

COMMAND RESPONSIBILITY: A SMALL-UNIT LEADER'S PERSPECTIVE

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ABSTRACT—The doctrine of command responsibility posits that, when military commanders fail to effectively prevent, suppress, or punish their subordinates' war crimes, the commander may be punished for the subordinates' crimes. Several international criminal statutes have codified this doctrine, but the United States' Uniform Code of Military Justice has not. In light of U.S. law-of-war violations during the Iraq and Afghanistan wars, several legal commentators have called for stronger legal incentives within domestic military law and for the adoption of a formal command responsibility provision. Such measures, it is argued, would place sufficient pressure on senior military commanders to stem the tide of war crimes within the U.S. military. Assuming that a formal command responsibility statute is the best method of redress, this Note argues that a more nuanced approach is needed to introduce the provision domestically. Namely, Congress must shape the provision around the concerns and incentives of small-unit leaders, not senior military commanders. As the United States continues to engage heavily in counterinsurgency warfare, small-unit leaders have taken on increasingly more important roles, both strategically and with regard to preventing law-of-war violations. Accordingly, there is a critical need for lawmakers to draft the statutory elements of a command responsibility so as to minimize the doctrine's costs on small-unit leaders while maximizing these leaders' incentives to enforce the laws of war. Using this framework, this Note argues further that a domestic command responsibility provision should incorporate a negligence mens rea standard in only limited circumstances.

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INTRODUCTION

In the military, commanders¹ have tremendous authority over their subordinates. A superior may require a subordinate to conduct physical exercises as corrective training to the point of utter exhaustion.² In combat, a commander may order a subordinate to assault a fortified enemy position in the face of heavy resistance. In either situation, the subordinate often has little choice but to accept his orders as a matter of duty.³

The price for such authority is what many refer to as the burden of command.⁴ Commanders are expected to complete every assigned mission while simultaneously being entrusted with their subordinates' lives, training, equipment, discipline, fitness, and overall well-being.⁵

¹ Although the term commander has a specific meaning within the U.S. military, this Note uses the term to refer to any military leader that has direct authority over one or more soldiers. It is used interchangeably with the terms "superior" and "leader."

² The concept is called "smoking." Although highly discouraged by senior military leaders, it is a common form of corrective training. See Lewis Wald, *Corrective Training: Every Unit Commander Should Know, Follow Three Golden Rules*, FORT HOOD SENTINEL (Sept. 2, 2010), <http://www.forthoodsentinel.com/story.php?id=4723>.

³ See ALFRED TENNYSON, *Charge of the Light Brigade*, in SELECTED POEMS 52, 52 (Stanley Applebaum ed., Dover Publ'ns 1992) ("Theirs not to make reply, / Theirs not to reason why, / Theirs but to do and die. / Into the valley of Death / Rode the six hundred.").

⁴ See, e.g., THE LAST CASTLE (DreamWorks Pictures 2001) (using the phrase "burden of command" in this context).

⁵ See U.S. DEP'T OF ARMY, FIELD MANUAL 6-22, ARMY LEADERSHIP para. 2-10 (12 Oct. 2006) [hereinafter FM 6-22].

Furthermore, a commander's responsibility exists regardless of whether the subordinate is on-duty or off-duty, in the field or in the barracks, or deployed overseas or stationed at home.⁶ In short, commanders are "responsible for all that the unit does or fails to do."⁷

This maxim raises an interesting question: to what extent are commanders criminally responsible for the illegal actions of their subordinates? Consider the following three scenarios. First, Commander *A* in Iraq is compelled to release a detainee he strongly suspects killed one of his soldiers. He orders his lieutenant to transport the man to a nearby village and to "take care of him" along the way. Reading between the lines, the lieutenant executes the detainee in the desert.⁸ Second, a sergeant watches one of his fellow soldiers become severely injured during an attack in Afghanistan. Over the next week, he openly complains in front of Commander *B* that the unit should retaliate for the attack. Soon after, the sergeant slips off base in the early morning and kills several civilians.⁹ Third, a group of soldiers carry out a plan to kill an unarmed Afghan teenager and make it look like an act of self-defense. Despite convincing evidence to the contrary, Commander *C* accepts their version of events and halts any further inquiry.¹⁰ What punishment, if any, could each commander face under the current military justice system?

Commander *A*'s criminal liability has long been established under the Uniform Code of Military Justice (UCMJ).¹¹ Under Article 77, any military leader that "counsels, commands, or procures" the commission of a crime is punishable as if he committed the crime himself.¹² The provision is similar to the notion of complicity, because it translates a commander's active participation in the crime into actual commission.¹³ Here, because

⁶ *Id.* para. 2-11.

⁷ KEITH E. BONN, ARMY OFFICER'S GUIDE 314 (50th ed. 2005).

⁸ This hypothetical is based loosely on an event that occurred near Baiji, Iraq in April 2008. See Joe Mozingo, *A Killing in the Desert: Two Gunshots and Many Questions*, L.A. TIMES, Sept. 13, 2009, at A1.

⁹ This hypothetical is based on the killings carried out by Staff Sergeant Robert Bales. See Michael Evans, *How a Bearded US Sergeant Slipped Out to Commit an Afghan Massacre*, AUSTRALIAN (Mar. 13, 2012, 11:35 AM), <http://www.theaustralian.com.au/news/world/how-a-bearded-us-sergeant-slipped-out-to-commit-an-afghan-massacre/story-fnb64oi6-1226298022670>.

¹⁰ This hypothetical is based on the Kill Team murders. See Mark Boal, *The Kill Team: How U.S. Soldiers in Afghanistan Murdered Innocent Civilians and Mutilated Their Corpses*, ROLLING STONE, Apr. 14, 2011, at 56, available at <http://www.rollingstone.com/politics/news/the-kill-team-20110327>.

¹¹ The UCMJ, which is codified in Title 10 of the U.S. Code, sets out military law that "govern[s] the Army as a separate community, to include the procedural and substantive rules governing the conduct of members of the armed forces." John M. Hackel, *Planning for the "Strategic Case": A Proposal to Align the Handling of Marine Corps War Crimes Prosecutions with Counterinsurgency Doctrine*, 57 NAVAL L. REV. 239, 246 (2009) (internal quotation marks omitted).

¹² 10 U.S.C. § 877 (2012).

¹³ See MODEL PENAL CODE § 2.06(3) (Official Draft and Explanatory Notes 1985); see also Timothy Wu & Yong-Sung (Jonathan) Kang, *Criminal Liability for the Actions of Subordinates—The*

Commander *A*'s take care instruction is a tacit order to kill the detainee, he would be liable for murder.¹⁴

Commanders *B* and *C* also face the prospect of punishment, even though they have not actively participated in their subordinates' crimes. In these cases, their culpability depends on the doctrine of *command responsibility*. In general, the doctrine states that commanders have a duty to prevent, suppress, and punish their subordinates' war crimes.¹⁵ If they fail to take all necessary and reasonable measures to carry out these duties, they may be punished.¹⁶ In *B*'s case, his culpability results from a failure to prevent the enraged sergeant from killing civilians, whereas *C*'s culpability stems from his failure to punish his subordinates for the staged killing.

The doctrine of command responsibility has been recognized within the United States military since the aftermath of the Second World War. American military jurists first applied it to belligerent military leaders during the Tokyo and Nuremberg trials.¹⁷ In 1956, the U.S. Army incorporated command responsibility within its own military dogma with the release of its manual on the law of land warfare.¹⁸ By including command responsibility within the manual, the U.S. Army established the doctrine as a guiding principle for future commanders.

Despite such recognition, however, the United States has never codified the doctrine within the UCMJ. As such, the U.S. military does not have a criminal command responsibility statute applicable to its own leaders. So although the doctrine serves as a touchstone for military discipline, it does not serve a direct basis for criminal culpability.

Under the current military justice system, leaders who fail to adequately prevent or punish violations of the law of war are disciplined instead under the general category of command failures. Stated differently, these failures are generally punished in the same manner as all other types of command failures. In many instances, a commander's failure—including one that involves a violation of the law of war—is handled through administrative or other nonjudicial means.¹⁹ In more serious cases, a commander may be charged with criminal dereliction of duty under Article 92 of the UCMJ.

Doctrine of Command Responsibility and Its Analogues in United States Law, 38 HARV. INT'L L.J. 272, 279 (1997) ("The guilt of the superior-accomplice is premised on the commission of a crime by a subordinate-principal.").

¹⁴ See, e.g., CHANTAL MELONI, *COMMAND RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW* 2 (2010).

¹⁵ *Id.* at 3.

¹⁶ *Id.*

¹⁷ See Wu & Kang, *supra* note 13, at 274–76.

¹⁸ See U.S. DEP'T OF ARMY, *FIELD MANUAL 27-10, THE LAW OF LAND WARFARE* para. 501 (18 July 1956) [hereinafter FM 27-10].

¹⁹ See Victor Hansen, *Creating and Improving Legal Incentives for Law of War Compliance*, 42 NEW ENG. L. REV. 247, 257 (2008).

Although rare, a commander may face the prospect of more severe punishment than criminal dereliction of duty. In at least one instance in U.S. history, military prosecutors applied Article 77 against a commander who failed to prevent his subordinates from committing a mass atrocity.²⁰ Consequently, there is also precedent to invoke the UCMJ's complicity provision when prosecuting command responsibility failures under the current military justice system.

Despite the flexibility it offers in punishing leaders who fail to prevent or appropriately punish subordinate war crimes, this legal framework has received scant support from legal scholars. Many believe these tools fail to create an effective system for enforcing the law of war within the military.²¹ Drawing on their concerns, two military lawyers have sought to codify the doctrine within the UCMJ.²² By drafting a provision that mirrors the international standard of command responsibility, they argue, the U.S. military will be better able to prevent the next My Lai, Abu Ghraib, or Haditha.²³

Assuming that military leaders need more accountability over their subordinates' law-of-war violations, and adopting a command responsibility provision is the best method for achieving this result,²⁴ the proposals offered by these two practitioners would fail to create an effective preventative regime within the United States. In line with the

²⁰ See Kenneth A. Howard, *Command Responsibility for War Crimes*, 21 J. PUB. L. 7 (1972) (discussing *United States v. Medina*, C.M. 427162 (1971)); Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 192–200 (2000) (same).

²¹ See Hansen, *supra* note 19, at 248; Jenny S. Martinez, *Understanding Mens Rea in Command Responsibility: From Yamashita to Blaškić and Beyond*, 5 J. INT'L CRIM. JUST. 638, 639 (2007); William C. Peters, *Adjudication Deferred: Command Responsibility for War Crimes and US Military Justice from My Lai to Haditha and Beyond*, 37 NATIONALITIES PAPERS 926, 927 (2009); Amy J. Sepinwall, *Failures to Punish: Command Responsibility in Domestic and International Law*, 30 MICH. J. INT'L L. 251, 258–60 (2009).

²² See Hansen, *supra* note 19, at 266–70; Smidt, *supra* note 20, at 215–19.

²³ See Hansen, *supra* note 19, at 248–58; Smidt, *supra* note 20, at 215–19. For more information on the My Lai incident, see *infra* Part II.B.2. The Abu Ghraib prison abuse scandal occurred in 2003 and involved U.S. intelligence soldiers physically, psychologically, and sexually abusing Iraqi prisoners. See generally SEYMOUR M. HERSH, *CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB* (2004) (discussing both the torture occurring at Abu Ghraib and the resulting scandal). The Haditha incident occurred in 2005 and involved a Marine unit killing at least twenty-four civilian noncombatants. Initially, the Marine Corps claimed the civilians had been accidentally killed in a roadside bombing and failed to investigate the incident. See Peters, *supra* note 21, at 940.

