Volume 202 **Winter 2009**

MILITARY LAW REVIEW

ARTICLES

BOOK REVIEWS

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Volume 202 **Winter 2009**

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ARTICLES

BOOK REVIEWS

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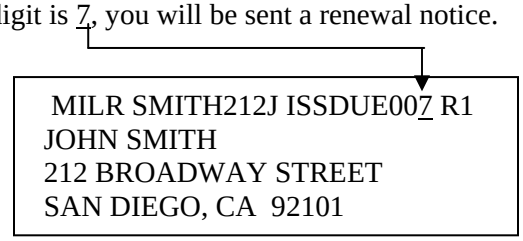

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MILITARY LAW REVIEW

Volume 202 **Winter 2009**

LOCKING DOWN PRETRIAL CONFINEMENT REVIEW: AN ARGUMENT FOR REALIGNING RCM 305 WITH THE CONSTITUTION

MAJOR BRIAN P. GAVULA*

Whatever procedure [may be adopted], it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.[1]

I. Introduction

It is 1700 on a Friday. After a rough week in the courtroom, Captain (CPT) Hack, a trial counsel at Fort Grillem, is getting ready to head home for a relaxing weekend when his office phone rings. On the other end is one of his company commanders.

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[1] Gerstein v. Pugh, 420 U.S. 103, 124–25 (1975) (footnotes omitted).

"Hey, buddy. I'm glad I caught you," barks the commander. "My favorite Soldier is at it again. Ever since I read him his summary court-martial charges for the marijuana use, he's been a real "pain in the neck."[2] He's always late to formation and just sits around while the rest of the Soldiers are working. The other day, the first sergeant caught him hanging out at the post exchange when he was supposed to be in the motor pool helping to pack up our equipment. And just this afternoon, his squad leader overheard him saying that he planned to get high this weekend, since he's getting court-martialed anyway. We're trying to get ready for a deployment, and I don't have time to deal with this nonsense! Can you just get this guy out of our hair?"

Sensing the exasperation in the commander's voice, CPT Hack quickly suggests that the commander put the Soldier in pretrial confinement to keep him from causing problems in his unit and from getting into any more trouble prior to his summary court-martial. After assuring the company commander that he will have his paralegal start on the paperwork immediately, CPT Hack slumps back into his chair and wonders whether he gave the right advice. Although one of his fellow trial counsel is constantly bragging about how his brigade puts Soldiers in jail as a general rule whenever they prefer court-martial charges, CPT Hack has never used pretrial confinement in his short time as a trial counsel and is not sure if it is appropriate in this case. He opens his *Manual for Courts-Martial* (*MCM*) to Rule for Courts-Martial (RCM) 305 to review the requirements for ordering a Soldier into pretrial confinement.

The standard specified in the *MCM* is probable cause, which is satisfied by a finding that there are reasonable grounds to believe that:

> (i) An offense triable by a court-martial has been committed;
> (ii) The prisoner committed it; and
> (iii) Confinement is necessary because it is foreseeable that:

[2] This language comes from *United States v. Heard*, which is commonly cited for the proposition that an accused may not be placed in pretrial confinement solely on the basis that he is a "pain in the neck." *See* 3 M.J. 14, 16, 22 (C.M.A. 1977); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305 analysis, at A21-18 (2008) [hereinafter MCM] (distinguishing the accused in *Heard* from the "'quitter' who disobeys orders and refuses to perform duties" and may be confined due to his detrimental effect on morale and discipline).

> (a) The prisoner will not appear at trial, pretrial hearing, or investigation, or
>
> (b) The prisoner will engage in serious criminal misconduct; and
>
> (iv) Less severe forms of restraint are inadequate.[3]

The person ordering confinement should ensure that these grounds exist before making his decision.[4] In addition, within seventy-two hours, the commander must document the grounds for his determination in a written memorandum, along with the reasons for continued pretrial confinement.[5] Within forty-eight hours of the initiation of confinement, a "neutral and detached officer" must review the initial confinement decision in accordance with RCM 305(i)(1) to determine whether probable cause indeed exists.[6] Provided that the commander is neutral and detached and completes his 72-hour review within forty-eight hours, he may satisfy the 48-hour review required by RCM 305(i)(1) with his memorandum.[7] Moreover, the rules do not prohibit the 48-hour review and the 72-hour commander's review from occurring contemporaneously with ordering the accused into confinement.[8] Finally, RCM 305(i)(2) requires the review of "the probable cause determination and necessity for continued pretrial confinement" within seven days by a "neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned."[9] For the Army, Army Regulation (AR) 27-10 requires that the 7-day review be conducted by a judge advocate appointed as a military magistrate.[10]

Having refreshed his understanding of the requirements for the imposition and review of pretrial confinement, CPT Hack decides that he will save time by drafting the 72-hour memorandum for the company commander's signature so that he does not need to explain the legal standards to the commander in detail. In analyzing the elements of the probable cause determination, CPT Hack again ponders whether

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[3] MCM, *supra* note 2, R.C.M. 305(h)(2)(B).
[4] *See id.* R.C.M. 305(d) & discussion.
[5] *Id.* R.C.M. 305(h)(2)(C).
[6] *Id.* R.C.M. 305(i)(1).
[7] *Id.* R.C.M. 305(h)(2)(A).
[8] *See id.*
[9] *Id.* R.C.M. 305(i)(2).
[10] U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE paras. 5-15, 9-5 (16 Nov. 2005) [hereinafter AR 27-10]. The Army is the only service branch that requires a judge advocate magistrate. The requirements of the other service regulations are addressed in Part II.B.4, *infra*.

confinement in this case meets the legal standard, but he believes that he can at least make a colorable argument. After all, CPT Hack reasons, the accused is already charged with an offense, his perpetual lateness to formation and absence from his place of duty make it foreseeable that he will not appear at trial, and the accused's statement that he plans to use marijuana again certainly shows that he intends to engage in serious criminal misconduct.[11] Upon completing the 72-hour memorandum, CPT Hack instructs his paralegal to take it, along with the confinement order and other required documents,[12] to the company commander for signature.

Realizing the utility of conducting the 48-hour "neutral and detached" review immediately, so as to avoid having to do it over the weekend, CPT Hack also prepares a succinct memorandum stating that there is probable cause that pretrial confinement should continue. He then considers who should serve as the "neutral and detached officer" for the 48-hour review. Although he remembers his chief of military justice telling him it is a good practice to arrange for a part-time military magistrate to conduct the 7-day review within forty-eight hours to satisfy the requirements of both RCM 305(i)(1) and RCM 305(i)(2),[13] CPT

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[11] Mere lateness to formation and a failure to go to his appointed place of duty generally would not make it foreseeable that the accused will not appear at trial. Moreover, mere drug use would not make it foreseeable that the accused will engage in serious criminal misconduct within the meaning of RCM 305(h)(2)(B) unless there is some nexus between the drug use and "the safety of the community or . . . the effectiveness, morale, discipline, readiness, or safety of the command." MCM, *supra* note 2, R.C.M. 305(h)(2)(B). *Compare* United States v. Williams, 54 M.J. 626, 631 (A.F. Ct. Crim. App. 2000) ("No *trained* commander or magistrate could reasonably believe this evidence [of cocaine possession and use] was sufficient to establish, by a preponderance of the evidence, that incarceration was appropriate."), *and* United States v. Sharrock, 32 M.J. 326, 331–32 (C.M.A. 1991) (failing to mention accused's drug use in upholding the lawfulness of his pretrial confinement), *with* United States v. Plummer, No. 200601319, 2007 CCA LEXIS 229, at *10 (N-M. Ct. Crim. App. 2007) (unpublished decision) (accused posed "serious threat to the community" because he distributed drugs to other Marines from his government quarters in addition to using drugs), *and* United States v. Fortune, No. 200300779, 2005 CCA LEXIS 119, at *6 (N-M. Ct. Crim. App. 2005) (unpublished decision) (pretrial confinement was warranted because "as a mechanic working on amphibious vehicles during an exercise, the appellant's drug use presented a safety hazard to the other Marines in the field").

[12] Army regulations require preparation of a Department of Army (DA) Form 5112, Checklist for Pretrial Confinement, in addition to the confinement order. *See* AR 27-10, *supra* note 10, paras. 5-15c, 9-5b(2).

