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Failures To Punish: Command Responsibility in Domestic and International Law (forthcoming, 30 MICH. J. INT'L L. ____ (2009))

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Abstract

Military spokespeople and upper echelon commanders routinely maintain that wartime atrocities are the acts of a few “bad apples.”¹ Yet, while disclaimers of responsibility from higher-ups in the chain of command often beg credulity, the law provides safe harbor for those holding command positions since it is frequently powerless to ensnare anyone but the atrocity’s immediate perpetrators. This Article spans international and domestic law, and it addresses one of the doctrinal constraints on holding commanders criminally liable: the doctrine of command responsibility as it applies where commanders fail adequately to investigate or punish atrocities of their troops.

As a theoretical matter, there are two ways to respond to such failures: First, the commander may be held responsible solely for dereliction of duty; alternatively, she may be held criminally liable for her subordinates’ atrocity. Currently, both domestic and international tribunals have adopted the former response.

This Article argues that, in doing so, these tribunals have betrayed the doctrinal history of command responsibility, and significantly misconstrued the nature of the harm waged by a commander’s failure to punish. The Article articulates an expressive theory of harm according to which a commander’s failure to punish can, under certain circumstances, come to constitute part of the injury of his subordinates’ offense; when these circumstances arise, it is appropriate to hold the commander criminally liable for that offense.

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¹ See, e.g., Michael Massing, “*Bad Apples*” or *Predictable Fruits of War?*, L.A. TIMES, May 10, 2004.

“[A] slap on the wrist of the offender is a slap in the face of the victims.”
 -- Mark B. Harmon and Fergal Gaynor, prosecutors before the
 ICTY²

“Military justice is to justice what military music is to music.”
 -- Groucho Marx, and French Premier Georges Clemenceau³

INTRODUCTION

Though we are told that Abu Ghraib or the Srebrenica massacre is the work of a handful of depraved souls,⁴ we are gripped by a tenacious sense that something more systemic is going on. But the law does not yield to our unease, and no wonder: In both domestic and international criminal law, individual causal responsibility is seen to be the sine qua non of culpability.⁵ Within that paradigm, systemic harms have no traction.⁶

² Mark B. Harmon and Fergal Gaynor, *The Sentencing Practice of International Criminal Tribunals: Ordinary Sentences for Extraordinary Crimes*, 5 J. INT'L CRIM. JUST. 683, 711 (2007).

³ See, e.g., Leslie Southwick, *Military Justice for Foreign Terrorists and for American Soldiers: Comparisons and a Mississippi Precedent*, 72 MISS. L.J. 781, 784 & n. 12 (2002) (attributing the quote to Groucho Marx and noting that others have said that Marx borrowed it from Clemenceau).

⁴ For the claim that detainee abuses at Abu Ghraib can be chalked up to a few bad apples, see, for example, Phillip Carter, *The Road to Abu Ghraib: The Biggest Scandal of the Bush Administration Began at the Top*, WASHINGTON MONTHLY (Nov. 2004) (reporting that “the Bush administration has condemned the abuses as the work of a ‘few bad apples,’ while working diligently to get the story off the front pages and out of the presidential campaign.”) For a critique of the view that Serbia’s war-time atrocities, including the Srebrenica massacre, “could be reduced to the machinations of a single dominant personality,” Paul Aaron, *The Anguish of Nation Building: A Report from Serbia*, 22 WORLD POLICY J. 113, 120 (2005) – that of Slobodan Milosevic – see *id.* (“The ‘bad apple,’ the source of mayhem, the necromancer who spellbound his people and made them walk over the abyss: this melodramatic plot line has deflected attention from the complex nature of Milosevic’s regime and the enduring institutionalized legacy it left behind.”). The International Court of Justice’s decision in Bosnia’s suit against Serbia for genocide did find that the Srebrenica massacre was perpetrated by a group entity – the army of the Republika Srpska, see Judgment on the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 I.C.J. 413-24 (Feb. 25), but neither the ICJ nor the International Criminal Court has jurisdiction over that entity, see Articles 35 and 36 of the Statute of the International Court of Justice; Article 6 of the Statute of the International Tribunal for the Former Yugoslavia (restricting jurisdiction to natural persons).

⁵ This Article is the first piece of a larger project seeking to challenge the too hasty

The intransigence of systemic harms to legal categorization has not prevented other scholars from attempting to elucidate the way in which a higher-up may be complicit in an atrocity of his troops that he did not explicitly order: Torture of Afghan and Iraqi detainees committed during the course of interrogations has been attributed to the promulgation of intentionally vague and ambiguous directives around what constitutes appropriate interrogation techniques.⁷ The My Lai massacre has been credited to a failure of proper leadership “at all levels, from division down to platoon.”⁸ The Nazis’ genocidal program is said to owe its success to a “quintessential ‘bureaucracy of murder.’”⁹ More generally, a code of silence among officers, such as the “West Point Protective Benevolent Association,”¹⁰ has been blamed for the

alignment of individual causal responsibility and criminal liability. For a statement reflecting reverence for the principle of individual culpability, see, for example, the Appeals’ decision in *Prosecutor v. Tadic*, before the International Tribunal for the former Yugoslavia (ICTY): “The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*).” *Prosecutor v. Tadic*, Case No. IT-94-1-A (Int’l Crim. Trib. for the Former Yugoslavia Appeal Judgment, July 15, 1999), at para. 186 (footnotes omitted).

⁶ See, e.g., George Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L. J. 1499, 1514 (2002) (“the liberal bias toward individual criminal responsibility obscures basic truths about the crimes that now constitute the core of international criminal law. The four crimes over which the [International Criminal] Court has jurisdiction—aggression, crimes of war, crimes against humanity, and genocide—are deeds that by their very nature are committed by groups.”); Jenny S. Martinez, *Understanding Mens Rea in Command Responsibility: From Yamashita to Blaskic and Beyond*, 5 J. INT’L CRIM. JUST. 638, 639 (2007) (noting “a fundamental dilemma of legal responses to mass atrocity, which is that the atrocities are usually carried out by foot soldiers but it is often the generals and presidents who bear a greater share of moral responsibility.”); Beatrice Bonafe, *Command Responsibility Between Personal Culpability and Objective Liability: Finding a Proper Role for Command Responsibility*, 5 J. INT’L CRIM. JUST. 599, 600 (2007) (“it can be very difficult to fit the contribution of commanders into the categories of international criminal law, and to demonstrate their criminal liability.”).

⁷ See, e.g., Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 Colum. L. Rev 1751, 1773 & n. 99 (2005); Christopher Kutz, *Lawyers Know Sin: Complicity in Torture*, in *THE TORTURE DEBATE IN AMERICA* (Karen J. Greenberg ed., 2005). Cf. M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT’L L. 389, 390 (2006) (“[T]he President, the Vice President, and the Secretary of Defense made several official statements on the need for U.S. interrogators to obtain ‘results,’ thus creating a top-down command influence leading subordinates to commit torture, while their superiors felt compelled to look the other way.”).

⁸ WILLIAM R. PEERS, *THE MY LAI INQUIRY* 232 (1979) (cited in Jeffrey F. Addicott & William A. Hudson, Jr., *The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons*, 139 MIL. L. REV. 153, 169 (1993)).

⁹ Osiel, *supra* note 7 at 1833; see *id.* at 1833 n. 374.

¹⁰ WILLIAM T. GENEROUS, JR., *SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE* 201 (1973). Cf. Elizabeth L. Hillman, *Gentlemen Under Fire*:

scapegoating of low-level soldiers.¹¹ Still others cite the anomie of war, especially a war whose moral justification is abstract, or absent altogether,¹² as a way of suggesting that perhaps responsibility lies with the state as a whole.¹³ But, however compelling these theories of *moral* responsibility may be, they fail to articulate legally cognizable harms.

Only a handful of theorists have acknowledged the ill fit between the collective nature of crimes of war and the individualist paradigm of criminal law,¹⁴ and their response has largely been one of surrender, as they advocate non-criminal, or even extra-legal, mechanisms for addressing war crimes.¹⁵ In so doing, they have forsaken the drama and expressive character that are the special province of the traditional courtroom.¹⁶

The U.S. Military and "Conduct Unbecoming", 2008 LAW & INEQ. 1, 3 (2008) ("the perception that high-ranking officers are rarely disciplined and almost never criminally prosecuted is so common partly because it is true.").

¹¹ GENEROUS, *supra* note 10 at 201.

¹² See, e.g., Michael L. Smidt, *Yamashita, Medina and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155 (2000).

¹³ See, e.g., Daniel W. Jacobowitz, *Alienation, Anomie and Combat Effectiveness*, Sept.-Oct. 1980 AIR UNIVERSITY REVIEW, available at <http://www.airpower.maxwell.af.mil/airchronicles/aureview/1980/sep-oct/jacobowitz.html>.

¹⁴ See, e.g., Osiel, *supra* note 7 at 1768 ("Among U.S. scholars in the field, only Fletcher and Drumbl have thus far entertained the possibility that the first principle of domestic criminal law--personal culpability--may have to be modified or abandoned, if international law is ever to successfully 'adapt[] . . . the paradigm of individual guilt to the cauldron of collective violence' epitomized by mass atrocity.") (quoting Mark A. Drumbl, *Pluralizing International Criminal Justice*, 103 MICH. L. REV. 1293, 1309 (2005) (hereinafter *Pluralizing*), and citing *id.* and George P. Fletcher, *Collective Guilt and Collective Punishment*, 5 THEOR. INQUIRIES L. 163, 168-69, 173-74 (2004)); see also Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. L. REV. 539, 542 (2005) (hereinafter *Collective Violence*) ("The dominant discourse determines accountability through third-party trial adjudication premised on liberalism's construction of the individual as the central unit of action. This means that a number of selected guilty individuals squarely are to be blamed for systemic levels of violence.") (footnote omitted); George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499 (2002).

¹⁵ See, e.g., Drumbl, *Pluralizing*, *supra* note 14 at 1315-1322 (promoting the use of gacaca, among other measures, as a way of addressing collective violence); Osiel, *supra* note 7 at 1842-1859 (advocating the imposition of collective *civil* sanctions, the justness of which is purportedly secured by allowing officers to redistribute the sanction internally so that it is levied in accordance with individual guilt). Cf. Darryl Levinson, *Collective Sanctions*, 56 Stan. L. Rev. 345 (2003) (advocating collective sanctions within criminal law, but anticipating that the sanctions will work themselves out internally, to cohere with principles of individual culpability).

¹⁶ See, e.g., MARK A. DRUMBL, *ATROCITY, PUNISHMENT AND INTERNATIONAL LAW* 3 (2007) (describing how, in the wake of World War II, President Truman "envisioned careful trials to narrate to all the value of law and the depth of the defendants' culpability"); Allison Marston Danner and Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 94-95 (2005). One exception to the retreat from

This Article advances an alternative theoretical framework, rooted in expressivist conceptions of harm, for holding a commander *criminally* responsible for an atrocity of his subordinates. More specifically, this Article argues that, where a commander's failure to punish an atrocity of his troops can be read as an expression of his support for his subordinates' act or the message it conveyed, his failure comes to constitute part of the injury. As such, he may be held criminally liable for the atrocity, and not just for neglecting his duty to punish.

The Article thus embraces one of two contested understandings of what a failure to punish entails. On the first understanding, a commander's failure to punish is construed solely as a dereliction of duty. Accordingly, her failure to punish constitutes a separate offense from the underlying atrocity that her troops have committed. The failure to punish is, then, a substantive offense in its own right. On a second understanding, for which I argue here, the failure to punish renders the commander criminally liable for the atrocity itself, even if he neither ordered nor even knew about the atrocity before its occurrence. Here, then, the failure to punish is a mode of liability – it grounds an ascription of the atrocity of one's soldiers to their commander, but does not capture an offense in its own right. For the sake of brevity, I shall refer to these two understandings, respectively, as the *substantive offense view* and *mode of liability view*,¹⁷ and I shall follow international and domestic law

criminal prosecutions for mass atrocity can be found in Mark Osiel's proposed reconstruction of superior responsibility. Under current doctrine, a superior will bear responsibility for a subordinate's crime only if the superior actually controlled the subordinate at the time of the crime. *See infra* n. 80, and text accompanying note 37. But, as Osiel argues, a superior's control ebbs and flows throughout a military operation, and the entity to which she belongs may be organized in a complex and fluid fashion, such that she can convincingly argue that she lacked control over the direct perpetrator. *See* Osiel, *supra* note 7 at 1831-32. To better capture the organizational dynamics of the groups committing mass atrocities today, Osiel proposes that the law consider not whether a superior had control over the particular subordinate who directly perpetrated the crime but instead whether the superior had control over the organizational apparatus of which the subordinate was a part. *Id.* at 1830-33. My problem with command responsibility lies not so much in its element of effective control but instead in its lax understanding of the nature of the harm that a commander's omission involves. Osiel's proposal leaves this understanding intact. Thus, even if Osiel's conception of control were to result in more convictions for commanders, it would not remedy the problem that is the subject of this Article.

¹⁷ These two possible constructions of the failure to punish were elucidated in Prosecutor v. Halilovic, Case No. IT-01-48-T (Int'l Crim. Trib. for the Former Yugoslavia Trial Chamber, Nov. 15, 2005). The terminology should thus be familiar to international criminal law scholars. Domestic criminal law scholars might wonder whether domestic accomplice liability represents a third possible way of understanding the failure to punish. There are two reasons for thinking it does not. First, the language of the complicity doctrine within domestic military law suggests a fairly rigorous causation requirement. *See* Art. 77(2) of the UCMJ. Second, it is doubtful that even the more capacious understanding of accomplice liability that holds outside of the military context

in employing the term “failure to punish” as a catch-all for the failure to undertake the duty with which commanders are charged to investigate, report, refer, discipline, punish, and so on.¹⁸

Though the doctrine of command responsibility typically criminalizes a commander’s failure to *prevent or punish* an atrocity of his subordinates,¹⁹ this Article focuses on the failure to punish prong for two reasons. First, that prong provides unique prosecutorial advantages. One of the most vexing problems for those who prosecute war crimes and crimes against humanity is the difficulty of achieving convictions against the big fish, rather than just the small fry.²⁰ It is very difficult to prove that a commander failed to *prevent* an atrocity, since to do so a prosecutor must establish that the commander knew or should have known about the atrocity prior to its occurrence,²¹ and yet often no such knowledge is reasonably available to the commander. But imputing knowledge of the atrocity to the commander *after* the atrocity has been committed is less problematic, both because a more liberal time period is in play, and because the atrocity calls attention to itself in a way that the hushed murmurs of his subordinates’ plans do not, or their spontaneous waging of an atrocity cannot.²² In short, then, the mental state element is much easier to establish for a charge of failure to punish than for a charge of failure to prevent.

Despite the potential prosecutorial advantages inherent in the failure to punish prong, prosecutors have declined to indict high-level commanders for their failures to punish because, under current international and domestic law, the failure to punish is a relatively toothless doctrine. More specifically, under both systems of law, the commander’s failure to punish is treated merely as a matter of dereliction of duty.²³ Since dereliction of duty is a relatively meager offense, often

would accommodate the nature of the harm inflicted by the commander who fails to punish an atrocity of his troops. I elaborate on this point below. *See infra* [in Part II.B].

¹⁸ *See, e.g.*, Jordan J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99, 176 (1972) (describing a commander’s “failure to take corrective action” as encompassing the failure to discipline, educate, prosecute, report, etc.)

¹⁹ *See, e.g.*, Article 7(3) of the ICTY Statute, S.C. Res. 827, U.N. SCOR, 48th Ses., 3217th mtg., Annex, U.N. Doc. S/RES/807 (1994), *reprinted in* 32 I.L.M. 1163 (1994) (hereinafter ICTY Statute).

²⁰ *See e.g.*, Eric A. Posner, *Transitional Justice As Ordinary Justice*, 117 HARV. L. REV. 761, 800 (2004); Danner and Martinez, *supra* note 16.

²¹ I discuss the mental state requirement for both the failure to prevent and punish in Part II, *see infra* text accompanying notes 59-60.

²² For example, after twenty-four civilians were killed by U.S. Marines in Iraq, families of the victims went to meet with the commanding officer, to urge him to investigate the killings and take appropriate disciplinary action. *See* note 121 and accompanying text.

²³ *See, e.g.*, Chantal Meloni, *Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offense of the Superior?* 5 J. INT. CRIM. L. 619, 620 (2007).

ensuing in a sentence of just a few months' confinement,²⁴ prosecutors are inclined to look for other ways to ensnare those high up in the chain of command. For example, prosecutors at the International Criminal Tribunal for the Former Yugoslavia (ICTY) increasingly rely upon a kind of conspiratorial liability, called joint criminal enterprise (JCE), in their efforts to achieve convictions against high-level defendants.²⁵ As other commentators have argued, the problem with JCE is that it confers a great amount of discretion upon prosecutors to construe the joint enterprise very broadly – so broadly that the doctrine threatens to convict innocents.²⁶

A second reason to focus on the failure to punish offense, then, is that this offense is both less subject to prosecutorial abuse, and a better fit for the commander's crime. In particular, if the failure to punish prong were rehabilitated in accordance with the mode of liability view, as I urge here, only those commanders who bore an illicit connection to their subordinates' atrocity would be convicted, and their conviction would carry a moral taint that matches the nature of their contribution better than the substantive offense view does.²⁷

Part I of this Article surveys the history of the doctrine of command responsibility in an effort to critique the way in which international and domestic military courts currently respond to commanders' failures to punish. I argue that neither international nor domestic law is inexorably led, as a matter of doctrine or theory, to the substantive offense view. In Part II, I advance the Article's theory of harm, and argue that the failure to punish can, under circumstances that I identify, inflict an expressive harm that renders the commander a party to his subordinates' offense. In the last section of Part II, I address the arguments of criminal law scholars who have embraced the substantive offense view.