²⁴ Some scholars argue that procedural changes to the current military justice system are a better avenue for addressing command responsibility issues than substantive alterations. See Jason Sengheiser, *Command Responsibility for Omissions and Detainee Abuse in the "War on Terror,"* 30 T. JEFFERSON L. REV. 693, 719 (2008) (calling for independent prosecutors to handle command responsibility cases); James W. Smith III, *A Few Good Scapegoats: The Abu Ghraib Courts-Martial and the Failure of the Military Justice System*, 27 WHITTIER L. REV. 671, 701–08 (2006) (proposing procedure changes to court martial system). Another alternative solution is simply to improve training standards throughout the military regarding the laws of war, especially among junior leaders. See *infra* note 236.

prevailing opinion on command responsibility, these proposals seek to hold leaders at the highest levels of authority responsible for law-of-war violations.²⁵ To accomplish this feat, a statute must establish a low bar for liability (i.e., a low standard for mens rea and causation) because it is often difficult to connect senior leaders to a war crime.²⁶ This low threshold, however, yields an unintended secondary effect: it establishes a *near*-strict liability regime for small-unit commanders²⁷ who have a closer connection with subordinate-offenders. The consequences of this effect are significant. As the U.S. has shifted toward a counterinsurgency (COIN) warfare model, small-unit leaders have taken on increasingly more complex and strategically vital roles. In current military operations, they are often entrusted with broad authority to operate in their own battle spaces and are crucial to mission success and preventing law-of-war abuses.²⁸

Given the importance of small-unit commanders, there is a need to reevaluate how command responsibility should be adopted within the UCMJ. If Congress is to draft a formal criminal provision, it must do so in a manner that gives greater weight to the concerns of small-unit leaders. Essentially, the legislature should formulate the statutory elements of a command responsibility statute by considering their costs and benefits on junior military leaders.

Relying on this new framework, this Note will address one of the more difficult questions of command responsibility: whether the doctrine should encompass a negligence standard.²⁹ Current proposals for formally adopting command responsibility within the U.S. generally embrace a

²⁵ Legal scholars exploring the issue of command responsibility often seek to assign responsibility to senior military leaders. See Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 156–59 (2005) (focusing on senior leadership in Abu Ghraib); Victor Hansen, *What's Good for the Goose Is Good for the Gander—Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards Its Own*, 42 GONZ. L. REV. 335, 397–400 (2007); Martinez, *supra* note 21, at 639 (finding that “generals and presidents [often] bear a greater share of moral responsibility” in command responsibility cases); MELONI, *supra* note 14, at 27–31 (discussing the need to establish responsibility for top leaders); Sengheiser, *supra* note 24, at 697 (“For the doctrine of command responsibility to reduce violations of the laws of war, it must seek to assign responsibility up the chain of command.”); Sepinwall, *supra* note 21, at 276–79 (focusing on prosecution of high-ranking commanders in Haditha incident).

²⁶ See Martinez, *supra* note 21, at 639 (stating that “hard proof of the connection between the generals and the crimes committed by their foot soldiers is often extremely difficult to find”); Wu & Kang, *supra* note 13, at 272 (“The further away a superior is from the actual ‘smoking gun,’ however, the more difficult he is to prosecute.”).

²⁷ The term “small-unit commander” refers to military leaders who serve in tactical (i.e., ground-level) leadership positions. Namely, it encompasses sergeants, lieutenants, and captains.

²⁸ See MARK MOYAR, *A QUESTION OF COMMAND: COUNTERINSURGENCY FROM THE CIVIL WAR TO IRAQ* 236–37 (2009) (illustrating broad scope of one small-unit leader’s authority during COIN operations in Iraq).

²⁹ See Wu & Kang, *supra* note 13, at 285–86.

negligence requirement.³⁰ When considering the effects of this standard on small-unit leaders, however, it becomes apparent that negligence should only be used in limited circumstances.

This Note proceeds as follows. Part I explores a brief history of command responsibility, reveals the doctrine's core elements, and identifies its most controversial components. To best illustrate the current state of command responsibility within the United States, Part II draws on two recent law-of-war violations committed by American soldiers: the Kill Team incidents and the Staff Sergeant Robert Bales massacre. These incidents help illustrate the methods for punishing command failures under the current military justice system. Part III then discusses the criticism of this system and introduces two proposals for codifying command responsibility within the UCMJ. After outlining these schemes, Part IV identifies their shortcomings and addresses the need for a small-unit commander approach by considering the central tenets of COIN warfare. Having shown the necessity for a small-unit leader approach, Part V analyzes the effectiveness of maintaining a negligence standard within command responsibility.

I. A BRIEF HISTORY OF COMMAND RESPONSIBILITY

Although command responsibility dates back to the early fifteenth century,³¹ it is best understood in the context of its modern history. The current doctrine is essentially the product of developments made in the law of armed conflict in the 1940s.³² Toward the end of the Second World War, the United States and its allies sought to hold several high-ranking German and Japanese officers accountable for a number of atrocities committed by their soldiers. In many of these cases, though, there was little direct evidence that these leaders ordered or actively participated in the abuses.³³ Consequently, the Allies needed an indirect theory of liability—one that criminalizes leaders for failing to exercise their power of control.³⁴

Stated simply, command responsibility posits that, under certain circumstances, a commander may be criminally culpable for a war crime committed within his ranks.³⁵ This responsibility stems from a breach of two related duties. In general, a commander has a duty to maintain discipline and order within his unit. As part of this duty, he has the

³⁰ See Hansen, *supra* note 19, at 269; Smidt, *supra* note 20, at 169. *But see* Sengheiser, *supra* note 24, at 698 (proposing a recklessness standard).

³¹ See MELONI, *supra* note 14, at 3 (“A significant forerunner of the doctrine . . . was contained in the *Ordinance* issued in 1439 by *Charles VII d’Orleans* . . .”).

³² See Wu & Kang, *supra* note 13, at 274.

³³ *Id.*

³⁴ *Id.* (claiming there was a need “for a legal doctrine through which superiors could be held liable for the same substantive crimes as their subordinates”).

³⁵ See, e.g., MELONI, *supra* note 14, at 3.

obligation to prevent his subordinates from violating the laws of war.³⁶ If the commander fails in these duties, his omission translates into criminal culpability.

The theory does not hold leaders strictly liable.³⁷ Commanders are not held responsible simply because they assumed a position of command.³⁸ Instead, they must be connected to the war crime in two ways. First, there must be a causal relationship between the commander's omission and the misconduct. Second, "the commander must have had the opportunity and ability to prevent the crime."³⁹ In other words, he must have the power to stop it.

The United States laid much of the groundwork for the doctrine during the trial of General Tomoyuki Yamashita.⁴⁰ Yamashita was the Japanese commander of the Philippines during the U.S. invasion of the islands in the spring of 1945. After several months of hard fighting, the American advance started to gain momentum and forced the Japanese to fall back. In the midst of their retreat, Japanese soldiers executed thousands of Filipino citizens and American prisoners of war.⁴¹ After the islands fell, the U.S. subsequently charged Yamashita with "unlawfully disregard[ing] and fail[ing] to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes"⁴²

Despite a lack of evidence that Yamashita had personally ordered these acts or even knew about them, he was convicted under a command responsibility theory by a military commission.⁴³ Yamashita claimed that because the United States had effectively cut his lines of communication, it was impossible for him to know what was happening, or, even if he had known, he could not have ordered his soldiers to stop.⁴⁴ The commission believed, however, that the crimes were so "extensive and widespread, both as to time and area, that they must either have been willfully permitted by

³⁶ *Id.* (stating that a superior's criminality consists of his "failure to exercise control properly over his subordinates and to take the necessary measures for the purpose of preventing their crimes or punishing them").

³⁷ See Wu & Kang, *supra* note 13, at 281 (stating that strict liability "is an inapposite analogy to command responsibility").

³⁸ See Smidt, *supra* note 20, at 182–83 (discussing the *German High Command Case*).

³⁹ William G. Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, 97 MIL. L. REV. 1, 5 (1982).

⁴⁰ See Wu & Kang, *supra* note 13, at 274–75. To be sure, there are a number of important cases during this era that helped lay the groundwork for command responsibility, including the *German High Command Case* and the *Hostage Cases*. The trial of Yamashita, though, is the most famous. *Id.* at 274.

⁴¹ *Id.*

⁴² *In re Yamashita*, 327 U.S. 1, 13–14 (1946) (internal quotation marks omitted).

⁴³ Wu & Kang, *supra* note 13, at 275.

⁴⁴ *Yamashita*, 327 U.S. at 53–54 (Rutledge, J., dissenting).

[Yamashita], or secretly ordered by” him.⁴⁵ In convicting Yamashita, the commission set two important precedents. First, it confirmed a commander’s legal duty to control his subordinates and prevent abuses.⁴⁶ Second, it established two elements of culpability: a commander must have “some degree of knowledge” about the crimes and the opportunity to prevent them.⁴⁷ In doing so, it carved out mens rea and actus reus elements.

Although *Yamashita* helped lay the groundwork for command responsibility, the doctrine suffered from two major issues in the postwar era. First, *Yamashita* (along with other war crimes trials) left several questions unanswered. Namely, it failed to define the extent of a commander’s duty, what steps a commander must take to fulfill his duty, the appropriate level of mens rea, and the role of causation.⁴⁸ Furthermore, the doctrine lacked widespread acceptance immediately following the war. Several jurists complained that the doctrine was simply an exercise of “victor’s justice.”⁴⁹

In an effort to address these concerns, the international community has codified command responsibility in several accords over the past fifty years. The doctrine appears in Protocol I to the Geneva Convention (Protocol I),⁵⁰ the Statutes of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR),⁵¹ and the Rome Statute of

⁴⁵ Wu & Kang, *supra* note 13, at 275 (citing 4 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 34 (1948)).

⁴⁶ Smidt, *supra* note 20, at 180–81.

⁴⁷ *Id.* at 181. Smidt points out that there are several interpretations of what level of mens rea was used to convict Yamashita. One possibility is that he had actual knowledge of the crimes and secretly ordered them. Another is that he must have known of the crimes and did not stop them. *Id.*

⁴⁸ See Wu & Kang, *supra* note 13, at 295 (discussing scope of commander’s duty); *id.* at 295–97 (discussing limits on feasibility); *id.* at 278–79 (discussing mens rea); *id.* at 288–90 (discussing causation).

⁴⁹ Arthur T. O’Reilly, *Command Responsibility: A Call to Realign the Doctrine with Principles of Individual Accountability and Retributive Justice*, 40 GONZ. L. REV. 127, 128 (2005); see also *Yamashita*, 327 U.S. at 29–30 (Murphy, J., dissenting) (suggesting Yamashita’s prosecution was an “impulse[] of vengeance and retaliation”).

⁵⁰ Protocol I, Article 86, titled “Failure to Act,” states:

1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3, 42–43 [hereinafter Protocol I].

⁵¹ The ICTY and ICTR provisions are substantively identical:

The fact that any of the acts referred to [in the respective articles of each Statute] was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason

the International Criminal Court.⁵² These documents reaffirm the core elements of command responsibility from *Yamashita* and attempt to answer the doctrine's open-ended questions. Together, they demonstrate marked progress in the development of command responsibility. Differences among the individual provisions, though, illustrate that some uncertainties in the doctrine remain.

In the past five decades, the international community has settled on the first two unanswered questions from *Yamashita*: the breadth of a commander's duty and how to measure his efforts. At first, commanders were simply required to "repress grave breaches" of the laws of war.⁵³ This meant that they were only culpable for failing to prevent ongoing crimes or crimes that were about to occur. The most current articulations of the doctrine, however, state that a commander also has the duty to "punish the perpetrators" of a crime.⁵⁴ Thus, commanders must act when they discover a crime *ex post facto*. Similarly, international law has firmly established the requisite level of effort required by a commander to fulfill his duty. He must take all "necessary and reasonable measures" to either prevent or punish the commission of a crime.⁵⁵ The provision is adaptable to the circumstances of each case and seeks to determine whether the commander had the "effective ability" to take prophylactic measures.⁵⁶

Despite the agreement on the above issues, there is little consensus on the remaining two questions from *Yamashita*: the requisite level of *mens rea* and the appropriate role of causation in command responsibility.⁵⁷ With

to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Compare Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 1877, art. 7(3), U.N. Doc. S/RES/1877 (July 7, 2009) [hereinafter ICTY Statute], *with* Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 1901, art. 6(3), U.N. Doc. S/RES/1901 (Dec. 16, 2009) [hereinafter ICTR Statute].

⁵² Article 28 of the Rome Statute establishes:

(a) A military commander . . . shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

- (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
- (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Rome Statute of the International Criminal Court, art. 28(a), July 17, 1998, 2187 U.N.T.S. 19 [hereinafter Rome Statute], *available at* <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>.

⁵³ Protocol I, *supra* note 50.

⁵⁴ ICTR Statute, *supra* note 51; ICTY Statute, *supra* note 51.

⁵⁵ Rome Statute, *supra* note 52; *see also* ICTR Statute, *supra* note 51; ICTY Statute, *supra* note 51.