[13] This has been recognized as good practice since the 1998 changes to the *MCM* incorporated the 48-hour review. *See* Major Michael J. Hargis, *Pretrial Restraint and Speedy Trial: Catch Up and Leap Ahead*, ARMY LAW., Apr. 1999, at 13, 13; *see also*

Hack is afraid that the magistrate will determine that the legal requirements for pretrial confinement have not been met in this case. He believes that the battalion commander might ordinarily be a logical choice to conduct the 48-hour review of a company commander's confinement decision. However, because the battalion commander has already referred charges against this Soldier to a summary court-martial and he therefore may not be sufficiently "neutral and detached," CPT Hack decides instead to seek out the battalion executive officer.

"What do we need to do with this guy, Judge?" asks the battalion executive officer after CPT Hack briefed him on the situation.

"He's a dirtbag, sir," replies CPT Hack. "The company commander is signing the confinement order as we speak. He just needs you to sign a memo saying you agree with his decision. There's a chance that the military magistrate will kick him out of jail, but that doesn't have to happen for seven days. At least he'll be out of the command's hair until then."

With that, the battalion executive officer signed the 48-hour review memorandum, and the accused's unit escorted him to a local confinement facility. The accused remained there for seven days until the military magistrate determined that pretrial confinement was not warranted and ordered his immediate release in accordance with RCM 305(i)(2)(C).[14]

The preceding scenario should be troubling, not only because of the many intentional and unintentional abuses of the pretrial confinement procedures,[15] but also because it is representative of tactics that are all

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Major Mackay, Note, *The COMA Addresses the Constitutional Requirements for Pretrial Confinement Determinations and Reviews in Light of* Gerstein v. Pugh *and* County of Riverside v. McLaughlin, ARMY LAW., Mar. 1994, at 46, 49 (calling a magistrate review at forty-eight hours "the more efficient solution" even prior to the 1998 changes to the *MCM*).

[14] "Upon completion of review, the reviewing officer shall approve continued confinement or order immediate release." MCM, *supra* note 2, R.C.M. 305(i)(2)(C).

[15] For example, pretrial confinement is generally not appropriate when the command is disposing of the offense with a summary court-martial. *See* UCMJ art. 10 (2008) ("when charged only with an offense normally tried by a summary court-martial, [an accused] shall not ordinarily be placed in confinement."); U.S. ARMY TRIAL JUDICIARY, STANDING OPERATING PROCEDURES FOR MILITARY MAGISTRATES 13 (2006) [hereinafter MILITARY MAGISTRATE SOP]. In this hypothetical scenario, it is doubtful that the circumstances even require pretrial confinement. *See supra* note 10. Finally, for a discussion of the

too common in today's military justice practice. This potential for abuse is important because pretrial confinement is the most drastic form of restraint that can be imposed on an accused prior to trial. Beyond depriving the accused of his liberty, it interferes with his performance of duty "and may greatly complicate [his] defense by making more difficult the attorney-client relationship."[16] Therefore, "unless confinement prior to trial is compelled by a legitimate and pressing social need sufficient to overwhelm the individual's right to freedom . . . restrictions unnecessary to meet that need are in the nature of intolerable, unlawful punishment."[17]

Certainly, the military's status as a "specialized society separate from civilian society"[18] necessitates considerations such as military discipline and national security[19] in addition to those factors customarily used in state and federal criminal procedure in determining whether pretrial confinement is appropriate.[20] But it is precisely because of the expansive bases on which a commander can justify placing an accused servicemember in pretrial confinement[21] as well as the absence of bail in

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typical prosecutor-driven, *ex parte* nature of the 48-hour and 72-hour reviews, see Part III.A.3, *infra*.

[16] 1 FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE § 4-10.00 (3d ed. 2006); *see also* Major Richard R. Boller, *Pretrial Restraint in the Military*, 50 MIL. L. REV. 71, 73, 74–75 (1970) (noting that pretrial confinement may hinder the preparation of the accused's defense and may have subtle effects on the outcome of the trial). At Fort Drum, New York, for example, pretrial confinees are sometimes jailed in civilian confinement facilities as far away as Syracuse, New York, a drive that takes over two hours round trip under normal conditions and can take several hours during inclement weather.

[17] United States v. Heard, 3 M.J. 14, 20 (C.M.A. 1977).

[18] Parker v. Levy, 417 U.S. 733, 743 (1974).

[19] Under RCM 305, the definition of "serious criminal misconduct" includes "intimidation of witnesses or other obstruction of justice, serious injury of others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command, or to the national security of the United States." MCM, *supra* note 2, R.C.M. 305(h)(2)(B). At the extreme edge of this broad range of what is considered "serious criminal misconduct" justifying preventive detention is the concept of the "quitter," who may be confined based on the impacts of his behavior on good order and discipline. *See id.* R.C.M. 305 analysis, at A21-18.

[20] *See, e.g.*, 18 U.S.C. § 3142 (2006) (discussing the factors considered for pretrial detention in the federal system).

[21] Noted military law scholars Frances Gilligan and Frederic Lederer have opined that the preventative detention scheme in the *MCM* may be unconstitutional in light of the framework approved by the Supreme Court in *United States v. Salerno*, 481 U.S. 739 (1987), in which the Court reviewed the constitutionality of the Bail Reform Act of 1984. *See* GILLIGAN & LEDERER, *supra* note 16, § 4-32.00.

the military system[22] that it is so vital that the legal review of the pretrial confinement decision be meaningful, in terms of both its timeliness and its reliability. Indeed, promptness and reliability are central to the Supreme Court's concept of the constitutionally-required judicial review of pretrial confinement.[23]

As the Supreme Court has delineated the constitutional limits of pretrial confinement over the years, however, the military has imperfectly implemented the Court's mandates.[24] As a result, the current version of RCM 305 establishes a pretrial confinement framework that is prone to systematic abuse and does not provide a meaningful, reliable judicial review in a timely manner to protect the basic rights of servicemembers. In particular, because RCM 305 allows for the review of pretrial confinement by non-legally-trained officers who may neither understand the nature of the probable cause determination nor be truly neutral and detached, the current system is inherently unreliable and insufficiently judicial. In order for military pretrial confinement procedures to be in compliance with the Constitution, RCM 305 must be amended to require review of pretrial confinement by a neutral and detached judge advocate magistrate within forty-eight hours.

In building the case for realigning RCM 305 with the Constitution, Part II of this article first explains the Supreme Court's concept of the constitutionally-required judicial review of pretrial confinement, as well as the way in which the military courts have applied the Supreme Court precedent to the armed services. It then traces the historical development of the law pertaining to pretrial confinement in the military, demonstrating how the military has continually lagged behind the constitutional standard. Part II concludes by examining the development of RCM 305 and the various service regulations, which have failed to adequately implement the constitutionally-required pretrial confinement review procedures.

Part III explores the problems with the current system in terms of the illogical framework of pretrial confinement review in RCM 305 and the lack of uniformity across the services, which have resulted in a system that is prone to abuse. A proposed revision to RCM 305, laid out in the Appendix and explained in Part III.B, is designed to comply more

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[22] Courtney v. Williams, 1 M.J. 267, 271 (C.M.A. 1976).
[23] *See infra* Part II.A.
[24] *See infra* Part II & Part III.A.

squarely with the Constitution. This revision would eliminate the multiple layers of review, ensure consistency across the services, and reduce the opportunities for abuse.

Finally, in support of the proposed revisions, Part IV of this article argues that the military cases applying the Supreme Court's mandates concerning pretrial confinement review are flawed in their justifications for allowing non-lawyers to review pretrial confinement decisions. This article concludes by arguing that this proposal should be implemented because only judge advocates can consistently fulfill the Supreme Court's vision for neutral and detached magistrates and provide a meaningful review of pretrial confinement that complies with the Constitution.

II. Background

A. The Constitutional Standard for Pretrial Confinement Review

1. Prompt Review by a Neutral and Detached Magistrate

The Fourth Amendment guarantees the "right of the people to be secure in their persons . . . against unreasonable searches and seizures."[25] While the Supreme Court has long held that the Fourth Amendment standard for arrest and pretrial detention is probable cause,[26] the current jurisprudence regarding the appropriate standards for the review of pretrial confinement began in 1975 with *Gerstein v. Pugh*.[27] In that seminal case, the Supreme Court considered the issue of "whether a person arrested and held for trial . . . is constitutionally entitled to a judicial determination of probable cause for pretrial restraint of liberty."[28] The petitioner in *Gerstein* challenged a Florida criminal procedure whereby "a person arrested without a warrant and charged by information [could] be jailed . . . pending trial without any opportunity for a probable cause determination."[29] The Court held that the Fourth

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[25] U.S. CONST. amend. IV.

