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Military Superior's Duty to His Subordinates, A

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A MILITARY SUPERIOR'S DUTY TO HIS SUBORDINATES

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I. INTRODUCTION

The virtual institutionalization of military service since World War II, as a normal part of the life of every young American, a fact which shows little sign of change in the near future, has made military law, once the exclusive domain of a handful of specialists in the Judge Advocate General's Corps, a matter of interest to every lawyer in the United States, and an area of special concern to that large growing pool of young lawyers facing active duty or reserve training at home. Within the ambit of this field, a neglected but significant area of inquiry is the legal duty owed to a subordinate by his superiors. Stated from another viewpoint, what protection does a subordinate have against the acts of superiors, and what are the acts which the law protects him against?

From time to time in recent years, we can see from the daily press that superior officers have been criticized and even court-martialed for violation of the rights of their subordinates. Cases occur where superiors strike men below them, make them stand in the sun, beat them, and even take them on a "death march." Each of these instances raises the

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Ed. Note: Following is a key to the abbreviations used herein:
AGN—Articles for the Government of the Navy;
A-P—South West Pacific Area (A), Pacific (P) (United States Army);
BR—Board of Review (United States Army);
CBI—China-Burma-India;
CBI-IBT—China-Burma-India-India Burma Theater;
CM—General Court-Martial (United States Army);
CMO—Court-Martial Orders (United States Navy);
CMR—Court-Martial Reports—The Judge Advocates General of the Armed Forces and the United States Court of Military Appeals;
Dig. Op. JAG—Digest of Opinions of the Judge Advocate General of the Army;
ETO—European Theater of Operations (United States Army);
GCMO—General Court Martial Orders;
IBT—India Burma Theater;
MO-JAGA—Memorandum Opinions of the Judge Advocate General of the Army;
NCM—Navy Board of Review Decision;
USCMA—Official Reports, United States Court of Military Appeals.

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problem of where the use of a commander's authority ends, and its abuse begins.

This article will explore that area of the military law. The significance of this area in placing the legal status of a military superior in proper prospective is obvious; its importance to subordinates in the military requires no demonstration. As for its value in determining the fitness of one to be a military leader, an old naval case declared:

> A dictatorial and an unnecessarily severe manner in handling enlisted men is one of the most severe defects that can be possessed by an officer. An officer is necessarily charged with much authority, and the abuse thereof, more than any other one feature in an officer's character, is conclusive as to his unfitness for the trust imposed in him.[1]

II. The Duty of Protection

A. *The Origin of the Duty*

In the year 1883, the United States Steamer *Ashuelot,* then on cruise, struck a rock and commenced sinking. The commanding officer ordered all hands to their duty stations to save the ship. The junior officers and men assigned to the fireroom and engine room of the vessel went there, and prepared to stay until ordered out, in spite of the extreme hazard they faced.

It is obvious from their actions that the above individuals were in the naval service of the United States. Had they been civilians, a group of individuals with no obligation to each other, it is reasonably probable that each of them would have turned his primary attention to the task of saving his own life. This normal desire was thwarted, and the normal ability of the individuals to effectuate the desire was impaired by the order of the commanding officer. Such order the men were bound to obey, just as they would have been bound to obey it today had it been given under similar circumstances. Criminal sanctions, extending to death in wartime, would be available to enforce the order.[2]

Because of the constraint under which the men in the engine room operated, it is clear that when the ship became so imperiled that its commander ordered it abandoned, and so informed the engineer in charge,

1. CMO 42-1915, P. 11.
2. Uniform Code of Military Justice, Art. 90, 10 U.S.C., § 90 (hereinafter called UCMJ).

if the engineer abandoned the vessel without previously seeing that the men in his department had received the order and were sent up from below, he needlessly and greatly risked the lives of his subordinates.[3] The men, ordered to stay at their posts, would do so until the ship sank.[4] Thus the constraint of the power, exercised by military superiors, made it necessary for them to protect their subordinates, or leave them to the mercy of the dangers the superiors themselves had created or aggravated.

The eminently just legal rule that power begets responsibility for its exercise is nowhere more clearly illustrated than in the genesis of the duty of protection. In civilian life, a person has the natural right and ability of self-protection against the economic, social, and natural forces around him. He is free to act to counter these forces. In the military, however, his freedom to so act is restricted, and such restriction may take the form of geographic or even physical limitations on his ability to defend himself against the vicissitudes of life. Hence, his interests must go unprotected unless his superiors, the very persons whose authority restrains him from the natural protection of his own interests, undertake to assume that obligation themselves.

For example, if a civilian were advised by a friend that the stock market was falling and that he must sell his holdings or be wiped out, the civilian could act in self-defense against the economic danger by calling his broker and ordering the sale. But a soldier in a similar predicament might be in such a place or under such orders that he would be prevented from making the call. Since his natural right of economic self-defense is curtailed by the superior's authority, it is only just to impose upon the superior the obligation to care for the interests of the subordinate by making the call himself.[5]

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3. GCMO 21, Navy, July 6, 1883.

4. GCMO 22, Navy, July 26, 1883, at 4: "As senior assistant to the engineer in charge his post of duty was the engine room, and although he may have been relieved from further duty at that post by an order to join his boat, he was not thereby relieved from his obligation, as senior officer, to look after the safety of the subordinate officers and enlisted men who were below on duty in the engineer's department. He knew better than they the imminence of their danger, aggravated as it was by their isolated position; he knew that, if not aware of the order, 'all hands abandon ship,' the requirements of discipline would keep them at their posts of duty until ordered away, although liable, at any moment, to go down with the vessel; yet, knowing all this, and with sufficient time to warn them, if necessary, of their danger and, by ordering them on deck, give them the same opportunity to save their lives that he had to save his own, he neglected to do so, and while abandoning the ship, abandoned them, also, to their possible fate."

5. *Cf.* CM 277485, Patnode, 51 BR 131 (1945); CM 323234, Mead, 72 BR 165, 171, 173 (1947). And also note the World War II "Railroad Conspiracy

The existence of the duty of protection also stems from recognition of the fact that subordinates will perform their tasks more readily and more efficiently if assured that their superiors have an obligation to attend to their welfare in those situations in which, because of the duties imposed on the subordinates, they are unable to fend for themselves. Indeed, modern social science authority confirms the universally known fact that a soldier with problems on his mind is less able to devote his whole thought and energies to the military tasks at hand.[6] This is all the more true when the superior himself creates the situation to be redressed. As an old naval case declared, "nothing is more productive of discontent, and a consequent lack of prompt obedience, on the part of subordinates, than the exposition of a tyrannical disposition, united with a disregard of legal restraints on the part of their superiors."[7]

Of course, like other military duties, the duty of protection is subject to overriding military necessity, and in fact basically the same defenses may be interposed to a charge of failure to perform this duty as may be interposed to a charge of failure to perform other duties. For example, the superior may plead that performance was impossible. In the above instance, the superior's failure to relay the urgent private message from a subordinate would be excused when the superior has no means of communication available to him. Likewise, performance of the duty may be illegal, as where, in the above instance, transmission of the message may involve a breach of a higher authority's order to maintain radio silence. So too, a conflict of orders or duties may be pleaded; the superior may have more urgent messages to transmit. A mistake of fact on the part of the person whose request gives rise to the duty is a defense; at the time the request is made the soldier may be in error in thinking that

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Cases," ETO 18418, Springer, 33 ETO 375 (1945) and ETO 18408, Loop, 33 ETO 367 (1945). In the latter case, commenting on a conviction under the general article for converting cigarettes, "thereby contributing to a shortage of cigarettes in the European Theater of Operations, which cigarettes were intended and necessary for morale of the armed forces during a critical period of combat operations," the board of review declared at 369: "the evidence . . . disclosed wholesale pillaging of United States Government property, furnished and intended for the military service thereof, by members of that battalion from trains which they operated, and that this looting and pillaging contributed to a shortage of military supplies during a critical period of combat operations."

6. See generally, GINZBERG, THE INEFFECTIVE SOLDIER (1959).

7. GCMO 1, Navy, Jan. 3, 1883. To the same effect see G.O. 217, Navy, August 12, 1876. And as Judge Latimer declared in United States v. Greenwalt, 6 USCMA 569, 20 CMR 285, 290 (1955), "the concept that 'loyalty down breeds loyalty up' is deeply ingrained in the military, and is, in almost all instances, a salutary one."

the market is falling. A change of circumstances, such as a rise in the market, may intervene; this too is a defense. A mistake of fact on the part of the leader who has the duty is a good defense; he may, for instance, honestly and reasonably believe that the requested call really is not urgent.[8] In sum, all standard defenses apply to a charge of failure to perform a military duty of protection.[9]

Like military duties in general, the superior has a duty to mitigate the damage resulting from a failure to perform a duty of protection. For example, taking the above illustration one step further, if the superior was unable to transmit the urgent message of his subordinate at the time it was requested, but later became able to do so, he would be required to send the message at the later time. Here again, this particular duty ties into the larger pattern of military duties in general.

B. *The Duty as a Corollary of Command*

An intentional violation of the duty of protection, as will be shown below, is punished as oppression. It is required by statute that the person oppressed be "subject to the orders" of the accused.[10] A negligent violation is not specifically made punishable by the Uniform Code of Military Justice, but it seems clear that the same element is required. The reason for this is that the duty of protection is co-extensive with and reciprocal

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8. At first blush, the equation of a mistake of fact of a subordinate with the typical defense of mistake of fact of authority, and the defense of mistake of fact on the part of the superior, with the defense of mistake of fact of accused, would appear to be a striking anomaly, in fact a complete reversal of roles. See AVINS, THE LAW OF AWOL (1957), pp. 188 *et seq.* This surface inconsistency stems from the fact that while normally the subordinate's defense is based on the mistake of fact of the superior or his own mistake as to the extent of duty imposed by a superior, here the superior's defense is based on a mistake of fact on the part of a subordinate, or his own mistake as to what extent the subordinate's communication imposes a duty on him.

But this surface inconsistency is more apparent than real. Since the duty of protection is the corollary duty to the duty of obedience, more generally enforced, it constitutes a duty owed by a superior to his subordinates, and hence the roles in the typical quasi-Hohfeldian right-duty relationship in the military are here reversed. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 32 (1913). It follows that the defenses based on the relationship likewise should be reversed. That they are in fact so reversed is significant proof of the logic, consistency, and harmony in the pattern of the military law.