⁵⁶ MELONI, *supra* note 14, at 171–72.

⁵⁷ *See* Eckhardt, *supra* note 39, at 18–20; Hansen, *supra* note 25, at 403.

respect to mens rea, most agree that requiring a commander to have actual knowledge of a crime is unproductive.⁵⁸ Thus, each international statute and treaty establishes a mens rea requirement below knowledge.⁵⁹ None of these provisions, however, agrees on a single standard.⁶⁰ Commentators disagree as to what constitutes an appropriate mens rea regime as well.⁶¹ Similarly, the role of causation remains unsettled. On one hand, Protocol I and the Rome Statute require that a subordinate's crime be the result of his commander's omission.⁶² On the other, the ICTY and ICTR Statutes omit a causation analysis altogether.⁶³ Jurists and scholars have yet to propose a widely accepted formulation as well.⁶⁴

The struggle to define the latter two elements of command responsibility revolves around the tension between the doctrine's principle aim—deterrence—and notions of fundamental fairness.⁶⁵ Amidst the fog of war, military leaders “bear the brunt of preventing” violations of the law of war.⁶⁶ They are tasked with instilling discipline among their subordinates and controlling those subordinates' use of force. Under the threat of criminal punishment, these commanders are encouraged to provide “the maximum degree of control and vigilance” over their soldiers.⁶⁷ In this sense, leaders become the instrument that international law uses to prevent

⁵⁸ See, e.g., Eckhardt, *supra* note 39, at 20 (stating that a knowledge standard is an invitation to “see and hear no evil” (quoting Roger S. Clark, Medina: *An Essay on the Principles of Criminal Liability for Homicide*, 5 RUTGERS-CAM. L.J. 59, 78 (1973))).

⁵⁹ See Protocol I, *supra* note 50; ICTR Statute, *supra* note 51; ICTY Statute, *supra* note 51; Rome Statute, *supra* note 52.

⁶⁰ See Protocol I, *supra* note 50 (listing mens rea standard as “if they knew, or had information that should have enabled them to conclude”); ICTY Statute, *supra* note 51 (listing mens rea standard as “knew or had reason to know”); Rome Statute, *supra* note 52 (listing mens rea standard as “knew or, owing to the circumstances at the time, should have known”). Complicating the matter further, few jurists agree on the exact meaning of each phrase. See Hansen, *supra* note 25, at 405 (“It is not unusual for tribunals to place different meanings on the same terms.”).

⁶¹ Compare Hansen, *supra* note 19, at 269 (advocating for a Model Penal Code-based formulation), with Smidt, *supra* note 20, at 217 (advocating for an ICC formulation).

⁶² Protocol I, *supra* note 50; Rome Statute, *supra* note 52.

⁶³ ICTR Statute, *supra* note 51; ICTY Statute, *supra* note 51; see also MELONI, *supra* note 14, at 127 (stating that it is unclear from the jurisprudence of the ad hoc tribunals whether a causal relationship is required).

⁶⁴ See MELONI, *supra* note 14, at 173–74. Several proposed causation standards include: an increased-risk approach, actual and proximate causation, and an encouragement test. See *id.* at 177 (describing the ICC's implementation of an increased-risk approach); Hansen, *supra* note 19, at 272 (advocating a proximate cause analysis); Sengheiser, *supra* note 24, at 719–20 (advocating an encouragement test); Wu & Kang, *supra* note 13, at 288 (internal quotation marks omitted) (discussing a “natural and probable consequence” standard).

⁶⁵ See O'Reilly, *supra* note 49, at 151–52 (stating that in the context of international crimes the “United Nations is focused on the objectives of deterrence and just punishment”).

⁶⁶ Hackel, *supra* note 11, at 266.

⁶⁷ MELONI, *supra* note 14, at 31.

future crimes.⁶⁸ However, “fairness in determining criminal accountability . . . require[s] some personal involvement on the part of the commander.”⁶⁹ Taken to the extreme, a prevention-based justification for command responsibility could easily translate into strict liability⁷⁰—a notion that has been rejected from the outset.⁷¹ The shifting landscape of command responsibility results from swings between the counterweights of deterrence and fairness.

Despite this tension, the international community seems to have settled on the following: Commanders have a legal duty to prevent, suppress, and punish any law-of-war violations within their chain of command.⁷² They must take all necessary and reasonable measures to fulfill these duties.⁷³ A commander is culpable if he has knowledge of a crime⁷⁴ and if his breach of duty proves to be a catalyst for his subordinate’s actions.⁷⁵ At the very least, these tenets form the core of the modern doctrine.

II. COMMAND RESPONSIBILITY UNDER DOMESTIC LAW

Although command responsibility holds a prominent place within international law, it is less pervasive under domestic military law. The doctrine has been incorporated within U.S. military dogma since 1956⁷⁶ but has not been codified within the UCMJ. Command responsibility thus serves as a guiding principle for military discipline, but not as a direct criminal tool for military prosecutors. The U.S. military instead scrutinizes command responsibility-type issues under the same lens as all other types of leadership failures. As such, commanders who fail to prevent or punish war crimes are typically disciplined using a traditional framework of administrative and criminal provisions, as opposed to a distinct command responsibility provision.⁷⁷

⁶⁸ *Id.*

⁶⁹ Eckhardt, *supra* note 39, at 18.

⁷⁰ See Mirjan Damaska, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455, 480–81 (2001) (discussing how even a negligence standard can “begin to shade into liability without culpability”).

⁷¹ See *supra* notes 37–39 and accompanying text.

⁷² See *supra* notes 53–54 and accompanying text.

⁷³ See *supra* notes 55–56 and accompanying text.

⁷⁴ See *supra* notes 57–59 and accompanying text.

⁷⁵ See *supra* notes 62–64 and accompanying text.

⁷⁶ See FM 27-10, *supra* note 18, paras. 178–79. The doctrine’s tenets have been reaffirmed recently upon the release of the U.S. military’s COIN manual. See U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY app. para. D-24 (15 Dec. 2006) [hereinafter FM 3-24].

⁷⁷ See *infra* Part II.B.

A. Murder in Kandahar

To better understand how the U.S. military currently punishes leadership failures and how such failures could be punished under a substantive command responsibility provision, it is first helpful to draw on two recent incidents. One is the 5th Stryker Brigade Kill Team murders that occurred near Kandahar, Afghanistan in early 2010. The other is the Staff Sergeant Bales civilian massacre that took place near the same area in March 2012. Both offer valuable insight into the current military justice system and the most principled approach for implementing command responsibility domestically.

1. *The Afghan Kill Team.*—In March 2011, a reporter from Rolling Stone magazine revealed how several soldiers in a platoon planned, executed, and covered up the murder of at least three innocent Afghan civilians.⁷⁸ The soldiers, who were members of 3rd Platoon, Bravo Company, 2-1 Infantry, 5th Stryker Brigade, first deployed to Afghanistan in July 2009. Throughout their first several months of operating near Kandahar, the platoon sustained several casualties, but had little opportunity to identify and engage the enemy directly.⁷⁹ After a popular squad leader⁸⁰ was wounded, Staff Sergeant Calvin Gibbs was transferred to the platoon to take over this role. Shortly after his arrival, Gibbs concocted a plan to turn morale around. After weeks of discussion, he convinced several members of his squad to start staging attacks in order to justify killing Afghan “savages.”⁸¹

The first staged killing occurred in January 2010 in the isolated farming village of La Mohammad Kalay. While their platoon leader, First Lieutenant Roman Ligsay, and another officer were conducting a village meeting, Gibbs and two of his subordinates identified a teenage boy on the village outskirts as a target. One Kill Team⁸² member tossed a grenade at the boy’s feet, waited until it exploded, and then joined another member in shooting the boy. The two claimed that a lone Taliban fighter attempted to ambush the unit in broad daylight with a single grenade—“an unlikely story.”⁸³ Shortly after the attack, a village elder approached the patrol’s

⁷⁸ See generally Boal, *supra* note 10.

⁷⁹ *Id.* at 58, 64.

⁸⁰ A squad leader is a small-unit commander who is typically in charge of four to ten soldiers and holds the rank of Staff Sergeant. See *Operational Unit Diagrams*, U.S. ARMY, <http://www.army.mil/info/organization/unitsandcommands/oud/> (last visited Oct. 27, 2013).

⁸¹ See Boal, *supra* note 10, at 58; see also Craig Whitlock, *Soldier Says Afghans’ Killings Were Plotted by Staff Sergeant*, WASH. POST, Sept. 28, 2010, at A14, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/27/AR2010092705753.htm>.

⁸² Mark Boal used the moniker “Kill Team” in his article exposing the murders. Boal, *supra* note 10, at 56. There is no evidence that the soldiers in Gibbs’s squad referred to themselves as such.

⁸³ *Id.* at 58.

leaders, claiming that the boy was murdered.⁸⁴ However, these leaders ignored both the elder and the questionable circumstances. Within a few days of the killing, the teenager's uncle, along with several other villagers, "descended on the gates of [the unit's base]... to demand an investigation."⁸⁵ The soldiers involved were re-interviewed, but the battalion's investigating officer believed there were "no inconsistencies in their story."⁸⁶

Gibbs staged another attack in the village of Kari Khey1 a month later. Prior to the mission, he had scrounged up a series of drop weapons⁸⁷ to bolster his cover stories. For this killing, he had found a functioning AK-47 rifle. During the mission, while the rest of the platoon was legitimately engaged with other village members, Gibbs identified his target. He fired the AK-47 into a nearby wall, threw it at the victim's feet, and shot the man with the help of two other subordinates.⁸⁸ Gibbs later reported the victim shot first, but then had his rifle jam. A fellow squad leader, Staff Sergeant Sprague, inspected the AK-47 shortly thereafter and believed it be in perfect working condition. Later in the day, Sprague actually used the weapon after receiving fire and claimed it worked "with no problems at all."⁸⁹ After identifying this discrepancy, he reported it to Lieutenant Ligsay; however, the platoon leader did not look into the matter further.⁹⁰

Eventually Army investigators stumbled onto the killings after looking into a separate incident. In the course of their investigation, other members of the platoon reported that the Kill Team's illegal exploits were common knowledge. In fact, the platoon had built a reputation for "staging killings and getting away with it."⁹¹ Moreover, a few others indicated that they were well aware of the Kill Team's ambitions prior to the first incident in January.

Several months later, the Army launched a separate investigation into the question of officer accountability within 5th Stryker Brigade. The report found a system-wide breakdown of discipline. Officers generally did not communicate properly with their subordinates and showed contempt for

⁸⁴ *Id.*

⁸⁵ *Id.* at 60.

⁸⁶ *Id.*

⁸⁷ During combat operations in Iraq and Afghanistan, the Army maintains records of all ammunition, magazines, and explosives assigned and expended by units. A 'drop weapon' is generally a former enemy weapon or explosive, not listed in any records, which can be dropped at the scene, whenever a unit's actions may have violated the rules of engagement. See American News Project, *US Troops Discuss "Drop-Weapons,"* YOUTUBE (June 2, 2008), http://www.youtube.com/watch?v=SODTL_C1q_Q. Staff Sergeant Gibbs had found his 'drop' AK-47 while on a previous mission. Boal, *supra* note 10, at 66.

⁸⁸ Boal, *supra* note 10, at 67.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 60.

normal Army rules.⁹² Furthermore, several soldiers were caught smoking hashish in their Stryker vehicles, while others circulated photos of themselves standing over dead bodies, the latter of which is a law-of-war violation itself.⁹³ The report also placed part of the blame directly on Colonel Harry Tunnell, the brigade commander.⁹⁴ It claimed that his “inattentiveness to administrative matters . . . may have helped create an environment in which misconduct could occur.”⁹⁵ It also questioned whether his open contempt for the Army’s COIN doctrine and outspoken support for “ruthlessly hunt[ing] down the Taliban”⁹⁶ may have influenced the behavior of the Kill Team.⁹⁷

In the aftermath of the killings, the U.S. military summarily punished the soldiers directly involved in the crime. Staff Sergeant Gibbs was tried for murder and received a sentence of life in prison as the leader of the Kill Team.⁹⁸ Most of the remaining Kill Team members pled guilty to murder or other charges and received lesser sentences—the maximum being twenty-four years.⁹⁹

2. *The Staff Sergeant Bales Massacre.*—The Kill Team murders occurred over a series of months, whereas the Staff Sergeant Bales atrocity occurred in a single night. In the early morning hours of March 11, 2012,

⁹² Soldiers were often found unshaven, conducted patrols with their sleeves rolled up, and called officers by their first names—all of which are basic infractions of Army policy. See Karin Assmann et al., ‘Let’s Kill’: Report Reveals Discipline Breakdown in Kill Team Brigade, DER SPIEGEL ONLINE (Apr. 4, 2011, 5:44 PM), <http://www.spiegel.de/international/world/let-s-kill-report-reveals-discipline-breakdown-in-kill-team-brigade-a-754952.html>.