[26] *See Ex parte* Burford, 7 U.S. (3 Cranch) 448, 453 (1806) (finding a warrant of commitment illegal under the Fourth Amendment, "for want of stating some good cause certain, supported by oath").

[27] 420 U.S. 103 (1975).

[28] *Id.* at 105.

[29] *Id.* at 116. A criminal "information" is "[a] formal criminal charge made by a prosecutor without a grand-jury indictment." BLACK'S LAW DICTIONARY 795 (8th ed.

Amendment mandates "a *judicial* determination of probable cause as a prerequisite to extended restraint of liberty following arrest."[30]

Central to the Court's concept of this judicial review of pretrial confinement was the idea that a "neutral and detached *magistrate*" should decide the existence of probable cause "whenever possible."[31] In establishing this constitutional requirement, the Court carefully distinguished between the initial probable cause determination incident to arrests and the probable cause review needed for pretrial confinement. In the former instance, the Court acknowledged that the interests of law enforcement demand that a police officer's on-scene assessment of probable cause be sufficient to justify the arrest of a suspect, as well as "a brief period of detention to take the administrative steps incident to arrest."[32] Once these steps are complete, however, the need for unilateral action by the government disappears, and the "need for a neutral determination of probable cause increases significantly"[33] due to the profound effects that pretrial confinement can have on the suspect's life.[34] Because the impacts of pretrial confinement are so severe, "the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty."[35]

2004). "The information is used to prosecute misdemeanors in most states, and about half the states allow its use in felony prosecutions as well." *Id.*

[30] *Gerstein*, 420 U.S. at 114 (emphasis added).

[31] *Id.* at 112 (emphasis added). The Court further explained:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by an officer engaged in the often competitive enterprise of ferreting out crime.

Id. at 112–13 (quoting Johnson v. United States, 333 U.S. 10, 13–14 (1948)).

[32] *Id.* at 113–14.

[33] *Id.* at 114.

[34] The Court noted the impacts on the suspect's employment, income, and family relationships, as well as his ability to assist in the preparation of his defense. *See id.* at 114, 123. *See generally* LEWIS R. KATZ ET AL., JUSTICE IS THE CRIME: PRETRIAL DELAY IN FELONY CASES 56–62 (1972) (decrying the psychological and physical effects of being confined before trial with those already convicted of serious crimes).

[35] *Gerstein*, 420 U.S. at 114.

Having established the constitutional requirement for review of pretrial confinement by a neutral and detached magistrate, the Court expounded as to who could fulfill this function. Reasoning that "a prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate,"[36] the Court held that a prosecutor's judgment as to probable cause, implicit in his decision to file a criminal information, does not satisfy the requirements of the Fourth Amendment.[37] Moreover, the Court emphasized that the magistrate must be completely independent from both the prosecution and law enforcement.[38] Such independence is critical to guard against both intentional and inadvertent disregard of liberties by those associated with enforcing the law.

Finally, the Court in *Gerstein* addressed the nature of the review itself. In cautioning that the Constitution does not require any particular procedure, the Court nonetheless warned that whatever procedure a jurisdiction chooses, "it must provide a fair and reliable determination of probable cause . . . by a judicial officer either before or promptly after arrest."[39] Because the sole issue determined by the magistrate is "whether there is probable cause for detaining the arrested person pending further proceedings,"[40] a reliable determination can be made without an adversarial hearing.[41] Likewise, due to "its limited function and its nonadversary character, the probable cause determination is not a 'critical stage' in the prosecution that would required appointed counsel."[42]

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[36] *Id.* at 117 (citing Coolidge v. New Hampshire, 403 U.S. 443, 449–53 (1971)).
[37] *Id*.
[38] *Id.* (citing Shadwick v. City of Tampa, 407 U.S. 345 (1972)). In Part IV.B.1, *infra*, I discuss the unique way in which the military justice system distributes the traditional prosecutorial functions among the trial counsel, the chain of command, the staff judge advocate, and the convening authority.
[39] *Id.* at 124–25.
[40] *Id.* at 120. In applying *Gerstein* to the military, the Court of Military Appeals (COMA) explained the probable cause determination as having two components: "if a person *could* be detained and if he *should* be detained." Courtney v. Williams, 1 M.J. 267, 271 (C.M.A. 1976) (emphasis added).
[41] *Gerstein*, 420 U.S. at 120–22.
[42] *Id.* at 122. The *MCM*, however, does allow for military counsel to be provided to pretrial confinees. MCM, *supra* note 2, R.C.M. 305(f). It also provides that counsel "shall be allowed to appear before the 7-day reviewing officer and make a statement, if practicable." *Id.* R.C.M. 305(i)(2)(A)(i).

2. The 48-Hour Rule

In the two decades following *Gerstein*, the courts wrestled with what constituted "prompt" judicial review of pretrial confinement. In *County of Riverside v. McLaughlin*,[43] the Supreme Court considered a California county's policy of combining the probable cause determination following warrantless arrests with the arrestee's arraignment proceedings, which were required to be conducted without unreasonable delay and within two days of arrest, excluding weekends and holidays.[44] Recognizing that *Gerstein* "struck a balance between competing interests,"[45] the Court in *McLaughlin* held that "judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*,"[46] and thus are presumptively reasonable under the Fourth Amendment.[47]

The Court acknowledged that although the Fourth Amendment "permits a reasonable postponement of a probable cause determination while the police cope with the everyday problems of processing suspects through an overly burdened criminal justice system,"[48] there is no legitimate state interest in detaining individuals without probable cause for extended periods.[49] Therefore, judicial determinations of probable cause made after forty-eight hours are presumptively unreasonable.[50] In such cases, "the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance."[51]

Under the *McLaughlin* rule, neither a state's desire to combine proceedings nor intervening weekends and holidays constitute extraordinary circumstances that justify delay beyond forty-eight hours.[52] In fact, the Court specifically noted that the exclusion of weekends and holidays from the county's computation of the two days within which the

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[43] 500 U.S. 44 (1991).
[44] *Id.* at 47.
[45] *Id.* at 54.
[46] *Id.* at 56.
[47] Colonel Francis A. Gilligan & Lieutenant Colonel Stephen D. Smith, *Criminal Law Division Notes: Supreme Court—1990 Term, Parts III and IV*, ARMY LAW., July 1991, at 50, 53.
[48] *McLaughlin*, 500 U.S. at 55.
[49] *Id.*
[50] Gilligan & Smith, *supra* note 47, at 53.
[51] *McLaughlin*, 500 U.S. at 57.
[52] *See id.* at 57–58.

combined proceedings had to occur—a policy that caused delays of up to seven days in some cases—meant that the county's standard procedures regularly exceeded the constitutionally-permissible 48-hour period.[53] Moreover, the Court opined that the typical practice of the combined proceedings taking place on the last possible day might constitute "delay for delay's sake,"[54] which would make the probable cause review unreasonable even if the hearing was held within forty-eight hours.[55]

B. Pretrial Confinement Review in the Military

1. Application of the Constitutional Standard to the Military

With what appeared to be a clear mandate from the Supreme Court for a judicial review of pretrial confinement by a neutral and detached magistrate within forty-eight hours, the issue of who is authorized to conduct this review in the military came before the military courts. At the time the Army Court of Military Review (ACMR) considered this issue in *United States v. Rexroat*[56] in 1992, it had already been established that the *Gerstein* rule applied to the military,[57] but it was not yet clear whether the 48-hour rule of *McLaughlin*, decided the year prior, would also apply.[58]

In *Rexroat*, the accused's pretrial confinement had been reviewed within forty-eight hours by "LTC R," a convening authority not in the accused's chain of command, but the review by a military magistrate did not occur until his seventh day of confinement.[59] The accused sought confinement credit on the grounds that LTC R was not a neutral and detached magistrate as defined by AR 27-10 and as required by *Gerstein*, and that the subsequent magistrate review was not conducted within

