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Failures to Punish: Command Responsibility in Domestic and International Law

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Failures to Punish: Command Responsibility in Domestic and International Law

Abstract

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

Disciplines

Human Rights Law | International Humanitarian Law | International Law | Law | Military, War, and Peace | Transnational Law

FAILURES TO PUNISH: COMMAND RESPONSIBILITY IN DOMESTIC AND INTERNATIONAL LAW

*Amy J. Sepinwall**

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[A] slap on the wrist of the offender is a slap in the face of the victims.

Mark B. Harmon and Fergal Gaynor, Prosecutors, International Criminal Tribunal for the Former Yugoslavia¹

Military justice is to justice what military music is to music.

Groucho Marx and French Premier Georges Clemenceau²

Military spokespeople and upper echelon commanders routinely maintain that wartime atrocities are the acts of a few “bad apples.”³ But while torture at Abu Ghraib is passed off as the work of a handful of depraved souls,⁴ and while the Srebrenica massacre “could be reduced to the machinations of [Slobodan Milosevic],”⁵ we are still gripped by a tenacious sense that something more systemic is occurring. Yet the law does not yield to our unease, and no wonder: In both domestic and international criminal law, individual causal responsibility is seen to be the *sine qua non* of culpability.⁶ Within that paradigm, systemic harms have no traction.⁷

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

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

3. See, e.g., Michael Massing, “Bad Apples” or Predictable Fruits of War?, L.A. TIMES, May 10, 2004, at B11.

4. See Phillip Carter, *The Road to Abu Ghraib: The Biggest Scandal of the Bush Administration Began at the Top*, WASH. MONTHLY, Nov. 2004, at 20, 21 (“The Bush [A]dministration has condemned the abuses as the work of a ‘few bad apples,’ while working diligently to get the story off the front pages and out of the presidential campaign.”).

5. See *id.*; Paul Aaron, *The Anguish of Nation Building: A Report from Serbia*, 22 WORLD POL'Y J. 113, 120 (2005) (arguing that the exclusive focus on Milosevic's responsibility “has deflected attention from the complex nature of Milosevic's regime and the enduring institutionalized legacy it left behind”). The International Court of Justice's (ICJ) decision in Bosnia's suit against Serbia for genocide did find that the Srebrenica massacre was perpetrated by a group entity—the army of Republika Srpska. See Judgment on Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2008 I.C.J. 91, 148–52 (Feb. 26). But, neither the ICJ nor the International Criminal Court (ICC) has jurisdiction over that entity. See Rome Statute of the International Criminal Court art. 11, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1055, 156 U.N.T.S. 77.

6. This Article is the first piece of a larger project seeking to challenge the too hasty alignment of individual causal responsibility and criminal liability. For a statement reflecting reverence for the principle of individual culpability, see, for example, Prosecutor v. Tadić,

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

Case No. IT-94-I-A, Appeals Judgment, ¶ 186 (July 15, 1999) [hereinafter *Tadić Appeals Judgment*]. The International Criminal Tribunal for the Former Yugoslavia (ICTY) stated:

The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*).

Id. (footnotes omitted).

7. See, e.g., George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1514 (2002). Fletcher stated,

[T]he liberal bias toward individual criminal responsibility obscures basic truths about the crimes that now constitute the core of international criminal law. The four crimes over which the [International Criminal] Court has jurisdiction—aggression, crimes of war, crimes against humanity, and genocide—are deeds that by their very nature are . . . committed by groups

Id.; see Jenny S. Martinez, *Understanding Mens Rea in Command Responsibility: From Yamashita to Blaškić and Beyond*, 5 J. INT’L CRIM. JUST. 638, 639 (2007) (noting that “a fundamental dilemma of legal responses to mass atrocity . . . is that the atrocities are usually carried out by foot soldiers but it is often the generals and presidents who bear a greater share of moral responsibility”); see also Beatrice I. Bonafé, *Command Responsibility Between Personal Culpability and Objective Liability: Finding a Proper Role for Command Responsibility*, 5 J. INT’L CRIM. JUST. 599, 600 (2007) (“[I]t can be very difficult to fit the contribution of commanders into the categories of international criminal law, and to demonstrate their criminal liability.”).

8. See, e.g., Christopher Kutz, *The Lawyers Know Sin: Complicity in Torture*, in THE TORTURE DEBATE IN AMERICA 241, 242–43 (Karen J. Greenberg ed., 2005) [hereinafter Kutz, *Complicity in Torture*]; cf. M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT’L L. 389, 390 (2006) (“[T]he President, the Vice President, and the Secretary of Defense made several official statements on the need for U.S. interrogators to obtain ‘results,’ thus creating a top-down command influence leading subordinates to commit torture, while their superiors felt compelled to look the other way.”); Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1773 & n.99 (2005) [hereinafter Osiel, *Banality of Good*].

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

10. Osiel, *Banality of Good*, *supra* note 8, at 1833 & n.374 (citing Albert Breton & Ronald Wintrobe, *The Bureaucracy of Murder Revisited*, 94 J. POL. ECON. 905 (1986)).

a code of silence among officers, such as the “‘West Point Protective and Benevolent Association,’”¹¹ has been blamed for insulating military superiors, but not low-level soldiers, from the administration of military justice.¹² Still others cite the anomie of war, especially a war whose moral justification is abstract, or absent altogether,¹³ as a way of suggesting that perhaps responsibility lies with the State as a whole.¹⁴ But, however compelling these theories of *moral* responsibility may be, they fail to articulate legally cognizable harms.

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

11. WILLIAM T. GENEROUS, JR., *SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE 201* (1973); cf. Elizabeth L. Hillman, *Gentlemen Under Fire: The U.S. Military and “Conduct Unbecoming”*, 26 *LAW & INEQ.* 1, 3 (2008) (“[T]he perception that high-ranking officers are rarely disciplined and almost never criminally prosecuted is so common partly because it is true.”).

12. GENEROUS, *supra* note 11, at 201.

13. See, e.g., Michael L. Smidt, *Yamashita, Medina and Beyond: Command Responsibility in Contemporary Military Operations*, 164 *MIL. L. REV.* 155, 163 (2000).

14. But cf. Daniel W. Jacobowitz, *Alienation, Anomie, and Combat Effectiveness*, *AIR U. REV.*, Sept.–Oct. 1980, at 21, 23, available at <http://www.airpower.maxwell.af.mil/airchronicles/aureview/1980/sep-oct/jacobowitz.html> (exploring the need to overcome societal trends toward alienation and anomie in military recruitment and training to prevent the disintegration of military units and the deterioration of combat effectiveness).

15. See, e.g., Osiel, *Banality of Good*, *supra* note 8, at 1768 (noting that Fletcher and Drumbl “[have] entertained the possibility that the first principle of domestic criminal law—personal culpability—may have to be modified or abandoned, if international law is ever to successfully ‘adapt[] . . . the paradigm of individual guilt to the cauldron of collective violence’ epitomized by mass atrocity” (quoting Mark A. Drumbl, *Pluralizing International Criminal Justice*, 103 *MICH. L. REV.* 1295, 1309 (2005) [hereinafter Drumbl, *Pluralizing*] (alteration in original) (citations omitted))); see also Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 *Nw. U. L. REV.* 539, 542 (2005) [hereinafter Drumbl, *Collective Violence*] (“The dominant discourse determines accountability through third-party trial adjudication premised on liberalism’s construction of the individual as the central unit of action. This means that a number of selected guilty individuals squarely are to be blamed for systemic levels of violence.” (footnote omitted)); Fletcher, *supra* note 7, at 1513–26.

16. See Drumbl, *Pluralizing*, *supra* note 15, at 1315–22 (supporting the use of *gacaca* courts, used in Rwanda, by which individuals accused of crimes “return to the communities where they allegedly committed their crimes to face judgment by the whole community,” among other measures, as a way of addressing collective violence); Osiel, *Banality of Good*, *supra* note 8, at 1842–59 (advocating the imposition of collective *civil* sanctions, the justness of which is purportedly secured by allowing officers to redistribute the sanction internally so that it is levied in accordance with individual guilt); cf. Daryl Levinson, *Collective Sanctions*, 56 *STAN. L. REV.* 345 (2003) (advocating collective sanctions within criminal law, but anticipating that the collective’s members will in turn distribute the sanctions among themselves, in accordance with each member’s individual culpability).

expressive character that are the special province of the traditional courtroom.¹⁷

This Article advances an alternative theoretical framework, rooted in expressivist conceptions of harm, for holding a commander *criminally* responsible for an atrocity of his subordinates.¹⁸ More specifically, this Article argues that, where a commander's failure to punish an atrocity of his troops can be read as an expression of his support for his subordinates' act or the message it conveyed, his failure comes to constitute part of the injury. As such, he may be held criminally liable for the atrocity, and not just for neglecting his duty to punish.

This Article thus embraces one of two contested understandings of what a failure to punish entails. On the first understanding, a military commander's failure to punish is construed solely as a dereliction of duty. Accordingly, his failure to punish constitutes a separate offense from the underlying atrocity that his troops have committed. The failure

17. See, e.g., Laurie L. Levenson, *Courtroom Demeanor: The Theater of the Courtroom*, 92 MINN. L. REV. 573, 627 n.286 (2008) ("To the extent that trials are an opportunity for society to judge itself and its standards for justice, then the full drama of the courtroom may be needed to make such a judgment."). For the claim that international tribunals have been used to narrate history and express society's condemnation of international criminal law violations, see, for example, MARK A. DRUMBL, *ATROCITY, PUNISHMENT AND INTERNATIONAL LAW* 3 (2007) (explaining that, in the wake of World War II, "President Truman . . . envisioned careful trials to narrate to all the value of law and the depth of the defendants' culpability"); Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 94–95 (2005) (describing the narrative function of international criminal trials). One exception to the retreat from criminal prosecutions for mass atrocity can be found in Mark Osiel's proposed reconstruction of superior responsibility. See Osiel, *Banality of Good*, *supra* note 8, at 1830–33. Under current doctrine, a superior will bear responsibility for a subordinate's crime only if the superior actually controlled the subordinate at the time of the crime. See, e.g., *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Judgment, ¶¶ 407–08, 421, 511 (July 29, 2004) [hereinafter *Blaškić Appeals Judgment*] (acquitting defendant because of no effective control); Gregory Raymond Bart, *Special Operations Commando Raids and Enemy Hors de Combat*, ARMY LAW., July 2007, at 33, 38 ("Effective control is an element of command responsibility."). But, as Osiel argues, a superior's control ebbs and flows throughout a military operation, and the entity to which he belongs may be organized in a complex and fluid fashion such that he can convincingly argue that he lacked control over the direct perpetrator. See Osiel, *Banality of Good*, *supra* note 8, at 1830–32. To better capture the organizational dynamics of the groups committing mass atrocities today, Osiel advocates an approach proposed by Claus Roxin: that the law consider not whether a superior had control over the particular subordinate who directly perpetrated the crime, but instead whether the superior had control over the organizational apparatus of which the subordinate was a part. *Id.* at 1830–33. My problem with command responsibility lies not so much in its element of effective control but instead in its lax understanding of the nature of the harm that a commander's omission involves. Osiel's proposal leaves this understanding intact. Thus, even if Osiel's conception of control were to result in more convictions for commanders, it would not remedy the problem that is the subject of this Article.

18. I use the masculine version of the third-person singular pronoun throughout this Article when referring to the generic commander in order to reflect women's historic exclusion from the officer corps. See, e.g., Hillman, *supra* note 11, at 43–44.

to punish is, then, a substantive offense in its own right. On a second understanding, for which I argue here, the failure to punish renders the commander criminally liable for the atrocity itself, even if he neither ordered nor even knew about the atrocity before its occurrence. Here, then, the failure to punish is a mode of liability—it grounds an ascription of the atrocity of one's soldiers to their commander, but does not capture an offense in its own right. For the sake of brevity, I shall refer to these two understandings, respectively, as the *substantive offense view* and *mode of liability view*,¹⁹ and I shall follow international and domestic law in employing the term “failure to punish” as a catch-all for the failure to undertake the duty with which commanders are charged to investigate, report, refer, discipline, punish, and so on.²⁰

Although the doctrine of command responsibility typically criminalizes a commander's failure to *prevent or punish* an atrocity of his subordinates,²¹ this Article focuses on the failure to punish prong for two reasons. First, that prong provides unique prosecutorial advantages. One of the most vexing problems for those who prosecute war crimes and crimes against humanity is the difficulty of achieving convictions against the big fish, rather than just the small fry.²² It is very difficult to prove that a commander failed to *prevent* an atrocity, since to do so a prosecutor must establish that the commander knew or should have known about the atrocity prior to its occurrence,²³ and often no such knowledge is reasonably available to the commander. But, imputing knowledge of the atrocity to the commander *after* the atrocity has been committed is less

19. These two possible constructions of the failure to punish were elucidated in Prosecutor v. Halilović, Case No. IT-01-48-T, Trial Judgment, ¶¶ 91–100 (Nov. 15, 2005) [hereinafter *Halilović Trial Judgment*]. The terminology should thus be familiar to international criminal law scholars. Domestic criminal law scholars might wonder whether domestic accomplice liability represents a third possible way of understanding the failure to punish. There are two reasons for thinking that it does not. First, the language of the complicity doctrine within domestic military law suggests a fairly rigorous causation requirement. See Uniform Code of Military Justice, 10 U.S.C. § 877(2) (2008). Second, it is doubtful that even the more capacious understanding of accomplice liability that holds outside of the military context would accommodate the nature of the harm inflicted by the commander who fails to punish an atrocity of his troops. I elaborate on this point below. See discussion *infra* Part II.B.

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

21. See, e.g., Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7(3), S.C. Res. 827, Annex, U.N. Doc. S/RES/827/Annex (May 25, 1993), amended by S.C. Res. 1660, U.N. Doc. S/RES/1600 (Feb. 28, 2006), reprinted in 32 I.L.M. 1163 (1994) [hereinafter ICTY Statute].

22. See, e.g., Danner & Martinez, *supra* note 17; Eric A. Posner, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 800 (2004).

23. See, e.g., ICTY Statute, *supra* note 21 (stating that a commander may be held criminally responsible if he “knew or had reason to know” that his subordinates had committed an offense and if he failed to punish that offense).

problematic, both because a more liberal time period is in play, and because the atrocity calls attention to itself in a way that the hushed murmurs of his subordinates' plans do not, or that the spontaneous wagging of an atrocity cannot.²⁴ In short, then, the mental state element is much easier to establish for a charge of failure to punish than for a charge of failure to prevent.

Despite the potential prosecutorial advantages inherent in the failure to punish prong, prosecutors have declined to indict high-level commanders for their failures to punish because, under current international and domestic law, the failure to punish is a relatively toothless doctrine. More specifically, under both systems of law, the commander's failure to punish is treated merely as a matter of dereliction of duty.²⁵ Since dereliction of duty is a relatively meager offense, often ensuing in a sentence of just a few months' confinement,²⁶ prosecutors are inclined to look for other ways to ensnare those high up in the chain of command. For example, prosecutors at the International Criminal Tribunal for the Former Yugoslavia (ICTY) increasingly rely on a kind of conspiratorial liability, called joint criminal enterprise (JCE), in their efforts to achieve convictions against high-level defendants.²⁷ As other commentators have argued, the problem with JCE is that it confers a great amount of discretion on prosecutors to construe the joint enterprise very broadly—so broadly that the doctrine threatens to convict innocents.²⁸

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

24. For example, after twenty-four civilians were killed by U.S. Marines in Iraq, families of the victims went to meet with the commanding officer to urge him to investigate the killings and to take appropriate disciplinary action. See *infra* text accompanying note 137.

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

26. See, e.g., Mynda G. Ohman, *Integrating Title 18 War Crimes into Title 10: A Proposal to Amend the Uniform Code of Military Justice*, 57 A.F. L. REV. 1, 59 (2005).

27. See, e.g., Danner & Martinez, *supra* note 17, at 107–08 (stating that, between June 25, 2001, and January 1, 2004, eighty-one percent of indictments before the ICTY charged defendants on the basis of this doctrine); Osiel, *Banality of Good*, *supra* note 8, at 1766 (citing the preference of prosecutors at the ICTY for use of the joint criminal enterprise (JCE) doctrine, rather than the doctrine of command responsibility, because it is so difficult to convict under the latter).