⁹³ See *id.*; see also Boal, *supra* note 10, at 60, 65.

⁹⁴ A brigade commander is a senior officer that is typically in charge of 3000–5000 soldiers and holds the rank of colonel. See *Operational Unit Diagrams*, *supra* note 80.

⁹⁵ Assmann, *supra* note 92 (alteration in original).

⁹⁶ *Id.*

⁹⁷ See Craig Whitlock, *Brigade’s Strategy: ‘Strike and Destroy,’* WASH. POST, Oct. 14, 2010, at A1.

⁹⁸ Nick Allen, *Leader of US Army ‘Kill Team’ Guilty of Afghan Murders*, THE DAILY TELEGRAPH (Nov. 12, 2011, 12:33 AM), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/8885631/Leader-of-US-army-kill-team-guilty-of-Afghan-murders.html>.

⁹⁹ Adam Ashton, *On Appeal, Army Court Reduces One of Three “Kill Team” Murder Convictions*, THE NEWS TRIBUNE (May 31, 2014), <http://www.thenewstribune.com/2014/05/31/3221157/on-appeal-army-court-reduces-one.html> (outlining Private First Class Holmes’s plea deal and seven-year sentence); Matthew Cole, ‘Kill Team’ Soldier Gets Three Years in Prison, ABC NEWS (Aug. 6, 2011), <http://abcnews.go.com/Blotter/kill-team-soldier-years-prison/story?id=14239130> (describing Specialist Winfield’s plea deal and three-year prison sentence); *Court Sentences ‘Kill Team’ Soldier to 24 Years in Prison*, DER SPIEGEL ONLINE (Mar. 24, 2011, 1:10 PM), <http://www.spiegel.de/international/world/murder-in-afghanistan-court-sentences-kill-team-soldier-to-24-years-in-prison-a-752918.html> (noting Specialist Morlock pled guilty to multiple counts of murder (among other charges) and received twenty-four years in prison). Military prosecutors, however, dropped all charges against Specialist Wagnon, whom the Army initially suspected of being the fifth Kill Team member. See *Army Drops Murder Charge Against Last Soldier Tied to ‘Kill Team’ Cases*, STARS AND STRIPES (Feb. 4, 2012), <http://www.stripes.com/army-drops-murder-charge-against-last-soldier-tied-to-kill-team-cases-1.167726>.

Staff Sergeant Bales unexpectedly departed from Camp Belambay, a small U.S. outpost located near Kandahar.¹⁰⁰ After walking past an Afghan guard, Bales traveled down the road to a nearby village.¹⁰¹ Once there, he proceeded to break into several homes and execute sixteen men, women, and children.¹⁰² Sometime during the night, an Afghan guard notified the chain of command that a U.S. soldier left the base carrying his weapon.¹⁰³ The outpost commander then ordered a headcount and realized that Bales was missing. Just after the commander dispatched a patrol to search for him, Bales returned by himself. Finding Bales covered in blood, several U.S. soldiers promptly detained him.¹⁰⁴

Earlier in the evening, Bales visited and drank with other members of his platoon. At one point, they discussed how a colleague had lost his leg in an attack the week prior. Later in the evening, he spoke with a senior noncommissioned officer about being disappointed that the unit had not retaliated for the attack.¹⁰⁵ Leading up to the killings, Bales also began to frequently lash out at junior soldiers.¹⁰⁶ Moreover, almost the entire day before the crime, he vented his anger by “chopping and sawing a large tree that the soldiers had taken down near the base.”¹⁰⁷ The unit’s leadership, however, did not identify Bales as a potential law-of-war threat. In the end, Staff Sergeant Bales admitted to the killings, pled guilty, and received a sentence of life in prison without the possibility of parole.¹⁰⁸

B. *The Prospects of Punishing Command Failures*

Although the punishment meted out to the Kill Team members and Staff Sergeant Bales was widely publicized, there is little information on whether their commanders received any discipline. It is likely that the commanders received little, if any, punishment for failing to prevent their

¹⁰⁰ Evans, *supra* note 9.

¹⁰¹ *Id.*

¹⁰² Kirk Johnson, *Pretrial Hearing Starts for Soldier Accused of Murdering 16 Afghan Civilians*, N.Y. TIMES, Nov. 6, 2012, at A16.

¹⁰³ See Evans, *supra* note 9.

¹⁰⁴ See Associated Press, *Highlights of Testimony in Preliminary Trial of Staff Sgt. Robert Bales*, OREGONIAN (Nov. 12, 2012, 6:43 AM), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2012/11/highlights_of_testimony_in_pre.html.

¹⁰⁵ *Id.*

¹⁰⁶ Gene Johnson, *Staff Sgt. Bales Apologizes for Afghan Massacre*, USA TODAY (Aug. 22, 2013, 5:22 PM), <http://www.usatoday.com/story/news/nation/2013/08/22/afghanistan-massacre-bales/2688995/>.

¹⁰⁷ *Id.*

¹⁰⁸ Associated Press, *Staff Sgt. Robert Bales Sentenced to Life in Prison Without Chance of Parole for Afghanistan Massacre that Left 16 Dead*, N.Y. DAILY NEWS (Aug. 23, 2013, 2:35 PM), <http://www.nydailynews.com/news/national/army-staff-sgt-robert-bales-life-chance-parole-article-1.1435117>.

subordinates' war crimes.¹⁰⁹ Regardless of this outcome, there are a number of punitive measures the U.S. military could have applied to the Kill Team and Staff Sergeant Bales' commanders. Such options include: applying administrative sanctions,¹¹⁰ implementing nonjudicial punishment,¹¹¹ or charging the commanders with criminal dereliction of duty.¹¹² These measures are available whenever a commander commits any type of serious leadership failure.

There is also a fourth, seldom-used option that could have been applied (likely for the Kill Team murders only): charging a commander as an accomplice to the crime using Article 77 of the UCMJ. Military prosecutors have applied this approach at least once in American history in an effort to introduce command responsibility through the military judiciary.¹¹³ Part II.B outlines these current U.S. mechanisms and, using Lieutenant Ligsay as an example, demonstrates how they may be applied to commanders who fail to take appropriate action with respect to their subordinates' war crimes.

1. Noncriminal Punishment.—Army Regulation 27-10, the directive that governs military justice, permits senior leaders to employ a wide range of administrative measures to enforce discipline.¹¹⁴ Common methods include: issuing a letter of reprimand, giving a subordinate leader a negative evaluation report, or removing a subordinate commander from his position of authority.¹¹⁵

Issuing a letter of reprimand is one of the more common approaches to addressing command failures.¹¹⁶ The letter is an official document that outlines how the recipient failed to comply with military standards. In Lieutenant Ligsay's case, his letter would likely outline (among other things) how he failed to investigate the questionable circumstances surrounding Gibbs's staged killings or report these disparities to his superiors. At the discretion of his commander, this letter can either be filed in Lieutenant Ligsay's official record, which would likely cause serious

¹⁰⁹ There are no public reports indicating that any of the officers in the Kill Team or Staff Sergeant Bales' chain of command were punished in connection with the war crimes committed.

¹¹⁰ See Hansen, *supra* note 19, at 257.

¹¹¹ See Smith, *supra* note 24, at 685–86.

¹¹² See 10 U.S.C. § 892 (2012).

¹¹³ See Howard, *supra* note 20 (discussing *United States v. Medina*, C.M. 427162 (1971)); Smidt, *supra* note 20, at 192–200 (same).

¹¹⁴ See U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE paras. 3-3 to -4 (3 Oct. 2011) [hereinafter AR 27-10].

¹¹⁵ *Id.*

¹¹⁶ For example, this was the approach taken toward two senior commanders involved with the Abu Ghraib scandal. Hansen, *supra* note 19, at 257 & n.43.

damage to his career, or his local file, which would result in relatively little damage.¹¹⁷

In addition to writing letters of reprimand, a senior commander can also issue a negative evaluation report of his derelict subordinate¹¹⁸ or relieve him of command.¹¹⁹ Both of these measures are aimed at hurting the subordinate commander's advancement prospects.¹²⁰ They are especially damaging when used against more senior or career-minded military leaders.

Nonjudicial punishment, authorized under Article 15 of the UCMJ, is a much more forceful tool than administrative action.¹²¹ In brief, it consists of referring a formal charge against a soldier or officer who has failed to maintain proper discipline or carry out his duty. Procedurally, a senior commander acts as both judge and jury, weighing the evidence of liability and considering any mitigating factors with respect to punishment.¹²² For example, if Lieutenant Ligsay were found guilty of permitting his soldiers to collect and retain drop weapons, his senior commander would be authorized to impose the following measures: reduction in rank, deprivation of pay, deprivation of liberty, or some combination thereof.¹²³ However, despite the few similarities between these proceedings and criminal trials, Article 15 punishment does not amount to criminal liability.¹²⁴

2. *Criminal Punishment.*—In addressing leadership failures, a senior commander could also initiate a criminal proceeding—i.e., trial by court martial.¹²⁵ One route into the court martial system is for the senior commander to refer his subordinate leader for a dereliction of duty charge under Article 92. A more unorthodox approach, however, is also available if a senior commander believes his junior leader's failure is particularly egregious. He can charge the junior leader directly with the underlying law-of-war violation using Article 77. In other words, Lieutenant Ligsay could have been charged with murder in connection with the Kill Team's three homicides.

¹¹⁷ See U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION para. 3-4 (19 Dec. 1986).

¹¹⁸ See U.S. DEP'T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM para. 3-4 (5 June 2012).

¹¹⁹ See U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 2-17 (18 March 2008).

¹²⁰ Cf. Hansen, *supra* note 19, at 257–58 (describing how informal sanctions ended the career of a senior commander involved in the Abu Ghraib scandal).

¹²¹ See AR 27-10, *supra* note 114, at ch. 3.

¹²² See MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. V, ¶ 4 (2012) [hereinafter MCM].

¹²³ *Id.* at pt. V, ¶ 5. The appropriate authority could impose a reduction of rank by one level, forfeiture of a total of one month's pay, impose after-hours duty assignments for up to forty-five or sixty days, or some combination thereof. *Id.*

¹²⁴ *Id.* at pt. V, ¶ 1b (“Nonjudicial punishment is a disciplinary measure more serious than the administrative corrective measures . . . but less serious than trial by court-martial.”).

¹²⁵ For an overview of the court martial process, see Smith, *supra* note 24, at 686–93.

a. Article 92: dereliction of duty.—The first type of criminal charge that may be leveled at a commander who fails to prevent or punish a law-of-war violation is dereliction of duty. Under Article 92, any soldier who “is derelict in the performance of his duties[] shall be punished as a court-martial may direct.”¹²⁶ If Lieutenant Ligsay’s failure to prevent the Kill Team murders qualifies as dereliction, he is thus subject to the provision’s criminal penalties.

Despite Article 92’s vague language, three elements are needed to establish Lieutenant Ligsay’s criminality. First, a military prosecutor must prove that Lieutenant Ligsay had a duty to prevent, suppress, or punish law-of-war violations committed by his subordinates.¹²⁷ Although the UCMJ does not specifically establish these duties, they could flow from the Fourth Hague Convention. According to the Manual for Courts-Martial (MCM),¹²⁸ a soldier’s duty may be defined by “treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service.”¹²⁹ Under the Hague Convention, a commander has “the legal obligation to control the conduct of his forces such that they can achieve military objectives without . . . committing unnecessary suffering . . . to non-combatants.”¹³⁰ As such, a commander’s overall duty to control may encompass the specific duties to prevent, suppress, and punish a subordinate’s war crimes under the MCM standard.¹³¹ Even if the court-martial does not find a duty from the Hague Convention, Lieutenant Ligsay at least had a specific duty to *report* any suspected war crimes occurring within his unit.¹³² His duty to report would have stemmed from the rules of engagement operating in Afghanistan at the time.¹³³

A prosecutor must establish next that Lieutenant Ligsay had “[a]ctual knowledge . . . [or] reasonably should have known” about his duty to prevent or report law-of-war violations.¹³⁴ Although this language indicates

¹²⁶ 10 U.S.C. § 892(3) (2012).