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[53] *See id.* at 58–59.
[54] *Id.* at 59.
[55] *See id.* at 56.
[56] 36 M.J. 708 (A.C.M.R. 1992) (en banc), *rev'd in part by* 38 M.J. 292 (C.M.A. 1993).
[57] *See* Courtney v. Williams, 1 M.J. 267 (C.M.A. 1976) (holding that the requirement for a prompt probable cause determination for pretrial confinement by a neutral and detached magistrate was applicable to the military).
[58] *See generally* Gilligan & Smith, *supra* note 47, at 54 (speculating as to the impacts of *McLaughlin* on military procedure).
[59] *Rexroat*, 36 M.J. at 710. Whereas the ACMR referred to the reviewing officer as "LTC R," the COMA would later use his actual name. To avoid confusion in this article, "LTC R" is used when discussing both cases.

forty-eight hours as mandated by *McLaughlin*.[60] Additionally, the accused argued that LTC R "was inherently disqualified to act as a neutral and detached magistrate since, as a commander, he performed prosecutorial or law enforcement duties."[61]

The ACMR first held that the 7-day review for probable cause under RCM 305(i) was not constitutional in light of the 48-hour requirement specified in *McLaughlin*, and that the decision to place a Soldier in pretrial confinement must be reviewed by a neutral and detached magistrate within forty-eight hours.[62] The court found that LTC R was not authorized under RCM 305(i) and AR 27-10 to act as a magistrate for review of pretrial confinement.[63] Therefore, his probable cause review was invalid.

On appeal, the Court of Military Appeals (COMA) affirmed the holding that the 48-hour time limit of *McLaughlin* applied to the military.[64] In next considering who is constitutionally qualified to conduct the review, however, the court reversed the decision of the ACMR and held that the 48-hour probable cause determination may be conducted by a "neutral and detached *official*."[65] In departing from the "magistrate" language used by the Supreme Court in *Gerstein*, the court in *Rexroat* relied on *Shadwick v. City of Tampa*[66] as Supreme Court precedent that a non-lawyer may be constitutionally qualified to

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[60] *Id.*
[61] *Id.* at 711.
[62] *Id.* at 712.
[63] *Id.* at 711. The court reasoned that since *McLaughlin* only dealt with what constituted a "prompt" review under *Gerstein*, "its only effect on military procedure was to replace the seven-day rule . . . with a forty-eight hour rule." *Id.* at 713. Therefore, in the court's opinion, guidance from the Office of the Judge Advocate General that a neutral and detached commander or other officer could conduct the new *McLaughlin* review erroneously changed *who* was authorized to conduct the probable cause review. *Id.*
[64] United States v. Rexroat, 38 M.J. 292, 295 (C.M.A. 1993), *cert. denied*, 510 U.S. 1192 (1994). The Army Court of Criminal Appeals has enforced the 48-hour rule very stringently. *See* United States v. Dingwall, 54 M.J. 949 (A. Ct. Crim. App. 2001) (finding that conducting the 48-hour probable cause determination fifty-four hours after appellant was arrested by civilian authorities was unreasonable despite the fact that the accused had to be transported from California to Fort Bragg, North Carolina).
[65] *Rexroat*, 38 M.J. at 298 (emphasis added).
[66] 407 U.S. 345 (1972). In *Shadwick*, the appellant was arrested for driving while impaired, a violation of a municipal ordinance, under a warrant issued by the non-lawyer clerk of the municipal court. *Id.* at 346. Part IV.A.1 of this article argues that the COMA in *Rexroat* improperly applied *Shadwick*.

determine whether there is probable cause to detain a person.[67] The court also pointed to its "undeviating line of cases"[68] holding that a commander can be neutral and detached for the purposes of authorizing a search, and concluded there was no reason to treat the determination of probable cause for pretrial confinement differently.[69]

Applying its newly-crafted rule, the COMA found that even though LTC R could neither conduct the RCM 305(h) review (because he was not the accused's commander), nor conduct the RCM 305(i) review (because he was not a magistrate appointed in accordance with AR 27-10), his review within forty-eight hours would nonetheless satisfy *Gerstein* and *McLaughlin* as long as he was neutral and detached.[70] The court found LTC R to be neutral and detached despite being a convening authority because he was outside of the accused's chain of command and played no prosecutorial or law enforcement role in the accused's case.[71]

2. History of the Statutory Basis for Military Pretrial Confinement

The *Rexroat* decision was the last major step in the case law governing pretrial confinement review in the military, and arguably a step backward at that, effectively reducing the judicial character of the review. A look at the history of pretrial confinement in the military similarly demonstrates that the rules have evolved over time both in response to constitutional jurisprudence and in response to perceived abuses of the system, but that the military has always lagged behind the constitutional standard.

Prior to the adoption of the U.S. Constitution, and continuing through World War I, pretrial confinement was the norm for enlisted members.[72] The Articles of War of 1775 specified that a

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[67] *Rexroat*, 38 M.J. at 297.
[68] *Id.* at 296 (quoting United States v. Ezell, 6 M.J. 307, 330 (C.M.A. 1979) (Cook, J., dissenting in part)).
[69] *Id.* at 298.
[70] *Id.* In making this determination, the COMA posited that RCM 305 did not prohibit additional procedures for reviewing pretrial confinement. *Id.*
[71] *Id.*
[72] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 123 (2d. ed. 1896, reprint 1920) ("[I]n all cases, the trial . . . is to be preceded by arrest in the form of *confinement*."); *see* GILLIGAN & LEDERER, *supra* note 16, § 4-31.10 (noting that the provision mandating pretrial confinement for enlisted members "remained substantially unchanged" from 1775 to 1920); Boller, *supra* note 16, at 93 & n.117 ("[C]onfinement was, for the enlisted

noncommissioned officer or Soldier who committed a crime "shall . . . be imprisoned till he shall be either tried by a court-martial, or shall be lawfully discharged by proper authority."[73] Thus, the only threshold requirement for pretrial confinement was that a Soldier be charged with a crime. Such confinement was to last "no more than eight days, or till such time as a court-martial [could] be *conveniently* assembled."[74] Although the Articles of War contained no procedures specifying a formal review of the necessity for pretrial confinement, Article XLV required that the names and crimes of pretrial confinees be reported in writing within twenty-four hours to the colonel of the regiment (where the prisoner was confined within his own regiment based on offenses relating only to dereliction of duty within his own corps) or to the commander-in-chief of the Continental Army.[75] Only the confining officer and higher level commanders had the authority to release such prisoners.[76]

After the Declaration of Independence, the Articles of War of 1776 renumbered the provisions but retained an identical pretrial confinement scheme for offenses committed within the military.[77] A new provision, however, mandated the deliverance to the "civil magistrate" of both officers and enlisted members accused of crimes against the civilian populace.[78] While an amendment to the Articles in 1786 maintained

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man, the traditional mode of pretrial restraint."). Colonel William Winthrop pointed out in 1896 that because the military did not yet have a system of nonjudicial punishment, the effect of the Articles of War was to require pretrial confinement anytime an enlisted member was charged with a crime. WINTHROP, *supra* note 72, at 123.

[73] Articles of War of 1775, art. XLI, *reprinted in* WINTHROP, *supra* note 72, at 956. Officers, on the other hand, were to be put in "arrest." *Id.* When the treatment of officers and enlisted members was later bifurcated into separate articles, "arrest" of an officer was defined as being confined to quarters. WINTHROP, *supra* note 72, at 111–12. By regulation and practice, the limits of arrest could be extended in the discretion of the imposing commander, though the officer remained suspended from the functions of his office. *Id.* at 112–13, 116. Thus, it resembles the modern-day concept of arrest under RCM 304. *See* MCM, *supra* note 2, R.C.M. 304(a)(3). The rationale for the disparate treatment of officers and enlisted men was the fact that officers would be in danger of forfeiting their commissions if they violated the terms of their arrest or failed to appear for trial. WINTHROP, *supra* note 72, at 114, 124.

[74] Articles of War of 1775, art. XLII, *reprinted in* WINTHROP, *supra* note 72, at 956 (emphasis added).

[75] Articles of War of 1775, art. XLV, *reprinted in* WINTHROP, *supra* note 72, at 957.

[76] WINTHROP, *supra* note 72, at 125, 129.