28. See DRUMBL, *supra* note 17, at 39 (noting that some observers now scornfully jest that JCE in fact stands for “just convict everyone”); Danner & Martinez, *supra* note 17, at 108–10; Osiel, *Banality of Good*, *supra* note 8, at 1791, 1796–1802, 1854.

would carry a moral taint that matches the nature of their contribution better than does the substantive offense view.²⁹

Part I of this Article surveys the history of the doctrine of command responsibility in an effort to critique the way in which international and domestic military courts currently respond to commanders' failures to punish. I argue that neither international nor domestic law is inexorably led, as a matter of doctrine or theory, to the substantive offense view. In Part II, I advance the Article's theory of harm, and argue that the failure to punish can, under circumstances that I identify, inflict an expressive harm that renders the commander a party to his subordinates' offense. In the last section of Part II, I address the arguments of criminal law scholars who have embraced the substantive offense view. Throughout the Article, I provide detailed accounts of the ways in which commanders have responded to the atrocities that I discuss. My purpose here is not merely illustrative; the process of holding soldiers accountable for an atrocity that they have committed has a truth-telling function that confers some amount of solace on the atrocity's victims (or their families).³⁰ The commander who foregoes discipline thus deprives the victims of this source of solace. Their stories are told here in an effort to fill the silence that would otherwise reign.

I. WANTON KILLINGS AND MERE WRIST SLAPS

In December 2003, an Iraqi auto repair shop owner in the Sunni Triangle made an obscene gesture as a platoon of U.S. soldiers passed by his garage. The soldiers stopped and searched the shop. Although they found nothing, their platoon commander ordered them to take the shop owner to a bridge over the Tigris and throw him into the water. Apparently, the soldiers' tactic worked, because the next time the platoon passed by the auto repair shop, its owner greeted them with a polite wave. A few weeks later, the same squad decided to throw two more Iraqis off a bridge. This time, things did not turn out as well: one of the Iraqis is believed to have drowned.³¹

29. For a less optimistic view of the power of command responsibility, grounded in the theoretical possibility that organizations could be structured to thwart a claim of superior responsibility, see Osiel, *Banality of Good*, *supra* note 8, at 1780–83.

30. Danner & Martinez, *supra* note 17, at 94.

31. Dexter Filkins, *The Fall of the Warrior King*, N.Y. TIMES, Oct. 23, 2005, at E52. Although the soldiers on the bridge that night report that they saw two figures emerge from the water after both had been thrown in, one of the two Iraqis swears that the other never made it out of the water. Army investigators have concluded that one of the two Iraqis did drown, and the soldiers involved have been prosecuted for homicide. *Id.*

The incident is remarkable not only for the brazen abuse it involves, but also for the way in which it was handled by Lt. Col. Nathan Sassaman, the commander of the battalion that included the soldiers who were present on the bridge that night. Sassaman claims not to have heard about the first bridge-throwing incident, and to have learned about the second incident only a few days after it occurred. Sassaman immediately asked his deputy to investigate and, based on what his deputy told him, Sassaman believed that no one had been harmed—that the stunt, though “dumb,” was not criminal.³² He decided not to report the incident to his superior. When army investigators later started questioning Sassaman’s men about the incident, Sassaman urged his subordinates to tell the investigators everything that they wanted to know—except “the part about the water.”³³

Sassaman’s cover-up eventually came to light. Although the Uniform Code of Military Justice (UCMJ) provides for the court-martial of a commander who fails to investigate or punish an offense committed by his subordinates,³⁴ Sassaman was subjected to the lesser disciplinary route of non-judicial punishment.³⁵ Sassaman received a written reprimand. He has since retired from the Army and hopes to pursue a career as a football coach.³⁶

The delicate handling of Sassaman’s case is hardly unique.³⁷ Although abuses in the war in Iraq are now believed to be “common,”³⁸ these often initially go unreported, and “almost always go unpunished.”³⁹ Yet commanders bear a duty, under both domestic and international law, to investigate alleged abuses committed by their subordinates and to punish any abuses that they determine to have occurred. Thus, *Army*

32. *Id.*

33. *Id.*

34. As we shall see in Part II.B, *infra*, this offense is typically prosecuted under the Uniform Code of Military Justice’s (UCMJ) more general dereliction of duty provision. See 10 U.S.C. § 892 (2008).

35. See, e.g., *Army Punishes Commanders in Drowning of Iraqi Civilian*, ORLANDO SENTINEL, July 8, 2004, at A5; Suzanne Goldberg, *US to Try 20 More Troops for Abuse in Iraq*, GUARDIAN, Jan. 17, 2005, available at <http://www.guardian.co.uk/world/2005/jan/17/iraq.usa>.

36. Filkins, *supra* note 31.

37. See, e.g., *supra* note 11 and accompanying text. Sassaman was not the only one to have been treated leniently. Staff Sgt. Tracy Perkins, who threw the two Iraqis into the water, was convicted of assault and sentenced to six months confinement. His platoon officer, Lt. Jack Saville, who had ordered his troops to throw the Iraqis into the water, pled guilty and was sentenced to forty-five days of confinement. Filkins, *supra* note 31 (“Both men, in effect, were convicted not of killing Zaydoon but of pushing him and Marwan into the water. Of getting them wet.”). See generally Ohman, *supra* note 26, at 98.

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

39. *Id.*

Field Manual 27-10 states that “[c]ommanding officers of United States troops must ensure that war crimes committed by members of their forces against enemy personnel are promptly and adequately punished.”⁴⁰ Similarly, Article 87 of the Additional Protocol to the Geneva Conventions requires “any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol . . . to initiate disciplinary or penal action against violators thereof.”⁴¹ Nonetheless, commanders who fail to discharge this duty are rarely prosecuted for their failures to punish. Where they are prosecuted, we shall see that the law effectively treats commanders’ failures to punish with a proverbial slap on the wrist.

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

A. *The Failure to Punish in International Criminal Law*

Contemporary command responsibility provisions criminalize a commander’s failure to punish an atrocity committed by his troops. The language of Article 7(3) of the Statute of the ICTY is representative.⁴² It reads, in pertinent part,

40. U.S. DEP’T OF THE ARMY, FIELD MANUAL 27-10: THE LAW OF LAND WARFARE ¶ 507(b) (1956) [hereinafter ARMY FIELD MANUAL 27-10]. One can infer that a similar duty exists for Navy officers, since they may be held responsible for their subordinates’ act if they “acquiesce” in it. See Paust, *supra* note 20, at 176–77; see also Articles of War, 14 U.S.C. § 2308(a) art. 54 (1916) (stating that a commander has a duty to ensure “to the utmost of his power, redress of all abuses and disorders which may be committed by an officer or a soldier under his command”).

41. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 87(3), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; see also Prosecutor v. Hadžihasanović, Case No. IT-01-47-T, Trial Judgment, ¶ 1777 (Mar. 15, 2006) [hereinafter *Hadžihasanović Trial Judgment*] (“[I]n international law, a commander has a duty to take the necessary and reasonable measures to punish those who violate the laws or customs of war.”).

42. Article 7(3) is identical to Article 6(3) of the statute governing the International Criminal Tribunal for Rwanda (ICTR). See S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955 (Nov. 8, 1994). Both articles use the term “superior” instead of the narrower “commander” because they contemplate not just military authorities but also political and civilian leaders who fail to punish abuses committed by their subordinates. See, e.g., Prosecutor v. Orić, Case No. IT-03-68-T, Trial Judgment, ¶ 308 (June 30, 2006)

[T]he fact that any of the [acts criminalized by] the present Statute was [sic] committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to . . . punish the perpetrators thereof.⁴³

In other words, the statute makes criminal, *inter alia*,⁴⁴ a superior's failure to punish an offense of his subordinates if he knew or had reason to know that the offense had occurred. On the other hand, the statutory language leaves unsettled the question of the nature of the offense for which the commander is to be held criminally responsible. In particular, is the failure to punish a ground for holding the commander criminally liable for the atrocity committed by his troops, or is it an offense in its own right? Under international law, we shall see, the doctrine has shifted from the former to the latter.

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

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

As we have seen, contemporary command responsibility statutes punish commanders if they "knew or had reason to know" that their troops had committed atrocities and failed to punish those atrocities.⁴⁵

[hereinafter *Orić Trial Judgment*]. Article 28 of the Rome Statute also contains a failure to punish clause, although it explicitly distinguishes, in separate provisions each with its own mental state requirement, military commanders from political and civilian leaders. Rome Statute, *supra* note 5, art. 28. Although I anticipate that the critique that I advance translates to the context of civilian leadership, I restrict my focus to the military context since I am interested, in particular, in probing the normative dimensions of the military command structure. For the view that Article 28 of the Rome Statute is narrower than the ICTY and ICTR formulations, because Article 28 makes the commander liable for failure to punish only if the commander is also guilty of failing properly to control his troops, and that failure led to the troops' atrocity, see Volker Nerlich, *Superior Responsibility Under Article 28 ICC Statute: For What Exactly Is the Superior Held Responsible?*, 5 J. INT'L CRIM. JUST. 665, 678–79 (2007).

43. ICTY Statute, *supra* note 21, art. 7(3).

44. The full text of Article 7(3) criminalizes not only a commander's failure to punish but also his failure to prevent an offense that he knew, or had reason to know, his subordinate was about to commit. See *id.* Since this Article contemplates only those offenses about which the commander is ignorant before or during their occurrence, and for which the commander's ignorance is not itself culpable, I do not consider the "failure to prevent" prong of Article 7(3) here. For a critical discussion of the failure to prevent prong, see Mirjan Damaška, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455, 461–67 (2001); Danner & Martinez, *supra* note 17, at 124–31.

45. See *supra* note 44 and accompanying text.

Much has been written about the “knew or had reason to know” formulation,⁴⁶ and indeed the ICTY itself wrestled with the term until it reached a conclusive interpretation in *Prosecutor v. Blaškić*.⁴⁷ The ICTY’s struggle has been attributed to “the ghost of *Yamashita*,”⁴⁸ a reference to the U.S. Supreme Court case that affirmed a death sentence for General Tomoyuki Yamashita,⁴⁹ commanding general of the Imperial Japanese Army in the Philippines during World War II. Yamashita was found criminally liable for acts of rape and murder committed by troops ostensibly under his command.⁵⁰ At his trial before a military commission, no evidence was presented to establish that Yamashita possessed actual knowledge of the atrocities committed by his subordinates, and he contended that his chain of communication had been disrupted. Nonetheless, the commission found him guilty, and the Supreme Court affirmed its verdict, on the supposition that Yamashita *must have known* that the crimes in question were so widespread that only willful blindness could have prevented him from actually knowing about their occurrence.⁵¹

Historians of the case have since argued that the situation on the ground may well have prevented Yamashita from acquiring the knowledge presupposed by his conviction.⁵² Even more problematic was that the United States itself had disrupted Yamashita’s lines of communication. Thus, Justice Murphy offered this searing characterization of Yamashita’s conviction by a U.S. military commission:

46. See, e.g., Bonafé, *supra* note 7, at 605–07; Damaška, *supra* note 44, at 461–62; Danner & Martinez, *supra* note 17, at 125–30; Arthur T. O’Reilly, *Command Responsibility: A Call To Realign the Doctrine with Principles*, 20 AM. U. INT’L L. REV. 71, 91–94 (2004). Mark Osiel has written that “[v]irtually all academic discussion focuses on the *mens rea* requirement.” Osiel, *Banality of Good*, *supra* note 8, at 1774. *But see* Danner & Martinez, *supra* note 17, at 130–31 (discussing at length the doctrinal requirement of a superior-subordinate relationship).

47. *Blaškić Appeals Judgment*, *supra* note 17. That decision held that the “‘had reason to know’” clause encompassed only situations in which “information was available” to the commander “which would have put him on notice of offences by subordinates.” *Id.* ¶ 62. For an excellent overview of the evolution of the *mens rea* requirement under Article 7(3), see Martinez, *supra* note 7, at 654–59.

48. Martinez, *supra* note 7, at 641; cf. Bonafé, *supra* note 7, at 601 (contending that the ICTY and ICTR are reacting against the interpretations of command responsibility that were wielded by the Nuremberg and Tokyo tribunals).

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

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

51. U.N. War Crimes Comm’n, *Trial of General Tomoyuki Yamashita*, in 4 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 35, 37 (1948).

52. See, e.g., Laurie Barber, *The Yamashita War Crimes Trial Revisited*, 1 WAIMILHIST, Sept. 1998, <http://www.waikato.ac.nz/wfass/subjects/history/waimilhist/1998/wmh3.html> (last visited Jan. 26, 2009).

We, the victorious American forces, have done everything possible to destroy and disorganize your lines of communication, your effective control of your personnel, your ability to wage war We will judge the discharge of your duties by the disorganization which we ourselves created in large part. Our standards of judgment are whatever we wish to make them.⁵³

In light of the injustice so forcefully conveyed in Justice Murphy's dissent, *Yamashita* might well be characterized as the *Korematsu* of international criminal law decisions.⁵⁴ Justice Rutledge, who also dissented in the case, privately referred to the majority opinion as "'the worst in the [C]ourt's history, not even barring *Dred Scott*.'"⁵⁵

But although *Yamashita* is rightly reviled, its spurious *mens rea* element was not at issue in the ICTY cases in which the Tribunal articulated and adopted a novel construction of command responsibility. Trial chambers in those cases found that the defendants had *actual* knowledge of their subordinates' abuses. Nonetheless, the ghost of *Yamashita* continues to haunt jurists.

2. Article 7(3) of the ICTY Statute Interpreted

Enver Hadžihasanović was the Commander of the 3rd Corps of the Armed Forces of Bosnia-Herzegovina (ABiH) in the summer of 1993, when the units under his command launched a series of heavy attacks against the Croatian Defence Council (HVO).⁵⁶ Those attacks resulted in the unlawful detention and abuse of Bosnian Croats and Serbs.⁵⁷ Mladen Havranek, an HVO soldier, was among those detained.⁵⁸ He was held in the basement of a furniture warehouse, with little food and no functioning toilets. A sewage pipe had burst, leaving pools of excrement-filled standing water.⁵⁹ Each night, the soldiers guarding the furniture warehouse would call for five or six detainees one by one, whom they proceeded to beat with wooden implements, clubs, and iron rods.⁶⁰ When

53. *Yamashita*, 327 U.S. at 34–35 (Murphy, J., dissenting).

54. *Korematsu v. United States*, 323 U.S. 214 (1944) (finding no constitutional infirmity in the internment of Japanese Americans during World War II).

55. Richard Brust, *Setting Precedent in Two Wars: How Justice Stevens Turned 60-Year-Old Dissents into Major Rulings in the War on Terrorism*, 93 A.B.A. J. 48, 51 (2007) (quoting a private letter from Justice Rutledge to a colleague, *reprinted in* JOHN M. FERREN, *SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE* (2004)). For the view that the contemporary understanding of command responsibility in international law embodies the *Yamashita* standard, see Smidt, *supra* note 13, at 206–07.

56. *Hadžihasanović Trial Judgment*, *supra* note 41, ¶¶ 1734, 1742–45.

57. *Id.* ¶¶ 1614–15.

58. *Id.* ¶ 1620.

59. *Id.* ¶ 1597.

60. *Id.* ¶ 1598.

the guards wanted to take a break, they forced the prisoners to beat one another.⁶¹ On August 5, 1993, Havranek was among those whose names were called.⁶² From the basement, the other detainees could hear Havranek moaning and screaming and begging the guards to stop beating him.⁶³ He lost consciousness shortly after he was returned to the basement, and died later that night.⁶⁴

Hadžihasanović was apprised of Havranek's death about two weeks later.⁶⁵ He also learned that the soldiers who had beaten and killed Havranek had been disciplined, but that no criminal prosecution was being pursued.⁶⁶ Hadžihasanović expressed his satisfaction with this response.⁶⁷ At his trial, the ICTY found that mere disciplinary measures were insufficient to address Havranek's murder⁶⁸ and that Hadžihasanović had therefore failed to fulfill his duty to punish.⁶⁹ For the first time in its history, the ICTY convicted a commander solely for his failure to punish.⁷⁰

This important step was, however, undercut by the ICTY's understanding of the nature of Hadžihasanović's offense. Hadžihasanović was not found liable for Havranek's murder; instead, he was convicted of the separate offense of failing to punish.⁷¹ In other words, the ICTY construed the wrong that Hadžihasanović had perpetrated as a species of dereliction of duty. The *Hadžihasanović* Chamber arrived at this construction by choosing to adopt the analysis proffered by another ICTY Chamber, in *Prosecutor v. Halilović*.⁷²

Halilović, decided in November 2005, marked the first time that a commander faced counts of an indictment predicated solely on his failure to prevent or punish an offense, rather than his instigating or ordering an offense.⁷³ The *Halilović* Chamber thus addressed at great

61. *Id.* ¶ 1603.

62. *Id.* ¶ 1600.

63. *Id.* ¶ 1616.

64. *Id.* ¶¶ 1600, 1616–17.

65. *Id.* ¶¶ 1753–55.

66. *Id.* ¶¶ 1752–53.

67. *Id.* ¶¶ 1753, 1770.

68. *Id.* ¶ 1777.

69. *Id.*

70. Hadžihasanović was not the first to be charged before the ICTY solely for his failure to punish. That distinction belongs to Sefer Halilović. See *infra* note 72 and accompanying text.