Throughout the Article, I provide detailed accounts of the ways in which commanders have responded to the atrocities I discuss. My purpose here is not merely illustrative; the process of holding soldiers

²⁴ See, e.g., Mynda G Ohman, *Integrating Title 18 War Crimes into Title 10: A Proposal To Amend the Uniform Code of Military Justice*, 57 Air Force L. Rev. 1, 59 (2005).

²⁵ See, e.g., Danner and Martinez, *supra* note 16 at 107-108 (stating that, between June 25, 2001, and January 1, 2004, 81% of indictments before the International Criminal Tribunal for the Former Yugoslavia (ICTY) charged defendants on the basis of this doctrine); Osiel, *supra* note 7 at 1766 (citing the preference of prosecutors at the ICTY for use of the joint criminal enterprise doctrine, rather than the doctrine of command responsibility, because it is so difficult to convict under the latter).

²⁶ See, e.g., Danner and Martinez, *supra* note 16 at 108-110; Osiel, *supra* note 7 at 1791, 1796-1802, 1854. Drumbl notes that some observers now scornfully jest that "JCE" in fact stands for "just convict everyone." DRUMBL, *supra* note ____ at 39.

²⁷ For a less optimistic view of the power of command responsibility, grounded in the theoretical possibility that organizations could be structured to thwart a claim of superior responsibility, see Osiel, *supra* note 7 at 1780-83.

accountable for an atrocity they commit has a truth-telling function that confers some amount of solace upon the atrocity's victims (or their families).²⁸ The commander who foregoes discipline thus deprives the victims of this source of solace. Their stories are told here, then, in an effort to fill the silence that would otherwise reign.

I. WANTON KILLINGS AND MERE WRIST SLAPS

In December 2003, an Iraqi auto repair shop owner in the Sunni Triangle made an obscene gesture as a platoon of American soldiers passed by his garage. The soldiers stopped and searched the shop. Though they found nothing, their platoon commander ordered them to take the shop owner to a bridge over the Tigris and throw him into the water. Apparently, the soldiers' tactic worked, because the next time the platoon passed by the auto repair shop, its owner greeted them with a polite wave. A few weeks later, the same squad decided to throw two more Iraqis off a bridge. This time, things didn't turn out as well: one of the Iraqis is believed to have drowned.²⁹

The incident is remarkable not only for the brazen abuse it involves, but also for the way in which it was handled by Lt. Col. Nathan Sassaman, the commander of the battalion that included the soldiers who were present on the bridge that night. Sassaman claims not to have heard about the first bridge-throwing incident, and to have learned about the second incident only a few days after it occurred. Sassaman immediately asked his deputy to investigate and, based on what his deputy told him, Sassaman believed that no one had been harmed -- that the stunt, though "dumb," was not criminal.³⁰ He decided not to report the incident to his superior. When army investigators later started questioning Sassaman's men about the incident, Sassaman urged his subordinates to tell the investigators everything they wanted to know -- except "the part about the water."³¹

Sassaman's cover up eventually came to light. Though the Uniform Code of Military Justice (UCMJ) provides for the court-martial of a commander who fails to investigate or punish an offense committed by his subordinates,³² Sassaman was subjected to the lesser disciplinary

²⁸ Danner and Martinez, *supra* note 16 at 108-110.

²⁹ Dexter Filkins, *The Fall of the Warrior King*, N.Y. TIMES (Oct. 23, 2005). Though the soldiers on the bridge that night report that they saw two figures emerge from the water after both had been thrown in, one of the two Iraqis swears that the other never made it out of the water. Army investigators have concluded that one of the two Iraqis did drown, and the soldiers involved have been prosecuted for homicide. *Id.*

³⁰ *Id.*

³¹ *Id.*

³² As we shall see in Part II.B, *infra*, this offense is typically prosecuted under the UCMJ's more general dereliction of duty provision, *see* 10 U.S.C. § 843.

route of non-judicial punishment.³³ Sassaman received a written reprimand. He has since retired from the Army and hopes to pursue a career as a football coach.³⁴

The delicate handling of Sassaman's case is hardly unique.³⁵ Though abuses in the war in Iraq are now believed to be "common,"³⁶ these often initially go unreported, and "almost always go unpunished."³⁷ Yet commanders bear a duty, under both domestic and international law, to investigate alleged abuses committed by their subordinates, and to punish any abuses they determine to have occurred. Thus, Army Field Manual 27-10 states that "[c]ommanding officers of United States troops must ensure that war crimes committed by members of their forces against enemy personnel are promptly and adequately punished."³⁸ Similarly, Article 87 of the Additional Protocol to the Geneva Conventions requires "any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol... to initiate disciplinary or penal action against violators thereof."³⁹ Nonetheless, commanders who fail to discharge this duty are rarely prosecuted for their failures to

³³ See, e.g., *Army Punishes Commanders in Drowning of Iraqi Civilian*, ORLANDO SENTINEL, July 8, 2004, at A5; Suzanne Goldberg, *US To Try 20 More Troops for Abuse in Iraq*, THE GUARDIAN, Jan. 17, 2005.

³⁴ Filkins, *supra* note 27.

³⁵ See, e.g., GENEROUS, *supra* note 10 and accompanying text. Sassaman wasn't the only one to have been treated leniently. Staff Sgt. Tracy Perkins, who threw the two Iraqis into the water, was convicted of assault, and sentenced to six months confinement. His platoon officer, Lt. Jack Saville, who had ordered his troops to throw the Iraqis into the water, pled guilty and was sentenced to forty-five days of confinement. Filkins, *supra* note 27. "Both men, in effect, were convicted not of killing Zaydoon but of pushing him and Marwan into the water. Of getting them wet." *Id.* See generally Mynda G. Ohman, *Integrating Title 18 War Crimes into Title 10: A Proposal To Amend the Uniform Code of Military Justice*, 7 A.F. L. REV. 1, 98 (2005).

³⁶ Chris Hedges and Laila Al-Arian, *The Other War: Iraq Vets Bear Witness*, THE NATION, at _____ July 30, 2007, available at <http://www.thenation.com/doc/20070730/hedges>.

³⁷ *Id.*

³⁸ FM 27-10, Rule 507(b). One can infer that a similar duty exists for Navy officers, since they may be held responsible for their subordinates' act if they "acquiesce" in it. See Paust, *supra* note 17 at 176-77. See also Article 54 of the 1916 Articles of War, stating that a commander has a duty of insuring, "to the utmost of his power, redress of all abuses and disorders which may be committed by an officer or a soldier under his command."

³⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 87(3), available at <http://www.icrc.org/ihl.nsf/4e473c7bc8854f2ec12563f60039c738/c203555d5f233d81c12563cd0051e1fe!OpenDocument> (last visited Mar. 22, 2008). See also Prosecutor v. Hadzihasanovic, ICTY (Trial Chamber), IT-01-47-T (Mar. 15, 2006), para. 1777 ("[I]n international law, a commander has a duty to take the necessary and reasonable measures to punish those who violate the laws or customs of war.").

punish. Where they are, we shall see, the law effectively treats commanders' failures to punish with a proverbial slap on the wrist.

In this Part, I present a historical overview of the development of the failure to punish prong of the doctrine of command responsibility in international and domestic law. I argue that this history compels a far more robust interpretation of command responsibility than the one embodied in today's doctrine. Section I.A offers a close doctrinal analysis of the international criminal law case that inaugurated a revisionist reading of command responsibility. Section I.B turns to the domestic context, to trace the disconnect between the authoritative texts governing the conduct of U.S. commanders and the lenient treatment they in fact receive.

A. The Failure to Punish in International Criminal Law

Contemporary command responsibility provisions criminalize a commander's failure to punish an atrocity committed by her troops. The language of Article 7(3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia is representative.⁴⁰ It reads, in pertinent part:

[T]he fact that any of the [acts criminalized by] the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason 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 ... punish the perpetrators thereof.⁴¹

⁴⁰ Article 7(3) is identical to Article 6(3) of the statute governing the International Criminal Tribunal for Rwanda (ICTR). See S.C. Res. 955, U.N. SCOR, 49th Sess., 345 3d mtg., Annex, U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1598, 1604 (1994). Both use the term "superior" instead of the narrower "commander" because they contemplate not just military authorities but also political and civilian leaders who fail to punish abuses committed by their subordinates. See, e.g., Prosecutor v. Oric, Case No. IT-03-68-T, para. 308 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber, June 30 2006). Article 28 of the Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, also contains a failure to punish clause, although it explicitly distinguishes, in separate provisions each with its own mental state requirement, military commanders from political and civilian leaders. Though I anticipate that the critique I go on to advance translates to the context of civilian leadership, I restrict my focus to the military context since I am interested, in particular, in probing the normative dimensions of the military command structure. (For the view that Article 28 of the Rome Statute is narrower than the ICTY and ICTR formulations, because Article 28 makes the commander liable for failure to punish only if the commander is also guilty of failing properly to control his troops, and the failure to control led to the troops' atrocity, see Volker Nerlich, *Superior Responsibility Under Article 28 ICC Statute: For What Exactly Is the Superior Held Responsible?*, 5 J. INT'L CRIM. JUST. 665, 678-79 (2007).)

⁴¹ ICTY Statute, *supra* note 18.

In other words, the statute makes criminal, *inter alia*,⁴² a superior's failure to punish an offense of his subordinates where he knew or had reason to know that the offense occurred. On the other hand, the statutory language leaves unsettled the question of the nature of the offense for which the commander is to be held criminally responsible. In particular, is the failure to punish an offense in its own right, or is it a ground for holding the commander criminally liable for the atrocity committed by his troops? Under international law, we shall see, the doctrine has shifted from the first of these possibilities to the second.

In this section, I critique this shift. I first describe the doctrine's shadowy past. Next, I argue that this past prompted an over-correction by the ICTY. Finally, I expose the unwarranted novelty and undesirable implications wrought by the ICTY's interpretation.

1. Haunted by the Excesses of the Post-World War II War Crimes Trials

As we have seen, contemporary command responsibility statutes punish commanders where they "knew or had reason to know" that their troops had committed atrocities, and the commanders failed to punish these atrocities.⁴³ Much has been written about the "knew or had reason to know" formulation,⁴⁴ and indeed the ICTY itself struggled until it reached a conclusive interpretation.⁴⁵ The ICTY's struggle has been

⁴² The full text of Article 7(3) criminalizes not just a commander's failure to punish but also his failure to prevent an offense that he knew, or had reason to know, his subordinate was about to commit. *See id.* Since this Article contemplates only those offenses about which the commander is ignorant before or during their occurrence, and for which the commander's ignorance is not itself culpable, I do not consider the "failure to prevent" prong of Article 7(3) here. Critical discussions of that prong can be found in Mirjan Damaska, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455 (2001); Danner and Martinez, *supra* note 16.

⁴³ *See supra* note 41 and accompanying text.

⁴⁴ *See, e.g.*, Damaska, *supra* note 58 at; Danner and Martinez, *supra* note 16 at 125-130; Bonafe, *supra* note 6 at; Arthur T. O'Reilly, *Command Responsibility: A Call To Realign the Doctrine with Principles*, 20 AM. U. INT'L L. REV. 71, 135-36 (2004). Mark Osiel has written that "[v]irtually all academic discussion focuses on the mens rea requirement." Osiel, *supra* note 7 at 1775. *But see* Danner and Martinez, *supra* note 16 at 130-31 (discussing at length the doctrinal requirement of a superior-subordinate relationship).

⁴⁵ The ICTY settled its interpretation when it decided the appeal in *Prosecutor v. Blaskic*, IT-95-14-A (Int'l Crim. Trib. for the Former Yugoslavia Appeal Judgement, July 29, 2004). That decision held that the "had reason to know" clause encompassed only situations where "information was available" to the commander "which would have put him on notice of offences by subordinates," *Id.* at para. 62; it would not encompass situations where the commander neglected a duty to acquire such knowledge, *id.* For an excellent overview of the evolution of the mens rea requirement under Article 7(3), see Martinez, *supra* note 6 at 658.

attributed to “the ghost of *Yamashita*,”⁴⁶ a reference to the United States Supreme Court case that affirmed a death sentence for General Tomoyuki Yamashita,⁴⁷ commanding general of the Imperial Japanese Army in the Philippines during World War II, who was found criminally liable for acts of rape and murder committed by troops ostensibly under his command.⁴⁸ At his trial before a military commission, no evidence was presented to establish that Yamashita possessed actual knowledge of the atrocities committed by his subordinates, and he contended that his chain of communication had been disrupted. Nonetheless, the commission found him guilty, and the Supreme Court affirmed its verdict, on the supposition that Yamashita *must have known* – that the crimes in question were so widespread that only willful blindness could have prevented him from actually knowing about their occurrence.⁴⁹

Historians of the case have since argued that the situation on the ground may well have prevented Yamashita from acquiring the knowledge presupposed by his conviction.⁵⁰ Even more problematic, it was the United States itself that had disrupted Yamashita’s lines of communication. Thus, Justice Murphy offered this searing characterization of Yamashita’s conviction by a U.S. military commission:

We, the victorious American forces, have done everything possible to destroy and disorganize your lines of communication, your effective control of your personnel, your ability to wage war. ... We will judge the discharge of your duties by the disorganization which we ourselves created in large part. Our standards of judgment are whatever we wish to make them.⁵¹

In light of the injustice so forcefully conveyed in Justice Murphy’s dissent, *Yamashita* might well be characterized as the *Korematsu* of international criminal law decisions;⁵² Justice Rutledge,

⁴⁶ Martinez, *supra* note 6 at 641. Cf. Bonafe, *supra* note 6 at 601 (contending that the ICTY and ICTR are reacting against the interpretations of command responsibility wielded by the Nuremberg and Tokyo tribunals).

⁴⁷ *In re Yamashita*, 327 U.S. 1 (1946).

⁴⁸ For an excellent overview of the *Yamashita* case, see William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 20-37 (1973).

⁴⁹ 4 United Nations War Crimes Commission, Trial of General Tomoyuki Yamashita, in LAW REPORTS OF TRIALS OF WAR CRIMINALS 35 (1948).

⁵⁰ See, e.g., Laurie Barber, *The Yamashita War Crimes Revisited*, 1 WaiMilHist (1998), at <http://www.waikato.ac.nz/wfass/subjects/history/waimilhist/1998/wmh3.html>.

⁵¹ 327 U.S. at 34-35 (Murphy, J., dissenting).

⁵² *Korematsu v. United States*, 323 U.S. 214 (1944), was, of course, the United States Supreme Court decision that found no constitutional infirmity in the internment of Japanese Americans during World War II.

who also dissented in the case, privately referred to the majority opinion as “the worst in the [C]ourt's history, not even barring Dred Scott.”⁵³

But though *Yamashita* is rightly reviled, its spurious *mens rea* element was not at issue in the ICTY cases where the Tribunal articulated and adopted a novel construction of command responsibility. Trial Chambers in those cases found that the defendants had *actual* knowledge of their subordinates’ abuses. Nonetheless, the ghost of *Yamashita* continues to haunt jurists, as we shall now see.

2. Article 7(3) Interpreted

Enver Hadzihasanovic was the Commander of the 3rd Corps of the armed forces of Bosnia-Herzegovina (ABiH) in the summer of 1993 when the units under his command launched a series of heavy attacks against the Croatian Defence Council (HVO).⁵⁴ Those attacks resulted in the unlawful detention and abuse of Bosnian Croats and Serbs.⁵⁵ Mladen Havranek, an HVO soldier, was among those detained.⁵⁶ He was held in the basement of a furniture warehouse, with little food and no functioning toilets. A sewage pipe had burst, leaving pools of excrement-filled standing water.⁵⁷ Each night, the soldiers guarding the furniture warehouse would call for five or six detainees one by one, whom they proceeded to beat with wooden implements, clubs, and iron rods.⁵⁸ When the guards wanted to take a break, they forced the prisoners to beat one another.⁵⁹ On August 5, 1993, Havranek was among those whose names were called.⁶⁰ From the basement, the other detainees could hear Havranek moaning and screaming and begging the guards to stop beating him.⁶¹ He lost consciousness shortly after he was returned to the basement, and died later that night.⁶²

Hadzihasanovic was apprised of Havranek’s death about two weeks later.⁶³ He also learned that the soldiers who had beaten and killed Havranek had been disciplined, but that no criminal prosecution was

⁵³ Richard Brust, *Setting Precedent in Two Wars: How Justice Stevens Turned 60-year-old Dissents into Major Rulings in the War on Terrorism*, ABA JOURNAL (Sept. 2007) (quoting from a letter Justice Rutledge wrote, as reproduced in John Ferren’s biography of Rutledge). For the view that the contemporary understanding of command responsibility in international law embodies the *Yamashita* standard, see Smidt, *supra* note 12 at 206-207.

⁵⁴ *Hadzihasanovic*, *supra* note 37 at para. 1734, 1742-45.

⁵⁵ *Id.* at 1614-15.

⁵⁶ *Id.* at para. 1620.

⁵⁷ *Id.* at para. 1597.

⁵⁸ *Id.* at para. 1598.

⁵⁹ *Id.* at para. 1603.

⁶⁰ *Id.* at para. 1600.

⁶¹ *Id.* at para. 1616.

⁶² *Id.* at para. 1600, 1616-17.