¹²⁷ Hansen, *supra* note 25, at 394.

¹²⁸ “The MCM is an executive order that details the rules for administering military justice. For example, it sets forth the rules of evidence for courts-martial and contains a list of maximum punishments for each offense.” U.S. ARMY JUDGE ADVOCATE GEN. LEGAL CTR. & SCH., COMMANDER’S LEGAL HANDBOOK 7 (2013).

¹²⁹ MCM, *supra* note 122, at pt. IV, ¶ 16c(3)(a).

¹³⁰ Hansen, *supra* note 19, at 254 (citing Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631).

¹³¹ *Cf. id.* at 254–55 (“Even though the elements and explanations [of dereliction of duty] do not explicitly mention the special legal duties imposed on a commander for the conduct of his subordinates, [the MCM’s definition of duty] is certainly broad enough to include a commander’s duties and responsibilities over his forces.”).

¹³² According to the Army’s standard rules of engagement, all soldiers have a duty to “report any suspected violations of the Law of War committed by any US . . . force.” *See, e.g.*, MND-N ROE Card (Jan. 1, 2009) (on file with author).

¹³³ *See id.*

¹³⁴ MCM, *supra* note 122, at pt. IV, ¶ 16c(3)(b).

a mens rea standard of negligence, there is some precedent suggesting commanders must have actually known about these duties in order to impose criminal liability.¹³⁵ Regardless of the standard, it would be difficult for Lieutenant Ligsay to argue he did not have such knowledge. This is especially true regarding his duty to report, because all soldiers are required to know their rules of engagement.¹³⁶

Lastly, a commander must actually be derelict with respect to his duty.¹³⁷ To be derelict, Lieutenant Ligsay must have willfully or negligently failed to perform his duties or performed them in a culpably negligent manner.¹³⁸ This would be an issue for a military jury to decide. Assuming *arguendo* that he is guilty, however, the maximum punishment for negligent dereliction is three months confinement in a military prison.¹³⁹

b. Article 77: principals.—Alternatively, it would have been possible for Lieutenant Ligsay’s senior commander to initiate a murder charge against him as a principal to the staged killings using Article 77. At first glance, the approach seems counterintuitive in this case, because the statute’s language is directed at leaders who actively participate in their subordinates’ crimes.¹⁴⁰ Article 77 identifies as a principal any commander who affirmatively “aids, abets, counsels, commands, or procures” the commission of a crime.¹⁴¹ Lieutenant Ligsay did not have any such direct involvement in the murders. However, the court-martial in *United States v. Medina*—the most prominent command responsibility case in American history—adopted the approach of using Article 77 to charge commanders with their subordinate’s war crime when there is only passive complicity.¹⁴²

United States v. Medina was a byproduct of the infamous My Lai massacre during the Vietnam War. In brief, Captain Medina’s company conducted an assault on the village of My Lai.¹⁴³ Although he expected heavy resistance, his lead unit initially reported little to no enemy presence.¹⁴⁴ Soon thereafter, the same unit opened fire on unarmed villagers, killing hundreds.¹⁴⁵ In the meantime, Captain Medina, who was

¹³⁵ Hansen, *supra* note 19, at 255–56 (citing *United States v. Ferguson*, 40 M.J. 823, 833–34 (N.M.C.M.R. 1994)).

¹³⁶ See U.S. DEP’T OF ARMY, FIELD MANUAL 7-21.13, THE SOLDIER’S GUIDE para. 1-79 (2 Feb. 2004) [hereinafter FM 7-21.13].

¹³⁷ Hansen, *supra* note 25, at 394.

¹³⁸ MCM, *supra* note 122, at pt. IV, ¶ 16c(3)(c); see also Eckhardt, *supra* note 39, at 21.

¹³⁹ MCM, *supra* note 122, at pt. IV, ¶ 16e(3)(A). The maximum punishment for willful dereliction is six months. *Id.* at pt. IV, ¶ 16e(3)(B).

¹⁴⁰ Smidt, *supra* note 20, at 195.

¹⁴¹ 10 U.S.C. § 877 (2012).

¹⁴² See Howard, *supra* note 20 (discussing *United States v. Medina*, C.M. 427162 (1971)); Smidt, *supra* note 20, at 192–200 (same).

¹⁴³ Eckhardt, *supra* note 39, at 12.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

controlling the battlefield from only 150 meters away, did not radio his platoon to stop shooting until nearly three hours after the assault began.¹⁴⁶ He later admitted that “he had no reason to believe My Lai was contested by the enemy and that he had lost control of his company.”¹⁴⁷

The prosecution convinced the court that Article 77 applied in this case based on a discussion section accompanying the provision in the MCM.¹⁴⁸ The discussion section indicated that a commander could be liable for failing to *suppress* a war crime under certain conditions.¹⁴⁹ Namely, the commander’s failure to act must have actually encouraged the subordinate and the commander must have intended his failure to act as encouragement.¹⁵⁰ Relying on this theory, the judge gave the following jury instruction at trial:

[A] commander is also responsible if he has actual knowledge that troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary and reasonable steps to insure compliance with the law of war.¹⁵¹

These instructions show that there is room within the UCMJ to convict commanders who fail to suppress the commission of a war crime. As Captain Medina’s acquittal later demonstrated, however, the standard is exacting. Prosecutors must demonstrate beyond a reasonable doubt that a commander has actual knowledge of the crime and that his failure served as encouragement.¹⁵² Therefore, even though senior military leaders likely chose not to punish Lieutenant Ligsay for his command failures, they had several punitive measures available should they have decided to punish him.

¹⁴⁶ *Id.* at 14.

¹⁴⁷ *Id.*

¹⁴⁸ See Smidt, *supra* note 20, at 196–98 (quoting MCM, *supra* note 122, at pt. IV, ¶ 1b(2)(b) to ¶ 1b(3)). The relevant discussion indicates that a narrow affirmative duty exists when certain persons witness a crime, including commanders.

¹⁴⁹ *Id.* at 197. The combination of the discussion section and a customary duty to control subordinates is what creates this duty. *Id.*

¹⁵⁰ *Id.* at 198.

¹⁵¹ Eckhardt, *supra* note 39, at 15 (quoting Instructions to the Court Members, Appellate Exhibit XCIII, at 18, *United States v. Medina*, C.M. 427162 (1971)). The trial judge, in a later article discussing this standard, explained further:

[I]f the commander gains actual knowledge and does nothing, then he may become a principal in the eyes of the law in that by his inaction he manifests an aiding and encouraging support to his troops, thereby indicating that he joins in their activity and wishes the end product to come about.

Smidt, *supra* note 20, at 198 (alteration in original) (quoting Howard, *supra* note 20, at 22).

¹⁵² See Sengheiser, *supra* note 24, at 715–16 (“Medina was acquitted on the basis of his lack of actual knowledge of the atrocities.”). In a general court-martial, the accused is “presumed to be innocent until [his] guilt is established by legal and competent evidence beyond reasonable doubt.” MCM, *supra* note 122, R.C.M. 920(e)(5)(A).

III. CHALLENGES TO THE CURRENT COMMAND RESPONSIBILITY CLIMATE

Despite the breadth of punitive measures available for punishing leadership failures, the current military justice system has received scant support from legal scholars interested in the doctrine of command responsibility.¹⁵³ They contend that the system either lacks adequate punitive measures to compel law-of-war compliance among commanders or hinders the military's ability to carry out its mission.¹⁵⁴ Amplifying these criticisms, two military lawyers have advocated for the adoption of a command responsibility provision within the UCMJ that resembles the international version of the doctrine.¹⁵⁵ By codifying command responsibility, they assert, the U.S. military will be better able to prevent the next major law-of-war violation. Accordingly, Part III will first discuss the criticisms of the current military justice system and then introduce two proposals for adopting a command responsibility statute in the United States.

A. *Critiques of the Current System*

Legal scholars studying command responsibility offer two principal critiques of the American approach. The first critique faults the UCMJ for not offering sufficient incentives to ensure leaders take their law-of-war responsibilities seriously.¹⁵⁶ The severity of punishment associated with administrative blowback, nonjudicial action, or a dereliction of duty charge “does not adequately inform military commanders that law-of-war compliance is a matter for their direct and constant attention.”¹⁵⁷ Considering the “complex, confusing, and dangerous environment” of war, the threat of a reprimand, reduction in rank, loss in pay, or even a six-month prison sentence seems like an inappropriate means of persuading commanders to diligently root out war crimes.¹⁵⁸ Critics could further argue

¹⁵³ See, e.g., Hansen, *supra* note 19, at 248–54 (focusing on Abu Ghraib scandal); Peters, *supra* note 21, at 939–43 (discussing the Haditha incident).

¹⁵⁴ See Hansen, *supra* note 19, at 266 (finding that after reviewing the punitive Articles, “the unmistakable conclusion is that the incentives under the UCMJ are inadequate”); Peters, *supra* note 21, at 942 (“The way ahead for US military justice and the vexing problem of command responsibility remains open. Acknowledging serious deficiencies in the current process is only the first step.”); Sepinwall, *supra* note 21, at 259 (internal quotation marks omitted) (stating that under the current system, U.S. war crimes “often initially go unreported, and almost always go unpunished”); see also William C. Westmoreland & George S. Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 4 HARV. J.L. & PUB. POL’Y 199 (1980) (arguing generally that the UCMJ is inadequate to perform its function in times of war).

¹⁵⁵ See Hansen, *supra* note 19, at 248–58; Smidt, *supra* note 20, at 215–19.

¹⁵⁶ See Hansen, *supra* note 19, at 258; see also Eckhardt, *supra* note 39, at 21–22.

¹⁵⁷ Hansen, *supra* note 19, at 258.

¹⁵⁸ See Eckhardt, *supra* note 39, at 21; Hansen, *supra* note 19, at 256; see also Sepinwall, *supra* note 21, at 258–59 (discussing how Lieutenant Colonel Nathan Sassaman received a “mere wrist slap”

that the threat of a murder charge against a commander using Article 77 is hollow as well because of the difficulty associated with the “actual knowledge” requirement.¹⁵⁹

The second principal critique of the current U.S. approach to command responsibility is that it degrades the military’s image and ability to function effectively. The disparity between the U.S. and international approaches to command responsibility reinforces the notion that the United States is not serious about the law of war.¹⁶⁰ It also weakens the legitimacy of U.S.-led military campaigns overseas, making long-term operations more difficult to sustain.¹⁶¹ Furthermore, the legal regime helps create the perception that only lower ranking soldiers are held accountable for their criminal conduct.¹⁶² This inequality of accountability erodes support for military operations at home and affects discipline in the field, as lower level soldiers may grow distrustful of their superiors.¹⁶³

B. Codifying Command Responsibility

Two military law practitioners go beyond identifying flaws in the American command responsibility structure to argue that the most effective response is to codify the doctrine within the UCMJ.¹⁶⁴ They claim that the doctrine’s international formulations would serve as an appropriate model to do so.¹⁶⁵ Both proposals therefore draw extensively on the principles and language of the ad hoc Tribunal and Rome Statutes and seek to implement a more rigid standard on commanders. Although these proposals demonstrate marked progress in the discussion on command responsibility within the United States, they ultimately fall short of establishing a workable standard for American military forces.

for covering up incident in his battalion where a subordinate leader threw several Iraqis off a bridge, killing at least one).

¹⁵⁹ Medina’s acquittal demonstrates the difficulty of this standard.

¹⁶⁰ Cf. Smidt, *supra* note 20, at 156, 215–16.

¹⁶¹ *Id.* at 156.

¹⁶² See Hansen, *supra* note 25, at 398; see also Smith, *supra* 24, at 674–75 (discussing disparity of punishment between soldiers and commanders in Abu Gharib affair); cf. Elizabeth L. Hillman, *Gentlemen Under Fire: The U.S. Military and “Conduct Unbecoming,”* 26 LAW & INEQ. 1, 3 (2008) (“[T]he perception that high-ranking officers are rarely disciplined and almost never criminally prosecuted is so common partly because it is true.”).

¹⁶³ See Hansen, *supra* note 25, at 398.