71. See *Hadžihasanović Trial Judgment*, *supra* note 41, ¶¶ 1777–80.

72. See *Halilović Trial Judgment*, *supra* note 19.

73. In *Prosecutor v. Strugar*, the defendant was convicted solely under Article 7(3) of the ICTY Statute, although he had been charged under both Articles 7(1) and 7(3) for the same underlying offense. *Prosecutor v. Strugar*, Case No. IT-01-42-T, Trial Judgment, ¶ 2 (Jan. 31, 2005). Other prior cases involving a failure to prevent and/or punish arose in cases in which the defendant also bore causal responsibility for the offense that he had failed to prevent

length the question of whether the failure to punish was a *mode of liability* that would render the commander criminally responsible for his subordinates' offense, or, instead, a *sui generis* crime flowing from his dereliction of duty.⁷⁴ To answer that question, the Trial Chamber marshaled an extensive history of command responsibility. In what follows, I summarize the *Halilović* Trial Chamber's analysis with a view to exposing the shaky support on which it relied for its ultimate conclusion.

The Chamber largely based its analysis on post-World War II case law.⁷⁵ The Chamber first invoked four cases arising in the immediate aftermath of the war. According to its own reading, the Chamber acknowledged that three of these cases held that a commander can be held liable for the offenses of his subordinates if he fails to prevent or punish them;⁷⁶ the last case is silent with respect to the offense for which the commander should be punished, stating only that "*he has failed in his performance of his duty as a commander and must be punished.*"⁷⁷ As such, that case leaves open the possibility that the crime for which the commander ought to be punished is the atrocity of his subordinates, rather than his dereliction of duty. Nonetheless, in a marked understatement, the *Halilović* Chamber concluded from this set of cases that the post-World War II case law is "not uniform in its determination as to the nature of the responsibility arising from the concept of command responsibility."⁷⁸

and/or punish, because he ordered or instigated that offense. *See, e.g.*, Prosecutor v. Delalić et al., Case No. IT-96-21-A, Appeals Judgment (Feb. 20, 2001) [hereinafter *Čelebici Appeals Judgment*]; Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeals Judgment (Mar. 24, 2000). Article 7(1) of the ICTY Statute criminalizes the ordering or instigating of an offense by a commander, while Article 7(3) criminalizes his failure to prevent or punish. In *Prosecutor v. Blaškić*, the ICTY determined that a commander could not be found guilty under both Articles 7(1) and 7(3) for the same offense; instead, only Article 7(1) could be used as a ground for criminal liability, with a commander's failure to prevent and/or punish functioning as an aggravating factor at sentencing. *See Blaškić Appeals Judgment, supra* note 17.

74. *Halilović Trial Judgment, supra* note 19, ¶ 42.

75. *Id.* ¶¶ 42–53. Before turning to the post-World War II case law, the *Halilović* Chamber first quickly adverted to the early history of command responsibility, beginning with a 1439 order of Charles VII of France, which held that "a captain 'shall be responsible for the offence as if he had committed it himself and shall be punished in the same way as the offender would have been.'" *Id.* ¶ 40 n.94. Nonetheless, because the *Halilović* Chamber based its interpretation on post-World War II doctrine, I do not consider the earlier history here (although it strongly supports the mode of liability view).

76. *Halilović Trial Judgment, supra* note 19, ¶ 47 & n.113 (quoting United States v. Soemu Toyoda, Official Transcript of Record of Trial, at 5006 (Int'l Mil. Trib. for the Far East 1949)).

77. *Id.* (emphasis added).

78. *Halilović Trial Judgment, supra* note 19, ¶ 48.

The Chamber next turned to the reports submitted to the Security Council prior to the adoption of the ICTY's governing statute.⁷⁹ The Chamber began by noting that a "reading of the Secretary General's Report concerning Article 7(3) *does not exclude the possibility* that command responsibility under the Statute of the Tribunal may be responsible for dereliction of duty."⁸⁰ It then cited a report by the Commission of Experts, which stated that superiors are "individually responsible for a war crime or crime against humanity committed by a subordinate,"⁸¹ from which the Chamber inferred that "the Commission of Experts *may* have considered that Article 7(3) attached responsibility to commanders for the crimes of their subordinates."⁸² The *Halilović* Chamber also noted that "the Trial Chamber Judgment in *Čelebici* relied upon the report of the Secretary-General to find that command responsibility under Article 7(3) attaches responsibility for the crimes of subordinates,"⁸³ a finding that was affirmed on appeal,⁸⁴ as the *Halilović* Chamber acknowledged.⁸⁵ Finally, the panel invoked the International Law Commission Commentary on Article 6 of the ICTY Statute,⁸⁶ which, according to the panel's reading of it, "considered that a military commander may be held criminally responsible for the unlawful conduct of his subordinates if he contributes indirectly to the commission of a crime by failing to prevent or repress that crime."⁸⁷

The only source cited by the *Halilović* Chamber that could support a substantive offense reading of Article 7(3) emerged from the dissenting portion of Judge Shahabuddeen's opinion in an interlocutory appeal decision in the *Hadžihasanović* case. Judge Shahabuddeen stated that *he would* "prefer to interpret the provision as making the commander

79. The *Halilović* Chamber paused briefly first to consider Articles 86 and 87 of Additional Protocol I to the Geneva Conventions, which, as the Chamber rightfully noted, are "silent as to the nature of command responsibility—that is, whether it is responsibility for dereliction of duty or responsibility for the crimes of subordinates." See *id.* ¶ 49.

80. *Id.* ¶ 51 (emphasis added).

81. *Id.*

82. *Id.* (emphasis added).

83. *Id.* ¶ 51 n.117. For the text that footnote 117 of the *Halilović* opinion accompanied, see *infra* text accompanying note 80.

84. The Appeals Chamber held that, where a superior has effective control over his subordinates, "he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control." *Čelebici Appeals Judgment, supra* note 73, ¶ 198 (emphasis added).

85. *Halilović Trial Judgment, supra* note 19, ¶ 53.

86. *Report of the International Law Commission on the Work of Its Forty-Eighth Session*, U.N. GAOR, 51st Sess., Supp. No. 10, at 25, U.N. Doc. A/51/10 (1996), reprinted in [1996] 2 Y.B. Int'l L. Comm'n 11, U.N. Doc. A/CN.4/SER.A/1996/Add.1.

87. *Halilović Trial Judgment, supra* note 19, ¶ 52.

guilty for failing in his supervisory capacity to take the necessary corrective action”⁸⁸

In sum, on the basis of the doctrinal history that *Halilović* invoked, there is overwhelming support for the mode of liability view. Indeed, as the *Hadžihasanović* Chamber subsequently noted, “The analysis by the Chamber in *Halilović* shows that most Chambers of [the ICTY] have determined that a superior is responsible for the acts of his subordinates under Article 7(3) of the Statute.”⁸⁹ Nonetheless, the *Halilović* Chamber arrived at the remarkable conclusion that Article 7(3) does not render a commander liable for the offenses of his subordinates; instead, it criminalizes the substantive offense of failing to prevent or punish. The *Halilović* Chamber stated:

The Trial Chamber finds that under Article 7(3) command responsibility is responsibility for an omission This omission is culpable because international law imposes an affirmative duty on superiors to prevent and punish crimes committed by their subordinates *A commander is responsible not as though he had committed the crime himself*⁹⁰

There remained, of course, the niggling matter that prior ICTY case law routinely speaks of holding a commander criminally responsible “for the acts of his subordinates.”⁹¹ The *Halilović* Chamber was, however, undaunted as it insisted that the phrase

88. *Id.* ¶ 53 (citing Prosecutor v. Hadžihasanović, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 32 (July 16, 2003) (Shahabuddeen, J., dissenting) [hereinafter, *Hadžihasanović Interlocutory Appeal*]). The cited statement of Judge Shahabuddeen’s opinion is drawn from the portion of his opinion in which he dissents from the majority. The majority opinion does not comment on the question that occupied the *Halilović* Trial panel—*viz.*, whether Article 7(3) criminalizes a substantive offense or confers a mode of liability.

89. *Hadžihasanović Interlocutory Appeal*, *supra* note 88, ¶ 72.

90. *Halilović Trial Judgment*, *supra* note 19, ¶ 54. It is significant that the Chamber acquitted *Halilović* on the ground that he lacked effective control during the period in which his subordinates committed the atrocities in question, and so did not have the material ability to punish them. *See id.* ¶¶ 746, 750–53. The acquittal outcome should have been sufficient, then, to quell whatever unease the Chamber had about interpreting Article 7(3) as a mode of liability. The fact that the Chamber nonetheless was at pains to repudiate that interpretation underscores the strength of the panel’s aversion to rendering a commander criminally liable for the acts of his subordinates solely because he fails to punish them.

Halilović’s acquittal has since been affirmed by the ICTY Appeals Chamber. *See Prosecutor v. Halilović*, Case No. IT-01-48-A, Appeals Judgment (Oct. 16, 2007). The appellate decision addressed only the prosecution’s challenge to the Trial Chamber’s finding that *Halilović* lacked effective control over his subordinates. Since the Appeals Chamber upheld this finding, it declined to consider the prosecution’s challenge to the Trial Chamber’s treatment of Article 7(3)’s failure to punish prong. *See id.* ¶¶ 216–17.

91. *See, e.g.*, Prosecutor v. Obrenović, Case No. IT-02-60/2-S, Sentencing Judgment, ¶ 40 (Dec. 10, 2003) (finding that defendant, the Acting Commander or Deputy

“for the acts of his subordinates” . . . does not mean that the commander shares the same responsibility as the subordinates who committed the crimes, but rather that because of the crimes committed by his subordinates, the commander should bear responsibility for his failure to act.⁹²

In other words, the otherwise straightforward phrase “criminally responsible for the acts of his subordinates” is, on the ICTY’s reading of it, elliptical for something like “criminally responsible in light of the acts of his subordinates, which he failed to prevent or punish.”

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

The foregoing reconstruction of *Halilović* suggests that the case tortures the history that it marshals in order to arrive at the substantive offense view. But, there is both more ancient history and more authoritative doctrine that tends to the alternative interpretation.

For example, scholars have traced a conception of command responsibility in line with the mode of liability view as far back as Sun Tzu’s writings on military discipline in 500 B.C.⁹³ The history picks up again in the early 1400s, and then again at the time of the Revolutionary War in the United States.⁹⁴ In the aftermath of World War II, when there was a relative explosion in pronouncements about command responsibility, most of the Allied States enacted command responsibility provisions that expressly adopted the mode of liability view. Article 3 of the Law of August 2, 1947, of the Grand Duchy of Luxembourg, on the Suppression of War Crimes is representative. It reads, in pertinent part: “[T]he following may be charged according to the [circumstances], as *co-authors or accomplices* in the crimes and delicts set out in Article 1 of the present Law: superiors in rank who have tolerated the criminal activities of their subordinates”⁹⁵ The Netherlands, France, China, and Canada passed substantively similar laws.⁹⁶

At the time that *Halilović* was decided, there existed implicit evidence supporting the mode of liability view within ICTY case law itself.

Commander/Chief of Staff, was “criminally responsible *for the acts of his subordinates* when he knew or had reason to know that his subordinates were about to commit criminal acts or had done so and he failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof” (emphasis added)); Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Trial Judgment, ¶ 67 (June 25, 1999) (“A superior is held responsible *for the acts of his subordinates* if he did not prevent the perpetration of the crimes of his subordinates or punish them for the crimes.”) (emphasis added).

92. *Halilović Trial Judgment*, *supra* note 19, ¶ 54.

93. See Martinez, *supra* note 7, at 661; Parks, *supra* note 50, at 3.

94. Martinez, *supra*, note 7, at 661.

95. U.N. War Crimes Comm’n, *supra* note 51, at 87 (emphasis added).

96. See Parks, *supra* note 50, at 18–19.

In *Blaškić*,⁹⁷ the ICTY Appeals Chamber found that it is duplicative to convict a commander *both* for ordering or instigating an offense (a violation of Article 7(1)),⁹⁸ *as well as* failing to prevent or punish that offense (a violation of Article 7(3)).⁹⁹ As the ICTY stated in *Prosecutor v. Krstić*, “any responsibility under Article 7(3) is subsumed under Article 7(1).”¹⁰⁰ Yet, if Article 7(3) contemplated the *substantive offense* of dereliction of duty, there would be no duplication in convictions rendered under both Articles 7(1) and 7(3). In other words, the Appeals Chamber’s position in *Blaškić* makes sense only if Article 7(3) is intended to make the commander criminally liable for his troops’ atrocity.¹⁰¹

Taken together, the foregoing is intended to establish that the weight of history and precedent lies on the side of the mode of liability view.¹⁰² Nonetheless, although none of the judges comprising the *Halilović* panel sat on the *Hadžihasanović* panel, *Hadžihasanović* followed *Halilović* in adopting the substantive offense view.

The difference in interpretations is not merely semantic. First, the construction of Article 7(3) as the substantive offense of dereliction of duty, rather than as a mode of liability for the underlying atrocities, entails a significantly less severe sentence. As the *Hadžihasanović* Chamber intoned,

the *sui generis* nature of command responsibility under Article 7(3) of the Statute may justify the fact that the sentencing scale applied to those Accused convicted solely on the basis of Article 7(1) of the Statute, or cumulatively under Articles 7(1) and 7(3),

97. *Blaškić Appeals Judgment*, *supra* note 17, ¶ 90.

98. Article 7(1) states, “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.” ICTY Statute, *supra* note 21, art. 7(1).

99. *Blaškić Appeals Judgment*, *supra* note 17, ¶¶ 91–92.

100. *Prosecutor v. Krstić*, Case No. IT-98-33-T, Trial Judgment, ¶ 605 (Aug. 2, 2001).

101. Chantal Meloni adduces other considerations that demonstrate the extent to which the dereliction of duty interpretation is strained. First, she notes that a commander can be convicted under Article 7(3) only if his troops actually commit an offense. Meloni, *supra* note 25, at 628. If the commander is, say, derelict in his duty to prevent, but someone else acts to prevent the soldiers’ intended crime, the commander will not be charged with dereliction. *Id.* Second, the commander’s sentence will turn, first and foremost, not on the extent of his dereliction but instead on the gravity of his subordinates’ offense. *Id.* at 632. Notwithstanding these considerations, Meloni still rejects the mode of liability view, as we shall see in Part III. See *infra* text accompanying note 196.

102. For yet another indication that *Halilović* turned settled doctrine on its head, consider that, just ten months before *Halilović* was handed down, Danner and Martinez had offered this description of the portent of Article 7(3): “It is important to realize that, under command responsibility, the commander is convicted of the actual crime committed by his subordinate and not of some lesser form of liability, such as dereliction of duty.” Danner & Martinez, *supra* note 17, at 121.

is not applied to those convicted solely under Article 7(3), in cases where nothing would allow that responsibility to be assimilated or linked to individual responsibility under Article 7(1).¹⁰³

Thus, in *Prosecutor v. Orić*,¹⁰⁴ a second case to follow *Halilović*, the defendant was sentenced to two years in prison, rather than the eighteen years recommended by the prosecution, which had urged a mode of liability reading.¹⁰⁵

Orić is instructive for another reason: it extended the interpretation of Article 7(3) articulated in *Halilović* and followed in *Hadžihasanović* to a case in which the defendant was convicted for *failing to prevent* his subordinates' atrocities. In *Orić*, troops under the command of the defendant routinely abused Bosnian Serbs whom they had detained, and at least four detainees died as a result. The ICTY Trial Chamber found that, in his position as Commander of the Bosnian Muslim forces in Srebrenica, Orić knew or had reason to know about these acts of mistreatment,¹⁰⁶ and that he had effective control over those who could have prevented them.¹⁰⁷ The *Orić* Chamber refused to countenance Orić's claim that his attentions were diverted as a result of the deteriorating military situation: "[A]s a general rule, the treatment of prisoners in armed conflict, including their physical and mental integrity, cannot be relegated to a position of importance inferior to other considerations, military or otherwise, however important they may be . . ."¹⁰⁸

103. *Hadžihasanović Trial Judgment*, *supra* note 41, ¶ 2076; *see also Orić Trial Judgment*, *supra* note 42, ¶ 724 (stating that trial chambers have "greater flexibility" when sentencing a defendant convicted solely for his failure to prevent or punish an offense, relative to the defendant who is convicted of instigating or ordering that offense).

104. *Orić Trial Judgment*, *supra* note 42, ¶¶ 293, 724. The judges presiding in *Orić* were different from those presiding in *Halilović* and *Hadžihasanović*, which suggests an emerging consensus in ICTY jurisprudence.