9. See generally, AVINS, THE LAW OF AWOL, "The Defense's Case" pp. 141 *et seq.* (1957).

10. UCMJ, Art. 93; MANUAL FOR COURTS-MARTIAL, U.S. 1951, para. 172; Exec. Order No. 10214, 16 Fed. Reg. 1303 (1951) (hereinafter referred to as MCM, U.S., 1951). *Cf.* CMO 3-1938, P. 4.

to the duty of obedience. Non-performance of the duty is a malfunction of command.[11] The same rule appears to prevail under British and Commonwealth law, notwithstanding statutes with somewhat different wording.[12]

For example, a person cannot issue an illegal order which will oppress one not subject to his orders since the latter will not be tempted to obey. The reason is that whereas the presumption of legality induces many subordinates to obey orders of their superiors which are illegal, if the recipient of an order need not obey it in any case, he will not be constrained to obey an illegal order. Likewise, while a person normally attends to his own welfare first, the orders of a superior can divert his attention and efforts to other tasks. But if the order is issued by one whom the recipient need not obey, the superior would be unable to divert the attention of the recipient and hence need not assume the burden of assuring that such diversion would not leave his welfare unattended.

A good illustration of the reason for the above rule occurred in a World War II case where the accused, a first lieutenant who was drunk at the time, said to a private first class: "I am going to hit you in the face, the funny thing about it, you can't do anything about it because I am an officer." The accused then hit the soldier, for which he was con-

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11. Hence the uniform holdings that one guilty of maltreatment or oppression should be removed from command. CMO 8-1927, P. 3; CMO 9-1936, P. 23.

12. Army Act of 1955, 3 & 4 Eliz. 2, c. 19, § 65 provides: "If (a) any officer subject to military law strikes or otherwise ill-treats any officer subject thereto of inferior rank or less seniority or any warrant officer, non-commissioned officer or soldier subject to military law, or (b) any warrant officer or non-commissioned officer subject to military law strikes or otherwise ill-treats any person subject to military law, being a warrant officer or non-commissioned officer of inferior rank or a soldier, he shall, on conviction by court-martial, be liable to imprisonment for a term not exceeding two years or any less punishment provided by this Act."

The National Defence Act of Canada, 1950, c. 43 § 86, 3 CAN. REV. STAT. ch. 184 (1952) at 3825, declares: "Every person who strikes or otherwise ill-treats any person who by reason of rank or appointment is subordinate to him is guilty of an offence and on conviction is liable to imprisonment for less than two years or to less punishment." The Indian Army Act (No. 46) of May 20, 1950, 1 INDIA CODE, Armed Forces, (1955) § 47, at 227 provides: "Any officer, junior commissioned officer, warrant officer or non-commissioned officer who uses criminal force to or otherwise ill-treats any person subject to this Act, being his subordinate in rank or position, shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to seven years . . . ." The New Zealand Army Act of 1950, § 56, punishes "every officer or non-commissioned officer who . . . (a) strikes or otherwise ill-treats any soldier." And South African Defence Act (No. 44) of 1957, First Schedule § 16, provides: "Any person who assaults or points a firearm at or draws any weapon against or ill-treats any person who is by reason of rank or appointment subordinate to him, shall be guilty of an offence."

victed under the general article.[13] It is clear in the above case that the superior rank of the accused inhibited the private from exercising his natural right of self-defense. This converted a simple assault into an oppressive act.

In addition to the conventional cases wherein the person maltreated is clearly subject to the orders of the accused, there have been several borderline situations which have more clearly defined the meaning of that limitation. Thus, it has been held that a marine guard who was a private first class could maltreat prisoners whom he guarded,[14] since his status as a prison guard gave him limited power to issue orders.[15] Likewise, a third class midshipman at the Naval Academy was tried for oppression of a fourth classman, apparently on the theory that the accused had a limited power to issue orders to him.[16]

In *United States ex rel. Hirshberg v. Malanaphy*,[17] the petitioner, a Navy chief petty officer, was captured by the Japanese and interned in the Philippines during the early part of World War II. The Japanese placed him in charge of a work section of Americans at a prisoner-of-war camp, where he maltreated subordinates who were in the work section. After he was tried by a naval general court-martial and convicted of maltreatment of persons subject to his orders, he sought a writ of habeas corpus in the federal district court.

In federal court he contended that since his sole power to issue orders came from the Japanese, he did not issues orders as a petty officer but as a Japanese agent. Hence the persons maltreated were not subject to his orders as an American, and therefore the Articles for the Government of the Navy did not apply. The district court rejected this contention,[18] and its holding on this point was affirmed by the Court of Appeals for the Second Circuit.[19] When the case was reversed by the United States Supreme Court, it did not pass on this contention, since the point was not raised there.[20]

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13. CM P-1030, Gerwell, 4 A-P 301, 302 (1945).
14. United States v. Finch, 22 CMR 698 (NCM, 1956).
15. MCM, U.S., 1951, Paragraph 171b; AVINS, *op. cit. supra* note 9, at 229.
16. CMO 12-1913.
17. 73 F. Supp. 990 (E.D.N.Y. 1947).
18. *Id.* at 992.
19. United States *ex rel.* Hirshberg v. Malanaphy, 168 F.2d 503, 505 (2d Cir. 1948).
20. Hirshberg v. Cooke, 336 U.S. 210-12, n.1 (1949). See also CMO 6-1949, P. 127.

It would appear that this decision is clearly correct. An American officer or non-commissioned officer made a prisoner-of-war retains his power of authority to issue orders;[21] hence subordinates in the prison camp remain "subject to his orders." While a superior prisoner may have his power curtailed by the enemy, to the extent it is not, he may still divert, by orders, the attention or activity of subordinates. Since the reason for the rule is present, the rule is also.

A case in this area that arose during the Korean War is worthy of some note because it shows how a misconception of what a term in the Uniform Code of Military Justice means can arise if there is no resort to its historical derivation and application. The accused, a lieutenant commanding an American ordnance company in a supply storage compound in Korea, supervised the work of Korean nationals, who, as members of Korean Service Corps units performed manual labor for the United States Army. The accused had the power to take administrative action regarding the units, such as moving them around, having them work in specific areas, and enforcing working regulations.

The accused was convicted of having maltreated a member of one of the units and a board of review affirmed. After rejecting the contention that the phrase "any person subject to his orders" included only persons in the military service of the United States and did not include civilians or those occupying a comparable status vis-à-vis the accused, the board declared:

> We are of the opinion that the purpose of Article 93 is to prevent persons subject to the Code who are in a command capacity from maltreating those under their supervision, and it is immaterial whether or not such maltreated persons be subject to the Uniform Code of Military Justice. . . . [Here] the victim did have a duty to obey the lawful orders of the accused.[22]

As is more fully shown below, Article 93 was taken from the Articles for the Government of the Navy, which was designed principally to punish ship captains,[23] who, away from the restraint of any superior power or authority, were occasionally wont to inflict on their subordinates every

21. United States v. Floyd, 18 CMR 362 (CM, 1955); AVINS, *op. cit. supra* note 9, at 167.
22. United States v. Dickey, 20 CMR 486 (CM, 1956).
23. For an early example of this, see The Trial of Lieutenant James Renshaw, 17 Am. St. Tri. 650 (1808).

manner of unauthorized or cruel punishment or treatment, extending even to death.[24] But in all of the cited cases it was constantly reiterated that the gist of the crime was violation of the rights of military subordinates who were by law made dependent upon the commander for the enjoyment of their rights.[25] It is obvious that one not required by law to obey a commander is not in such a category.

Moreover, the Articles for the Government of the Navy contained two provisions, not merely one, punishing maltreatment. One punished maltreatment of persons subject to the orders of the accused;[26] the other punished maltreatment of an inhabitant while on shore.[27] It is clear that maltreatment of a subordinate while on shore was punishable under the former provision.[28] Hence, the only distinction between the two provisions is that the person maltreated in the former one must have been legally required to obey the orders of the accused. This means he would have to be subject to the Articles for the Government of the Navy, since that is the only source from which this duty could arise. It follows that when Congress adopted the Uniform Code of Military Justice, the successor to the naval articles, the requirement that the person maltreated be required to obey the orders of the accused was adopted as part of it.

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24. Cooper, NAVAL COURT MARTIAL TRIAL OF COMMANDER ALEXANDER S. MACKENZIE AND REVIEW (1844); Wilson v. MacKenzie, 7 Hill (N.Y.) 95 (1845).

25. In G.O. 168, Jan. 6, 1872 (Comm. A. A. Semmes), it is stated: "The first of the articles for the better government of the Navy enjoins upon all commanders of vessels to show in themselves an example of subordination. Charged as they are with the high and responsible duty of administering the law on board the ships and among the persons whom the law has intrusted to their care, often beyond the reach of revision or appeal, it is clearly their own first duty themselves to obey the law.

"Commander Semmes has been found guilty . . . of the crime of disregarding the legal rights and immunities of the men made dependent upon him for the enjoyment of these rights, and for common justice; and of punishing them in direct violation of the provisions of the law by which alone he was authorized to inflict any punishment whatever.

"[T]he sentence of the Court in this case must be sustained, not only as a punishment to Commander Semmes, but in the hope that it may operate as a warning to all who, intrusted like him with authority, are like him found to be unmindful or reckless of the rights of those who are placed under them; and to give assurance to the service and to the country that every such instance, when clearly established, will be severely punished.

"The service must understand and appreciate the fact that the Navy exists and is maintained by law alone; that its officers are superior in authority to the enlisted men only because the law has so elevated them; and that it is the interest of all officers, as well as their duty, to adhere with scrupulous fidelity to the laws enacted for their guidance."

26. AGN 8(2).

27. AGN 8(16). See CMO 11-1945, P. 438; CMO 30, 31-1920, P. 1.

28. See the specifications reprinted in United States *ex rel.* Hirshberg v. Malanaphy, *supra,* note 16. See also, CMO 30, 31-1920, P. 1.

In addition, the decision above is erroneous in reason. The rationale of the duty of protection is derived from the moral force which a superior possesses by virtue of the power he receives from the Uniform Code of Military Justice over his subordinates. His power and right to give orders stems, in the final analysis, from the criminal penalties imposed for failure to obey them. Enforcement is the key to the status of command, for orders without enforcement are only hortatory messages, having at best merely a persuasive impact. This being so, it follows that the only people who will be inhibited from resisting the oppressive acts of an officer are those who can be punished under the Code for resisting his lawful acts, and who therefore will be hesitant about taking the chance of deciding whether the act is lawful or not.

The board argued that since the officer had power over the Korean, the latter was "subject to his orders." This argument, if it proves anything, proves too much, for if mere power creates a command situation, then an officer who kidnaps a civilian at gunpoint may be guilty of violating Article 93 since, through force and fear, he can "order" the victim around. The fallacy in the board's analysis is that this provision punishes a malfunction of command, a malfeasance in office, and not the exercise of naked power. The superior must have the *right* to order, not merely the *might* to order. The conclusion follows that whatever may have been his physical ability to resist, since the Korean national was not inhibited from resisting *by the Code,* he was not "subject to the orders" of the lieutenant, and the board's decision was erroneous.