¹⁶⁴ See Hansen, *supra* note 19, at 248–58; Smidt, *supra* note 20, at 215–19.

¹⁶⁵ As an initial matter, the customary and treaty-based international law outlined in Part I has not been directly incorporated into U.S. military law. The United States has yet to ratify the Rome Statute. See David Scheffer & Ashley Cox, *The Constitutionality of the Rome Statute of the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 983, 984 (2008). Furthermore, customary international law may not be incorporated within federal law without the approval of the Senate. See *Medellin v. Texas*, 552 U.S. 491 (2008) (holding that international treaties are not self-executing).

1. *Incorporating the ICC into Article 77.*—In a review of the command responsibility doctrine prior to 9/11, Michael Smidt offers a simple solution to the problems associated with command responsibility in the United States: incorporate Article 28(a) of the Rome Statute wholesale into the UCMJ.¹⁶⁶ He proposes adopting the language of the Rome Statute almost verbatim and placing command responsibility within the confines of Article 77. Smidt’s provision states:

- (3) [I]n the case of a military commander or a person effectively acting as a military commander, while on a military operation outside the territory of the United States, however the operation is characterized, where forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise proper control over such forces, where[:]
- (i) That military commander or person either knew or owing to the circumstances a[t] the time, should have known that the forces were committing or about to commit a crime under this chapter; and
- (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission; is a principal.¹⁶⁷

Although Smidt does not resolve some of the ambiguous language within the ICC, he does insist that the proposal embraces a negligence standard for mens rea.¹⁶⁸

2. *Adjusting Article 92: A New Dereliction of Duty.*—After examining the fallout of the Abu Ghraib scandal, Victor Hansen also identifies a need to adopt command responsibility into the UCMJ.¹⁶⁹ He proposes punishing these types of command failures as derelictions of duty rather than treating the commander as a principal to the crime.¹⁷⁰ Hansen’s proposed provision would apply to any military leader exercising command authority over a subordinate and would be triggered when the subordinate has committed or is about to commit a war crime specified in the War Crimes Act of 1996.¹⁷¹ To satisfy the mens rea requirement under Hansen’s proposal, a prosecutor may show that the commander had knowledge of, or was reckless or negligent with respect to his knowledge of, the war crimes.¹⁷² Once a commander knows about the crime, or at least should have known, he has a duty to prevent, suppress, or punish the crime using “all necessary and reasonable measures within his or her power.”¹⁷³

¹⁶⁶ See Smidt, *supra* note 20, at 215–19.

¹⁶⁷ *Id.* at 217.

¹⁶⁸ See *id.* at 217–18.

¹⁶⁹ See Hansen, *supra* note 19, at 248–58.

¹⁷⁰ See *id.* at 272 app.

¹⁷¹ *Id.* at 267–68.

¹⁷² *Id.* at 269.

¹⁷³ *Id.* (quoting Rome Statute, *supra* note 52, art. 28(a)(ii)).

Moreover, the commander's failure must be a "proximate cause" of the subordinate's crime.¹⁷⁴

The most novel aspect of Hansen's scheme is his method of determining punishment. For Hansen, punishment should vary according to the level of mens rea and type of failure. If a commander knows about a war crime and fails to prevent it, he faces the possibility of capital punishment. If his failure was reckless or negligent, he could receive a maximum sentence of life in prison or a twenty-year prison term, respectively. If a commander fails to punish a war crime he knows has occurred, his maximum punishment is a two-year prison sentence. Reckless failures to punish incur a sentence of one year, whereas grossly negligent failures warrant a six-month sentence.¹⁷⁵ Overall, Hansen believes this scheme will effectively balance a commander's freedom to maneuver while creating legal incentives to make law-of-war compliance a top priority.¹⁷⁶

IV. COMMAND RESPONSIBILITY, COUNTERINSURGENCY WARFARE, AND SMALL-UNIT COMMANDERS

Assuming the scholarly critiques of the current U.S. military justice system are valid and adopting a substantive command responsibility provision within the UCMJ is needed,¹⁷⁷ both the Hansen and Smidt proposals still fall short of providing a workable standard. Both plans fail to adequately consider their effects on small-unit leaders. Modern warfare has shifted increasingly toward a COIN model since the Vietnam War.¹⁷⁸ In this model, small-unit commanders have taken on more complex and important roles. They are often entrusted with broad authority to operate in their own battle spaces and are the keys to both successful COIN operations and preventing law-of-war abuses in their areas.¹⁷⁹

Prevailing scholarly opinion of command responsibility, however, focuses mainly on the need to apply punitive measures against senior military leaders.¹⁸⁰ As a result, most command responsibility provisions, including the Hansen and Smidt proposals, are designed to reach the passive failures of high-ranking commanders.¹⁸¹ This means that when these provisions address the more controversial aspects of command responsibility (i.e., causation and mens rea), they generally embrace a low threshold for liability. Otherwise, a senior commander may escape the

¹⁷⁴ *Id.* at 272 app.

¹⁷⁵ *Id.* at 272–73 app.

¹⁷⁶ *Id.* at 270.

¹⁷⁷ *See supra* note 24.

¹⁷⁸ *See* MOYAR, *supra* note 28, at 160–67 (discussing U.S.'s COIN approach during Vietnam War).

¹⁷⁹ *See id.* at 236; Hackel, *supra* note 11, at 266.

¹⁸⁰ *See* sources cited *supra* note 25.

¹⁸¹ *See supra* notes 50–52. The ad hoc and Rome Statutes all establish low thresholds for command liability.

reach of the statute altogether because it is often hard to link him with the actual commission of a war crime.¹⁸²

This low threshold creates serious problems for small-unit commanders. For these leaders, who have a much closer connection to a subordinate-offender, the proposed standards function as a *near*-strict liability regime. Given the importance of small-unit commanders in COIN operations, this implication highlights the need to readdress command responsibility in a more nuanced manner if it is to be adopted within the UCMJ. A more principled approach would be to draft a provision that focuses on the cost and benefits of liability for small-unit commanders. This approach is imperative if the U.S. military continues to engage predominantly in COIN conflicts in the future.

A. *The Influence of COIN Operations on Command Responsibility*

The increased role of small-unit commanders, both operationally and with respect to the laws of war, is generally the result of a shift in modern warfare toward COIN operations. Although the U.S. military did not formally adopt a COIN approach until the middle of the Iraq and Afghanistan wars, it has studied and applied COIN tactics since the Vietnam War.¹⁸³ In contrast to traditional warfare, COIN requires soldiers to concentrate on more than just engaging the enemy. Soldiers must become nation builders as well as security forces.¹⁸⁴ In addition to seeking out insurgents, they must be equally prepared to help reestablish local councils and police forces, rebuild infrastructure, and provide humanitarian relief.¹⁸⁵

A counterinsurgent's main goal is to establish legitimacy for the local government and the rule of law.¹⁸⁶ Conversely, insurgents seek to mobilize support for their cause by using various techniques such as persuasion, coercion, reaction to abuses, and foreign support.¹⁸⁷ In light of this conflict, COIN is often described as a battle for the "hearts and minds" of the local populace.¹⁸⁸ "Put in the context of Iraq, the insurgency consists of those enemy forces seeking to . . . convince the Iraqi public not to support the

¹⁸² See Martinez, *supra* note 21, at 369 (stating that "hard proof of the connection between the generals and the crimes committed by their foot soldiers is often extremely difficult to find"); Wu & Kang, *supra* note 13, at 272 ("The further away a superior is from the actual 'smoking gun,' however, the more difficult he is to prosecute.").

¹⁸³ See MOYAR, *supra* note 28, at 160–67 (discussing the U.S. military's COIN approach during the Vietnam War). The United States officially embraced COIN as a method of warfare in 2006 when it was adopted into military doctrine. See generally FM 3-24, *supra* note 76.

¹⁸⁴ David H. Petraeus & James F. Amos, *Foreword to FM 3-24, supra* note 76.

¹⁸⁵ *Id.*

¹⁸⁶ See *id.*

¹⁸⁷ FM 3-24, *supra* note 76, paras. 1-41 to -46.

¹⁸⁸ MOYAR, *supra* note 28, at 2.

transition to democracy”¹⁸⁹ In response, the U.S. strategy has become one of “clear-hold-build.”¹⁹⁰ In short, units must first establish security in an area, build a long-term foothold of support within the population, and then work with local leaders to build governmental capacity.¹⁹¹

The result of this strategy is that COIN operations are highly decentralized.¹⁹² Because success depends on a thorough understanding of local history, customs, and politics, resources and responsibility are pushed to the lowest level on the ground.¹⁹³ Company- and platoon-sized¹⁹⁴ elements control their own battle spaces and often build small combat outposts near important population centers.¹⁹⁵ As one battalion commander put it: “I delegate authority [to subordinate commanders] until I feel uncomfortable, and then I know I’ve got it about right.”¹⁹⁶ Consequently, small-unit commanders effectively fight hundreds of smaller COIN wars while senior commanders coordinate these conflicts and provide guidance and direction.¹⁹⁷

Because these small-unit commanders operate with much less direct supervision than they did in traditional warfare, law-of-war compliance has become even more of a ground-level campaign. The degree of independence, responsibility, and authority that these commanders enjoy necessitates a focus by scholars on their legal incentives. Small-unit commanders have always been the greatest line of defense in this area;¹⁹⁸ however, the current *modus operandi* of military operations makes their role even more essential. Small-unit commanders bear the greatest burden in preventing war crimes, in addition to rebuilding communities and engaging insurgents. The command responsibility doctrine should thus reflect this reality in a manner that permits these commanders to lead without an unreasonable fear of criminal liability for their subordinates’ actions and simultaneously drives them to prioritize compliance with the laws of war.

¹⁸⁹ Hackel, *supra* note 11, at 263–64 (internal quotation marks omitted).

¹⁹⁰ FM 3-24, *supra* note 76, paras. 5-50 to -54.

¹⁹¹ *Id.* paras. 5-51 to -80.

¹⁹² *Id.* paras. 1-145 to -146.

¹⁹³ *Id.*

¹⁹⁴ A company is a military unit that consists of 100 to 200 soldiers, whereas a platoon is a unit comprised of up to forty soldiers. *See Operational Unit Diagrams, supra* note 80.

¹⁹⁵ *See* MOYAR, *supra* note 28, at 236 (describing how Marines in Iraq established “a galaxy of small outposts in the district’s towns and along its roads, which they used as living quarters and bases for combined patrolling”).

¹⁹⁶ Kalev I Sepp, *From ‘Shock and Awe’ to ‘Hearts and Minds’: The Fall and Rise of US Counterinsurgency Capability in Iraq*, 28 *THIRD WORLD Q.* 217, 226 (2007).

¹⁹⁷ *See* MOYAR, *supra* note 28, at 5–6.

¹⁹⁸ *See* Hackel, *supra* note 11, at 266.

B. Carving Out Room for Small-Unit Commanders

Although the COIN doctrine gives special consideration to small-unit commanders, the doctrine of command responsibility does not. The doctrine typically applies to any serviceman “who is entitled to give orders to soldiers that it is the latter’s duty to obey.”¹⁹⁹ Consequently, command responsibility applies to every leader in the military, from team leaders and platoon leaders to company commanders and commanding generals.²⁰⁰ Needless to say, a commanding general is liable under the doctrine if he satisfies the same criminal elements as a team leader. So in theory, small-unit and senior commanders are equal in the eyes command responsibility. The doctrine provides the same incentives for all military leaders to ensure their subordinates comply with the laws of war.²⁰¹

In reality, command responsibility does not affect all military commanders equally. Instead, the doctrine applies much more forcefully to small-unit commanders than their senior counterparts. Consider the case of Lieutenant Ligsay and his brigade commander, Colonel Tunnell. Imagine that Congress had adopted a command responsibility provision that incorporated a mens rea requirement of recklessness prior to the Kill Team murders.²⁰² This provision would not have applied to Lieutenant Ligsay and Colonel Tunnell with equal measure. As a platoon leader, Lieutenant Ligsay interacted with the subordinate-offenders on a continuous basis during his deployment. On the other hand, as a brigade commander, Colonel Tunnell was quite removed from the same enlisted soldiers who carried out the murders. It would be far easier to establish that Lieutenant Ligsay consciously disregarded any warning signs about the staged killings than Colonel Tunnell did.²⁰³ Therefore, Lieutenant Ligsay’s incentives and potential for liability would be increased much more dramatically, while Colonel Tunnell would likely be indifferent to the change.