105. *See Meloni*, *supra* note 25, at 621 n.7 (citing *Prosecutor v. Orić*, Case No. IT-03-68-A, Prosecution's Appeal Brief, ¶ 10 (Oct. 16, 2006)). *Hadžihasanović* received a single sentence of five years, which resulted from his convictions not only for the failure to punish Havranek's murder, but also for the failures to prevent or punish atrocities committed by his subordinates at the Zenica Music School, as well as other failures to prevent or punish. *Hadžihasanović Trial Judgment*, *supra* note 41, ¶¶ 2085, 1240. It is thus difficult to discern what portion of *Hadžihasanović's* sentence resulted solely from his failure to punish Havranek's murder.

Other commentators have noted that the ad hoc tribunals, and especially the ICTY, have, in general, dispensed sentences significantly lower—sometimes bafflingly lower—than those imposed by municipal courts for crimes on a much smaller scale. *See, e.g., Drumbl*, *Collective Violence*, *supra* note 15, at 578–79; Harmon & Gaynor, *supra* note 1, at 684–89.

106. *Orić Trial Judgment*, *supra* note 42, ¶ 560.

107. *Id.* ¶¶ 567–68.

108. *Id.* ¶ 559.

The *Orić* Chamber recognized that commanders bear an obligation to prevent and punish because doing so can avert imminent crimes and deter future crimes.¹⁰⁹ But, the *Orić* Chamber nonetheless refused to construe Orić's failure to prevent as a causal contributor to the acts of abuse described above.¹¹⁰ Its refusal was grounded not in the facts of the case, but instead in its understanding of the nature of Article 7(3). If Article 7(3) were to require causation, the Chamber reasoned, there would be no difference between Articles 7(1) and 7(3). As such, the Chamber concluded, Article 7(3) could be saved from superfluity only if the Chamber ignored the material harm caused by the failure to prevent, and construed that failure solely as a substantive offense.¹¹¹

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

Orić may thus have been the unlikely beneficiary of the Tribunal's faulty reasoning and overblown concerns about superfluity. As a result, although the Chamber found that Orić knew that captives detained by his subordinates were routinely beaten, sometimes to death, and that he had failed to prevent this mistreatment, it convicted Orić solely of neglecting his duty, and did not hold him responsible for the underlying offenses.¹¹² Orić was given credit for time served, and released shortly after his case was decided.

The point here is not that Orić or Hadžihasanović necessarily deserved a more severe sentence. I shall argue in Part II that the failure to

109. *Id.* ¶ 338.

110. *See id.*

111. *Id.*

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

punish grounds criminal liability for the underlying offense only when that failure communicates that the victims of the underlying offense did not merit better treatment than they received. Since we do not know whether Orić's or Hadžihasanović's failure to punish was propelled by such a belief, we are not in a position to judge the particular treatment of each before the ICTY.

But, there is a broader lesson to be drawn from their trials. The ICTY chambers deciding their cases were not compelled, as a matter of precedent, history, or logic, to interpret the offense criminalized in Article 7(3) simply as a dereliction of duty, and the adoption of this interpretation has had, and will continue to have, significant implications for the gravity of the sentence imposed on a commander convicted under the command responsibility doctrine in international law.¹¹³

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

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

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

This Section aims to demonstrate that construing the failure to investigate or punish solely as a matter of dereliction of duty, rather than as a ground of criminal liability for the underlying offense, is no more justified in domestic law than in international law. To that end, I first describe the history of command responsibility in domestic military law. I next invoke the Haditha incident as an example of the current understanding of command responsibility as the substantive offense of dereliction of duty. To fully grasp the operation of command responsibility within domestic law, however, we must inquire not only into doctrine and history, but also into the institutional dynamics affecting military justice. The latter inquiry is necessary because of the peculiar shape of U.S. military justice: Whereas international war crimes are tried before international tribunals independent of the militaries whose members commit these crimes, U.S. military atrocities are tried by the military itself, and, as we

113. International criminal law consists, in part, of the decisions of the ad hoc tribunals, which are probative sources of law for the ICC. Thus, we can assume that the ICTY's interpretation of command responsibility will influence the ICC's construction of the doctrine. *See, e.g.,* Nerlich, *supra* note 42, at 682 ("The finding of the ICTY Trial Chamber in *Hadžihasanović* and *Kubura* thus sheds light on an important aspect of superior responsibility that, to a certain extent, may be also of relevance to the interpretation and application of Article 28 [of the Rome Statute].").

shall see, commanders can exert much control over who gets prosecuted, and for which offenses. A study into command culture can thus help us glean the factors propelling a commander to uphold or forsake his obligation to punish; this study can also throw into relief the perils of treating the failure to investigate and punish leniently. I undertake this study in the last sub-section, using the My Lai massacre as an illustration.

1. The Long-Standing View of the Failure to Punish as a Mode of Liability

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

Every officer commanding, in quarters, or on a march, shall keep good order, and to the utmost of his power, redress all such abuses or disorders which may be committed by any Officer or Soldier under his command; if upon complaint made to him of Officers or Soldiers beating or otherwise ill-treating any person, or committing any kind of riots to the disquieting of the inhabitants of this Continent, he, the said commander, who shall refuse or omit to see Justice done to this offender or offenders, and reparation made to the party or parties injured, as soon as the offender's wages shall enable him or them, upon due proof thereof, be punished, as ordered by General Court-Martial in such manner *as if he himself had committed the crimes or disorders complained of*.¹¹⁴

In other words, the crime of the commanding officer's subordinates would attach to the officer unless he sought to punish his subordinates and ensure that the victims' injuries were redressed. An identical provision was included first in Article XII of the American Articles of War, enacted June 30, 1775, and re-enacted as section IX of the American Articles of War of 1776 on September 20, 1776.¹¹⁵ Thus, from the very outset of this nation, commanders faced criminal liability for their subordinates' offense if they failed adequately to punish it.

The mode of liability view of command responsibility has persisted through two world wars, and the wars in Korea and Vietnam, to the

114. Articles of War, Provisional Congress of Mass. Bay, April 5, 1775, *quoted in Parks, supra* note 50, at 5 (emphasis added).

115. Parks, *supra* note 50, at 5.

present day.¹¹⁶ In addition, it is clear that the United States imposes the mode of liability view on enemy combatants whom it tries before courts-martial. As the Military Commissions Act of 2006 states,

Any person is punishable as a principal under this chapter who . . . is a superior commander who, with regard to acts punishable under this chapter, knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and [the superior] failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.¹¹⁷

More generally, some commentators have argued that the U.S. Constitution and early Supreme Court opinions evidence the Framers' intention that customary international law be binding on the United States.¹¹⁸ On that argument, the international doctrine of command responsibility, which, as we saw above, has traditionally construed the

116. For example, *Army Field Manual 27-10* states, "In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control." ARMY FIELD MANUAL 27-10, *supra* note 40, ¶ 501. That provision goes on to explain that the commander will bear responsibility for "massacres and atrocities" committed by his troops if "he has actual knowledge, or should have knowledge . . . that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps . . . to punish violators thereof." *Id.*; see also Paust, *supra* note 20, at 176–77 (citing a 1955 *Law of Navy Warfare* provision substantially similar to *Army Field Manual 27-10*); Smidt, *supra* note 13, at 185 n.125 (stating that, as of the writing of 2000, *Army Field Manual 27-10* was still current Army doctrine). Writing in 1982, the Chief of the Appellate Defense Division of the Army Judge Advocate General's Corps stated:

Command criminal responsibility goes beyond personal felonious acts. It assumes that a commander does not issue illegal orders or in some way personally direct or supervise a prohibited activity; such conduct would make the commander a personal participant. It is not personal criminal activity but criminal responsibility for the actions of subordinates or for command decisions affecting others.

William G. Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, 97 MIL. L. REV. 1, 4 (1982). Similarly, in 1988, the Army declared that commanders are "responsible for everything their command does or fails to do." U.S. Dep't of the Army, Reg. 600–20, Army Command Policy, ch. 2-1b (Mar. 30, 1988); see also U.S. Dep't of Defense, Dir. 5100.77, DOD Law of War Program, ¶¶ 4.1–4.3 (Dec. 9, 1998).

117. Military Commissions Act of 2006, Pub. L. No. 109-366, § 950(q), 120 Stat. 2600 (2006).

118. Smidt, *supra* note 13, at 212–14; see also ARMY FIELD MANUAL 27-10, *supra* note 40, ¶ 511 (warning that "[t]he fact that domestic law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law"); Paust, *supra* note 20, at 106–07 (citing an 1865 letter from the U.S. Attorney General to the President that states that Congress has the power to *define*, but not to make or abrogate, the law of nations as applied to the United States and that even where Congress does not exercise this power, the law of nations is nonetheless binding on the U.S. government).

failure to punish as a mode of liability,¹¹⁹ would apply domestically. As in international criminal law, the difference in domestic law between the two ways of construing a commander's failure to punish—again, as a substantive offense or mode of liability—is of great material consequence. According to the UCMJ, the maximum penalty for willful dereliction of duty is six months of confinement per offense;¹²⁰ by comparison, torture and war crimes carry twenty- and thirty-year maximum sentences under federal law.¹²¹ The upshot of the substantive offense view is also gravely symbolic. As one commentator notes with respect to the UCMJ's dereliction of duty provision, “[a]n article that is routinely used to prosecute abuse of the government travel card hardly contains the inherent stigma deserving of a war crime.”¹²² Dereliction of duty nonetheless remains the favored response to U.S. commanders who fail to punish an atrocity of their troops.

2. The Failure to Investigate and Punish at Haditha

In November 2005, a bomb detonated by Iraqi insurgents struck a U.S. humvee carrying U.S. Marines on the outskirts of the town of Haditha. The bomb killed one Marine, and his fellow Marines proceeded to shoot and kill twenty-four civilians,¹²³ including women and children, in what some believe was a retaliatory shooting rampage.¹²⁴ The next day, a Marine spokesman issued a statement declaring that the Iraqis had died as a result of the roadside bomb.¹²⁵

119. *Halilović Trial Judgment*, *supra* note 19, ¶¶ 54–55.

120. See 10 U.S.C. § 892 (2008). Ironically, one of the goals behind the drafting of the UCMJ, which functions as the military's substantive and procedural criminal law, was to “increase[] public confidence in military justice.” GENEROUS, *supra* note 11, at 34. It is hard to see how the lenient treatment of U.S. military superiors advances this goal. For an overview of the history of U.S. military law prior to the drafting of the UCMJ, see, for example, WILLIAM B. AYCOCK & SEYMOUR W. WURFEL, *MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE* 9–15 (Univ. of N.C. Press 1955) (1951).

121. Ohman, *supra* note 26, at 59. The purpose of Mynda Ohman's article is to bring to light a more general problem with U.S. military justice—*viz.*, its inability to charge *as war crimes* the most serious atrocities committed in the course of war. See *id.* Broadly, the UCMJ can incorporate crimes that it does not explicitly specify only if those crimes are not punishable by death. Since, under the War Crimes Act, genocide, torture, rape, and other serious war crimes are punishable by death under some circumstances, the UCMJ cannot incorporate these. The result is that military personnel who commit these crimes can only be charged with their common crime counterparts. But genocide, for example, is not your garden-variety murder, and torture leading to death is not common aggravated assault. See *id.*

122. See *id.* at 59 (footnote omitted).

123. Bing West, *The Road to Haditha*, ATLANTIC MONTHLY, Oct. 1, 2006, at 95, available at <http://www.theatlantic.com/doc/200610/haditha>.

124. See Tim McGirk, *One Morning in Haditha*, TIME, Mar. 27, 2007, at 34, 35, available at <http://www.time.com/time/world/article/0,8599,1174649,00.html>.

125. *Id.*

That version of the Haditha incident persisted until *Time* magazine received a videotape suggesting that the Marines may have been engaging in a cover-up.¹²⁶ When *Time* contacted the Marine spokesman to see if he wanted to amend his earlier statement, he laughed off the videotape as “Al Qaeda propaganda.”¹²⁷

The Marines finally decided, some three months later, to pursue an investigation into what had happened on that November day. Investigators learned not only that the Iraqi civilians had been killed by Marines and not by the roadside bomb, as initially announced, but also that crucial evidence had been withheld or destroyed.¹²⁸ As a result of the investigation, four Marines were charged with unpremeditated murder, and four officers were charged with dereliction for failing to report the incident to superiors, and for failing to initiate an investigation.¹²⁹

The highest-ranking Marine to be indicted was a Lieutenant Colonel.¹³⁰ He was charged with incorrectly reporting the facts to his superior and failing to open an investigation when it had appeared more than likely that a violation of the laws of war had taken place.¹³¹ According to the investigating officer’s report, which concluded that the Lieutenant Colonel’s case should go to trial,¹³² the Lieutenant Colonel had approved a report of the Haditha incident stating that fifteen civilians had died, all as a result of the car bomb or the exchange of fire between coalition forces and insurgents who were shooting from within the surrounding houses.¹³³ The report, prepared and approved on the day of the killings, stated further that the Lieutenant Colonel had gone to the scene to conduct a command assessment of the events. In fact, the Lieutenant Colonel did not go to the scene until the day after the report was is-

126. *Id.*

127. *Id.*

128. *Id.*

129. *See, e.g.,* Paul von Zielbauer, *2 More Marine Trials in Killings of 17 Iraqis*, N.Y. TIMES, Jan. 1, 2008, at A8.

130. Indeed, he is the highest ranking U.S. military official to face a court-martial for decisions or actions taken in combat since the war in Vietnam. Chelsea J. Carter, *Court-Martial for 2 in Haditha Deaths*, USA TODAY, Oct. 19, 2007, available at http://www.usatoday.com/news/nation/2007-10-19-3785523458_x.htm. There are ten officer ranks within the Marines, and Lieutenant Colonel is fifth-highest, ranking just below Colonel. *See* U.S. Dep’t of Defense, The United States Military Officer Rank Insignia, <http://www.defenselink.mil/specials/insignias/officers.html> (last visited Jan. 26, 2009).

131. Investigating Officer’s Report, Executive Summ. of Pretrial Investigative Report in the Case of Lieutenant Colonel XXX, pt. 5 (July 10, 2007) [hereinafter Investigating Officer’s Report]. This report was given to the author on the condition that the defendant’s name not be used. The author has retained a copy of the report on file.

132. *Id.* pt. 5, ¶ b; *see* 10 U.S.C. § 832 (2008) (mandating that an investigative report be prepared prior to a trial by court-martial).

133. Investigating Officer’s Report, *supra* note 131, pt. 3, ¶ m.

sued,¹³⁴ and after he had been ordered by his superior to conduct an investigation.¹³⁵ That investigation took the Lieutenant Colonel to the site of the car bomb, where he spent roughly thirty minutes looking around; he never stepped inside the homes where the killings had occurred.¹³⁶ Although the Lieutenant Colonel was subsequently approached by Iraqi villagers who demanded that he open an investigation into the killings, and although he assured them that he would, he did not investigate further.¹³⁷

On the basis of the report approved by the Lieutenant Colonel described above, the battalion developed a storyboard for the incident that depicted the civilian casualties as the unfortunate consequence of the insurgents' tactic of using civilians as human shields.¹³⁸ That storyboard was later invoked in response to the questions posed by *Time* magazine.¹³⁹ Following *Time's* inquiry, the Lieutenant Colonel was again asked by his superiors to conduct an investigation.¹⁴⁰ The Lieutenant Colonel responded indignantly, "My men are not murderers . . .," and refused to investigate further.¹⁴¹

Subsequent reports have stated that the first five Iraqis killed on that day in Haditha were unarmed civilians, who were gunned down after stepping out of their car and holding their arms in the air in a gesture of surrender.¹⁴² Nineteen other civilians were killed, including women and young children,¹⁴³ in an operation in which the Staff Sergeant later ordered his troops to "shoot first and ask questions later."¹⁴⁴ On the other hand, some of those present, as well as commentators on the case, argue that the Marines acted in accordance with their rules of

134. *Id.* pt. 3, ¶ n; see also *id.* pt. 5, ¶ a.

135. *Id.* pt. 3, ¶ k.

136. *Id.* pt. 3, ¶ n.

137. Track Impunity Always, *Report on Jeffrey Chessani*, http://www.trial-ch.org/en/trial-watch/profile/db/facts/jeffrey_chessani_724.html (last visited Nov. 1, 2008).

138. Investigating Officer's Report, *supra* note 131, pt. 3, ¶ p.

139. *Id.*

140. *Id.* pt. 3, ¶ t.

141. *Id.*

142. See, e.g., Josh White, *Death in Haditha: Eyewitness Accounts in Report Indicate Marines Gunned Down Unarmed Iraqis in the Aftermath of a Roadside Bombing in 2005*, WASH. POST, Jan. 6, 2007, at A1 (reporting the findings of a Navy Criminal Investigative Services report); Paul von Zielbauer, *Marine Testifies to Urinating on Body*, N.Y. TIMES, May 10, 2007, at A12.

