

**ALWAYS ON DUTY: CAN I ORDER YOU TO REPORT
CRIMES OR TO INTERVENE?**

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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 BRACTON, BRACTON 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. Flatau*, 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).