, established by Air Force regulations and directives applicable to appellant as a noncommissioned officer and customs of the service.¹²⁴ The prosecution's evidence proved that appellant was present on at least five occasions when the airmen were using marijuana and that appellant used marijuana on three of those occasions.¹²⁵ The court granted review of the following issue: "Can the appellant's conviction for dereliction of duty for failure to report drug abuse by others be affirmed when the government's evidence indicated that the appellant was criminally involved in most of the drug abuse?"¹²⁶ The court held that when "the witness to drug abuse is already an accessory or principal to the illegal activity that he fails to report, the privilege against compelled self-incrimination may excuse non-compliance. We emphasize, however, that the basic reporting requirement is valid and

¹²² *United States v. Heyward*, 22 M.J. 35 (C.M.A. 1986).

¹²³ *Id.* at 36.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

permissible.”¹²⁷ The court’s following commentary regarding the legality of the duty to report drug abuse is particularly insightful:

A citizen’s obligation “to raise the ‘hue and cry’ and report felonies to the authorities” has been recognized throughout our history. Although “gross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship,” it will not, standing alone, subject an individual to criminal prosecution in the absence of a special duty. In this case, the court below found that appellant had a duty to report drug abuse, which duty was established by evidence of Air Force regulations, directives applicable to appellant as a noncommissioned officer, and the custom of the service. A military member who knowingly fails to perform a duty, whether the duty be imposed by administrative regulation, a custom of the service, or lawful order may be prosecuted under Article 92(3) for dereliction of duty.¹²⁸

Moreover, the court reasoned that the Air Force’s imposition of a special duty to report drug abuse was reasonable considering the military’s charge of maintaining high standards of health, morale, and fitness for duty to fight the nation’s wars.¹²⁹

Appellant argued that dereliction of duty predicated on his failure to report the drug abuse of others violated his privilege against self-incrimination.¹³⁰ The court stated that the Air Force’s reporting requirement did not compel a servicemember to report his own misconduct.¹³¹ Rather, it only required a servicemember to report the illegal acts of others.¹³² The requirement was facially neutral and did not require the declarant to provide an admission of his own criminal activity.¹³³

¹²⁷ *Id.* at 37 (citations omitted).

¹²⁸ *Id.* at 36.

¹²⁹ *Id.*

¹³⁰ *Id.* at 37.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

The court analogized the Air Force's reporting requirement to the constitutionally firm reporting requirement of a "hit and run" statute, as analyzed by the Supreme Court of the United States in *California v. Byers*,¹³⁴ in that "[the reporting requirement] depends on the occurrence of an event that is not suspect in itself—the knowledge of drug abuse by others."¹³⁵ However, the Court further determined that "when compelled disclosures have an incriminating potential, the government's need for the disclosure must be balanced against the individual's right against self-incrimination."¹³⁶ The Court performed the balancing test and concluded that at "the time a duty to report arises, and the witness to the drug abuse is already an accessory or principal to the drug abuse that he fails to report, the privilege against compelled self-incrimination may excuse his own non-compliance."¹³⁷ Therefore, the Court stated appellant could not be properly convicted of dereliction of duty for failure to report the use of others on the same occasions when he also personally used marijuana.¹³⁸

In a concurrence, Chief Judge Everett discussed the historical reluctance at common law to impose affirmative duties to report crimes or to rescue.¹³⁹ He described the awkward nature of punishing omissions by stating: "I do not applaud or condone the unwillingness many have to be their brother's keeper—although, on the other hand, I certainly would not wish to live in a country like Nazi Germany, where children were motivated to report any seemingly disloyal thought or action of family members."¹⁴⁰ The Chief Judge's main concern was that someone who failed to act may be unaware of the omission's consequences. In his view, it necessarily must be proved that an accused knew or should have known that he was subject to a particular duty.¹⁴¹ In Technical Sergeant Heyward's case, the Air Force directives sufficiently put him on notice of his duty as a noncommissioned officer to report subordinates' drug abuse.¹⁴²

In 1987, the Court of Military Appeals analyzed the legality of a Navy Regulation requiring all Naval personnel to report crimes in *United States*

¹³⁴ *California v. Byers*, 402 U.S. 424 (1971).

¹³⁵ *Heyward*, 22 M.J. at 37.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 38.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 39.

v. Reed.¹⁴³ Appellant was convicted of violating Navy Regulation Article 1139, by failing to report the transfer and possession of marijuana by a fellow marine, which was charged as a failure to obey a lawful general regulation.¹⁴⁴ Article 1139 stated, “Persons in the Department of the Navy shall report to proper authority offenses committed by persons in the Department of the Navy which come under this observation.”¹⁴⁵ Appellant was also found guilty, pursuant to his pleas, of a single specification of using marijuana on ten occasions.¹⁴⁶ The Court granted review of the following issue: “Whether United States Navy Regulations, Article 1139, requiring members of the naval service to report known offenses, may be enforced by criminal prosecution under Article 92.”¹⁴⁷

The court decided the case on a more narrow basis, but offered plenty of criticism and skepticism in dicta. The court reversed, holding that the providence inquiry was inadequate because the trial judge failed to resolve whether appellant’s failure to report was a result of his being an accessory or principal to the illegal activity he failed to report.¹⁴⁸ Despite concluding the case’s reversal pursuant to *Heyward* in one paragraph of analysis, Chief Judge Everett focused his concurring opinion on casting doubt on the propriety of the Navy’s general regulatory duty to report offenses.¹⁴⁹ Specifically, Chief Judge Everett expressed concerns regarding due process and First Amendment guarantees.¹⁵⁰

Distinguishing *Reed* from *Heyward*, the Chief Judge concluded that Article 1139 did not provide Reed with constitutionally required notice because Article 1139’s broad language did not adequately define the duty to report offenses.¹⁵¹ According to the Chief Judge,

¹⁴³ United States v. Reed, 24 M.J. 80 (C.M.A. 1987).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* (quoting U.S. DEP’T OF NAVY, U.S. NAVY REGULATIONS art. 1139 (1979)). The original 1973 version of Article 1139 stated “their observation” rather than the inexplicable and nonsensical change to “this observation” in a 1979 change to Article 1139. *Reed*, 24 M.J. at 81. The *Reed* court understood the change to be no more than a clerical error and read Article 1139 to actually state the original “their observation.” *Id.* Moreover, Article 1139 analyzed in *Reed*, is currently found at Article 1137, *supra* note 73.

¹⁴⁶ *Reed*, 24 M.J. at 81.

¹⁴⁷ *Id.* at 80.

¹⁴⁸ *Id.* at 83.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 84.

[A]ppellant was not adequately advised by Article 1139 that his failure to report drug usage by others was intended to be criminally punishable. Because generally no legal duty exists to report “to proper authority” the crimes of others, the vague language of this regulation was insufficient to meet due-process requirements.¹⁵²

The Chief Judge then went on to detail his conclusion that a sweeping requirement to report the crimes of others is unconstitutional pursuant to the First Amendment.¹⁵³

The drafters of the Bill of Rights contemplated that Americans could speak and associate freely. However, if each person in the community is subject to punishment for not reporting any offense he may observe someone else commit, free speech will be chilled, and the development of close personal relationships will be stifled

Police officers and prosecutors usually have some discretion as to whom they arrest and prosecute. However, Article 1139 leaves no similar discretion for persons in the Navy in determining what offenses to report; and it appears to subject them to an absolute, all inclusive duty to report offenses. . . . To impose on everyone this sweeping obligation will have inhibiting effects on freedom of association and assembly in the Navy—effects so great as to be impermissible under the First Amendment. . . .

[T]he power of an armed service over its members is not unlimited; and, even in the interests of military necessity military authorities may not create a “police state” within the military society, as Article 1139 purports to do.¹⁵⁴

In *United States v. Bland*, an airman recruit (E-1) was convicted of violating a lawful general regulation for failing to report a larceny and an

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 85

attempted larceny, offenses that came under his observation.¹⁵⁵ The court took the opportunity to reiterate the pronouncement of *Heyward* that the Navy's basic reporting requirement contained in Article 1137 (which previously was Article 1139) is valid and permissible.¹⁵⁶ However, without any further analysis, the court concluded that the general reporting requirement applied to an E-1 who did not possess special duties or serve in a leadership position.¹⁵⁷ In essence, the court's conclusion can be interpreted as applying the Navy's reporting requirement to all sailors and marines regardless of rank or position.

In 2005, in an unpublished decision, the Air Force Court of Criminal Appeals decided *United States v. Thompson*, revisiting an alleged duty to report drug abuse.¹⁵⁸ Airman basic (E-1) Thompson was found guilty, contrary to his pleas, of wrongfully using, possessing, and distributing marijuana on divers occasions.¹⁵⁹ Appellant alleged that the military judge erred by admitting incriminating statements appellant made to Air Force Office of Special Investigations investigators.¹⁶⁰ Appellant alleged that during his interview with law enforcement he provided incriminating information that he associated with other servicemember drug users, observed them use drugs, and was present when they purchased drugs.¹⁶¹ Appellant argued that by making those disclosures, he should have been suspected of dereliction of duty for not reporting the drug use of other servicemembers and consequently advised of his Article 31 rights.¹⁶²

¹⁵⁵ *United States v. Bland*, 39 M.J. 921 (N.M.C.M.R. 1994). The lawful general regulation at issue in *Bland* was Article 1137, U.S. Navy Regulations (1990) which revised Article 1139, U.S. Navy Regulations analyzed in *Reed*. *Bland*, 39 M.J. at 923. Article 1137 states, "Persons in the naval service shall report as soon as possible to superior authority all offenses under the Uniform Code of Military Justice which come under their observation, except when such persons are themselves criminally involved in such offenses at the time such offenses first come under their observation." U.S. DEP'T OF NAVY, U.S. NAVY REGULATIONS, 1990, art. 1137 (14 Sept. 1990). The court in *Bland*, noted that the 1990 revision of article 1137, which previously was Article 1139, aligned the regulation with the holding of *Reed* to carve out an exception to protect against compelling self-incrimination. *Bland*, 39 M.J. at 923.

¹⁵⁶ *Bland*, 39 M.J. at 923.

¹⁵⁷ *Id.*

¹⁵⁸ *United States v. Thompson*, No. 35274, 2005 WL 1017616, at *1 (A.F. Ct. Crim. App. Apr. 29, 2005).

¹⁵⁹ *Id.* at *1.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

Appellant, in a novel argument, tried to use *Medley* and *Heyward* as a sword to claim a duty to report drug abuse did in fact exist.¹⁶³ The court stated that *Medley* and *Heyward* were not germane because *Medley* and *Heyward* were predicated on a now-obsolete Air Force regulation requiring a duty to report.¹⁶⁴ Additionally, the court held that the appellant did not hold a special status as a matter of custom, such as an officer, noncommissioned officer, or law-enforcement officer that would require him to report the drug use of other servicemembers.¹⁶⁵ Therefore, the military judge did not abuse his discretion in denying appellant's motion to suppress his statement.¹⁶⁶

In sum, Article 92, UCMJ violations for failure to report crimes have withstood judicial scrutiny either as a custom of the particular service or through service regulations. There is some hesitation by the courts to sanction a general duty applicable to all soldiers regardless of rank. The majority of duty to report cases examine the duties of noncommissioned officers.¹⁶⁷ A commander wishing to create a generally applicable duty to report must craft a detailed written order sufficiently putting all those subjected to the order on proper notice of their duties to report specific offenses.¹⁶⁸ Even though a duty to report is likely lawful, practical considerations discussed in section IV weigh against creating such a duty.

C. Duty to Intervene Case Law

United States v. Thompson was decided the same day as *Heyward*.¹⁶⁹ In *Thompson*, appellant, a noncommissioned officer in the Air Force stood convicted of dereliction of duty for failing to prevent an airman from using marijuana "as it was in his duty to do by virtue of his position as a noncommissioned officer in the United States Air Force."¹⁷⁰ Additionally, appellant was convicted of using marijuana at the same time and place with the airman.¹⁷¹ The court granted review to determine whether the evidence was insufficient as a matter of law to support an Article 92

¹⁶³ *Id.* at *2.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *E.g.*, *Heyward*, 22 M.J. at 35; *United States v. Medley*, 33 M.J. 75 (C.M.A. 1991).

¹⁶⁸ *See, e.g.*, *Heyward*, 22 M.J. at 38–39; *Reed*, 24 M.J. at 83–86;

¹⁶⁹ *United States v. Thompson*, 22 M.J. 40 (C.M.A. 1986).

¹⁷⁰ *Id.* at 40.

¹⁷¹ *Id.* at 41.

violation alleging appellant was derelict in failing to prevent drug use.¹⁷² Citing *Heyward*, the court passed on the granted issue and held that when a noncommissioned officer is himself a principal to the criminal activity that he fails to report or prevent, he cannot be convicted of the substantive offense and dereliction of duty.¹⁷³ As a result, the court dismissed the dereliction of duty offense.¹⁷⁴

Although the court, citing *Heyward*, dismissed the offense, it detailed in dicta its doubts concerning whether the government established a clear-cut duty for appellant, as a noncommissioned officer, to prevent a crime.¹⁷⁵ In *Thompson*, the government attempted to prove that a noncommissioned officer had a duty to prevent drug use by providing examples of Air Force programs and policies aimed at eliminating drug abuse and the testimony of appellant's commander opining that the duty to prevent crime is inherent in the rank of a noncommissioned officer.¹⁷⁶ Despite agreeing with the general premise that noncommissioned officers have a responsibility to maintain high personal standards of conduct and to correct subordinates deficiencies,¹⁷⁷ the court stated,

Nevertheless, in the absence of an identifiable regulation, directive, or custom of service which would provide notice to noncommissioned officers of the *legal* requirements to which they are subject, we are reluctant to approve criminal sanctions under Article 92(3) for failure to perform a general unspecified duty to "prevent" crime.¹⁷⁸

The court went on to present the following questions illustrating the problems associated with assuming such duties:

In the context of dereliction of duty, what does the duty to prevent crime entail? Would an order by a

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Echoing the sentiments of any hardened Sergeant Major, First Sergeant, or Platoon Sergeant, the court stated that "any noncommissioned officer worth his salt would not hesitate to take affirmative action to stop the use of drugs, to break up fights, or halt a thief, or to take reasonable measures to 'prevent' crime, in any shape or form." *Id.*

¹⁷⁸ *Id.* (emphasis added).

noncommissioned officer to cease and desist be sufficient? Must the noncommissioned officer apprehend the suspect? What degree of force may a noncommissioned officer employ to prevent a crime? Does the duty extend to misconduct observed by a noncommissioned officer off-post as well as on-post? Explicit directives defining responsibilities in this regard would be advisable if the Air Force desires to subject its noncommissioned officers to criminal liability for failure to “prevent” drug abuse or any other crime.¹⁷⁹

The next major relevant case concerning a duty to prevent crime, *United States v. Dupree*, was decided by the Court of Military Appeals in 1987.¹⁸⁰ Staff Sergeant Dupree was a manager of a dormitory and his first sergeant arranged for prisoners from the local correctional facility to work for appellant at the dormitory.¹⁸¹ The first sergeant instructed appellant that the prisoners were to be returned to the correctional facility by 4:30 PM and were not to leave base or consume alcohol.¹⁸² Instead of performing work at the dormitory, appellant drove the prisoners to the beach for a party with female civilians.¹⁸³ At the beach, appellant drank beer and the prisoners and girls passed around a marijuana joint.¹⁸⁴ The appellant failed to intervene and stop the prisoners’ marijuana use.¹⁸⁵ Appellant was subsequently convicted of dereliction of duty, violating Article 92(3), UCMJ, by failing to report and prevent the same prisoners from using marijuana.¹⁸⁶

The Court of Appeals granted the following issue: Whether appellant’s conviction for dereliction of duty by failing to report the drug use of the prisoners could be affirmed when the drug abuse occurred while appellant was disobeying an order to return the prisoners to their confinement facility, and reporting the drug use was inconsistent with his

¹⁷⁹ *Id.*

¹⁸⁰ *United States v. Dupree*, 24 M.J. 319 (C.M.A. 1987).

¹⁸¹ *Id.*

¹⁸² *Id.* at 320.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 320–21.

¹⁸⁶ *Id.* at 320. The Specification in violation of Article 92 stated, “Dupree . . . was derelict in the performance of those duties in that he willfully failed to prevent and report the use of marijuana, a Schedule I controlled substance, by prisoners . . . as it was his duty to do.” *Id.* at 321.

right to remain silent.¹⁸⁷ The court held that the dereliction of duty for failing to report the drug use could not be affirmed, citing *United States v. Rosato*.¹⁸⁸ The court stated the prisoners' drug use was "inextricably intertwined with appellant's misconduct in taking these prisoners off base, his consumption of alcohol with them, and his failure to return them at the proper time It was reasonable for him to expect that his report on the prisoners would necessarily incriminate him in all these crimes."¹⁸⁹

The court then examined the remaining portion of the dereliction of duty specification which alleged the appellant's failure to prevent the prisoners' drug use.¹⁹⁰ In an unusual step, the court returned the record of trial to the Air Force Judge Advocate General for resubmission to the United States Air Force Court of Military Review to consider the Court of Military Appeals' concern about a clear-cut duty to prevent crime as discussed in dicta of *United States v. Thompson*.¹⁹¹ The Court of Military Appeals acknowledged in a footnote that the dicta in *Thompson* was not controlling and stated the Court of Military Review should also consider Article 7(c), UCMJ.¹⁹² That Article states: "Commissioned officers, warrant officers, petty officers, and noncommissioned officers have authority to quell quarrels, frays and disorders among persons subject to this chapter and to apprehend persons subject to this chapter who take part therein."¹⁹³ The Court of Military Appeals went on to state,

This statutory provision is not new and reflects the traditional duty of a noncommissioned officer to prevent disorders within their ranks. Use of marijuana by alcohol consuming military prisoners on a work detail in the company of civilian females would appear to be a serious disorder requiring immediate preventive action by their supervising noncommissioned officer. The disorder approach to this issue was not considered in *United States v. Thompson*.¹⁹⁴

¹⁸⁷ *Id.* at 320.

¹⁸⁸ *United States v. Rosato*, 11 C.M.R. 143, 147 (C.M.A. 1953) (holding that an order to provide a handwriting specimen violated Article 31, and thus, the order could not be the predicate for an Article 90, UCMJ, violation for refusing to obey the order).

¹⁸⁹ *United States v. Dupree*, 24 M.J. 319, 321 (C.M.A. 1987) (citations omitted).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 322.

¹⁹² *Id.*

¹⁹³ UCMJ art. 7(c) (2012).

¹⁹⁴ *Id.* at 322 n.3 (citations omitted).

Tasked by the Court of Military Appeals,¹⁹⁵ the Air Force Court of Military Review had to wrestle with the facially inconsistent dicta of *Thompson* and Article 7(c), UCMJ.¹⁹⁶ The Court of Military Review started its analysis by reviewing Air Force Regulation 30-1.¹⁹⁷ The court pointed out that the regulation stated that illegal drug use is incompatible with Air Force standards of behavior and would not be tolerated.¹⁹⁸ The court then pointed to Air Force Regulation 39-6 and stated,

Noncommissioned officers must “[m]aintain exemplary standards of behavior, including personal conduct, courtesy, loyalty, and personal appearance. Exercising leadership by example, they must be alert to correct personnel who violate these standards.” Further on in the same paragraph [non-commissioned officers] are admonished that their duties include “[o]bserving, counseling, and correcting subordinates on matters of duty performance, individual conduct, customs, courtesies, safety, and personal appearance both on and off duty.” They are also reminded of their responsibilities for “[e]nsuring appropriate action is taken when the conduct or duty performance of a subordinate is marginal or substandard.”¹⁹⁹

The court held that Air Force Regulations were sufficient to put noncommissioned officers on notice that they have a duty to “take all reasonable measures to correct the substandard conduct of their subordinates and to prevent those crimes which are reasonably within their control.”²⁰⁰ However, the court stated that the regulations and customs of service were not sufficient to create a duty of a noncommissioned officer to prevent every single conceivable crime occurring in his presence.²⁰¹ In affirming, the court stated it was unaware of any case law or statutory authority that would bar the conviction of appellant for failing to prevent

¹⁹⁵ *Id.* at 320, 322.

¹⁹⁶ *United States v. Dupree*, 25 M.J. 659 (A.F.C.M.R. 1987).

¹⁹⁷ *Id.* at 661 (referencing DEP’T OF AIR FORCE INSTR. 30-1, AIR FORCE STANDARDS (4 May 1983)).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 661 (referencing DEP’T OF AIR FORCE REG. 39-6, ENLISTED FORCE ORGANIZATION (12 Aug. 1977) (citations omitted)).

²⁰⁰ *Id.* at 662.

²⁰¹ *Id.* at 661–62.

the use of marijuana by those subordinates in his charge under the particular circumstances of this case.²⁰² Having reached this conclusion, the court declined to consider the application of Article 7(c), UCMJ.²⁰³

In 1991, for the first time, the Court of Military Appeals in *United States v. Medley* discussed the importance of Rule 302 in the Rules for Courts-Martial (RCM) as it relates to a potential duty to prevent crime.²⁰⁴ Curiously, the case did not involve a duty to prevent crime. Appellant, a non-commissioned officer (NCO) in the Air Force, was convicted of three specifications of wrongfully using cocaine and one specification of dereliction of duty for failing to report cocaine use by other servicemembers, in violation of Article 92, UCMJ.²⁰⁵ At trial, the court-martial members were instructed in accordance with *Heyward* and *Thompson*, that Sergeant Medley could not be convicted of failing to report the drug use of fellow servicemembers that also coincided with occasions of her own personal drug use.²⁰⁶ The court-martial was convinced by the proof that on one occasion, appellant joined her fellow servicemembers in using cocaine, and therefore acquitted her of the corresponding dereliction of duty offense.²⁰⁷ However, the court-martial members were also convinced that on another occasion when appellant knew her fellow servicemembers were using drugs, but was not using the drugs herself, that she failed to report the use.²⁰⁸

The court held that the *Heyward* rule did not extend to the facts of the case because appellant was convicted of failing to report only as to those occasions on which she did not personally use drugs.²⁰⁹ In reaching that conclusion, the Court of Military Appeals pointed to RCM 302(b)(2) as authority for a military leader's fundamental obligation to intervene and prevent criminal conduct.²¹⁰ However, the court repeated its statements

²⁰² *Id.* at 662.

²⁰³ *Id.* See also UCMJ art. 7(c) (2012).

²⁰⁴ *United States v. Medley*, 33 M.J. 75 (C.M.A. 1991).

²⁰⁵ *Id.* at 75.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 76.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 77.

²¹⁰ *United States v. Medley*, 33 M.J. 75, 77 (C.M.A. 1991). Article 7, UCMJ states,

(b) Any person authorized under regulations governing the armed forces to apprehend persons subject to this chapter or to trial thereunder may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it.

from *Thompson* and *Heyward* that its reluctance to permit the prosecution of servicemembers for failing to carry out arrests or apprehensions was rooted in concerns over lack of training and experience in law enforcement and lack of notice as to how exactly to react, rather than the absence of a duty to act at all.²¹¹ The court went on to state,

We have never intimated that it is lawful or excusable for a person in a position of military leadership to consciously ignore the blatant criminal conduct of subordinates. This classic duty not to tolerate malfeasance cuts to the very core of military leadership and responsibility. It is the duty with respect to others that clearly exceeds the duty

(c) Commissioned officers, warrant officers, petty officers, and noncommissioned officers have authority to quell quarrels, frays, and disorders among persons subject to this chapter and to apprehend persons subject to this chapter who take part therein.

UCMJ art. 7 (2012). Similarly, R.C.M. 302 states the following officials may apprehend anyone subject to trial by court-martial:

(1) *Military law enforcement officials.* Security police, military police, master at arms personnel, members of the shore patrol, and persons designed by proper authorities to perform military criminal investigative, guard or police duties, whether subject to the code or not, when in each of the foregoing instances, the official making the apprehension is in the execution of law enforcement duties;

(2) *Commissioned, warrant, petty, and noncommissioned officers.* All commissioned, warrant, petty, and noncommissioned officers on active duty or inactive duty training[.]

MCM, *supra* note 94, R.C.M. 302(b). Moreover, R.C.M 302(c) states,

A person subject to the code or trial thereunder may be apprehended for an offense triable by court-martial upon probable cause to apprehend. Probable cause to apprehend exists when there are reasonable grounds to believe that an offense has been or is being committed or is committing it. Persons authorized to apprehend under subsection (b)(2) of this rule may also apprehend persons subject to the code who take part in quarrels, frays, or disorders, wherever they occur.

MCM, *supra* note 94, R.C.M. 302(c). Additionally, R.C.M 302(d)(3) states, “Any person authorized under these rules to make an apprehension may use such force and means as reasonably necessary under the circumstances to effect the apprehension.” *Id.* at 302(d).

²¹¹ *Medley*, 33 M.J. at 77.

of ordinary citizens The policy basis for reporting misconduct in the military is more than powerful; it is axiomatic.²¹²

In a concurrence, Senior Judge Everett stated that he joined in the majority's opinion because the appellant was a noncommissioned officer who knew of her duty to report drug abuse as a result of her status as a leader.²¹³ However, he wrote a separate opinion to make clear his continuing doubt of the constitutionality of a blanket regulatory burden requiring even the most junior-ranking servicemembers to report crimes of others.²¹⁴ Judge Everett expressed concern that such a duty presents a notice problem as applied to junior-ranking servicemembers because it deviates drastically from the rules at common law and almost all state jurisdictions regarding the affirmative obligations of ordinary citizens to act.²¹⁵

In the 2006 case of *United States v. Simmons*, the Court of Appeals for the Armed Forces analyzed "whether a duty to intervene arises for purposes of aider and abettor liability when a superior witnesses the commission of an offense by or against a service member in his chain of command."²¹⁶ In *Simmons*, the appellant, a noncommissioned officer in the Marine Corps, pled guilty to aiding and abetting another marine's assault of a junior marine in violation of Article 128, UCMJ.²¹⁷ The appellant's providence inquiry established that while in the appellant's barracks room, Corporal (Cpl) Schuknecht grabbed Private First Class (PFC) Whetstone by the neck for ten seconds.²¹⁸ The appellant admitted to the military judge that he had a duty to intervene because he was a noncommissioned officer and PFC Whetstone was in his platoon.²¹⁹ Moreover, the appellant admitted that he was criminally responsible because his inaction encouraged Cpl Schuknecht.²²⁰

On appeal, the appellant argued that he did not share Cpl Schuknecht's criminal intent when Schuknecht assaulted PFC Whetstone and thus, did

²¹² *Id.*

²¹³ *Id.* at 78.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *United States v. Simmons*, 63 M.J. 89 (C.A.A.F. 2006).