[77] *See* Articles of War of 1776, sec. XIV, arts. 15–20, *reprinted in* WINTHROP, *supra* note 72, at 969.

[78] Articles of War of 1776, sec. X, art. 1, *reprinted in* WINTHROP, *supra* note 72, at 964. This article, along with another new article prohibiting officers from protecting their

essentially the same provisions for military pretrial confinement (including the mandatory imprisonment for enlisted members charged with crimes),[79] it attempted to preclude prolonged arrest or confinement without trial by omitting the word "conveniently" from the language concerning the time in which a court-martial should be assembled.[80] At the same time, however, it essentially reduced the level of likely review by requiring that the confinement be reported to "the commander in chief *or* commanding officer."[81] The Articles of War of 1806 further reduced the reporting requirement to simply "the commanding officer,"[82] which language was retained by the Articles of War of 1874.[83]

Undoubtedly, this reporting requirement allowed for some measure of rudimentary review of pretrial confinement, at least in extreme cases. Colonel (COL) William Winthrop, who served as Assistant Judge Advocate General and whose treatise on military law was widely recognized as the definitive work of its kind,[84] wrote with respect to the reporting requirement of Article 69 of the 1874 Articles:

> The chief intent of this statute evidently is to preclude the unreasonable detention without trials of the prisoners committed daily to the guard-house at posts, . . . and to secure them a prompt trial by bringing the cases, every twenty-four hours, . . . to the attention of the commanding officer, who, upon examination of the facts

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Soldiers from creditors, appears to have been intended to bolster the presumably under-enforced existing provision requiring commanders to redress acts of public disorder committed by members of their commands. *See id.* sec. IX, art. 1, *reprinted in* WINTHROP, *supra* note 72.

[79] *See* Articles of War of 1786, art. 16, *reprinted in* WINTHROP, *supra* note 72, at 973. The 1786 Articles repealed Section XIV of the Articles of War of 1776 and replaced it with twenty-seven articles entitled "Administration of Justice." WINTHROP, *supra* note 72, at 22–23.

[80] Boller, *supra* note 16, at 92 (stating that the omission of the word "conveniently" was intended to "preclude protracted arrests and confinements and to secure prompt trials"); *see also* WINTHROP, *supra* note 72, at 118, 126 (interpreting the omission to mean that the court-martial must be assembled with "reasonable diligence" and "as soon as the exigencies of the service may permit").

[81] Articles of War of 1786, art. 19, *reprinted in* WINTHROP, *supra* note 72, at 974 (emphasis added).

[82] Articles of War of 1806, art. 82, *reprinted in* WINTHROP, *supra* note 72, at 983.

[83] *See* Articles of War of 1874, art. 68, *reprinted in* WINTHROP, *supra* note 72, at 992.

[84] *Col. William Winthrop's Retirement*, N.Y. TIMES, July 30, 1895, at 9.

> reported, may determine then and there, . . . whether the parties shall be tried or released.[85]

Nonetheless, this system of oversight/review appears to have been prone to abuse for three reasons: first, because the "commanding officer" referred to in Article 69 could vary depending on the level of command to which the prisoner was delivered[86] (and could presumably be the same commander who ordered confinement); second, because Article 69 did not actually *require* any formal review; and third, because the only determining factor for the appropriateness of pretrial confinement was whether the Soldier was charged with a crime, however minor, since there was not yet a system of nonjudicial punishment to deal with minor offenses.[87] Indeed, COL Winthrop conceded that under this framework, enlisted men were frequently "detained in arrest and confinement for long and apparently unreasonable periods before trial."[88]

In response to the extensive and often unnecessary pretrial confinement of enlisted personnel,[89] the military's pretrial confinement framework finally received an overhaul in 1920.[90] Article 69 of the

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[85] WINTHROP, *supra* note 72, at 128.
[86] *See id.* ("officer commanding the regiment, detachment, garrison, post, [etc.]").
[87] *Id.* at 123.
[88] *Id.* at126.
[89] *See* A MANUAL FOR COURTS-MARTIAL ch. V, ¶ 52 note (1921) [hereinafter 1921 MCM]. The 1921 *MCM* explained:

> The chief object of Congress in changing, by the Code of 1920, the provisions of [Article of War] 69 relating to arrest and confinement was to lessen resort to confinement, particularly of enlisted men, in cases where restraint is not a necessity, either to prevent the escape of the accused or to restrain him from further violence or for other like reasons.

Id.
[90] *See* GILLIGAN & LEDERER, *supra* note 16, § 4-31.10 (noting that pretrial confinement "remained substantially unchanged until the 1920 enactment of Article of War 69"). Whereas the provisions for confinement remained substantially similar from 1775 to 1920, there were some changes beginning in the late nineteenth century with respect to pretrial *arrest*. The Articles of War of 1874 added a provision under which trial for officers placed in arrest was to commence within ten days under normal circumstances, or after an additional thirty days if military necessity prevented an earlier trial; if the trial did not commence in a timely manner, the arrest was to end. Articles of War of 1874, art. 71, *reprinted in* WINTHROP, *supra* note 72, at 992. This was the first time that the military law included a mechanism for automatic release. The Articles of War of 1917

Articles of War of 1920 provided that "[a]ny person subject to military law charged with crime or with a serious offense . . . shall be placed in confinement or arrest as circumstances may require; but when charged with a minor offense only such person shall not ordinarily be placed in confinement."[91] Not only did the new law treat officers and enlisted personnel the same, but also it greatly curtailed the default use of pretrial confinement for enlisted Soldiers. Moreover, by including the clause "as the circumstances may require," the law contemplated instances in which no pretrial restraint would be necessary.[92]

Despite narrowing the circumstances warranting pretrial confinement, however, the Articles of War still provided no mandatory procedures for reviewing its necessity, containing only a requirement to take "immediate steps" to try the accused or release him.[93] The 1921 *MCM*, on the other hand, contained an early form of pretrial confinement review by someone outside of the chain of command, albeit without providing independent authority to effect a release. Paragraph 47(c) of the *MCM* allowed the court or counsel to make recommendations to the appointing authority, while reserving to the chain of command the actual authority to release a pretrial confinee or to modify the nature of the restraint.[94]

With the enactment of the Uniform Code of Military Justice (UCMJ) in 1950, Article 10 contained similar language to Article of War 69, authorizing "arrest or confinement, as circumstances may require" for those charged with an offense, and cautioning that a person "charged only with an offense normally tried by a summary court-martial" should "not ordinarily be placed in confinement."[95] Article 9 added that "[n]o person shall be ordered into arrest or confinement without probable

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also revised the provisions relating to arrest. *See* Articles of War of 1917, arts. 69–74, Pub. L. No. 64-242, § 3, 39 Stat. 619, 661–62 (1916); Boller, *supra* note 16, at 92–93.

[91] Articles of War of 1920, art. 69, Pub. L. No. 66-242, ch. 2, 41 Stat. 759, 802; 1921 MCM, *supra* note 89, ch. V, ¶ 46(a) & note.

[92] This interpretation would become explicit in subsequent editions of the *MCM*. *See* A MANUAL FOR COURTS-MARTIAL, U.S. ARMY ch. V, ¶ 19 (1928) (stating that pretrial arrest or confinement was not mandatory); MANUAL FOR COURTS-MARTIAL, U.S. ARMY ch. V, ¶ 19 (1949) (emphasizing pretrial confinement is within the discretion of the officer empowered to impose it and that restraint should be the "minimum necessary under the circumstances," including no restraint).

[93] Articles of War of 1920, art. 70, Pub. L. No. 66-242, ch. 2, 41 Stat. 759, 802.

[94] 1921 MCM, *supra* note 89, ch. V, ¶ 47(c).