143. See White, *supra* note 142.

144. Chelsea J. Carter, *Court-Martial of Marine Postponed over CBS Subpoena*, N. COUNTY TIMES (San Diego), Feb. 29, 2008, available at http://nctimes.com/articles/2008/03/01/military/9_14_062_29_08.txt.

engagement,¹⁴⁵ and that any over-zealousness in their response should be attributed to nothing more nefarious than the “‘fog of war.’”¹⁴⁶

These diverging views may help to explain the military’s lack of success in convicting the four officers whom it sought to prosecute for their failures to investigate. Charges against two of these officers have been dropped—one in exchange for a grant of immunity for testimony offered at the trials of the remaining defendants,¹⁴⁷ and the second because of insufficient evidence.¹⁴⁸ A third officer was charged with participating in the cover-up by ordering the destruction of photographs of the Iraqis killed in Haditha.¹⁴⁹ He has since been acquitted, apparently because the prosecution proved unable to establish that the destruction of photos was anything other than prescribed military practice.¹⁵⁰

The remaining officer—the Lieutenant Colonel who had refused to investigate his men on the ground and maintained that they were “not murderers”¹⁵¹—was to be tried before a court-martial for four counts of dereliction of duty and one count of violating a lawful order to investigate.¹⁵² His case has since been dismissed without prejudice, after the

145. See, e.g., Thomas Watkins, *Marine Officers Charged in Haditha Case*, WASH. POST, Dec. 22, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/22/AR2006122200143.html>.

146. Mark Walker, *Haditha Trial Set to Unfold*, N. COUNTY TIMES (San Diego), Feb. 23, 2008, at A1, A5, available at http://www.nctimes.com/articles/2008/02/23/news/top_stories/25_00_012_23_08.txt (quoting Gary Solis, described in the article as “a former Marine judge and attorney who has written extensively on the laws of armed conflict”); see also Rick Rodgers, *Haditha Charges Dropped for 2 Marines; General Issues Statement To Explain His Decision*, SAN DIEGO UNION-TRIB., Aug. 10, 2007, at A10 (reporting on a statement issued by the military official who dismissed charges against two Marines involved in the Haditha incident, and quoting U.S. Supreme Court Justice Oliver Wendell Holmes, Jr., in explanation, as saying that “‘detached reflection cannot be demanded in the face of an uplifted knife’”).

147. See, e.g., Rick Rodgers, *Charges in Haditha Case Are Dropped; McConnell Led Unit Accused in 24 Deaths*, SAN DIEGO UNION-TRIB., Sept. 19, 2007, at B1.

148. See *id.*

149. Additional Charge Sheet, United States v. 1st Lt. Andrew A. Grayson, U.S. Marine Corps, Dec. 28, 2008, available at <http://warchronicle.com/TheyAreNotKillers/LtAndrewGrayson/Charges.pdf> (last visited Nov. 14, 2008). Grayson faced up to six months confinement for the dereliction of duty charge and five years for each of the two remaining charges. See, e.g., Staff Reports, *Intel Officer Faces Charges*, LEATHERNECK, Dec. 22, 2006, available at <http://www.leatherneck.com/forums/showthread.php?t=38864>.

150. Chelsea J. Carter, *Marine Acquitted in Haditha Cover-Up Case*, HUFFINGTON POST, June 4, 2008, http://www.huffingtonpost.com/2008/06/04/marine-acquitted-in-hadith_n_105336.html.

151. See *supra* text accompanying note 139.

152. See, e.g., Gidget Fuentes, *Haditha CO Faces Additional Charges*, MARINE CORPS TIMES, Aug. 31, 2007, available at http://www.marinecorpstimes.com/news/2007/08/marine_chessani_charges_070830/. Each of the dereliction of duty charges carries a maximum penalty of six months confinement, and the violation of a lawful order charge carries a maximum penalty of two years confinement. See, e.g., Staff Reports, *3rd Battalion Commander Highest-Ranking Officer to Face Charges*, LEATHERNECK, available at <http://>

presiding judge found that the decision to charge him resulted from “unlawful command influence” (essentially, an illegal conflict of interest).¹⁵³ The prosecution has filed a notice of appeal.¹⁵⁴

The various readings of the Haditha incident—from a gun battle with insurgents, to a My Lai type massacre, to an overblown, media-driven witch-hunt—suggest a *Rashomon*-type complexity. As one commentator cynically suggests: “Haditha became yet another test in a polarized nation, and never mind the details: if you liked President George W. Bush, you believed that no massacre had taken place; if you disliked him, you believed the opposite.”¹⁵⁵ We may never arrive at a full, coherent, and true account of Haditha, but the difficulty of making sense of Haditha must lie, at least in part, with those who forsook their obligations to investigate and punish.

Further, whatever the real truth of Haditha, it remains instructive for our purposes, for it illustrates the way in which the U.S. military understands the harm inflicted by a failure to investigate and punish suspected war crimes. At the time of the indictments, the military had good reason to believe that a massacre had occurred.¹⁵⁶ Yet, the charges brought

www.leatherneck.com/forums/showthread.php?t=38864 [hereinafter *3rd Battalion Commander to Face Charges*].

153. Mark Walker, *Charges Against Haditha Commander Dismissed*, N. COUNTY TIMES (San Diego), June 17, 2008, available at <http://nctimes.com/articles/2008/06/17/military/zeca5018258ba2e208825746b005ae619.txt> [hereinafter Walker, *Charges Dismissed*]. According to the motion to dismiss, one of the lead investigators in the case subsequently served as the legal advisor to the Lieutenant General who had ultimate authority in deciding whether to bring charges against the Lieutenant Colonel. The motion alleged, and the presiding judge found, that the legal advisor had taken part in dozens of meetings about the Haditha incident. On the basis of this finding, the judge dismissed the case, although he left the door open for the charges to be refiled under a new convening authority. *Id.*

It is not clear what to make of the dismissal. Those sympathetic to the prosecution insist that the advisor did not offer and was not asked his opinion in the Haditha meetings. The commander of the Marine forces in the Middle East, whose responsibility it was to decide whether to prosecute, maintains that he “‘make[s] his own decisions.’” See Walker, *Charges Dismissed*, *supra*. On this account, then, it looks like the Marines believed that the evidence was sufficiently strong to speak for itself in favor of prosecuting Lt. Col. Jeffrey Chessani. Those who side with the defendant, on the other hand, are quick to point out that the whole incident has had the stench of politics about it, and that the prosecuted Marines have been scapegoated as a result of a too hasty outcry in the face of initial—and inadequate—news of the Haditha killings. See, e.g., “*Unlawful Command Influence*” Taints Murtha Case, WORLD NET DAILY, May 21, 2008, <http://www.wnd.com/index.php?fa=PAGE.view&pageId=64902>.

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

154. See, e.g., Mark Walker, *Marine Corps Appealing Dismissal Ruling for Haditha*, N. COUNTY TIMES (San Diego), June 18, 2008, available at <http://www.nctimes.com/articles/2008/06/18/military/zcbf483709c591cef8825746d00001c81.txt>.

155. William Langewiesche, *Rules of Engagement*, VANITY FAIR, Nov. 2006, at 312, 318, available at <http://www.vanityfair.com/politics/features/2006/11/haditha200611>.

156. Investigating Officer’s Report, *supra* note 131, pt. 4.

against these commanders address only injuries that these officers allegedly waged against the military itself—failing to fulfill a duty to the *military*, obstructing the *military's* administration of justice, and bringing discredit to the *armed forces*. These charges thus neglect the harm to the families of the victims arising from a missed opportunity to have a full account of the civilian killings brought to light—and to see justice done, if in fact these killings did constitute war crimes.¹⁵⁷

Haditha is enlightening for a second reason, for it invites inquiry into the role of command influence in a commander's decision to investigate or punish an offense of his troops. Strictly construed, command influence is "the improper use of command authority to steer or influence a judicial process."¹⁵⁸ But, command influence is a broader force, for it can arise well before a judicial process has been initiated. In particular, command influence encompasses the power of commanders to help determine which individuals and which offenses get disciplined in the first place. Command influence was brought to the fore in the Haditha incident when it served as the ground for dismissing the case against the Lieutenant Colonel. But, it likely reared its head well before then, and may even have motivated the Lieutenant Colonel to forsake his obligation to investigate.

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

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

One need not believe that Haditha involved a massacre, let alone one of the scale or gravity of My Lai,¹⁵⁹ in order to be impressed by the simi-

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

158. Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649, 664 (2002).

159. Even if Haditha did involve the known killing of unarmed civilians, it would still pale in comparison to My Lai. For one thing, there is a significant difference between the number killed in Haditha (twenty-four) and My Lai (approximately 500). See *supra* text accompanying note 121; Doug Anderson, "Kill Everyone in the Village", N.Y. TIMES MAG., Mar. 22, 1992, at 11 (reviewing MICHAEL BILTON & KEVIN SIM, *FOUR HOURS IN MY LAI* (1992)). Further, accounts of Haditha suggest that the Marines ran quickly from house to house, unsure of what they would find. Their "rampage" thus appears to have been spontaneous. The My Lai killings, by contrast, were found to have been premeditated, as the victims were rounded up and then shot at point blank. See, e.g., Digital History, *Summary of Peers Report*, http://www.digitalhistory.uh.edu/learning_history/vietnam/peers_report.cfm (last visited Nov. 14, 2008) [hereinafter *Peers Report*]. Finally, at My Lai, many of the victims are

larities between the military's handling of both incidents. My Lai was, of course, the massacre named for the village in which it took place—a village where, on March 16, 1968, approximately five hundred unarmed and unresisting Vietnamese civilians, mostly women, children and old men, were rounded up, shot, and killed.¹⁶⁰ The U.S. public did not learn about the massacre until some six months later, in large part because of the military's efforts to cover it up.

Like Haditha, My Lai followed on the heels of the deaths of U.S. soldiers by a guerrilla enemy, which, at least in the case of My Lai, “primed [these soldiers] for serious reprisals.”¹⁶¹ Initial investigations at My Lai, like those alleged to have been conducted just after the Haditha killings,¹⁶² were cursory and halfhearted.¹⁶³ Also like Haditha, superiors within the military received reports from the local population suggesting that the incident was far worse than what had been stated in the reports prepared by the military's investigators, yet the disparity prompted no further investigation.¹⁶⁴ Perhaps most stunning of all, the North Vietnamese's perception of the incident—like the Iraqis' of Haditha¹⁶⁵—was dismissed by the U.S. military as nothing more than enemy “propaganda [intended] to discredit the United States.”¹⁶⁶

Much has been written about My Lai in the years since the massacre, so, even while the dust continues to swirl around Haditha, it is possible to glean from My Lai the way in which a command culture, effectuated in large part through command influence, incentivizes military cover-ups.¹⁶⁷

believed to have been raped, tortured, and/or mutilated, but no such allegations have been made about Haditha. See, e.g., *Murder in the Name of War—My Lai*, BBC NEWS, July 20, 1998, <http://news.bbc.co.uk/2/hi/asia-pacific/64344.stm>.

160. See, e.g., WEST, *supra* note 153, at 154; Anderson, *supra* note 159.

161. Anderson, *supra* note 159.

162. See *supra* note 134 and accompanying text.

163. *Peers Report*, *supra* note 159, pt. C, § 1, para. 1 (“Henderson's actions appear to have been little more than a pretense of an investigation and had as their goal the suppression of the true facts concerning the events of 16 March.”).

164. *Id.* pt. C, §§ 1–2.

165. See *supra* note 135 and accompanying text.

166. WEST, *supra* note 153, at 208 (quoting Colonel Henderson).

167. To be sure, the military has recognized and sought to curtail command influence, which it has termed “the mortal enemy of justice.” See, e.g., Walker, *Charges Dismissed*, *supra* note 153. See generally Turley, *supra* note 158, at 666. Indeed, one of the goals behind the drafting of the UCMJ was to curb command influence and thereby “increas[e] public confidence in military justice.” GENEROUS, *supra* note 11, at 27, 34. Yet, as Turley writes,

[T]he UCMJ had a less obvious but equally important effect: it established the fundamental principles for a distinct military justice system to adjudicate the full range of criminal conduct in peacetime, including a distinct appellate system. On a more functional level, while prohibiting unlawful command influence, the UCMJ also

Scholars of command influence have noticed two insidious currents in the administration of military justice. First, where an offense threatens to embarrass the U.S. military, the prosecution will be vigorous, and the pressure to convict fierce.¹⁶⁸ At the same time, every effort will be taken to ensure that the embarrassment does not redound to those high up in the chain of command.¹⁶⁹ The effect of these two currents is a kind of scapegoating of low-level soldiers in an effort to ensure that the command remains “clean.”¹⁷⁰ The My Lai incident provides a good illustration of the way in which these currents operate.

Colonel Oran Henderson was the commander believed to have done more than any other investigator in suppressing information about My Lai.¹⁷¹ Henderson had arrived in Vietnam and had assumed the position

continued to uphold the central role of the commanding officer as convening authority with the consolidation of executive and judicial functions.

Turley, *supra* note 158, at 666. For an overview of the history of U.S. military law prior to the drafting of the UCMJ, see, for example, AYCOCK & WURFEL, *supra* note 120, at 9–15.

168. See, e.g., WEST, *supra* note 153, at 101–02, 114; Kingsley R. Browne, *Military Sex Scandals from Tailhook to the Present: The Cure Can Be Worse Than the Disease*, 14 DUKE J. GENDER L. & POL’Y 749, 762–64 (2007) (describing the way in which public and political pressure to respond to the Tailhook allegations infected the administration of justice against the accused).

Ironically, in situations in which the source of embarrassment is an offense committed abroad, the court-martial system does little to include the foreign population in its trials. To be sure, the *Manual for Courts Martial* (MCM) provides for open trials except in limited circumstances. MANUAL FOR COURTS MARTIAL, UNITED STATES, R.C.M. 806(a) (2008) [hereinafter MCM]. But, the MCM also contemplates, and permits, courts-martial to take place on a ship at sea, or in a unit in a combat zone. See *id.* The exigencies of war may thus make it more difficult for the victim or her family to witness the accused’s trial. And, of course, many courts-martial take place in the United States, as the Haditha trials did. By contrast, the Moscow Declaration on German Atrocities, for example, signed by Great Britain, the United States, and the Soviet Union on November 1, 1943, stated that those accused of war crimes would, if possible, be “brought back to the scene of their crimes and judged on the spot by the peoples whom they had outraged.” Declaration on German Atrocities, U.S.-U.K.-U.S.S.R., Nov. 1, 1943, 9 Dep’t. St. Bull. 310 (1943), 3 Bevens 816; Parks, *supra* note 50, at 15.

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

169. WEST, *supra* note 153, at 134; cf. Hillman, *supra* note 11, at 2 (“Many soldiers believe that officers are insulated against prosecution for wrongdoing by the political expediency of pushing blame to the lowest possible level, where it does not reflect as poorly on the judgment of military and civilian leaders.”).

170. WEST, *supra* note 153, at 134; see also Langewiesche, *supra* note 155 (reflecting on the Haditha prosecutions: “The Corps has this reflex when it feels threatened at home. It has a history of eating its young.”).

171. See *Peers Report*, *supra* note 159 (“[Col.] Henderson’s deception of his commanders as to what he had done to investigate the matter and as to the facts he had learned probably played a larger role in the suppression of the facts of Son My than any other factor.”).

of Brigade Commander for the brigade that included the My Lai troops just the day before the My Lai massacre.¹⁷² Henderson was thus unseasoned when it came to the perils of Vietnam. But, this was his third war, and he likely would have been no stranger to military culture.

Having been in a low-flying helicopter over My Lai on the morning of the massacre, Henderson had a "box-office seat,"¹⁷³ and he is believed to have witnessed the killing of between six and eight unresisting Vietnamese civilians. He also heard reports from two of his soldiers, who believed that they had witnessed a massacre and described what they had seen accordingly.¹⁷⁴ Henderson thus had reason to know that a massacre had occurred. But, if Henderson knew, so too did his superiors, Major General Koster and Brigadier General George Young. Koster, like Henderson, had witnessed the killing of unresisting civilians while flying in a helicopter over My Lai on the day of the incident.¹⁷⁵ Young had twice heard first-hand testimony that a massacre had occurred on that day.¹⁷⁶

On the afternoon following the My Lai incident, Henderson ordered his troops to fly over the village of My Lai again. According to one soldier who had received the order, the purpose of the return trip was to determine the number of civilians who had been killed, and the cause of their wounds.¹⁷⁷ But, Henderson's order was countermanded by Koster, who personally rescinded the order by radio without explanation.¹⁷⁸ In light of a culture in which commanders are supposed to insulate one another from embarrassment and allegations of wrongdoing,¹⁷⁹ Henderson may well have inferred from Koster's order that his superiors did not want to know, or to have to acknowledge knowing, that there had been a massacre.¹⁸⁰

Unfortunately for Henderson, his subordinates were not going to give him an easy time of sweeping the incident under the rug. Several

172. See, e.g., WEST, *supra* note 153, at 196.

173. *Id.*

174. Major Frederick W. Watke, a pilot at My Lai, went to Brigadier General George Young, Assistant Division Commander of the Americal Division, to officially report the massacre. WEST, *supra* note 153, at 207. A meeting was called for the next day, at which Watke, Henderson, and Young were present, and at which Young directed Watke to repeat his story to Henderson. *Id.* A second My Lai pilot, Hugh Thompson, who heroically rescued women and children from My Lai in an effort to save them from his own peers, also shared his concerns with Henderson on that day. *Id.* at 206.