⁶³ *Id.* at para. 1753.

being pursued.⁶⁴ Hadzihasanovic expressed his satisfaction with this response.⁶⁵ At his trial, the International Criminal Tribunal for the former Yugoslavia (ICTY) found that mere disciplinary measures were insufficient to address Havranek's murder,⁶⁶ and that Hadzihasanovic had therefore failed to fulfill his duty to punish.⁶⁷ For the first time in its history, the ICTY convicted a commander solely for his failure to punish.⁶⁸

This important step was, however, undercut by the ICTY's understanding of the nature of Hadzihasanovic's offense. Hadzihasanovic was not found liable for Havranek's murder; instead, he was convicted of the separate offense of failing to punish.⁶⁹ In other words, the wrong that Hadzihasanovic perpetrated was, as the ICTY construed it, a species of dereliction of duty. The *Hadzihasanovic* Chamber arrived at this construction by choosing to adopt the analysis proffered by another ICTY Chamber, in *Prosecutor v. Halilovic*.⁷⁰

Halilovic, decided in November 2005, marked the first time that a commander faced counts of an indictment predicated solely upon his failure to prevent or punish an offense, rather than his instigating or ordering an offense.⁷¹ The *Halilovic* Chamber thus addressed at great length the question of whether the failure to punish was a *mode of liability* that would render the commander criminally responsible for his subordinates' offense or instead a *sui generis* crime flowing from his dereliction of duty.⁷² To answer that question, the Trial Chamber

⁶⁴ *Id.* at para. 1752-53.

⁶⁵ *Id.* at para. 1753, 1770.

⁶⁶ *Id.* at para. 1777.

⁶⁷ *Id.*

⁶⁸ Hadzihasanovic was not the first to be charged before the ICTY solely for his failure to point. That distinction belongs to Sefer Halilovic, *see infra*, text accompanying note 69.

⁶⁹ *See Hadzihasanovic*, *supra* note 37 at para. 1780, 74-75.

⁷⁰ *Prosecutor v. Halilovic*, Case No. IT-01-48-T (Int'l Crim. Trib. for the Former Yugoslavia Trial Chamber, Nov. 15, 2005).

⁷¹ In *Prosecutor v. Strugar*, IT-01-42, Jan. 31, 2005, the defendant was convicted solely under Article 7(3), though he had been charged under both Articles 7(1) and 7(3) for the same underlying offense. Other prior cases involving a failure to prevent and/or punish arose where the defendant also bore causal responsibility for the offense he failed to prevent and/or punish, because he ordered or instigated that offense. *See, e.g.*, *Prosecutor v. Delalic*, Case No. IT-96-21-A (Int'l Crim. Trib. for the Former Yugoslavia Appeal Judgment, Feb. 20, 2001) (a.k.a. Celebici Appeal Judgment); *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A (Int'l Crim. Trib. for the Former Yugoslavia Appeal Judgment, Mar. 24, 2000). Article 7(1) of the ICTY statute criminalizes a commander's ordering or instigating of an offense, while Article 7(3) criminalizes his failure to prevent or punish. In the *Blaskic* Appeals Judgment, *Prosecutor v. Blaskic*, IT-95-14-A (Int'l Crim. Trib. for the Former Yugoslavia Appeal Judgment, July 29, 2004), the ICTY determined that a commander could not be found guilty under both Articles 7(1) and 7(3) for the same offense; instead, only Article 7(1) could be used as a ground of criminal liability, with a commander's failure to prevent and/or punish functioning as an aggravating factor at sentencing.

⁷² *See, e.g., Halilovic*, *supra* note 54 at para. 42.

marshaled an extensive history of command responsibility. In what follows, I summarize the *Halilovic* Trial Chamber's analysis with a view to exposing the shaky support it adduced for its ultimate conclusion.

The Chamber largely based its analysis on post-World War II caselaw.⁷³ The Chamber first invoked four cases arising in the immediate aftermath of the War. According to its own reading, the Chamber acknowledged that three of these cases hold that a commander can be held liable for the offenses of his subordinates where he fails to prevent or punish these;⁷⁴ the last case is silent with respect to the offense for which the commander should be punished, stating only that "*he has failed in his performance of his duty as a commander and must be punished.*"⁷⁵ As such, that case leaves open the possibility that the crime for which the commander ought to be punished is the atrocity of his subordinates, rather than his dereliction of duty. Nonetheless, in a marked understatement, the *Halilovic* Chamber concluded from this set of cases that the post-WWII caselaw is "not uniform in its determination as to the nature of the responsibility arising from the concept of command responsibility."⁷⁶

The Chamber next turned to the reports submitted to the Security Council prior to the adoption of the ICTY's governing statute.⁷⁷ The Chamber began by noting that a "reading of the Secretary General's Report concerning Article 7(3) *does not exclude the possibility* that command responsibility under the Statute of the Tribunal may be responsibility for dereliction of duty."⁷⁸ It then cited a report by the Commission of Experts, which states that superiors are "individually responsible for a war crime or crime against humanity committed by a subordinate,"⁷⁹ from which the Chamber inferred that "the Commission of Experts *may* have considered that Article 7(3) attached responsibility

⁷³ *Halilovic*, paras. 42-53. Before turning to the post-World War II caselaw, the *Halilovic* Chamber first quickly adverted to the early history of command responsibility, beginning with an Order of Charles VII of France from 1439, which held that "a captain 'shall be responsible for the offence as if he had committed it himself and shall be punished in the same way as the offender would have been.'" *Halilovic*, para. 40 n. 94. In fact, the doctrine of command responsibility can be traced as far back as Sun Tzu's writings on military discipline in 500 B.C. Martinez, *supra* note 6 at 661. Though the pre-World War II conception of command responsibility for the failure to punish strongly supports the mode of liability view, I do not consider that history here since the Chamber based its interpretation on post-World War II doctrine.

⁷⁴ *Halilovic*, para. 47 & n. 113 (quoting *United States v. Soemu Toyoda*, Official Transcript of the Record of Trial at p. 5006).

⁷⁵ *Id.* (emphasis added).

⁷⁶ *Halilovic*, para. 48.

⁷⁷ The Chamber paused briefly first to consider Articles 86 and 87 of Additional Protocol I to the Geneva Conventions, see *Halilovic*, para. 49, which, as the Chamber rightfully notes, are "silent as to the nature of command responsibility -- that is; whether it is responsibility for dereliction of duty or responsibility for the crimes of subordinates." *Id.*

⁷⁸ *Halilovic*, para. 51 (emphasis added).

⁷⁹ *Halilovic* para. 51.

to commanders for the crimes of their subordinates.”⁸⁰ The *Halilovic* Chamber also noted that “the Trial Chamber Judgement in *Celebici* relied upon the report of the Secretary General to find that command responsibility under Article 7(3) attaches responsibility for the crimes of subordinates,”⁸¹ a finding that was affirmed on appeal,⁸² as the *Halilovic* Chamber acknowledged.⁸³ Finally, the panel invoked the International Law Commission Commentary on Article 7(3),⁸⁴ which, according to the panel’s reading of it, “considers that a military commander may be held criminally responsible for the unlawful conduct of his subordinates if he contributes indirectly to the commission of a crime by failing to prevent or repress that crime.”⁸⁵

The only source cited by the *Halilovic* Chamber that would possibly support a substantive offense reading of Article 7(3) emerged from the dissenting portion of Judge Shahabuddeen’s opinion in the *Hadzihasanovic* Interlocutory Appeal Decision, stating that *he* would “prefer to interpret the provision as making the commander guilty for failing in his supervisory capacity to take the necessary corrective action....”⁸⁶

In sum, on the basis of the doctrinal history that *Halilovic* invoked, there is overwhelming support for the mode of liability view. Indeed, as the *Hadzihasanovic* Chamber subsequently noted, “[t]he analysis by the Chamber in *Halilovic* shows that most Chambers of [the ICTY] have determined that a superior is responsible for the acts of his subordinates under Article 7(3) of the Statute.”⁸⁷ Nonetheless, the *Halilovic* Chamber arrived at the remarkable conclusion that Article 7(3) does not render a commander liable for the offenses of his subordinates; instead, it criminalizes the separate offense of failing to prevent or punish:

⁸⁰ *Halilovic* para. 51 (emphasis added).

⁸¹ *Halilovic* para. 51 n. 117. Footnote 117 of the decision accompanies the Chamber’s statement, cited in the text accompanying note 78, that “a reading of the Secretary General’s Report concerning Article 7(3) does not exclude the possibility that command responsibility under the Statute of the Tribunal may be responsibility for dereliction of duty.” Para. 51 (emphasis added).

⁸² The Appeals Chamber held that where a superior has effective control over his subordinates “he could be held responsible for the commission of the crimes if he failed to exercise such abilities of control.” *Prosecutor v. Delalic*, Case No. IT-96-21-A (Int’l Crim. Trib. for the Former Yugoslavia Appeal Judgment, Feb. 20, 2001) (a.k.a. *Celebici* Appeal Judgment) para. 198 (emphasis added).

⁸³ *Halilovic*, para. 53.

⁸⁴ ILC Commentary to the Additional Protocols, p. 35.

⁸⁵ *Halilovic*, para. 52.

⁸⁶ *Halilovic*, para. 53 (citing *Hadzihasanovic* Interlocutory Appeals Chamber Decision, para. 32). The cited statement of Judge Shahabuddeen’s opinion is drawn from the portion of his opinion in which he dissents from the majority. The majority opinion does not comment at all on the question that occupied the *Halilovic* Trial panel – viz., whether Article 7(3) criminalizes a substantive offense or confers a mode of liability.

⁸⁷ *Hadzihasanovic*, *supra* note 37 at para. 72.

The Trial Chamber finds that under Article 7(3) command responsibility is responsibility for an omission. ... This omission is culpable because international law imposes an affirmative duty on superiors to prevent and punish crimes committed by their subordinates. ... *a commander is responsible not as though he had committed the crime himself*
⁸⁸

There remained, of course, the niggling matter that prior ICTY caselaw routinely speaks of holding a commander criminally responsible “for the acts of his subordinates.”⁸⁹ The *Halilovic* Chamber was, however, undaunted as it insisted that the phrase “for the acts of his subordinates’ ... does not mean that the commander shares the same responsibility as the subordinates who committed the crimes, but rather that because of the crimes committed by his subordinates, the commander should bear responsibility for his failure to act.”⁹⁰ In other words, the otherwise straightforward phrase “criminally responsible for the acts of his subordinates” is, on the ICTY’s reading of it, elliptical for

⁸⁸ *Halilovic*, para. 54. It is highly significant that the Chamber ends up acquitting *Halilovic*, on the ground that he lacked effective control during the period when his subordinates committed the atrocities in question, and so did not have the material ability to punish them. See *Halilovic*, paras. 746, 750-53. The acquittal outcome should have been sufficient, then, to quell whatever unease the Chamber had about interpreting 7(3) as a mode of liability. The fact that the Chamber nonetheless was at pains to repudiate that interpretation underscores the strength of the panel’s aversion to rendering a commander criminally liable for the acts of his subordinates solely because he fails to punish them.

Halilovic’s acquittal has since been affirmed by the ICTY Appeals Chamber, see *Prosecutor v. Halilovic*, IT-01-48-A (Int’l Crim. Trib. for the Former Yugoslavia Appeal Judgment, Oct. 16, 2007). The appellate decision addressed only the prosecution’s challenge to the Trial Chamber’s finding that *Halilovic* lacked effective control over his subordinates. Since the Appeals Chamber upheld this finding, it declined to consider the prosecution’s challenge to the Trial Chamber’s treatment of Article 7(3)’s failure to punish prong. See *id.* at paras. 216-17.

⁸⁹ See, e.g., *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T (Int’l Crim. Trib. for the Former Yugoslavia Trial Judgment, June 25, 1999) (“Aleksovski Trial Judgment”), para. 67. (“A superior is held responsible *for the acts of his subordinates* if he did not prevent the perpetration of the crimes of his subordinates or punish them for the crimes.”) (emphasis added); *Prosecutor v. Obrenovic*, Case No. IT-02-60/2-S (Int’l Crim. Trib. for the Former Yugoslavia Sentencing Judgment, Dec. 10, 2003), para. 40 (“Additionally, Dragan Obrenovic is charged with and has accepted responsibility under the principle of command responsibility pursuant to Article 7(3) of the Statute; thus, by virtue of his position as the Acting Commander or Deputy Commander/ Chief of Staff, he is criminally responsible *for the acts of his subordinates* when he knew or had reason to know that his subordinates were about to commit criminal acts or had done so and he failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”) (emphasis added).

⁹⁰ *Halilovic*, para. 54.

something like “criminally responsible in light of the acts of his subordinates, which he failed to prevent or punish.”

3. The Novelty and Implications of the ICTY’s Reading

The foregoing reconstruction of *Halilovic* suggests that it tortures the history it marshals in order to arrive at the dereliction of duty view. But there is both more ancient history, and more authoritative doctrine, that tends to the alternative interpretation, as this sub-section endeavors to demonstrate.

For example, scholars have traced a conception of command responsibility in line with the mode of liability view as far back as Sun Tzu’s writings on military discipline in 500 B.C.⁹¹ The history picks up again in the early 1400s, and then again at the time of the Revolutionary War in the United States.⁹² In the aftermath of World War II, when there was a relative explosion in pronouncements about command responsibility, most of the Allied countries enacted command responsibility provisions that expressly adopted the mode of liability view. Article 3 of the Law of August 2, 1947, of the Grand Duchy of Luxembourg, on the Suppression of War Crimes is representative. It reads, in pertinent part: “[T]he following may be charged according to the circumstances, as co-authors or accomplices in the delicts set out in Article 1 of the present law: superiors in rank who have tolerated the criminal activities of their subordinates....”⁹³ The Netherlands, France, China and Canada passed substantively similar laws.⁹⁴

In addition, at the time that *Halilovic* was decided, there existed implicit evidence supporting the mode of liability view within ICTY caselaw itself. In *Prosecutor v. Blaskic*,⁹⁵ the ICTY Appeals Chamber held that it is duplicative to convict a commander *both* for ordering or instigating an offense (a violation of Article 7(1)),⁹⁶ *as well as* failing to prevent or punish that offense (a violation of Article 7(3)).⁹⁷ As the ICTY stated in *Prosecutor v. Krstic*, “any responsibility under Article 7(3) is

⁹¹ See Martinez, *supra* note 6 at 661; Parks, *supra* note 63 at 3.

⁹² Martinez, *supra*, note 6 at 661.

⁹³ United Nations War Crimes Commission, IV LAW REPORTS OF TRIALS OF WAR CRIMINALS 87 (1948) (emphasis added) (cited in Parks, *supra* note 63 at 16).

⁹⁴ See Parks, *supra* note 63 at 18-19.

⁹⁵ IT-95-14-A (Int’l Crim. Trib. for the Former Yugoslavia Appeal Judgement, July 29, 2004)

⁹⁶ Article I states: “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.”

ICTY Statute, *supra* note 18.

⁹⁷ *Blaskic* at paras. 91-92.

subsumed under Article 7(1).”⁹⁸ Yet if Article 7(3) contemplated the *separate offense* of dereliction of duty, there would be no duplication in convictions rendered under both Articles 7(1) and 7(3). In other words, the Appeals Chamber’s position in *Blaskic* makes sense only if Article 7(3) is intended to make the commander criminally liable for his troops’ atrocity.⁹⁹

Taken together, the foregoing is intended to establish that the weight of history and precedent lies on the side of the mode of liability view.¹⁰⁰ Nonetheless, though none of the judges comprising the *Halilovic* panel sat on the *Hadzihasanovic* panel, *Hadzihasanovic* followed *Halilovic* in adopting the substantive offense view.

The difference in interpretations is not merely semantic. First, the construction of Article 7(3) as the substantive offense of dereliction of duty rather than a mode of liability for the underlying atrocities entails a significantly less severe sentence. As the *Hadzihasanovic* Chamber intoned, “the sui generis nature of command responsibility under Article 7(3) of the Statute may justify the fact that the sentencing scale applied to those Accused convicted solely on the basis of Article 7(1) of the Statute, or cumulatively under Articles 7(1) and 7(3), is not applied to those convicted solely under Article 7(3), in cases where nothing would allow that responsibility to be assimilated or linked to individual responsibility under Article 7(1).”¹⁰¹ Thus, in *Prosecutor v. Oric*,¹⁰² yet a second case to follow *Halilovic*, the defendant was sentenced to two

⁹⁸ IT-98-33-T (Int’l Crim. Trib. for the Former Yugoslavia Trial Judgement, Aug. 2, 2001), para. 605.

⁹⁹ Chantal Meloni adduces other considerations that demonstrate how strained the dereliction of duty interpretation is. *Supra* note 22. First, she notes that a commander can be convicted under Article 7(3) only if his troops actually commit an offense, *id.* at 628; if he is, say, derelict in his duty to prevent but someone else steps in in his stead, no offense will lie. Second, the commander’s sentence will turn, first and foremost, not on the extent of his dereliction but instead on the gravity of his subordinates’ offense. *Id.* at 632. Notwithstanding these considerations, Meloni still rejects the mode of liability view, as we shall see in Part III, *see infra* text accompanying notes 189.

¹⁰⁰ For yet another indication that *Halilovic* turned settled doctrine on its head, consider that, just ten months before *Halilovic* was handed down, Danner and Martinez, *supra* note 16 at 121, offered this description of the portent of Article 7(3): “It is important to realize that, under command responsibility, the commander is convicted of the actual crime committed by his subordinate and not of some lesser form of liability, such as dereliction of duty.”

¹⁰¹ *Hadzihasanovic* at para. 2076; *see also Oric* at para. 793 (stating that trial chambers have “greater flexibility” when sentencing a defendant convicted solely for his failure to prevent or punish an offense, relative to the defendant who is convicted of instigating or ordering that offense).