²¹⁷ *Id.* at 90.

²¹⁸ *Id.* at 91.

²¹⁹ *Id.*

²²⁰ *Id.* at 90.

not meet the requisite *mens rea* necessary under Article 77, UCMJ, to establish aider and abettor liability.²²¹ Strangely, the appellant conceded that he had a duty to intervene because he was a noncommissioned officer in PFC Whetstone's platoon.²²² The court agreed and concluded that Navy and Marine Corps regulations evidence 230 years of custom and tradition creating a duty to intervene.²²³ However, the court went on to state that a duty to intervene combined with inaction, without more, does not per se establish the requirement of shared criminal purpose necessary to establish aider and abettor liability under Article 77, UCMJ.²²⁴

The court pointed out that Article 77, UCMJ, is conjunctive and requires "a finding of encouragement, for example, a result plus an intent. Here, while the facts on the record might support a finding of a result, they do not support a finding of intent."²²⁵ The court determined that Cpl Schuknecht's grabbing of PFC Whetstone was too spontaneous and quick to draw an inference that appellant's noninterference was intended to act as encouragement to Cpl Schuknecht.²²⁶ In the end, the court held that a duty to intervene may arise, but it must be accompanied by a shared criminal intent for aider and abettor liability to attach under Article 77, UCMJ, and in this case there was substantial basis in law and fact to question the appellant's guilty plea.²²⁷

Finally, in the unpublished decision of *United States v. Risner*, the court analyzed a noncommissioned officer's duty to prevent underage marines from consuming alcohol in the noncommissioned officer's presence, and to ensure that subordinate marines in the noncommissioned officer's presence returned to base by a time established in a written order creating an "Off-Base Liberty Card Program."²²⁸ Sergeant Risner was convicted of two specifications of dereliction of duty in violation of Article 92, UCMJ.²²⁹ The appellant argued that the dereliction of duty specifications failed to state offenses.²³⁰ He specifically argued that the order cited in Specification 3, prohibiting consumption of alcohol by

²²¹ *Id.* at 91.

²²² *Id.* at 91, 93.

²²³ *Id.* at 93.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at 94.

²²⁸ *United States v. Risner*, No. 200501643, 2006 WL 4573103, at *1, *3 (N-M. Ct. Crim. App. Aug. 9, 2006).

²²⁹ *Id.* at *1.

²³⁰ *Id.* at *3.

marines under the age of twenty-one, did not impose a duty upon the appellant to prevent underage drinking by marines in his presence.²³¹ With respect to Specification Four, the appellant argued that the cited written order establishing the off-base Liberty Card Program, failed to impose a duty upon the appellant to ensure that subordinate marines in his presence returned to base by the time established in the order.²³² The appellant further argued that neither of the specifications alleged a custom of the service that established the duty the appellant was convicted of not performing.²³³

The court identified two issues to determine if the specifications properly stated offenses: (1) Whether a custom of the service exists to impose a duty upon noncommissioned officers to enforce orders, and (2) whether the specifications allege that the appellant's affirmative duty to act was a result of that custom of the service.²³⁴ The court held there is custom of the service in the Marine Corps that requires noncommissioned officers to:

(1) [P]revent underage consumption of alcohol by Marines in the NCO's presence and under his supervision pursuant to Marine Corps Bases Japan Order . . . and (2) to make sure Marines in the NCO's presence and under his supervision return to base within the time proscribed by Marine Corps Bases Order . . . implementing the Off-Base Liberty Card Program.²³⁵

In doing so, the court cited *United States v. Simmons*.²³⁶

In the Army, regulations do not establish a general duty for all soldiers to intervene and stop crime. Moreover, the Army Court of Military Review has stated there is no legal duty requiring a soldier to intervene.²³⁷ In *United States v. Fuller* the court stated,

The law has been traditionally reluctant to find a general duty or requirement, for individuals without special

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at *4

²³⁴ *Id.*

²³⁵ *Id.* at *7-8.

²³⁶ *United States v. Simmons*, 63 M.J. 89 (C.A.A.F. 2006).

²³⁷ *United States v. Fuller*, 25 M.J. 514, 516 (A.C.M.R. 1987).

duties, to either stop crime, report crime, rescue people or rescue property, and we decline to so find in this case. Judicial restraint and caution militate against expanding the definition of criminal activity or judicially increasing responsibility of individuals to act to prevent crime or damage caused by criminal acts.²³⁸

However, AR 600-20, paragraph 4-5, states, “Officers, [warrant officers], NCOs, and petty officers are authorized and directed to quell all quarrels, frays, and disorders among persons subject to military law and to apprehend participants. Those exercising authority should do so with judgment and tact.”²³⁹ Interestingly, the language in AR 600-20 directs leaders to quell disorders and to apprehend offenders.²⁴⁰ This obligatory language exceeds the discretionary authority found in RCM 302 and Article 7, UCMJ, which states leaders have the authority to intervene and apprehend if they so choose.²⁴¹ Army Regulation 600-20 provides qualifying language that those exercising the authority to intervene and apprehend should do so with judgment and tact.²⁴² This language suggests AR 600-20 does not intend to place an affirmative duty on leaders to always act. Rather, it provides leaders with leeway in making common sense decisions using judgment and tact. Ultimately, AR 600-20 does provide leaders with authority to act congruent with Article 7, UCMJ, and RCM 302. However, the authority to act does not equate to an affirmative duty to always exercise that authority.

In the end, when synthesizing the case law, it is possible through customs of service, or an order, to create a duty on a special class of servicemembers to physically intervene. The courts have stated generally that leaders are expected to enforce good order and discipline. However, a general duty, applicable to all servicemembers, to physically intervene and stop all imaginable crimes is a step too far. The majority of case law is not comfortable with punishing servicemembers for not intervening, because it is difficult to provide sufficient notice as to what a duty to intervene would require. Moreover, even when a duty may exist, courts are generally uncomfortable forcing individuals not trained in law enforcement to assume the role of a cop and physically intervene.

²³⁸ *Id.*

²³⁹ AR 600-20, *supra* note 76, para. 4-5.

²⁴⁰ *Id.*

²⁴¹ See UCMJ art. 7 (2012); MCM, *supra* note 94, R.C.M. 302.

²⁴² AR 600-20, *supra* note 76, para. 4-5.

Finally, it is incredibly difficult in most circumstances to expect a leader to properly assess when physical intervention is required to stop a drunk driver from driving or to stop a sexual assault. How is a bystander expected to assess a soldier's level of intoxication? In the case of a stumbling soldier it may be an easy call. However, lower levels of intoxication may be difficult to assess. How is a bystander able to determine if a soldier's blood alcohol content is higher than the legal limit? In the context of a sexual assault case, is it reasonable to expect a bystander to recognize sexual assault offenses as defined in Article 120, UCMJ? Even a group of judge advocates reviewing a sexual assault case file often cannot reach a consensus on whether or not a sexual assault occurred.

IV. Concerns for the Hard Charging Commander

Even if tailored duties to report and intervene are permissible, the following considerations are offered to highlight issues with the practical application of such duties. The practical concerns weigh against imposing criminal obligations to report or intervene.

A. Set the Victim on Repeat

The practical consequence of ordering soldiers to intervene and stop sexual assault is that the victim will have to testify in detail about the offense at not only the court-martial of the rapist, but also the court-martial of the soldier who was derelict by not intervening.²⁴³ It will not suffice to simply present evidence that places the derelict soldier at the scene of the sexual assault. The victim will necessarily have to testify substantively about the assault. To successfully prosecute a soldier for not intervening, the government will have to prove that the soldier witnessed a sexual assault. This unfortunate practical result requires trying the sexual assault case twice.

The following hypothetical illustrates the concern.

Sergeant Jones and Sergeant Davis are roommates. After spending an evening out with friends, Jones returns to his

²⁴³ This assertion assumes that the only witnesses to the sexual assault are the victim, rapist, and a third witness.

barracks room. He opens the door to his room and discovers Davis clearly forcing himself inside Specialist Thomas while Thomas is physically fighting off Davis and yelling “stop, no, I don’t want to do this.” The lights are on and Thomas sees Jones enter the room. However, Jones turns around and leaves the room without providing help. Thomas immediately reports the sexual assault to law enforcement who subsequently attempts to interview Davis. Davis, however, invokes his Article 31 rights²⁴⁴ and remains silent. If the Government intends to prosecute Jones for his failure to intervene, Thomas will have to testify in detail about the sexual assault, that is, prove all of the elements of an Article 120, UCMJ offense. It will be insufficient for Thomas to simply say, “I was sexually assaulted by Sergeant Davis and Jones was in the room, saw what was happening, and failed to help.” To gain a conviction for Jones’s failure to intervene, Thomas will have to provide similar testimony required to find Davis guilty of sexual assault.

Is the Army so cruel as to put a sexual assault victim in the position of having to face direct and cross examination in two different trials? Some victims may have the will, strength, and desire to participate in a separate court-martial of a soldier that failed to help them, but as a general principle, the practical effect of prosecuting a duty to intervene is contrary to current policy attempts to mitigate and decrease the amount of times a victim has to publically relive a sexual assault.

B. Freezer 6

Does a commander want to risk chilling the cooperation of witnesses of serious crimes like sexual assault? Using the same hypothetical as above, if Sergeant Jones is operating in an environment where he has a duty to intervene imposed by a general order and fails to do so, he may be hard pressed to cooperate with the government, not invoke his Article 31 rights, and testify against Sergeant Davis. If Sergeant Jones were to testify, he would be admitting to an Article 92 offense, exposing Sergeant Jones to potentially two years of confinement.²⁴⁵ The chilling effect of

²⁴⁴ UCMJ art. 31 (2012).

²⁴⁵ UCMJ art. 92 (2012).

attaching severe criminal sanctions for not rendering aid will jeopardize the availability of evidence critical to the prosecution of the rapist. In a case that lacks physical evidence, and relies primarily on the account of the victim, a corroborating witness could easily be the difference between reasonable doubt and a conviction.

Without the testimony of Sergeant Jones, the members are left with the all too common he said/ she said case that usually leaves enough room for reasonable doubt. Commanders may argue that they are willing to accept the risk of chilling witness cooperation in hopes of demanding action that saves a victim from trauma. That position, however, ignores the criticality of corroborating testimony in an otherwise he said/she said case. The corroborating testimony of the failed intervenor is what ultimately will likely bring the victim justice and ensure that a sexual predator is removed from the ranks and placed in confinement where he will be unable to assault more victims.

Importantly, a duty to report imposes the same chilling effect and fails to change the analysis in any meaningful way. Witnesses that fail to immediately report will not be inclined to come forward later for fear of admitting to an Article 92 violation. As a result, fewer witnesses will be available to testify and provide crucial testimony. Nothing short of an offer of immunity would convince a witness not to invoke his Article 31 rights.²⁴⁶

The Government may certainly offer immunity in return for a witness's testimony; however, the defense will be in a position to lead a convincing assault on the witness's motive to fabricate. The defense will argue that the witness is willing to falsely accuse the alleged rapist in order to avoid a two-year prison term. That is a powerful defense argument that cannot be ignored. In fact, in Nevada, prosecutors do not support duty to report statutes because witnesses will be unwilling to come forward for fear of prosecution under a failure to report statute.²⁴⁷

²⁴⁶ *Id.* art. 31.

²⁴⁷ Vance, *supra* note 14, at 147 (citation omitted).

C. We're All Rats, So Says the Law

A sweeping duty to report risks stifling freedom of speech and association as pointed out by Chief Judge Everett.²⁴⁸ For the Chief Judge, the problem of converting military society into a police state was one of constitutional concern. This is true; however, there also exists a practical reason not to affirmatively make every serviceman and woman a “rat.” The answer is simply related to that quality which binds all military services, and which is ancient in its origins—trust. What binds servicemembers is the special trust developed under the unique circumstances of the profession of arms. Soldiers rely on each other for the preservation of their lives and it is that profound concept that makes the military unique. Making everyone a cop erodes the trust necessary to operate as a selfless fighting force with individuals willing to die without hesitation to save the man or woman next to them. Making all soldiers cops risks making all soldiers enemies of each other. Teams become individuals, and individuals do not successfully win wars.

D. Buddy Duty to the Extreme

In July 2008, in Fayetteville, North Carolina, a group of 82d Airborne Division paratroopers spent an evening drinking.²⁴⁹ At the end of the night Private First Class Luke Brown was dead.²⁵⁰ At trial, the evidence showed that Brown provoked a confrontation with another person when he drank that person’s beer without permission.²⁵¹ The group of soldiers defused the confrontation and escorted Brown outside the bar.²⁵² Once outside, Brown ran away and was chased by the soldiers into nearby woods.²⁵³ The soldiers caught Brown in the woods several times, but Brown managed to violently break free.²⁵⁴ At one point, Brown choked a soldier and was punching and kicking while the soldiers tried to subdue him.²⁵⁵ Four soldiers eventually managed to gain control of Brown while Sergeant

²⁴⁸ *United States v. Reed*, 24 M.J. 80, 84–85 (C.M.A. 1987).

²⁴⁹ *United States v. Boyle*, No. 20090893, 2011 WL 6258527, at *1 (A. Ct. Crim. App. Dec. 14, 2011).

²⁵⁰ *Id.* at *2.

²⁵¹ *Id.* at *1.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

Justin Boyle performed a “rear naked” choke hold on him.²⁵⁶ As a result of the choke hold, Brown passed out and the group carried him toward a vehicle.²⁵⁷ As Brown began to regain consciousness, Boyle applied another choke hold rendering Brown unconscious again.²⁵⁸ The soldiers then used zip-ties from the bar’s security staff to bound Brown’s hands and feet before putting him in a car.²⁵⁹ When the group arrived at Ft. Bragg, Brown had no pulse and was later pronounced dead at the hospital.²⁶⁰

At Sergeant Boyle’s court-martial for involuntary manslaughter, soldiers testified that at Friday safety briefings, commanders order soldiers “to do whatever it takes” to bring rowdy buddies back to post and to “choke someone out if you have to.”²⁶¹ Co-accused, Sergeant Mignocchi, pleaded guilty to negligent homicide and testified at Boyle’s court-martial that commanders told soldiers to bring their buddies back to post “if you have to knock them out and drag them back.”²⁶² According to Mignocchi, a purpose of the orders was to “not air our dirty laundry” by getting civilian law enforcement involved in arresting disorderly soldiers.²⁶³ In the end, Sergeant Boyle was convicted of involuntary manslaughter and conspiracy to commit assault consummated by a battery; he was sentenced to twenty-four months confinement.²⁶⁴

The Boyle case highlights the real concern of sanctioned interventionism morphing into vigilantism. It is easy to imagine how soldiers not trained in law-enforcement may inappropriately use force to prevent a soldier from committing a crime. Imposing a duty to intervene encourages soldiers to aggressively take action. Soldiers will err on the side of intervention at all costs to avoid punishment and common sense will be lost in an effort to comply with the duty.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at *2.

²⁶⁰ *Id.*

²⁶¹ David Zucchini, *Army’s Buddy System is Put to the Test*, L.A. TIMES (Oct. 2, 2009), <http://articles.latimes.com/print/2009/oct/02/nation/na-soldier-death2>.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Boyle*, 2011 WL 6258527, at *1.

E. Who Wants to Fight?

Vigilantism as described in the Sergeant Boyle case highlights the potential for individuals to use too much force in an attempt to comply with a duty to intervene. However, it is more likely that an alleged offender will respond aggressively and create a dangerous situation for a good Samaritan. A villain undeterred at committing sexual assault is certainly undeterred at committing violence against an intervening bystander. It is for this reason that state duties to intervene provide exceptions to act when bystanders believe intervention will compromise their physical safety.

In the drunken driving context, a duty to physically prevent drunken driving places an unfortunate bystander in the position of stopping a person whose mental faculties are severely compromised. Asking a bystander to physically stop an inebriated soldier begs for a physical confrontation best suited for professional law enforcement. Law enforcement personnel possess the proper training and experience to handle such difficult situations. Moreover, offenders are less inclined to physically challenge the police compared to plain-clothed bystanders or fellow soldiers in uniform.

F. An Inadvertent Tort Cause of Action?

Although beyond the scope of this paper, any commander that decides to create a duty to intervene should consider the implications of that order as applied to a potential civil negligence action brought by a sexual assault victim against a soldier for failing to intervene. Is it possible that a duty to intervene may breathe life into a negligence claim? Would an order to intervene create a special relationship between the victim and the soldier that failed to act, such that the failure to act is considered a breach of that duty in a tort context? These are the types of second and third order effects that a commander must consider before creating duties to intervene.

V. Conclusion

The momentum of the current Department of Defense push to prevent sexual assault should not be a reason to hastily promulgate criminal sanctions for not intervening or reporting sexual assault. A hyper-reactionary response to the current political climate would fail to take into

account practical considerations undermining the efficacy of such an approach. It is probably lawful to craft an order requiring the reporting of specific crimes witnessed by all service members regardless of rank; however, such an approach is short sighted. Moreover, a duty applicable to all soldiers to physically intervene to stop sexual assault or to stop a soldier from driving drunk is likely unlawful.

Variations of these types of orders may be lawful, but they are, without question, not advisable, and frankly foolish. Converting all of the Army into law enforcement officials tasked with physical intervention to stop crimes would be trailblazing of historic proportions not seen in any other segment of society or the law. No other jurisdiction in America requires physical intervention as the only method to comply with duty to rescue laws. Even in the few jurisdictions that have enacted duty to rescue statutes, witnesses may comply by notifying law enforcement for assistance.²⁶⁵ Such a radical change must be avoided at all costs. Instead, the Army needs to focus its sexual assault prevention plan on fostering an environment of dignity and respect of all of its teammates. The Army requires a cultural shift and major changes in attitudes, not a change in the law. The center of gravity should be dignity and respect for all, with an emphasis on building trust. Appeasing political pressure should not be a reason to dramatically alter the law.

²⁶⁵ *E.g.*, Wis. Stat. Ann. § 940.34 (West, 2013); MINN. STAT. ANN. § 604A.01 (West 2015); TEX. PENAL CODE ANN. § 38.17 (West, 2013).

**MORAL INJURY AND PREVENTIVE LAW: A FRAMEWORK
FOR THE FUTURE**

MAJOR ERIK D. MASICK*

The evidence for the existence of moral injury is overwhelming. Moral injury causes mental torture to the very troops whose care is entrusted to American leaders. It leads soldiers to try to drown their sorrows in alcohol or the euphoria of drugs, to be involuntarily separated from the service due to disciplinary action, or to voluntarily leave the service—or the world, by killing themselves—because they feel they cannot cope anymore. It greatly burdens the U.S. military and civilian healthcare systems. It hurts the ability of veterans to positively contribute to society. It distresses and sometimes leads to the physical harm of those who interact with afflicted soldiers. Of all these adverse effects of moral injury, it is the role that moral injury may play in the U.S. military’s high suicide rate that has attracted the most attention.¹

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I. Introduction

What if a root cause of misconduct, self-harm, and soldier suicide could be traced to one terrifying phenomenon in the ranks? The concept of a moral injury² is as provocative as it is controversial, as ubiquitous as it is ancient, and as seemingly nebulous as it is seemingly simple. A rapidly growing community of scholars, clinicians, and organizations assert that moral injury is a signature wound of the combat veteran, and can lead to potentially devastating issues in the ranks if left unnoticed, or unaddressed. The notion that an underlying phenomenon can cause or contribute to legal issues is a paradigm not unfamiliar to the military legal practitioner. Moral injury is the emerging chapter in that “book,” and one that could very soon become a household name. The intent of this article is to explore the phenomenon, contemplate potential applications, and stimulate academic discourse for this new and emerging field in the law of the armed forces.

This article begins by introducing the phenomenon of moral injury and its potentially devastating effects to the military legal practitioner. Here, the salient themes from the interdisciplinary community are synthesized into a workable framework to assist judge advocates seeking to apply the phenomenon in practice. With that foundation, some of the potential scenarios in which the phenomenon might rear its head, or become a priority to a commander are explored. The article then looks at some of the ways judge advocates can prepare for moral injury to appear on the scene through expanded and innovative preventive law strategies. Under this paradigm of preventive law, this article recommends some specific steps that can be taken now to get ahead of this phenomenon—one which could soon be knocking on the courthouse door, be a key factor for analysis, or be a priority for a commander or a client.

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¹ Lieutenant Colonel Douglas A. Pryer, *Moral Injury and the American Soldier*, CICERO MAG. (Nov. 23, 2014, 1:12 PM), <http://ciceromagazine.com/features/moral-injury-and-the-american-soldier/>.

² See generally *infra* section II.

II. The Phenomenon of Moral Injury

Imagine a transgression of core beliefs, values, or morals so severe and traumatic that a soldier's very concept of right and wrong is fundamentally transformed. This provocative and potentially devastating notion is a moral injury,³ a phenomenon that a large

³ This definition is offered to orient readers to the phenomenon.

Military personnel serving in war are confronted with ethical and moral challenges, most of which are navigated successfully because of effective rules of engagement, training, leadership, and the purposefulness and coherence that arise in cohesive units during and after various challenges. However, even in optimal operational contexts, some combat and operational experiences can inevitably transgress deeply held beliefs that undergird a service member's humanity. Transgressions can arise from individual acts of commission or omission, the behavior of others, or by bearing witness to intense human suffering or the grotesque aftermath of battle. An act of serious transgression that leads to serious inner conflict because the experience is at odds with core ethical and moral beliefs is called *moral injury*.

Shira Maguen & Brett Litz, *Moral Injury in Veterans of War*, 23 PTSD RES. QUART. 1 (2012). See *infra* section II(B) for the thematic elements being offered to define moral injury.

Moral injury is a kind of psychological anguish that can be mild or intense and isn't specific to war but does often come as part of the aftermath of war. It has to do with the reaction to doing wrong, being wronged or witnessing wrongs. For the thinking soldier, war delivers up spades of moral conundrums: Is the fight just? Is calling in this airstrike the right thing to do? Did I protect my troops enough? Did I harm civilians? But it's not just questioning. It's anguish, sometimes crippling shame or guilt. This is not new, it's ancient. Moral rage and anguish goes far back. We see it in Homer, when Achilles, angry over the death of his friend, drags Hector's body around from the back of his chariot. In clinical medicine, moral injury often gets ignored in favor of the slimmer notion of psychological trauma, which primarily is fear-based. This goes beyond the medical model; it's the spiritual and mental anguish some experience when they go to war.

Patricia Clime, *5 Questions: Philosopher Explores Warriors' Moral Anguish*, MIL. TIMES (Nov. 11, 2015), <http://www.militarytimes.com/story/military/benefits/health-care/2015/11/16/questions-philosopher-explores-warriors-moral-anguish/75709512/>.

population of interdisciplinary⁴ scholars and clinicians now confront.⁵ In essence, “Moral [i]njury is the complex effects from moral reasoning processes that gnaw at the heart, and darken the soul of combat veterans.”⁶ The phenomenon, minus the name,⁷ is at least as old as the written word,⁸ with literary references appearing all the way back to antiquity.⁹ The

⁴ Moral injury is increasingly a focus of discussion and study across disciplines and settings. “Within the last decade, there have been several experts who have addressed the realities of moral injury Each of these scholars and behavior health professionals have researched the effects of moral injury from a psychological, cultural, and spiritual perspective.” Chaplain David Smith, *Understanding the Elephant in the Room—Moral Injury* JUSTPEACE (Mar. 11, 2015), <http://justpeaceumc.org/understanding-the-elephant-in-the-room-moral-injury/>; see also THE MORAL INJURY PROJECT, Syracuse Univ., <http://moralinjuryproject.syr.edu/about-moral-injury/> (last visited June 7, 2016). This project was formed after “a gathering of academics, administrators, researchers, religious scholars, veterans, professors, chaplains, and mental health providers” met to address the question “What are we doing about moral injury among U.S. military veterans.” *Id.* As another example, the 2015 *Moral Injury and Veterans Symposium*, was held “for educators, students, primary and behavioral health providers, faith-based communities, advocates and veterans to examine this multi-layered framework; through presentations, panels, and facilitated discussions.” *Swords to Plowshares*, <https://www.swords-to-plowshares.org/event/20160127/moral-injury-and-veterans-symposium> (last visited June 7, 2016).

⁵ See generally Smith, *supra* note 4, at 2.

⁶ Jeff Zust, *The Two-Mirrors of Moral Injury: A Concept for Interpreting the Effects of Moral Injury* 1, COMM. AND GEN. STAFF COLLEGE FOUND., <http://www.cgscfoundation.org/wp-content/uploads/2015/06/Zust-TwoMirrorModel-final.pdf> (last visited June 7, 2016).

⁷ “Moral Injury, though not widely known by that term, has been in existence for thousands of years. It is becoming relevant in today’s world as a result of research from academia, the medical profession and other organizations.” *What Is Moral Injury?*, MIL. OUTREACH USA, <http://www.militaryoutreachusa.org/what-is-moral-injury/> (last visited June 7, 2015).

⁸ “In this essay, I describe what moral injury is and argue that its validity as a mental health condition is supported, not just by a plethora of psychological studies but by a literary tradition that is probably older than the written word.” Douglas A. Pryer, *Moral Injury and the American Service Member: What Leaders Don’t Talk about When They Talk About War*, COMM. AND GEN. STAFF COLL. FOUND. 10, <http://www.cgscfoundation.org/wp-content/uploads/2014/05/PryerMoralInjuryandtheAmericanServiceMember-1May14.pdf> (last visited June 7, 2016).

⁹ *What is Moral Injury*, *supra* note 7.

Although some have proclaimed it the “signature wound of today’s veterans,” moral injury has been around for as long as war itself. Ajax, the titular warrior in Sophocles’s tragedy, ultimately commits suicide after spiraling into shame for slaughtering innocent animals. Soldiers’ diaries from the Civil War expressed guilt and paranoia for feeling responsible for atrocities, and World War II airmen wrote in their journals about their remorse for bombing civilians. In Tim O’Brien’s iconic book about the Vietnam War, *The Things They Carried*, the

notion that trauma can manifest in a soldier from transgressed ethics and morals¹⁰ is thus “far from new.”¹¹

In fact all that *is* new is the clinical term, “moral injury,”¹² coined by Dr. Jonathan Shay¹³ after his groundbreaking and comprehensive work

narrator confessed: “I watched a man die on a trail near the village of My Khe. I did not kill him. But I was present, you see, and my presence was guilt enough.”