III. Intentional Violation of the Duty of Protection—Maltreatment

A. *Historical Derivation*

In 1777, Lieutenant General Burgoyne, commanding a force of British troops sent to cut New York State in half, was defeated at the decisive battle of Saratoga by the continental army, and surrendered his army on condition that they be interned and sent back to England safely. The defeated English troops, quartered under American guard near Cambridge, Massachusetts, became unruly. One day several of the worst offenders were assembled before some American officers. One of them commenced talking and persisted in doing so although repeatedly ordered to be silent. Finally the American commander used force to shut him up. For this he was tried for oppression but acquitted.[29]

29. Continental Revolutionary Government of the American Provinces on

From the above case, it can be seen that the military offense of oppression is very old, and has been part of the military law since the founding of the United States. Indeed, intentional violation of a subordinate's rights was an actionable tort at common law,[30] and when it resulted in the death of the subordinate, the superior was considered guilty of murder.[31] Moreover, the fact that a deserter left the service because his superiors had subjected him to cruel and arbitrary punishment, or other oppressive treatment, has been held to mitigate the offense of desertion.[32]

Oppression or maltreatment of subordinates today is punishable under Article 93 of the Code. This article does not define the terms "oppression" or "maltreatment," nor does the explanatory provision of the *Manual for Courts-Martial*.[33] But because it was adopted from the naval articles,[34] prior naval precedents should be used primarily in interpreting its provisions. Since, however, cases of oppression or maltreatment in the army likewise were punished, although under the general article,[35] and this fact was known to the drafters of the Code,[36] precedents under the general article are also relevant.

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the Complaint of General Burgoyne v. Colonel David Henley, 3 Am. St. Tri. 806, 855, 859-860 (1778).

30. Wall v. M'Namara, 1 T.R. 536, 99 Eng. Rep. 1239 (K.B., 1779); Kamoo v. Bassett, 1 Kyshee's Reports (Civil Cases, Straits Settlements) 1 (Ct. of Jud., P.W.I., 1808).

31. Wall's Case, 28 How. St. Tri. 51 (1802) (excessive flogging). *Cf.* Sutton v. Johnstone, 1 T.R. 493, 503-4, 99 Eng. Rep. 1215, 1221 (1786).

32. G.O. 13, Dept. of the Tenn., 1867; G.O. 3, Dept. of the Lakes, 1870; G.C.M.O. 58, Dept. of the East, 1872, noted in WINTHROP, MILITARY LAW AND PRECEDENTS, 643, n.69 (2d ed., 1920 reprint).

33. MCM, U.S., 1951, Paragraph 172.

34. *Hearings on H.R. 2498 (U.C.M.J.) Before a Subcommittee of the House Armed Services Committee,* 81st Cong. 1st Sess. 1227 (1949) reports that "This article (Art. 93) is derived from proposed AGN 9(12). The present Army practice is to handle an offense of this nature under AW 96." The Article for the Government of the Navy from which proposed AGN 9(12) was derived was AGN 8(2), which punishes anyone "guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders."

35. WINTHROP, *op. cit. supra,* note 32, at 726, gives as an example of an offense under the general article the "abuse of authority in assaulting or punishing inferiors," and cites in note 2 the following cases: "G.O. 81 of 1822; Do. 8 of 1826; Do. 28 of 1829; Do. 2, 17, 68 of 1843; Do. 39 of 1845; GCMO 80, 114 of 1875; Do. 112, Dept. of the East, 1870; Do. 50, Dept. of the Mo., 1871; Do. 35, Dept. of Texas, 1873; Do. 39, Id., 1874; Do. 33, Id., 1876; G.O. 9, Div. of the Atlantic, 1869; Do. 5, Id., 1870, Do. 20, Div. of the Pacific, 1869; Do. 53, Dept. of Va. & No. Ca., 1864; Do. 22, Dept. of the Platt, 1867. And see G.O. 23 of 1824; Do. 34 of 1842; Do. 4 of 1843; Do. 2 of 1844; Do. 32, Div. of the Pacific, 1867; Hough, 634. And note case in GCMO 7 of 1880, of harassing junior cadets."

36. See note 34 *supra.*

The offense of maltreatment is derived, in part at least, from the admiralty law, under which superiors on board a vessel have a duty to protect sailors under their charge.[37] So, too, an analogous duty exists in the law of master and servant: the duty to refrain from ill-treating a subordinate employee.[38] The cases in these areas illustrate anew the close relationship between military law and the law of employment.

Finally, through historical derivation, the offense of maltreatment can only be committed intentionally. Thus, in one case an enlisted man was being questioned by an officer. The man turned to leave without being dismissed, and the officer took hold of his shirt to detain him, whereupon the shirt was torn as the man "was pulling free." It was held that the officer was not guilty of maltreatment because there was reasonable doubt that the shirt was torn "wilfully and without justifiable cause."[39]

B. *Physical Abuse*

The first act mentioned by the *Manual for Courts-Martial* as oppressive is the assaulting of a subordinate.[40] This may be broadened to include any physical abuse.

Physical abuse of a person subject to the orders of an accused was considered oppressive under the British Articles of War.[41] Thus, where a commanding officer struck one of his subordinates in the face with a drawn sword, he was severely reprimanded by the King in general orders, although

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37. For cases in the maritime law, from which this article was taken, illustrating the duty of protection, as well as what is cruelty and oppression, see Limland v. Stephens, 3 Esp. 269, 170 Eng. Rep. 611 (1800); Shorey v. Rennell, 22 Fed. Cas. 1 (No. 12,806) (D. Mass., 1858); Anderson v. Ross, 1 Fed. Cas. 845 (No. 361) (D. Cal. 1871).

38. Green v. Baughman, 243 F.2d 610 (CADC, 1957); S. Unterberger R. Co. v. Wiley, 170 Ark. 976, 281 S.W. 899 (1926); Stover Mfg. Co. v. Latz, 42 Ill. App. 230 (1891); Youngblood v. Dodd, 2 La. Ann. 187 (1847); Doyer v. Crane, 6 La. Ann. 707 (1851); MacIntosh v. Abbott, 231 Mass. 180, 120 N.E. 383 (1918); Erickson v. Sorby, 90 Minn. 327, 96 N.W. 791 (1903); Corley v. Rivers, 107 Miss. 67, 64 So. 964 (1914); Henderhen v. Cook, 66 Barb. 21 (N.Y. 1866); Goldberg v. Moses, 277 App. Div. 1035, 100 N.Y.S.2d 1020 (1950) *reversing* 97 N.Y.S.2d 582 (1950), *aff'd* 302 N.Y. 834, 100 N.E.2d 36 (1951); Bovne v. Lyde, 3 Strob. 77 (S.C., 1848); Lone Star Cotton Mills v. Thomas, 227 S.W.2d 300 (Tex. Civ. App., 1949); Patterson v. Gage, 23 Vt. 558 (1851); Bishop v. Ranney, 59 Vt. 316, 7 Atl. 820 (1887); Williams v. Hammond, 4 W.L.R. 208, 16 Man. L.R. 369 (1906).

39. CMO 2-1943, P. 39.

40. MCM, U.S., 1951, Paragraph 172.

41. JAMES, A COLLECTION OF THE CHARGES, OPINIONS, AND SENTENCES OF GENERAL COURTS-MARTIAL (1795-1820), at 306, Lt. Lewis Helmond (1809) (striking sentinels); at 489, Lt. Peter Lawless (1813) (striking recruit with clenched hand). See also, Grant v. Shard, 4 Taut. 85, 128 Eng. Rep. 260 (1784). MANUAL OF MILITARY LAW 285 (1956), defines ill-treating a subordinate as, *inter alia,* kicking him.

the blow was inflicted without cruelty and without any material hurt.[42] Likewise, an officer was convicted of violently striking a soldier under his command with a stick and inflicting such injuries as to disable him from duty while their unit was on parade in the presence of many spectators near a church.[43]

When American military law was copied from the British, the rule punishing superiors who inflicted physical harm or abuse on subordinates was likewise adopted.[44] During World War II, numerous instances of such maltreatment were punished under the general article.[45] As a board of review declared in one case:

> As a military police officer, he was expressly forbidden to injure those under his authority by tyrannical or capricious conduct. Personal violence employed by an officer against a soldier has long been recognized as a serious military offense, except where circumstances may justify it as an extreme measure. As assault by an officer upon an enlisted man is not an authorized means of enforcing discipline, but an offense punishable under the appropriate Articles of War.
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> [T]he beating inflicted by the accused upon his relatively helpless victim was not an exercise of lawful authority, but a tyrannical, oppressive, and violent abuse of power such as to mark the accused as a person wholly unfit to be entrusted with authority over other men.[46]

Also punished under the same provisions were abuses of authority by prison officers. Thus, in one case, a prison officer was convicted under

42. James, *op. cit. supra* note 41, at 164, 167, Lt. Col. John Smith (1804).

43. *Id.* at 174, Major P. Monoux (1804).

44. 6 OPS. ATTY. GEN. 506 (1854) (kicking subordinate); Dig. Ops. JAG, 1912-40 § 453(3) at 341, Sept. 3, 1918; CM 118423 (1918) § 454(10) at 348. HOWLAND, DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY (1862-1912) at 149 gives as an example of a conviction under the general article "striking a soldier, or using any unnecessary violence against him. (Feb. 1890)." See also, Hagan, *The Judge Advocate General's Department in the American Expeditionary Forces,* 8 CALIF. L. REV. 300 (1920) at 311-12: "Another set of cases worthy of mention were the so called 'Prison Farm' cases, in which four officers and six sergeants were tried on charges of consistently abusing and maltreating soldiers apprehended as A.W.O.L. in Paris and gathered for safe keeping at Prison Farm No. 2. . . . All were found guilty of some offense which was a crime at civil law . . . ."

45. CM 242082, Reid, 26 BR 391 (1943) (striking soldier); ETO 3303, Croucher, 9 ETO 197 (1944) (striking enlisted man in face); ETO 7585, Manning, 18 ETO 201 (1945) (kicking soldier); ETO 8456, Thorpe, 19 ETO 245 (1945) (striking soldier in face with fist); ETO 9304, Suitt, 20 ETO 265 (1945) (same); CM P-1030, Gerwell, 4 A-P 301 (1945).

46. CM 277217, Sherman, 51 BR 99, 104 (1945). It might be noted that the accused officer in this case was enraged at the soldier's derogatory reference to his religion.

the general article for directing, permitting, and encouraging "prison guards to chase and prod, with shotguns and rifles, and fixed bayonets, prisoners under his jurisdiction and control while executing double-time orders."[47] So too, a lieutenant colonel was convicted of ordering a sergeant in a rehabilitation center to hit a private, and of seizing and shaking the private himself.[48] And a lieutenant was court-martialed for holding a mock firing squad and ordering a group of enlisted men under his control to aim pistols and fire upon a staff sergeant.[49]

Of perhaps more value for the purpose of interpreting Article 93 is the fact that naval law followed a parallel development, for as noted above, the present Code provision was copied from the naval articles. Thus, in naval law the term "maltreatment" has always included striking or kicking another person.[50] So too, under a charge of maltreating persons subject to his orders, an officer was convicted of "firing a revolver at their

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47. CM 238226, Campbell, 24 BR 215 (1943), Spec. 1.