175. *Id.* at 207.

176. *Id.* Interestingly, the Lieutenant Colonel in the Haditha incident has maintained that his superiors had also been on notice of the possibility of war crimes, and that they too had failed to order an investigation, although none of them has been prosecuted. See *3rd Battalion Commander to Face Charges*, *supra* note 152.

177. WEST, *supra* note 153, at 204.

178. *Id.*

179. See *supra* note 169 and accompanying text.

180. See WEST, *supra* note 153, at 201.

made official reports of the massacre to Henderson or to Young. In the wake of the report that Young received, he ordered Henderson to investigate the massacre further and to report orally on his findings.

Perhaps still believing that his superiors wanted a whitewashed version of the events,¹⁸¹ Henderson conducted a slapdash and superficial investigation into the incident and eventually authored a report that he knew to contain misstatements.¹⁸² That report stated that just twenty civilians had been killed, and that the killings had occurred inadvertently in the course of a gun fight with the enemy.¹⁸³ On the basis of this report, Koster and Young could both maintain that they had no knowledge that a massacre occurred—despite the fact that they, in fact, had good reason to know of its occurrence.¹⁸⁴

Had Henderson's report been allowed to stand, he would have succeeded in preventing blame for the massacre from traveling up the chain of command. In the fall of 1968, however, several enlisted men contacted their elected representatives and members of the President's administration with information about My Lai, including photographic evidence of the massacre.¹⁸⁵

Once the U.S. public learned of the killings at My Lai, the first current of command influence materialized: the military's attitude toward the massacre shifted from one of suppression to one of rabid prosecution. Twelve enlisted men and sixteen officers were charged in connection with My Lai.¹⁸⁶ Yet, Henderson was the only officer who was tried in connection with the cover-up, and he was eventually acquitted.¹⁸⁷

Henderson thus appears to have made a well-hedged—and ultimately successful—bet. Had he conducted an assiduous investigation, he would have inculcated his superiors and have risked ostracism or retaliation.¹⁸⁸ Worse still, given that he witnessed the killings as they were

181. *See id.*

182. *See supra* note 163 and accompanying text.

183. *Id.*

184. *See supra* notes 175–176 and accompanying text.

185. *See, e.g., The Heroes of My Lai: Ron Ridenhour's Story*, http://www.law.umkc.edu/faculty/projects/ftrials/mylai/Myl_hero.html#RON (last visited Jan. 29, 2009).

186. *See, e.g., Jeffrey A. Addicott & William A. Hudson, Jr., The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons*, 39 MIL. L. REV. 153, 160–61 (1993).

187. WEST, *supra* note 153, at 196, 212.

188. One way in which superiors could pursue this retaliation would be to provide the commander with a lukewarm efficiency report, since these reports form the basis of promotional decisions. For instances in which military defense counsel have been retaliated against in this way for zealously defending their clients, *see id.* at 72–73, 110–13; *cf. David J. Luban, Lawfare and Legal Ethics in Guantanamo*, 60 STAN. L. REV. 1981, 1999–2019 (2008) (describing the ways in which Judge Advocate General's Corps members assigned as defense counsel before military commissions at Guantanamo face conflicts of interest, including threats that zealous advocacy will lead to their own court-martial).

occurring and did nothing to stop them, Henderson would have exposed himself to the charge of failing to prevent the massacre.¹⁸⁹ A shoddy investigation, which turned up no illegal killings, could avoid these difficulties. To be sure, by shirking his duty to investigate, Henderson risked subjecting himself to a charge of dereliction of duty. But that charge carries a relatively moderate penalty—a maximum of six-months confinement per offense.¹⁹⁰ By contrast, the failure to prevent is, under the UCMJ,¹⁹¹ grounds for treatment as a principal in the underlying offense—murder, in this case, which is punishable by death.¹⁹² Besides, Henderson could wager that his loyalty to the officer class would be rewarded at any eventual trial—as indeed it may have been, since the jury that acquitted him consisted of five colonels and two generals.¹⁹³

Henderson's maneuverings in the My Lai incident suggest that there are institutional dynamics—in particular, a norm of mutual protection among officers and a military justice system that sometimes affords enough wiggle room to facilitate that protection¹⁹⁴—that already incline commanders to forsake their duties to investigate and punish. Some of

In other instances, the retaliation is more blatant, as when Brigadier General Janis Karpinski, commanding officer at Abu Ghraib, was demoted to Colonel after the detainee abuse scandal broke—on some accounts, because she failed to “allow or encourage such illegal practices.” Bassiouni, *supra* note 8, at 409–10 & n. 76.

189. Cf. Darley, *supra* note 112, at 34 (arguing that organizations confront an incentive not to punish executives who commit harm and then engage in a cover-up, since punishing these executives is an admission that the organization itself committed harm). Although Henderson sought to avoid blame for My Lai, he nonetheless saw himself as blameworthy. After his acquittal, he reported that he felt “responsible for the incident because the troops involved were under his command.” Michael T. Kaufman, *Oran Henderson, 77, Dies; Acquitted in My Lai Case*, N.Y. TIMES, June 5, 1998, at D21.

190. See 10 U.S.C. § 892 (2008).

191. See 10 U.S.C. § 877 (2008) (considering a principal to be, *inter alia*, one who aids and abets the commission of a crime).

192. See 10 U.S.C. § 918 (2008). For an example of one who was charged with murder for his failure to prevent, consider the case of Captain Ernest Medina, who was tried by court-martial on the theory that “[he] knew his orders were being misconstrued and that his troops were murdering noncombatants [at My Lai].” WEST, *supra* note 153, at 182 (quoting from the opening statement of military prosecutor Major William G. Eckhardt at Medina’s court-martial). The prosecution in that case did not seek to argue that Medina ordered the massacre; instead, it claimed that his decision not to intervene, given what he knew, “‘offered comfort and encouragement to his men in carrying out the carnage.’” *Id.* at 182–84. For this assistance, Medina was initially charged with the murder of 102 villagers, although the prosecution did not seek the death penalty in his case. *Id.* at 184. The charges were eventually reduced to involuntary manslaughter, and would have been punishable by a maximum of three years of confinement. *Id.* at 192. In the end, however, Medina, like Henderson, was acquitted. *Id.* at 193.

193. WEST, *supra* note 153, at 212.

194. For accounts of the ways in which the military justice system can be subject to the insidious influence of military commanders, see generally WEST, *supra* note 153; Lindsey Nicole Alleman, *Who Is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, 16 DUKE J. COMP. & INT’L L. 169 (2006).

these may have been at work in the Haditha incident. Or, more charitably, Haditha may represent a case in which the commander decided to balk at the norms of command culture. The Lieutenant Colonel in Haditha might honestly have believed that no illegal killings had occurred. His initial failure to investigate adequately, and subsequent refusal to investigate, might thus have been a showing of solidarity with his troops, whom he was not about to sacrifice for the sake of superiors so whipped up by public outcry as to already presume his troops' guilt.

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

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

II. FAILURE TO PUNISH AS AN EXPRESSIVE HARM

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

Part II.A draws out the normative dimensions of the military command structure in an effort to establish that, under certain circumstances, the mere failure to punish a war crime committed by a commander's subordinates justifies attribution of that war crime to the commander.

Part II.B advances an expressivist conception of harm in order to identify the circumstances in which the failure to punish supplies this justification. In Part II.C, I argue that the account advanced in the first two sections of this Part can withstand scholarly objections to the mode of liability view.

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

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

To begin, consider that soldiers' routine operations are typically ascribable to their commander. The ascription flows from a central feature of the structure of military relationships—*viz.*, the near-total autonomy soldiers relinquish during basic training and while on duty.¹⁹⁵ Active soldiers do not plan their day, let alone actively pursue projects of greater duration. Instead, what it is to be a soldier is to subject one's will to the will of one's superior; it is to allow another—one's commander—to execute his agency through you.¹⁹⁶ To be sure, the relinquishment is not total. Soldiers are not mere automatons, void of consciousness of their actions. Although the threat of coercion—and, in particular, discipline for disobedience—may deter soldiers from reclaiming their autonomy,

195. See, e.g., MARK J. OSIEL, *OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE & THE LAW OF WAR* 241 n.21 (1999) [hereinafter OSIEL, *OBEYING ORDERS*]; Osiel, *Banality of Good*, *supra* note 8, at 1770 (arguing that the doctrine of superior responsibility “stresses the formal, hierarchical structure of military organizations and the consequent reasons why a high-ranking superior can reasonably expect his orders to be obeyed, including standing orders to honor the Geneva Conventions”); Gary D. Solis, *Obedience of Orders and the Law of War: Judicial Application in American Forums*, 15 AM. U. INT'L L. REV. 481, 526 (1999) (“[S]ubordinates will obey illegal orders, given the overwhelming influence of the military hierarchical structure—particularly in the lower ranks and in combat.”).

196. Cf. Osiel, *Banality of Good*, *supra* note 8, at 1831–32 (describing Claus Roxin's theory of the bureaucratization of mass atrocity). Osiel states,

The superior's control over an “organizational apparatus of hierarchical power,” as Roxin calls it, enables him to utilize the subordinate “as a mere gear in a giant machine” to produce the criminal result “automatically.” . . . Roxin's key insight, then, is that the more powerful party behind the scenes may, through the organizational resources at his disposal (including the culpable inferior) be said to commit the offense.

Id. (quoting Claus Roxin, *Problemas de autoría y participación en la criminalidad organizada* [*Problems of perpetration and participation in organized crime*], in DELINCUENCIA ORGANIZADA: ASPECTOS PENALES, PROCESALES Y CRIMINOLÓGICOS [ORGANIZED CRIME: CRIMINAL, PROCEDURAL AND CRIMINOLOGICAL ASPECTS] 191, 194 (Juan Carlos Ferré Olivé & Enrique Anarte Borralló eds., 1999) (footnotes omitted); Smidt, *supra* note 13, at 158 (“Soldiers learn to rely on the commander's guidance as the soldier surrenders some of his own discretion, judgment, and inhibitions to play a role in the collective success of the unit and to further the higher cause in which they are engaged.”)).

the possibility of disobedience is always a live one.¹⁹⁷ It is for this reason that the defense of superior orders has traditionally been found unavailing.¹⁹⁸ Nonetheless, the military ideal, and the routine reality, is one in which soldiers *serve*—they do what their commanders order them to do.

If we are entitled to ascribe to the commander a soldier's routine military operation, are we also entitled to ascribe to him a war crime committed by one of his soldiers without his prior authorization?¹⁹⁹ In other words, does the logic of commander authorship, grounded as it is in the command structure, extend to the extraordinary case in which soldiers commit atrocities while on active duty? One might think that it does not; in particular, one might hold that the illegal nature of the soldiers' act blocks, at least presumptively, the ascription of that act to the commander. The commander is owed the benefit of the doubt, on this thought, in virtue of the duties and prestige attaching to his office. He is charged with instructing his subordinates about the laws of war, and inculcating a norm of adherence to those laws.²⁰⁰ Further, his status demands deference and, in this circumstance, deference requires that the commander enjoy a presumption that he will have discharged the duties of his office. In general, then, we suspend the ascription of the soldier's act to his commander where the act constitutes a violation of the laws of war.

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

197. For example, in the case of the bridge-throwing incident, discussed above, see *supra* text accompanying notes 28–34. One of the five soldiers involved refused to follow his platoon commander's order to take the captured Iraqis down to the riverbank, despite the possibility of arrest that his refusal risked. See Dexter Filkins, *The Fall of the Warrior King*, N.Y. TIMES MAGAZINE, Oct. 23, 2005, at 52, available at <http://www.nytimes.com/2005/10/23/magazine/23sassaman.html>.

198. See John D. Van der Vyver, *The International Criminal Court and the Concept of Mens Rea in International Criminal Law*, 12 U. MIAMI INT'L & COMP. L. REV. 57, 76–84 (2004); see also Solis, *supra* note 195, at 484–87 (reviewing the history of the superior orders defense).

199. I use the terms “violations of the laws of war,” “atrocities,” and “war crimes” interchangeably, and I distinguish these crimes from crimes that soldiers commit that cannot plausibly be related to their military positions. Thus, for example, although an off-duty soldier may be court-martialed for a “midnight punch to the gut outside of a downtown bar,” Ohman, *supra* note 26, at 62, there is no suggestion that his superior will bear responsibility for the soldier's assault.

200. See, e.g., OSIEL, OBEYING ORDERS, *supra* note 195, at 260.

ture is restored and the soldier's act is properly attributed to his commander.²⁰¹

Yet, ordering an offense is not the only contribution that deprives the commander of the benefit of the doubt; failing to punish does so as well, but it does not operate as decisively as does ordering an atrocity. The commander who orders an offense both forfeits the benefit of the doubt and confirms the ascription of his soldiers' act to him in one fell swoop, as it were. The commander who fails to punish an atrocity of his troops also foregoes the benefit of the doubt, but more is needed to confirm that his soldiers' atrocity is ascribable to him. In particular, *it must be the case that his failure to punish can be read as an expression of his support for his troops' act.*²⁰²

In the next Section, I elaborate on the reasons for which expressing support through punishment constitutes a means of participation in the underlying offense. In the remainder of this Section, I identify the circumstances in which the failure to punish conveys support for an offense.

To begin, it is worth noting that a commander may forego punishment for any number of reasons, not all of which convey his support. For example, a military emergency may entail that a commander's attention is necessarily elsewhere.²⁰³ In such a case, withholding punishment may well be the right thing to do, at least while the military emergency exists. But, there are other, less clear-cut, cases. For instance, consider the commander who foregoes punishment out of solidarity with his troops, if not with their offense. Lt. Col. Sassaman, the commander of the soldiers who threw Iraqi civilians off of a bridge, offered this explanation for instructing his soldiers to cover up their act.²⁰⁴ Considerations

201. For a commander to order the act is for him to cause it to be done. Given that causation is paradigmatically taken to be a necessary condition for criminal liability, *see, e.g.*, Christopher Kutz, *Causeless Complicity*, 1 CRIM. L. & PHIL. 289, 290 (2007) [hereinafter Kutz, *Causeless Complicity*], international and domestic law have no trouble in holding commanders who order an atrocity criminally liable for that atrocity, *see, e.g.*, ICTY Statute, *supra* note 21, art. 7(1); 32 C.F.R. § 11.6(c)(3).

202. Compare Parks, *supra* note 50, at 81. Parks states,

Current British military law . . . consider[s] a commander to have acquiesced in an offense "if he fails to use the means at his disposal to insure compliance with the law of war"; in comment it continues: "The failure to do so raises the presumption—which for the sake of the effectiveness of the law cannot be regarded as easily rebuttable—of authorisation, encouragement, connivance, acquiescence or subsequent ratification of the criminal acts."

Id. (quoting III BRITISH WAR OFFICE, MANUAL OF MILITARY LAW: LAW OF WAR ON LAND, para. 631 & n.1 (1958).

203. Orić attempted to raise a watered-down version of this explanation in his defense, which the ICTY refused to entertain. *Orić Trial Judgment*, *supra* note 42, ¶ 559.

204. See Filkins, *supra* note 31.

of political expediency may also lead a commander to pass over his troops' crime; where, for example, support for the military effort is waning, a commander may seek to avoid the negative publicity that investigation into an atrocity will undoubtedly invite. Then again, a commander may be motivated to forego punishment not for the sake of some larger national goal, but instead for the sake of personal ambition and, in particular, a fear that his subordinates' offense will taint his future professional prospects.²⁰⁵ Finally, a commander's failure to punish may arise not from considerations exogenous to his subordinates' crime but instead from the crime itself, for the commander may approve of his troops' act and hence view it as unworthy of punishment.

In what follows, I focus on these last two reasons for failing to punish—*viz.*, cases in which the failure stems from self-interested concerns or from approval of the underlying offense. In the former case, the commander *acquiesces* in his troops' crime; in the latter case, he *endorses* it.

It may well be that dereliction of duty is an inadequate response not only in cases of endorsement or acquiescence, but also in cases in which a commander fails to punish out of solidarity with his troops, or because he is concerned about the broader political ramifications of punishing.²⁰⁶ Nonetheless, I defend the mode of liability view here only as it applies to cases of endorsement or acquiescence, which are, I take it, among the most culpable reasons for failing to punish.²⁰⁷ The mode of liability view is controversial enough, as we shall see,²⁰⁸ and so should be defended, in the first instance, with the strongest cases for a robust doctrine of command responsibility in hand.