Maggie Puniewska, *Healing a Wounded Sense of Morality*, *The Atlantic* (Jul. 3, 2015), <http://www.theatlantic.com/health/archive/2015/07/healing-a-wounded-sense-of-morality/396770/>.

¹⁰ Ethics and morals are often taught from a litigation risk-management perspective. John D. Willis, *Moral Injury—Insights into Executive Morality and Toxic Organizations*, LEADERSHIP ETHICS ONLINE (Nov. 27 2012), <http://www.leadershipethicsonline.com/2012/11/27/moral-injury-executive-morality-toxic-organizations/>; “Morals are defined as the personal and shared familial, cultural, societal, and legal rules for social behavior, either tacit or explicit.” Brett T. Litz et al., *Moral Injury and Moral Repair in War Veterans: A Preliminary Model and Intervention Strategy*, 29 *CLIN. PSYCH. REV.* 695, 699 (2009); “Military ethics can be defined as the art of observing those ethical obligations and precepts that are appropriate to the soldier’s role within the profession of arms.” RICHARD A. GABRIEL, *THE WARRIOR’S WAY: A TREATISE ON MILITARY ETHICS* 16 (2007).

¹¹ William P. Nash et al., *Psychometric Evaluation of the Moral Injury Events Scale*, 178 *MIL. MED.* 646 (2013). Moral injuries are contemplated by some experts as a common denominator in armed conflicts. “Like physical injuries, moral injuries of the kind described by Litz, Nash, Maguen, and others in their now numerous publications on moral injury strike in every war.” Jonathan Shay, *Moral Injury*, 31 *PSYCHOANALYTICAL PSYCH.* 182, 184 (2014). This notion has been around since antiquity, if not by name.

Both *Achilles in Vietnam* and Shay’s 2002 follow-up, *Odysseus in America: Combat Trauma and the Trials of Homecoming*, show that, while the term “moral injury” may be new, there is nothing new about the idea that a warrior’s sense of shattered honor can lead to profound mental distress. The idea is, in fact, an ancient one. To illustrate, Shay draws upon Homer’s 2800 year-old poems, *The Iliad* and *The Odyssey*, comparing the causes and symptoms of psychological distress in Homer’s heroes with those of his own patients.

Pryer, *supra* note 8, at 15; *see also* JONATHAN SHAY, *ODYSSEUS IN AMERICA: COMBAT TRAUMA AND THE TRIALS OF HOMECOMING* (2003).

¹² ROBERT EMMET MEAGHER, *KILLING FROM THE INSIDE OUT: MORAL INJURY AND JUST WAR* 3 (2014). “While the term is a relatively recent addition to discussions of the psychological surround of military missions . . . it is clear that moral injury is an experience that echoes throughout the history of armed conflict” Megan M. Thompson, *Moral Injury in Military Operations: A Review of the Literature and Key Considerations for the Canadian Armed Forces*, TORONTO RESEARCH CENT. 2 (Mar. 2015), <https://cimvhr.ca/documents/DRDC-RDDC-2015-R029.pdf>.

¹³ “Dr. Shay was a staff psychiatrist at the Department of Veterans Affairs Outpatient Clinic, Boson, 1987–2008, where his only patients were combat veterans with severe

with combat veterans.¹⁴ The extended military campaigns in Iraq and Afghanistan have piqued interest in moral injury.¹⁵ “Today we find it in wide circulation among veterans and their professional caregivers, as well as in psychiatric journals, government reports, church pulpits, and the national media,”¹⁶ along with veterans organizations,¹⁷ and the military.¹⁸

psychological injuries He is currently retired from clinical practice and he describes himself as a missionary to the Armed Forces on prevention of psychological and moral injury from the veterans he has served.” JONATHAN SHAY, *THE ATTORNEY’S GUIDE TO DEFENDING VETERANS IN CRIMINAL COURT* 57 (Brockton D. Hunter & Ryan C. Else eds., 2014).

¹⁴ “My game for decades has been *prevention* of psychological and moral injury in military service.” *Id.* at 64. See generally Shay, *Moral Injury*, *supra* note 11, at 182.

¹⁵ Jacob K. Farnsworth, *Dialogical Tensions in Heroic Military and Military-Related Moral Injury*, 8 INT’L J. FOR DIAL. SCI. 1, 13 (2014). Consider this abstract on a study done on the phenomenon of moral injury in the Canadian Armed Forces:

As the Canadian Armed Forces (CAF) regroup from its largest deployment since Korea and the longest combat deployment since the Second World War, emerging mental health data suggests that approximately 14% of CAF personnel who had been deployed to Afghanistan had a mental health disorder that was linked to the Afghan mission. This paper focuses on a particular psychological aftermath of military operations, that which may be associated with the moral and ethical challenges that personnel face in military missions. More specifically, in this paper I provide an introduction to the concept of *moral injury*.

Thompson, *supra* note 12, at i.

¹⁶ MEAGHER, *supra* note 12, at 3–4.

¹⁷ Tyler Boudreau, *The Morally Injured*, THE MASS. REV. 746, 748 (2011).

¹⁸ *Id.* “The term has been revived in clinical circles, and though not exclusive to veteran populations, it is gaining currency in the military behavioral health arena.” NANCY SHERMAN, *AFTERWAR: HEALING THE MORAL WOUNDS OF OUR SOLDIERS* 8 (2015). For example, in soliciting bids to study the “pressing needs” in soldier health and welfare; one of pressing needs the Department of Defense (DoD) isolated was, in part, moral injury. The solicitation stated, “The goal of the [Department] is to advance the state of medical science in those areas of most pressing need and relevance to today’s battlefield experience.” *Program Announcement: Psychological Health/Traumatic Brain Injury Research Program*, CONGRESSIONALLY DIRECTED MEDICAL RESEARCH PROGRAMS 3, http://cdmrp.army.mil/funding/pa/14phtbiphra_pa.pdf. (last visited June 7, 2016). The intent portion of the solicitation expounded on “most pressing need and relevance to today’s battlefield experience.” *Id.* at 4. “To meet the intent of the [Fiscal Year 2014] . . . mechanism, all applications *must* specifically address one or more of the Topic Areas listed below,” listing as one of four possible categories; “[m]ilitary-related grief, guilt, or loss issues, moral injury, and/or anger, rage or aggression issues.” *Id.* Interestingly, of particular interest in the solicitation was the heightened risk for maladaptive coping, or even misconduct: “Of particular interest are universal and selective interventions that are aimed at equipping leaders, units, [servicemembers] and/or [f]amilies to handle situations

The phenomenon is considered by some to be “a signature wound of the wars in Iraq and Afghanistan but with roots as old as war itself.”¹⁹ Some even contemplate it as the crucial missing link in the lexicon of combat trauma.²⁰ A substantial interdisciplinary community is in agreement with this assertion.²¹ In a 2011 interdisciplinary study, the *Drescher Study*,²² “there was universal agreement”²³ that moral injury needs to be included in the lexicon of combat trauma.²⁴ The Department

that invoke grief, guilt or anger and prevent the development of a negative trajectory.” *Id.* One way to be awarded the “Fiscal Year 2014 Defense Medical Research and Development Program” was to conduct a thorough study on “military-related grief, guilt, or loss issues, moral injury, and/or anger, rage or aggression issues.” *Id.* at 3–4.

¹⁹ *Swords to Plowshares*, *supra* note 4. “Distinct from possible physical and psychological trauma, witnessing and/or participating in violence can injure one’s moral core, resulting in spiritual crisis and intense shame Modern training and combat conditions have made this moral injury increasingly likely, so moral conflict may now be considered a normal response to war.” Jeremy Jinkerson, *Moral Injury as a New Normal in Modern Wars*, 29 MIL. PSYCH. 3, 16–17(2014).

²⁰ “Pure PTSD, as officially defined, with no complications, such as substance abuse or danger seeking, is rarely what wrecks veterans’ lives, crushes them to suicide, or promotes domestic and/or criminal violence. Moral injury—both flavors—does.” Shay, *supra* note 11, at 184; *see generally* Laura Copland, *Staff Perspective: On Moral Injury*, CENT. FOR DEPLOY. PSYCH. (Oct. 30, 2015, 12 PM), <http://www.deploymentpsych.org/blog/staff-perspective-moral-injury/>. “Moral injury is increasingly acknowledged as the signature wound of this generation of veterans, with lasting impact on the individual and on their families.” RANDALL G. SHELDEN ET AL., CRIME AND CRIMINAL JUSTICE IN AMERICAN SOCIETY 418 (2d ed. 2008).

²¹ *Moral Injury Project*, *supra* note 4.

To understand moral injury and address its effects, we need to recognize that it exists. If we don’t, if we continue to categorize moral injury under the same umbrella we have for centuries, those who have borne our wars will have to carry their own wounded. Those faceless few with draped arms over slouched shoulders will still be trudging across the terrain of battles fought long ago.

Thomas Gibbons-Neff, *Haunted by Their Decisions in War*, WASH. POST (Mar. 6, 2015), https://www.washingtonpost.com/opinions/haunted-by-their-decisions-in-war/2015/03/06/db1cc404-c129-11e4-9271-610273846239_story.html

²² The *Drescher Study* involved twenty-three health care and ministry professionals from the Department of Defense (DoD) and Department of Veteran’s Affairs (DVA). William P. Nash & Brett T. Litz, *Moral Injury: A Mechanism for War-Related Psychological Trauma in Military Family Members*, 16 CLIN. CHILD AND FAM. PSYCH. REV. 365, 368 (2013).

²³ The study was called *An Exploration of the Viability and Usefulness of the Construct of Moral Injury in War Veterans*. Copland, *supra* note 20.

²⁴ *Id.*

of Defense (DoD) also moved toward data collection and analysis, and funded a significant clinical trial to study marines afflicted with moral injury.²⁵ The study of moral injury is clearly gaining momentum.

A. Defining Moral Injury

The first step in defining the phenomenon of moral injury is agreeing on what the correct name is, or should be. While moral injury is an ancient phenomenon, it is an emerging field of research.²⁶ The field right now is still in “its infancy,”²⁷ and “there are more unanswered questions than definitive answers at this point.”²⁸ Voluminous research is being done,

²⁵ David Wood, *Healing: Can We Treat Moral Wounds?*, HUFF. POST (Dec. 9, 2014, 8:26 PM), <http://projects.huffingtonpost.com/moral-injury/healing>.

²⁶ Nash et al., *supra* note 11, at 647.

Emerging empirical evidence confirms that military personnel confront a range of moral challenges in the course of military operations. How these operational moral challenges are processed can lead to moral injuries, which in turn, are associated with a wide range of damaging psychological, interpersonal, occupational, and life threatening outcomes for military personnel.

Thompson, *supra* note 12, at i.

²⁷ Litz et al., *supra* note 10, at 696. “Discussions concerning moral injury are relatively recent.” Thompson, *supra* note 12, at 10.

²⁸ Maguen & Litz *supra* note 3, at 1. “Although moral injury, per se, has not been systematically studied, there has been some research on acts of perpetration such as atrocities (i.e., unnecessary, cruel, and abusive harm to others or lethal violence) and killing.” Litz et al., *supra* note 10, at 697.

However, we believe that the clinical and research dialogue is very limited at present because questions about moral injury are not being addressed. In addition, clinicians who observe moral injury and are motivated to target these problems are at a loss because existing evidence-based strategies fail to provide sufficient guidance. Consequently, our goal is two-fold: We want to stimulate discourse and empirical research and, because we are sorely aware of the clinical care vacuum and need (especially in the Department of Defense), we offer specific treatment recommendations based on our conceptual model and a pilot study we are conducting in the Marine Corps.

Litz et al., *supra* note 10, at 696. The following is from the draft version of the joint Navy-Marine Corps Combat and Operational Stress Control Doctrine: “A moral injury is a stress injury ‘about which medical and psychological scientists know the least, even though it has been part of human experience for as long as humans have existed.’” *A Life Given Back*, MED. NAVY., <http://www.med.navy.mil/sites/nmcscd/nccosc/item/a-life-given-back/index>.

most crucially by the medical community,²⁹ but it is “still in its nascent stages.”³⁰ Enough is known, however, to at least stimulate academic discourse and address the phenomenon directly.³¹ While the phenomenon is being addressed, there is reluctance by some to arrive at a definition, or even to agree on a name.³²

While moral injury has been popularized³³ as the name for the phenomenon, it is not yet universally accepted. “In an era of complex medical diagnoses and legal terminology, a new definition for this ancient wound is required.”³⁴ In the *Drescher Study*, more than one-third of twenty-three participants thought moral injury was not the best name for the phenomenon, and that one or both of the words should be replaced.³⁵ This sentiment extends to portions of the interdisciplinary community, where “some believe the term ‘moral’ should be eliminated, while others want to replace the term ‘injury.’”³⁶

aspx (last visited Apr. 14, 2016).

²⁹ Joseph M. Palmer, *Moral Injury: A Guide for Clergy and Lay Ministries*, MIL. OUTREACH U.S.A. iv (2014), <http://www.militaryoutreachusa.org/wp-content/uploads/2015/06/Moral-Injury-Guide-for-Clergy-and-Lay-Ministries.pdf>. Referring to a study being done by the Naval Center for Combat and Operational Stress Control (NCCOSC):

We are also partnering with a clinical psychologist at [Naval Medical Center San Diego’s (NMCS D)] Overcoming Adversity and Stress Injury Support (OASIS) program for a study on moral injury (the internal conflict that may arise in the context of deployment and combat)—specifically, the causes and consequences of moral injury. We will be conducting focus groups at NMCS D and Camp Pendleton with active-duty [s]ailors and [m]arines, Navy mental health providers, and Navy chaplains to gain insight into the concept of moral injury. Our hope is that we can learn more about the best way to treat moral injury in a clinical setting.

Steven Van Der Werff, *NCCOSC Contributes to Medical Research*, NAVY MED. (Aug. 13, 2015), <http://navymedicine.navylive.dodlive.mil/archives/9342>.

³⁰ Farnsworth, *supra* note 15, at 13.

³¹ “To summarize, the scientific discourse about moral injury is nascent, yet it provides an excellent springboard for future investigations.” Maguen & Litz, *supra* note 3, at 3.

³² MEAGHER, *supra* note 12, at 3.

³³ Pryer, *supra* note 8, at 14. “The term *moral injury* has recently begun to circulate in the literature on psychological trauma.” Shay, *Moral Injury*, *supra* note 11, at 182

³⁴ Paul W. Fritts, *Adaptive Disclosure: Critique of a Descriptive Intervention Modified for the Normative Problem of Moral Injury in Combat Veterans*, COMM. AND GEN. STAFF COLL. <http://www.cgscfoundation.org/events/ethics-symposium/ethics-symposium-arc-hive/> (last visited Apr. 14, 2015).

³⁵ Nash et al., *supra* note 11, at 647.

³⁶ Copland, *supra* note 20.

Initially reluctant to address moral injury,³⁷ the various services are generally making progress.³⁸ For example, the Army's Comprehensive Soldier and Family Fitness Program now makes reference to moral

³⁷ "Difficult problems might arise from official recognition of moral injury: how to measure the intensity of the pain, for instance, and whether the government should offer compensation, as it does for [Post Traumatic Stress Disorder, or] PTSD." Wood, *supra* note 25.

³⁸

While moral injury is not clinically defined, nor captured as a formal diagnosis, it is recognized as real. The Defense Department provides a wide range of medical and non-medical resources for servicemembers seeking assistance in addressing moral injuries. From a medical perspective, there are no clinical practice guidelines specifically for moral injury. However, DoD mental health providers often address moral injury in combination with treating psychiatric disorders. For example, during treatment for PTSD, depression or other mental health conditions, patients may disclose information that suggests they have experienced a moral injury (e.g., guilt from accidentally killing a civilian during a combat operation or some other dilemma) and clinicians will help patients explore their feelings of guilt, anguish or other troubling thoughts/feelings they have about the incident.

Jayne Davis, *Is there an Answer to Your Mental Health Question? Ask DcoE*, DEF. CENT. OF EXC. FOR PSYCH. HEALTH & TRAUM. BRAIN INJ. (May 1, 2014), http://www.dcoe.mil/blog/14-05_01/Is_There_an_Answer_to_Your_Mental_Health_Question_Ask_DCoE.aspx (quoting an answer provided by Navy Captain Anthony Arita, Deployment Health Clinical Center director).

Moral injury is as old as war itself, but the tools and strategies to aid recovery are continuing to evolve. The military has therefore focused significant resources to better understand moral injury and the context for healing. Military medicine, Chaplain Corps, [the] research community, and leadership at all levels have joined in this effort. New forms of therapy for moral injury are being explored, and moral injury as a concept is increasingly being discussed in military treatment facilities. For example, Naval Medical Center Portsmouth has a specific Warrior Recovery Division with an array of treatment options to help service members better understand and resolve their unique post-deployment conflicts. Additionally, Naval Medical Center San Diego has programs that include complementary/alternative medicines and a variety of recreational therapies.

Id. See also Miller Kerr & Mathew Rariden, *Navy Medicine Perspective: Moral Injury*, NAVY MED. (Apr. 2, 2015), <http://navymedicine.navylive.dodlive.mil/archives/8437>.

injuries.³⁹ The Navy and the Marine Corps⁴⁰ prefer the name “inner conflict,”⁴¹ in part “because the potential synonym, moral injury, is perceived by some to be pejorative.”⁴² Other practitioners think inner

³⁹ “Resilience in soldiers helps prevent moral injuries in the complex environment of combat.” U.S. DEP’T OF ARMY, REG. 350-53, COMPREHENSIVE SOLDIER AND FAMILY FITNESS para. 2-3 (19 June 2014) [hereinafter AR 350-53]. “The term ‘moral injury’ is increasingly used in military behavioral health units.” Sherman, *supra* note 18, at 174.

⁴⁰ Megan McCloskey, *Combat Stress as ‘Moral Injury’ Offends Marines*, STARS AND STRIPES (Apr. 28, 2011), <http://www.stripes.com/blogs/stripes-central/stripes-central-1.8040/combat-stress-as-moral-injury-offends-marines-1.142177>.

⁴¹ Wood, *supra* note 25.

The third event that can cause Orange Zone stress injuries—inner conflict—is the one about which medical and psychological scientists know the least, even though it has been part of human experience for as long as humans have existed. Inner conflict has also been called “moral injury,” “betrayal of what’s right,” or “shattered assumptions” and is caused by events that violate deeply held beliefs, especially codes of conduct and moral codes regarding right and wrong. Inner conflict stress injuries can result when individuals either act or fail to act in ways that violate their own deeply held beliefs and moral codes. It can also occur when trusted others—especially spouses, close friends, or trusted leaders—either act or fail to act in ways that violate these same core beliefs and moral codes. The distress and changes in functioning that can result from an inner conflict stress injury can be just as profound and long-lasting as those resulting from a life-threat or loss.

U.S. DEP’T OF NAVY, NAVAL TACTICS, TECHNIQUES, PROCEDURES 1-15M, AND MARINE CORPS REFERENCE PUBLICATION, 6-11C, COMBAT AND OPERATIONAL STRESS CONTROL, 4-16 (Dec. 2010) [hereinafter COMBAT AND OPERATIONAL STRESS CONTROL].

⁴² Nash et al., *supra* note 11, at 647.

In short, the marines have adopted the concept, but renamed it “inner conflict.” Marines would tell Smith, “I understand I can get injured while I’m doing the thing I’m trained to do, but when you say the thing I’m trained to do injures me, some of them at least struggle with that. So we avoided [the struggle] by sticking with inner conflict.” Changing the name makes the concept more acceptable for marines who need help, says Navy commander and clinical psychologist Andrew Martin.

Martha Bebinger, *Moral Injury: Gaining Traction, but Still Controversial*, WBUR, BOST. NPR NEWS STATION (June 25, 2013), <http://www.wbur.org/2013/06/25/moral-injury-research>. Dr. Patricia Resick, Professor of Psychology at Duke University, therapist, and former Director of the Women’s Health Sciences Division of the National Center for PTSD finds the term “limiting” and “somewhat judgmental.” Amanda Taub, *How This*

conflict is not specific enough, and that the name implies a collective term that includes a wide variety of combat trauma.⁴³

If naming the phenomenon is a challenge, agreeing on a technical definition is a herculean endeavor.⁴⁴ For example, when the DoD was once asked to comment on the definition of moral injury, the response was denial that a definition even exists,⁴⁵ simply asserting that it is “not clinically defined,”⁴⁶ and that no formal diagnosis exists.⁴⁷ The truth to this assertion is that, at this stage, there are actually several competing definitions emanating from various disciplines,⁴⁸ none of which constitute the universally agreed-upon clinical definition.⁴⁹ Today there is a tremendous effort underway to define moral injury, specifically in the context of military service, and the potentially negative outcome residual in the lingering effects of combat.⁵⁰

Psychologist Treats Soldiers who Can't Let Go of What They Did at War, VOX.COM (May 25, 2015), <http://www.vox.com/2015/5/7/8553091/soldiers-trauma-treatment>.

⁴³ McCloskey, *supra* note 40.

⁴⁴ Copland, *supra* note 20.

⁴⁵ Wood, *supra* note 25.

⁴⁶ *Id.*

⁴⁷ *Id.* The Military Health System and the Defense Health Agency, however, try to help servicemembers understand the phenomenon. “Moral injury occurs when one experiences an act that conflicts with or violates a core moral value, or deeply held belief, and leads to an internal moral conflict.” *Understanding Moral Injury*, HEALTH.MIL (May 4, 2015), <http://www.health.mil/News/Articles/2015/05/04/Understanding-Moral-Injury>.

⁴⁸ For example, Jeff Zust recently synthesized elements of definitions from Jonathan Shay, Edward Tick, Rita Nakashima-Brock, Gabriella Lettini, and Brett Litz to arrive at the following working definition of moral injury: “Moral Injury is a complex “soul” wound that results from soldiers’ conscientious inability to reconcile the moral dissonance between their idealized values and their perceived experiences. This wound produces a continuum of exiling behaviors that damage soldiers’ ability to reconnect with their lives.” Zust, *supra* note 6, at 2.

⁴⁹ Boudreau, *supra* note 17, at 748.

⁵⁰ Consider this training announcement from the International Society for Traumatic Stress Studies, “Preventing Psychological & Moral Injury in Military Service.” Here the charter is to, among other things, define moral injury, teach others to spot it, and in one learning objective, “define moral injury in the context of military service and misconduct during combat.” Shay et al., *Preventing Psychological & Moral Injury in Military Service*, INT’L SOC. FOR TRAUM. STRESS STUD., <http://www.istss.org/education-research/online-learning/expert-trainings/preventing-psychological-moral-injury-in-military.aspx> (last visited June 13, 2016).

B. Thematic Elements

The challenge for judge advocates applying the concept of moral injury to any kind of legal practice is to first synthesize the working definitions to arrive at a definition that captures the most salient themes from the interdisciplinary community.⁵¹ For now and until the Pentagon releases one official definition, the best way to conceptualize moral injury is as three thematic elements. These elements are the common denominators, or themes, that can be synthesized from the interdisciplinary community. The three elements are: (1) an act; (2) a transgression; and (3) a harm.

1. Element 1: The Act

The first thematic element of moral injury is an act of transgression (act).⁵² The act can be a commission or its inverse, an omission.⁵³ The act can be carried out by an individual soldier, or collectively as a unit.⁵⁴ One popular modification contemplates an act that is “caused by doing, failing to prevent, or observing acts that go against deeply held moral beliefs and expectations.”⁵⁵ In this modification, the commission or omission can be

⁵¹ Synthesis of the working definitions is not intended as a medical diagnosis, psychological diagnosis, or therapeutic assessment criteria of any kind. This synthesis is intended only to help judge advocates navigate working definitions, and does not serve as a substitute for medical diagnosis.

⁵² Willis, *supra* note 10. “The key precondition for moral injury is an act of transgression.” Shira Maguen & Brett Litz, *Moral Injury in the Context of War*, U.S. DEP’T OF VET. AFF., http://www.ptsd.va.gov/professional/co-occurring/moral_injury_at_war.asp (last visited Apr. 14, 2016).

⁵³ Maguen & Litz, *supra* note 3, at 1.

Professor Sherman has interviewed hundreds of veterans to try to understand the damage caused by war. “A moral injury is not a threat to one’s life,” she explains, “and doesn’t always rise to the level of paralysis or suicidal proportion.” She describes a moral injury as one where “a soldier is holding onto incidents where they feel they’ve somehow transgressed, where they omitted to do more.” This can be something that a soldier did or didn’t do, and even something over which he or she had no control.

Gail Bosario, *The Untold Cost of Moral Injuries in War*, ABC.COM (Apr. 24, 2013, 5:36 PM), <http://www.abc.net.au/radionational/programs/latenightlive/anzac-day/4648634>.

⁵⁴ Maguen & Litz, *Moral Injury in the Context of War*, *supra* note 52.

⁵⁵ *Problems Associated With Combat Trauma*, THE WOUND. WARR. PROJ., <http://www>.

an act of another⁵⁶ that is merely witnessed,⁵⁷ regardless of any control the observer had on the event.⁵⁸ “William Nash, M.D., a leading researcher, educator, and clinical consultant in military and veteran psychological health defines moral injury as ‘stress resulting from perpetrating, or merely witnessing, acts—or failures to act.’”⁵⁹ Thus “seeing someone else violate core moral values”⁶⁰ is enough to satisfy the element under this construction.

Another modification is even more permissive, and contemplates an act manifesting by just learning about the immoral conduct of others, meaning no first-hand knowledge is required. “Near the end of 2009, U.S. Department of Veterans Affairs clinicians offered this definition of moral injury: Moral injury is perpetrating, failing to prevent, bearing witness to, or learning about acts that transgress deeply held moral beliefs and expectations.”⁶¹ Under this broad construction, “witnessing or learning

woundedwarriorproject.org/programs/combat-stress-recovery-program/problems-associated-with-combatoperational-stress-trauma.aspx (last visited Apr. 14, 2016).

⁵⁶ In one definition, the “act of another” adds another modification, and specifically states that the act of another must be “by someone who holds legitimate authority.” SHAY, *DEFENDING VETRANS*, *supra* note 13, at 63.

⁵⁷ Farnsworth, *supra* note 15, at 13; *see also* Maguen & Litz, *Moral Injury in the Context of War*, *supra* note 52.

⁵⁸ “Nancy Sherman . . . similarly describes moral injury as resulting when “a soldier is holding onto incidents where they feel they’ve somehow transgressed, where they omitted to do more. This can be something that a soldier did or didn’t do, and even something over which he or she had no control.” Thompson, *supra* note 12, at 6.