[95] UCMJ art. 10 (1951).

cause."[96] With respect to the conditions of confinement, Article 13 prohibited it from being "any more rigorous than the circumstances require" to ensure the accused's presence at trial.[97]

Although the 1951 *MCM*, in implementing the UCMJ, failed to indicate the exact nature of the probable cause to be established, it further limited the circumstances under which pretrial confinement could be imposed to those "deemed necessary to insure [sic] the presence of the accused at the trial or because of the seriousness of the offense charged."[98] This provision remained unchanged through the 1969 *MCM*,[99] which, in turn, stayed in effect until 1984. Despite the seeming progress in delineating the bases for pretrial confinement, confusion abounded in the courts as to what constituted lawful pretrial confinement.[100]

Furthermore, at the time of *Gerstein*, there were still no uniform procedures prescribed for the military services to review pretrial confinement. Without a review mechanism, servicemembers were still subject to confinement for the convenience of their commands, sometimes on multiple occasions.[101] Moreover, the only statutory remedy for illegal pretrial confinement, other than the hope that a higher commander would intervene and order release, was the potential punishment under Article 97, UCMJ, of the person ordering the illegal confinement.[102] The accused could not even count on receiving

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[96] *Id.* art. 9(d). The current version uses "may" in place of "shall." *See* UCMJ art. 9(d) (2008).
[97] UCMJ art. 13 (1951).
[98] MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. V, ¶ 20c (1951). Although the reference to the seriousness of the offense appeared to permit preventive detention, the COMA interpreted this language such that the seriousness of the charges were relevant only to establishing the likelihood that the accused would flee to avoid trial. *See* DeChamplain v. Lovelace, 48 C.M.R. 506, 508 (C.M.A. 1974).
[99] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. V, ¶ 20c (1969) [hereinafter 1969 MCM].
[100] United States v. Heard, 3 M.J. 14, 16 (C.M.A. 1977) (discussing the problems in interpreting the UCMJ in conjunction with the *MCM*).
[101] The quintessential example of such abuses is *United States v. Heard*, in which the accused was put in pretrial confinement on three separate occasions over a five-month period for relatively minor offenses that did not justify pretrial confinement. *Id.*
[102] *See* 1969 MCM, *supra* note 99, ch. V, ¶ 20e.

confinement credit toward an adjudged sentence,[103] as the case law awarding such credit had not yet developed.[104]

3. Development of RCM 305

While the statutory authority for pretrial confinement has not changed since the advent of the UCMJ, the *MCM* and service regulations implementing this authority and providing the standards for review, as well as the judicial interpretations thereof, have evolved with the development of the corresponding constitutional jurisprudence. At the time that the COMA applied *Gerstein*'s requirement for a prompt review of pretrial confinement by a neutral and detached magistrate to the military in *Courtney v. Williams*,[105] neither the UCMJ nor the *MCM* provided a procedure for reviewing probable cause. The contemporaneous Department of Defense Directive (DoDD) 1325.4, however, required the review of pretrial confinement every thirty days,[106] and the Army had begun to implement a magistrate program.[107]

In response to the requirements of *Gerstein* and *Courtney*, the military services independently implemented magistrate programs for the review of pretrial confinement through their respective service

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[103] Major Patrick Finnegan, *Pretrial Restraint and Pretrial Confinement*, ARMY LAW., Mar. 1985, at 15, 24, 25.

[104] *See, e.g.*, United States v. Allen, 17 M.J. 126 (C.M.A. 1984) (day-for-day credit for time spent in legal pretrial confinement); United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983) (credit for illegal pretrial confinement amounting to punishment).

[105] 1 M.J. 267, 270 (C.M.A. 1976). In *Courtney*, the accused, a fireman apprentice in the Navy who was pending a special court-martial for two specifications of unauthorized absence, was placed in pretrial confinement after committing an assault. *Id.* at 269. The accused never had the opportunity to respond to the basis for confinement. *Id.* Only upon the thirty-day review mandated by Department of Defense Directive 1325.4 did the convening authority order the release of the accused from pretrial confinement, on the rationale that the victim of the assault had departed the area and would no longer be in danger should the accused be released. *Id.* at 269 & n.5.

[106] U.S. DEP'T OF DEF., DIR. 1325.4, para. III.A.2.b (7 Oct. 1968) [hereinafter DoDD 1325.4].

[107] *Courtney*, 1 M.J. at 270 & n.10 (citing DoDD 1325.4, *supra* note 106, para. III.A.2.b); *id.* at 271 n.14 (noting that the Army was implementing a magistrate program through a change to AR 27-10, ch. 16); *see also* Captain Jack E. Owen, Jr., *A Hard Look at the Military Magistrate Pretrial Confinement Hearing:* Gerstein *and* Courtney *Revisited*, 88 MIL. L. REV. 3, 4 (1980) (stating that, prior to 1976, pretrial confinement was within "the virtually uncontrolled discretion of the commanding officer").

regulations.[108] The result was a lack of uniformity. According to a contemporary military scholar, there were "at least four major, inexplicable procedural differences between" the respective magistrate procedures of the Army, Air Force, Navy/Marine Corps, and Coast Guard.[109] Among these differences were the varying interpretations of *Gerstein*'s promptness requirement for the magistrate review, ranging from seventy-two hours for the Air Force, Navy/Marine Corps, and Coast Guard, to seven days for the Army.[110] Another significant difference was whether or not the magistrate had to be a judge advocate. While both the Army and the Navy required that the magistrate be a judge advocate, the Marine Corps and Coast Guard did not; the Air Force took a middle position, specifying that the magistrate must either be the special court-martial convening authority, or a judge advocate appointed by him.[111]

Finally implementing uniform procedures that would comply with *Gerstein*, *Courtney*, and their progeny, the President promulgated the RCM, including RCM 305, for the first time in the 1984 edition of the *MCM*.[112] That version of the rule first defined what probable cause entailed for pretrial confinement and set forth the current elements that must be established under RCM 305(h)(2)(B).[113] In addition to the traditional authorization for confinement to ensure the accused's presence at trial,[114] the rule's inclusion of foreseeable "serious criminal misconduct" as a basis for pretrial confinement expressly authorized the

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[108] *See* GILLIGAN & LEDERER, *supra* note 16, § 4-10.00 n.7; Owen, *supra* note 107, at 40–47. *See generally* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE ch. 16 (26 Nov. 1968) (C17, 15 Aug. 1977) (Army); U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 1640.10, DEP'T OF THE NAVY MILITARY MAGISTRATE PROGRAM (16 Aug. 1978) (Navy/Marine Corps); U.S. DEP'T OF AIR FORCE, MANUAL 111-1, MILITARY JUSTICE GUIDE para. 3-25 (C2 8 Oct. 1976) (Air Force); U.S. COAST GUARD, MANUAL 488, MILITARY JUSTICE MANUAL pt. 202 (1977) (Coast Guard).

[109] Owen, *supra* note 107, at 42.

[110] *Id.* at 44.

[111] *Id.*

[112] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305 & analysis, at A21-14 (1984) [hereinafter 1984 MCM]; *see* United States v. Rexroat, 38 M.J. 292, 295 (C.M.A. 1993); *see also* GILLIGAN & LEDERER, *supra* note 16, § 4-31.20 (discussing the codification of the bases for pretrial confinement).

[113] 1984 MCM, *supra* note 112, R.C.M. 305(h)(2)(B). For a listing of the elements, see *supra* note 3 & accompanying text.

[114] Although this justification for pretrial confinement was not explicitly referenced until the 1951 *MCM*, it was commonly understood that it was the underlying basis. *See generally* WINTHROP, *supra* note 72, at 114, 124 (discussing arrest and confinement in terms of preventing escape of the accused prior to trial).

type of preventive detention about which the military courts had theretofore speculated.[115]

Most significantly, the new RCM 305 established uniform procedures and timetables for review of pretrial confinement, as well as more meaningful remedies for noncompliance with these procedures. It called for both the 72-hour review by the commander and the 7-day review by a neutral and detached officer designated by the respective service regulations.[116] The new RCM 305(j) also empowered the military judge, for the first time, to review pretrial confinement after referral of charges and to order release when insufficient grounds existed.[117] Furthermore, RCM 305(k) provided a remedy for illegal pretrial confinement beyond the punishment of the confining officer. In addition to the day-for-day credit that an accused could now receive on his sentence for time spent in legal pretrial confinement under *United States v. Allen*,[118] RCM 305(k) allowed day-for-day credit for confinement served as the result of noncompliance with the review procedures.[119] These provisions remain substantially the same today, changed mainly to incorporate references to the 48-hour review, as well as to clarify when the clock starts in situations where an accused is "apprehended by civilian authorities and remains in civilian custody at the request of military authorities."[120]

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[115] *See, e.g.*, United States v. Heard, 3 M.J. 14, 20–21 (C.M.A. 1977) (discussing the questionable constitutionality of preventative detention); DeChamplain v. Lovelace, 48 C.M.R. 506, 508 (C.M.A. 1974) (seriousness of offense alone does not justify pretrial confinement, but may be used as a "strong indication" that the accused is a flight risk). The drafters of the 1984 *MCM* "slightly expand[ed] on the legitimate bases for confinement found by the Court of Military Appeals in *United States v. Heard*." Finnegan, *supra* note 103, at 20 & n.42.