48. CM 255436, Reed, 36 BR 93 (1944), Specs. 2, 7. In that case, it was said at 101: "It is clear that throughout the period under consideration, accused forced the various prisoners to do exercises and to double time beyond the point of exhaustion, ordered them struck with switches when they stopped or slowed down, and sat calmly by while those under his command administered this and other cruel treatment. He admitted ordering the switching of Laschisky, but claimed that the blows were not hard and were ordered because of Laschisky's defiant attitude. The prosecution's evidence refutes this claim. . . . In this connection the seizing of McCandless by the collar was in no way justified by the scurrilous remarks attributed by accused . . . if, indeed, any such remarks were made.

"Cruel treatment of soldiers constitutes a violation of Article of War 95 as well as Article of War 96. (MCM, 1928, par. 151). The mere fact that the soldiers were prisoners does not lessen the degree of culpability. One who is an officer and a gentleman does not engage in or countenance such brutal conduct."

49. CM 251542, Ball, 33 BR 277 (1944).

50. G.O. 35, Navy, May 5, 1864; CMO 78-1896; CMO 59-1897; CMO 53-1910; CMO 11-1945, P. 438; United States *ex rel.* Hirshberg v. Malanaphy, *supra* note 18. In NAVAL COURTS AND BOARDS, 1937, § 60 at 35, there is found the following model specification, taken from an actual case and approved by the Judge Advocate General: "while on duty as a turnkey of the barracks brig at said barracks, wilfully and without justifiable cause maltreat one D——— E. F———, mess attendant third class, U.S. Navy, a prisoner in said brig subject to the orders of the said C———, by assaulting and striking the said F———." And in NAVAL COURTS AND BOARDS, 1917 at 112, under the section for maltreating a person subject to his orders, is found the following model specification, likewise approved: "In that Lieutenant ———, U.S. Navy, serving on board the U.S.S. ———, did, on April 6, 1915, on board the said ship, wilfully and without justifiable cause assault and kick ———, mess attendant third class, U.S. Navy, serving on board the said ship." It might be noted that MCM, U.S., 1951, Appendix 6c at 476, contains a model specification for Article 93 using as an example the kicking of a subordinate in the stomach.

heels to hasten their movements."[51] And in the two naval cases reported since the Code was enacted, the decisions follow the same line.[52]

In addition to being maltreatment of a subordinate, which it clearly is, physical abuse of one subject to the accused's orders may be also considered oppression. This is because a subordinate is much less likely to defend himself against an unwarranted assault from a superior than from one not his superior. He has been taught that to strike his superior is a serious offense,[53] and will therefore hesitate much before he does so, even in self-defense. A superior who takes advantage of his legal position by inflicting harm while depriving a subordinate of the latter's normal ability to defend himself, appears to be acting in a clearly oppressive manner.

In cases where a superior has assaulted a subordinate, the almost invariable excuse given by the accused is that he did so to preserve discipline. With equal regularity the excuse is rejected.[54]

The use of force to preserve discipline is reserved as a last resort, to be employed only in extreme cases where it is imperatively required by the situation at hand. The correction of refractory individuals, it has long been held, should in all other cases be left to the normal course of military law, which provides adequate safeguards to insure that neither the punishment inflicted nor the manner of arriving at it will be unjust to the subordinate receiving it.[55] As one old naval case declared:

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51. CMO 30-31-1920, P. 1. The Judge Advocate General declared at 6: "the conduct of the accused was brutal and un-American almost beyond belief."

52. United States v. Reaton, 8 USCMA 697, 25 CMR 201 (1958) (marine pfc in charge striking recruit in stomach with fist); United States v. Finch, *supra* note 14 (marine pfc, prison guard, kicking prisoner and compelling prisoners to kick each other).

53. UCMJ, Art. 90, makes the striking or assaulting of a superior commissioned officer a capital offense in wartime.

54. CM 238970, Hendley, 25 BR 1 (1943) (seizing enlisted man by collar and striking him in the face); CM 239609, Mulroy, 25 BR 215 (1943) (same); CBI 122, Nappier, 1 CBI-IBT 123, 126 (1944) (grasping lapel of soldier's coat). See also ETO 4526, Archuletta, 13 ETO 21, 23 (1945) (condemnation of sergeant for slapping soldier because of attitude). And in CM 254349, Willetts, 35 BR 231, 238 (1944), a board of review declared: "The Articles of War specifically penalize the striking of a superior officer. While they do not expressly prohibit assaults by superior officers upon subordinates, that offense is only slightly less heinous, particularly when the object of the attack is an enlisted man. The power and authority vested in an officer are a sacred trust and must be coupled with commensurate self-restraint. Although the officer's assault may be motivated by praiseworthy considerations such as a desire to promote discipline, his action will not be condoned."

55. In HOUGH, PRECEDENTS IN MILITARY LAW (1855) at 266, after setting forth several cases where officers were court-martialed for striking soldiers under Indian AW 103 ("Any officer or non-commissioned officer who shall strike or otherwise ill-treat any soldier,") it is stated: "If a soldier be insolent to an officer or to a non-commissioned officer, there are the regular means of punishing the man."

> Chief Engineer Wells . . . approached an enlisted man, who was one of his subordinates, and with threatening language and menacing manner wilfully assaulted him—the only provocation for such an assault was an alleged neglect of duty on the part of such subordinate. It is not proven that the assault was accompanied with blows, but it is clearly shown that Mr. Wells was guilty of an abusive exercise of authority and a wilful disregard of the rights of an inferior.
>
> For the punishment of offenses committed, or neglect in the performance of duty, by enlisted men, the law and regulations provide ample means—means which experience has shown to be far more effective, for the preservation of good order and discipline, than any arbitrary exercise of individual power. Whatever, therefore, may have been the offense of the man Travers, Chief Engineer Wells had no right to take into his own hands the punishment of the offender, either by a personal assault or by threat of personal chastisement.[56]

C. *Unlawful Punishment*

The other example given by the *Manual for Courts-Martial* as a violation of Article 93 of the Code is the subjection of a subordinate to an unlawful punishment.[57] And if more of the convictions for physical abuse of a subordinate have been cases of maltreatment, then the majority of instances of such punishment have involved cruelty. Indeed, cruel or unlawful punishment was condemned in British military law.[58]

The several army cases involving the infliction of unauthorized or cruel punishment had been prosecuted, prior to the Code, under one of the two general articles.[59] Thus, in one old case, where a captain caused

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56. GCMO 1, Navy, Jan. 3, 1883.

57. MCM, U.S., 1951, Paragraph 172. See also Appendix 6c at 476, containing a model specification for Article 93 using as an example the confining of a person without water for twenty-four hours.

58. JAMES, *op. cit. supra* note 41, at 210, 212, Lt. Col. P. Belson (1806). See also note 12 *supra*. See also the conviction and dismissal of a British naval lieutenant for cruelty, in gagging a seaman who had made a noise by forcing a piece of wood into his mouth, and tying it with a bandage, as a result of which the man suffocated to death, reported in 20 Hans. Parl. Deb. 1028, 1032, 1036-8 (1811). And note the conviction of an officer for cruelty and tyranny for illegal and cruel punishments in 26 Hans. Parl. Deb. 1146 (1813) and in 20 Hans. Parl. Deb. 1029 (1811).

59. WINTHROP, *op. cit. supra* note 32, at 715, gives this as an example of conduct unbecoming an officer and gentleman. And see Reed, *supra* note 48, and its companion case, CM 255437, Mudd, 36 BR 105, 114 (1944) (prison officer "is barred from transgressing the rules of humane treatment"); CM 258423, Lefkoff, 38 BR 43, 49 (1944) (flogging prisoners with a rubber hose weighted with 45 caliber pistol slugs).

one disobedient soldier to be tied up by the wrists with his feet partly raised from the ground for six hours, and the other to be so tied for an hour, and to be immersed several times in a water hole, the Judge Advocate General declared that infliction of any cruel or unusual punishment not authorized for the service was punishable under the general article, although the subordinates had committed an offense for which some punishment was authorized.[60]

However, as previously noted, since Article 93 is taken from the naval articles, primary reference must be made to them in interpreting its provisions as they apply to the infliction of unlawful punishment. In this regard, it may be noted that there are a large number of naval precedents in this area, stretching back to the earliest reported naval cases.[61]

Two cases are of particular interest because they show the extent to which cruel punishments were sometimes carried in the navy, and the practices sought to be stamped out by the predecessor of Article 93. In one, a sailor was confined in a ship's launch, his feet ironed to a ringbolt, his hands ironed, "exposed to the burning rays of the sun." He was forced to remain in this position without food or drink until evening, when he was taken to the ship's deck, and there gagged and confined in an ill-ventilated sweat-box of such dimensions that he could not sit down. A bucket, placed there "for purposes of nature," was emptied only once in twenty-four hours, and the sailor's health was so impaired that he had to be put under medical care. Thereafter, he was confined in double irons on the deck, his hands ironed behind him and attached to an eyebolt above, for sixty hours, during twelve of which he was gagged.[62]

In another case a captain of a steamer was tried on several specifications of maltreatment. In one instance he had a sailor put in double

60. HOWLAND, *op. cit. supra* note 44, at 583 (June, 1893). See also CM 226870, Woods, 15 BR 163 (1942). *Cf.* Schuneman v. Diblee, 14 Johns. 235 (N.Y. 1817).

61. Renshaw, *supra* note 23 (placing person in irons with handcuffs on his wrists and shackles on his legs for twenty-four hours, giving him little to eat, and subjecting him to verbal abuse); G.O. 2, Navy, Jan. 2, 1863 ("tricing up" sailor); G.O. 57, Navy, June 9, 1865; G.O. 65, Navy, Aug. 31, 1865 (conviction of acting ensign for "cruelty, oppression, and maltreatment of those subject to his orders" for ordering a sailor to be "triced up" with his hands behind him, two heavy solid shot to be slung by a cord about his neck, and to be gagged for more than an hour); G.O. 142, Navy, Oct. 15, 1869; G.O. 217, Navy, Aug. 12, 1876; G.O. 221, Navy, Jan. 9, 1877 ("compelling seamen in double irons to stand up all day, till 10 o'clock in the evening, except at meals, and to have no blankets or hammocks at night.")