⁵⁹ Copland, *supra* note 20.

⁶⁰ RITA NAKASHIMA BROCK & GABRIELLA LETTINI, *SOUL REPAIR: RECOVERING FROM MORAL INJURY AFTER WAR* xv (2013).

⁶¹

To stimulate a dialogue about moral injury, we offer the following working definition of potentially morally injurious experiences: *Perpetrating, failing to prevent, bearing witness to, or learning about acts that transgress deeply held beliefs and expectations.* This may entail participating in or witnessing inhumane or cruel actions, failing to prevent the immoral acts of others, as well as engaging in subtle acts or experiencing reactions that, upon reflection, transgress a moral code.

Litz et al, *supra* note 10, at 700.

Near the end of 2009, U.S. [DVA] Affairs clinicians offered this definition of moral injury: “Moral injury is perpetrating, failing to prevent, bearing witness to, or learning about acts that transgress deeply held moral beliefs and expectations. This may entail participating in or witnessing inhumane or cruel actions, failing to

about such an event⁶² is very permissive, and contemplates a wide variety of scenarios in which an act may manifest even without first-hand knowledge. A variation on this theme are definitions that make special mention of a soldier being “required or coerced to accept or cover up”⁶³ the act of another.

Some argue that the risk-exposure to an act under this broad construction increases in combat,⁶⁴ contemplated by some definitions as “a high stakes situation.”⁶⁵ Some of this risk might emanate from just proximity to violence and bearing witness to killing.⁶⁶ The act, however,

prevent the immoral acts of others, as well as engaging in subtle acts or experiencing reactions that, upon reflection, transgress a moral code.”

Nash et al., *supra* note 11, at 647; *see also* Copland, *supra* note 20.

⁶² Litz et al., *supra* note 10, at 700.

⁶³ Willis, *supra* note 10.

⁶⁴ *See, e.g.*, Maguen & Litz, *supra* note 3, at 1–3; “Sending people to fight necessarily sends them into situations where moral injury will result.” Sherman, *supra* note 18, at xvi. “The moments for moral injury, for a sense of grievous transgression and falling short, are all too abundant in war.” *Id.* at 17.

Examples of moral injury in war include, [u]sing deadly force in combat and causing the harm or death of civilians, knowingly but without alternatives, or accidentally, giving orders in combat that result in the injury or death of a fellow servicemember, failing to provide medical aid to an injured civilian or servicemember, returning home from deployment and hearing of the executions of cooperating local nationals, failing to report knowledge of a sexual assault or rape committed against oneself, a fellow servicemember, or civilians, following orders that were illegal, immoral, and/or against the Rules of Engagement (ROE) or Geneva Convention, [a] change in believe about the necessity or justification for war, during or after ones service,’ and countless others.

Moral Injury Project, *supra* note 4 (internal quotations and citations omitted). “Moral Injury is a testimony to the destructive power of the perceived present in combat.” Züst, *supra* note 6, at 10.

⁶⁵ SHAY, DEFENDING VETERANS, *supra* note 13, at 63.

⁶⁶ Litz et al., *supra* note 10, at 700. “Several studies demonstrate an association between killing in war and mental and behavioral health problems, which may be proxies for moral injury.” Maguen & Litz, *Moral Injury in the Context of War*, *supra* note 52. One important disclaimer here is that exposure to violence is not, in itself, inherently traumatizing. Rather it is potentially traumatizing event (PTE). E-mail from Dr. Brett T. Litz, (May 10, 2015, 13:01 EST) [hereinafter Dr. Litz E-mail] (on file with author).

can manifest in the most routine of scenarios,⁶⁷ even when a soldier is following a lawful order, or is in an unavoidable situation.⁶⁸ “A common example used by the psychiatrist who coined the term is the [m]arine who acted on orders to shoot a sniper who was using an infant serving as a human shield.”⁶⁹

Although killing may be a precursor to moral injury, it is important to note that not all killing in war results in adverse outcomes for military personnel. As noted earlier, certain elements need to be present for moral injury to occur, including a perceived transgression that goes against individual or shared moral expectations. For example, a military member who kills an enemy combatant in self-defense may perceive that the death was justified. If however, a civilian was perceived to be armed and consequently killed, with military personnel later discovering that the individual was in fact unarmed, this may set the stage for the development of moral injury.

Maguen & Litz, *Moral Injury in the Context of War*, *supra* note 52. Inherently traumatizing events require “some kind of per or near-per-traumatic response the impact is felt and there is harm done.” Dr. Litz E-mail, *supra*. “A loss in a unit is a PTE. The impact depends on proximity, closeness to the person lost, culpability, etc.” *Id.* In other words, proximity violence still requires the other two elements; transgression and a harm. *Id.*

⁶⁷ MEAGHER, *supra* note 12, at 45. “Military personnel are well trained in the rules of engagement and do a remarkable job making life or death decisions in war; however, sometimes unintentional error leads to the loss of life of non-combatants, setting the stage for moral injury.” Maguen & Litz, *Moral Injury in the Context of War*, *supra* note 52.

Although moral injury is most often associated with violence and aggression within the context of combat, military personnel can also experience inner turmoil secondary to nonviolent events, such as exposure to dead bodies or human remains, reported by 65% of Iraq and Afghanistan veterans . . . and/or seeing wounded civilians and being unable to assist, reported by 60% of Iraq and Afghanistan veterans The potential conflicts between these experiences and a service member’s moral standards can lead to lasting emotional distress and inner turmoil for military personnel, a situation that has been termed *moral injury*

Craig J. Bryan et al., *Measuring Moral Injury: Psychometric Properties of the Moral Injury Events Scale in Two Military Samples*, SAGE J. (June 19, 2015), <http://asm.sagepub.com/content/early/2015/06/18/1073191115590855.full.pdf+html> (citations omitted).

⁶⁸ “Moral injury results from a traumatic event in which a veteran felt authorized or required by the circumstances in combat to act in conflict with his or her conscience and sense of values.” 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. 1, 254 (2012); see also Brock & Lettini, *supra* note 60, at xv–xvi.

⁶⁹ Brooker et al., *supra* note 68, at 251.

The first thematic element then is an act; defined as an act of commission or omission, by oneself or another, that can be either witnessed or learned about, in real time or upon reflection.⁷⁰ While this is a broadly constructed synthesis, in the absence of one official definition it is prudent to synthesize permissively and consider a wide variety of scenarios where an act might manifest.

2. *Element 2: The Transgression*

The second thematic element is the transgression that is caused by the act,⁷¹ often later in time and upon reflection.⁷² “It comes from having

By contrast, here is a combat incident alone that might cause moral injury This was told to me at a Marine Corps Combat and Operational Stress Control conference in San Diego as an incident that happened at Fallujah. A Marine scout-sniper team was supporting a marine infantry unit that had taken several casualties from a well-hidden and effective enemy sniper. My understanding is that the typical marine team is two: the shooter and the spotter; they have different roles at given moments of engagement, but both marines are trained to perform both functions, and often swap. The marine sniper eventually found and identified the enemy sniper in his scope and could see that he had a baby strapped to his front in a sling we would call a *Snuggly*. The marine believed that the enemy was using this baby as a “human shield,” although other interpretations were possible (for example, “I want my son to join me in Paradise,” that is, martyr thinking, or “If I am dead, there will be nobody to protect and look after him—if I die, he will die”). However, the point here is not the enemy sniper’s thinking, but the marine’s. The marine sniper’s understanding of the then-current Rules of Engagement and of the Law of Land Warfare was that shooting the enemy sniper was permissible, even if the baby could be foreseen to die unintentionally in the process. His understanding of his job description and his duty to the marines he was supporting was to make the shot, which he did. He saw the round land, and will probably live with that memory the rest of his life.

Shay, *Moral Injury*, *supra* note 11, at 185–86; *cf.* Hector/Astyanax in the *Iliad* or Odysseus/Telemachus in *The Odyssey*, *supra* note 11 and accompanying discussion.

⁷⁰ The modifier “on reflection” is added to illustrate that this element may not be immediately apparent. Brock & Lettini, *supra* note 60, at xiv.

⁷¹ The act must lead to a transgression of some kind, and ultimately a harm, to constitute a moral injury. Dr. Litz E-mail, *supra* note 66.

⁷² Copland, *supra* note 20.

transgressed one's basic moral identity and violated core moral beliefs."⁷³ Definitions of this element vary widely as to what the basic moral identity and core moral beliefs that are referenced actually mean, or should mean.⁷⁴ For some scholars, the transgression must be against the soldier's personal moral identity, and personal set of values⁷⁵ (personal moral code). Some

⁷³ Brock & Lettini, *supra* note 60, at xiv.

Whether a moral transgression is the result of one's own actions or omissions, or those of others, it is not the event itself that appears to be crucial to the etiology of moral injury. Rather, it is the extent to which the person makes sense of the event and its associated actions (or lack of actions) that is key. That is, can the person create any reasonable causal explanation for the event at all? Should such a rationale be out of reach, the person may devote an inordinate amount of energy in trying to understand, make sense of, and derive meaning regarding the event. This experience will be among the first indications that one's moral standards have been betrayed or violated and opens the potential for moral injury to occur.

Thompson, *supra* note 12, at 6.

⁷⁴ To have a moral injury implies the existence of a moral code, or basic moral identity as a condition-precedent. "Moral injury is a question of conscience and implies the existence of moral health, moral service, and the possibility for moral healing." Züst, *supra* note 6, at 2.

[Moral injury] begins in the moral development of responsible agency. In the profession of arms, responsible agency entwines personal character and professional ethos to empower those who conscientiously accept military service to serve honorably under difficult conditions and to return home successfully. In combat, responsible agency doesn't guarantee acceptable actions. Reasoned choices and planned actions fail; character and ethos fragment, and moral injuries occur as participants live with the consequences. [Moral Injury] grows out of a moral reasoning conscience, trying to reconcile the dissonance between "idealized" standards against perceptions of "real" behaviors and events during combat. The idealized standards, perceived behaviors, and the resulting dissonance reflect the outcomes of moral development, morals judgment and moral reconciliation processes occurring within a [s]oldier's conscience.

Id.

⁷⁵ MEAGHER, *supra* note 12, at xvi-xvii. "A number of clinician-researchers, among them Brett Litz, Shira Maguen, and William Nash, have done an excellent job of describing an equally devastating second form of moral injury that arises when a servicemember does something in war that violates their own ideals, ethics, or attachments." Shay, *Moral Injury*, *supra* note 11, at 184.

even assert that this construction of the element: “the violation, by oneself or another, of a personally embedded moral code,”⁷⁶ is the most common.⁷⁷ On the other end of the spectrum are constructions of the element that contemplate transgressions of “communally shared moral beliefs and expectations”⁷⁸ (communal moral code). This will be an interesting distinction as the Army moves toward codifying the professional ethic,⁷⁹ and gives additional guidance on what those communal expectations are.

Most definitions fall in the middle of spectrum or are silent as to whether the transgression is against a personal or a communal moral code. These definitions refer generally to “betrayals of ‘what’s right,’”⁸⁰ and acts “that transgress deeply held beliefs and expectations.”⁸¹ Some definitions contemplate both personal and communal moral code transgressions. One example refers to these as “moral and ethical expectations that are rooted in religious or spiritual beliefs, or culture-based, organizational, and group-based rules about fairness, the value of life, and so forth.”⁸² Some definitions even assert that while the soldier enters military service with a

Separate to physical injuries, or even symptoms of PTSD, moral injury is able to destroy a soldier’s deeply held personal beliefs about right and wrong. It can disrupt an individual’s confidence about his or her own moral behaviour or others’ capacity to behave in a just and ethical manner.

Bosario, *supra* note 53.

⁷⁶ MEAGHER, *supra* note 12, at xvi.

⁷⁷ *Id.* at xvi–xvii.

⁷⁸ Copland, *supra* note 20.

⁷⁹ “The goal is an articulated, accessible, commonly understood, and universally applicable Army Ethic—motivating *Honorable Service*, guiding, and inspiring right decisions and actions. In turn, the Army Ethic will drive the *Concept and Strategy for Character Development*.” *The Army Ethic White Paper*, CENT. FOR THE ARMY PRO. ETH. (July 11, 2014), <http://cape.army.mil/army-ethic-white-paper/>.

⁸⁰ Nash et al., *supra* note 11, at 647.

⁸¹

Near the end of 2009, U.S. [DVA] clinicians offered this definition of moral injury: *Moral injury is perpetrating, failing to prevent, bearing witness to, or learning about acts that transgress deeply held moral beliefs and expectations. This may entail participating in or witnessing inhumane or cruel actions, failing to prevent the immoral acts of others, as well as engaging in subtle acts or experiencing reactions that, upon reflection, transgress a moral code.*

Litz et al., *supra* note 10, at 700 (emphasis added); see also Copland, *supra* note 20.

⁸² Willis, *supra* note 10.

subjective moral code,⁸³ “within months this moral code is replaced with the warrior code.”⁸⁴

The second thematic element thus is the transgression caused by the act, defined as betraying or violating deeply held beliefs in either a personal or a communal moral code.

3. *Element 3: The Harm*

The third thematic element is the harm, or damage caused by the act of transgression. This definition also presents a wide spectrum as to what is actually damaged, and what the damage really means to the soldier and to the unit. Some definitions speak nebulously to a “disruption of the self on a number of different levels,”⁸⁵ or a transgression that generally “leads

⁸³ Zust, *supra* note 6, at 5–6 (discussing the “pre-wired” personal values that civilians enter the armed forces with and the altruistic motives of many recruits).

David Wood, *The Grunts: Damned if They Kill, Damned if They Don’t*, HUFF. POST (Dec. 11, 2014, 10:42 PM), <http://projects.huffingtonpost.com/moral-injury/the-grunts>.

⁸⁴ Palmer, *supra* note 29, at 1. Jacob K. Farnsworth et al., *The Role of Emotions in Military Trauma: Implications for the Study and Treatment of Moral Injury*, 18 REV. OF GEN. PSYCH. 249, 249–252 (2014) (discussing the intense assimilation of a “new moral system” at basic training; “reorienting a recruit’s moral emotions and judgments to the social context of their military branch). “From the time a recruit takes their oath of military service they will learn about their Service’s code of ethics. While every [s]ervice has their own [c]ode reflecting on the particular mission of that [s]ervice there is commonality in such values as honor, service and sacrifice.” JOSEPH M. PALMER, A GUIDE TO AN UNDERSTANDING AND RESOLUTION OF THE INVISIBLE WOUND OF WAR KNOWN AS MORAL INJURY (2015). “Soldiers and Army [c]ivilians enter the Army with personal values developed in childhood and nurtured over years of personal experience. By taking an oath to serve the nation and the institution, one agrees to live and act by a new set of values—Army Values.” DEP’T OF ARMY, ADP 6-22, ARMY LEADERSHIP para 3-3 (1 Aug. 2012) [hereinafter ADRP 6-22].

⁸⁵ Farnsworth, *supra* note 15, at 22. The following account is from Captain Josh Mantz, who reports having died and been resuscitated on the battlefield in Baghdad on April 21, 2007, and is now crushed with survivor’s guilt. “‘It’s the moral injury over time that really kills people. Soldiers lose their identity. They don’t understand who they are anymore . . . Most people don’t appreciate the awful weight of that moral injury.’” Sherman, *supra* note 18, at 7. For a complete account of this moral injury, see Sherman, *supra* note 18, at ch. 1. “Josh Mantz experiences *moral* anguish, in part, because he feels transgressed and fell short. He wasn’t all he thought he should be as a commander. He let his soldier go without help while he was saved.” *Id.* at 18. The various levels can be physical, mental, and emotional. “Not surprisingly, the effects of severe violations of one’s basic beliefs concerning what is right, just, and fair involve an array of intense emotional, cognitive and even physical reactions.” Thomspson, *supra* note 12, at 7.

to serious inner conflict.”⁸⁶ Alternate definitions specifically enumerate how that inner conflict manifests. One category of definitions refers generally to moral and ethical harm, and contemplates transgressions that “shatters moral and ethical expectations,”⁸⁷ and leaves “enduring negative emotional distress related to moral injury.”⁸⁸ Other categories of definitions focus on spiritual harm⁸⁹ and contemplate transgressions “resulting in deep injury to the psyche or soul.”⁹⁰ Still others focus on the psychological aspect, and contemplate a lifelong,⁹¹ or “lasting and powerful psychological wound.”⁹² The most expansive definitions attempt to enumerate exhaustive lists of how the harm might manifest, ranging from the spiritual, to the psychological.⁹³

⁸⁶ Maguen & Litz, *supra* note 3, at 1.

⁸⁷ Willis, *supra* note 10.

On the other hand, research on the mental and spiritual components of psychological trauma, loss, and moral injury has shown that one of the defining features of such stress injuries is that they shatter existing assumptions about God, goodness, and the moral order in a way that leaves a void in understanding and meaning.

COMBAT AND OPERATIONAL STRESS CONTROL, *supra* note 41, at 3-27–3-28.

⁸⁸ Litz et al., *supra* note 10, at 698.

⁸⁹

Moral injury is damage to the soul of the individual. War is one of, but not the only thing that can cause this damage. Abuse, rape, and violence cause the same type of damage. “Soul repair” and “soul wound” are terms already in use by researchers and institutions in the United States who are exploring moral injury and paths to recovery.

Moral Injury Project, *supra* note 4.

⁹⁰ MEAGHER, *supra* note 12, at xvi–xvii.

Moral [i]njury is best understood as an invisible soul wound resulting from a desire for responsible agency (moral development). In the profession of arms, responsible agency integrates personal character and professional ethos to empower those who conscientiously accept military service to serve honorably under difficult conditions and successfully return home. In combat, responsible agency doesn’t guarantee acceptable actions (moral judgment). Reasoned choices and planned actions fail; character and ethos fragment; and moral injuries occur as participants live with the consequences (moral dissonance).

Zust, *supra* note 6, abstract.

⁹¹ JONATHAN SHAY, ODYSSEUS IN AMERICA, *supra* note 11.

⁹² Litz et al., *supra* note 10, at 697.

⁹³ *Id.*

Some argue that the risk exposure to a harm, like the risk-exposure to an act, increases in combat.⁹⁴ Numerous studies document the lingering detrimental effects of the violence of direct combat.⁹⁵ Part of this might emanate from sheer proximity to or participation in the violence, similar to the first element.⁹⁶ Similar as well to the first element, the risk can be acute even when the soldier acted within the rules of engagement, and pursuant to a lawful order.⁹⁷ The harm can manifest in a multitude of ways, and includes anxiety,⁹⁸ “feelings of worthlessness, remorse, and despair,”⁹⁹ “shame and guilt and anger,”¹⁰⁰ or even a feeling “as if they lost their souls in combat and are no longer who they were.”¹⁰¹

⁹⁴ See generally *supra* notes 66–69.

⁹⁵ Farnsworth, *supra* note 15, at 14.

Former Army Reserve Capt. Josh Grenard thought the anguish of losing men in combat would eventually wane in the years after a deployment to Iraq. But when soldiers from his unit began committing suicide, the wounds reopened—fresh, raw and painful. “It’s almost two sets of injuries—but having your men kill themselves is wholly different,” Grenard said. “Was there something I could have done? Was there a way we could have gotten them help? Should I have seen it?” He found himself slipping into isolation, going to his law office each day but questioning his very existence. He drank from 7 a.m. to 10 p.m. daily—“very metered, all day.” “You don’t want to think about anything. You don’t want to answer those questions,” he said. Grenard was not suffering from post-traumatic stress disorder, the psychiatric condition normally associated with combat. Rather, his feelings which included helplessness, emotional pain, guilt and frustration, are often described as “moral injury,” a psychological condition related to having done something wrong, being wronged by others, or even witnessing a wrongdoing, argues Georgetown University philosophy professor Nancy Sherman.

Patricia Kime, *Moral Injury: Troops Talk of How War Assaults Conscience*, MIL. TIMES (Nov. 19, 2015), <http://www.militarytimes.com/story/military/2015/11/19/moral-injury-troops-talk-how-war-assaults-conscience/76000632/>.

⁹⁶ *Id.* Readers are reminded of the same disclaimers offered in note 66, that proximity to violence is not inherently morally-injurious. See generally *supra* note 66 and accompanying discussion.

⁹⁷ Brooker et al., *supra* note 68, at 254.

⁹⁸ Willis, *supra* note 10.

⁹⁹ Brock & Lettini, *supra* note 60, at xv–xvi.

¹⁰⁰ David Wood, *The Recruits: When Right and Wrong are Hard to Tell Apart*, HUFF. POST (Jan. 12, 2015, 9:38 AM), <http://projects.huffingtonpost.com/moral-injury/the-recruits>.

¹⁰¹ Brock & Lettini, *supra* note 60, at xv–xvi. “A moral injury is not established by a formal diagnosis and there is no set threshold to mark its presence.” *Understanding Moral*

The third thematic element then is the harm—defined as the damage caused by an act of transgression—that causes substantial inner conflict, manifesting as psychological, emotional, moral, or spiritual and dimensional harm.

4. *Satisfaction of all three elements*

A synthesis of the salient considerations from the interdisciplinary community thus reveals three thematic elements. The first thematic element is an act; defined as an act of commission or omission, by oneself or another, that can be either witnessed or learned about, in real time or upon reflection. The second thematic element is the transgression caused by the act, defined as betraying or violating deeply held beliefs in either a personal or a communal moral code. The third thematic element is the harm, defined as the damage caused by an act of transgression; that causes substantial inner conflict, manifesting as psychological, emotional, moral, or spiritual and dimensional harm. When all three elements are satisfied, the result is a “Potentially Morally Injurious Event” (PMIE).¹⁰² It is potential because “there is no threshold for establishing the presence of moral injury.”¹⁰³ In other words, every case is different¹⁰⁴ and leaders should be cognizant of the elements, and why their satisfaction could be significant for good order and discipline, readiness, and soldier health and welfare.

C. The Potential Effects

The implications of a PMIE are thought by many to be significant, as some assert that it can form a contributing cause, or be associated with¹⁰⁵

Injury, REAL WARRIORS, <http://www.realwarriors.net/active/treatment/moralinjury.php> (last visited Nov. 12, 2015).

¹⁰² Dr. Litz E-mail, *supra* note 66.

¹⁰³ Maguen & Litz, *supra* note 3, at 1.

¹⁰⁴ *See infra* Section III.

¹⁰⁵ “Others have similarly concluded that moral injuries are associated with a range of social problems, spiritual/existential issues, risk-taking and emotional distress.” Thompson, *supra* note 12, at 7.

a heightened risk of misconduct,¹⁰⁶ self-harm,¹⁰⁷ and even soldier suicide.¹⁰⁸ One Navy psychiatrist even asserts that moral injury is a predominant harbinger of significant negative outcomes.¹⁰⁹ “Nash, the retired Navy psychiatrist, believes that if research were available, it would reveal that moral injury underlies veteran suicide, homelessness, and criminal behavior.”¹¹⁰ The damage¹¹¹ that can manifest is referred to as a shrinking of “the moral and social horizon.”¹¹² Herein lies the red star cluster.

1. *Shrinking of the Moral Horizon*

When a soldier is morally injured, many scholars assert that his¹¹³ paradigm of what constitutes ethical and moral conduct can change and diminish.¹¹⁴ “All potentially morally injurious experiences create risk for

¹⁰⁶ “Overall, many violations of the *Uniform Code of Military Justice* may be further explained by the specific symptom clusters, stress triggers, or environmental stimuli addressed below.” Brooker et al., *supra* note 68, at 252. Moral injury is one of those addressed. “Moral injury can result in criminal offenses, especially those involving domestic violence, through the veteran’s effort to ‘strike first,’ one of three common maladaptive responses to the lack of ability to trust others.” *Id.* at 254.

¹⁰⁷ Litz et al., *supra* note 10, at 701.

¹⁰⁸ SHAY, *DEFENDING VETERANS*, *supra* note 13, at 62.

¹⁰⁹ Wood, *The Grunts*, *supra* note 83.

¹¹⁰ Sheldon et al., *supra* note 20, at 419.

¹¹¹ “Moral injury damages the unit, can damage the nation, and chronically damages the [s]oldier when he or she returns to [h]ome [s]tation or to civilian life.” Jonathan Shay, *Moral Leadership Prevents Moral Injury*, COMM. AND GEN. STAFF COLL. (Mar. 2014), <http://www.cgscfoundation.org/wpcontent/uploads/2014/03/FtLvnEthicsSymposiumReport-2010.pdf#page=333>.

¹¹² See generally JONATHAN SHAY, *ACHILLES IN VIETNAM: COMBAT TRAUMA AND THE UNDOING OF CHARACTER* 23–39 (1995). “What they feel is profound moral dislocation and a consequent slipping sense of connectedness with family they love.” Sherman, *supra* note 18, at 26–27. “This ‘shrinkage of the social and moral horizon,’ as psychologist Jonathan Shay puts it in *Achilles in Vietnam*, is a common phenomenon for small groups of soldiers in prolonged combat settings.” JIM FREDERICK, *BLACK HEARTS: ONE PLATOON’S DESCENT INTO MADNESS IN IRAQ’S TRIANGLE OF DEATH* 173 (2011).

¹¹³ References to “his” in this article are intended to be gender-neutral, and refer generically to the entire population of morally injured combat soldiers. “Although moral injury is by no means restricted to male [s]ervicemembers, the vast majority of military personnel are male. Therefore, the vast majority of [v]eterans experiencing and seeking treatment for military-related psychological complaints are likewise male.” Farnsworth, *supra* note 15, at 14.

¹¹⁴ Litz et al., *supra* note 10, at 701; see generally SHAY, *ODYSSEUS IN AMERICA*, *supra* note 11, at 64–71; “All potentially morally injurious experiences create risk for

demoralization and alienation, as well as altered moral expectations (informally termed a ‘broken moral compass’).”¹¹⁵ One naval-psychotherapist calls this “an erosion of moral certainty, or the confidence in their sense of right and wrong,” or “the transformative capacity of what happens when we send our children into a war zone and say, ‘Kill like a champion.’”¹¹⁶ The operative modifier is “transformative.”

While some in the psychiatric community assert that trauma cannot transform a person’s character,¹¹⁷ others assert that traumatic combat experiences can damage good character,¹¹⁸ relying on the ancient presumption that character is malleable into adulthood.¹¹⁹ This character change¹²⁰ is called the “shrinking of the moral horizon,” and with the

demoralization and alienation, as well as altered moral expectations (informally termed a ‘broken moral compass’).” Dr. Litz E-mail, *supra* note 66.