[116] *See* 1984 MCM, *supra* note 112, R.C.M. 305(h)(2)(A) & (i); *Rexroat*, 38 M.J. at 295.

[117] *See* 1984 MCM, *supra* note 112, R.C.M. 305(j). *But cf.* 1969 MCM, *supra* note 99, ch. V, ¶ 21c (no authority of the court over pretrial restraint of the accused).

[118] 17 M.J. 126 (C.M.A. 1984) (now commonly referred to as "*Allen* credit"); *see also* 1984 MCM, *supra* note 112, R.C.M. 305(k) analysis, at A21-18 (indicating that credit awarded under RCM 305(k) was in addition to *Allen* credit).

[119] 1984 MCM, *supra* note 112, R.C.M. 305(k). In 1998, RCM 305(k) was amended to incorporate case law "allowing the military judge to grant additional discretionary pretrial confinement credit for pretrial confinement under 'unusually harsh circumstances.'" Hargis, *supra* note 13, at 13; *see* United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983).

[120] 1984 MCM, *supra* note 112, R.C.M. 305(i)(1) (C6, 21 Jan. 1994); *see* Lieutenant Colonel Eugene R. Milhizer & Lieutenant Colonel Thomas W. McShane, *Analysis of Change 6 to the 1984* Manual for Courts-Martial, ARMY LAW., May 1994, at 40, 43. With respect to this amendment, the ACCA has stated that "the constitutional standard is not always met by compliance with R.C.M. 305(i)(1)" since "[t]he 48-hour requirement of R.C.M. 305(i)(1) is triggered when the servicemember is brought under military

Although *Rexroat* imposed the *McLaughlin* requirement for a review within forty-eight hours on the military in 1993, it was not until May 1998 that Executive Order 13,086 amended RCM 305 to reflect this requirement in what is now RCM 305(i)(1).[121] This provision first appeared in the 1998 *MCM*.[122] The new 48-hour review, however, did not *replace* any of the existing review procedures, but rather was *in addition* to them. This resulted in the multiple levels of review that remain in force in the 2008 *MCM*.

Thus, with respect to the review of pretrial confinement, the current version of RCM 305 provides for the following: an initial consideration by the officer ordering confinement as to whether probable cause exists;[123] a review of "the adequacy of probable cause" by a "neutral and detached officer" within forty-eight hours;[124] a review by the commander within seventy-two hours;[125] a review within seven days by "a neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned" of both "the probable cause determination and necessity for continued pretrial confinement;"[126] and, upon motion for appropriate relief after the referral of charges, a review by the military judge.[127] Even though this framework appears at first glance to provide more than adequate safeguards of the accused's liberty interests,

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control," whereas "the constitutional standard is triggered by warrantless arrest." United States v. Dingwall, 54 M.J. 949 (A. Ct. Crim. App. 2001). The CAAF has yet to address this potential unconstitutionality of RCM 305(i)(1).

[121] DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 5-9(C) & n.28 (6th ed. 2004); *see* Hargis, *supra* note 13, at 13.

[122] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305(i)(1) (1998).

[123] MCM, *supra* note 2, R.C.M. 305(d) & discussion.

[124] *Id.* R.C.M. 305(i)(1).

[125] *Id.* R.C.M. 305(h)(2)(A).

[126] *Id.* R.C.M. 305(i)(2).

[127] *Id.* R.C.M. 305(j). Absent an abuse of discretion or new evidence establishing the accused should be released, the military judge may not overturn a 7-day reviewing officer's decision that pretrial confinement should continue. *See id.* Conversely, absent new evidence or misconduct, the military judge also cannot order the accused back into pretrial confinement after the 7-day reviewing officer has ordered release. Keaton v. Marsh, No. 9502052, 1996 CCA LEXIS 345 (A. Ct. Crim. App. Jan. 11, 1996); Major Amy M. Frisk, *New Developments in Pretrial Confinement*, ARMY LAW. Mar. 1996, at 25, 25–26 (discussing *Keaton*). In addition, the standard of review of pretrial confinement under RCM 305(j) depends whether the military judge is reviewing the "'legality of confinement previously served'" (abuse of discretion) or "deciding whether the accused should be released" (*de novo*). Major Amy Frisk, *Walking the Fine Line Between Promptness and Haste: Recent Developments in Speedy Trial and Pretrial Restraint Jurisprudence*, ARMY LAW., Apr. 1997, at 19–20 (discussing United States v. Gaither, 45 M.J. 349 (C.A.A.F. 1996)).

Parts III and IV of this article argue that this system does not comply with constitutional requirements. Furthermore, these supposed safeguards do not provide for timely, meaningful review of pretrial confinement because of the illogical framework of RCM 305 and the inconsistencies across the service regulations which implement the review procedures.

4. Service Regulations

The military services have implemented RCM 305 through their respective service regulations, the chief function of which is to designate who may perform the review of pretrial confinement under RCM 305(i).[128] The differing approaches used by these regulations have resulted in substantial inconsistencies across the services, which are discussed below.

a. Army

The Army establishes its Military Magistrate Program through Chapter 9 of AR 27-10, in part for the purpose of reviewing pretrial confinement under RCM 305(i).[129] This regulation defines a military magistrate as a judge advocate.[130] Although military judges fall under the definition of an "assigned military magistrate,"[131] typically pretrial confinement reviews are performed by a "part-time military magistrate," which is a judge advocate appointed by The Judge Advocate General (TJAG) or his designee to perform magistrate duties with training by and under the supervision of a military judge.[132] Judge advocates nominated to serve as part-time military magistrates must "possess the requisite training, experience, and maturity to perform the duties of a

[128] *See* MCM, *supra* note 2, R.C.M. 305(i)(2) ("[A] neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned shall review the probable cause determination.").
[129] AR 27-10, *supra* note 10, para. 9-1a. The regulation does not specifically state that the military magistrate conducts the 7-day review under RCM 305(i)(2) versus the 48-hour review under RCM 305(i)(2); however, this is understood when the regulation is read in conjunction with RCM 305(i), though of course nothing precludes the magistrate's review from also satisfying the requirement of RCM 305(i)(2). Perhaps this is a vestige of the pre-1998 versions of RCM 305(i) which included only the 7-day review.
[130] *Id.* para. 9-1d.
[131] *Id.* para. 9-1e.
[132] *Id.* para. 9-1f–g; MILITARY MAGISTRATE SOP, *supra* note 15, at 3.

magistrate,"[133] and though they may not be performing prosecutorial functions at the time of their nomination, military justice experience is preferable.[134]

b. Air Force

Pretrial confinement review in the Air Force is governed by Air Force Instruction (AFI) 51-201.[135] This instruction distinguishes "military magistrates," which are officers appointed under Military Rule of Evidence (MRE) 315(d)(2) to issue search, seizure, and apprehension authorizations[136] from "pretrial confinement review officers" (PCROs) appointed under RCM 305(i)(2) to conduct the 7-day review.[137] Special court-martial convening authorities (SPCMCAs) in the Air Force may appoint "a reasonable number of mature officers to serve as PCROs."[138] Although there are no further rank requirements, the instruction specifically *prohibits* the appointment of chaplains, Air Force Office of Special Investigations and Air Force Security Forces personnel, court-martial convening authorities, and "SJA office personnel" as PCROs.[139] Presumably, the latter prohibition would disqualify all judge advocates who might otherwise be able to serve in this capacity. In fact, the only explicit role for Air Force judge advocates in pretrial confinement review, aside from trial and defense counsel, is to brief PRCOs on their duties.[140]

Unlike the Army's regulation, AFI 51-201 also addresses the qualifications of the officer who conducts the 48-hour review. In addition to restating the requirements of RCM 305(i)(1) that this officer be neutral and detached, the instruction lists several factors to consider in