¹⁰² Case No. IT-03-68-T (Int’l Crim. Trib. for the Former Yugoslavia Trial Judgment June 30, 2006), paras. 293, 724. The judges presiding in *Oric* were different from those presiding in *Halilovic* and *Hadzihasanovic*, which suggests an emerging consensus among ICTY jurisprudence.

years in prison, rather than the eighteen years recommended by the prosecution, which had urged a mode of liability reading.¹⁰³

Oric is instructive for another reason: it extended the interpretation of Article 7(3) articulated in *Halilovic* and followed in *Hadzihasanovic* to a case where the defendant was convicted for *failing to prevent* his subordinates' atrocities. In *Oric*, troops under the command of the defendant routinely abused Bosnian Serbs whom they had detained, and at least four detainees died as a result. The ICTY Trial Chamber found that, in his position as Commander of the Bosnian Muslim forces in Srebrenica, Oric knew or had reason to know about these acts of mistreatment,¹⁰⁴ and that he had effective control over those who could have prevented them.¹⁰⁵ The *Oric* Chamber refused to countenance Oric's claim that his attentions were diverted as a result of the deteriorating military situation: "[A]s a general rule, the treatment of prisoners in armed conflict, including their physical and mental integrity, cannot be relegated to a position of importance inferior to other considerations, military or otherwise, however important they may be...."¹⁰⁶

The *Oric* Chamber recognized that commanders bear an obligation to prevent and punish because doing so can avert imminent crimes and deter future crimes.¹⁰⁷ But the *Oric* Chamber nonetheless refused to construe Oric's failure to prevent as a causal contributor to the acts of abuse described above.¹⁰⁸ Its refusal was grounded not in the facts of the case, but instead in its understanding of the nature of Article 7(3): If Article 7(3) were to require causation, the Chamber reasoned, there would be no difference between Articles 7(1) and 7(3). As such, the Chamber concluded, Article 7(3) could be saved from superfluity only if the Chamber ignored the material harm caused by the failure to prevent, and construed that failure solely as a separate offense.¹⁰⁹

¹⁰³ See Meloni, *supra* note 22 at 621 n. 7 (citing The Prosecution's Appeal Brief, Oric, Case no. IT-03-68-A (Oct. 16, 2006), sec. 10). Hadzihasanovic received a single sentence of five years, para. 2085, which resulted from his convictions not only for the failure to punish Havranek's murder but also the failures to prevent or punish atrocities committed by his subordinates at the Zenica Music School and Omarska detainee camp, *see* Part IX, Disposition, at p. 622. It is thus difficult to discern what portion of Hadzihasanovic's sentence resulted solely from his failure to punish.

Other commentators have noted that the ad hoc tribunals, and especially the ICTY, have, in general, dispensed sentences significantly lower – sometimes bafflingly lower -- than those imposed by municipal courts for crimes on a much smaller scale. *See, e.g.,* Harman and Gaynor, *supra* note 1; Drumbl, *Collective Violence*, *supra* note 14 at 578-79.

¹⁰⁴ *Oric* at para. 560.

¹⁰⁵ *Oric* at para. 567-68.

¹⁰⁶ *Oric* at para. 559.

¹⁰⁷ *Oric* at para. 338.

¹⁰⁸ *See id.*

¹⁰⁹ *Id.*

The Chamber's argument is deeply flawed: In fact, causation could be an element of both Articles 7(1) and 7(3) without rendering the latter redundant, for each could still capture a different offense with a different mental state. In particular, Article 7(1) could cover instances of ordering or instigating an atrocity, where intent is implicit in the act requirement, while the failure to prevent prong of Article 7(3) could cover instances of reckless or willful omissions. Moreover, even if one is convinced that the failure to punish prong is properly understood as a substantive offense, there is no reason to require that the failure to prevent be understood in this way as well.

Oric may thus have been the unlikely beneficiary of the Tribunal's faulty reasoning and overblown concerns about superfluity. As a result, though the Chamber found that Oric knew that captives detained by his subordinates were routinely beaten, sometimes to death, and that Oric failed to prevent this mistreatment, it convicted Oric solely of neglecting his duty, and did not hold him responsible for the underlying offenses.¹¹⁰ Oric was given credit for time served, and released shortly after his case was decided.

The point here is not that Oric or Hadzihasanovic necessarily deserved a more severe sentence. I shall argue in Part II that the failure to punish grounds criminal liability for the underlying offense only when that failure communicates that the victims of the underlying offense did not merit better treatment than they received. Since we do not know whether Oric's or Hadzihasanovic's failure to punish was propelled by such a belief, we are not in a position to judge the particular treatment of each before the ICTY.

But there is a broader lesson to be drawn from their trials: The Chambers deciding their cases were not compelled, as a matter of precedent, history or logic, to interpret the offense criminalized in Article 7(3) simply as a dereliction of duty, and the adoption of this interpretation has had, and will continue to have, significant implications for the gravity of the sentence a commander convicted under Article 7(3) will face.

¹¹⁰ See *id.* at para. 724. John Darley has provided reason to be especially skeptical of a claim, like Oric's, that delegating authority to oversee and discipline is a sufficient way of discharging one's role as an authority. Delegation of authority, Darley argues, is a way for higher-ups to simultaneously allow the evil acts of their subordinates to continue while insulating themselves from liability. See John M. Darley, *How Organizations Socialize Individuals into Evildoing*, in *CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS* 1, 32 (David M. Messick and Ann E. Tenbrunsel eds., 1996). Cf. David Luban, Alan Strudler, and David Wasserman, *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2348 (1992) (describing bureaucratization as a mechanism through which institutional actors insulate themselves, by dividing the traditional elements of an offense between them, such that no one actor can satisfy them all).

I defer a consideration of the normative significance of failing to punish to Part II. First, we must survey command responsibility's strange trajectory within domestic law.

B. The Failure to Punish in U.S. Military Law

We have seen that the construction of command responsibility under international law has undergone a dramatic and explicit about-face in the ICTY jurisprudence. The situation in domestic law is both subtler and more sinister.

This Section aims to demonstrate that construing the failure to investigate or punish solely as a matter of dereliction of duty, rather than a ground of criminal liability for the underlying offense, is no more justified in domestic law than in international law. To that end, I first describe the history of command responsibility in domestic military law. I next invoke the Haditha incident as an example of the current understanding of command responsibility as the substantive offense of dereliction of duty. To fully grasp the operation of command responsibility within domestic law, however, we must inquire not only into doctrine and history, but also into the institutional dynamics affecting military justice. The latter inquiry is necessary because of the peculiar shape of American military justice: Whereas international war crimes are tried before international tribunals independent of the militaries whose members commit these crimes, American military atrocities are tried by the military itself, and, as we shall see, commanders can exert much control over who gets prosecuted, and for which offenses. A study into command culture can thus help us glean the factors propelling a commander to uphold or forsake his obligation to punish; this study can also throw into relief the perils of treating the failure to investigate and punish leniently. I undertake this study in the last sub-section, using the My Lai massacre as an illustration.

1. The Long-Standing View of the Failure To Punish As a Mode of Liability

An understanding of command responsibility along the lines of the mode of liability view predates the nation's founding, and has been a fixture of American law for most of its history. On the eve of the Revolutionary War, the Provisional Congress of Massachusetts Bay, adopted the Massachusetts Articles of War, the eleventh article of which provided:

Every officer commanding, in quarters, or on a march, shall
Keep good order, and to the utmost of his power, redress all

such abuses or disorders which may be committed by any Officer or Soldier under his command; if upon complaint made to him of Officers or Soldiers beating or otherwise ill-treating any person, or committing any kind of riots to the disquieting of the inhabitants of this Continent, he, the said commander, who shall refuse or omit to see Justice done to this offender or offenders, and reparation made to the party or parties injured, as soon as the offender's wages shall enable him or them, upon due proof thereof, be punished, as ordered by General Court-Martial in such manner *as if he himself had committed the crimes or disorders complained of.*¹¹¹

In other words, the crime of the commanding officer's subordinates would attach to the officer unless he sought to punish his subordinates and ensure that the victims' injuries were redressed. An identical provision was included first in Article XII of the American Articles of War, enacted June 30, 1775, and re-enacted as section IX of the American Articles of War of 1776 on September 20, 1776.¹¹² Thus from the very outset of this nation, commanders faced criminal liability for their subordinates' offense if they failed adequately to punish it.

The mode of liability view of command responsibility has persisted through two World Wars, the wars in Korea and Vietnam, to the present day.¹¹³ In addition, it is clear that the United States imposes

¹¹¹ Articles of War, Provisional Congress of Massachusetts Bay, April 5, 1775 (quoted in Parks, *supra* note 63 at 5) (italics added).

¹¹² Parks, *supra* note 63 at 12.

¹¹³ See, e.g., United States Army Field Manual 27-10, The Law of Land Warfare, Paragraph 501 (1956) ("In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof."); see also Smidt, *supra* note 12 at n. 125 (stating that, as of the writing of his article in 2000, FM 27-10 was still current Army doctrine); Paust, *supra* note 17 at 176-77 (citing a provision substantially similar to FM 27-10 from the Navy's field manual). Writing in 1982, the Chief of the Appellate Defense Division of the Army JAG Corps stated that "[c]ommand criminal responsibility goes beyond personal felonious acts. It presumes that a commander does not issue illegal orders or in some way personally direct or supervise a prohibited activity: such conduct would make the commander a personal participant. It is not personal criminal activity but criminal responsibility for the actions of subordinates or for command decisions affecting others." William G. Eckhardt, *Command Criminal*

the mode of liability view on enemy combatants whom it tries before courts martial. As the Military Commissions Act of 2006 states:

[a]ny person is punishable as a principal under this chapter who... is a superior commander who, with regard to acts punishable under this chapter, knew, had reason to know, or should have known, that a 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.¹¹⁴

More generally, some commentators have argued that the Constitution, as well as early Supreme Court opinions, evidence the Framers' intention that customary international law be binding on the United States.¹¹⁵ On that argument, the international doctrine of command responsibility, which, as we saw above, has traditionally construed the failure to punish as a mode of liability,¹¹⁶ would be binding on the United States.

As in international criminal law, the difference in domestic law between the two ways of construing a commander's failure to punish – again, as a substantive offense or mode of liability -- is of great material consequence: According to the UCMJ, the maximum penalty for willful dereliction of duty is six months of confinement per offense,¹¹⁷ by

Responsibility: A Plea for a Workable Standard, 97 MIL. L. REV. 1, 4 (1982). Similarly, in 1988, the Army declared that commanders are “responsible for everything their command does or fails to do.” U.S. Dept. of Army, Reg. 600-20, Army Command Policy, para. 2-1b (Mar. 30, 1988). See also U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM, para. 4.1-4.3 (Dec. 9, 1998); CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01A, para. 5a(1)-(3) (27 Aug. 1999). See generally Paust, *supra* note 17 at 112-18.

¹¹⁴ Military Commission Act, Section 950(q) (2006).

¹¹⁵ Smidt, *supra* note 12 at 212-214. See also FM 27-10, *supra* note 139, at para. 511 (warning readers that “[t]he fact that domestic law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.”); Paust, *supra* note 17 at 106-107 (citing an 1865 letter from the U.S. Attorney General to the President, stating that Congress has the power to *define*, but not make or abrogate, the law of nations as applied to the United States and that even where Congress does not exercise this power, the law of nations is nonetheless binding on the U.S. government). See generally *id.* at 112-118.

¹¹⁶ See *supra* notes 89-92 and accompanying text.

¹¹⁷ See UCMJ Article 92. Ironically, one of the goals behind the drafting of the Uniform Code of Military Justice, which functions as the military's substantive and procedural criminal law, was to “increas[e] public confidence in military justice.” GENEROUS, *supra* note 10 at 34. It is hard to see how the lenient treatment of U.S. military superiors advances this goal. (For an overview of the history of American military law prior to the drafting of the UCMJ, see, for example, WILLIAM B. AYCOCK AND SEYMOUR W. WURFEL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE 9-15 (1955).)

comparison, torture and war crimes carry twenty- and thirty-year maximum sentences under federal law.¹¹⁸ The upshot of the substantive offense view is also gravely symbolic: As one commentator notes with respect to the UCMJ's dereliction of duty provision: "An article that is routinely used to prosecute abuse of the government travel card hardly contains the inherent stigma deserving of a war crime."¹¹⁹ Dereliction of duty nonetheless remains the favored way of responding to American commanders who fail to punish an atrocity of their troops, as we shall now see.

2. The Failure To Investigate and Punish at Haditha

In November, 2005, a U.S. humvee carrying Marines was struck by a bomb detonated by Iraqi insurgents in the town of Haditha. The bomb killed one Marine, and his fellow Marines proceeded to shoot and kill twenty-four civilians, including women and children, in what some believe was a retaliatory shooting rampage.¹²⁰ The next day, a Marines' spokesman issued a statement declaring that the Iraqis had died as a result of the roadside bomb.¹²¹

That version of the Haditha incident was allowed to stand until *Time* magazine received a videotape suggesting that the Marines may have been engaging in a cover up.¹²² When *Time* contacted the Marines' spokesman to see if he wanted to amend his earlier statement, he laughed off the videotape as "Al Qaeda propaganda."¹²³

The Marines finally decided, some three months later, to pursue an investigation into what happened on that November day. Investigators learned not only that the Iraqi civilians had been killed by Marines and not by the roadside bomb, as initially announced, but also that crucial evidence had been withheld or destroyed.¹²⁴ As a result of the

¹¹⁸ *Ohman, supra* note 23 at 59. The purpose of Ohman's article is to bring to light a more general problem with U.S. military justice – *viz.*, its inability to charge *as war crimes* the most serious atrocities committed in the course of war. *Id. at passim*. Broadly, the UCMJ can incorporate crimes it does not explicitly specify only if these are not punishable by death. Since, under the War Crimes Act, genocide, torture, rape and so on are punishable by death under some circumstances, the UCMJ cannot incorporate these. The result is that military personnel who commit these crimes can only be charged with their common crime counterparts. But genocide, for example, is not your garden-variety murder, and torture leading to death is not your everyday aggravated assault. *See id.*

¹¹⁹ *Ohman, supra* note 23 at 59 (footnote omitted).

¹²⁰ *See* Tim McGirk, *Collateral Damage or Civilian Massacre in Haditha?*, TIME (Mar. 19, 2007), available at <http://www.time.com/time/world/article/0,8599,1174649,00.html>.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

investigation, four Marines were charged with unpremeditated murder, and four officers were charged with dereliction for failing to report the incident to superiors and failing to initiate an investigation.¹²⁵

The highest-ranking Marine to be indicted was a Lieutenant Colonel.¹²⁶ He was charged with incorrectly reporting the facts to his superior and failing to open an investigation, when it appeared more than likely that a violation of the laws of war had taken place.¹²⁷ According to the investigating officer's report, which concluded that the Lt. Col.'s case should go to trial,¹²⁸ the Lt. Col. had approved a report of the Haditha incident stating that fifteen civilians died, all as a result of the car bomb or the exchange of fire between coalition forces and insurgents who were shooting from within the surrounding houses.¹²⁹ The report, prepared and approved on the day of the killings, stated further that the Lt. Col. had gone to the scene to conduct a command assessment of the events. In fact, the Lt. Col. did not go to the scene until the day after the report was issued,¹³⁰ and after he had been ordered by his superior to conduct an investigation.¹³¹ That investigation took the Lt. Col. to the site of the car bomb, where he spent roughly thirty minutes looking around; he never stepped inside the homes where the killings occurred.¹³² Though the Lt. Col. was subsequently approached by Iraqi villagers who demanded that he open an investigation into the killings, and though he assured them he would, he did not seek to investigate further.¹³³

On the basis of the report approved by the Lt. Col. described above, the battalion developed a storyboard for the incident that depicted the civilian casualties as the unfortunate consequence of the insurgents' tactic of using civilians as human shields.¹³⁴ That storyboard was later invoked in response to the questions posed by *Time* magazine.¹³⁵ Following *Time*'s inquiry, the Lt. Col. was again asked by his superiors

¹²⁵ See, e.g., Paul von Zielbauer, *2 More Marine Trials in Killings of 17 Iraqis*, N.Y. TIMES (Jan. 1, 2008).

¹²⁶ Indeed, he is the highest ranking U.S. military official to face a court martial for decisions or actions taken in combat since the war in Vietnam. Chelsea J. Carter, *Courts-martial for 2 in Haditha deaths*, USA TODAY (Oct. 19, 2007).

¹²⁷ Investigating Officer's Report, Executive Summary of Pretrial Investigative Report in the Case of Lieutenant Colonel XXX, Pt. 5 (July 10, 2007). (This report was given to the author on the condition that the defendant's name not be used. The author has retained a copy of the report on file.)

¹²⁸ *Id.* at Pt. 5, para. b. Article 32 of the Uniform Code of Military Justice (UCMJ) mandates that an investigative report be prepared prior to a trial by court-martial.

¹²⁹ Investigating Officer's Report, *supra* note 115 at Pt. 3, para. m.

¹³⁰ *Id.* at Pt. 3, para. n.; see also *id.* at Pt. 5, para. a.

¹³¹ *Id.* at Pt. 3, para. k.

¹³² *Id.* at Pt. 3, para. n.

¹³³ Trial Watch, Lt. Col. Chessani, at http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/jeffrey_chessani_724.html (last visited Feb. 22, 2008).

¹³⁴ Investigating Officer's Report, *supra* note 115 at Pt. 3, para. p.