¹¹⁵ Dr. Litz E-mail, *supra* note 66.

¹¹⁶ Wood, *The Recruits*, *supra* note 100.

¹¹⁷ Shay, *Moral Injury*, *supra* note 11, at 65.

We have been carefully taught to believe that good character cannot change in adulthood. This belief has a brilliant pedigree. It starts with Plato and runs through the Stoics, Kant, and Freud. It says, if you make it out of childhood with “good breeding” (Plato’s term; today we would say “good genes”) and good upbringing, then your good character is set by the end of childhood. No bad experience can break it. The trouble with this idea is that it is bunk.

SHAY, *DEFENDING VETERANS*, *supra* note 13, at 184. This notion of character, or moral foundation, is a crucial paradigm in a moral injury analysis.

Morals are the fundamental rules that we hold about what is good or bad, right or wrong, just or unjust, and often have implications for the well-being of others Our moral foundation is important as it is a central basis of “our expectations about and understanding of ourselves, others and the world around us . . . [that is,] how things should work and how one should behave in the world”. As such, morals are instrumental in our belief systems and behavioral sanctions regarding how we, and how others, should behave.

Thompson, *supra* note 12, at 1-1 (citations omitted).

¹¹⁸ W.D. EHRHART, *THE MADNESS OF IT ALL: ESSAYS ON WAR, LITERATURE, AND THE AMERICAN LIFE* 80 (2002). Referring specifically to moral injuries, “They deteriorate character.” Shay, *Moral Injury*, *supra* note 11, at 182.

¹¹⁹ “Homer and the Greek tragic poets held the terrifying view that apparently stable adult character *continues* to be dependent and vulnerable, even after it has been established by good nurturing in childhood.” SHAY, *ACHILLES IN VIETNAM*, *supra* note 112, at 37.

¹²⁰

shrinking goes “a person’s ideals and attachments and ambitions,”¹²¹ and the subsequent “regressive over-accommodation of moral violation, culpability, or expectations of injustice.”¹²² Another term for this transformation is “the undoing of character.”¹²³

In other words, many scholars assert that moral injury can result in “maladaptive coping,”¹²⁴ which may manifest as a diminished capacity or willingness¹²⁵ to adhere to laws or values,¹²⁶ and “can result in behavior

How does moral injury change someone? It deteriorates their character; their ideals, ambitions, and attachments begin to change and shrink. Both flavors of moral injury impair and sometimes destroy the capacity for trust. When social trust is destroyed, it is replaced by the settled expectancy of harm, exploitation, and humiliation from others.

Shay, *Moral Injury*, *supra* note 11, at 186. “When ruptures are too violent between the social realization of ‘what’s right’ and the inner *themis* of ideals, ambitions, and affiliations, the inner *themis* can collapse.” SHAY, ACHILLES IN VIETNAM, *supra* note 112, at 37.

¹²¹ Copland, *supra* note 20.

¹²² Litz et al., *supra* note 10, at 701.

¹²³

Before the psychological injuries recorded in *The Iliad*, Achilles’ habit was to respect enemy dead rather than kill them. Achilles loses his humanity in two stages: He ceases of care about his fellow Greeks after betrayal by his commander, and then he loses all compassion for any human being after the death of Patroklos. *The Iliad* is the story of the undoing of Achilles’ character.”

SHAY, ACHILLES IN VIETNAM, *supra* note 112, at 26.

¹²⁴ See generally Thompson, *supra* note 12, at 6–7 (discussing the association with maladaptive coping in the morally-injured veteran).

Thus . . . in order to protect themselves from future harm, moral injury can cause a veteran to invoke at least one of three maladaptive ways of coping: striking out, retreating and thus becoming isolated, or developing “effective deception and concealment” strategies. While such behavioral strategies may reduce symptomology temporarily, they are usually extremely destructive in the long run. Importantly, they also preclude the possibility of engaging in activities and being open to experiences that might tend to disprove this maladaptive view of oneself and/or the world.

¹²⁵ This is what Dr. Nash refers to as “trouble pumping the brakes.” Telephonic interview with Dr. William Nash at Fort Gordon, Georgia (Nov. 13, 2015) (notes on file with the author) [hereinafter Dr. Nash Interview].

¹²⁶ Brooker et al., *supra* note 68, at 254.

that is simultaneously symptomatic and criminal.”¹²⁷ This most extreme negative outcome, the connection between combat-trauma and criminal behavior,¹²⁸ is contemplated by some as a form of “staying in combat

Inadequate treatment (or no treatment) of veterans with PTSD, [traumatic brain injury], and/or moral injury increases the probability that they will become entangled in the criminal justice system.

Shelden et al., *supra* note 20, at 419 (Discussing the revolving-door nature of individuals with behavioral health conditions with the criminal justice system. “Inadequate treatment (or no treatment) of veterans with PTSD, [traumatic brain injury], and/or moral injury increases the probability that they will become entangled in the criminal justice system.”). Thompson, *supra* note 12, at 8 (citations omitted) (discussing some of the behavioral problems associated with a the breakdown in trust as a result of a moral injury stemming from a betrayal of someone in power; along a broad spectrum from “loss of motivation” to the more catastrophic and criminal).

It may be that for some vulnerable individuals, combat-induced psychological trauma leads to breakdowns in personality, ethics, and self-control, a phenomenon that may be related to Shay’s concept of moral injury in individuals who have experienced the horrors of war. More research is clearly needed to more fully understand the causal pathways from combat exposure to misconduct.

Stephanie Booth-Kewly et al., *Psychosocial Predictors of Military Misconduct*, 198 J. OF NERVOUS AND MENT. DIS. 91, 97(2010).

¹²⁷

Invisible wounds of war, including a range of mental health conditions and symptoms that fall below the threshold of a diagnosable disorder, are predictable occupational hazards of military service. In a small number of cases, these inevitable byproducts of loyal and faithful performance of one’s duties manifest in behavior that is simultaneously symptomatic and criminal. Even though the great majority of [v]eterans (both with and without mental health conditions) do not engage in violent or criminal behavior, the small group of outliers with service-related misconduct is hardly insignificant and collectively represents a public health and public safety concern given the group’s tactical and combat training and experience.

Evan R. Seamone, *Active Duty Service as the Ultimate Intercept for Diversion of Veterans from Incarceration and Recidivism in the Civilian Criminal Justice System*, UNIV. PENN. (Dec. 2015), <https://www.law.upenn.edu/institutes/cerl/conferences/Legaethicalinvisiblewounds/required-readings.php>.

¹²⁸ “[V]arious [operational stress injury] symptoms can contribute to criminal offending in veteran populations, such as . . . ‘shattered assumptions of moral order,’ . . . [and] ‘moral injury.’” Evan R. Seamone & David L. Albright, *Veterans in the Criminal Justice System*, in *CIVILIAN LIVES OF U.S. VETERANS: ISSUES AND IDENTITIES ISSUES AND IDENTITIES* (Louis Hicks et al. eds., 2016) (forthcoming). “Operational Stress Injury,” or OSI, is a term used by the Canadian Armed Forces to mean “any psychological difficulty resulting from

mode,”¹²⁹ meaning a residual by-product of the survival-mode of combat.¹³⁰ “War itself does this, because the skills, instincts and other valid adaptations essential to survive combat have few civilian equivalents *that are not illegal.*”¹³¹ Consider the third thematic element, the harm. The residual harm from combat can cause the morally-injured soldier to “animalize human nature, thereby questioning the legitimacy of human morality as a whole.”¹³² Experts assess the risk of these potentially devastating outcomes as significantly increased when the soldier recluses himself to deal with the pain on his own.¹³³

Operational duties.” *What Is an Operational Stress Injury*, VETERANS AFFAIRS CANADA, <http://www.veterans.gc.ca/eng/services/health/mental-health/understanding-mental-health> (last visited 15 Jun 2016)

¹²⁹ Dr. Shay illustrates the notion of “staying in combat mode” using Odysseus.

A career that war exactly prepares veterans for upon return to civilian life is a *criminal* career, symbolized here by Odysseus’ pirate raid on Ismarus In his writing, he points out that the first adventure of Odysseus after the Trojan War was to sack the city of Ismarus—essentially a pirate raid where the soldiers applied their hard-earned wartime skills to a civilian environment. If this kind of behavior is common, should the courts consider combat service when a veteran has been charged with criminal activity?

Deborah Sontag & Amy O’Leary, *Dr. Jonathan Shay on Returning Veterans and Combat Trauma*, N. Y. TIMES (Dec. 22, 2014, 7:34 PM), http://www.nytimes.com/2008/01/13/us/13shay-interview.html?_r=0 [hereinafter *Interview with Dr. Shay*]. See generally Seamone & Albright, *supra* note 128 (discussing how staying in combat-mode might be associated with legal issues).

¹³⁰ SHAY, DEFENDING VETERANS, *supra* note 13, at 57.

¹³¹ *Id.* (emphasis added).

¹³² Farnsworth, *supra* note 15, at 22.

¹³³

War alienates and separates. Much of what those who fight wars experience or do is simply alien to any sense of “normality.” Those left behind soldiers often say, “have no clue.” This feeling is not just an experiential difference, it is a moral dislocation. It is a separation of individuals from the important and necessary ties with friends, spouses, families, and communities. None of us is the fully autonomous individual that stereotypes like to project. Each of us is part of multiple important networks of relationships and communities. War separates soldiers from these networks of relationships and communities. War separates soldiers from these networks, not only physically because they leave, but morally because of the alien territory war creates. Disengagement upon return from war widens the separation, expands the moral dislocation, and thereby increases the moral injury already present.

Sherman, *supra* note 18, at xv–xvi.

2. *Shrinking of the Social Horizon*

When a soldier is morally injured, the response is often withdrawal and an inability to connect with others,¹³⁴ otherwise referred to as the shrinking of the social horizon.¹³⁵ “Veterans who experience moral injury may experience a reluctance to get close to other people, difficulty trusting others or themselves.”¹³⁶ Erosion of trust, confidence, and the ability to connect means diminished unit cohesion.¹³⁷ This erosion of the unit at the seams, particularly the “destruction of the capacity for trust,”¹³⁸ “may be the single most important ‘criminogenic’ feature of moral injury.”¹³⁹

When the social horizon shrinks, the soldier will often withdraw to reflect and compartmentalize¹⁴⁰ the “turmoil in the human mind.”¹⁴¹ The catastrophic effect is that the festering turmoil and pain can “work their way out in dysfunctional behaviors.”¹⁴² This list includes not just increased risk for maladaptive behaviors, but also “self-harming

¹³⁴ Brock & Lettini, *supra* note 60, at xv–xvi “A morally injurious event may severely impact self-esteem if not lead to self-loathing, which would also be manifest in the PTSD symptoms of emotional numbing (i.e., disinterest, detachment, and restricted range of affect).” Dr. Litz E-mail, *supra* note 66.

¹³⁵ Copland, *supra* note 20.

¹³⁶ SHAY, DEFENDING VETERANS, *supra* note 13, at 64.

¹³⁷ U.S. DEP’T OF ARMY, FIELD MANUAL 6-22, ARMY LEADERSHIP, COMPETENT, CONFIDENT, AGILE paras. 3-20, 4-54, 4-62, 7-71 (12 Oct. 2006). *See infra* section C.3 for a discussion on cohesion.

¹³⁸ SHAY, DEFENDING VETERANS, *supra* note 13, at 64. A moral injury can “impair the capacity for trust and elevate despair, suicidality, and interpersonal violence.” Shay, *Moral Injury*, *supra* note 11, at 182.

¹³⁹ SHAY, DEFENDING VETERANS, *supra* note 13, at 64.

¹⁴⁰

However, given the extreme challenges to the self-posed by moral injury, it is likely that many [v]eterans may resort to extreme measures in order to preserve stability amongst their internal and external repertoires. For some [v]eterans, the divergence of their actions in combat and their preferred civilian discourses may lead them to compartmentalize their behavior during deployment and non-deployment periods among entirely different selves.

Farnsworth, *supra* note 15, at 22.

¹⁴¹ Willis, *supra* note 10.

¹⁴² *Id.*

behaviors,”¹⁴³ and “self-handicapping behaviors.”¹⁴⁴ The most heartbreaking potential consequence of the underlying moral injury, and a soldier suffering in silence, is losing a soldier to suicide.¹⁴⁵ “When the consequences become overwhelming, the only relief may seem to be to leave this life behind.”¹⁴⁶ The military already has an intolerably-high suicide rate,¹⁴⁷ and “of the adverse effects of moral injury, the role that moral injury may play in the U.S. military’s high suicide rate has attracted the most attention.”¹⁴⁸ Moral injury and suicide risk are unequivocally connected.¹⁴⁹ While it’s attracted attention, however, “the reporting on military and veteran suicides mostly fails to explore the role of moral injury.”¹⁵⁰ The prevention of moral injury is a missing link in the

¹⁴³ Self-harm “such as poor self-care, alcohol and drug abuse, severe recklessness, and parasuicidal behavior.” Litz et al, *supra* note 10, at 701; “Some will self-medicate with alcohol or drugs.” Sherman, *supra* note 18, at 11.

¹⁴⁴ Self-handicapping “such as retreating in the face of success or good feelings, and demoralization, which may entail confusion, bewilderment, futility, hopelessness, and self-loathing.” Litz et al., *supra* note 10, at 701.

¹⁴⁵ SHAY, DEFENDING VETERANS, *supra* note 13, at 62.

¹⁴⁶ Brock & Lettini, *supra* note 60, at xv–xvi.

¹⁴⁷ *Id.* at xii (discussing veteran suicide statistics, which according to one statistic averages “one every thirty minutes, an unprecedented eighteen a day or six thousand a year”).

¹⁴⁸ Pryer, *supra* note 8, at 34.

¹⁴⁹

The link between guilt and suicide, a putative outcome stemming from moral injury, is also an important area of inquiry. [Researchers] highlighted how different trauma types can lead to diverse mental health and functional outcomes. They found that being the target of killing or injuring in war was associated with PTSD and being the agent of killing or failing to prevent death or injury was associated with general psychological distress and suicide attempts. In a related study, [researchers] found that combat guilt was the most significant predictor of both suicide attempts and preoccupation with suicide, suggesting that guilt may be an important mediator. [F]or a significant percentage of the suicidal [v]eterans, the killing of women and children occurred while feeling emotionally out of control due to fear or rage. This suggests that killing of women and children—arguably morally injurious events—may be associated with guilt feelings. A more recent study of service members who have recently returned from war suggests that the relationship between killing and suicide may be mediated by PTSD and depression

Maguen & Litz, *supra* note 3, at 2.

¹⁵⁰

The reporting on military and veteran suicides mostly fails to explore the role of moral injury. When a suicide occurs years after a soldier returns from war, combat experience is often disregarded as a primary cause of the suicide. Yet, as Karl Marlantes, a Vietnam veteran,

military's fight for suicide prevention,¹⁵¹ and one that should be obvious.¹⁵²

The shrinking of the social horizon also means diminished relationships, which have been demonstrated to be a leading cause of soldier suicide.¹⁵³ Shifting the aperture to recovering the social horizon, and thereby recovering relationships, could protect soldiers from suicidal ideations. "So if we address the moral injury that causes someone to withdraw from relationships . . . it may give us the capacity to drive down the number of completed suicides annually."¹⁵⁴ Consider also the

reports in *What it is Like to Go to War*, he was fine for a decade, and then, he crashed. Often, such delays are used to deny DVA services or are regarded as a family problem, rather than as a consequence of service in combat. The alarming rates of reported suicides are squishy statistics and do not reflect the true numbers of soldiers who take their own lives. Many combat veterans tell stories of comrades who shot themselves, but who were reported as "non-combat" or "accidental" casualties. Soldiers who deliberately place themselves in harm's way in hopes of dying are reported as casualties, not suicides. Since many life-insurance policies will not pay benefits to families if suicide is the cause of death, the need to disguise suicide may mean some apparently accidental deaths were, in actuality, planned. We will never know the true suicide numbers, but we do know moral injury causes intense inner anguish.

Brock & Lettini, *supra* note 60, at 115.

¹⁵¹

According to the [DVA] the suicide rate among veterans of all wars averages almost one per hour. This is an underreported figure given that many veterans' deaths are reported as accidental. Military Outreach U.S.A. believes that many of these suicides, of which almost 70% are committed by men and women over the age of 50, are either directly or partially attributable to the invisible wound of war known as *moral injury*.

Palmer, *supra* note 29, at iv.

¹⁵² "Military suicide today is not some undecipherable, modern or even postmodern, aberration, without deep roots in our shared human past. Rather, it is the lamentable legacy of a long tradition of justified war and inevitable moral injury." MEAGHER, *supra* note 12, at xvi.

¹⁵³ *Moral Injury: Unseen Wounds*, ARMY.MIL., http://www.army.mil/article/139776/Moral_Injury__Unseen_wounds/ (last visited Apr. 14, 2016). "Nancy Sherman is a professor at Georgetown University and an expert on resilience, trauma, military ethics, and moral philosophy. She is convinced that the moral injuries suffered by soldiers continue to go unreported and play a large role in the alarming suicide statistics for military veterans." Bosario, *supra* note 53.

¹⁵⁴ *Unseen Wounds*, *supra* note 153.

“Interpersonal-Psychological Theory of Suicide”¹⁵⁵ (ITS), which “fits well with the model of moral injury.”¹⁵⁶ Under this theory, “feelings that one does not belong,” and “feelings that one is a burden to others,” coupled with the “acquired capability to overcome” fear one can acquire in the military, can put morally injured soldiers at risk for suicide.¹⁵⁷

3. *Moral Injury and Post Traumatic Stress Disorder*

Beyond the shrinking of the moral and social horizons, there is always the risk that the PMIE will crystalize into Post-traumatic Stress Disorder (PTSD). Under this paradigm, the relationship of moral injury to PTSD is one of potential-cause and potential-effect,¹⁵⁸ meaning a PMIE can form

¹⁵⁵ Maguen & Litz, *supra* note 3, at 2.

¹⁵⁶ *Id.*

¹⁵⁷

According to the theory, three factors are associated with suicide: feelings that one does not belong with other people, feelings that one is a burden on others or society, and an acquired capability to overcome the fear and pain associated with suicide. . . . [O]f all factors, acquired capability may be the most associated with military experience because combat exposure and training may cause habituation to fear of painful experiences, including suicide. Consequently, killing behaviors, through a series of other mediators, result in more easily being able to turn the weapon of destruction onto oneself. Interestingly, findings . . . suggest that suicide is not the only high-risk outcome of concern; indeed a variety of arguably morally injurious combat actions can lead to multiple risky behaviors. More specifically, greater exposure to violent combat, killing another person, and contact with high levels of human trauma were associated with greater post-deployment risk-taking in a number of different domains.

Id.

¹⁵⁸ “Because moral injury transgression poses a threat to social bonds and social-schemas, and because these events are uniquely aversive to remember, PTSD represents, at the current state of our knowledge, the principal (not sole) psychiatric outcome from exposure to morally injurious warzone events.” Dr. Litz E-mail, *supra* note 66. “As we see from our stories and these analyses, moral pain, with its incumbent harm to the soul, is a root cause of PTSD. If we do not address the moral issues, we cannot alleviate it, no matter how many medications we apply.” EDWARD TICK, WAR AND THE SOUL: HEALING OUR NATION’S VETERANS FROM POST-TRAUMATIC STRESS DISORDER 117 (2005). “We know that when someone suffers from moral injury and nothing is done to address that, at some point in time it will become PTSD. So the compelling question is what are we doing to address this collaboratively on the continuum of care?” *Unseen Wounds*, *supra* note 153.

the “index event” that is used to evaluate potential PTSD in a patient.¹⁵⁹ Some in the international psychiatric community might characterize this relationship as “complex PTSD.”¹⁶⁰ Moral injury and PTSD, however,

¹⁵⁹ “The science right now supports MI as what I call a principal harm, namely, the index event that is used to evaluate PTSD symptoms, the worst and most currently distressing war experience.” Dr. Litz E-mail, *supra* note 66.

The prevalence of moral injury as a principal harm among service members, relative to life-threat trauma and traumatic loss, is also unknown at the population level. However, we conducted a study of soldiers with PTSD at Fort Hood seeking treatment for PTSD in garrison in the context of South Texas Research Organizational Network Guiding Studies on Trauma and Resilience (STRONG STAR) research consortium to begin to answer this question. We created a reliable coding scheme that categorized the Criterion-A index events chosen by these soldiers as their worst and most currently haunting war-zone event and reported the prevalence of event-types. In the original study, we evaluated 127 patients. The revised figures from more recent STRONG STAR data show that of the 648 treatment-seeking soldiers who had PTSD according to a clinical interview, 26% reported a life-threat to themselves (19% endorsed an event that entailed life threat to others), 17% reported a traumatic loss, and 37% reported a morally injurious event (broken down into bearing witness to the aftermath of violence [19%], witnessing the transgressions of others [12%], and personal transgression [6%]). These results should be considered conservative estimates of moral injury because [Diagnostic and Statistical Manual IV (DSM)] instructions for determining a Criterion-A event *require* some kind of life-threat to self or others or loss of life [for diagnosis]. In other words, the patient is, for the most part, asked to endorse their worst and most currently distressing *danger-based* event. We also assume that rates of moral injury as the principal harm in the form of perpetration, especially extralegal acts, are low due to understandable reporting biases.

Id.

In the aftermath of more than a decade of war, and in light of revisions to the criteria for PTSD in the *DSM-5*, it is now accepted that PTSD, symptoms of PTSD that fall below the diagnostic threshold for PTSD, and other mental health conditions may also arise from exposure to other types of traumatic events. “Moral injury” characterizes a traumatic event in which the service member is forced by circumstances of military service to take action or refrain from intervening to stop a behavior that challenges his or her deeply held moral beliefs.

Seamone & Albright, *supra* note 128, at 13.

¹⁶⁰

have a nuanced relationship,¹⁶¹ and it is easy for non-medical personnel to get lost in the terminology.¹⁶² While the intent of this analysis is not to

The American Psychiatric Association (APA) has rejected two attempts to get such phenomena recognized in the nosology: “Persistent Personality Change after Catastrophic Experience” and “Disorders of Extreme Stress, Not Otherwise Categorized.” The former is part of the world Health Organization nosology; the latter, under the less opaque label “complex PTSD,” is very widely accepted by clinicians who work with morally injured populations, such as survivors of incest or political torture, despite its lack of official blessing.

SHAY, DEFENDING VETERANS, *supra* note 13, at 65.

Over the years, the American Psychiatric Association (APA) has rejected every diagnostic concept that even hints at the possibility that bad experience in adulthood can damage good character. It has rejected what numerous clinicians . . . call “[c]omplex PTSD,” but which the APA atrociously named in its field trials, “Disorders of Extreme Stress Not Otherwise Specified” (DESNOS). It has rejected “Enduring Personality Change after Catastrophic Experience,” which is a current diagnosis in the WHO International Classification of Diseases, and “Post Traumatic Embitterment Disorder” I believe the stubborn APA opposition comes from American attachment to this old philosophic position with its brilliant pedigree, not from empirical facts, which abundantly show the opposite.

Shay, *Moral Injury*, *supra* note 11, at 184.

¹⁶¹ Bebinger, *supra* note 42 (describing marines at Camp Pendleton who request therapy; only one-third are describing PTSD, another one-third are describing moral injury).

¹⁶² Brock & Lettini, *supra* note 60, at xiii. When non-medical personnel reference PTSD, they often misuse the term in a much broader sense to refer to the entire potential spectrum of combat trauma. SHAY, DEFENDING VETERANS, *supra* note 13, at 60. A contributing factor is certainly the emerging state of the research on the correlation between moral injury and PTSD.

Although the notion of moral injury certainly is not new, it is only recently that attempts have been made to operationalize and measure it as a distinct psychological construct. Given the relative early stage of conceptual development and empirical investigation of moral injury, however, it is not yet fully known how moral injury is related to PTSD.

Craig J. Bryan et al., *Measuring Moral Injury: Psychometric Properties of the Moral Injury Events Scale in Two Military Samples*, SAGE PUB. (June 18, 2015), <http://asm.sagepub.com/content/early/2015/06/18/1073191115590855.full.pdf+html>.

Moral injury is discussed in academia but is rarely talked about—and is often misunderstood—among those who suffer from it. It isn’t really

comprehensively analyze the clinical differences,¹⁶³ it is helpful for judge advocates to be cognizant of some key considerations.¹⁶⁴

While PTSD symptoms might manifest immediately, moral injury symptoms¹⁶⁵ generally have a “slow burn quality.”¹⁶⁶ One theory for this,

a part of the “returning veteran” lexicon; instead, veterans use PTSD as a convenient catchall. Yet there is a danger in conflating post-traumatic stress and moral injury.

Gibbons-Neff, *supra* note 21.

¹⁶³ “According to Maguen and Litz . . . PTSD and moral injury should be distinguished in clinical settings.” Sherman, *supra* note 18, at 174. “Consequently, it is important to assess mental health symptoms and moral injury as separate manifestations of war trauma to form a comprehensive clinical picture, and provide the most relevant treatment. One example of a moral injury specific measure is the Moral Injury Events Scale.” Maguen & Litz, *Moral Injury in the Context of War*, *supra* note 52.

¹⁶⁴ Readers are reminded that this article does not purport to give medical advice, or serve as a substitute for medical or psychiatric care. The purpose of this analysis is to help judge advocates navigate the salient considerations, distinctions, and overlaps, and is not intended as a medical-substitute.

¹⁶⁵ Referring to the symptoms of moral injury, Dr. Shay generally categories the symptoms as falling into one of more of the following three categories. “The ‘re-experiencing’ or ‘intrusive’ cluster of symptoms, such as repetitive nightmares, intrusive thoughts and images, flashbacks of combat are evolutionary ancient forms of remembering what moral danger looks like, so as not to be taken by surprise.” SHAY, DEFENDING VETERANS, *supra* note 13, at 61. “The ‘avoidant’ or numbing cluster of symptoms represents adaptive shutting down of all emotional outlays that do not directly support survival in a fight.” *Id.* “The ‘increased arousal’ cluster of symptoms represents the mobilization of the mind and body for instant response to mortal danger.” *Id.*

¹⁶⁶

Moral injury is not PTSD. The latter is a dysfunction of brain areas that suppress fear and integrate feeling with coherent memory; symptoms include flashbacks, nightmares, dissociative episodes and hyper-vigilance. PTSD is an immediate injury of trauma. Moral injury has a slow burn quality that often takes time to sink in. To be morally injured requires a healthy brain that can experience empathy, create a coherent memory narrative, understand moral reasoning and evaluate behavior. Moral injury is a negative self-judgment based on having transgressed core moral beliefs and values or on feeling betrayed by authorities.