The claim to be defended in the next Section, then, is that, in cases of acquiescence or endorsement, we are entitled to conclude that the commander bears responsibility for his subordinates' offense.

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

205. See *supra* note 169 and accompanying text.

206. I assume that military necessity may furnish a justification for a commander's failure to punish, in which case his failure ought not to be punished at all.

207. *But cf.* Darley, *supra* note 112, at 31 (arguing that covering up an injury out of solidarity for one's fellows will subsequently render the dissimulator culpable where maintaining the lie entails that the injurious conduct will continue).

208. See *infra* Part II.C.

Some have depicted the Haditha incident in terms that make it sound like an instance of endorsement. According to one recent investigative report, for example, “the commanders [in Haditha] had created a climate that minimized the importance of Iraqi lives.”²⁰⁹ Even more compelling is the case of Maj. Gen. Shigeru Sawada, who was prosecuted before a U.S. Military Commission in Shanghai for permitting the illegal trial and execution of three U.S. airmen during World War II.²¹⁰ The trial underlying Sawada’s indictment occurred in his absence. When he was later informed of the trial and its results, Sawada endorsed the record and forwarded it to the chain of command.²¹¹ The three airmen had been sentenced to death and, once Sawada endorsed the verdict, the death sentences were carried out. The Military Commission held that Sawada had “ratified the illegal acts which occurred in his absence and therefore bore the responsibility for them.”²¹² In other words, although Sawada did not conduct or otherwise guide the trial that the Military Commission subsequently deemed illegal, the trial and its results were nonetheless ascribed to him because he had retroactively authorized them.

For an example of acquiescence, consider a 1996 Canadian scandal in which then-Minister of Defense Kim Campbell, vying for the post of Prime Minister in an upcoming election, participated in suppressing information about the murder of a sixteen-year-old Somali boy committed by Canadian peace-keeping troops in Somalia.²¹³ Here, Campbell may well have *privately* disapproved of the peacekeepers’ act. She nonetheless determined that punishing the atrocity would bring it to light, and that the public’s response to the atrocity would target her, and thereby damage her political ambitions.²¹⁴

209. David S. Cloud, *Marines May Have Excised Evidence on 24 Iraqi Deaths*, N.Y. TIMES, Aug. 18, 2006, at A6 (citing a report based on an investigation by Maj. Gen. Eldon A. Bargewell of the U.S. Army); see also Rodgers, *supra* note 146 (quoting a contemporary scholar’s invocation of the “‘mere gook rule’” to analogize the alleged devaluation of the Viet Cong by U.S. troops fighting in Vietnam to the Haditha Marines’ attitudes toward Iraqis).

210. See Trial of Lieutenant-General Shigeru Sawada and Three Others, Case No. 25, 5 U.N. WAR CRIMES COMM’N L. REP. TRIALS & WAR CRIMINALS 1 (U.S. Mil. Comm’n in Shanghai 1948).

211. Parks, *supra* note 50, at 74.

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

213. See, e.g., Allan Thompson, *Canada’s New Face at U.N. an Enigma*, TORONTO STAR, Jan. 15, 1995, at A7 (“The Ottawa-based military magazine *Esprit de Corps* has bluntly and audaciously accused Fowler of engineering a cover-up, partly to protect the political fortunes of Kim Campbell, who was then defence minister and a contender for the Tory leadership.”).

214. For a strikingly similar fictional version of this scenario, consider the plot line from the series finale of *The Wire*, in which a Baltimore mayor with his sights set on the governorship declines to punish a major police scandal because news of the scandal would hurt his gubernatorial campaign. *The Wire*: -30- (HBO television broadcast Mar. 9, 2008).

It is worth noting that, considered in and of themselves, of the two, endorsement is worse than acquiescence. The moral difference between endorsement and acquiescence can perhaps be grasped by analogizing the pair to the distinction between *dolus eventualis* and recklessness. Both *dolus eventualis* and recklessness entail that one knowingly undertakes a risk, but the former has the added dimension that one *willingly* does so.²¹⁵ As one set of commentators puts it, with *dolus eventualis*, there is the element of “approval and identification with the evil result.”²¹⁶ Similarly, the commander who endorses an atrocity of his troops does not merely know that forgoing punishment will deprive the atrocity’s victims of the restoration that punishment can confer;²¹⁷ he intends this deprivation, for it is the mechanism through which he aligns himself with his subordinates’ atrocity. By contrast, with acquiescence, the commander knows that forgoing punishment will fail to restore the atrocity’s victims but, all else being equal, he might prefer that the restoration occur. For example, Kim Campbell might well have punished the perpetrators of the Somali boy’s death had doing so not conflicted with her political ambitions.²¹⁸ Yet, while the injury of acquiescence is less categorical than that arising from endorsement, acquiescing is worse than the blanket offense of dereliction of duty, for one can be derelict in his duty to punish even if he has good reasons to forego punishment.

I have contended that a commander’s failure to punish is not justifiable in cases in which the failure signals acquiescence or endorsement. But, I have not yet argued that these reasons for foregoing punishment are reprehensible enough to warrant holding a commander responsible for his subordinates’ offense. To establish that claim, I first must inquire into the expressive dimensions of the failure to punish.

B. *The Expressive Harm of Failing to Punish*

The expressive characteristics of punishment can explain why commanders who endorse or acquiesce in their subordinates’ atrocity ought to be held criminally liable for that atrocity. General theories of expressivism are concerned with the way that action, speech, or any other mode

215. See, e.g., Meloni, *supra* note 25, at 635 n.94.

216. George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT’L CRIM. JUST. 539, 554 (2005); see also Martinez, *supra* note 7, at 644–45.

217. See *infra* Part II.B.

218. Compare Article 4 of the French Ordinance of 28 August 1944, which subjected commanders to prosecution if they “‘tolerated the criminal acts of their subordinates.’” Smidt, *supra* note 13, at 176 n.84 (quoting 4 U.N. WAR CRIMES COMM’N, LAW REP. OF TRIALS OF WAR CRIMINALS 87 (1948)). As Smidt notes, toleration “may exist even where one is personally opposed to the conduct but takes no affirmative action to prevent the behavior,” *id.* at 176, or, perhaps, to punish it either.

of expression manifests a belief, attitude, emotion, and so on.²¹⁹ Expressivism holds that “we are morally required to express the right attitudes toward people.”²²⁰ Although general expressivist theories do not specify what count as the “right attitudes,”²²¹ those who have articulated expressivist theories of punishment are largely inspired by Kantian ethics, according to which actions should express persons’ equal moral worth.²²² Thus, on such a theory, the injury of a crime consists not just of its physical or psychological harm but also of the affront to the victim’s self-worth. As Jeffrie Murphy writes, “such injuries are also *messages*—symbolic communications. They are ways a wrongdoer has of saying to us, ‘I count but you do not’”²²³ Further, empirical research supports the expressivist’s sense that a significant part of the harm of a crime lies in its emotional or psychic consequences for the victim.²²⁴

A commander’s efforts to punish his troops’ unauthorized atrocity can remedy the expressive injury that the atrocity waged. For the

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

220. Anderson & Pildes, *supra* note 219, at 1514.

221. See, e.g., *id.* at 1509.

222. See, e.g., Jean Hampton, *Forgiveness, Resentment and Hatred*, in FORGIVENESS AND MERCY 35, 46 (Jeffrie G. Murphy & Jean Hampton eds., 1998) [hereinafter Hampton, *Forgiveness, Resentment and Hatred*].

223. Jeffrie G. Murphy, *Forgiveness and Resentment*, in FORGIVENESS AND MERCY, *supra* note 222, at 14, 25; see also Hampton, *Forgiveness, Resentment and Hatred*, *supra* note 222, at 44 (“When someone wrongs another, she does not regard her victim as the sort of person who is valuable enough to require better treatment.”). At some points, Hampton claims that the victim will experience the perpetrator’s message as an affront only if she subscribes to a non-egalitarian theory of human worth. See, e.g., Hampton, *Forgiveness, Resentment and Hatred*, *supra* note 222, at 53. In other words, the victim must already believe that it is possible for one person’s value to differ from another’s if the victim is to feel hurt by the expressive content of the perpetrator’s injury. Since Hampton adopts an egalitarian theory of human worth, the effect of her claim is to impugn the notion that injuries do indeed involve expressive harms. See, e.g., *id.*; Jean Hampton, *The Retributive Idea*, in FORGIVENESS AND MERCY, *supra* note 222, at 111, 111–61 [hereinafter Hampton, *The Retributive Idea*]. But, Hampton’s claim is problematic for several reasons. First, as Jeffrie Murphy points out, one’s worth is an ineluctable social fact: “Our self-respect is *social* . . . , and it is simply part of the human condition that we are weak and vulnerable in these ways.” Murphy, *supra*, at 25. Second, the victim may subscribe to an egalitarian theory of human worth but recognize that others do not, and she may resent being called on to defend her worth, in the face of the perpetrator’s smear, to these others. Finally, Hampton enjoys a rhetorical advantage in the argument, for a non-egalitarian theory of human worth raises the specter of racism or ethnic-based animus. But the rhetorical advantage is spurious, for one may hold that individuals are unequal in worth not by virtue of some ascriptive characteristic, but by virtue of their characters. Where one’s theory of worth is character-based in this way, it is not clear that it is any less attractive than the egalitarian view that Hampton adopts. As such, the injuries that a character-based theory of human worth makes salient deserve our attention.

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

expressivist, punishment serves the role of restoring the victim to a position of equal worth in his eyes and in the eyes of others; it vindicates his status as a moral equal. Punishment can thus “annul the message, sent by the crime, that [perpetrator and victim] are not equal in value.”²²⁵

Where a commander fails to punish an atrocity because he endorses that atrocity, or because his own interests have gotten in the way, he denies the victims of the atrocity the opportunity for the restoration of dignity. Instead, he effectively underwrites the dignitary harm that the atrocity waged.²²⁶ Indeed, because of his position of superior authority, he lends even more credence to the estimation of the worth of the victims expressed by the soldiers’ act. His stature has already been ratified by the society that placed him in a distinguished military position, and so the expression of the victims’ inferior worth communicated by his failure to punish carries that much more credibility.²²⁷

The commander is uniquely situated to affirm or deny the meaning of the soldiers’ act through punishment. When a commander declines to punish his soldiers because he endorses or acquiesces in their offense, he affirms the meaning that the offense conveyed. And, his position within the military command structure lends this affirmation a credibility and gravity that it lacked in its guise as a rogue act. The dignitary harm waged by the commander’s failure to punish thus comes to constitute part of the wrong of the atrocity. In this way, we should view the atrocity as one that is extended through time, with an initial set of harms inflicted by the soldiers, and an additional dignitary assault waged by the commander.²²⁸ *It is because the commander compounds his subordinates’*

225. Hampton, *The Retributive Idea*, *supra* note 223, at 131. I do not mean to suggest that all punishment will affect the called-for restoration of dignity. It will not be sufficient for the commander to punish his troops solely for their disobedience. That punishment responds to the *manner* in which the soldiers carried out the atrocity, not the nature of the atrocity itself. Thus, we could imagine a commander retroactively authorizing some benign act that his soldiers had performed of their own accord, while also punishing them for having acted without orders. Nor will it be sufficient for the commander to punish his troops for the atrocity itself if he does so only as a matter of towing the line. For example, if the commander imposes a harsh punishment even while he publicly endorses his subordinates’ atrocity, his endorsement will undercut the expressive force of the punishment. Only if the punishment addresses the atrocity itself, and conveys the commander’s public condemnation of his soldiers’ act, will it serve to counter the expressive component already present in the atrocity.

226. Cf. Kutz, *Causeless Complicity*, *supra* note 201, at 303 (arguing that the attorneys in the Bush Administration who authored the so-called “torture memos” bear responsibility for the Administration’s unlawful interrogation techniques, *even if these techniques occurred prior to the memos’ production*, because the memos ratified these earlier acts).

227. Cf. Murphy, *supra* note 223, at 25 (describing the symbolic message communicated by an offense’s perpetrator as signaling that “I am here up high and you are there down below”).

228. This understanding of the commander’s contribution accurately tracks, I believe, the scenario in which soldiers commit an unauthorized atrocity in which their commander subsequently comes to participate as a result of a failure to punish that is rooted in the com-

offense in this way that he ought to be held criminally liable for it.²²⁹ As Immanuel Kant noted, if those charged with punishing “fail to do so, they may be regarded as accomplices,” and the “bloodguilt” of the perpetrator’s crime will come to rest with them.²³⁰

Dereliction of duty does not track the commander’s contribution to the wrong. The commander who is derelict in his duty to punish offends against the State that bestowed on him the obligation to punish. But, commanders who endorse or acquiesce in their troops’ atrocity do more than just neglect their obligations to the State; they add to the injury of the atrocity.²³¹

mander’s endorsement or acquiescence. I do not contend here, however, that this understanding is the best way in which to construe the contribution of a commander involved in a campaign whose very purpose is to wage atrocities on the victim group. Thus, for example, William Schabas is correct to argue that the wrong perpetrated by military superiors in Rwanda is something far worse than failing to punish genocide, for these superiors operated with the intention that their subordinates *commit* genocide. See Osiel, *Banality of Good*, *supra* note 8, at 1788 (quoting e-mail from William Schabas, Dir., Irish Ctr. for Hum. Rts., Nat’l Univ. of Ir., to Mark Osiel (July 20, 2005, 10:24:19 EST)). By contrast, many of the most egregious abuses committed in the course of the wars in Iraq and Afghanistan, *see supra* text accompanying notes 30–36, as well as those emerging from the Balkan conflict, *see, e.g., supra* text accompanying notes 41–51, begin as the rogue acts of a handful of soldiers that come to redound to their superiors only after the fact, and only because those superiors willfully turned a blind eye to cover them up.

229. It will be useful to distinguish the argument that I advance from a strategy proposed by Osiel in his efforts to find a legally cognizable way of holding members of an officer corps responsible for atrocities committed by their subordinates. Osiel summarizes his proposal as follows: “When a high-level officer is convicted of mass atrocity, fellow officers of the same or higher rank within his relevant unit would collectively suffer monetary sanctions.” Osiel, *Banality of Good*, *supra* note 8, at 1842–43. Osiel describes the fellow officers as “well-positioned bystanders”—that is, individuals who could perhaps have averted the atrocity had they interceded. *Id.* at 1844. The rationale for his approach lies in its deterrent effect; he concedes that the approach does not hew to liberalism’s insistence upon individual guilt. *See id.* at 1845–46. The approach that I advance, by contrast, does not view commanders who omit to intercede as mere bystanders; instead, because they have a duty to intercede, their omission constitutes a ground of culpability. Thus officers are held responsible not in spite of concerns about individual guilt but precisely because they bear such guilt.

230. Hampton, *The Retributive Idea*, *supra* note 223, at 131 (quoting IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 102 (John Ladd trans., Bobbs-Merrill 1965) (1797)).

231. In what sense, one may wonder, does a commander add to the atrocity of his troops if he fails to investigate a suspected atrocity, yet it subsequently emerges that no underlying offense was in fact committed? For example, on some accounts of the Haditha incident, the Marines are believed to have acted within the scope of their rules of engagement. *See, e.g., Walker, supra* note 146. If these accounts are correct, what does the commanding officer’s failure to conduct an investigation into the civilian casualties entail for his guilt on the expressivist theory advanced here?

Again, we are concerned only with cases in which the commander neglects to investigate because he believes that the alleged victims deserve to be treated as they claim to have been treated (*i.e.*, he would endorse his subordinates’ atrocity, if they had committed one), or he believes that investigating the alleged atrocity is contrary to his personal interests (*i.e.*, he

For similar reasons, a finding of “conduct unbecoming,”²³² or a “demotion in rank,”²³³ fails adequately to respond to the nature of the commander’s injury. The commander’s participation in the atrocity of his troops, which results from the expressive harm that his failure to punish lends to his soldiers’ act, already reveals him to be unworthy of the prestige and authority that attaches to a command position. Demoting the commander, or sanctioning him for conduct unbecoming, is just a formal acknowledgment that he occupied a position superior to that which he deserved; these penalties do not address the expressive harm itself.²³⁴

Finally, I am doubtful that the doctrine of complicity would extend to the harm of acquiescence or endorsement that I articulate here. Under international law, for example, the accomplice “must have contributed in a material way to the crime.”²³⁵ Since the commander’s failure to punish arises after his subordinates have completed their acts, his failure cannot be said to have made a material contribution. Further, it is far from clear that the failure to punish would fit within even the more capacious un-

acquiesces in the alleged atrocity). In such cases, the commander’s failure to investigate inflicts an expressive harm, but there is no underlying offense to compound with that harm.