¹³⁵ *Id.*

to conduct an investigation.¹³⁶ The Lt. Col. responded indignantly: “My men are not murderers,” he said, and he refused to investigate further.¹³⁷

Subsequent reports have stated that the first five Iraqis killed on that day in Haditha were unarmed civilians, who were gunned down after stepping out of their car and holding their arms in the air in a gesture of surrender.¹³⁸ Nineteen other civilians were killed, including women and young children,¹³⁹ in an operation where the Staff Sergeant later admitted to ordering his troops to “shoot first and ask questions later.”¹⁴⁰ On the other hand, some of those present, as well as commentators on the case, argue that the Marines acted in accordance with their rules of engagement,¹⁴¹ and that any over-zealousness in their response should be attributed to nothing more nefarious than the “fog of war.”¹⁴²

These diverging views may help to explain the military’s lack of success in convicting the four officers whom it sought to prosecute for their failures to investigate. Charges against two of these officers have been dropped – one in exchange for a grant of immunity for testimony offered at trials for the remaining defendants,¹⁴³ and the second because of insufficient evidence.¹⁴⁴ A third officer was charged with participating in the cover up, by ordering the destruction of photographs of the Iraqis killed in Haditha.¹⁴⁵ He has since been acquitted, apparently because the

¹³⁶ *Id.* at Pt. 3, para. t.

¹³⁷ *Id.*

¹³⁸ See, e.g., Josh White, *Death in Haditha: Eyewitness Accounts in Report Indicate Marines Gunned Down Unarmed Iraqis in the Aftermath of a Roadside Bombing in 2005*, WASH. POST at A1 (Jan. 6, 2007) (reporting the findings of a Navy Criminal Investigative Services report); Paul von Zielbauer, *Marine Testifies to Urinating on Body*, N.Y. TIMES (May 10, 2007).

¹³⁹ See White, *supra* note 126.

¹⁴⁰ Chelsea J. Carter, *Court-martial of Marine Postponed over CBS Subpoena*, N.C. TIMES (Feb. 29, 2008).

¹⁴¹ See, e.g., Thomas Watkins, *Marine Officers Charged in Haditha Case*, WASH. POST (Dec. 22, 2006).

¹⁴² Mark Walker, *First Haditha Trial Set to Unfold*, NORTH COUNTY TIMES (Feb. 23, 2008) (quoting Gary Solis, described in the article as “a former Marine judge and attorney who has written extensively on the laws of armed conflict”); see also Rick Rodgers, *Haditha Charges Dropped for Two Marines: General Issues Statement To Explain His Decision*, SAN DIEGO TRIBUNE (Aug. 10, 2007) (reporting on a statement issued by the military official who dismissed charges against two Marines involved in the Haditha incident, which offered the following quotation from Supreme Court Justice Oliver Wendell Holmes, Jr.: “detached reflection cannot be demanded in the face of an uplifted knife”).

¹⁴³ See, e.g., Rick Rodgers, *Charges in Haditha Case Are Dropped; McConnell Led Unit Accused in 24 Deaths*, SAN DIEGO TRIBUNE (Sept. 19, 2007).

¹⁴⁴ See, e.g., Rodgers, *supra* note 130.

¹⁴⁵ Charge Sheet for Lt. Andrew A. Grayson, Dec. 28, 2008, available at <http://warchronicle.com/TheyAreNotKillers/LtAndrewGrayson/Charges.pdf> (last visited Mar. 14, 2008). Grayson faced up to six months for the dereliction of duty charge, and five years for each of the two remaining charges. See, e.g., Staff Reports, Intel Officer Faces Charges, The Leatherneck, at

prosecution proved unable to establish that the destruction of photos was anything other than prescribed military practice.¹⁴⁶

The remaining officer -- the Lt. Col. who refused to investigate his men on the ground that they “were not murderers”¹⁴⁷ -- was to be tried before a court-martial for five counts of dereliction of duty.¹⁴⁸ His case has since been dismissed without prejudice, after the presiding judge found that the decision to charge him resulted from “unlawful command influence” (essentially, an illegal conflict of interest).¹⁴⁹ The prosecution has filed a notice of appeal.¹⁵⁰

The various readings of the Haditha incident – from a gun battle with insurgents, to a My Lai type massacre, to an overblown, media-driven witch-hunt – suggest a *Rashomon*-type complexity. As one commentator cynically suggests: “Haditha became yet another test in a polarized nation, and never mind the details: if you liked President

<http://www.leatherneck.com/forums/showthread.php?t=38864> (Dec. 22, 2006; last visited March 14, 2008).

¹⁴⁶ Chelsea J. Carter, *Marine Acquitted in Haditha Cover-Up Case*, THE HUFFINGTON POST, http://www.huffingtonpost.com/2008/06/04/marine-acquitted-in-haditha_n_105336.html (June 4, 2008).

¹⁴⁷ *Supra* note ____.

¹⁴⁸ See, e.g., *Additional Charges for Marine Officer*, AP ALERT (Aug. 31, 2007). Each of the dereliction of duty charges carries a maximum penalty of six months confinement, and the failure to investigate charge carries a maximum penalty of two years confinement. See, e.g., Staff Reports, 3rd Battalion Commander Highest-Ranking Officer To Face Charges, The Leatherneck, at <http://www.leatherneck.com/forums/showthread.php?t=38864> (Dec. 22, 2006; last visited March 14, 2008) (*hereinafter* 3rd Battalion Commander).

It is not clear what to make of the dismissal. Those sympathetic to the prosecution insist that the advisor did not offer and was not asked his opinion in the Haditha meetings. They argue further that the evidence was sufficiently strong to speak for itself in favor of prosecuting the Lt. Col. See Walker, *Charges, supra*. Those who side with the defendant, on the other hand, are quick to point out that the whole incident has had the stench of politics about it, and that the prosecuted Marines have been scapegoated as a result of a too hasty outcry in the face of initial – and inadequate – news of the Haditha killings. See, e.g., “Unlawful Command Influence” Taints Murtha Case, WORLD NET DAILY, <http://www.wnd.com/index.php?fa=PAGE.view&pageId=64902> (May 21, 2008).

For a fascinating study of command influence in military justice, see LUTHER C. WEST, *THEY CALL IT JUSTICE: COMMAND INFLUENCE AND THE COURT-MARTIAL SYSTEM* (1977).

¹⁴⁹ Mark Walker, *Charges Against Haditha Commander Dismissed*, NORTH COUNTY TIMES (June 17, 2008) (*hereinafter* “Walker, *Charges*”). According to the motion, one of the lead investigators in the case subsequently served as the legal advisor to the Lt. Gen. who had ultimate authority in deciding whether to bring charges against the Lt. Col. The motion alleged, and the presiding judge found, that the legal advisor had taken part in dozens of meetings about the Haditha incident. On the basis of this finding, the judge dismissed the case, though he left the door open for the charges to be refiled under a new convening authority. *Id.*

¹⁵⁰ See, e.g., Mark Walker, *Marine Corps Appealing Dismissal Ruling for Haditha*, NORTH COUNTY TIMES (June 18, 2008).

George W. Bush, you believed that no massacre had taken place; if you disliked him, you believed the opposite.”¹⁵¹ We may never arrive at a full, coherent and true account of Haditha, but the difficulty of making sense of Haditha must lie, at least in part, with those who forsook their obligations to investigate and punish.

Further, whatever the real truth of Haditha, it remains instructive for our purposes, for it lets us see the way in which the U.S. military understands the harm inflicted by a failure to investigate and punish suspected war crimes. At the time of the indictments, the military had good reason to believe that a massacre had occurred.¹⁵² Yet the charges brought against these commanders address only injuries that these officers allegedly waged against the military itself – failing to fulfill a duty to the *military*, obstructing the *military*’s administration of justice, and bringing discredit to the *armed forces*. What goes neglected is the harm to the families of the victims arising from a missed opportunity to have a full account of the civilian killings brought to light -- and to see justice done, if in fact these killings did constitute war crimes.¹⁵³

Haditha is enlightening for a second reason, for it invites inquiry into the role of command influence in a commander’s decision to investigate or punish an offense of her troops. Strictly construed, command influence is “the improper use of command authority to steer or influence a judicial process.”¹⁵⁴ But command influence is a broader force, for it can arise well before a judicial process is initiated. In particular, command influence encompasses the power of commanders to

¹⁵¹ William Langewiesche, *Rules of Engagement*, VANITY FAIR (Nov. 2006), available at <http://www.vanityfair.com/politics/features/2006/11/haditha200611>.

¹⁵² Investigating Officer’s Report, *supra* note 115 at Pt. 3, para.

¹⁵³ In Part III, *infra*, I elaborate on the way in which the failure to investigate or punish constitutes an expressive harm to the victims, or the families of the victims, of the underlying offense.

¹⁵⁴ Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649, 664 (2002). The authoritative work on command influence remains WEST, *supra* note ____.

To be sure, the military recognizes command influence, which it has termed “the mortal enemy of justice,” and has taken steps to curtail it. *See, e.g.*, Turley, *supra* at 666. Indeed, one of the goals behind the drafting of the Uniform Code of Military Justice, was to curb command influence and thereby “increas[e] public confidence in military justice.” GENEROUS, *supra* note 10 at 34. Yet, as Turley writes,

the UCMJ had a less obvious but equally important effect: it established the fundamental principles for a distinct military justice system to adjudicate the full range of criminal conduct in peacetime, including a distinct appellate system. On a more functional level, while prohibiting unlawful command influence, the UCMJ also continued to uphold the central role of the commanding officer as convening authority with the consolidation of executive and judicial functions.

Turley, *supra* at 666. For an overview of the history of American military law prior to the drafting of the UCMJ, see, for example, WILLIAM B. AYCOCK AND SEYMOUR W. WURFEL, *MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE* 9-15 (1955).

help determine which individuals and which offenses get disciplined in the first place. Command influence was brought to the fore in the Haditha incident when it served as the ground for dismissing the case against the Lt. Col. But it likely reared its head well before then, and may even have motivated the Lt. Col. to forsake his obligation to investigate.

To grasp the interplay between command influence and the failure to investigate or punish, we shall have to take a step back from Haditha, and turn to the My Lai massacre, where the effects of command influence are more easily discerned.

3. My Lai as a Window into the Forces Motivating U.S. Commanders To Forego or Pursue Investigation and Punishment

One need not believe that Haditha involved a massacre, let alone one of the scale or gravity of My Lai,¹⁵⁵ in order to be impressed by the similarities between the military's handling of both incidents. My Lai was, of course, the massacre named for the village where it took place – a village where, on March 16, 1968, approximately five hundred unarmed and unresisting Vietnamese civilians – mostly women, children and old men -- were rounded up and shot and killed.¹⁵⁶ The American public did not learn about the massacre until some six months later, in large part because of the military's efforts to cover it up.

Like Haditha, My Lai followed upon the heels of the deaths of American soldiers by a guerrilla enemy, which, at least in the case of My Lai, “primed [these soldiers] for serious reprisals.”¹⁵⁷ Initial investigations at My Lai, like those alleged to have been conducted just after the Haditha killings,¹⁵⁸ were cursory and halfhearted.¹⁵⁹ Also like Haditha, higher-ups in the military received reports from the local

¹⁵⁵ Even if Haditha did involve the known killing of unarmed civilians, it would still pale in comparison to My Lai. For one thing, there's a great difference in numbers killed -- Haditha's 28 versus My Lai's approximately 500. *See supra* note ____ and Doug Anderson, 'Kill Everyone in the Village,' N.Y. TIMES (Mar. 22, 1992) (reviewing MICHAEL BILTON AND KEVIN SIM, FOUR HOURS IN MY LAI (1992)). Further, accounts of Haditha suggest that the Marines ran quickly from house to house, unsure what they would find in each one. Their “rampage” would thus have had none of the premeditation of the My Lai killings, where the victims were rounded up and then shot at point blank, *see, e.g.*, SUMMARY OF PEERS REPORT, available at http://www.digitalhistory.uh.edu/learning_history/vietnam/peers_report.cfm (last updated Aug. 4, 2008) (*hereinafter* PEERS REPORT). Finally, at My Lai, many of the victims are believed to have been raped, tortured, and/or mutilated, *see, e.g.*, *Murder in the Name of War – My Lai*, BBC News, at <http://news.bbc.co.uk/2/hi/asia-pacific/64344.stm> (Jul. 20, 1998); no such allegations have been made about Haditha.

¹⁵⁶ *See, e.g.*, WEST, *supra* note ____ at 154; Anderson, *supra* note ____.

¹⁵⁷ Anderson, *supra* note ____.

¹⁵⁸ *See supra* notes ____ and accompanying text.

¹⁵⁹ PEERS REPORT, *supra* note ____ (“Henderson's actions appear to have been little more than a pretense of an investigation and had as their goal the suppression of the true facts concerning the events of 16 March.”).

population suggesting that the incident was far worse than what was stated in the reports prepared by the military's investigators, yet the disparity prompted no further investigation.¹⁶⁰ Perhaps most stunning of all, the North Vietnamese take on the incident – like the Iraqi take on Haditha¹⁶¹ – was dismissed by the U.S. military as nothing more than enemy “propaganda [intended] to discredit the United States.”¹⁶²

Much has been written about My Lai in the years since the massacre, so, even while the dust continues to swirl around Haditha, it is possible to glean from My Lai the way in which a command culture, effectuated in large part through command influence, incentivizes military cover-ups.

Scholars of command influence have noticed two insidious currents in the administration of military justice. First, where an offense threatens to embarrass the U.S. military, the prosecution will be vigorous, and the pressure to convict fierce.¹⁶³ At the same time, every effort will be taken to ensure that the embarrassment does not redound to those high up in the chain of command.¹⁶⁴ The effect of these two currents is a kind of scapegoating of low-level soldiers in an effort to

¹⁶⁰ *Id.*

¹⁶¹ See *supra* note ____ and accompanying text.

¹⁶² WEST, *supra* note ____ at 208.

¹⁶³ See, e.g., WEST, *supra* note ____ at 101-102, and 114; Kingsley R. Browne, *Military Sex Scandals from Tailhook to the Present: The Cure Can Be Worse Than the Disease*, 14 DUKE J. GENDER L. & POL'Y 749, 762-64 (2007) (describing the way in which public and political pressure to respond to the Tailhook allegations infected the administration of justice against the accused).

Ironically, where the source of embarrassment is an offense committed abroad, the court martial system does little to include the foreign population in its trials. To be sure, the Manual for Courts Martial provides for open courtrooms except in limited circumstances, see MCM, RCM 806(a) (2008). But it also contemplates, and permits, court-martials to take place on a ship at sea, or in a unit in a combat zone, see *id.* and “Discussion” thereof. The exigencies of war may thus make it more difficult for the victim or her family to witness the accused's trial. (Contrast this way of convening a judicial forum with, for example, the Moscow Declaration on German Atrocities, signed by Great Britain, the United States and the Soviet Union on November 1, 1943, stating that those accused of war crimes would, if possible, be “brought back to the scene of their crimes and judged on the spot by the peoples whom they had outraged.” Parks, *supra* note 63 at 15.) And, of course, many court martials take place stateside, as the Haditha trials did.

It is perhaps for this reason that Iraqis received news of the Haditha indictments with great skepticism: “The trial they are talking about is fake,” said Naji al-Ani, 36, a labourer in Haditha. “The troops should be brought here, in front of an Iraqi court. They committed a horrible crime against innocents.” Tim Reid, *Marine Faces Murder Charges over Deaths of 24 Iraqi Civilians*, TIMESONLINE (Dec. 22, 2006), at http://www.timesonline.co.uk/tol/news/world/us_and_americas/article1264015.ece

¹⁶⁴ WEST, *supra* note ____ at 134. Cf. Hillman, *supra* note ____ at 2 (“Many soldiers believe that officers are insulated against prosecution for wrongdoing by the political expediency of pushing blame to the lowest possible level, where it does not reflect as poorly on the judgment of military and civilian leaders.”)

ensure that the command remains “clean.”¹⁶⁵ The My Lai incident provides a good illustration of the way these currents operate.

The commander believed to have done more than any other investigator in suppressing information about My Lai was Colonel Oran Henderson.¹⁶⁶ Henderson had arrived in Vietnam and assumed the position of Brigade Commander for the brigade that included the My Lai troops just the day before the My Lai massacre.¹⁶⁷ Henderson was thus unseasoned when it came to the perils of Vietnam. But this was his third war, and he likely would have been no stranger to military culture.

Having been in a low-flying helicopter over My Lai on the morning of the massacre, Henderson had a “box-office seat,”¹⁶⁸ and he is believed to have witnessed the killing of between six and eight unresisting Vietnamese civilians. He also heard reports from two of his soldiers, who believed they had witnessed a massacre and described what they saw accordingly.¹⁶⁹ Henderson thus had reason to know that a massacre had occurred. But, Henderson knew, so too did his superiors, Major General Koster and Brigadier General George Young: Koster, like Henderson, had witnessed the killing of unresisting civilians while flying in a helicopter over My Lai on the day of the incident.¹⁷⁰ Young had twice heard first-hand testimony that a massacre had occurred on that day.¹⁷¹

On the afternoon of the day of the My Lai incident, Henderson ordered his troops to fly over the village of My Lai again. According to one soldier who received the order, the purpose of the return trip was to determine the number of civilians who had been killed, and the cause of

¹⁶⁵ WEST, *supra* note ____ at 134. Cf. Langewiesche, *supra* note ____ (reflecting on the Haditha prosecutions: “The Corps has this reflex when it feels threatened at home. It has a history of eating its young.”)

¹⁶⁶ See PEERS REPORT, *supra* note ____ (“COL Henderson’s deception of his commanders as to what he had done to investigate the matter and as to the facts he had learned probably played a larger role in the suppression of the facts of Son My than any other factor.”).

¹⁶⁷ See, e.g., WEST, *supra* note ____ at 196.

¹⁶⁸ *Id.*

¹⁶⁹ Major Frederick W. Watke, a pilot at My Lai, went to Brigadier General George Young, assistant division commander of the Americal Division, to officially report the massacre. WEST, *supra* note ____ at 207. A meeting was called for the next day, at which Watke, Henderson and Young were present, and at which Young directed Watke to repeat his story to Henderson. *Id.* A second My Lai pilot, Hugh Thompson, who heroically rescued women and children from My Lai in an effort to save them from his own peers, also shared his concerns with Henderson on that day. WEST, *supra* note ____ at 201.