Rita Nakashima Brock, *Moral Injury: The Crucial Missing Piece in Understanding Soldier Suicides*, HUFF. POST (Dec. 9, 2014, 1:44 PM), http://www.huffingtonpost.com/ritanakashima-brock-ph-d/moral-injury-the-crucial-missing-piece-in-understanding-soldier-suicides_b_1686674.html. Recall the lack of a threshold for the presence of a moral injury. “There is no threshold for the presence of moral injury; rather, at a given point in time, a [v]eteran may have none, or mild to extreme manifestations.” Maguen & Litz, *Moral Injury in the Context of War*, *supra* note 52. Symptoms might manifest “upon reflection.”

with respect to combat soldiers, is that “[s]oldiers desensitize themselves in war.”¹⁶⁷ The purpose of this might be to preserve combat effectiveness,¹⁶⁸ “in order to survive, to push through the killing and to accomplish the mission, whatever the mission may be,”¹⁶⁹ only to discover upon reflection that their humanity is difficult to recover “once it’s been evicted.”¹⁷⁰

Brock & Lettini, *supra* note 60, at xiv. “Moral injury does not, by its nature, present itself immediately. Some will experience questions of moral injury days after an incident; for many others, difficulties will not surface for years. An experience with potential for moral injury is typically realized after a change in personal moral codes or belief systems.” *Moral Injury Project*, *supra* note 4.

Shay argued that these feelings of betrayal could surface during or soon after the betrayal, but could also surface years after the event(s) took place. Subsequent empirical research . . . also supports Shay’s clinical experience, in fact finding that moral injuries are more strongly associated with delayed—than immediate-onset traumatic reactions.

Thompson, *supra* note 12, at 5.

¹⁶⁷ MEAGHER, *supra* note 12, at 142. “Killing the enemy in combat is state-sanctioned, militarily justified and the focus of intense training. Nonetheless, research shows that it can be fraught with moral conflict and have significant psychological consequences for many soldiers. Moreover, this research also shows that these psychological costs increase when the moral sanctioning associated with the killing is lost.” Thompson, *supra* note 12, at 3. “One of the basic conundrums remains that during the training process, a soldier needs to learn how to desensitize themselves to killing. This includes learning that killing an enemy in a battle zone isn’t murder.” Bosario, *supra* note 53.

¹⁶⁸ See generally note 84 for a discussion of Josh Mantz.

In Josh Mantz’s case, the real psychological recovery began only after he realized that he was physically alive but emotionally dead. The emotional withdrawal was killing him. Downrange, a version of it made for survival—it allowed him to operate with fearlessness, with a stoic indifference to whether he lived or died. He didn’t become reckless, but simply was freed from unproductive worry about whether he would make it home. “The moment you stop caring about living, there is a great sense of freedom,” he tells me. It’s that liberation, “operating as above life and death” that allows you to “operate in and control chaos.”

Sherman, *supra* note 18, at 11.

¹⁶⁹ MEAGHER, *supra* note 12, at 142.

¹⁷⁰ *Id.*

While PTSD and moral injury do share some symptoms,¹⁷¹ others are unique to moral injury.¹⁷² As a result there is always the chance that the diagnostic-construct¹⁷³ for PTSD might not capture a diagnosis of moral

¹⁷¹ Maguen & Litz, *supra* note 3, at 1.

¹⁷² Maguen & Litz, *Moral Injury in the Context of War*, *supra* note 52.

The moral injury framework posed by Litz et al. suggests that although moral injury is manifested as PTSD-like symptoms (e.g., intrusions, avoidance, numbing), other outcomes are unique and include shame, guilt, demoralization, self-handicapping behaviors (e.g., self-sabotaging relationships), and self-harm (e.g., parasuicidal behaviors).” *Id.* at 1. In answering the question “Are moral injury and PTSD the same?” “More research is needed to answer this question. At present, although the constructs of PTSD and moral injury overlap, each has unique components that make them separable consequences of war and other traumatic contexts.” Specifically; “PTSD is a mental disorder that requires a diagnosis. Moral injury is a dimensional problem—there is no threshold for the presence of moral injury, rather, at a given point in time, a [v]eteran may have none, or mild to extreme manifestations. Transgression is not necessary for PTSD to develop nor does the PTSD diagnosis sufficiently capture moral injury (shame, self-handicapping, guilt, etc.).”

Id.

¹⁷³ The diagnostic-construct refers to the one found in the *Diagnostic and Statistical Manual of Mental Disorder* (DSM), a heavily-relied upon resource in the psychiatric community. “Since its first publication in 1952, the DSM has gained increasing importance in the field of psychiatry and, since the 1980s, has been considered the bible of mental health disorder diagnostics.” *Saving Normal: An Insider’s Revolt Against Out-of-Control Psychiatric Diagnosis, DSM-5, Big Pharma, and the Medicalization of Ordinary Life*, Reviewed by Michael E. Jones, ARMY LAW., Oct. 2014, at 54, 54. A diagnosis of PTSD must conform to the DSM.

If the diagnosis of a mental disorder does not conform to [the] DSM-5 or is not supported by the findings on the examination report, the rating agency shall return the report to the examiner to substantiate the diagnosis. Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, American Psychiatric Association (2013), is incorporated by reference into this section with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51.” 38 C.F.R. §4.125. It’s not always the case that the PTSD construct captures the underlying moral injury. What caused me to suffer some symptoms associated with posttraumatic stress disorder (PTSD) does not actually meet the criteria in the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders* for this condition.

Pryer, *supra* note 8, at 34. “The DSM diagnosis, Posttraumatic Stress Disorder, does not capture either form of moral injury.” Shay, *Moral Injury*, *supra* note 11, at 184. Some

injury,¹⁷⁴ as some argue that the two phenomena are “separable consequences of war and other traumatic contexts.”¹⁷⁵ The *Drescher Study*, for example, asserted that moral injury is and should be considered an independent phenomenon,¹⁷⁶ as the current PTSD conceptions may not adequately capture “the morally injurious aspects of combat.”¹⁷⁷ Even a soldier seeking self-help through “The Wounded Warrior Project”¹⁷⁸ will

caregivers may then be in the position of having to “question whether they truly grasp the source and extent or even the nature of their patients’ suffering,” and could be stuck having to just “acknowledge the obvious suffering of others and to just be there to listen.” MEAGHER, *supra* note 12, at 3.

¹⁷⁴ Copland, *supra* note 20. This assertion acknowledges the possibility, not the probability. “It is true that PTSD fails to capture the diverse hypothesized outcomes of exposure to [Potentially Morally Injurious Events] (PMIEs), but it is also true that PTSD is the best proxy outcome and in fact service members can have PTSD from MI. Dr. Litz E-mail, *supra* note 66. “In our experience, servicemembers and veterans can suffer long-term scars that are not well captured by the current conceptualizations of PTSD or other adjustment difficulties.” Litz et al., *supra* note 10, at 696; “This framework highlights the importance of thinking in a multi or inter-disciplinary fashion about helping repair the moral wounds of war. Litz et al. argue that existing PTSD treatment frameworks may not sufficiently target moral injury.” Maguen & Litz, *supra* note 3, at 1.

Moral injury is not explicitly addressed in the evidence-based treatments (EBTs) for PTSD supported by VA, namely prolonged exposure therapy (PE) and cognitive processing therapy (CPT). This is in part due to the fact that extant EBTs were primarily developed to target life-threat or danger-based posttraumatic memories and beliefs among victims of trauma. As such, they may not be sufficient for [s]ervicemembers and [v]eterans who suffer from the moral injuries of war, especially killing-based transgressions. Although the PE and CPT manuals do not mention moral injury, recently, these approaches have suggested strategies for addressing guilt and shame, and helping the patient to contextualize, rather than over accommodate perceived culpability. Whether these strategies can sufficiently reduce the sequelae of war-related moral injury is unknown.

Maguen & Litz, *Moral Injury in the Context of War*, *supra* note 52. “While the physical injuries of war are well-studied, mental conditions like PTSD and combat-related depression are less understood and moral injury is even more elusive.” Kime, *supra* note 95.

¹⁷⁵ Maguen & Litz, *Moral Injury in the Context of War*, *supra* note 52. See also Kime, *supra* note 95.

¹⁷⁶ Copland, *supra* note 20.

¹⁷⁷ Nash et al., *supra* note 11, at 647. “So what is the distinction between PTSD and a moral injury? Professor Sherman says, ‘PTSD is not so much separate, as not specifically focused on the moral dimensions of many of those psychological injuries.’” Bosario, *supra* note 53.

¹⁷⁸ The Wounded Warrior Project is a Veterans Service Organization whose purpose is: (1) “to raise awareness and enlist the public’s aid for the needs of injured service

find moral injury and PTSD appearing as independent phenomena.¹⁷⁹ The relationship of moral injury to PTSD is one that is still developing in the interdisciplinary community.¹⁸⁰

III. Moral Injury and Preventive Law

The momentum and volume of scholarship, coupled with the impact to soldiers that many experts identify, suggests that moral injury is an emerging chapter in the notion that an underlying phenomenon might cause or contribute to legal issues. Judge advocates could contemplate countless scenarios, particularly in criminal litigation and administrative separation, where a phenomenon purportedly effecting moral decision-making might apply. Judge advocates in the field might soon encounter, or maybe even seek to apply, the phenomenon in practice. To get ahead of the phenomenon, this article proposes an expanded preventive law focus that postures judge advocates to assist the commander in decisively engaging potential legal risk-areas at the embryo stage.

In the broadest sense, preventive law practice seeks to reduce, or manage,¹⁸¹ the risk of litigation.¹⁸² For a military commander, this effort to proactively¹⁸³ identify risk-areas and prevent legal problems before they manifest is perhaps the most valuable service a judge advocate can

members;” (2) “to help injured service members aid and assist each other;” and (3) “to provide unique, direct programs and services to meet the needs of injured service members.” *Problems Associated With Combat Trauma*, WOUNDED WARRIOR PROJ. (last visited Apr. 14, 2015).

¹⁷⁹ *Id.*

¹⁸⁰ For example, at a recent conference on preventing and treating combat trauma, scholars were asked to contemplate, among other things: “Should moral injury be recognized as a mental health concern that is distinct from PTSD?” *Preventing and Treating the Invisible Wounds of War: Combat Trauma and Psychological Injury*, UNIV. OF PENN., <https://www.law.upenn.edu/institutes/cerl/conferences/legaethicalinvisiblewounds/> (last visited Apr. 14, 2016).

¹⁸¹ Willis, *supra* note 10.

¹⁸² Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CA. WEST. L. REV. 1, 15, 16 (1997). For most judge advocates, the client is the Army, acting through its officials. “Except when representing an individual client pursuant to (g) below, an Army lawyer represents the Department of the Army acting through its authorized officials.” U.S. DEP’T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, comment to Rule 1.13(a) (1 May 1992) [hereinafter AR 27-26].

¹⁸³ “In essence, preventive law is a proactive approach to lawyering.” Stolle et al., *supra* note 182.

provide.¹⁸⁴ A robustly-planned and executed preventive law program enhances readiness, good order and discipline, and morale, as well as reduces the overall time and effort judge advocates ultimately spend on resolving legal issues.¹⁸⁵ While commanders and soldiers have long received preventive legal counsel,¹⁸⁶ the Army's formal preventive law program was first developed by regulation in 1963.¹⁸⁷

In its inception, the Secretary of the Army's goal for preventive law was quite broad,¹⁸⁸ with the intent of reducing the "countless man-hours now used in remedial counseling and the processing of courts-martial and administrative actions."¹⁸⁹ When it was implemented, the preventive law program had a noticeably positive impact on morale, readiness, and "contribut[ed] substantially to the reduction of the courts-martial rate of the Army."¹⁹⁰ Good order and discipline issues decreased¹⁹¹ because of

¹⁸⁴ "One of the most valuable services a [j]udge [a]dvocate can provide to a [c]ommander is eliminating problems before they ever occur through a robust preventive law program." JAGCNET, <https://www.jagcnet2.army.mil/Sites/crimlaw.nsf/document.xsp?documentId=a0bbfd9214f536f885257be30046eab9&action=openDocument> (last visited June 15, 2015).

¹⁸⁵ U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 5-3 (30 Sept. 1996) (RAR 13 Sept. 2011) [hereinafter AR 27-1].

¹⁸⁶ Carl E. Winkler, *Legal Assistance for the Armed Forces*, 50 AMER. BAR ASSOC. J., 451 (1964).

¹⁸⁷ Evan M. Seamone, *The Relationship-Centered Lawyering Perspective in Legal Services for Active and Separated Military Personnel who Suffer from Posttraumatic Stress Disorder* 1, ARIZ. LAW (2012), <http://www.law.arizona.edu/depts/uprintj/Seamone%20Guest%20Column.pdf>. "Observing the adage, '[a]n ounce of prevention is worth a pound of cure,' The Judge Advocate General of the Army has sponsored a preventive law program which has had notable success." Dugald W. Hudson, *The Army's Preventive Law Program*, 3 AMER. BUS. LA. J. 229 (1965).

¹⁸⁸ Winkler, *supra* note 186, at 452.

¹⁸⁹ U.S. DEP'T OF ARMY, REG. 600-14, PREVENTIVE LAW SERVICES para. 1 (30 Sept. 1965).

¹⁹⁰ Hudson, *supra* note 187, at 229.

¹⁹¹ Referring to the period of July 1, 1959 through June 30, 1964, Professor Hudson highlights the apparent correlation during this period between an increase in preventive law efforts, and a decrease in courts-martial rates stating,

In this five-year period it is noteworthy that the court-martial rate dropped approximately one-third while the legal assistance rendered almost doubled. This significant drop in the crime rate of army personnel is even more impressive when compared to an increasing crime rate for civilian personnel in similar age groups. While it is not possible to establish with scientific precision the casual relationship between the Preventive Law Program and reduction in crime, it is fair to conclude that concern for the soldier's welfare the systematic assistance given the individual have substantially contributed to the

the preventive law program's "notable success in eliminating legal problems before they arise,"¹⁹² and "in solving legal difficulties in the embryo stage."¹⁹³ After the Vietnam War the preventive law program appears to have eroded and later had to be recommended for revitalization.¹⁹⁴ During this time the program went through some regulatory changes. While it was once its own regulation,¹⁹⁵ preventive law guidance was subsequently absorbed into legal assistance regulations that emerged in the 1980s and early 1990s.¹⁹⁶ The program was intended to prevent legal issues across all the core disciplines.¹⁹⁷

Under the modern contemplation, commanders and judge advocates play key roles in preventive law. Commanders ultimately own the

improvement of discipline and morals. It is safe to conclude that a *positive* trend can be found.

Id. at 233–34.

¹⁹² *Id.* at 229.

¹⁹³ *Id.*

¹⁹⁴ "It is recommended that consideration be given to the revitalization of preventive law programs within the present structure of Army Regulation 600-14." Mack Borgen, *The Management and Administration of Military Legal Assistance Offices*, ARMY LAW., Apr. 1975, at 6.

¹⁹⁵ Alfred F. Arquilla, *The New Legal Assistance Regulation*, ARMY LAW, May 1993, at 3, 34.

¹⁹⁶ *Id.* at 34–35.

¹⁹⁷ During this time the Legal Assistance Policy Division reminded judge advocates not to unnecessarily limit the scope of preventive law practice to standard legal assistance issues, and stated that the practice should cover all the core disciplines. "For government practitioners, preventive law is an effective method to practice law, whether the area of law is legal assistance, contract law, environmental law, claims, administrative law, or criminal prosecution." *Id.* at 35. The core disciplines are today enumerated in the JAG Corps' Operational Support to the Operational Army guidance. "They include military justice, international and operational law, administrative and civil law, contract and fiscal law, claims, and legal assistance." U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY para. 5-1 (18 Mar. 2013) [hereinafter FM 1-04].

preventive law program,¹⁹⁸ which is a regulatory requirement,¹⁹⁹ and one that should be allocated its fair share of resources and command emphasis.²⁰⁰ Commanders that specifically oversee a legal assistance mission hold primary responsibility for ensuring establishment of preventive law services.²⁰¹ While the preventive law program ultimately belongs to the commander, the responsibility to plan and implement the program in accordance with the commander's intent belongs to supervisory²⁰² judge advocates.²⁰³ Supervisory judge advocates, in turn, must ensure preventive law practice happens across all the core disciplines, not just inside of the legal assistance function.²⁰⁴ In other

¹⁹⁸

Your objective as a [c]ommander should be to develop solid systems and a command climate that prevents legal issues, rather than just reacting to them. In sum, it is every bit as important to train your [s]oldiers to maintain a high level of discipline and compliance with law, policy, and military standards, as it is to train them to perform your Mission Essential Task List. In legal circles, we call this effort to prevent legal problems before they arise by properly training [s]oldiers, "preventive law." The responsibility to practice preventive law belongs to the Commander."

THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, COMMANDER'S LEGAL HANDBOOK 1 (2013) [hereinafter *COMMANDER'S LEGAL HANDBOOK*].

¹⁹⁹ THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., CLIENT SERVICES DESKBOOK para III(a)(3), (2014) [hereinafter *CLIENT SERVICES DESKBOOK*]. "Commanders are responsible for ensuring that preventive law services are provided within their commands." U.S. DEP'T OF ARMY, REG. 27-3, THE LEGAL ASSISTANCE PROGRAM para. 3-3(a) (21 Feb. 1996) (RAR 13 Sept. 2011) [hereinafter *AR 27-3*].

²⁰⁰ Borgen, *supra* note 194, at 6.

²⁰¹ "Commanders responsible for legal assistance services will sponsor preventive law initiatives and establish preventive law services that meet the needs of their commands." *Id.* para. 1-4(f)(3). This population of commanders would include brigade-level commanders who have a judge advocate on staff. Referring to the brigade judge advocate: "This officer plans, coordinates, and oversees client services, [s]oldier readiness programs, and preventive law programs for the brigade." FM 1-04, *supra* note 197, para. 4-12. In some organizations, preventive law general practice exists even at battalion-level. Charles C. McLeod, Jr., *Preventive Law at the Battalion Level: Exploiting Successful Command Relationships*, AMER. BAR ORG. (14 Jan. 2015, 10:15 PM), http://www.americanbar.org/content/newsletter/publications/dialogue_home/dialogue_archive/ls_dial_fa12_lamp1.html.

²⁰² Whether or not a judge advocate is "supervisory" is a question of fact. *AR 27-26*, *supra* note 182, comment to Rule 5.1(c)(2).

²⁰³ *CLIENT SERVICES DESKBOOK*, *supra* note 199, para. III(a)(3); *see also* Arquilla, *supra* note 195, at 10.

²⁰⁴ While commanders with a legal assistance hold primary responsibility for the preventive law program, the Judge Advocate General's Corps expands this requirement to all attorneys. "Supervising attorneys will ensure that preventive law services are provided

words, the intent is that judge advocates far and wide practice preventive law routinely.

Beyond what some might consider a purely legal assistance function,²⁰⁵ the preventive law mission is broadly construed as a readiness tool,²⁰⁶ should be “aggressive and innovative,”²⁰⁷ and should draw upon the multiple and dynamic roles expected of judge advocates. In the broadest sense, judge advocates are both officers and attorneys,²⁰⁸ and incur the unique obligations that come with being a staff officer.²⁰⁹ While

by attorneys performing legal assistance duties, as well as by others under their supervision.” AR 27-3, *supra* note 199, para. 3-3(b).

²⁰⁵

While preventive law is often contemplated in the context of the legal assistance program, e.g., a class on avoiding unscrupulous payday lenders or auto dealers using bait and switch schemes, the concept of preventive law is central to good order and discipline as well. For example, proper training and emphasis on the standards contained in a General Order #1 prior to entering a Theater of Operations can go a long way toward avoiding the types problems mentioned above. Your [j]udge [a]dvocate can help you to properly emphasize these standards in a number of ways.

COMMANDER’S LEGAL HANDBOOK, *supra* note 198, at 1.

²⁰⁶

Preventing legal problems is a readiness issue. Attorneys must ensure that commanders see the program in this way. More importantly, attorneys must plan their preventive law campaigns with readiness in mind. Aim at the issues that will cause readiness problems. Use forums that will maximize benefit to the unit’s readiness. Then use these facts to demonstrate to the commander that the program is well worth the resources he is putting toward it.

ADMINISTRATIVE & CIVIL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, JA 265 ch. 2, para. 1(d), CONSUMER LAW GUIDE (1999).

²⁰⁷ AR 27-1, *supra* note 185, para. 5-3.

²⁰⁸ MEMORANDUM FROM THE JUDGE ADVOCATE GENERAL, U.S. ARMY, SUBJECT: LOCATION, SUPERVISION, EVALUATION AND ASSIGNMENT OF JUDGE ADVOCATES IN BRIGADES –POLICY MEMORANDUM 14-08 (25 Aug. 2014).

²⁰⁹ Judge advocates are generally considered staff officers. U.S. DEP’T OF ARMY, FIELD MANUAL 6-0, COMMANDER AND STAFF ORGANIZATION AND OPERATIONS para. 2-113 (May 2014) [hereinafter FM 6-0]; “Judge advocates serve at all levels in today’s area of operations and advise commanders on a wide variety of operational legal issues They also serve as staff officers and on boards, centers, cells, and working groups, where they fully participate in the planning process within their respective headquarters.” *Id.* para. 1-4; AR 27-1, *supra* note 185, para. 5-2(b).

all staff officers engage in risk management²¹⁰ of varying types and degrees,²¹¹ judge advocates are specifically expected to analyze trends and vulnerable areas that could potentially lead to legal issues.²¹² Another term for this function is the “legal autopsy.”²¹³

This preventive law mandate to “look at weak points and behaviors in your organization that, while not violating the law now, might lead to legal issues”²¹⁴ is certainly an area where moral injury could be a relevant factor

²¹⁰ “Risk management is the process of identifying, assessing, and controlling risks arising from operational factors and making decisions that balance risk cost with mission benefits.” JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS para. 2(j)(4)(d)(k) (11 Aug. 2011).

²¹¹ Staff officers practice risk management (RM). “Staff officers must incorporate RM in their planning and assessments.” U.S. DEP’T OF ARMY, TECHNICAL PUBLICATION 5-19, RISK MANAGEMENT para. 2-2 (Aug. 2014). The duty to continually assess and incorporate risk management is a recurring requirement, and part of the “running estimate” that all staff functions perform. “Staffs should integrate RM into the steps and products of mission analysis. As they maintain running estimates and other assessments, they should continuously integrate RM considerations. They should continue to apply RM throughout operations, during planning, preparation, and execution.” *Id.* para. 4-13. Judge advocates, as key members of the commander’s staff, also conduct running estimates.

Judge advocates at all echelons utilize running estimates to assess their section’s ability to support the command in each of the core legal disciplines; identify personnel and equipment requirements; anticipate and resolve potential legal issues in current and future operations; and prepare recommendations to the commander. The running estimate is a valuable tool for judge advocates to record their assessments, considerations, and assumptions related to the delivery of legal support to the command in support of operations.

FM 1-04, *supra* note 197, para. 2-40.

²¹² “Your [j]udge [a]dvocate can help you to properly emphasize these standards in a number of ways. For example . . . [t]hey can also help you to analyze systems and look at weak points and behaviors in your organization that, while not violating the law now, might lead to legal issues.” COMMANDER’S LEGAL HANDBOOK, *supra* note 198, at 2. “Rather than adopt a ‘sit back and wait’ approach, [judge advocates] should track operations and plans for future operations and practice preventive law.” Center for Military Law and Operations, *Combat Training Centers: Lessons Learned for Judge Advocates*, ARMY LAW., Jun. 1999, at 52, 54.

²¹³ In a legal autopsy, “records of trial, administrative proceedings, and even accident-investigations” are analyzed to “determine the fundamental causes of the individual’s difficulties.” Winkler, *supra* note 186, at 452–53. When a “causative or contributing factor” becomes apparent and significant, educating the command about the root causes, and potential consequences of inaction, become crucial. *Id.* at 452.

²¹⁴ COMMANDER’S LEGAL HANDBOOK, *supra* note 198, at 2.

in an effective preventive law strategy. If the specified task²¹⁵ is to decisively-engage risk areas at the embryo stage, certainly an implied task²¹⁶ is to take cognizance of phenomenon that might lead to legal issues if left unaddressed.²¹⁷ Some commanders might want this level of analysis from judge advocates, both as staff officers, and in their capacities as advisors and counselors²¹⁸ to the commander. “Military education is thin on the psychological dynamics of combat. This is something [that as] a judge advocate and an advisor to a commander . . . you can emphasize.”²¹⁹ As advisors and counselors, commanders expect advice to look beyond the law at other “relevant factors”²²⁰ which affect the overall analysis.

²¹⁵ “A specified task is a task specifically assigned to a unit by its higher headquarters.” FM 6-0, *supra* note 209, at 9–33.

²¹⁶ “An implied task is a task that must be performed to accomplish a specified task or mission but is not stated in the higher headquarters’ order.” *Id.*

²¹⁷ This will depend on how far left of the event the commander intends to move the focus. Consider, for example, that one of the potential behavioral outcomes of moral injury is alcohol abuse. *Understanding Moral Injury*, REAL WARRIORS, <http://www.realwarriors.net/active/treatment/moralinjury.php> (last visited Apr. 14, 2016). Referring to the judge advocate: “For example, they can help you to craft policies for . . . curbing abuse of alcohol.” COMMANDER’S LEGAL HANDBOOK, *supra* note 198, at 2. Should a policy intending to curb the abuse of alcohol be an interdisciplinary effort that attempts to focus on the underlying issues as well as their contemplated effect? This will be entirely up to the intent of the commander, how narrowly or broadly the focus of such a policy would be, and the interdisciplinary ingenuity of the commander’s staff. “Substance abuse is an area where people are in a recovery process, they can’t be cured, so when you look at the moral injury constructs and it seems like you have an environment rich with the possibility to do something constructive.” *Unseen Wounds*, *supra* note 153.