62. G.O. 152, Navy, Mar. 29, 1870, in which the punishments were characterized as "torture" by the Secretary of the Navy.

irons in a kneeling position on the deck of the vessel with his hands behind his back, and gagged with a piece of wood forced into his mouth and secured between his teeth. In another instance he caused a sailor to be confined for eight hours in a strait-jacket with his arms pinioned to his sides by means of a rope lashing around his body. And in several other cases he confined various sailors in strait-jackets for various periods —several days, every night for six consecutive nights, five days, and twelve hours.[63] In each of these cases it is clear that the non-judicial punishment inflicted constituted maltreatment because of its cruel nature.

One case subsequent to the passage of the Code should be noted. Here a lieutenant in Korea had a civilian suspected of theft taken to a kennel area where sentry dogs were kept, and five dogs were permitted by the handlers to attack and "work over" him. As a result he had to be hospitalized for fifty days[64] for bites and bruises all over his body. While it seems clear that the board of review, as noted above, was in error in holding that the victim here was subject to the orders of the lieutenant, it is equally apparent that the action of the accused officer was cruel and therefore constituted a violation of Article 93 as the infliction of unlawful punishment.

D. *Infringement on Rights of Subordinates*

The third class of cases which properly fall within the purview of Article 93 encompasses a wide variety of situations with a common denominator, a superior's intentional infringement on the rights of subordinates. These cases include the subjecting of a subordinate to an unnecessary deprivation of comfort and convenience, inflicting hurt or humiliation on him, or otherwise intentionally violating a superior's duty to protect his subordinate. Most of the cases which fall into this category are examples of oppression.

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63. CMO 29-1890. And in NAVAL COURTS AND BOARDS, 1917, at 112, under the section for maltreating a person subject to his orders, is found the following specification taken from an actual case and approved by the Judge Advocate General of the Navy for use as a model: "In that Commander ———, U.S. Navy, being in command of the U.S.S. ———, did, on or about March 5, 1915, while the said ship was at ———, maltreat ———, then a fireman second class, U.S. Navy, and stationed on board said ship, by causing him . . . to be confined in a straitjacket on board said ship without justifiable cause therefor and to be kept so confined during a period of about seven days." Note also MANUAL OF MILITARY LAW 285 (1956), where a specimen charge uses for ill-treating "locking [a subordinate] up in a cupboard for an hour."

64. United States v. Dickey, *supra* note 22. See also United States v. Flynn, 2 CMR 565 (NCM, 1951).

One of the earliest forms of oppression, and one that was punished under the British Articles of War, was forcing sick persons subject to the orders of the accused to do duty when there was no compelling military necessity for it. Such conduct is oppressive because it violates the right of the subordinate to have his superiors protect his health to the greatest extent possible, consistent with overriding military necessity.[65] Thus, in one old English case, an officer was charged with

> Cruelty and oppression in compelling the sick, indiscriminately, to attend every parade of the regiment on the Artillery Ground, London, in the rear of their companies and the regiment, in the months of May and June, 1805, and detaining them on the damp ground, on or about the 10th, 15th, and 21st of June, 1805, to the injury of the service, and Francis Reilley of the 4th Company in particular.[66]

In another case of equal vintage, an officer was charged with

> [A]rbitrary conduct towards Second Lieutenant Robert Butler . . . in having ordered him . . . to remain in his quarters until such time as he could attend the regimental parades, although it had been certified to the said Lieutenant Colonel Wyatt, that . . . Butler was ill of rheumatic complaint, which required moderate exercise, but that he was incapable of military duty.[67]

The only recently reported case of this kind arose in a prison camp in North Korea where American prisoners of war were confined. The accused, a sergeant, suspended a fellow prisoner by a scarf from a peg in the wall, and then forcibly ejected him from his place of shelter. This caused him to be exposed to extremely cold temperature while he was sick from dysentery and unable to help himself.[68] It is clear beyond

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65. HOWLAND, *op. cit. supra* note 44, at 266, Mar. 1880.

66. JAMES, *op. cit. supra* note 41, at 198, Col. Sir John Eamer, (1805). See also 1st Lt. William H. Beck's case, G.C.M.O. No. 34, War Dept. 1879, where accused was convicted of conduct unbecoming an officer for marching men on a hot day over rough country without sufficient rest, causing enlisted men to fall out of ranks exhausted, without necessity, and cursing them when they did so, and for cursing a colored soldier, and when he respectfully remonstrated, placing him under guard at hard labor.

67. JAMES, *op. cit. supra* note 41, at 372, Lt. Col. W. E. Wyatt, G.O. Horse Guards (1811). See also, Belson, *supra* note 58. And in Lt. Lawless' case, *supra* note 41, the accused was convicted of, *inter alia,* "having forced a recruit to march forward from Liverpool, and for several days afterwards, although he knew the said recruit . . . was ill."

68. United States v. Gallagher, 23 CMR 591, 660 (CM, 1957). An analogous case is note in 20 Hans. Parl. Deb. 1029 (1811), where a ship captain refused to

dispute that the board of review was correct in characterizing this as maltreatment, and it would seem oppressive as well, although the accused did not directly inflict injury.[69]

Another species of oppressive treatment is the intentional denial to a subordinate of his rights to military due process. Thus, during World War II, a lieutenant was convicted of ordering the apprehension and confinement of a sergeant, a first sergeant, and a master sergeant, all under his command, without cause or justification.[70] Likewise, in an older naval case, a ship captain was tried for maltreating a seaman

> by causing him . . . to be confined in double irons for absence from his post of duty as acting quartermaster of the watch, [for] . . . five days before making an investigation to determine whether said . . . absence . . . was not authorized by proper authority, and when, in fact, the [seaman] had been authorized by proper authority to be so absent from his said post of duty.[71]

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rescue a member of his crew and permitted him to be drowned because the man had jumped overboard to avoid flogging.

69. As illustrative of the fact that the accused need not himself inflict the injury to be guilty of maltreatment and oppression, note the following from Sutton v. Johnstone, 1 T.R. 493, 503-4, 99 Eng. Rep. 1215, 1221 (Ex. 1786): "it may not be fit, in point of discipline, that a subordinate officer should dispute the commands of his superior, if he were ordered to go to the mast-head; but if the superior were to order him thither, knowing that, from some bodily infirmity, it was impossible he should execute the order, and that he must infallibly break his neck, in the attempt, and it were so to happen, the discipline of the Navy would not protect that superior from being guilty of the crime of murder."

70. CM 251542, Ball, 33 BR 277 (1944).

71. CMO 29-1890. *Accord,* Swinton v. Molloy, 1 T.R. 537, 99 Eng. Rep. 1239 (1783). It was out of an analogous situation that the famous Texas Mutiny case arose. See CM 106663, Mahen *et al.,* G.C.M.O. 1174, Hq. So. Dept., Oct. 16, 1917. There the battery commander placed the whole battery in arrest to get them together and to prevent anticipated disorder. In a memorandum of Oct. 30, 1917, in reviewing the case, the following remarks of Acting Judge Advocate General S. T. Ansell are found, reprinted in *Hearings on S. 64 Before a Senate Committee on Military Affairs Subcommittee,* 66th Cong., 1st Sess. 774 (1919): "It would not be proper, however, to place an entire battery in arrest merely for the purpose of 'having all the men present the next day.' Neither would it be proper to place an entire battery in arrest in order to prevent the occurrence of some anticipated event. . . . Army regulations provide in Paragraph 2 that 'military authority will be exercised with firmness, kindness, and justice,' and in paragraph 3 that 'superiors are forbidden to injure those under their authority by tyrannical or capricious conduct or by abusive language.' . . . the conclusion is inevitable that the conduct of Capt. Harvey in placing his battery in arrest was not only capricious and unwarranted, but that it . . . placed a number of young soldiers in a situation they did not understand and which formed the basis of an alleged offense they did not intend to commit. . . . One of these noncommissioned officers . . . attempted to speak to the battery commander . . . [but he] told his sergeant to shut up; that he would do the talking; and that all the others remained quiet until marched off to the guardhouse."

Finally, in an old English case

> Major John Browne . . . was tried, in October 1787 . . . on a charge of cruelty to Thomas Edwards, a private soldier. With respect to this last charge, he was found guilty in part, not of cruelty, but oppression, and was sentenced to be suspended from pay and duty 309 days, the time during which he had confined the soldier without trial. . . .[72]

While it would appear probable that had each of the above cases arisen after the Code was passed, the accused could have been convicted under Article 97 or 98, or both, nevertheless such offense is also oppressive, and hence punishable under Article 93.

Closely akin to the above cases are ones where a superior shows undue severity to a member of his command. This violates the right of the subordinate to receive fair treatment from his superiors, and thus breaches the duty of protection. For example, in one old case a regimental commander was tried for "cruelty and oppression" toward a soldier in his regiment, for bringing the soldier to trial before a regimental court-martial, for appealing to the lieutenant general commanding the corps at a time when the lieutenant general had not yet decided whether the appeal had merit, for permitting the court to carry on its proceedings late in the evening, and for approving and causing to be carried into immediate execution its sentence of 200 lashes. In approving the court-martial's findings of guilty the King remarked that the circumstances were such "that it is difficult to assign any other motive for the haste with which the business was conducted, than a vindictive spirit."[73] Such conviction is clearly correct, for use of official power over a subordinate to take revenge on him is *ipso facto* oppressive.

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72. SCOTT, THE MILITARY LAW OF ENGLAND 137 (1810).

73. Belson, *supra* note 58. Likewise, in JAMES, *op. cit. supra* note 41, at 828, Lt. Col. P. T. Roberton (1819), the accused was convicted of: "4th. For conduct most unmilitary and derogatory to his character, as an Officer commanding a regiment in His Majesty's service, in confining, in the month of September last, and subsequently trying and punishing private James Coburne, for making a complaint to him, the Commanding Officer; whereas the said private did not come forward with, or in fact make, any complaint, but being asked a question or questions, merely had returned a natural answer to such question or questions put from him the Commanding Officer. . . .

"6th. For gross abuse of his power and authority, as Commanding Officer of the 8th (or King's) Regiment, in conducting himself towards private James Coburne tyrannically, cruelly, and unjustly, as well in charge 4th, as in other respects throughout, from the period commencing in September last, and ending in November following; in showing a misplaced partiality in regard to private John

Also related to the above type of case is the case where a superior unlawfully inflicts punishment without authority.[74] The distinction is that here the particular superior does not occupy a position entitling him to inflict any punishment. Such conduct is oppressive, because it is unlikely that a subordinate will challenge the authority of a superior to inflict punishment even if he has no authority.