¹⁷⁰ WEST, *supra* note ____ at 207.

¹⁷¹ See *supra* note ____ [Watke]. Interestingly, the Lt. Col. in the Haditha incident has maintained that *his* superiors had also been on notice of the possibility of war crimes, and that they too had failed to order an investigation, though none of them has been prosecuted. See 3rd Battalion, *supra* note ____.

their wounds.¹⁷² But Henderson's order was countermanded by Koster, who personally came on the radio and rescinded the order without explanation.¹⁷³ In light of a culture in which commanders are supposed to insulate one another from embarrassment and allegations of wrongdoing,¹⁷⁴ Henderson may well have inferred from Koster's order that his superiors did not want to know, or have to acknowledge knowing, that there had been a massacre.¹⁷⁵

Unfortunately for Henderson, his subordinates were not going to give him an easy time of sweeping the incident under the rug. Several of them made official reports of the massacre to Henderson or Young. In the wake of the report that Young received, he ordered Henderson to investigate the massacre further, and report orally on his findings.

Perhaps still believing that his superiors wanted a whitewashed version of the events,¹⁷⁶ Henderson conducted a slapdash and superficial investigation into the incident, and eventually authored a report that he knew to contain misstatements.¹⁷⁷ That report stated that just twenty civilians had been killed, and that the killings had occurred inadvertently, in the course of a gun fight with the enemy.¹⁷⁸ On the basis of this report, Koster and Young could both maintain that they had no knowledge that a massacre occurred – despite the fact that they in fact had good reason to know of its occurrence.¹⁷⁹

Had Henderson's report been allowed to stand, he would have succeeded in preventing blame for the massacre from traveling up the chain of command. In the fall of 1968, however, several enlisted men contacted their elected representatives and members of the President's administration with information about My Lai, including photographic evidence of the massacre.

Once the American public learned of the killings at My Lai, the first current of command influence materialized: the military's attitude toward the massacre shifted from one of suppression to one of rabid prosecution. Initially, twenty-six enlisted men and fourteen officers were charged in connection with My Lai.¹⁸⁰ Yet Henderson was the only officer whose case went to trial, and he was eventually acquitted.¹⁸¹

Henderson thus appears to have made a well-hedged – and ultimately successful -- bet. Had he conducted an assiduous investigation, he would have inculpated his superiors, and risked

¹⁷² WEST, *supra* note ____ at 204.

¹⁷³ *Id.*

¹⁷⁴ See *supra* note ____ [second current] and accompanying text.

¹⁷⁵ See WEST, *supra* note ____ at 201.

¹⁷⁶ See WEST, *supra* note ____ at ____.

¹⁷⁷ See *supra* note ____.

¹⁷⁸ *Id.*

¹⁷⁹ See *supra* notes ____ and accompanying text.

¹⁸⁰ See, e.g., WEST, *supra* note ____ at ____.

¹⁸¹ *Id.*

ostracism or retaliation.¹⁸² Worse still, given that he witnessed the killings as they were occurring and did nothing to stop them, Henderson would have exposed himself to the charge of failing to prevent the massacre.¹⁸³ A shoddy investigation, which turned up no illegal killings, could avoid these difficulties. To be sure, by shirking his duty to investigate, Henderson risked subjecting himself to a charge of dereliction of duty. But that charge carries a relatively moderate penalty – a maximum of six months confinement per offense.¹⁸⁴ By contrast, the failure to prevent is, under the UCMJ,¹⁸⁵ grounds for being treated as a principal in the underlying offense – murder, in this case, which is punishable by death.¹⁸⁶ Besides, Henderson could wager that his loyalty to the officer class would be rewarded at any eventual trial – as indeed it may have been, since a jury consisting of five colonels and two generals acquitted Henderson of the charges against him.¹⁸⁷

¹⁸² One way for superiors to pursue this retaliation is to provide the upstart with a lukewarm efficiency report, since these reports form the basis upon which promotions are decided. For instances in which military defense counsel have been retaliated against in this way for zealously defending their clients, see WEST, *supra* note ____ at 73 and 110-113. Cf. David J. Luban, *Lawfare and Legal Ethics in Guantanamo*, 60 STAN. L. REV. 1981, 1999-2019 (2008) (describing the ways in which JAG corps members assigned as defense counsel before military commissions at Guantanamo face conflicts of interest, including threats that zealous advocacy will lead to their own court martial).

In other instances, the retaliation is more blatant, as when Brigadier General Janis Karpinski, commanding officer at Abu Ghraib, was demoted to Colonel after the scandal broke – on some accounts, because she failed to “allow or encourage such illegal practices.” Bassiouni, *supra* note ____ at 409-410 & n. 76.

¹⁸³ Cf. Darley, *supra* note 107 at 34 (arguing that organizations confront an incentive not to punish executives who commit harm and then engage in a cover-up, since punishing these executives is an admission that the organization itself committed harm). Though Henderson sought to avoid blame for My Lai, Henderson nonetheless saw himself as blameworthy. After his acquittal, he reported that he felt “responsible for the incident because the troops involved were under his command.” Michael T. Kaufman, *Oran Henderson, 77, Dies; Acquitted in My Lai Case*, N.Y. TIMES (Jun. 5, 1998).

¹⁸⁴ See UCMJ Article 92.

¹⁸⁵ See Article 77 of the UCMJ, which considers a principal to be, *inter alia*, one who aids and abets the commission of a crime.

¹⁸⁶ See UCMJ Article 118. For an example of one who was charged with murder for his failure to prevent, consider the case of Captain Ernest Medina, who was tried by court martial on the theory that “he knew his orders were being misconstrued and that his troops were murdering noncombatants [at My Lai].” WEST, *supra* note ____ at 182 (quoting from the opening statement of military prosecutor Major William G. Eckhardt). The prosecution in that case did not seek to argue that Medina ordered the massacre; instead, it claimed that his decision not to intervene, given what he knew, “offered comfort and encouragement to his men carrying out the carnage.” *Id.* For this assistance, Medina was initially charged with the murder of 102 villagers, though the prosecution did not seek the death penalty in his case. *Id.* at 184. The charges were eventually reduced to involuntary manslaughter, and would have been punishable with a maximum of three years of confinement. *Id.* at 192. In the end, however, Medina, like Henderson, was acquitted. *Id.* at 193.

¹⁸⁷ WEST, *supra* note ____ at ____.

Henderson's maneuverings in the My Lai incident suggest that there are institutional dynamics – in particular, a norm of mutual protection among officers, and a military justice system that sometimes affords enough wiggle room to facilitate that protection¹⁸⁸ – that already incline commanders to forsake their duties to investigate and punish. Some of these may have been at work in the Haditha incident too. Or, more charitably, Haditha may represent a case where the commander decided to balk at the norms of command culture: The Lt. Col. in Haditha might honestly have believed that no illegal killings occurred there. His initial failure to investigate adequately, and subsequent refusal to investigate at all, might thus have been a showing of solidarity with his troops, whom he was not about to sacrifice for the sake of superiors so whipped up by public outcry as to already presume their guilt.

Whatever a commander's motivations for failing to investigate or punish -- whether to protect her superiors or subordinates --, the fact remains that her response to these institutional dynamics is enabled where the failure to investigate and punish is treated solely as a dereliction of duty. There are, then, considerations of deterrence that counsel in favor of ratcheting up the offense of failing to punish. In particular, if the failure to punish were treated as a graver offense than dereliction of duty, then the potential penalties for failing to punish might be sufficiently weighty to offset the incentives otherwise motivating a commander's willful ignorance. In this way, a robust failure to punish prong could deter military cover-ups.

Yet deterrence is not the only, or even the key, factor supporting enhanced punishments for the failure to punish. Commanders who fail to investigate or punish an atrocity of their troops sometimes *deserve* more punishment than they receive – or so the next Part endeavors to establish.

II. FAILURE TO PUNISH AS AN EXPRESSIVE HARM

We have just seen that both international and domestic law currently treat a commander's failure to punish his troops solely as a matter of dereliction of duty despite doctrinal and historical support for the mode of liability view. In so doing, the law construes the commander's crime as an offense against the state (or quasi-state authority) that vested him with the obligation to punish. In this Part, I argue that commanders who endorse or acquiesce in their troops' atrocity by failing to punish it do more than just shun their obligations to the state; they compound the offense to the victims of the atrocity, and this

¹⁸⁸ For accounts of the ways in which the military justice system is subject to the insidious influence of military commanders, see generally WEST, *supra* note ____; Lindsey Nicole Alleman, *Who Is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, 16 DUKE J. COMP. & INT'L L. 169 (2006).

contribution ought to serve as a ground of criminal liability for the underlying offense.

Part II.A draws out the normative dimensions of the military command structure in an effort to establish that, under certain circumstances, the mere failure to punish a war crime committed by a commander's subordinates justifies our attributing that war crime to the commander. Part II.B advances an expressivist conception of harm in order to identify the circumstances where the failure to punish supplies this justification. In Part II.C, I argue that the account advanced in the first two sections of this Part can withstand scholarly objections to the mode of liability view.

A. *The Normative Implications of the Military Command Structure*

In this Section, I argue that a soldier's war crime is ascribable to his commander where his commander declines to punish the crime because she either endorses it or fears that punishment will thwart her own ambitions.

To begin, consider that soldiers' run-of-the-mill operations are typically ascribable to their commander. The ascription flows from a central feature of the structure of military relationships – *viz.* the near-total relinquishment of autonomy that soldiers undergo during basic training and while on duty.¹⁸⁹ Active soldiers do not plan their day, let alone actively pursue projects of greater duration. Instead, what it is to be a soldier is to subject one's will to the will of one's superior; it is to allow another -- one's commander -- to execute his agency through you.¹⁹⁰ To be sure, the relinquishment is not total. Soldiers are not mere

¹⁸⁹ See, e.g., MARK P. OSIEL, *OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE & THE LAW OF WAR* 241 n. 21 (1999); *id.* at 1770 (arguing that the doctrine of superior responsibility “stresses the formal, hierarchical structure of military organizations and the consequent reasons why a high-ranking superior can reasonably expect his orders to be obeyed, including standing orders to honor the Geneva Conventions.”); Gary D. Solis, *Obedience of Orders and the Law of War: Judicial Application in American Forums*, 15 AM. U. INT'L L. REV. 481, 526 (1999) (“subordinates will obey illegal orders, given the overwhelming influence of the military hierarchical structure--particularly in the lower ranks and in combat.”).

¹⁹⁰ Cf. Osiel, *supra* note 7 at 1831-1832 (describing Claus Roxin's theory of the bureaucratization of mass atrocity as follows: “The superior's control over an ‘organizational apparatus of hierarchical power,’ as Roxin calls it, enables him to utilize the subordinate ‘as a mere gear in a giant machine’ to produce the criminal result ‘automatically.’ ... Roxin's key insight, then, is that the more powerful party behind the scenes may, through the organizational resources at his disposal (including the culpable inferior) be said to commit the offense.”) (citing Claus Roxin, *Problemas de Autoría y Participación en la Criminalidad Organizada* [Problems of Perpetration and Participation in Organized Crime], in *Delincuencia Organizada: Aspectos Penales, Procesales y Criminológicos* [Organized Crime: Criminal, Procedural and Criminological Aspects] 194 (Juan Carlos Ferré Olivé & Enrique Anarte Borrillo eds., 1999)) (footnotes omitted);

automatons, void of consciousness of their actions. Though the threat of coercion – and, in particular, discipline for disobedience – may deter soldiers from reclaiming their autonomy, the possibility of disobedience is always a live one.¹⁹¹ It is for this reason that the defense of superior orders has traditionally been found unavailing.¹⁹² Still, the military ideal, and the routine reality, is one where soldiers *serve* – they do what their commanders order them to do.

If we are entitled to ascribe to the commander a soldier's routine military operation, are we also entitled to ascribe to her a war crime committed by one of her soldiers?¹⁹³ In other words, does the logic of commander authorship, grounded as it is in the command structure, extend to the extraordinary case where soldiers commit atrocities while on active duty? One might think that it does not; in particular, one might hold that the illegal nature of the soldiers' act blocks, at least presumptively, the ascription of that act to the commander. The commander is owed the benefit of the doubt, on this thought, in virtue of the duties and prestige attaching to her office: She is charged with instructing her subordinates about the laws of war, and inculcating a norm of adherence to these.¹⁹⁴ Further, her status demands deference and, in this circumstance, deference requires that the commander enjoy a presumption that she will have discharged the duties of her office. In general, then, we suspend the ascription of the soldier's act to his commander where the act constitutes a violation of the laws of war.

Sometimes, however, the suspension is not warranted, and we return to the situation where it is appropriate to ascribe soldiers' acts to their commander. In the clearest case, the commander who *ordered* an atrocity forfeits the benefit of the doubt. In that case, the atrocity can no longer be considered a rogue act; instead, the operation of the command

Smidt, *supra* note 12 at 158 (“Soldiers learn to rely on the commander's guidance as the soldier surrenders some of his own discretion, judgment, and inhibitions to play a role in the collective success of the unit and to further the higher cause in which they are engaged.”)

¹⁹¹ For example, in the case of the bridge-throwing incident, discussed above, *see supra* text accompanying notes 27-33, one of the five soldiers involved refused to follow his platoon commander's order to take the captured Iraqis down to the riverbank, despite the possibility of arrest that his refusal risked. *See* Dexter Filkins, *The Fall of the Warrior King*, N. Y. TIMES MAGAZINE (Oct. 23, 2005).

¹⁹² *See, e.g.*, John D. Van der Vyver, *The International Criminal Court and the Concept of Mens Rea in International Criminal Law*, 12 U. MIAMI INT'L & COMP. L. REV. 57, 76-84 (2004). *See generally* Solis, *supra* note 147 (reviewing the history of the superior orders defense).

¹⁹³ I use the terms “violations of the laws of war,” “atrocities,” and “war crimes” interchangeably, and I distinguish these from crimes soldiers commit that cannot plausibly be related to their military positions. Thus, for example, though an off-duty soldier may be court-martialed for a “midnight punch to the gut outside of a downtown bar,” Ohman, *supra* note 23 at 64, there is no suggestion that his superior will bear responsibility for the soldier's assault.

¹⁹⁴ *See, e.g.*, Osiel, *supra* note 7 at 260.

structure is restored and the soldier's act is properly attributed to his commander.¹⁹⁵

Yet ordering an offense is not the only kind of contribution that deprives the commander of the benefit of the doubt; failing to punish does so as well, but it does not operate as decisively as ordering an atrocity does. The commander who orders an offense both forfeits the benefit of the doubt and confirms the ascription of his soldiers' act to him in one fell swoop, as it were. The commander who fails to punish an atrocity of her troops also foregoes the benefit of the doubt, but more is needed to confirm that her soldiers' atrocity is ascribable to her. In particular, it must be the case that her failure to punish is unjustifiable.¹⁹⁶

Commanders may forego punishment for any number of reasons, not all of which are unjustifiable. For example, a military emergency may entail that a commander's attentions are necessarily elsewhere.¹⁹⁷ In such a case, withholding punishment may well be the right thing to do, at least while the military emergency exists. But there are other, less clear-cut cases. For instance, consider the commander who foregoes punishment out of solidarity with his troops, if not their offense. Nathan Sassaman, the commander of the soldiers who threw Iraqi civilians off a bridge, offered something like this as his reason for instructing his soldiers to cover up their act.¹⁹⁸ Considerations of political expediency may also lead a commander to pass over her troops' crime; where, for example, support for the military effort is waning, higher-ups may seek to avoid the negative publicity that investigation into an atrocity will undoubtedly invite. Then again, a commander may be motivated to forego punishment not for the sake of some larger national goal, but instead for the sake of personal ambition and, in particular, a fear that his subordinates' offense will taint his future professional prospects.¹⁹⁹ Finally, a commander's failure to punish may arise not from considerations exogenous to her subordinates' crime but instead from the

¹⁹⁵ For a commander to order the act is for him to cause it to be done. Given that causation is paradigmatically taken to be a necessary condition for criminal liability, *see, e.g.*, Christopher Kutz, *Causeless Complicity*, 1 CRIM. L. & PHIL. 289, 290 (2007), international and domestic law have no trouble in holding commanders who order an atrocity criminally liable for that atrocity, *see, e.g.*, Article 7(1) of the ICTY Statute; 32 C.F.R. 11.6(c)(3).

¹⁹⁶ Compare Parks, *supra* note 63 at 81 ("Current British military law states a commander to have acquiesced in an offense 'if he fails to use the means at his disposal to insure compliance with the law of war;' in comment it continues: 'The failure to do so raises the presumption – which for the sake of the effectiveness of the law cannot be regarded as easily rebuttable – of authorization, encouragement, connivance, acquiescence or subsequent ratification of the criminal acts.'") (citing British War Office, III MANUAL OF MILITARY LAW: LAW OF WAR ON LAND, para. 631 (1958)).

¹⁹⁷ Oric attempted to raise a watered down version of this explanation in his defense, which they ICTY refused to countenance. *See supra* text accompanying note 104.

¹⁹⁸ *See* Filkins, *supra* note 27.

¹⁹⁹ *See infra* note 164 and accompanying text.

crime itself, for the commander may approve of her troops' act and hence view it as unworthy of punishment.