The same disparate impact occurs when conducting a causation analysis. Colonel Tunnell’s distance from the “smoking gun” serves as a substantial obstacle for establishing a causal link between him and the violation of the law of war.²⁰⁴ The distance between Lieutenant Ligsay and the same “smoking gun,” however, is significantly closer and serves as a much smaller hurdle. Considering the difficulty in establishing command

¹⁹⁹ MELONI, *supra* note 14, at 155.

²⁰⁰ In the Army, Team Leaders are typically junior sergeants in charge of four soldiers. Platoon leaders are generally lieutenants in charge of forty to sixty soldiers. Company commanders are usually captains with authority over 100–200 soldiers. A commanding two-star general is typically in charge of 10,000–18,000 soldiers. *See Operational Unit Diagrams, supra* note 80.

²⁰¹ *See* Hansen, *supra* note 19, at 267.

²⁰² *See* MODEL PENAL CODE § 2.02(2)(c).

²⁰³ *See* Wu & Kang, *supra* note 13, at 273 (“The further away a superior is from the actual ‘smoking gun,’ however, the more difficult he is to prosecute.”).

²⁰⁴ *See id.*

responsibility for senior leaders, currently enacted provisions effectively establish a low threshold for liability.²⁰⁵ A more rigorous standard may otherwise remove senior commanders from the operational scope of the doctrine.

Any attempt to bring senior commanders within the reach of the doctrine through low liability thresholds has deleterious consequences for small-unit commanders. As illustrated above, adopting a recklessness mens rea requirement increases the prospect of liability for junior commanders considerably. Lowering this bar further, both as to mens rea and causation, would come dangerously close to creating a strict liability regime for small-unit commanders.²⁰⁶ At the very least, it would create the appearance of a no-fault standard that gives small-unit leaders little room for error with respect to law-of-war violations.

This result is problematic for two main reasons. First, establishing a near-strict liability standard violates notions of fundamental fairness.²⁰⁷ Small-unit commanders may be convicted of murder or manslaughter with little to no connection to the crime. The Staff Sergeant Bales atrocity illustrates this point well. Bales's superiors would arguably meet some of the international formulations of command responsibility even though there is a tenuous connection between their conduct and the crime. Their culpability would dangle simply on a failure to address Bales's post-traumatic stress following the loss of a comrade and a single retributive statement made hours before the murders.²⁰⁸ In the aftermath of the incident, however, no one has argued that these superiors are culpable.

Second, the ICC system would severely hinder a small-unit commander's ability to focus on his mission. These leaders are tasked with rebuilding communities and engaging an elusive enemy, in addition to maintaining the fitness of their soldiers, weapons, and equipment.²⁰⁹ As such, there is constant competition for a commander's time and attention. Although commanders may need stronger incentives to prioritize law-of-war compliance in this competition, it must not become a debilitating concern.²¹⁰ There is already a sense of unease among small-unit commanders that investigations or worse, criminal liability, will follow every command failure.²¹¹

²⁰⁵ This means in practice that command responsibility provisions generally include a standard of negligence and either an increased-risk or no causation requirement, in addition to an actus reus of omission. See *supra* notes 50–52.

²⁰⁶ See Damaska, *supra* note 70, at 480–81.

²⁰⁷ See Eckhardt, *supra* note 39, at 18.

²⁰⁸ See *supra* Part II.A.2.

²⁰⁹ See *supra* Part IV.A.

²¹⁰ See Hansen, *supra* note 19, at 266 (“It is important that the doctrine . . . strike a fair balance between imposing criminal liability and denying the commander the necessary freedom to act . . .”).

²¹¹ Hackel describes a similar phenomenon among enlisted Marines who served in Iraq. It was common for any soldier or Marine who had engaged in a firefight to have undergone an investigation

Amplifying this apprehension with near-strict liability for law-of-war violations may prove too much. Junior leaders may ultimately decide that they are “damned if they do, and damned if they don’t.” Instead of increasing their efforts to prevent war crimes, these leaders may instead opt out of the system altogether; the provision will likely hinder the recruitment and retention of small-unit commanders. Regrettably, the military struggled to retain talented junior leaders as the Iraq and Afghanistan wars carried on.²¹² Considering the vital role they play in COIN operations, the costs of near-strict liability could prove overwhelming and degrade the military’s overall effectiveness. So, although there is some benefit to a senior-commander-focused statute (reaching all commanders), the marginal costs are likely too high to make it worthwhile.

If a command responsibility provision is to be incorporated within the UCMJ, a more principled approach is to draft a provision that focuses on the costs and benefits of each criminal element on small-unit commanders. To be sure, this does not necessarily translate into an across-the-board increase in the standards of liability.²¹³ It simply calls for the doctrine to be evaluated in light of its effects on small-unit commanders.

There are two likely criticisms of a small-unit leader approach. The first is that it assumes most U.S. law-of-war violations occur because “bad apples” commit abuses on their own. At least one scholar argues that war crimes often occur instead as a result of improper command pressure.²¹⁴ Thus, if the doctrine of command responsibility fails to reach the senior commanders at the pinnacle of these abuses, it becomes a blunted

following the incident. Such investigations became a constant source of tension and frustration. Specifically, Hackel notes that it had “a big impact on your average [Marine] out there. He’s reading what’s going on in the news; he’s listening to the media. *He doesn’t want to be the guy investigated for the next shooting.* A lot of the witnesses . . . in all of these cases, all of them say at times [that] if they go back, they are a lot more reluctant to pull the trigger on anything.” Hackel, *supra* note 11, at 262 (alteration in original) (quoting Telephone Interview with Lieutenant Colonel K. Scott Woodard, Senior Def. Counsel, Camp Lejeune, N.C., in Charlottesville, Va. (Jan. 13, 2008)). Similarly, small-unit commanders are often weary from being investigated for their command decisions, whether they relate to keeping track of equipment, personnel matters, or decisions in combat.

²¹² See generally CASEY WARDYNSKI ET AL., TOWARDS A U.S. ARMY OFFICER CORPS STRATEGY FOR SUCCESS: RETAINING TALENT (2010), available at <http://strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=965> (addressing the problem of low retention rates for talented junior officers). See also David Barno, Op-Ed., *Military Brain Drain*, FOREIGN POLICY, Feb. 13, 2013, http://www.foreignpolicy.com/articles/2013/02/13/military_brain_drain?page=full (discussing flight of talented junior leaders). At the height of the war in Iraq, the Army resorted to offering select captains a retention bonus of up to \$20,000 in return for additional years of service—an unprecedented offer in U.S. Army history. See Jim Tice, *O-3s Could Soon Get \$20,000 Retention Bonus*, ARMY TIMES, Apr. 30, 2007, at 9, available at http://www.armytimes.com/news/2007/04/army_officer_bonus_070420w.

²¹³ Indeed, in some cases, a low threshold of culpability is still justifiable under a small-unit leader approach. See *infra* Part V.B.

²¹⁴ Sepinwall, *supra* note 21, at 252–54.

preventative tool.²¹⁵ Examples of such improper pressure include the Abu Ghraib scandal and the delayed investigation into the Haditha incident.²¹⁶ Even if this argument proves correct, however, a small-unit leader based statute would still appropriately address these types of scenarios. In the context of Abu Ghraib, the cost of creating a low bar for liability would not outweigh the benefits for small-unit commanders. Here, the need to ensure that small-unit leaders employ proper interrogation techniques is great.²¹⁷ On the other hand, these military intelligence commanders are operating within a setting they control—a guarded prison. This differs substantially from the leaders who are conducting continuous engagements among the local population. With respect to detainee operations then, a small-unit commander approach would accommodate a broad scope of liability. Furthermore, as outlined below, the same result occurs in the context of delayed investigations and potential cover-ups. Strong incentives are needed here as well to force all commanders (including junior leaders) to report war crimes to their superiors and punish them accordingly in COIN environments.²¹⁸

The second criticism is that a small-unit commander focus will further the impression that senior commanders only suffer “mere wrist slaps” for their failures.²¹⁹ Among legal scholars, there is a general perception that the “big fish” generally avoid punishment, while the “small fries” are routinely prosecuted for their crimes.²²⁰ This notion runs counter to the idea that senior commanders are supposed to be the standard bearers for the rest of the military. The appearance of invincibility signals that law-of-war compliance is only a secondary concern.

Although the argument carries some weight, it is little reason to shy away from a small-unit leader approach. The issue is simply a tradeoff between a negative image and an effective enforcement regime. Even if senior commanders signal that law-of-war compliance is of little importance, an approach focused on small-unit commanders would still combat this impression among junior leaders. Moreover, a small-unit leader provision could still increase pressure on senior commanders to make law-of-war compliance a top priority. For instance, if a junior leader were forced to stand trial for his command failures, the actions of his superiors would likely be brought to light as well.²²¹ If a senior commander wishes to

²¹⁵ Cf. *id.* at 257 (discussing how ICTY prosecutors tend to use the doctrine of joint criminal enterprise to convict high-level defendants instead of command responsibility).

²¹⁶ For background regarding the Abu Ghraib and Haditha incidents, see *supra* note 23. Both incidents can be seen as “systemic harms.” Sepinwall, *supra* note 21, at 253.

²¹⁷ See Hansen, *supra* note 19, at 248–54.

²¹⁸ See *infra* Part V.B.

²¹⁹ Sepinwall, *supra* note 21, at 258.

²²⁰ *Id.* at 256; see also *supra* note 25.

²²¹ This point is illustrated in the case of the Kill Team murders. There, senior Army leadership not only conducted an investigation into the staged killings, but also conducted a brigade-wide review of

avoid a public criticism and rebuke, his conduct must be above reproach. Therefore, if Congress were to incorporate a command responsibility regime within the UCMJ, the legislature should focus on the potential costs and benefits to small-unit commanders.

V. APPLYING THE SMALL-UNIT COMMANDER THESIS: NEGLIGENCE

If Congress were to adopt a command responsibility statute focused on small-unit leaders, it would have to decide the controversial question of whether commanders should be punished for their negligent failures to prevent, suppress, or punish war crimes.²²² Many formulations of the command responsibility doctrine embrace some form of negligence, including the ICC statute and Hansen's proposal.²²³ Using the small-unit leader framework as a guide, however, it becomes clear that negligence should only retain a limited role.

A negligent command failure encompasses two ideas. It may mean that a commander knows of an imminent crime, but negligently fails to take necessary and reasonable measures to prevent or punish the act.²²⁴ It may also refer to a commander who is unaware a crime is imminent (or is occurring), but whose ignorance is a direct result of negligence.²²⁵ Although both forms of liability are important, the latter is the real subject of debate. Many commentators argue that punishing commanders who should have known about law-of-war violations constitutes the core of the doctrine.²²⁶

The ICC and Hansen are also in agreement on this point. Under the Rome Statute, liability is assessed against a military commander who "either knew or, *owing to the circumstances at the time, should have known* that the forces were committing or about to commit such crimes."²²⁷ Similarly, under Hansen's Model Penal Code formulation, "[a] military commander acts negligently . . . when he *should be aware of a substantial and unjustifiable risk* that forces under his effective command and control will commit, are committing, or have committed such war crimes."²²⁸

As illustrated above, establishing command responsibility on this basis comes dangerously close to establishing strict liability for small-unit

leadership and discipline. See Assmann, *supra* note 92. Although this report remains classified, the information within has a better chance of being released to the public if a command responsibility trial were initiated.

²²² See Hansen, *supra* note 25, at 403 (identifying mens rea as "the thorniest issue" of command responsibility).

²²³ See Rome Statute, *supra* note 52; Hansen, *supra* note 19, at 269.

²²⁴ MELONI, *supra* note 14, at 200.

²²⁵ *Id.* at 202.

²²⁶ *Id.* at 201-02; see also O'Reilly, *supra* note 49, at 142-43.

²²⁷ Rome Statute, *supra* note 52 (emphasis added).

²²⁸ Hansen, *supra* note 19, at 273 (emphasis added).

commanders.²²⁹ These penalties would draw a commander's attention toward law-of-war compliance, but the question is whether they reach too far.²³⁰ When considering the effects of a negligence standard upon small-unit commanders, the answer is mixed. In the context of failures to prevent war crimes, a negligence regime proves unproductive. Conversely, when dealing with negligent failures to punish (or report) a war crime, it becomes more constructive.