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

The commander who fails to investigate out of endorsement or acquiescence, then, is like the person who attempts a crime. He seeks to align himself with the atrocity. The fact that no atrocity occurred should exculpate him no more than the fact that no crime eventuated should exculpate the person who attempted the offense.

232. See, e.g., 10 U.S.C. § 933 (2008) (“Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.”); Hillman, *supra* note 11, at 5 n.18 (suggesting that the officers implicated in torture at Abu Ghraib could, at least in theory, have been prosecuted under the “conduct unbecoming” provision of the UCMJ).

233. Such was the penalty imposed on Sergeant Selena Salcedo, who was implicated in the abuse of a detainee at Bagram Air Force Base that eventually led to his death. Salcedo pled guilty and received a sentence of a one-grade reduction in rank, along with a \$1,000 fine and a written reprimand. Ohman, *supra* note 26, at 111.

234. To wit: suppose the military brass were contemplating whether to promote a soldier to a command position when they learned that, before joining the military, the soldier had committed an expressive injury similar in magnitude to the commander’s. The brass might, on the basis of that information, deny the soldier the promotion. But, their doing so would not be a form of punishment; it would be a reflection of their assessment that he was unfit for a command position. Cf. Murphy, *supra* note 223, at 27 (“The suffering occasioned by falling from a position that (as one’s wrongful actions demonstrate) one had no right to occupy in the first place hardly seems relevant from the moral point of view.”).

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

derstanding of complicity in domestic law. Domestic accomplice law does extend to cases in which the defendant attempted but failed to assist or encourage the principal—that is, to cases in which the defendant’s contribution did not make an actual difference, although it could have done so.²³⁶ But, the commander’s failure to punish would not satisfy even a counterfactual standard of culpability, for the failure to punish necessarily arises *after* the subordinates have committed their atrocity, and a later event can never cause an earlier one. As such, a commander’s failure to punish his troop’s atrocity could never make a difference to *that* atrocity’s occurrence.²³⁷

Although endorsement and acquiescence likely do not fit within the doctrine of complicity, they nonetheless share something of the spirit of that doctrine. In particular, to the extent that endorsement—and, to a lesser extent, acquiescence—constitutes a kind of encouragement, the commander who endorses an atrocity of his troops acts no better, from an expressivist standpoint, than does the accomplice who shouts words of encouragement in the course of the offense’s commission. Thus, the expressivist considerations that justify assigning responsibility for offenses even to those accomplices who attempt, but fail, to provide encouragement also sustain an assignment of responsibility for an atrocity to those commanders who provide their encouragement, in the form of endorsement or acquiescence, after the fact.

In sum, where a commander fails to punish because he endorses or acquiesces in his subordinates’ offense, we ought to hold him criminally liable for that offense. Doing so appropriately responds to the nature of the harm that he has inflicted, and restores the victim to a position of

236. The classic case for this proposition is *State ex rel. Attorney General v. Tally*, 102 Ala. 25, 69 (1894). The Model Penal Code may be even more permissive insofar as it considers the mere attempt to offer aid or encouragement as a ground of complicity. See MODEL PENAL CODE § 2.06(3)(a)(ii) (1962). Recently, some scholars have argued that accomplice liability holds even if there was *no* possibility that the defendant’s contribution could make a causal difference, so long as she intended to offer aid or encouragement to the principal offender. See, e.g., Michael S. Moore, *Causing, Aiding and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395, 442–43 (2007). Others have argued that it ought to apply this broadly. See Kutz, *Causeless Complicity*, *supra* note 201, at 300–01. From an expressive standpoint, there may be no difference between aid that contingently arises after the fact and aid that necessarily arises after the fact, so long as the would-be accomplice in each scenario intends that the offense be committed. Still, it is not clear that expressivism provides a sufficient justification for punishment; considerations of deterrence clearly counsel in favor of privileging conduct that could have made a causal difference to conduct that could never have done so.

237. To be clear, I am not contemplating scenarios in which a commander fails to punish an atrocity of his troops on one occasion, and his laxity induces his troops to commit further atrocities. I deal with such scenarios in Part II.C. See *infra* text accompanying notes 242–245. Instead, what is at issue here is whether the commander’s failure to punish causally contributes to the atrocity that he has failed to punish.

equal worth. I turn now to scholarly objections, in an attempt to argue that these should not detract from the appropriateness of the mode of liability view.

C. Scholarly Resistance to the Mode of Liability View

To hold a commander liable for an atrocity of his troops that he neither ordered nor knew about in advance has been deemed “the most conspicuous departure of the ICTY Statute from the principle that conviction and sentence for a morally disqualifying crime should be related to the actor’s own conduct and culpability.”²³⁸ The principle of personal culpability is so sacrosanct that the ICTY Appeals Chamber has termed it “the foundation of criminal responsibility.”²³⁹ Further, scholars have anointed the principle of personal culpability “the key to establishing legitimacy in international criminal law”²⁴⁰ and “one of the most serious candidates for inclusion” within a hypothetical “catalog [of] general principles of law so widely recognized by the community of nations that [it] constitute[s] a subsidiary source of public international law.”²⁴¹ In response to these high-minded statements, this section endeavors to show that the mode of liability view does not, in fact, contravene the culpability principle.

As a preliminary matter, it is useful to confront a purported moral distinction, first articulated by Mirjan Damaška, between varieties of failure to punish.²⁴² On the first variant of the failure to punish, a commander fails, on successive occasions, to punish an atrocity of his troops; as a result, the commander’s earlier failure (or failures) to punish causally contribute to subsequent atrocities that his troops commit, as his troops come to expect that their misconduct will be treated with impunity.²⁴³ Damaška notes, correctly, that the failure to punish recurring offenses is tantamount to the failure to prevent, if not a form of accomplice liability.²⁴⁴ Here, concerns about violating the principle of culpability do not arise, because the commander is believed to have played a culpable causal role in his soldiers’ offense.

By contrast, on the second variant, the failure to punish is an isolated event; no further atrocities are committed by the commander’s subordi-

238. Damaška, *supra* note 44, at 468. Damaška refers here to just one of two kinds of failures to punish. I argue that the distinction is misguided, and that neither kind violates the culpability principle. See *infra* notes 243, 246 and accompanying text.

239. *Tadić Appeals Judgment*, *supra* note 6, ¶ 186.

240. Danner & Martinez, *supra* note 17, at 97; see also Damaška, *supra* note 44, at 470–71.

241. Damaška, *supra* note 44, at 470.

242. *Id.*

243. *Id.* at 467–68.

244. *Id.*

nates, and so the failure cannot be said to bear a causal connection to their wrongdoing.²⁴⁵ It is here that Damaška sees “the most conspicuous departure” from the culpability principle.²⁴⁶ For the sake of brevity, let us call the first variant “failure to punish repeat offenders” and the second “failure to punish one-time offenders.”

Damaška is correct that there are indeed two analytic categories of failure to punish. But, he is wrong to attach the normative significance to them that he does. First, the commander who fails to punish one-time offenders may nonetheless bear causal responsibility for subsequent atrocities committed by soldiers who are *not* under his effective control. The commander’s failure may signal the tolerance of the military as a whole, and so soldiers within the same military who fall under another’s command may infer that their offenses will be treated with impunity. But, even setting aside the relationship between a failure to punish on one occasion and any atrocities committed subsequent to that failure, we have good reason to think that the failure to punish is at least sometimes a ground for culpability for the underlying offense. In particular, the thrust of my argument in the previous Section was that the failure to punish, where it is motivated by endorsement or acquiescence in the underlying offense, wages an expressive injury that makes the commander a party to the underlying offense. On this argument, then, it is not relevant whether the commander’s failure to punish precipitates further war crimes—whether of his own soldiers or another’s. In cases of endorsement or acquiescence, the failure to punish is sufficiently culpable *in its own right* to warrant criminal liability.²⁴⁷

245. *See id.* at 468.

246. *Id.*

247. In the course of arguing that the Bush Administration lawyers who authored the so-called “torture memos” bear responsibility for the Administration’s unlawful interrogation techniques, Christopher Kutz raises a consideration that, I believe, further undermines the distinction between one-time and repeat failures to punish. Kutz writes,

Conceptually, ratification of prior acts in contexts where that ratification may have future effects looks . . . like a failed attempt to aid or encourage the prior acts, where the aid or encouragement is of a type that is generally appropriately targeted by criminal law because of its possible consequences.

Kutz, *Causeless Complicity*, *supra* note 201, at 304. To put the point another way, the lawyer who ratifies earlier acts of torture does not know, at the time that he drafts his memo, that the memo’s stance will not lead to future acts of torture. Imagine, then, a hypothetical world in which a lawyer drafted a set of memos identical to the “torture memos” but, because of some turn of events outside of his control, no further interrogations were conducted, and so the Administration had no further opportunities to torture those it had detained. The difference between this hypothetical world and the actual world is simply one of moral luck. Our hypothetical lawyer cannot be credited with the fact that his memos did not result in further acts of torture. He is thus no less culpable than is the lawyer in the real world whose memos did—on Kutz’s argument, anyway—produce further acts of torture. By the same token, the commander

Damaška is misled, I believe, at least in part because he ignores the role of the command structure in making a commander a presumptive candidate for liability. For example, he argues that holding a commander responsible for the crime of his subordinates solely on the basis of the commander's failure to punish is akin to "stigmatiz[ing] a parent as a thief when his child commits a larceny."²⁴⁸ But the analogy between parents and commanders is misguided. In the typical family, adult children are not empowered to act on behalf of their parents. Even the parent who approves of his child's transgression is not thereby made an author of, or party to, that transgression. To be sure, the parent who has taught his child to valorize wrongful acts of violence may bear some responsibility for the violent acts that his child goes on to commit. But, the parent's responsibility then flows not from the parental relationship itself but instead from the parent's inculcation of a violent disposition in his child. By contrast, we have seen that the very structure of the relationship between a commander and his subordinates is such that the subordinates' acts, at least when of a military character,²⁴⁹ presumptively redound to their commander. Unless he takes steps to dissociate himself from their action, or can justify his failure to do so, he incurs ownership of their acts, whether he ordered them or not. Damaška's appeal to the parent-child relationship ignores the normative dimensions of the relationship between a commander and his troops.

A more general problem with those, like Damaška, who invoke the culpability principle, is that they simply beg the question of what it entails. For example, Chantal Meloni objects to the mode of liability view because she believes that "no one, in fact, can be punished for a wrongful act unless the act is attributable to him."²⁵⁰ But, the question of when an act is attributable to a person is precisely what is at issue. The point of the expressive theory advanced in the last section was to establish that an atrocity begun by a commander's subordinates *can* legitimately be at-

whose failure to punish does not eventuate in the commission of further atrocities by his soldiers is no different, from an expressive standpoint, from the one whose failure to punish does facilitate the commission of further atrocities. To paraphrase Joel Feinberg, although the latter commander may be culpable of more, he is not more culpable. Joel Feinberg, *Collective Responsibility*, in *COLLECTIVE RESPONSIBILITY: FIVE DECADES OF DEBATE IN THEORETICAL AND APPLIED ETHICS* 53, 68 (Larry May & Stacy Hoffman eds., 1991).

248. Damaška, *supra* note 44, at 470.

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

250. Meloni, *supra* note 25, at 633.

tributed to the commander if he unjustifiably fails to punish it. In a similar vein, Damaška contends that the problem with the mode of liability view is that it attaches “opprobrium” to the commander “for heinous conduct to which he has in no way contributed.”²⁵¹ But again, whether the failure to punish counts as a contribution is exactly what is at stake.

Other scholars who object to the mode of liability view seem to hold that one may be culpable of an offense only if one causally contributes to it, and does so at least recklessly, if not intentionally.²⁵² These scholars reason that the commander who fails to punish could not have *caused* his subordinates’ atrocity, because his failure to punish necessarily takes place after his subordinates have participated in the atrocity, and one cannot cause an event that has already occurred. In this way, these scholars conclude that holding a commander liable for his subordinates’ atrocity simply because he failed to punish it violates the principle of personal culpability.

The problem with the line of argument just advanced is twofold. First, the culpability principle need not be so narrowly construed—there are established departures from it in both municipal and international law.²⁵³ Further, the account that I advance respects the requirements of even this narrow construal: Commanders who fail to punish their subordinates because they endorse or acquiesce in the subordinates’ offense cause further injury, and they intend, or at least recklessly render, that contribution. In short, those who assail the mode of liability view because they do not believe that a failure to punish constitutes participation in the subordinates’ offense lack a proper appreciation of the expressive injury inflicted by the commander’s failure to punish.²⁵⁴ Put differently,

251. Damaška, *supra* note 44, at 468.

252. See, e.g., Danner & Martinez, *supra* note 17, at 147 (citing, with approval, ICTY case law that requires something more than mere negligence for conviction on a command responsibility theory, because this case law preserves the culpability principle); O’Reilly, *supra* note 46, at 101 (“[A] respect for human dignity under the law requires a certain level of individualized fault before criminalization and punishment are appropriate. In those instances in which superiors are held liable for negligently failing to prevent or punish crimes of subordinates, the doctrine of command responsibility offends this basic tenet.”).

253. Consider, for example, the felony-murder rule, see, e.g., Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965 (2006), or conspiratorial liability on a Pinkerton theory, in domestic law, see *Pinkerton v. United States*, 328 U.S. 640 (1946), or the doctrine of joint criminal enterprise in international law, see, e.g., Rome Statute, *supra* note 5, art. 25(3)(d).

254. Damaška advances a related question-begging argument when he worries that holding a commander criminally liable solely because of his failure to punish risks impugning the legitimacy of international judicial decisions, and inviting sympathy for defendants convicted on this ground. Damaška, *supra* note 44, at 477–78. He concludes: “All in all, then, the employment of imputed forms of command responsibility could be detrimental to the socio-pedagogical mission of international criminal justice.” *Id.* at 478. But, a doctrine that fails to respond to the expressive contribution that a commander makes if he fails to punish an atrocity

the account that I have proposed does not seek to depart from a theory of “just deserts”;²⁵⁵ it just sees “just deserts” that have heretofore gone unnoticed.

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

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

If the account that I have advanced here reflects an improvement over current doctrine, then it will be worth noting that its implications may extend beyond criminal liability for individual commanders. For, at some point, the failure to punish may rise so high up the chain of command that one wonders whether the atrocity’s perpetrators come to include not just the soldiers who initiated it and the commanders who failed to punish it, but the whole nation in whose military they serve. Consider, for example, the case of Captain Carolyn Wood, chief military intelligence officer at the Bagram Control Point in Afghanistan in December 2002, when two Afghan detainees died as a result of harsh interrogation techniques.²⁵⁶ Army investigative reports conclude that Captain Wood lied when she told investigators that detainees’ hands were shackled above their heads in order to protect army interrogators; in fact, the reports uncovered that the shackling was part of an effort “to inflict pain and sleep deprivation.”²⁵⁷ Although a handful of the twenty-eight soldiers implicated in the assaults have been prosecuted, no action has been taken against Captain Wood.²⁵⁸ After leaving Afghanistan, she helped to establish the interrogation unit at Abu Ghraib. She has since

because he endorses or acquiesces in it no better serves the “socio-pedagogical mission” of international criminal justice.

255. *Id.* at 469.

256. See Douglas Jehl, *Army Details Scale of Abuse of Prisoners in an Afghan Jail*, N.Y. TIMES, Mar. 12, 2005, at A1.

257. *Id.*

258. *Id.*

been awarded two bronze stars, one each for the services she provided in Afghanistan and Iraq,²⁵⁹ and is currently stationed at the Army's Fort Huachuca, where she is charged with instructing soldiers in interrogation techniques.²⁶⁰ The Bush Administration's treatment of Wood is tantamount to its retroactive authorization of the interrogation techniques that she oversaw, and so the possibility of widespread government complicity, if not national responsibility, arises. On similar grounds, one might seek to indict Serbia for having knowingly harbored Radovan Karadzic, the Bosnian Serb leader charged with masterminding the worst massacre since World War II.²⁶¹

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

259. *The Fifth Estate: A Few Bad Apples?* (CBC television broadcast, Nov. 16, 2005) [hereinafter *The Fifth Estate*]. For information regarding the documentary, see <http://www.cbc.ca/fifth/badapples/index.html>.

260. *The Fifth Estate*, *supra* note 259.

261. See Dan Bilefsky, *Karadzic Arrest Is Big Step for a Land Tired of Being Europe's Pariah*, N.Y. TIMES, July 23, 2008, at A10. Serbia's participation in Karadzic's arrest is seen as an about-face from the policy of providing official protection to Karadzic—a policy motivated by nationalist suspicion of the ICTY, and abandoned in the wake of the recent election of a pro-Western government and the prospect of membership in the European Union. See *id.*