In what follows, I focus on these last two reasons for failing to punish – *viz.* where the failure stems from self-interested concerns or approval of the underlying offense. In the former case, the commander *acquiesces* in his troops' crime; in the latter case, he *endorses* it. The claim to be defended in the next Section is that, in cases of acquiescence or endorsement, we are entitled to conclude that the commander bears responsibility for his subordinates' offense.²⁰⁰

First, though, a few more words about endorsement and acquiescence: The commander who *endorses* his subordinates' atrocity does not view that atrocity as worthy of punishment; he shares his subordinates' belief that the victims warrant the treatment they have received. The commander who *acquiesces* in her subordinates' atrocity privileges her own interests over her duty to punish; she expresses indifference to the victims of the atrocity.

Some have depicted the Haditha incident in terms that make it sound like an instance of endorsement. According to one recent investigative report, for example, "the commanders [in Haditha] had created a climate that minimized the importance of Iraqi lives."²⁰¹ Even more compelling is the case of Major General Shigeru Sawada, who was prosecuted before a United States Military Commission in Shanghai for permitting the illegal trial and execution of three U.S. airmen in World War II.²⁰² The trial underlying Sawada's indictment occurred in his absence. When he was later informed of the trial and its results, Sawada endorsed the record and forwarded it to the chain of command.²⁰³ The three airmen had been sentenced to death and, once Sawada endorsed the

²⁰⁰ Military necessity may furnish a justification for a commander's failure to punish, in which case the failure ought not to be punished at all. By contrast, it may well be that dereliction of duty is an inadequate response not only in cases of endorsement or acquiescence, but also in cases where a commander fails to punish out of solidarity with her troops, or because she is concerned about the broader political ramifications of punishing. Nonetheless, I defend the mode of liability view here only as it applies to cases of endorsement or acquiescence. That view has received ample scholarly criticism, *see infra* Part II.C, and so is a controversial enough object of defense. *But cf.* Darley, *supra* note 107 at 31 (arguing that covering up an injury out of solidarity for one's fellows will subsequently render the dissimulator culpable where maintaining the lie entails that the injurious conduct will continue).

²⁰¹ David S. Cloud, *Marines May Have Excised Evidence on 24 Iraqi Deaths*, N.Y. TIMES (Aug. 18, 2006) (citing a report based on an investigation by Maj. Gen. Eldon A. Bargewell of the Army); *see also* Rodgers, *supra* note 130 (quoting a contemporary scholar's invocation of the "mere gook rule" to analogize between the alleged devaluation of the Viet Cong by U.S. troops fighting in Vietnam and the Haditha Marines' attitudes toward Iraqis).

²⁰² *See* U.N. WAR CRIMES COMMISSION, 5 LAW REPORTS OF TRIALS OF WAR CRIMINALS, CASE NO. 25, TRIAL OF LIEUTENANT-GENERAL SHIGERU SAWADA AND THREE OTHERS 1 (1948).

²⁰³ Parks, *supra* note 63 at 74.

verdict, the death sentences were carried out. The U.S. Military Commission held that Sawada had “ratified the illegal acts which occurred in his absence and therefore bore the responsibility for them.”²⁰⁴ In other words, though Sawada did not conduct or otherwise guide the trial that the Military Commission subsequently deemed illegal, the trial and its results were nonetheless ascribed to him because he retroactively authorized them.

For an example of acquiescence, consider a 1996 Canadian scandal where then-Minister of Defense Kim Campbell, vying for the post of Prime Minister in an upcoming election, participated in suppressing information about the murder of a sixteen year-old Somali boy committed by Canadian peacekeeping troops in Somalia.²⁰⁵ Here, Campbell may well have *privately* disapproved of the peacekeepers’ act. She nonetheless determined that punishing the atrocity would bring it to light, and that the public’s response to the atrocity would target her, and thereby damage her political ambitions.²⁰⁶

It is worth noting that, all else being equal, endorsement is worse than acquiescence.²⁰⁷ The moral difference between endorsement and acquiescence can perhaps be grasped by analogizing the pair to the distinction between dolus eventualis and recklessness. Both dolus eventualis and recklessness entail that one knowingly undertakes a risk, but the former has the added dimension that one willingly does so.²⁰⁸ As one set of commentators puts it, with dolus eventualis, there is the element of “approval and identification with the evil result.”²⁰⁹ Similarly, the commander who endorses an atrocity of his troops does not merely know that forgoing punishment will deprive the atrocity’s victims of the

²⁰⁴ *Id.*; see also Gary D. Solis, *Judge-Advocates, Courts-Martial, and Military Law Advisors*, 190/191 MIL. L. REV. 153, 160-61 (2006/2007).

²⁰⁵ See, e.g., Allan Thompson, *Canada’s New Face at U.N. an Enigma*, Toronto Star (Jan. 15, 1995) (“The Ottawa-based military magazine *Esprit de Corps* has bluntly and audaciously accused Fowler of engineering a cover-up, partly to protect the political fortunes of Kim Campbell, who was then defence minister and a contender for the Tory leadership.”).

²⁰⁶ For a strikingly similar fictional version of this scenario, consider the plot line from the series finale of *The Wire*, where a Baltimore mayor with his sights set on the governorship declines to punish a major police scandal because news of the scandal would hurt his gubernatorial campaign. -30-, *The Wire* (HBO television broadcast, March, 2008).

²⁰⁷ The gravity of the offense obviously has a role to play in determining the reprehensibility of either endorsement or acquiescence; further, associated statements by the commander that amplify her endorsement or acquiescence can also render her failure to punish more severe. The text accompanying this note, however, abstracts from these elements in order to determine the relative blameworthiness of endorsement and acquiescence considered in and of themselves.

²⁰⁸ See, e.g., Meloni, *supra* note ____ at 635 n. 94.

²⁰⁹ George P. Fletcher and Jens D. Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT’L CRIM. JUST. 539, 554 (2005); see also Martinez, *supra* note ____ at 644-45.

restoration that punishment can confer;²¹⁰ he intends this deprivation, for it is the mechanism through which he aligns himself with his subordinates' atrocity. By contrast, with acquiescence, the commander knows that forgoing punishment will fail to restore the atrocity's victims but, all else being equal, he might prefer that the restoration occur -- for example, Kim Campbell might well have punished the Somalian boy's death had doing so not conflicted with her political ambitions.²¹¹ Yet, while the injury of acquiescence is less categorical than that arising from endorsement, acquiescing is worse than the blanket offense of dereliction of duty, for one can be derelict in his duty to punish even if he has good reasons to forego punishment.

I have contended that a commander's failure to punish is not justified in cases where the failure signals acquiescence or endorsement. But I have not yet argued that these reasons for forgoing punishment are reprehensible enough to warrant our holding a commander responsible for his subordinates' offense. To establish that claim, we shall first have to inquire into the expressive dimensions of the failure to punish.

B. The Expressive Harm of Failing to Punish

The expressive characteristics of punishment can explain why commanders who endorse or acquiesce in their subordinates' atrocity ought to be held criminally liable for that atrocity. General theories of expressivism are concerned with the way that action, speech or any other mode of expression manifests a belief, attitude, emotion, and so on.²¹² Expressivism holds that "we are morally required to express the right attitudes toward people."²¹³ Though general expressivist theories do not specify what count as the "right attitudes,"²¹⁴ those who have articulated expressive theories of punishment are largely inspired by Kantian ethics, according to which actions should express persons' equal moral worth.²¹⁵ Thus, on such a theory, the injury of a crime consists not just of its physical or psychological harm but also of the affront to the victim's

²¹⁰ See *infra* Part II.B.

²¹¹ Compare, for example, Article 4 of the French Ordinance of 28 August 1944, which subjected commanders to prosecution if they "'tolerated the criminal acts of their subordinates.'" Smidt, *supra* note ____ at 176 n. 84. As Michael Smidt notes, toleration "may exist even where one is personally opposed to the conduct but takes no affirmative action to prevent the behavior," *id.* at 176, or, perhaps, to punish it either.

²¹² See e.g., Elizabeth S. Anderson and Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 PENN. L. REV. 1503, 1508 (2000). For one application of expressivist theories to international war crimes, see Diane Marie Amann, *Message As Medium in Sierra Leone*, 7 ILSA J. INT'L & COMP. L., 237, 238 (2001).

²¹³ Anderson and Pildes, *supra* note ____ at 1514.

²¹⁴ See, e.g., *id.* at 1509.

²¹⁵ See, e.g., Hampton, *supra* note ____.

self-worth. As Jeffrie Murphy writes, “such injuries are also *messages* – symbolic communications. They are ways a wrongdoer has of saying to us, ‘I count but you do not,’”²¹⁶ Further, empirical research supports the expressivist’s sense that a significant part of the harm of a crime lies in its emotional or psychic consequences for the victim.²¹⁷

A commander’s efforts to punish his troops’ unauthorized atrocity can remedy the expressive injury that the atrocity waged. For the expressivist, punishment serves the role of restoring the victim to a position of equal worth in her eyes and in the eyes of others; it vindicates her status as a moral equal. Punishment can thus “annul the message, sent by the crime, that [perpetrator and victim] are not equal in value.”²¹⁸

This is not to say that all punishment will effect the called for restoration of dignity. It will not be sufficient for the commander to punish his troops solely for their disobedience. That punishment responds to the *manner* in which the soldiers carried out the atrocity, not the atrocity itself. Thus we could imagine a commander retroactively authorizing some benign act that his soldiers had performed of their own accord, while also punishing them for having acted without orders. Nor will it be sufficient for the commander to punish his troops for the atrocity itself if he does so only as a matter of towing the line. For example, if the commander imposes a harsh punishment even while he publicly endorses his subordinates’ atrocity, his endorsement will

²¹⁶ Jeffrie C. Murphy, *Forgiveness and Resentment*, in FORGIVENESS AND MERCY 25 (Jeffrie C. Murphy and Jean Hampton eds., 1988). See also Jean Hampton, *Forgiveness, Resentment and Hatred*, in FORGIVENESS AND MERCY, *supra* at 44 (“When someone wrongs another, she does not regard her victim as the sort of person who is valuable enough to warrant better treatment.”). At some points, Hampton claims that the victim will experience the perpetrator’s message as an affront only if she subscribes to a non-egalitarian theory of human worth. See, e.g., *id.* at 53. In other words, the victim must already believe that it is possible for one person’s value to differ from another’s if the victim is to feel hurt by the expressive content of the perpetrator’s injury. Since Hampton adopts an egalitarian theory of human worth, see, e.g., *id.*; Jean Hampton, *The Retributive Idea*, in FORGIVENESS AND MERCY, *supra* at 124, the effect of her claim is to impugn the notion that injuries do indeed involve expressive harms. But Hampton’s claim is problematic for several reasons. First, as Murphy points out, one’s worth is an ineluctable social fact: “Our self-respect is *social* . . . , and it is simply part of the human condition that we are weak and vulnerable in these ways.” Murphy, *supra*, at 25. Second, the victim may subscribe to an egalitarian theory of human worth but recognize that others do not, and she may resent being called upon to defend her worth, in the face of the perpetrator’s smear, to these others. Finally, Hampton enjoys a rhetorical advantage in the argument, for a non-egalitarian theory of human worth raises the specter of racism or ethnic-based animus. But the rhetorical advantage is spurious, for one may hold that individuals are unequal in worth not in virtue of some ascriptive characteristic, but in virtue of their characters. Where one’s theory of worth is character-based in this way, it is not clear that it is any less attractive than the egalitarian view that Hampton adopts. As such, the injuries that a character-based theory of human worth makes salient deserve our attention.

²¹⁷ See, e.g., Kenworthy Bilz and John M. Darley, *What’s Wrong with Harmless Theories of Punishment?*, 79 CHI.-KENT L. REV., 1215, 1233-35 (2004).

²¹⁸ Hampton, *The Retributive Idea*, *supra* note 168 at 131.

undercut the expressive force of the punishment. Only if the punishment addresses the atrocity itself, and conveys the commander's public condemnation of his soldiers' act, will it serve to counter the expressive component already present in the atrocity.

Where a commander fails to punish an atrocity because he endorses that atrocity, or because his own interests have gotten in the way, he denies the victims of the atrocity the opportunity for dignity restoration. Instead, he effectively underwrites the dignitary harm that the atrocity waged.²¹⁹ Indeed, because of his position of superior authority, he lends even more credence to the estimation of the worth of the victims expressed by the soldiers' act: His stature has already been ratified by the society that placed him in a distinguished military position, and so the expression of the victims' inferior worth communicated by his failure to punish carries that much more credibility.²²⁰

The commander is uniquely situated to affirm or deny the meaning of the soldiers' act through punishment. When a commander declines to punish his soldiers because he endorses or acquiesces in their offense, he affirms the meaning the offense conveyed. And his position within the military command structure lends this affirmance a credibility and gravity it lacked in its guise as a rogue act. The dignitary harm waged by the commander's failure to punish thus comes to constitute part of the wrong of the atrocity. In this way, we should view the atrocity as one that is extended through time, with an initial set of harms inflicted by the soldiers, and an additional dignitary assault waged by the commander.²²¹ *It is because the commander compounds his*

²¹⁹ Cf. Christopher Kutz, *Causeless Complicity*, 1 CRIM. LAW & PHIL. 289 (2007) (arguing that the attorneys in the Bush administration who authored the so-called "torture memos" bear responsibility for the administration's unlawful interrogation techniques, *even if these techniques occurred prior to the memos' production*, because the memos ratified these earlier acts).

²²⁰ Cf. Murphy, *supra* note 168 at 25, describing the symbolic message communicated by an offense's perpetrator as signaling that "'I am here up high and you are there down below.'"

²²¹ This understanding of the commander's contribution accurately tracks, I believe, the scenario where soldiers commit an unauthorized atrocity in which their commander subsequently comes to participate as a result of a failure to punish that is rooted in the commander's endorsement or acquiescence. I do not contend here, however, that this understanding is the best way of construing the contribution of a commander involved in a campaign whose very purpose is to wage atrocities on the victim group. Thus, for example, William Schabas is correct to argue that the wrong perpetrated by military superiors in Rwanda is something far worse than failing to punish genocide, for these superiors operated with the intention that their subordinates *commit* genocide. See Osiel, *supra* note 7 at 1788. By contrast, many of the most egregious abuses committed in the course of the wars in Iraq and Afghanistan, *see supra* text accompanying notes 27-33, as well as those emerging from the Bosnian-Serb conflict, *see e.g., supra* text accompanying notes 38-48, begin as the rogue acts of a handful of soldiers that come to redound to their

*subordinates' offense in this way that he ought to be held criminally liable for it.*²²² As Immanuel Kant notes, if those charged with punishing “fail to do so, they may be regarded as accomplices” and the “bloodguilt” of the perpetrator’s crime will come to rest with them.²²³

Dereliction of duty does not track the commander’s contribution to the wrong. The commander who is derelict in his duty to punish offends against the state that bestowed upon him the obligation to punish. But commanders who endorse or acquiesce in their troops’ atrocity do more than just neglect their obligations to the state; they add to the injury of the atrocity.²²⁴

superiors only after the fact, and because these superiors willfully turn a blind eye or cover them up.

²²² It will be useful to distinguish the argument I advance from a strategy proposed by Mark Osiel in his efforts to find a legally cognizable way of holding members of an officer corps responsible for atrocities committed by their subordinates. Osiel summarizes his proposal as follows: “When a high-level officer is convicted of mass atrocity, fellow officers of the same or higher rank within his relevant unit would collectively suffer monetary sanctions.” Osiel, *supra* note 7 at 1842-43. Osiel describes the fellow officers as “well-positioned bystanders,” *id.* at 1844 – that is, individuals who could perhaps have averted the atrocity had they interceded. The rationale for his approach lies in its deterrent effect; he concedes that the approach does not hew to liberalism’s insistence upon individual guilt. *See id.* at 1845-46. The approach I advance, by contrast, does not view commanders who omit to intercede as mere bystanders; instead, because they have a duty to intercede, their omission constitutes a ground of culpability. Thus officers are held responsible not in spite of concerns about individual guilt but precisely because they bear such guilt.

²²³ Immanuel Kant, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 102 (John Ladd trans., 1965) (quoted in Hampton, *The Retributive Idea*, *supra* note 168 at 131).

²²⁴ In what sense, one may wonder, does a commander add to the atrocity of his troops if he fails to investigate a suspected atrocity, yet it subsequently emerges that no underlying offense was in fact committed? For example, on some accounts of the Haditha incident, the Marines are believed to have acted within the scope of their rules of engagement. *See, e.g.,* Walker, *supra* note 130. If these accounts are correct, what does the commanding officer’s failure to conduct an investigation into the civilian casualties, as both his superiors and the victims’ families urged that he do, *see supra*, text accompanying note 174, entail for his guilt on the expressive theory advanced here?

Again, we are concerned only with cases where the commander neglects to investigate because he believes that the alleged victims deserve to be treated as they claim to have been treated (i.e., he would endorse his subordinates’ atrocity, were they to have committed one), or he believes that investigating the alleged atrocity is contrary to his personal interests (i.e., he acquiesces in the alleged atrocity). In such cases, the commander’s failure to investigate wages an expressive harm, but there is no underlying offense to compound with that harm.

I believe that the appropriate analog for these cases is the doctrine of attempt. Where one attempts, but fails, to harm another, it is fair to say that the intended victim nonetheless suffers an expressive injury, for one’s *intention* to harm her already communicates that one believes that she deserves no better. Moreover, the person who made the attempt is prosecuted for more than just this expressive injury; because it is a merely a matter of moral luck that his efforts were thwarted, the law does not greatly discount his punishment, relative to that of the successful offender.

The commander who fails to investigate out of endorsement or acquiescence, then, is like the person who attempts a crime: He seeks to align himself with the atrocity.