²¹⁸ Risk-management and the role of counselor-advisor is crucial to effective preventive law practice. “The emergence of preventive law has created yet another facet to the “counselor” role, risk management. Incumbent on the lawyer-risk-manager is a pro-active, preventive approach to the client’s legal health.” Stephen F. Black & Roger F. Witten, *Introduction to the Theory of Preventive Law*, in BUSINESS LAW MONOGRAPHS, ch. 3 §1.01 (1999). “As we get more senior, the role of counselor and advisor to the commander becomes more and more important.” Remarks of Brigadier General Paul S. Wilson, Fort Gordon, Georgia, February 17, 2016. “For a Staff Judge Advocate to be effective there are two roles, both equally important. The first is that of lawyer, or technical expert. The second is that of advisor and counselor.” Remarks of Major General Stephen G. Fogarty, Fort Gordon, Georgia, Apr. 1, 2016.

²¹⁹ Brigadier General H.R. McMaster, *Lecture to the U.S. Army 58th Judge Advocate Officer Graduate Course: The Role of the Judge Advocate in Contemporary Operations: Ensuring Moral and Ethical Conduct During War*, ARMY LAW., May 2011 at 35, 40 [hereinafter General McMaster Lecture].

²²⁰ “In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client’s situation, but not in conflict with the law.” AR 27-26, *supra* note 182, rule 2.1. The comment to rule 2.1 expands on the latitude judge advocates have in their capacity as advisors and counselors to consider relevant moral and ethical considerations. “It is proper

For a commander that expects this type of counsel, one can imagine numerous examples where the other “relevant factors,” in this case phenomena like moral injury, might be instructive. Consider the example of the General Court-Martial Convening Authority (GCMCA) who must decide whether a soldier will be separated from the service pursuant to an administrative separation, or pursuant to medical evaluation board process.²²¹ Here the GCMCA must decide whether the “disability is the cause, or a substantial contributing cause, of the misconduct that might result in a discharge under other than honorable conditions.”²²² The

for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.” *Id.* rule 2.1 comment.

²²¹

The [general court-martial convening authority] may direct, in writing, that the [s]oldier be processed through the physical disability system when action under the [uniform code of military justice] has not been initiated, and one of the following has been determined: (a) The [s]oldier’s medical condition is the direct or substantial contributing cause of the conduct that led to the recommendation for administrative elimination. (b) Other circumstances of the individual case warrant disability processing instead of further processing for administrative separation.

U.S. DEP’T OF ARMY, REG. 635-200 para. 1-33(b)(1) (6 Jun. 2005) (RAR 6 Sept. 2011). “Except as provided below, an enlisted [s]oldier may not be referred for, or continue, physical disability processing when action has been started under any regulatory provision which authorizes a characterization of service of under other than honorable conditions.” U.S. DEP’T OF ARMY, REG. 635-40, PHYSICAL EVALUATION FOR RETENTION, RETIREMENT, OR SEPARATION para. 4-3(a) (8 Feb. 2006) (RAR 20 Mar. 2012). “If the case comes within the limitations above, the commander exercising general court-martial jurisdiction over the [s]oldier may abate the administrative separation. This authority may not be delegated. A copy of the decision, signed by the General Court-Martial Convening Authority must be forwarded with the disability case file to the [Physical Evaluation Board].” *Id.* para. 4-3(b).

²²² *Id.* para. 4-3(b)(1).

Aside from the efforts of individual commanders to create options for offenders in need of treatment, institutional responses exist for individuals who qualify for Disability Evaluation System processing for a mental health condition. If they are simultaneously facing separation for misconduct, the commander acting as the separation authority must evaluate the circumstances surrounding the misconduct and address whether the mental health condition was the “direct or substantial contributing cause of the conduct that led to the recommendation for administrative separation.”

requirement for GCMCAs to make this consideration “suggests special sensitivity toward and recognition of the connection between mental health conditions and criminal conduct.”²²³ It is certainly a decision-point with Congressional interest.²²⁴

With some scholars associating moral injury with legal risk, particularly the risk of misconduct,²²⁵ the argument that a moral injury “is the cause, or a substantial contributing cause, of the misconduct”²²⁶ may not be far away. Of the 22,000 soldiers separated in 2009 for misconduct, one leading scholar suspects a correlation with an underlying moral injury for part of this population.²²⁷ To other scholars, moral injury might not

Brooker et al., *supra* note 68, at 257.

²²³ *Id.*

²²⁴ Congress spoke directly to this decision-point in, among other places, the 2010 National Defense Authorization Act. “(2) A member covered by paragraph (1) shall not be administratively separated under conditions other than honorable until the results of the medical examination have been reviewed by appropriate authorities responsible for evaluating, reviewing, and approving the separation case, as determined by the Secretary concerned.” National Defense Authorization Act for 2010, 10 U.S.C. § 1177 (2010). In 2010, Congress addressed PTSD and Traumatic Brain Injury (TBI) as potential matters in extenuation. “(b) *Purpose of Medical Examination*—The medical examination required by subsection (a) shall assess whether the effects of post-traumatic stress disorder or traumatic brain injury constitute matters in extenuation that relate to the basis for administrative separation under conditions other than honorable or the overall characterization of service of the member as other than honorable.” *Id.* Implementing DoD instructions also speak to PTSD and TBI as potential matters in extenuation. “To comply with section 1177 . . . an enlisted [s]ervicemember must receive a medical examination to assess whether the effects of PTSD or traumatic brain injury (TBI) constitute matters in extenuation that relate to the basis for administrative separation if the member meets all of the following criteria.” U.S. DEP’T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS para. 9(1) (4 Dec. 2014).

²²⁵ See generally Seamone & Albright, *supra* note 128, part 1.

²²⁶ See generally *supra* note 222 and accompanying sources.

²²⁷ A National Public Radio article recently asserted:

The U.S. Army has kicked out more than 22,000 soldiers since 2009 for “misconduct,” after they returned from Iraq and Afghanistan and were diagnosed with mental health disorders and traumatic brain injuries. That means many of those soldiers are not receiving the crucial treatment or retirement and health care benefits they would have received with an honorable discharge.

Daniel Zerdling, *Missed Treatment: Soldiers with Mental Health Issues Dismissed for ‘Misconduct’*, NAT’L PUB. RADIO (Oct. 28, 2015), <http://www.npr.org/2015/10/28/4511>

rise to the level of a disability,²²⁸ but might “render a servicemember unsuitable for military service and can lead to an administrative separation.”²²⁹ Either way, judge advocates can envision fascinating arguments, and potentially-contentious battles of experts.²³⁰

46230/missed-treatment-soldiers-with-mental-health-issues-dismissed-for-misconduct; *see also* Letter from The Honorable Eric Fanning, Acting Under Secretary of the Army to General Mark A. Milley, Chief of Staff of the U.S. Army, Nov. 4, 2015, <http://ec.militarytimes.com/static/pdfs/11-4-15-Letter-to-Army-on-Misconduct-Discharges.pdf> (last visited June 16, 2016). Dr. Nash believes many of these were moral injury related. Interview, *supra* note 125.

²²⁸ The Fiscal Year 2014 National Defense Authorization Act directed the Comptroller General to submit the following report:

Not later than one year after the date of the enactment of this Act, the Comptroller General of the United States shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report evaluating—(1) the use by the Secretaries of the military departments, since 2007, of the authority to separate members of the Armed Forces from the Armed Forces due to unfitness for duty because of a mental condition not amounting to disability, including separation on the bases of a personality disorder or adjustment disorder and the total number of members separate on such basis; (2) the extent to which the Secretaries failed to comply with regulatory requirements in separating members of the Armed Forces on the basis of a personality or adjustment disorder; and (3) the impact of such a separation on the ability of veterans so separated to access service-connected disability compensation, disability severance pay, and disability retirement pay.

National Defense Authorization Act for 2014, 10 U.S.C. § 574 (2014)

²²⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-266, REPORT TO CONGRESSIONAL COMMITTEES, DEFENSE HEALTH CARE, BETTER TRACKING AND OVERSIGHT NEEDED FOR SERVICEMEMBER SEPARATIONS FOR NON-DISABILITY MENTAL CONDITIONS I (Feb. 2015).

²³⁰ “I think in a year or two we will see calls for experts.” Dr. Nash Interview, *supra* note 125. When asked whether moral injury experts may soon be asked to participate in legal proceedings, Dr. Nash responded with: “Yes, absolutely this will happen . . . any conceptual framework that can help a court better understand motivations and behaviors, however imprecise and subjective, belongs in the courtroom.” E-mail from Dr. William P. Nash, to author (Nov 16, 2015, 12:51 AM) (on file with author). Curriculum Vitae’s are starting to reflect moral injury as a field of study. For example, the Curriculum Vitae of Joseph Mason Currier, Ph.D., Assistant Professor, Director of Clinical Training Psychology Department/Clinical Counseling Doctoral Program, University of South Alabama states: “At present, many of my projects are devoted to testing/validating the construct of moral injury as it relates to military Veterans and other trauma-exposed professional groups.” <http://www.southalabama.edu/colleges/artsandsci/psychology/faculty/currier.html>. In another example, the Curriculum Vitae of Elizabeth Margaret Bounds, Ph.D., states that from 2014 to present, she has served as co-chair of the “Moral Injury and Recovery in Religion, Society, and Culture Group” at the American Academy of Religion. *Curriculum Vitae Elizabeth Bounds*, EMORY UNIV., <http://candler.emory.edu/>

Perhaps with a similar perspective as Congress, the Secretary of Defense recently directed service secretaries to consider discharge upgrade petitions for veterans with other-than-honorable discharges that had an underlying PTSD or PTSD-related diagnosis. Here one finds an interesting juxtaposition of PTSD with “related conditions that they believe mitigated the misconduct that led to the discharge.”²³¹ This

faculty/profiles/cv-files/bounds-elizabeth_cv.pdf.

²³¹

This guidance applies to veterans whose characterization of discharge was under other than honorable conditions and who assert that they suffered PTSD or related conditions that they believe mitigated the misconduct that led to the discharge. This memorandum focuses on those veterans who served before PTSD was a recognized diagnosis; however, the guidance will be applied to all veterans.

“*New*” *Discharge Upgrades and PTSD*, ARMY REVIEW BOARDS AGENCY, <http://arba.army.pentagon.mil/adrb-ptsd.cfm> (last visited Apr. 14, 2016). The guidance makes reference to PTSD *or related* conditions. “Liberal consideration will be given in petitions for changes in characterization of service to [s]ervice treatment record entries which document one or more symptoms which meet the diagnostic criteria for Post-Traumatic Stress Disorder (PTSD) or related conditions.” MEMORANDUM FROM THE SECRETARY OF DEFENSE, U.S. DEP’T OF DEF. TO THE SERVICE SECRETARIES, SUBJECT: SUPPLEMENTAL GUIDANCE TO MILITARY BOARDS FOR CORRECTION OF MILITARY/NAVAL RECORDS CONSIDERING DISCHARGE UPGRADE REQUESTS BY VETERANS CLAIMING POST TRAUMATIC STRESS DISORDER (3 Sept. 2014). The Secretary of Defense’s directive casts a wide net, and invokes not just diagnosis, but evidence of symptomology.

Liberal consideration will also be given in cases where civilian providers confer diagnoses of PTSD or PTSD-related conditions, when case records contain narratives that support symptomatology at the time of service, or when any other evidence which may reasonably indicate that PTSD or a PTSD-related disorder existed at the time of discharge which might have mitigated the misconduct that caused the under other than honorable conditions characterization of service. In cases in which PTSD or PTSD-related conditions may be reasonably determined to have existed at the time of discharge, those conditions will be considered potential mitigating factors in the misconduct that caused the under other than honorable conditions characterization of service.

Id. Specifically, the Army Review Boards Agency (ARBA) is instructed to carefully weigh the evidence of the diagnosis against the severity of the misconduct.

Corrections Boards will exercise caution in weighing evidence of mitigation in cases in which serious misconduct precipitated a discharge with a characterization of service of under other than

framework seems to invoke the argument that a moral injury, as a PTSD-related phenomenon, might form a mitigating factor. Here again, one can envision interesting arguments to be made that moral injury is, or is not, a PTSD-related,²³² or perhaps even a “sub-threshold” condition.²³³

Regardless of what it is labeled, a sizable community of interdisciplinary scholars associate moral injury with risk to the military formation, potentially even legal risks if left unaddressed. That suggests commanders will soon be interested in prevention efforts, particularly now that moral injury is being discussed in places like the Command and General Staff College.²³⁴ Dr. Shay, perhaps the most preeminent moral injury scholar, advocates a comprehensive plan uniquely-tailored to the armed forces revolving around three concurrent lines-of-effort;²³⁵

honorable conditions. Potentially mitigating evidence of the existence of undiagnosed combat-related PTSD or PTSD-related conditions as a causative factor in the misconduct resulting in discharge will be carefully weighed against the severity of the misconduct.

Id. The ARBA is instructed that PTSD is not normally a cause, but hints at a connection between symptoms and the misconduct. “PTSD is not a likely cause of premeditated misconduct. Corrections Boards will also exercise caution in weighing evidence of mitigation in all cases of misconduct by carefully considering the likely causal relationship of symptoms to the misconduct.” *Id.*

²³² “These moral injuries can result in problems that mimic PTSD but are not necessarily treatable in the same way. They can also result in behaviors leading to discharge characterizations that limit access to care.” Policy Statement, American Public Health Association, *Removing Barriers to Mental Health Services for Veterans*, ALPHA.ORG (Jan. 28, 2015), <http://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2015/01/28/14/51/removing-barriers-to-mental-health-services-for-veterans>.

²³³ See Brooker et al., *supra* note 106

²³⁴ “The Fort Leavenworth Ethics Symposium is an annual symposium co-sponsored and hosted by the U.S. Army Command and General Staff College (CGSC) and the Command and General Staff College Foundation, Inc.” COMM AND GEN. STAFF COLL. FOUND. INC., <http://www.cgscfoundation.org/events/ethics-symposium/> (last visited Apr. 14, 2016). For example, three of the twenty-two papers presented (Paul D. Fritts, *Adaptive Disclosure: Critique of a Descriptive Intervention Modified for the Normative Problem of Moral Injury in Combat Veterans*, Douglas A. Pryer, *Moral Injury and the American Service Member: What Leaders Don’t Talk About When They Talk About War*, Rhonda Quillin, *The Importance of Unit Climate in Effecting Moral Injury*), and one of the five presentations (Dr. George E. Reed, *Religion & Moral Injury*) directly addressed moral injury during the 2014 Ethics Symposium directly addressed moral injury. At the 2015 Ethics Symposium, two of the twenty-five papers presented directly addressed moral injury (Chaplain (Major) Seth George, *Moral Injury and the Problem of Facing Religious Authority*, Chaplain (Colonel) Jeff Zust). *Id.*

²³⁵ “A line of effort is a line that links multiple tasks using the logic of purpose rather than geographical reference to focus efforts toward establishing operational and strategic

cohesion, leadership, and training.²³⁶ A preventive law strategy informed by these lines of effort produces a useful framework for judge advocates to assist the commander in decisively engaging moral injury, and targeting legal risk at the embryonic stage.

Consider the first proposed line-of-effort; leadership. “Leaders, not mental health professionals, play the key role in reducing moral injury.”²³⁷ Here, judge advocates can orient leaders to the nuanced statutory obligations associated with assertions like these; legal obligations that many leaders are unaware exist in statute.²³⁸ The foundational and somewhat nebulous mandate directs all those in authority to lead by example through exemplary conduct.²³⁹ Specifically, the mandate states that “All commanding officers and others in authority . . . are required to show in themselves a good example of virtue, honor, patriotism, and subordination.”²⁴⁰ It is a duty “to advance and preserve an internal norm of ‘exemplary conduct.’”²⁴¹ To this duty the Senate Armed Services Committee said, “. . . the nation deserves complete integrity, moral courage, and the highest moral and ethical conduct.”²⁴²

conditions.” U.S. DEP’T OF ARMY, DOCTRINE REFERENCE PUBLICATION 3-0, UNIFIED LAND OPERATIONS para. 4-23 (16 May 2012).

²³⁶ Dr. Shay’s three suggested focus areas for the military to confront moral injury are leadership, training, and cohesion. SHAY, ODYSSEUS IN AMERICA, *supra* note 11, at 6. “My mantra is over and over: cohesion, leadership, training; cohesion, leadership, training, as the keys to preventing psychological and moral injury.” *A Call to Arms: A Review of Benefits for Deployed Federal Employees: Hearing Before the Subcommittee on Federal Workforce, Postal Service, and the District of Columbia of the Committee on Oversight and Government Reform*, 111th Congress. 77 (2009) (Statement of Jonathan Shay, M.D., PH.D.) [hereinafter *Subcommittee Hearing*].

²³⁷ Pryer, *supra* note 8, at 34.

²³⁸ “The senior officers in my Air War College ethics class looked at me in mild astonishment. I had just informed them that, by law, they were to be ‘a good example of virtue,’ to be ‘vigilant in inspecting the conduct of all persons who are placed under their command,’ and to ‘guard against and suppress all dissolute and immoral practices.’” James H. Toner, *Educating for “Exemplary Conduct”*, 20 AIR & SPACE POWER J. 18, 18 (2006).

²³⁹ The “Exemplary Conduct Statute” 10 U.S.C. § 3583 (1956) [hereinafter *Exemplary Conduct Statute*].

²⁴⁰ U.S. DEP’T OF DEF., THE ARMED FORCES OFFICER 26 (2006).

²⁴¹ Kevin Govern, *Military Laws on Exemplary Conduct: What Remains After “Don’t Ask Don’t Tell” Rulings*, JURIST (Jan. 28, 2015, 11:25 AM), <http://jurist.org/forum/2010/10/military-laws-on-exemplary-conduct-what-remains-after-dont-ask-dont-tell.php>

²⁴²

John Adams understood the concept of “exemplary conduct,” when in 1775 he drafted such standards for Continental Navy and Army forces. In its efforts to create modern “exemplary conduct” statutes, now Title 10, U.S.C. sections 3583 (for the Army), 8583.58 (for the Air Force),

A leader's statutory duty to lead by example is obviously crucial for innumerable reasons, but particularly so in a moral injury prevention paradigm. Consider the civilian illustration of a corporate officer who aggressively fosters a climate of profits over people.²⁴³ "Some very fine corporations, with great humane traditions built into their profit-making methods, have been put on the path to [morally injurious] ruin by . . . individuals appointed as [Chief Executive Officers]."²⁴⁴ Here, some argue that one toxic leader, left unchecked, could infect the whole organization. "A single powerful individual can seed, water, and harvest [moral injury] within a shockingly short time. 'It is easier to tear down than build up.'"²⁴⁵ A term for that leader, in the corporate world is "Moral Injury Perpetrator."²⁴⁶ In the military context, a moral injury perpetrator could be devastating, partly because soldiers are forever watching and gauging the trustworthiness²⁴⁷ of leaders.²⁴⁸ In one definition of moral injury the first thematic element is modified such that the act must be "by someone

and 5947 (for the Navy and Marine Corps), the Senate Armed Services Committee said, ". . . [T]he nation deserves complete integrity, moral courage, and the highest moral and ethical conduct."

Id.

²⁴³ The Army's definition of "toxic leadership" is similar to how the corporate officer, in this example, might be framed. U.S. DEP'T OF ARMY, DOCTRINE PUBLICATION 6-22., ARMY LEADERSHIP para. 11 (1 Aug. 2012) (C1, 10 Sept. 2012) (defining "toxic leadership").

²⁴⁴ Willis, *supra* note 10.

²⁴⁵ *Id.*

²⁴⁶ "A steady line of career moves where profits were more important than people, where other executives were pawns for abuse, where organizational personnel were exploitable and expendable, create these reputations." Willis, *supra* note 10.

²⁴⁷ "Trust is the bedrock upon which the United States Army grounds its relationship with the American people. Trust reflects the confidence and faith that the American people have in the Army to effectively and ethically serve the Nation, while resting assured that the Army poses no threat to them." U.S. DEP'T OF ARMY, DOCTRINE REF. PUB. 1, THE ARMY PROFESSION para. 2-1 (14 June 2013) [hereinafter ADRP 1]. "Within the Army, trust serves as a vital organizing principle that establishes the conditions necessary for effective and ethical mission command and a profession that continues to earn the trust of the American people. Such trust develops and sustains confidence among all Army professionals as they fulfill their duties and responsibilities." *Id.* para. 2-3. Mutual trust is the foundation of the 'Mission Command' operating concept. "Mission command is based on mutual trust and shared understanding and purpose. It demands every [s]oldier be prepared to assume responsibility, maintain unity of effort, take prudent action, and act resourcefully within the commander's intent." U.S. DEP'T OF ARMY, DOCTRINE REFERENCE PUBLICATION 6-0, MISSION COMMAND para. 1-9 (17 May 2012); "Mutual trust is shared confidence among commanders, subordinates, and partners." *Id.* para. 2-4.

²⁴⁸ SHAY, ODYSSEUS IN AMERICA, *supra* note 11, at 224.

who holds legitimate authority.”²⁴⁹ Leaders who fail to do what is right might then risk seeding moral injury in the formation,²⁵⁰ or even potentially the entire service.²⁵¹ “*There are no private wrongs in the abuse of military authority.* In some instances the moral fabric of the whole service is damaged, and the trust and respect of the nation are impaired.”²⁵² Soldiers sometimes do not know what to make of the devastating effect a toxic leader can have, and experience the “fear of bringing the ‘toxicity’ they feel to others.”²⁵³

Along with the foundational mandate to lead by example through exemplary conduct, there is the robust statutory mandate to “guard against and suppress all dissolute and immoral practices and to correct, according to the laws and regulations of the Army, all persons who are guilty of them.”²⁵⁴ This mandate to “guard against and suppress all dissolute and immoral practices” suggests a proactive (suppress) and preventive law (guard against) intent. Recall that some scholars associate moral injury with a diminished moral horizon, and a moral compass in need of

²⁴⁹ SHAY, DEFENDING VETERANS, *supra* note 13, at 63. “By someone who holds legitimate authority (e.g., in the military—a leader).” Shay, *Moral Injury*, *supra* note 11, at 183.

²⁵⁰ At the Combined Arms Center (CAC) at Fort Leavenworth Kansas, the recommended reading list contains a section in organizational culture and climate. The CAC recommends Dr. Shay’s work, *Achilles in Vietnam*, with this quoted language, recommending it for all Army leaders. “Using the paradigm of Homer’s Iliad, Shay relates that the roots of combat stress and PTSD can lie in the betrayal of duty by senior officers who failed to do ‘what’s right,’ creating moral injury in their [s]oldiers.” *Recommended Reading List*, U.S. ARMY COMBINED ARMS CENTER, <http://usacac.army.mil/organizations/cace/cgsc/dcl/reading> (last visited Apr. 14, 2016).

²⁵¹ SHAY, ODYSSEUS IN AMERICA, *supra* note 11, at 224.

²⁵² *Id.* (emphasis added).

²⁵³ Copland, *supra* note 20.

²⁵⁴

Title 10, Section 3583, requires exemplary conduct by all commanding officers and others in authority in the Army. All commanders are required to—*a.* Present themselves as examples of virtue, honor, patriotism, and subordination; *b.* Be vigilant in inspecting the conduct of all persons who are placed under their command; *c.* Guard against and suppress all dissolute and immoral practices and to correct, according to the laws and regulations of the Army, all persons who are guilty of them; and *d.* Take all necessary and proper measures under the laws, regulations, and customs of the Army to promote and safeguard the morale, physical wellbeing, and the general welfare of officers and enlisted personnel under their command or charge.

calibration. Under that paradigm, recognizing and identifying moral injury in the ranks should be a leader's tool to properly guard against and suppress immoral conduct. To this end, part of the focus should be on educating first-line leaders of their crucial role specific to moral injury prevention.²⁵⁵

Recall that when a morally-injured soldier's social horizon shrinks, feelings of hopelessness and isolation can cause soldiers to "suffer in isolation."²⁵⁶ It is likely that the soldier has not told his comrades or his command about the soul-crushing pain that has overtaken him, perhaps due to fear of ostracizing or shaming.²⁵⁷ The moral injury could lay dormant²⁵⁸ until it potentially manifests as maladaptive-coping, self-harm, misconduct, or suicide, unless and until a proactive leader identifies the thematic elements of moral injury in the soldier. In this way, first-line leaders are like first responders, similar to legal assistance attorneys who might be the first to notice PTSD in a client.²⁵⁹ With knowledge of

²⁵⁵ "Health professionals may often be able to stop injuries from becoming fatal, disabling, or permanent, once they've happened. Preventing the injuries in the first place is beyond their power. That is in the hands of the line leaders and trainers and of the policymakers." SHAY, *ODYSSEUS IN AMERICA*, *supra* note 11, at 6.

²⁵⁶ Litz et al., *supra* note 10, at 701.

²⁵⁷ *Id.* at 702.

²⁵⁸

Unlike lost legs and missing eyes, these wounds can often go unnoticed. And soldiers may keep them that way. For one year, for two, with stone silence. In some cases, for forty or fifty years, buried deep inside, untouchable, until perhaps another group of vets come home from war and they see themselves, now at sixty or seventy, in the faces of those twenty-year-olds.

Sherman, *supra* note 18, at 10.

²⁵⁹ Here the analogy is drawn to the legal assistance attorney who may be the first person in a position to respond to a client with PTSD. Evan R. Seamone, *Attorneys as First Responders: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veteran's Legal Decision-Making Process*, 202 MIL. L. REV. 144, 145-46 (2009).

As the campaigns in Iraq and Afghanistan continue, both military and civilian lawyers will encounter an increasing number of clients with Posttraumatic Stress Disorder (PTSD). Some of these clients will still need clinical diagnosis and treatment at the time they visit the attorney's office. Whether the lack of clinical involvement stems from the problems of an overtaxed medical system, or the veterans own reluctance to seek treatment, or systemic failures are transforming attorneys into PTSD "first responders."

thematic elements, first-line leaders should then invest time to talk informally²⁶⁰ with their personnel, and get to know²⁶¹ their natural state, so they can properly identify deviations from that state.²⁶² Each moral injury manifestation will be different based on the individual soldier,²⁶³ and may not be immediately evident.²⁶⁴ The individual best suited to identify the moral injury, with the unique knowledge of the soldier's natural state, is the first-line leader.²⁶⁵

Talking informally with soldiers is a key component in gauging unit climate, another statutory mandate. Leaders by statute must “be vigilant in inspecting the conduct of all persons who are placed under their

Evan R. Seamone, *The Veteran's Lawyer as Counselor: Using Therapeutic Jurisprudence to Enhance Client Counseling for Combat Veterans with Post-traumatic Stress*, 202 MIL. L. REV. 185, 185 (2009). Of particular interest in the solicitation for the grant was (recall the Program Announcement for the Psychological Health Research Award) special interest is given in equipping leaders and other populations with the right knowledge: “Of particular interest are universal and selective interventions that are aimed at equipping leaders, units, [s]ervicemembers and/or [f]amilies with skills to handle situations that may invoke grief, guilt or anger and prevent the development of a negative trajectory.” *Supra* note 18 and accompanying sources.