The *Manual for Courts-Martial* notes that a violation of Article 93 may be real although it is not physical.[75] A good example of this rule is found where a superior oppresses a subordinate by subjecting him to unnecessary inconvenience. Such action is oppressive because it violates the duty of a superior to see that his subordinates are not inconvenienced more than is necessary for military ends. Thus, in one case a brig warden was convicted under the older naval article for requiring prisoners not to speak but to indicate their wants by motions.[76] So too, an army prison officer was convicted during World War II under the general article of requiring prisoners "to inflict upon themselves unwarranted discomfort by compelling them to take dry shaves as punishment."[77]

Inconvenience intentionally and unjustifiably inflicted on a subordinate may be oppressive even where the same act, if done by a person of equal rank, might not even be an offense at all. Thus, in *United States v. Welsh*[78] the accused was tried for maltreatment. While intoxicated he entered a tent in which members of the squad of which he was leader were staying, some being asleep. He pointed a rifle at some and also without any reason

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Condell, and in having treated private Daniel Reily with undue severity; the whole of these acts being principally consequent to the evidence which the three above-mentioned soldiers had given at a General Court Martial, before which he prosecuted Lieutenant M'Swiney . . . ."

74. For such cases, see AVINS, *op. cit. supra* note 9, at 41.

75. MCM, U.S., 1951, Paragraph 172.

76. CMO 5-1946, P. 185. And in CMO 41-1915, it was stated: "An important sidelight on the official conduct of Rear Admiral Little, as Inspector of Machinery, is shown in the testimony of Lieutenant Moses, wherein it appears that Little was not easily approached and that he, Moses, was made to feel that his opinions and recommendations would more acceptably be made to the assistant inspectors. This attitude is further exemplified by Rear Admiral Little's own testimony, wherein he refers to Moses' request as a 'kick' and his statement that 'They were kicking all the time about one thing or another.' . . . Such an unbecoming attitude on the part of senior inspectors toward their subordinates is . . . subversive of good order and discipline."

77. CM 238226, Campbell, 24 BR 215 (1943). A Board of Review declared that "the gravamen of [this offense] . . . is essentially malfeasance in office." *Id.* at 219. And see IBT 287, Sarver, 2 CBI-IBT 79 (1944), where an officer was convicted of using his authority to get a person's name off of a travel list for personal reasons.

78. 15 CMR 573 (NCM, 1954).

woke up others who were asleep. A Navy board of review affirmed a finding of guilty, saying:

> The accused was obviously in no more than a merry-making mood, but his conduct is regarded as an unnecessary and unwarranted encroachment upon the rights of his tent-mates. Such conduct is prejudicial to good order and discipline—it is punishable.[79]

In this case, had the accused not been superior to his tent-mates, they would have restrained him or even possibly thrown him out. As his subordinates, however, they undoubtedly felt that they had to sit and "take it." This fact makes oppressive what would otherwise be just annoying; it violates the duty of the accused to look out for his subordinates' welfare by restraining himself, they being incapable of restraining him due to his higher rank.

The infliction of unneeded humiliation or degradation on a subordinate is also oppressive. Thus, calling a subordinate obscene names and threatening him violates his rights,[80] as does reprimanding him publicly without justification.[81] During World War II, an army officer was convicted under the general article of having "humiliated and degraded a noncommissioned officer in [the presence of enlisted men] by compelling him, by threats of demotion, to act as a waiter and wait upon the enlisted men who were of inferior rank."[82]

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79. *Id.* at 574.

80. IBT 407, McLeod, 2 CBI-IBT 315, 319 (1945); see also United States v. Jackson, 12 CMR 403 (CM, 1953).

81. GCMO 37, Navy, Oct. 27, 1886.

82. CM 243488, Bunker, 27 BR 385, 389 (1943). An examination of the charges and specifications preferred by the Secretary of the Navy against Lieutenant Charles Wilkes on July 14, 1842, in the Navy Law Library, Pentagon, Washington, is most instructive on several of these points. Under charges of oppression, the specifications alleged that Wilkes, as commanding officer of an American naval exploring squadron in the Pacific, refused to forward to the Secretary of the Navy a respectful petition for redress by subordinates against his acts; treated his subordinates with contempt; illegally withheld promotion due subordinates; confined a subordinate under arrest for a year without ordering a court-martial; promised a subordinate scientific duties carrying extra pay and had the subordinate perform these duties, and then checked the extra pay against the subordinate's account under the pretext that the subordinate had not performed the duties, thus placing the subordinate in the position of having overdrawn his account by a large sum; angrily reprimanded a subordinate officer in front of the entire unit under his charge in such a manner as to bring him into contempt with the unit without ascertaining whether the subordinate's conduct was unavoidable; angrily and publicly reprimanded a subordinate officer for acts done in consequence of his own orders; ordered a person inferior to the subordinate officer to deliver to the latter an insulting reply to a communication, thereby degrading the subordi-

Another good example of oppressive treatment can be found in the case where the accused, a commanding officer, instructed a sergeant, who was a member of his unit, to start a generator at seven a.m. The sergeant overslept, and at five minutes after seven the accused entered his room and shouted, "Get up you damned bastards." He then turned over the bed in which the sergeant was sleeping, throwing him to the floor, and said, "Get up and get that damned generator started." As a result of the fall, the sergeant was only slightly bruised; his "feelings were hurt more than anything." Later that day, the accused warned the sergeant "that if you say anything about what happened, I will bust you."[83] It is clear that the officer was properly convicted under the general article for oppression, for not only did he breach his duty to protect the sergeant from unnecessary humiliation, but also imposed his authority to prevent the sergeant from seeking redress.

Since isolated acts of humiliation are oppressive, *a fortiori* a calculated course of conduct to drive a seaman from a training class was held to constitute maltreatment and persecution. This included (1) throwing a bucket of water on the trainee, (2) throwing a lead ball at him, (3) calling him obscene names and challenging him to fight, (4) hooting, jeering, and singing derisive songs in his presence, (5) throwing the contents of a salt shaker on him, challenging him to fight, and upon his refusal calling him a "coward" and a "dirty cur," (6) letting down the cot on which he was sleeping and throwing shoes at him, (7) saying in his presence, "let's form a lynching party," and (8) forming a committee to demand that he leave the mess hall.[84]

Finally, the giving of an illegal order constitutes oppression when the act required of the subordinate would subject him to punishment under the Code.[85] In such a case, the superior abuses his authority and subjects

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nate in the eyes of one under him; and forced a subordinate officer to pay for repairs to public property out of his own funds. Under a charge of cruelty, Wilkes was alleged to have shot at unoffending natives, killing some, frightened natives from their homes, and burned their homes and food, and permitted subordinates to do likewise, and ordered natives to supply his ships with provisions.

83. ETO 10360, Gailey, 22 ETO 207, 209 (1945). See also, CM A-1120, McGrew, 1 A-P 417 (1944), where the action of a lieutenant in dumping a private out of a cot was described as "improper."

84. CMO 15-1896. And in CMO 12-1913, a senior midshipman at the naval academy was convicted of inflicting "indignity, humiliation, hardship, and oppression" on a junior by forcing him to stand on his head and perform calisthenic exercises.

85. See CM P-408, Glascock, 4 A-P 53, 60 (1945); CM P-677, Gilliam, 4 A-P 163 (1945); United States v. Stuart, 17 CMR 486 (NCM, 1954).

the subordinate to risk of criminal penalties, which is contrary to his duty to protect the subordinate. Thus, for example, a superior is punishable for ordering a subordinate to make a false statement about him,[86] for ordering him to destroy official documents when such destruction was not authorized,[87] for ordering him to divert government property to his own private use,[88] and for ordering him to act as a second in a duel.[89] In each of these cases, the higher rank of the accused tends to coerce the subordinate into complying, thereby subjecting himself to criminal liability. Giving such orders, therefore, constitutes an intentional violation of the duty of protection, and is thus oppressive.

The above cases would seem to set a reasonable standard, and would be followed today were it not for the doubt cast on their current authority by the recent alarming decision of a board of review of the Army in *United States v. Wheatley*.[90] In that case, a certain master sergeant under the accused officer ordered a recruit to respond to the question, "What's good?" by repeating a set phrase which the board admitted was "obscene and crude." Three times in accused's presence the sergeant required the recruit to shout the obscenity, and on the second occasion the recruit was ordered to repeat it a dozen times in front of others as well as the accused, yet the accused did nothing to stop the performance. The board nonetheless rejected the government's theory that accused's omission constituted him an aider and abettor to the sergeant's "mental maltreatment" by holding that the recruit had not been maltreated by the sergeant. It said:

> Perhaps a company commander should strive to establish high standards of rectitude and sober piety in speech and conduct for the men of his unit but we are not prepared to penalize him because he ignores and fails to censor the horse-play and language of his enlisted subordinates whenever it exceeds the bounds of good taste. In this case there is no evidence that the performance was required as a punishment. The individual most directly affected

86. CM 302850, Masterson, 59 BR 71 (1945); CM 263480, Griffith, 41 BR 265 (1944); CM 237521, Withington, 24 BR 23 (1943); G.O. 94, 1863, GCMO 5, 1872, GCMO 38, 1880, WINTHROP, *op. cit. supra* note 32, at 716.

87. CM 281413, Katz, 54 BR 135 (1945).

88. CM 324889, Poland, 73 BR 393 (1947); CM 320670, Yumang, 70 BR 117 (1947); CM 279359, Biggerstaff, 52 BR 175, 183 (1945); CM 252620, Watterson, 34 BR 95 (1944); CM 247303, Prattsmith, 30 BR 315 (1944); Dig. Ops. JAG 1912-40 § 454(10).

89. JAMES, *op. cit. supra* note 41, at 227, Lt. Ivers (1806).

90. 28 CMR 461 (CM, 1959).

> apparently considered it to be a mild and somewhat humorous form of hazing. Under the circumstances, we think it would be hyperbolic to describe Sergeant's Sovie's conduct as cruel or oppressive. Though the accused's permissive attitude with respect to such conduct on the part of his own non-commissioned officers may reflect unfavorably on his qualifications as a commander and troop leader, we do not consider that the evidence of record establishes maltreatment of Private Hathorne as a matter of fact or law within the purview of Article 93.[91]

First, the board's premise that the recruit was not maltreated because he testified that he considered the sergeant's exaction "more as a joke" than as punishment exhibits the height of naiveté. The numerous and subtle pressures which can be brought to bear on a recruit by a sergeant to induce favorable testimony when the latter's position is at stake, even from one who feels himself aggrieved, reduces the probative value of such an "admission against interest," so to speak, to next to nothing. The coercion which was able to compel the original exaction will be magnified, if anything, to meet its aftermath. But even if the recruit believed that the requirement was funny, it is not his subjective reaction which determines whether the conduct is oppressive. A superior who beats his subordinates will not be heard to plead that there was no maltreatment because they thought it was in jest. Oppression "is a subtle thing, and the recognition of constraint may call for a high degree of introspective perception."[92]

But even if all hands thought the performance fun, this cannot save the sergeant from a charge of oppression. Military service is too serious a business to be run by a bunch of pranksters.[93] Recruit training is not initiation into a college fraternity; and teen-age frolics still appropriate for "hell-night" on college campuses, though even at that rapidly going out of fashion because of increasing maturity of today's youth, are hardly condonable on a military installation. Military training today is mandatory for most youths, and there is no reason to add insult to injury and indignity to inconvenience to those performing it. A talk by the board members with representative recent trainees would convince them that countless thousands of youths have been permanently soured on military service bv their initial experiences in training camps where they are most impressionable, and that no small portion of such incidents have been moronic

91. *Id.* at 463-64.
92. N.L.R.B. v. Valley Broadcasting Co., 189 F.2d 582, 586 (6th Cir. 1951).
93. CM 251542, Ball, 33 BR 277 (1944).