A. *Negligent Failures to Prevent War Crimes*

When prosecuting a commander for failing to prevent a war crime, it is not necessary that the commander should have been aware of the details of the specific crime.²³¹ If this were the case, the doctrine would be stripped of its potency and would apply only to commanders with actual knowledge.²³² A commander would have to actually witness the crime unfold or have a detailed report of the scheme.

Modern formulations of the doctrine instead require that a commander be aware of the risk that some war crime will occur within his ranks.²³³ Using Staff Sergeant Bales's superior as an example, his liability would depend upon how likely it was for Bales to seek retribution against the local civilian population. If the risk was substantial and unjustifiable,²³⁴ or if the circumstances indicated a potential risk,²³⁵ then the superior is punishable. In order to avoid liability in this situation, a commander must continuously assess whether or not his soldiers are in danger of committing war crimes. This means practically that leaders must understand what constitutes a war crime under the Rome Statute or War Crimes Act of 1996 and evaluate the risk of each occurring within his ranks. In short, then, adopting a negligence standard transforms law-of-war compliance into an exercise in risk assessment.

I. Transforming Law of War into Risk Assessment:

Benefits.—Requiring commanders to evaluate the risk of war crimes (i.e., adopting a negligence standard) is not necessarily a bad result. It provides incentives for all commanders to actually study the list of applicable war crimes and understand the elements of each. This is important because current lower-level commanders tend to lack a working

²²⁹ See Damaska, *supra* note 70, at 480–81.

²³⁰ See Wu & Kang, *supra* note 13, at 281 (suggesting due process concerns would undermine the legitimacy of a conviction based on strict liability principles given the severity of the punishment).

²³¹ See MELONI, *supra* note 14, at 188–89.

²³² See *id.*

²³³ See *id.* at 189 (“[W]hat triggers the superior’s duty to act is the knowledge . . . of the risk of commission of crimes by subordinates.” (alteration in original)).

²³⁴ Hansen, *supra* note 19, at 273 app.

²³⁵ Rome Statute, *supra* note 52.

knowledge of many important aspects of the law of land warfare.²³⁶ Instead, these leaders frequently understand only a few important law-of-war issues—namely, those that are listed in the theater’s rules of engagement.²³⁷ The provision would incentivize small-unit commanders to understand the complete list of applicable crimes.

Turning law-of-war violation prevention into an exercise in risk assessment is also beneficial because commanders are already familiar with the concept.²³⁸ A commander is required to conduct risk assessment prior to any mission or training event.²³⁹ This exercise asks him to consider all conceivable hazards his soldiers may face during a mission and plan ahead in an attempt to mitigate these dangers.²⁴⁰ For example, prior to Lieutenant Ligsay’s visit to the village La Mohammad Kalay, he would have been required to assess such risks as the potential for ambush along the route, weather effects on his soldiers, or a possible communications breakdown during the mission. A negligence standard seeks to add an additional consideration to the matrix by asking commanders to assess the potential that their soldiers will inflict criminal injury on others. To be sure, Army doctrine already requires a commander to consider the effects of his mission on the civilian population (i.e., noncombatants).²⁴¹ But this form of command responsibility would highlight war crimes for special consideration.

2. *Transforming Law of War into Risk Assessment:*

Drawbacks.—Despite the benefits of including potential law-of-war violations in small-unit commanders’ routine risk assessment procedures, a problem occurs when a commander actually works through the analysis. Normally when a commander encounters a risk he must answer two questions: (1) How likely is the risk’s occurrence?; and (2) What are the adverse effects of the risk?²⁴² The latter inquiry is relatively

²³⁶ Although all military personnel are required to receive training on the laws of war, the subject is generally taught to junior leaders only during entry-level training schools and other intermittent leadership courses. See LAURIE R. BLANK & GREGORY P. NOONE, LAW OF WAR TRAINING: RESOURCES FOR MILITARY AND CIVILIAN LEADERS 29 (2008), available at <http://www.usip.org/publications/law-of-war-training-resources-military-and-civilian-leaders>.

²³⁷ Every soldier is required to know the rules of engagement in effect in his area of operation (e.g., Afghanistan or Iraq) and keep a copy with him while deployed. See FM 7-21.13, *supra* note 136, paras. 5-117 to -118.

²³⁸ See generally U.S DEP’T OF ARMY, FIELD MANUAL 5-19, COMPOSITE RISK MANAGEMENT (21 Aug. 2006) [hereinafter FM 5-19] (discussing the application of composite risk management to the military decision-making process).

²³⁹ *Id.* para. 1-0 (Composite Risk Management “is a continuous process applied across the full spectrum of Army training and operations . . .”).

²⁴⁰ See *id.* paras. 1-2 to -44 (describing the five-step Composite Risk Management process).

²⁴¹ See *id.* paras. 1-17 to -18 (discussing how civilian considerations are part of the standard format for identifying mission hazards).

²⁴² See *id.* paras. 1-22 (laying out the “three substeps” of Composite Risk Management).

straightforward—war crimes have a devastating effect on the local population and hinder a unit’s ability to operate within that local area. Instead, the real challenge is in assessing the likelihood that a war crime will occur.

Assessing the likelihood of a war crime is problematic for two reasons. First, there is little consensus on what factors to consider when evaluating the risk of a subordinate committing a war crime. Second, even if there were, there is little agreement as to when a risk becomes so great that it demands action from the commander. In light of these pitfalls, it is counterproductive to hold small-unit commanders responsible on the basis of negligence unless they have strong incentives to shun their law-of-war duties.

The first problem with using risk assessment in the context of war crimes is that there is little agreement as to what factors should be used when weighing the degree of risk. The Rome Statute asks what a commander should have known “owing to the *circumstances* at the time.”²⁴³ Although Hansen’s proposal does not use this language, it uses a reasonably prudent commander standard to assess negligence.²⁴⁴ Under this approach, prudence depends on the circumstances at hand as well.

But the question becomes: Which circumstances are relevant when considering the risk of war crimes? Certainly intelligence about a potential crime is relevant,²⁴⁵ even if it is just rumors. If Lieutenant Ligsay had received a report or overheard rumblings that his subordinates were planning to stage a killing, that should have factored into his assessment. Yet there are a number of other factors Lieutenant Ligsay could have also considered, such as: his soldiers’ level of training, particularly with respect to the laws of war; their attitude toward noncombatants; their personal issues, past misconduct, and general compliance with basic standards of discipline; and his unit’s reputation.²⁴⁶ Furthermore, in light of the Staff Sergeant Bales massacre, one might also include a subordinate’s mental health on this list.²⁴⁷ Each of these is a plausible indicator that a subordinate is likely to commit a war crime in the future. There has been little effort, however, to determine which of these factors commanders should be required to assess.²⁴⁸

²⁴³ See Rome Statute, *supra* note 52 (emphasis added); see also MELONI, *supra* note 14, at 185.

²⁴⁴ See Hansen, *supra* note 19, at 273 app.

²⁴⁵ MELONI, *supra* note 14, at 185.

²⁴⁶ These are drawn from the facts as outlined in Part II.A.1.

²⁴⁷ See *supra* Part II.A.2.

²⁴⁸ Hansen offers an opinion on what should constitute a relevant circumstance:

[T]he level of training and experience of the forces under his command; the severity and duration of past combat operations that involved his forces; the nature of the mission; the availability of other forces who may be at a higher state of readiness and competence; the existence of specific orders from a higher authority; and the overall morale of the forces under his command.

Hansen, *supra* note 25, at 408. However, there is no consensus on the issue.

Even if there is agreement on what constitutes a relevant warning sign, commanders may not be particularly adept at judging how particular circumstances fit together. They may not be able to accurately assess a mixture of positive and negative indicators. Consider the perspective of the following commander. He knows that his subordinate, Private Snuffy, refers to local Afghans as “savages” and is having problems with his family back home. At the same time, Private Snuffy is a professional soldier who knows his rules of engagement and has never acted out while on mission. How could the commander know whether Private Snuffy is likely to commit a war crime? As this simple example illustrates, a commander is forced to make an assessment he may be ill equipped to handle.²⁴⁹

The second major problem with utilizing risk assessment is that commanders do not have notice as to what degree of risk triggers the potential for liability. When assessing the likelihood of a hazard, commanders normally classify risks as either low, medium, high, or extremely high.²⁵⁰ Commentators have given little consideration, however, to where the line should be drawn for establishing liability. Does a commander have to identify a low, medium, high, or extremely high risk of a war crime before his failure to take reasonable preventative measures gives rise to criminal liability? There is always some level of risk that war crimes are about to be committed, even after a commander takes steps to mitigate them.²⁵¹ The problem lies in identifying what constitutes an acceptable level of risk. Because it is difficult to distinguish between an acceptable and substantial level of risk in the midst of war, commanders should be afforded the benefit of a more lenient mental standard.

* * *

In light of these considerations, adopting a negligent failure to prevent form of command responsibility is counterproductive. It is ultimately too difficult for commanders to assess the likelihood of a crime and the degree of risk that a crime will occur. It is inadvisable to allow command responsibility to turn on such uncertain determinations. The main benefit of a negligence regime is that it incentivizes commanders to expand their

²⁴⁹ Simply holding Private Snuffy back from a mission is not likely the easy solution to this problem. Commanders in Iraq and Afghanistan routinely faced issues regarding depleted manpower. See, e.g., Josh White, *A Shortage of Troops in Afghanistan*, WASH. POST, July 3, 2008, at A1, available at http://articles.washingtonpost.com/2008-07-03/world/36841792_1_afghanistan-troops-sufficient-forces.

²⁵⁰ These are the four levels of risk recognized by Army leaders. See FM 5-19, *supra* note 238, para. 1-22, fig.1-4.

²⁵¹ One method for mitigating future violations is to review law-of-war concepts with soldiers during a pre-mission safety brief or the orders issuing process.

knowledge on the laws of war. That benefit, which can be achieved through other means, does not outweigh its costs to small-unit commanders.

B. *Negligent Failures to Punish War Crimes*

The failure to punish form of command responsibility provides a different set of incentives for commanders. Whereas the preventative prong is about risk assessment and identifying warning signs, the punishment prong is meant to create incentives for commanders to investigate incidents and prevent cover-ups.²⁵² The inquiry into a commander's failure to punish usually revolves around what reporting systems he had in place and how closely he looked into the matter.²⁵³

Although punishing negligent failures to prevent is counterproductive, holding commanders liable for negligent failures to punish may be still appropriate. The difference lies in the preexisting incentives that are created by COIN warfare. Whereas commanders already have ample incentives to prevent crimes in order to avoid public backlash, there are negative incentives for commanders to report crimes once they occur.²⁵⁴ For example, if a commander can keep an incident discreet, he can avoid a potentially deadly outcry against his unit.²⁵⁵ Because of the pressure to keep quiet, any command responsibility regime should provide maximum incentives for both small-unit and higher-level leaders to hold their subordinates responsible for violations of the laws of war. Thus, adopting a standard of negligence is more appropriate for failures to punish than for preventative failures.

CONCLUSION

Although the U.S. military has recognized the concept of command responsibility for over sixty years, it remains a dormant criminal doctrine. The U.S. military instead relies mostly on administrative and nonjudicial means to punish leaders who fail to ensure that their soldiers comply with the laws of war. Many commentators assert that stronger incentives are needed to prevent future war crimes. But as scholars seek to create stronger measures and codify command responsibility, they must keep small-unit commanders in mind. Lower-level leaders are not only the best resource for preventing and reporting war crimes; they are the keys to success in COIN operations. Any codified form of command responsibility must strike a delicate balance to ensure that small-unit commanders focus on law-of-war compliance while still operating freely.

²⁵² See Sepinwall, *supra* note 21, at 259–60.

²⁵³ See MELONI, *supra* note 14, at 202–04.

²⁵⁴ See FM 3-24, *supra* note 76, app. paras. D-23 to -24.

²⁵⁵ Hackel, *supra* note 11, at 240–41 (describing the rise in violence after the initial reports of Abu Ghraib scandal).

The increasing importance of small-unit leaders makes clear that some basic notions of command responsibility need to be rethought before formalizing the doctrine in domestic law. As the focus on small-unit leaders demonstrates, a negligence standard does not always lead to optimal solutions, despite its widespread support. Perhaps, if the time comes, a small-unit leader approach will provide a framework that will help jurists and military leaders agree on how best to draft a widely accepted U.S. provision.