²⁶⁰ U.S. DEP'T OF ARMY, DOCTRINE REFERENCE PUBLICATION 6-22, ARMY LEADERSHIP para. 7-45 (1 Aug. 2012) (C1, 10 Sept. 2012) (discussing the role of informal communication with Soldiers).

²⁶¹ See generally John Wayne Troxell et al., *Ethical Dilemmas that Erode the Army Profession*, CENT. FOR THE ARMY PROF. AND ETHIC (2014), <http://cape.army.mil/army-profession-symposium/repository/2014/Ethical-Dilemmas-That-Erode-The-Army-Profession.pdf>. (PowerPoint presentation).

²⁶² “We have to watch [s]oldier behavior carefully and identify warning signs.” McMaster, *supra* note 219, at 40. Sherman, *supra* note 18, at 10 (discussing a number of factors thought to influence susceptibility and response to moral injury in servicemembers). See generally Clime, *supra* note 3.

²⁶³

No single moral injury fits all. There is no easy diagnosis and code number. Scientific research models can belie both the variety of suffering felt and the centrality of a sense of responsibility that underlies much of the suffering. For the individual soldier, acknowledging moral injury often requires coming to feel the fine grain of the emotions and conceptualizing the moral implications for honor and dignity.

Id. at 8. “We favor the tenet that ‘treatment’ of moral injury must be defined by the individual according to their beliefs and needs.” *Moral Injury Project*, *supra* note 4.

²⁶⁴ Wood, *supra* note 25.

²⁶⁵ “This is relevant to moral injury big-time,” said Nash. “It’s on-the-spot help from compassionate and wise mentors, the people who know Marines the best.” Wood, *The Recruits*, *supra* note 100.

command.”²⁶⁶ The Army’s regulatory expectations of leaders and unit climate mirror the overall statutory expectations, and vest leaders with a variety of responsibilities.²⁶⁷ Here the preventive law strategy should seek to translate the significance of unit climate to susceptibility to moral injury.²⁶⁸ To that end, special emphasis can be placed on encouraging soldiers to openly discuss PMIEs and the potentially catastrophic consequences,²⁶⁹ in an environment free of judgment and stigma.²⁷⁰ “Although the importance of empathy, interpersonal warmth and non-judgment are well-documented conditions for psychological growth generally, these elements take on special importance in the context of moral injury.”²⁷¹ The unit climate should be used as an opportunity, and as a leadership-tool to break-down stigmas and barriers, enhance trust and

²⁶⁶ “To be vigilant in inspecting the conduct of all persons who are placed under their command.” *Supra* note 239 and accompanying sources.

²⁶⁷ Climate is “The state of morale and level of satisfaction of members of an organization.” ADRP 1, *supra* note 247, section II. Leaders are expected to set the example for a positive unit climate, in keeping with the statutory mandate for exemplary conduct. “Leaders set the right example, live by and uphold the Army Ethic, establish a positive climate, and inspire the team.” *Id.* para. 2-27. The obligations towards establishment, maintenance, and improvement of unit climate contemplate several implied tasks. “Leaders are responsible for establishing and maintaining positive expectations and attitudes, which produce the setting for positive attitudes and effective work behaviors.” AR 600-100, *supra* note 254, para. 1-6(B)(5). Senior commanders obviously have a lot at stake with respect to climate. General McMaster Lecture, *supra* note 219, at 40 (discussing the tactical importance of a strong ethical climate). Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court Martial Process*, 220 MIL. L. REV. 129, 136–37 (discussing the Commander’s robust caretaker responsibilities regarding physical, material, mental, and spiritual health of the organization). “In practice, however, the establishment, maintenance, and improvement of positive and productive unit climate is a regulatory responsibility of leaders at all levels. Every leader will . . . foster a healthy command climate.” AR 600-100, *supra* note 254, para. 2-1(I). “Every leader will . . . ensure the physical, moral, personal, and professional wellbeing of subordinates.” *Id.* para. 2-1.

²⁶⁸ “Army unit leaders develop an organizational climate that may or may not emphasize Army values. Climate, subject to change based upon the unit’s current leaders, is the basic attitude and daily functioning of unit members When a unit’s climate is not congruent with Army values and the member’s personal values, then a [s]oldier is strongly susceptible to moral injury.” Thompson, *supra* note 12, at 13, (citing R. Quillen, *The Importance of Unit Climate in Effecting Moral Injury*, ARMY MAG. (Apr. 20, 2015), <http://www.army-magazine.org/2015/04/20/army-values-keep-moral-injury-at-bay/>).

²⁶⁹ Wood, *The Recruits*, *supra* note 100.

²⁷⁰ Bosario, *supra* note 53 (discussing the “zero-defect” culture, whereby psychological injury can be mistaken for moral weakness). *See generally* Sherman, *supra* note 18, at 3.

²⁷¹ Farnsworth, *supra* note 15, at 22.

interdependence,²⁷² and get soldiers talking about their experiences²⁷³ openly to recover the social horizon. One regulatory requirement for command climate is to “use initiative to assess risk and exploit opportunities.”²⁷⁴ Building a healthy climate that fosters trust helps set conditions for positive cohesion, a crucial factor in moral injury mitigation.²⁷⁵

Strong unit-cohesion is critical in preventing and mitigating combat stress and trauma.²⁷⁶ “What a returning soldier needs most when leaving war is not a mental health professional, but a living community to whom his experience matters.”²⁷⁷ Judge advocates engaged in risk analysis should consider periods immediately following re-deployment as higher risk.²⁷⁸ The living community is the soldier’s social horizon,²⁷⁹ where the cohesive strength and fabric of the unit play a key role in moral injury prevention.²⁸⁰ “Treating moral injury in combat veterans, Dr. Shay said in a *Public Broadcast Service* interview, happens not in the clinic, but in the community.”²⁸¹ Some argue that the reason for this is that “moral injury is not a clinical condition that can be medicated or cured by psychology,” it takes a cohesive unit where soldiers can reconstruct²⁸² their humanity

²⁷² Litz et al., *supra* note 10, at 702.

²⁷³ “Moral injury, then, is a burden carried by very few, until the “outsiders” become aware of, and interested in sharing it. Listening and witnessing to moral injury outside the confines of a clinical setting can be a way to break the silence that so often surrounds moral injury.” *Moral Injury Project*, *supra* note 4.

²⁷⁴ AR 600-100, *supra* note 254, para. 2-1(J).

²⁷⁵ Dan Maurer, *Military Mediation as Military Justice? Conjectures on Repairing Unit Cohesion in the Wake of Relational Misconduct*, 8 OHIO ST. J. ON DISPUTE RES. 419, 432 (2013).

²⁷⁶ McMaster, *supra* note 219, at 40.

²⁷⁷ *Id.*

²⁷⁸ See generally Booth-Kewley et al., *supra* note 126. Jacob K. Farnsworth et al., *The Role of Emotions in Military Trauma: Implications for the Study and Treatment of Moral Injury*, 18 REV. OF GEN. PSYCH. 249, 249–62 (2014) (discussing the theory that periods following deployment might generate heightened risk for moral injury manifestation).

²⁷⁹ “The social horizon of the unscarred soldier encompasses not only his family and other civilian ties but also those military formations to which his unit belongs and with which it cooperates.” Shay, *supra* note 112, at 23.

²⁸⁰ SHAY, ODYSSEUS IN AMERICA, *supra* note 11, at 33.

²⁸¹ Copland, *supra* note 20. “A sense of community and stability are key, he says, in preventing further damage.” Interview with Dr. Shay, *supra* note 129.

²⁸² See Sherman, *supra* note 18, at 32 (discussing the processing of moral responsibility, and its restorative potential).

with trusting comrades.²⁸³ With respect to moral injury then, unit cohesion should be built upon a foundation of community responsibility.²⁸⁴ “We are all, by the way, responsible for whatever transgression that he or she is involved in. That is our transgression, too.”²⁸⁵ This is not responsibility in the legal culpability sense, but responsibility to recover the social and moral horizons for comrades in arms.

Community responsibility hinges upon community-understanding, meaning the shaping of preventive law strategies to decisively engage the phenomenon based through local initiative.²⁸⁶ “The big challenge in effective preventive law is getting the word to the person who really needs it.”²⁸⁷ Information dissemination can take many forms²⁸⁸ including the traditional preventive law mediums of “publishing articles in military legal

²⁸³ *Id.*; see generally *Subcommittee Hearing*, *supra* note 236; moral injury healing requires “spiritual and social elements.” Farnsworth, *supra* note 15, at 14. See generally Clime, *supra* note 3.

²⁸⁴ “We have to understand how to communalize grief so we can get through difficult times together These include social disconnection, distractibility, suspiciousness of friends, irrationality, and inconsistency.” McMaster, *supra* note 219, at 40.

Experts in military and veteran mental health are now trying to articulate just what that healing would like and how treatments overlap or are critically different from those routinely used in treating posttraumatic stress. But the general issue or moral healing from moral combat injury is not just for experts and clinicians. It is something we all need to understand as part of the reentry of the largest number of service members into society since Vietnam.

Sherman, *supra* note 18, at 10.

²⁸⁵ Copland, *supra* note 20.

²⁸⁶ With mission-sets and unit needs varying widely organization to organization, successful preventive law programs have always relied heavily on local-level initiative to develop programs that work best for that particular set of needs. “The use of local initiative has been well demonstrated in the many and varied preventive law programs developed at base level.” Brigadier General Walter D. Reed, *Directorate of Civil Law*, JAG. L. REV. 23, 29 (1973). “Supervising Attorneys should be aggressive and innovative in disseminating information.” CLIENT SERVICES DESKBOOK, *supra* note 199, para. VII(A).

²⁸⁷ COMMANDER’S LEGAL HANDBOOK, *supra* note 198, at 1; see generally Reed, *supra* note 287, at 39. In 2014, preventive law practitioners taught 2810 preventive law courses to 275,557 students. See *infra* Appendix A. In one proposed moral injury treatment model, education and information-dissemination figured prominently as step two of eight in that model. Litz et al., *supra* note 10, at 703; Boudreau, *supra* note 17, at 754. See generally Borgen, *supra* note 194, at 6 (discussing the challenge in getting preventive law services to the end-user).

²⁸⁸ The methods available include, but are not limited to “installation newspaper[s], command bulletin, radio, TV, [and] Internet websites.” See generally CLIENT SERVICES DESKBOOK, *supra* note 199, para. C. See generally Borgen, *supra* note 194, at 6.

publications of general circulation and placing information on the electronic bulletin board,”²⁸⁹ or “fact sheets, handouts, and pamphlets,”²⁹⁰ etc. Here, the thematic elements section of this analysis should serve as a useful tool. This, however, is just a starting point, as preventive law practitioners should capitalize on the wealth of information now in circulation on moral injury.²⁹¹ In the near future, moral injury training packages will be available to the Army, and judge advocates should capitalize on these.²⁹² The expanded Comprehensive Soldier and Family Fitness program,²⁹³ for example, will soon offer “moral injury on the battlefield”²⁹⁴ training. Beyond that, preventive law practitioners should even get collaborative and think jointly. For example, there are sister-service training concepts available for use.²⁹⁵ Sharing training ideas between units and services is in fact a regulatory expectation of the preventive law program, specifically to “share innovative measures.”²⁹⁶ Although referred to as “inner conflict” training by the Navy and Marine Corps, they are available concepts for use.²⁹⁷

Perhaps another effective medium is to integrate moral injury vignettes into existing training packages. Commanders are accustomed to

²⁸⁹ AR 27-3, *supra* note 199, para. 3-4(a)(5).

²⁹⁰ Colonel Mark E. Sullivan, *The Legal Assistance Chief's Handbook*, ARMY LAW, Sept 2004, 1, 18.

²⁹¹ Countless websites provide resources on moral injury, and give trainers an endless menu of available training tools. *See, e.g., Resources for Moral Injury Project*, WHEATON COLL., <http://www.wheaton.edu/HDI/Training-and-Education/Offerings/Moral-Injury-Project/Resources-for-Moral-Injury-Project> (last visited Mar. 5, 2015).

²⁹² Wood, *The Recruits*, *supra* note 100.

The Army is also producing a series of videos to get troops to think about moral injury before they are sent into battle. In four of these [thirty]-minute videos, to be completed later this spring, combat veterans talk about their experiences and how they dealt with the psychological damage One of the videos focuses on killing.

Id.

²⁹³ Referring to Brigadier General Rhonda Cornum and the original purpose of Comprehensive Soldier and Family Fitness as being preventive in nature: “It’s focus, as Cornum and her deputy described it to me, is not ‘post-adversity,’ but ‘preventive,’ ‘to teach everyone to better thrive.’” Sherman, *supra* note 18, at 13.

²⁹⁴ COMPREHENSIVE SOLDIER & FAMILY FITNESS, ARMY FIT: ONLINE ASSESSMENT AND SELF-DEVELOPMENT, <http://csf2.army.mil/downloads/ArmyFitOne-Pagerv2.pdf> (last visited Mar. 9, 2015).

²⁹⁵ Nash et al., *supra* note 11, at 647.

²⁹⁶ AR 27-3, *supra* note 199, para. 3-4(a)(5).

²⁹⁷ Nash et al., *supra* note 11, at 647.

incorporating a moral dimension in training scenarios²⁹⁸ as part of the overall moral preparation for the battlefield.²⁹⁹ Considering the robust preventive law effort the Army already has in place across the core disciplines,³⁰⁰ adding a new dimension³⁰¹ of moral injury would be a seamless and highly-relevant addition to training. For example, the annual

²⁹⁸ “Commanders insist on realistic and tough performance-oriented training that focuses on the physical, moral, personal, and professional well-being and growth of their [s]oldiers.” AR 350-53, *supra* note 39, para. 4-1.

²⁹⁹

Preparing soldiers for war is not just a matter of technical and tactical training, not just a matter of building confidence and cohesion in units. Preparing soldiers for war also includes—or should include—helping soldiers figure out what war will do to them morally, and thereby to the network of relationships and communities within each of them lives. This dimension of *jus post bellum* is—or should be—as much a subject of professional military education and training for combat as any other.

Sherman, *supra* note 18, at xvii. Consider the following remarks by General Mattis:

The task is so grim, and I’m a [m]arine [i]nfantry [o]fficer, we’re people who close with and destroy the enemy in what we could call intimate killing, you cannot go into something like that and not be changed. So at times a sense of humor is almost like body armor on your body, this is armor around your spirit, as you keep your spirit from going so grim with some of these situations that it actually deals damage to your spirit. I think too that when you look at this sort of aspect, the only way you can return young men . . . to civilian society as better citizens is to make certain you don’t allow the grim aspects to basically define them. They’ve got to be able to do very bad things without becoming bad or evil in the process. That is a tough line and it takes constant nurturing of the young men, who are so young, you’re often in the role of loco parentis, you’re acting really as their parent.

Conversations with History presents Reflections a Conversation with General James Mattis, USMC Ret., UNIV. OF CA. BERKELY, INST. OF INT’L STUD. UNIV. OF CA. TEL. (June 11, 2014), <http://www.uctv.tv/shows/Reflections-with-General-James-Mattis-Conversations-with-History-28135>. “Flourishing after war is also connected to how well those who fight on our behalf are prepared for the moral ambiguity, the havoc on the conscience, and the torments that come to even the most conscientious soldier.” Sherman, *supra* note 18, at xvii. “War’s hurts linger, and there is no easy way to understand healing without taking seriously the moral wounds that need healing and that can crack soldiers wide open.” *Id.* at 17. See generally Wood, *supra* note 25.

³⁰⁰ See *infra* Appendix A (depicting the number of classes and number of students, by subject, trained in 2014 through the Army’s Preventive Law Program).

³⁰¹ “An emphasis upon preventive law could be taken as a major structural change in the legal assistance program, but it is better seen as adding a further dimension to the existing program.” Borgen, *supra* note 194, at 6.

law of armed conflict training³⁰² is a target of opportunity where moral injury vignettes could be highly instructive.³⁰³ Preventive law practitioners could easily and seamlessly discuss the thematic elements in a rules-of-engagement vignette, for example,³⁰⁴ particularly one with

³⁰² Richard P. DiMeglio, *Training Army Judge Advocates to Advise Commanders as Operational Law Attorneys*, 54 BOST. COLL. L. REV. 1185, 1191 (2013). U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT TABLE G-1 (Aug. 19, 2014).

³⁰³ Wood, *The Recruits*, *supra* note 100.

³⁰⁴ Recall this example from the discussion of the thematic elements, which would be highly illustrative in a rules-of-engagement vignette: “[a] common example used by the psychiatrist who coined the term is the [m]arine who acted on orders to shoot a sniper who was using an infant serving as a human shield.” Brooker et al., *supra* note 68, at 251.

counterinsurgency³⁰⁵ training conditions.³⁰⁶ Another selling point³⁰⁷ is the effectiveness of adding new dimensions to existing training, rather than

³⁰⁵ One suggestion to capitalize on the wealth of resources now and soon-to-be available is to apply the “train-the-trainer” approach. CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, FORGED IN THE FIRE: LEGAL LESSONS LEARNED DURING MILITARY OPERATIONS 1994-2008, 266 (1 Sept. 2008). “This method requires units to nominate a representative to receive a period of instruction and return to the unit to conduct further instruction.” *Id.* In this sense preventive law practitioners would self-study to gain expertise, rather than attend a formal Army training course, an expectation which is not foreign to Army officers. “Self-aware Army leaders build a personal frame of reference from schooling, experience, self-study, and assessment while reflecting on current events, history, and geography.” ADRP 6-22, *supra* note 84, para. 11-45.

³⁰⁶ Litz et al., *supra* note 10, at 696 (discussing the argument that that counter-insurgency operations and guerilla warfare, particularly in urban environments, expose troops to an increased frequency of morally challenging situations). Some servicemembers see these as environments ripe for risk for moral harm. “Anyone who comes to close to that environment is going to come away maybe not ruined but tarnished, dirtied, sullied.” Sherman, *supra* note 18, at 27. “In these types of operations, violence, immorality, distrust, and deceit are intentionally used by the insurgent. So the [counterinsurgency (COIN)] manual directs leaders to work proactively to establish and maintain the proper ethical climate in their organizations and to ensure violence does not undermine our institutional values.” McMaster, *supra* note 219, at 37–38; COIN operations involve “unconventional features . . . that produce greater uncertainty, greater danger for non-combat troops, and generally greater risk of harm among non-combatants.” Litz et al., *supra* note 10, at 696. “Indeed, it seems that many recent conflicts actually involve additional psychological challenges for service personnel.” Thompson, *supra* note 12, at 1. *See generally* Jacob K. Farnsworth et al., *The Role of Emotions in Military Trauma: Implications for the Study and Treatment of Moral Injury*, 18 REV. OF GEN. PSYCH. 249, 249–62 (2014) (discussing the association between insurgent terror tactics in Iraq and the frequency with which troops encountered morally-troubling events, necessitating another look at the moral injury paradigm).

Even when armed with a set of rigid values and discipline, warriors in combat can be caught in situations where they have no opportunity to choose between right and wrong. In the often chaotic fighting in Iraq and Afghanistan, where there was no clear distinction between enemy insurgent and innocent civilian, young Americans could act in good conscience, and in accordance with a strict moral code, and still suffer moral injury.

Wood, *The Recruits*, *supra* note 100.

³⁰⁷ Preventive law efforts often take some salesmanship to implement. “Effort must be made to ‘sell’ the program.” CLIENT SERVICES DESKBOOK, *supra* note 199, para. III(a)(3). This may emanate, at least in part, from an understandable reluctance by commanders to dedicate precious time, energy, and resources to a program where metrics and success may be difficult to measure. *Id.* para. III(a)(2). To this end, Staff Judge Advocates are required to “seek command support and involvement on preventive law.” AR 27-3, *supra* note 199, para. 1-4 (g)(2)(h). One way to market the program is as an investment in readiness.

creating standalone requirements.³⁰⁸ Ethics training programs provide a good illustration,³⁰⁹ as the goals are quite similar to a moral injury mitigation program.³¹⁰ “Some researchers have suggested that ethics instruction is more effective when it is included within professional training rather than taught as separate courses.”³¹¹

IV. Conclusion

The purpose of this article was to introduce a new and provocative field of research, and contemplate some of the potential applications that judge advocates might soon be grappling with. Specifically, this article was developed with two populations in mind. First is the judge advocate in the field who will likely soon encounter the phenomenon in one way or another. This could be the commander recently returning from Fort Leavenworth, who is now asking for counsel on a separation. This might also be the creative defense attorney seeking to make mitigation arguments. One can contemplate limitless potential legal applications for

“Preventing legal problems is a readiness issue. Attorneys must ensure that commanders see the program in this way.” CLIENT SERVICES DESKBOOK, *supra* note 199, para III(a)(4). In other words, “Attorneys must plan their preventive law campaigns with readiness in mind. Aim at the issues that will cause readiness problems.” *Id.*

³⁰⁸ See generally Leonard Wong, & Stephen J. Gerras, *Lying to Ourselves: Dishonesty in the Army Profession*, STRAT. STUD. INST. AND U.S. ARMY WAR COLL. PRESS (2015) (discussing the cumulative effect of the multiplication of standalone training requirements to the point of diminishing returns, and the propensity to “check the box”).

³⁰⁹ Peter Bradley et al., *Assessing and Managing Ethical Risk in Defence*, 13 CAN. MIL. J., 6, 10–12 (2013).

³¹⁰ “The *primary, fundamental* motive for teaching ethics in the military is neither to clean up the act of military operations under the gaze of the media, nor to make military operations more efficient. We teach ethics in the military because we want to *promote good and prevent evil*.” Tor Arne Berntsen & Raag Rolfsen, *Ethics Training in the Norwegian Defence Forces*, in ETHICS EDUCATION IN THE MILITARY 96 (Paul Robinson et al. eds., 2008). Ethical instruction, like moral injury prevention, share the goal of reducing exposure to ethical and legal risk. See generally George B. Rowell IV, *Marine Corps Value-Based Ethics Training: A Recipe to Reduce Misconduct*, MARINES (2013), http://r.search.yahoo.com/_ylt=A0LEVjE6I1hX0YIAJE4nnIIQ;_ylu=X3oDMTEyYzI5MG1xBGNvbG8DYmYxBHBvcwMxBHZ0aWQDQjIwNDRfMQRzZWMDc3I-/RV=2/RE=1465422778/RO=10/RU=http%3a%2f%2fwww.dtic.mil%2fcgi-bin%2fGetTRDoc%3fAD%3dADA590670/RK=0/RS=UC2XPz9PbGTeme.92Nd8kQOIIXI-. This illustration is offered in part because of the similarity in purposes of managing ethical risk, and mitigating moral injury. “Managing ethical risk is about anticipating, preventing, mitigating, and surviving ethical failures.” Bradley, *supra* note 309, at 8.

³¹¹ *Id.* at 9.

a scenario that experts assert can fundamentally alter a soldier's sense of right and wrong.

The second population is the institution at large, the Judge Advocate General's Corps should be cognizant of this approaching phenomenon. Stimulating academic discourse is a good start. To that end, hopefully this article will serve as a catalyst of sorts. The way ahead should be ultimately be toward the development of institutional positions, frameworks, and applications. The effort should be to posture the institution for a phenomenon that is rapidly growing in cognizance, and only logic dictates that legal applications are around the corner. The sheer energy and volume of the emerging scholarship strongly suggests that this phenomenon is sprinting toward the courthouse doors. The way ahead should be through preparation and by getting ahead of the phenomenon. The preventive law paradigm, as contemplated in this article, is a vehicle well-suited to posture judge advocates for success.

Appendix A

Number of Classes and Number of Students—by Subject—Trained in 2014
through the Army's Preventive Law Program³¹²

Practice Category	# of Classes	# of
MEB Outreach	16	1049
PEB Outreach	0	0
Other	885	114127
Estate Planning	287	21234
Taxes	112	24797
Family Law	736	22516
Real Property	119	14276
Economic	104	13265
Personal Property	111	19324
Consumer Protection	174	16197
Civilian Administrative	112	13273
Military Administrative	461	31301
Torts	74	12525
Civilian Criminal	72	11889
Totals	3263	315773

³¹² E-mail from Major Brendan R. Cronin, Deputy Chief, Legal Assistance Policy Division Office, Office of the Judge Advocate General (June 21, 2016, 2:32 PM) (on file with author).

Appendix B

The Army's 2014 Informal Preventive Focus by Subject and
Number of Articles Written³¹³

Practice Category	# of Articles
MEB Outreach	1
PEB Outreach	0
Other	54
Estate Planning	35
Taxes	150
Family Law	54
Real Property	14
Economic	46
Personal Property	25
Consumer Protection	87
Civilian Administrative	26
Military Administrative	67
Torts	6
Civilian Criminal	3
Totals	568

³¹³ E-mail from Major Brendan R. Cronin, Deputy Chief, Legal Assistance Policy Division Office, Office of the Judge Advocate General (June 21, 2016, 2:32 PM) (on file with author).

Appendix C

Moral Injury Events Scale³¹⁴

MIES

Instructions: Please circle a number to indicate how much you agree or disagree with each of the following statements about your experiences at any time since joining the military.

		<u>Strongly Disagree</u>	<u>Moderately Disagree</u>	<u>Slightly Disagree</u>	<u>Slightly Agree</u>	<u>Moderately Agree</u>	<u>Strongly Agree</u>
1.	I saw things that were morally wrong.	1	2	3	4	5	6
2.	I am troubled by having witnessed others' immoral acts.	1	2	3	4	5	6
3.	I acted in ways that violated my own moral code or values.	1	2	3	4	5	6
4.	I am troubled by having acted in ways that violated my own morals or values.	1	2	3	4	5	6
5.	I violated my own morals by failing to do something that I felt I should have done.	1	2	3	4	5	6
6.	I am troubled because I violated my morals by failing to do something I felt I should have done.	1	2	3	4	5	6
7.	I feel betrayed by leaders who I once trusted.	1	2	3	4	5	6
8.	I feel betrayed by fellow service members who I once trusted.	1	2	3	4	5	6
9.	I feel betrayed by others outside the U.S. military who I once trusted.	1	2	3	4	5	6

³¹⁴ Nash et al., *Psychometric evaluation of the Moral Injury Events Scale*, 178 MILITARY MEDICINE 646–52 (2013).