"jokes" played by ill-advised sergeants who have thereby convinced the recruits under them that stupidity is the chief ingredient for advancement in the military. It is not so long ago that Marine Corps recruit training was scandalized by the ill-advised actions of one sergeant,[94] and to permit "horseplay" by sergeants on defenseless recruits is to invite another such tragedy.

Moreover, the board passes over the requirement of the use of profanity much too lightly. One does not have to be prudish to believe that making a recruit shout obscene phrases is no way to inculcate into him respect for superiors as leaders. Such performance is degrading to all who participate therein, and most especially to those who order it. It stamps them as vulgar and boorish, and as persons to be looked down on rather than up to. They thereby gain contempt, rather than respect. Nothing could be more fatuous than to believe that the effectiveness of a leader can be measured by the number of four-letter words he knows. The days when the only requirement necessary for military leadership was a loud voice and a rich vocabulary, if indeed they ever existed, are long since past.[95]

People being what they are, we can pass over in silence the occasional use of profanity by a superior to a subordinate, although it must be noted that the privilege is by no means reciprocal.[96] But it is one thing to condone the occasional outburst of a harried sergeant and quite another to enshrine the use of obscenity as an approved training method. American society has come a long way from its prim Victorian days, and the taste and tolerance level of some is quite low,[97] but it is hard to believe that society's moral fiber has been so far decayed that we can openly approve having impressionable youngsters shout obscenities at each other. There will be time enough in their military careers for recruits to learn "Army talk" without teaching it to them in basic training. Indeed, if this is typical of the fare during recruit indoctrination, we can safely dispense with the whole process. One need not go on a morals crusade to be able to condemn the conduct here.

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94. See Avins, *The Joker in Jester, The Parris Island Death March Case,* 53 Nw. U. L. Rev. 33 (1958).

95. *Cf.* Avins, *Military Leadership and the Law,* 47 Calif. L. Rev. 828, 868-871 (1959).

96. UCMJ, Arts. 89, 91(3); MCM, U.S., 1951, Paragraphs 168, 170d.

97. See Grove Press, Inc. v. Christenberry, 175 F. Supp. 488, 501 (S.D.N.Y. 1959).

The law has a responsibility in a situation of this kind, too. There are minimal levels below which not even sergeants may be permitted to fall. It would appear that their conduct here has fallen below this level, and for this reason, the board's decision was in error.

While any intentional infringement of a subordinate's rights is oppressive, he does not have the right to shirk necessary work, and hence "the imposition of necessary or proper duties and the exaction of their performance will not constitute [a violation of Article 93] even though such duties are arduous or hazardous or both."[98] Thus, in an old English case, a lieutenant was acquitted of oppressive conduct in marching his detachment for sixteen miles in a day, on the ground that this was not oppressive.[99] Likewise, in the same case, although the court found that he ordered no billets to be issued to three recruits, "whereby the said recruits were obliged to remain in the streets during the night, after a march of twenty-nine miles," the court acquitted him of oppression because "strong measures [became] necessary in consequence of the insubordination of the detachment."[100] And finally, in one case where a private was ordered to do K.P. for a second week, after having been told at the end of the first week he would be taken off, a board of review upheld his conviction for disobedience, saying, "The command to perform the duty was a lawful one and was not unreasonable or tyrannical in its requirements."[101] In all of these instances, military necessity justified the action taken by the superior, and therefore it did not constitute maltreatment or oppression.

IV. Negligent Violation of the Duty of Protection—Neglect of Duty

A. *The Source of the Duty*

> The general rule is that the law imposes no duty upon anyone to assist another whose injuries he has neither caused nor aggravated . . . , but the rule is otherwise when the relationship existing between them is such that the law imposes a duty upon one to furnish the necessary assistance to the injured person. . . . A

98. MCM, U.S., 1951, Paragraph 172.
99. James, *op. cit. supra* note 41, at 489, Lt. P. Lawless (1813).
100. *Ibid. Cf.* Henley's Case, *supra* note 29.
101. In Sutton v. Johnstone, 1 T.R. 493, 546, 99 Eng. Rep. 1215, 1244 (1786), Lord Loughborough declared: "A subordinate officer must not judge of the danger, propriety, expedience, or consequence of the order he receives; he must obey; nothing can excuse him but a physical impossibility. A forelorn hope is devoted—many gallant officers have been devoted. Fleets have been saved, and victories obtained, by ordering particular ships upon desperate services, with almost a certainty of death or capture."

> relationship of this character exists among soldiers of the Army of the United States. The Government has a vital interest in the preservation of the life and health of every soldier. It has pursued continuously an active policy of conserving military manpower and of achieving its greatest possible utilization in the prosecution of the war. The victim of the accident in this case was an American soldier rendered helpless by his injuries. Under these circumstances, each accused was under a duty to the Government, by virtue of his status as a soldier, to render such assistance as he could reasonably provide to protect the injured fellow-soldier's life and to prevent the possible aggravation of his injuries. Every soldier is a member of a team engaged in the common enterprise of winning the war. The duty is predicated upon the need for surrounding with every reasonable safeguard the life, health, and safety of every soldier in order to prevent waste of military manpower. Failure on the part of the accused to fulfill this duty constituted a neglect to the prejudice of good order and military discipline, and conduct of a nature to bring discredit upon the military service. The fact that the conduct required of accused for fulfillment of this intensely practical obligation also accords with humanitarian and moral standards universally accepted among civilized people, is additional evidence of the validity of the rule.[102]

As has been noted above, the duty of protection stems from the military relationship of superior and subordinate. This relationship, insofar as it produces an affirmative duty on the part of the superior, is indeed only a facet of the general relationship between military personnel which imposes on each a minimal duty to assist others in need. The duties imposed by this general relationship are limited, and arise only in extreme situations. Thus, as in the case above, where the life of a fellow-soldier is in jeopardy, the law imposes a duty on other military personnel to assist him until aid arrives.

The legal relationship of superior and subordinate, however, imposes a higher standard of duty on a superior to attend to the welfare of persons under his charge than is imposed on military personnel whose sole connection is membership in the armed services. The superior stands in a special relationship of trust and confidence with the men under him,[103]

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102. ETO 4492, Shelton, 13 ETO 1, 5 (1945).

103. In ETO 11758, Vollmer, 24 ETO 281, 284 (1945), where accused accepted money from a soldier to be deposited to the soldier's credit in a soldier's deposit account, but neglected to do so for eighteen days, the board of review declared that "his legal relation was that of a fiduciary, and he will be held to the highest standard of care." See also CM 277458, Patnode, 51 BR 131 (1945).

and must therefore take affirmative action to insure that their welfare does not suffer more than is made necessary by the exigencies of military necessity.

A good example of the dereliction of the duty to protect a subordinate from imposition beyond that required by military necessity is found in a case from the European Theater of Operations. It also illustrates the genesis of the duty as arising in the peculiar opportunity a superior has, by virtue of his power, to either create or prevent such imposition. The accused officer here was the unit censor, and had authority to read the outgoing mail of enlisted men in the unit. While censoring mail, he casually read the contents and disclosed the authorship of letters written by enlisted men in his organization to men of the same unit who happened to be present at the time. There was no malicious motive, or intent to injure or ridicule the authors of the letters, nor did it have such effect; it was merely done as gossip. None of the listeners had any right or reason to know the matters disclosed.

The board of review held the above conduct to be punishable. It reasoned that since the censorship of mail is a military necessity imposed by security requirements,

> any unnecessary extension of the invasion of privacy inherent in censorship constitutes a breach of trust or confidence on the part of the officer guilty thereof. Regardless of the presence or absence of any malicious intent, the deliberate and indiscriminate disclosure by a censor of the contents and authorship of a soldier's mail to other soldiers of the same organization is a flagrant violation of the writer's absolute right of privacy in this respect. A breach of trust of this character seriously impairs the morale and discipline of the command [and] destroys confidence in the integrity of military administration.[104]

It is clear in the above case that the listeners would not have had the opportunity to have seen the letter but for the action of the censorship officer. Thus, he had the power to grant or deny any protection. Such power gives rise to a duty, and failure to perform this duty is an offense.

A much more difficult question is presented when the duty is sought to be imposed by orders upon persons of equal rank. The problem here is that the one singled out will hesitate to use the authority given to him because of a consciousness that he has no inherent superior authority.

104. ETO 9542, Isenberg, 21 ETO 73, 78 (1945).

Nevertheless, such authority must be exercised, as shown by a case from the European Theater of Operations,[105] because military law makes the soldier *pro haec vice* leader.[106]

In the case cited, both accused and the driver of a truck were Technicians, Fifth Grade. The vehicle was "dispatched" to accused, who signed the trip ticket. Based on this the board of review concluded that accused, by operation of law, became "the senior man" and hence in charge of the vehicle. Next, the board took notice of a theater directive that "the senior (officer, warrant officer, or enlisted man) present in a vehicle is responsible for the proper operation of the vehicle and that it does not exceed the speed limit." Since the evidence showed that the driver was exceeding the safe speed on a wet road, and driving too fast around curves, so that his driving was hazardous, the board concluded that accused, who was riding in the front seat and saw how the driver was operating the vehicle, had a duty to require him to slow down. The board declared:

> The substance of the offense . . . is Garcia's failure to discharge the *military duty* imposed upon him by the above-quoted directive, namely, to see that the vehicle was properly operated. The gravamen of such offense was not *joint criminal responsibility* as such with Coats for the negligent operation of the vehicle. The directive was not intended to, nor could it legally, change fundamental principles with respect to criminal liability for the simple negligence, on the one hand and culpable, gross negligence on the other. It merely imposed upon the senior present in a vehicle the *military duty* of seeing that it is properly driven.[107]

Since the board concluded that the negligent driving was apparent to accused, and yet he took no measures to require that the speed be reduced but instead remained silent, he failed to discharge the military duty imposed upon him.