For similar reasons, a finding of conduct unbecoming,²²⁵ or a demotion in rank,²²⁶ fails adequately to respond to the nature of the commander's injury. The commander's participation in the atrocity of his troops, which results from the expressive harm his failure to punish lends to his soldiers' act, already reveals him to be unworthy of the prestige and authority that attaches to a command position. Demoting the commander, or sanctioning him for conduct unbecoming, is just a formal acknowledgment that he occupied a position superior to that which he deserved; these penalties do not address the expressive harm itself.²²⁷

Finally, I am doubtful that the doctrine of complicity would extend to the harm of acquiescence or endorsement that I articulate here. International law's understanding of accomplice liability would almost surely fail to capture cases of endorsement or acquiescence. As William Schabas notes, an element of accomplice liability in international law is that the accomplice "must have contributed in a material way to the crime."²²⁸ Since the commander's failure to punish arises after his subordinates have completed their acts, his failure cannot be said to have made a material contribution. Domestic law operates with a much more capacious understanding of complicity, however. More specifically, domestic accomplice law extends to cases where the defendant's contribution did not make an actual difference though it could have done so.²²⁹ Further, some scholars have argued that accomplice liability

The fact that no atrocity occurred should exculpate him no more than the fact that no crime eventuated should exculpate the person who attempted the offense.

²²⁵ See, e.g., Hillman, *supra* note 10 at 5 (suggesting that the officers implicated in torture at Abu Ghraib could, at least in theory, have been prosecuted under the "conduct unbecoming" provision of the UCMJ, art. 133, [10 U.S.C. § 933 \(2000\)](#) ("Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.")).

²²⁶ Such was the penalty imposed upon Sergeant Selena Salcedo, who was implicated in the abuse of a detainee at Bagram Airforce Base that eventually led to his death. Salcedo pled guilty, and received a sentence of a one-grade reduction in rank, along with a \$1000 fine, and a written reprimand. Ohman, *supra* note 23 at 111.

²²⁷ To wit: suppose the military brass were contemplating whether to promote a soldier to a command position when they learned that, before joining the military, the soldier had committed an expressive injury similar in magnitude to the commander's. The brass might, on the basis of that information, deny the soldier the promotion. But their doing so would not be a form of punishment; it would be a reflection of their assessment that he was unfit for a command position. Cf. Murphy, *supra* note 168 at 27 ("The suffering occasioned by falling from a position that (as one's wrongful actions demonstrate) one had no right to occupy in the first place hardly seems relevant from the moral point of view.")

²²⁸ William A. Schabas, *Enforcing International Law: Catching the Accomplices*, 83 INT'L REV. OF THE RED CROSS 439, 446 (2001).

²²⁹ The classic case for this proposition is *State ex rel. Attorney General v. Tally*, 102 Ala. 25, 69, 15 So. 722, 734 (1894). The Model Penal Code may be even more permissive insofar as it considers the mere attempt to offer aid or encouragement as a ground of complicity. See Model Penal Code 2.06(3)(a)(ii).

holds,²³⁰ or ought to hold,²³¹ even where there was *no* possibility that the defendant's contribution could make a causal difference, so long as she intended to offer aid or encouragement to the principal offender. If one adopts this last conception of complicity – again, one in which a person may be deemed an accomplice even if it would have been impossible for her contribution to make a difference – then one should feel free to understand the account advanced here as an instance of accomplice liability. But one need not rely on such an expansive view of complicity in order to embrace the mode of liability view, for the analysis of the command structure and the expressive upshot of the failure to punish that I offer here are, I believe, sufficient to sustain the mode of liability view on their own.

In sum, where a commander fails to punish because he endorses or acquiesces in his subordinates' offense, we ought to hold him criminally liable for that offense. Doing so appropriately responds to the nature of the harm he has inflicted, and restores the victim to a position of equal worth. I turn now to scholarly objections, in an attempt to argue that these should not dampen our enthusiasm for the mode of liability view.

C. Scholarly Resistance to the Mode of Liability View

To hold a commander liable for an atrocity of his troops that he neither ordered nor knew about in advance has been deemed “the most conspicuous departure of the ICTY Statute from the principle that conviction and sentence for a morally disqualifying crime should be related to the actor's own conduct and culpability.”²³² So sacrosanct is the principle of personal culpability that the ICTY Appeals Chamber has termed it “the foundation of criminal responsibility.”²³³ Further, scholars have anointed the principle of personal culpability as “the key to establishing legitimacy in international criminal law,”²³⁴ and “one of the most serious candidates for inclusion” within a hypothetical “catalog [of] general principles of law so widely recognized by the community of nations that [it] constitute[s] a subsidiary source of public international law.”²³⁵ In response to these high-minded statements, this section

²³⁰ See Michael S. Moore, *Causing, Aiding and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395, 442-43 (2007).

²³¹ See Kutz, *supra* note ____ [Causeless Complicity] at ____.

²³² Damaska, *supra* note 57 at 468. Damaska is here referring to just one of two kinds of failures to punish. I go on to argue that the distinction is misguided, and that neither kind violates the culpability principle. See *infra* text accompanying notes ____.

²³³ Prosecutor v. Tadic, ICTY Appeals Chamber, Case No. IT-94-1-A (Int'l Crim. Trib. for the Former Yugoslavia Appeal Judgment, July 15, 1999), at para. 186.

²³⁴ Danner and Martinez, *supra* note 16 at 97; see also Damaska, *supra* note 57 at 470-71.

²³⁵ Damaska, *supra* note 57 at 470.

endeavors to show that the mode of liability view does not in fact contravene the culpability principle.

As a preliminary matter, it will be useful to confront a purported moral distinction, first articulated by Mirjan Damaska, between varieties of failure to punish.²³⁶ On the first variant of the failure to punish, a commander fails, on successive occasions, to punish an atrocity of her troops; as a result, the commander's earlier failure (or failures) to punish causally contribute to subsequent atrocities that her troops commit, as her troops come to expect that their misconduct will be treated with impunity.²³⁷ Damaska notes, correctly, that the failure to punish recurring offenses is tantamount to the failure to prevent, if not a form of accomplice liability.²³⁸ Here, concerns about violating the principle of culpability do not arise, because the commander is believed to have played a culpable causal role in her soldiers' offense.

By contrast, on the second variant, the failure to punish is an isolated event; no further atrocities are committed by the commander's subordinates and so the failure cannot be said to bear a causal connection to their wrongdoing.²³⁹ It is here that Damaska sees "the most conspicuous departure" from the culpability principle.²⁴⁰ For the sake of brevity, let us call the first variant, *failure to punish repeat offenders*, and the second, *failure to punish one-time offenders*.

Damaska is correct that there are indeed two analytic categories of failure to punish. But he is wrong to attach the normative significance to them that he does. First, the commander who fails to punish one-time offenders may nonetheless bear causal responsibility for subsequent atrocities committed by soldiers who are *not* under his effective control. The commander's failure may signal the tolerance of the military as a whole, and so soldiers within the same military who fall under someone else's command may infer that their offenses will be treated with impunity. But even setting aside the relationship between a failure to punish on one occasion and any atrocities committed subsequent to that failure, we have good reason to think that the failure to punish is at least sometimes a ground of culpability for the underlying offense. In particular, the thrust of my argument in the last section was that the failure to punish, where it is motivated by endorsement or acquiescence in the underlying offense, wages an expressive injury that makes the commander a party to the underlying offense. On this argument, then, it is not relevant whether the commander's failure to punish precipitates further war crimes -- whether of her own soldiers or someone else's. In

²³⁶ *Id.*

²³⁷ Mirjan Damaska, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455, 467-68 (2001).

²³⁸ *Id.*

²³⁹ *See id.* at 468.

²⁴⁰ *Id.*

cases of endorsement or acquiescence, the failure to punish is sufficiently culpable *in its own right* to warrant criminal liability.²⁴¹

Damaska is misled, I believe, at least in part because he ignores the role of the command structure in making a commander a presumptive candidate for liability. For example, he argues that holding a commander responsible for the crime of his subordinates solely on the basis of the commander's failure to punish is akin to "stigmatiz[ing] a parent as a thief when his child commits a larceny."²⁴² But the analogy between parents and commanders is misguided. In the typical family, adult-children are not empowered to act on behalf of their parents. Even the parent who approves of his child's transgression is not thereby made an author of, or party to, that transgression. To be sure, the parent who has taught his child to valorize wrongful acts of violence may bear some responsibility for the violent acts his child goes on to commit. But the parent's responsibility then flows not from the parental relationship itself but instead from the parent's inculcation of a violent disposition in his child. By contrast, we have seen that the very structure of the relationship between a commander and her subordinates is such that the subordinates' acts, at least when of a military character,²⁴³ presumptively redound to

²⁴¹ In the course of arguing that the Bush administration lawyers who authored the so-called torture memos bear responsibility for the administration's unlawful interrogation techniques, Christopher Kutz raises a consideration that, I believe, further undermines the distinction between one-time and repeat failures to punish. He writes: "Conceptually, ratification of prior acts in contexts where that ratification may have future effects looks a lot like a failed attempt to aid or encourage the prior acts, where the aid or encouragement is of a type that is generally appropriately targeted by criminal law because of its possible consequences." Kutz, *supra* note ____ at _____. To put the point another way, the lawyer who ratifies earlier acts of torture does not know, at the time that he drafts his memo, that the memo's stance will not lead to future acts of torture. Imagine, then, a hypothetical world where a lawyer drafted a set of memos identical to the "torture memos" but, because of some turn of events outside his control, no further interrogations were conducted and so the administration had no further opportunities to torture those it had detained. The difference between this hypothetical world and the actual world is simply one of moral luck: Our hypothetical lawyer cannot be credited with the fact that his memos did not result in further acts of torture. He is thus no less culpable than is the lawyer in the real world whose memos did (on Kutz's argument, anyway) produce further acts of torture. By the same token, the commander whose failure to punish does not eventuate in the commission of further atrocities by his soldiers is no different, from an expressive standpoint, from the one whose failure to punish does facilitate the commission of further atrocities. To paraphrase Joel Feinberg, though the latter commander may be culpable for more, he is not more culpable. Joel Feinberg, *Collective Responsibility*, in *COLLECTIVE RESPONSIBILITY: FIVE DECADES OF DEBATE IN THEORETICAL AND APPLIED ETHICS* 53, 68 (Larry May and Stacy Hoffman eds., 1991).

²⁴² Damaska, *supra* note 57 at 470.

²⁴³ To be sure, the presumption does not arise for every act that the subordinates carry out. If, for example, they decide to chip in for what becomes a winning lottery ticket, there is no presumption that the commander ought to share in, or authorize distribution of, the winning funds. This is because the shared purchase of a lottery ticket does not fall within the scope of acts over which the commander has authority over his troops.

their commander. Unless she takes steps to dissociate herself from their action, or can justify her failure to do so, she incurs ownership of their acts, whether she ordered these or not. Damaska's appeal to the parent-child relationship ignores the normative dimensions of the relationship between a commander and her troops.

A more general problem with those, like Damaska, who invoke the culpability principle, is that they simply beg the question as to what it entails. For example, Chantal Meloni objects to the mode of liability view because she believes that "no one, in fact, can be punished for a wrongful act unless the act is attributable to him."²⁴⁴ But the question of when an act is attributable to someone is precisely what is at issue. The point of the expressive theory advanced in the last section was to establish that an atrocity begun by a commander's subordinates *can* legitimately be attributed to the commander where he unjustifiably fails to punish it. In a similar vein, Damaska contends that the problem with the mode of liability view is that it attaches "opprobrium" to the commander "for heinous conduct to which he has in no way contributed."²⁴⁵ But again, whether the failure to punish counts as a contribution is just what's at stake.

Other scholars who object to the mode of liability view seem to hold that one may be culpable of an offense only if one causally contributes to it, and does so at least recklessly, if not intentionally.²⁴⁶ These scholars reason that the commander who fails to punish could not have *caused* his subordinates' atrocity, because his failure to punish necessarily takes place after his subordinates have participated in the atrocity, and one cannot cause an event that has already occurred. In this way, these scholars conclude that holding a commander liable for his subordinates' atrocity simply because he failed to punish it violates the principle of personal culpability.

The problem with the line of argument just advanced is twofold. First, the culpability principle need not be so narrowly construed – there are established departures from it in both municipal and international

Existing doctrine regarding the scope of a commander's authority is sufficient for purposes of determining which acts are of a military character.

²⁴⁴ Meloni, *supra* note 22 at 633.

²⁴⁵ Damaska, *supra* note 57 at 468.

²⁴⁶ See, e.g., Danner and Martinez, *supra* note 16 at 147 (citing with approval ICTY caselaw that requires something more than mere negligence for conviction on a command responsibility theory, because this caselaw preserves the culpability principle); O'Reilly, *supra* note 59 at 150 ("In sum, a respect for human dignity under the law requires a certain level of individualized fault before criminalization and punishment are appropriate. In those instances in which superiors are held liable for negligently failing to prevent or punish crimes of subordinates, the doctrine of command responsibility offends this basic tenet.").

law.²⁴⁷ Further, the account I advance respects the requirements of even this narrow construal: Commanders who fail to punish their subordinates because they endorse or acquiesce in the subordinates' offense cause further injury, and they intend, or at least recklessly render, that contribution. In short, those who assail the mode of liability view because they do not believe that a failure to punish constitutes participation in the subordinates' offense lack a proper appreciation of the expressive injury inflicted by the commander's failure.²⁴⁸ Put differently, the account I have proposed does not seek to depart from a theory of "just deserts";²⁴⁹ it just sees "just deserts" that have heretofore gone unnoticed.

IV. CONCLUSION: FROM A FEW BAD APPLES TO NATIONAL RESPONSIBILITY

The mode of liability view has a venerable history, recorded in written pronouncements in international and domestic law. Yet military jurists have resisted this view, and legal scholars have rejected it, because they have not appreciated that commanders who unjustifiably fail to punish an atrocity contribute to the injury the atrocity waged. This Article has urged that commanders who decline to punish their troops because they endorse their troops' atrocity, or because they put their interests before those of the atrocity's victims, ought to be held liable for the atrocity itself. In such cases, to construe a commander's failure to punish solely as a dereliction of duty is to compound the atrocity's expressive injury further.

If the account I have advanced here does reflect an improvement over current doctrine, then it will be worth noting that its implications may extend beyond criminal liability for individual commanders. For, at some point, the failure to punish may rise so high up the chain of command that one wonders whether the atrocity's perpetrators come to include not just the soldiers who initiated it and the commanders who

²⁴⁷ Consider, for example, the felony-murder rule or conspiratorial liability on a *Pinkerton* theory, in domestic law, or the doctrine of joint criminal enterprise in international law.

²⁴⁸ Damaska advances a related question-begging argument when he worries that holding a commander criminally liable solely because of his failure to punish risks impugning the legitimacy of international judicial decisions, and inviting sympathy for defendants convicted on this ground. *Supra* note 57 at 477-78. He concludes: "All in all, then, the employment of imputed forms of command responsibility could be detrimental to the socio-pedagogical mission of international criminal justice." *Id.* at 478. But a doctrine that fails to respond to the expressive contribution a commander wages where he fails to punish an atrocity because he endorses or acquiesces in it no better serves the "socio-pedagogical mission" of international criminal justice.

²⁴⁹ *See* Damaska, *supra* note 57 at 469.

failed to punish it, but the whole nation in whose military they serve. Consider, for example, the case of Captain Carolyn Wood, chief military officer at the Bagram Control Point in Afghanistan in December 2002, when two Afghan detainees died as a result of harsh interrogation techniques.²⁵⁰ Army investigative reports conclude that Captain Wood lied when she told investigators that detainees' hands were shackled above their heads in order to protect army interrogators; in fact, the reports uncovered, the shackling was part of an effort to inflict pain and sleep deprivation.²⁵¹ Though a handful of the twenty-eight soldiers implicated in the assaults have been prosecuted, no action has been taken against Captain Wood.²⁵² After leaving Afghanistan, she went on to help establish the interrogation unit at Abu Ghraib. She has since been awarded two bronze stars, one each for the services she provided in Afghanistan and Iraq,²⁵³ and is currently stationed at the Army's Fort Huachuca base, where she is charged with instructing soldiers about interrogation techniques.²⁵⁴ The Administration's treatment of Wood is tantamount to its retroactive authorization of the interrogation techniques she oversaw, and so the possibility of widespread government complicity, if not national responsibility, arises. On similar grounds, one might seek to indict Serbia for having knowingly harbored Radovan Karadzic, the Bosnian Serb leader charged in the worst massacre since World War II.²⁵⁵

Serious consideration of the prospect of national responsibility will have to await another day. Even in its more modest guise, the account advanced here gives a legally cognizable shape to our sense that many wartime atrocities are attributable not just to the young, dumb soldiers who appear in the photographs or grainy video footage taken at the time that the physical injuries occurred. Commanders who neither ordered nor even knew about these atrocities in advance will also have blood on their hands, at least figuratively speaking, if they unjustifiably failed to punish the subordinates who initiated these offenses. International and domestic law should address these unjustified failures

²⁵⁰ See Douglas Jehl, *Army Details Scale of Abuse of Prisoners in an Afghan Jail*, N.Y. TIMES, Mar. 12, 2005.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ See *A Few Bad Apples?*, CBC Documentary, Nov. 16, 2005. Information about the documentary can be found at <http://www.cbc.ca/fifth/badapples/index.html>.

²⁵⁴ *Id.*

²⁵⁵ See Dan Bilefsky, *Karadzic Arrest Is Big Step for a Land Tired of Being Europe's Pariah*, N.Y. TIMES (Jul. 23, 2008). Serbia's participation in Karadzic's arrest is seen as an about-face from the policy of providing official protection to Karadzic – a policy motivated by nationalist suspicion of the ICTY, and abandoned in the wake of the recent election of a pro-Western government and the prospect of membership in the European Union. See *id.*

to punish in a way that captures the expressive injuries these failures entail.