It is entirely probable in cases such as the above that soldiers without inherent superiority in rank will be loathe to use transient authority derived from the dubious and equivocal act of signing a trip ticket or from similar acts. It is questionable whether fellow soldiers will always

105. ETO 2788, Coats *et al,* 8 ETO 39 (1944).
106. Avins, *Military Leadership and the Law,* 47 CALIF. L. REV. 828, 829 (1959).
107. *Id.* at 849. And following this case is ETO 8457, Porter, 19 ETO 251 (1945), where the board declared at 254: "As senior officer in the vehicle, he was responsible for its proper operations, and the negligence of the driver may be imputed to him."

recognize such authority. However, it is of such importance that the duty of protection be placed on someone that the result in the above case is justified.

Since the duty of protection is imposed by military law in general and by the custom of the service, its neglect should be punished as dereliction of duty.[108] It would also seem that dereliction of duty is a lesser included offense of maltreatment, since the intentional violation of the duty of protection constitutes maltreatment, while the negligent violation thereof constitutes dereliction of duty. While authority is scanty,[109] logic would appear to so dictate, for every intentional violation of the rights of a subordinate necessarily includes a negligent failure to protect him. It follows that such neglect may always be proved as being lesser included in the maltreatment, oppression, or cruelty charged.

B. *Types of Neglect*

Since the duty of protection encompasses the obligation to attend to the welfare of subordinates under all circumstances, it is clear that neglect of this duty in any aspect is punishable. Hence, there is a considerable diversity of kinds of cases in which this obligation was made punishable.

One of the earliest types of neglect punished was the failure to prevent the imposition of unlawful punishment by a subordinate officer on men under the accused's command. Thus, in an old English case, a lieutenant colonel was tried "for not taking the notice he was bound to take, as Commanding Officer, that . . . a drummer, in Captain Bailie's company, had been most illegally and unjustifiably punished," although the accused knew of this.[110] So too, in an old naval case, an executive officer of a ship was convicted of neglect of duty for failing to stop a petty officer from inflicting cruel punishment on seamen, and for failing to keep himself informed as to what punishment was being inflicted.[111] And in a World

108. UCMJ, Art. 92(3); MCM, U.S., 1951, Paragraph 171(c).

109. In CMO 37-1909, P. 7, several petty officers were tried for "cowardly and inhuman conduct to the scandal and disgrace of the naval service." The court found the specification proved in part and the accused guilty in a less degree than charged, guilty of culpable inefficiency in the performance of duty. The Judge Advocate General returned the record to the court on the ground that it had substituted a new charge. Looking the other way is CMO 2-1943, P. 39, where an accused officer was charged with maltreatment of a person subject to his orders. The Judge Advocate General, in approving the acquittal, noted that since the alleged maltreatment was negligent and not wilful, the accused might be guilty of a lesser included offense under the general article.

110. JAMES, *op. cit. supra* note 41, at 443, Lt. Col. Marcus Corry (1812).

111. G.O. 148, Navy, Dec. 31, 1869. See also CMO 8-1927, P. 4, apparently holding that approval of the maltreatment of a person subject to one's orders by an officer under one's command is itself maltreatment.

War II army case, in the presence of the accused officer, a sergeant made one prisoner double-time holding a shovel over his head and when he passed out several times the sergeant kicked him, threw water on him, and made him continue. The sergeant also filled another soldier's mouth with mud when the latter cried out, and the officer did nothing. The accused officer was convicted of failing to perform his duty to stop such practices.[112] In all of these cases, neglect of duty of protection constituted the gravamen of the offense.[113]

Closely akin to the above cases are ones where the superior fails to stop a subordinate from committing an offense on another. Thus, officers have been convicted of failing to stop subordinates from committing rape[114] and assault.[115]

A superior is required to take steps to protect the safety of his subordinates. For neglect of this duty during the Civil War, an officer was convicted because he caused troops to be transported on a steamer known by him to be unsafe.[116] So too, a naval officer was tried for culpable inefficiency, in that, having doubts about the stability of a vessel whose construction he supervised, he neglected to notify his superiors and failed to make proper tests, so that the ship was "sent to sea in an unsafe

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112. CM 255436, Reed, 36 BR 93, 101 (1944). In CM 238226, Campbell, 24 BR 215 (1943), where the accused prison officer was convicted of failing and neglecting to keep proper records of punishment meted out by him or his subordinates under his control, a board of review declared at 218: "each Specification, in effect, alleges neglect of duty requiring continuous performance. As prison officer, it was accused's duty at all times to enforce regulations designed to protect prisoners from abuse; to keep a record of all penalties inflicted. . . . The conduct attributed to him in the Specifications involves, in each instance, omissions and neglects in the performance of these duties, prejudicial to good order and military discipline."

113. See CM 318513, Kilian, MO-JAGA 174 (1950), where the accused was found guilty under the general article of failing to perform his duties as commander of a guardhouse, in permitting imposition of cruel and unauthorized punishment on prisoners. The Judge Advocate General commented at 182: "The gravamen of the offense . . . was a neglect of duty of culpable magnitude, in that he wrongfully and unlawfully failed to exercise due care to provide appropriate safeguards, or take action within his power reasonably to control the troops under his command to prevent the illegal acts or to end the unlawful course of conduct charged, the direct and proximate result of such culpable neglects being the recurrence of the pleaded mistreatment of prisoners," citing, significantly, *In re* Yamashita, 327 U.S. 1 (1946). *Cf.* United States v. Wheatley, 28 CMR 461, 464-65 (CM, 1959).

114. ETO 17056, Boger, 31 ETO 341 (1945); CM A-1435, Havers, 2 A-P 211 (1944); *cf.* United States v. Sloan, 14 CMR 375 (CM 1954).

115. ETO 7001, Guy, 17 ETO 323 (1945).

116. WINTHROP, *op. cit. supra* note 32, at 728; HOWLAND, *op. cit. supra* note 44, at 149 (June 1865). Note also ETO 1554, Pritchard, 5 ETO 25 (1944), where a lieutenant was convicted of failure to use care in placing simulated fire from a machine gun, resulting in the death of trainees.

condition and the lives of the crew exposed to danger."[117] And it was also held that a failure to stop the showing of movies in a dangerous part of a ship was neglect of duty.[118]

In addition to attending to the safety of his men, a superior is required to take necessary steps to protect their health. An example of the punishment of an assistant surgeon for failing to do so is found in an old naval case. Accused was tried and convicted for culpable inefficiency in the performance of duty, in that having been required to transfer some sick sailors from an army hospital to their ship, he left the sailors on a wharf for an hour to the detriment of their health.[119]

Finally, a superior must be concerned with all other aspects of the welfare of the men under him. Thus, one commanding officer was tried "for inattention to the comforts of the soldiers, in excusing several of the privates from duty, and allowing them to be otherwise employed . . . whereby the duty at headquarters was rendered unusually severe upon the men stationed there."[120] And there are times when men must be "cared for, looked after, and, if necessary, protected from themselves by their commanding officer."[121]

While the duty of protection is broad, like other military duties, no more is required than reasonably appears to be necessary under the cir-

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117. CMO 32-1909.

118. CMO 12-1946, P. 389. See also ETO 5607, Baskin, 15 ETO 247 (1945), holding that failure of an officer to issue necessary orders violates the general article when "the safety of the platoon and the morale of its members were jeopardized by such conduct."

119. CMO 60-1898. See also CMO 12-1908 and GCMO 1, Navy, Jan. 17, 1882, for other cases where naval physicians neglected their patients. In Disman v. Wilkes, 12 How. (53 U.S.) 389, 405 (1851), the court said: "For . . . it was his duty, through proper and trustworthy officers, to inquire into his situation and treatment, and to see that it was not cruel or barbarous in any respect, and that he did not suffer for the want of those necessaries which the humanity of civilized countries always provides even for the hardened offender." *Accord,* McCall v. McDowell, 15 Fed. Cas. 1235, 1239 (No. 8673) (C.C. Cal. 1867). See also the 1842 Wilkes Court-Martial, *supra* note 82, where under the charge of oppression it was alleged that after a subordinate had lost all of his clothing and other personal property except the clothes on his back in a shipwreck, Wilkes refused "to take any cognizance of" the subordinate or have official communication with him, and considered the subordinate as detached from his squadron, "thus depriving him of the protection due his commission, while [the subordinate] was reduced to a state of destitution" by the wreck and Wilkes' neglect.

120. JAMES, *op cit. supra* note 41, at 443, Lt. Col. Marcus Corry (1812). In G.O. 19, Dept. of Cal. 1866, WINTHROP, *op. cit. supra* note 32, at 643, n.74, it was held that the offense of desertion is mitigated by the fact that the deserter's food was deficient, or that he was not given sufficient clothing or blankets to protect himself against the winter.

121. CMO 9-1893.

cumstances,[122] and a superior is not required to attempt futile action when such action will be of scant assistance.[123] Nor is he required to attempt to protect a subordinate when his superiors take the matter out of his hands.[124] The duty is one of exerting reasonable care to the end that a subordinate not be subjected to necessary hazards not normally incident to military life.

V. Conclusion

The duty of protection is a vital part of the relationship between a military superior and a subordinate. This duty is as inherent in the relationship as is the duty of obedience.

Were there no duty of protection, no military organization could operate effectively for any period of time. Its members, if they felt their own interests were going unprotected, would divert their thoughts, energies, and efforts toward looking after those interests, to the detriment of the mission of the military unit. Such an effect would destroy the ability of any military unit to perform its task.

Because of this, performance of the duty of protection is necessary to the maintenance of military discipline. Thus, both the needs of subordinates as well as the interests of the military as a whole make performance of this duty a necessity.

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122. United States v. Ferguson, 12 CMR 570, 576 (CM, 1953): "In short, Lt. Ferguson had fulfilled his duty as commander to instruct the subordinate personnel on appropriate safety regulations. From the foregoing it is also obvious that the accused neither wilfully failed to perform his duties nor did he perform them in a manner which might be termed culpably inefficient.

"Upon reflection we might say that the accused could have done more—he might have devoted more careful attention to the matter of safety, he might have impressed the need for safety in these operations more forcefully upon the junior officers. However, in testing for negligence the law does not substitute hindsight for foresight. The standard to be applied is whether the conduct of the individual was adequate and proper in the light of circumstances prevailing at the time of the incident."

See generally, Avins, *The Joker in Jester, The Parris Island Death March Case,* 53 Nw. U. L. Rev. 33 (1958).

123. In United States v. Flaherty, 12 CMR 466, 471 (CM, 1953) a board of review declared: "It has been argued to us that the accused's attempt to get out of the truck in the last few seconds showed that his concern was solely for himself, and that this was sufficient showing of his disregard of his duties towards his men. We think the time has long since passed when the 'Captain must go down with his ship', particularly where no useful purpose is served thereby."

124. CM 255437, Mudd, 36 BR 105 (1944).