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[133] AR 27-10, *supra* note 10, para. 9-2b.
[134] *Id.*; MILITARY MAGISTRATE SOP, *supra* note 15, at 1.
[135] U.S. DEP'T OF AIR FORCE, INSTR. 51-201, LAW: ADMINISTRATION OF MILITARY JUSTICE (21 Dec. 2007) [hereinafter AFI 51-201].
[136] *Id.* sec. 3A. These officers should generally be serving in the rank of lieutenant colonel or above, but may be appointed by or with the concurrence of the General Court-Martial Convening Authority (GCMCA) if in the rank of major or below. *Id.* para. 3.1.2.
[137] *Id.* para. 3.2.4. Those appointed as "military magistrates" under paragraph 3.1.1 to issue search and seizure authorizations may also be appointed as PCROs under paragraph 3.2.4.1, but generally may not act as the PCRO in a particular case if he otherwise acted upon the same case as a magistrate. *Id.* para. 3.2.4.1.
[138] *Id.* para. 3.2.4.
[139] *Id.*
[140] *See id.* para. 3.2.8.

determining whether any given reviewing officer is qualified. The factors include "whether the officer is the formal accuser on the charge sheet, is the officer who ordered the accused into confinement, or is directly or particularly involved in the command's law enforcement functions."[141] Curiously, AFI 51-201 appears to allow some of the very same "SJA office personnel" to conduct the 48-hour review who are specifically disqualified from conducting the 7-day review, so long as they are not directly involved in law enforcement.

c. Navy/Marine Corps

The regulation specifying who may conduct pretrial confinement reviews for the Navy and Marine Corps is the Manual of the Judge Advocate General (JAGMAN).[142] Like AFI 51-201, the JAGMAN provides guidance as to the 48-hour review in addition to specifying who must conduct the 7-day review.

With respect to the 48-hour review, which it calls the preliminary review, the JAGMAN states that the neutral and detached officer "may be the confinee's commanding officer, but this is not required."[143] Moreover, the JAGMAN specifically contemplates that the commander is still neutral and detached and may conduct the 48-hour review even when he is the person who ordered the accused into pretrial confinement.[144] In fact, as a rule, no separate 48-hour review is necessary when the commander "personally orders the accused into confinement" after determining probable cause under RCM 305(d) or when the commander signs the 72-hour memorandum within forty-eight hours.[145]

With respect to who may conduct the 7-day review under RCM 305(i)(2), which it calls the initial review, the JAGMAN provides that the General Court-Martial Convening Authority (GCMCA) "shall designate one or more officers of the grade of O-4 or higher . . . to act as

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[141] *Id.* para. 3.2.2.2 (citing United States v. Rexroat, 38 M.J. 292 (C.M.A. 1993); United States v. Lynch, 13 M.J. 394 (C.M.A. 1982)).
[142] U.S. DEP'T OF NAVY, JUDGE ADVOCATE GEN. INSTR. 5800.7D, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) (15 Mar. 2004) [hereinafter JAGMAN].
[143] *Id.* sec. 0127c.(3).
[144] *Id.*
[145] *Id.* sec. 0127c.(4)(a)–(b).

the initial review officer."[146] It further specifies that "officers designated as initial review officers should be neutral and detached, should be selected for their maturity and experience, and, if practicable, should have command experience."[147] There is no requirement, nor any suggestion, that the initial review officer for the Navy or Marine Corps be a judge advocate.

d. Coast Guard

Finally, for the Coast Guard, Commandant Instruction M5810.1D governs the review of pretrial confinement.[148] The Coast Guard manual terms the officer conducting the 7-day review the "Initial Review Officer" (IRO) and is unique amongst the services in that it empowers the reviewing officer to review "the conditions of confinement" for potential violations of Article 13, UCMJ, in addition to the probable cause determination and the necessity for continued pretrial confinement.[149] The GCMCA must "designate one or more officers in the grade of O-4 or higher to act as the IRO for purposes of RCM 305(i)(2)."[150] Similar to the Navy and Marine Corps, such officers "should be neutral and detached, should be selected for their maturity and experience, and, if practicable, should have command experience."[151] Since the Coast Guard does not maintain its own confinement facilities,[152] the GCMCA may also accept the pretrial confinement review of a duly appointed reviewing officer who is assigned to the

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[146] *Id.* sec. 0127d.

[147] *Id.* The preference for command experience could result in the appointment of initial review officers who have a bias toward the interests of the command and hence would not be truly neutral.

[148] U.S. COAST GUARD, COMMANDANT INSTR. M5810.1D, MILITARY JUSTICE MANUAL (17 Aug. 2000) [hereinafter COMDTINST M5810.1D]. The Coast Guard's Personnel Manual also discusses pretrial confinement, but this section appears to reference an older version on COMDINST M5810.1D. *See* U.S. COAST GUARD, COMMANDANT INSTR. M1000.6A, PERSONNEL MANUAL art. 8.F.3 (C41, 18 June 2007) [hereinafter COMDTINST M1000.6A].

[149] COMDTINST M5810.1D, *supra* note 148, paras. 3.C.4.a, 3.C.4.d(7). This is likely due to the fact that, as an agency of the Department of Homeland Security, the Coast Guard does not maintain its own confinement facilities and typically uses Navy brigs. *See* COMDTINST M1000.6A, *supra* note 148, art. 8.F.1.b.

[150] COMDTINST M5810.1D, *supra* note 148, para. 3.C.4.b. Note that the GCMCA is referred to as the Officer Exercising General Courts-Martial Jurisdiction (OEGCMJ) in the Coast Guard.

[151] *Id.* para. 3.C.4.b.

[152] COMDTINST M1000.6A, *supra* note 148, art. 8.F.1.b.

confinement facility into which the Coast Guard pretrial confinee is placed.[153]

III. The Problem and Solution

As the development of the law governing military pretrial confinement from 1775 to the present has shown, the military has historically lagged behind the rest of society in the protection of the liberty interest of its servicemembers, even considering the difference between the military and civilian sectors. This Part will examine how the military has imperfectly implemented the constitutional requirements for pretrial confinement review through RCM 305 and the service regulations, resulting in a system that is inconsistent across the services and prone to abuses.

A. The Problems with the Current System

1. An Illogical Framework

When the drafters incorporated the 48-hour rule of *McLaughlin*, as interpreted by *Rexroat*, into the 1998 *MCM*, they did so in a patchwork manner that has created an illogical framework for pretrial confinement review. Rather than simply requiring that the existing 7-day review take place within forty-eight hours, the amendment added a new, redundant, level of review.[154] The Analysis to RCM 305 contains no explanation for this choice. The result is often a meaningless 48-hour review that fails to satisfy the constitutional requirement for four major reasons.

First, the current framework retains the details of the 7-day hearing, but provides no guidance as to what the 48-hour reviewing officer must consider. Although the Court in *Gerstein* stated that the Constitution does not require any particular procedure,[155] RCM 305 allows the 48-hour review of the initial confinement decision to be made before the commander is even required to specify in writing his reasons for ordering

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[153] COMDTINST M5810.1D, *supra* note 148, para. 3.C.4.c.
[154] *See* Mackay, *supra* note 13, at 49 (having the military magistrate conduct the 48-hour review "meets both constitutional standards and R.C.M. 305 requirements and avoids encumbering the pretrial confinement procedure with an additional layer of review").
[155] Gerstein v. Pugh, 420 U.S. 103, 123 (1975).

pretrial confinement. Even if the 72-hour memorandum is complete at the time of the 48-hour review, there is no requirement that the neutral and detached officer consider it, as the rule only specifies that the commander shall forward the memorandum to the 7-day reviewing officer.[156] Since the purpose of the commander's memorandum is "to ensure that the officer reviewing the confinement has sufficient information to determine its propriety under the law,"[157] it is possible that the officer conducting the 48-hour review will not have a complete record before him to make a sound decision.

Second, the protections that accompanied the 7-day review under RCM 305(i), which the drafters presumably deemed necessary to satisfy *Gerstein* and *Courtney*, were not transplanted to the new 48-hour review. These protections include the right to consult with counsel[158] and the right to appear before the reviewing officer and make a statement.[159] This makes the 48-hour review inherently less reliable because, in most cases, the reviewing officer will only hear the command's side of the story.

Third, in addition to failing to specify the procedures and rights of the accused during the 48-hour review, RCM 305 contains a further glitch. Even after the inclusion of the 48-hour review, the authority to direct release from confinement under RCM 305(g) remained with "[a]ny commander of a prisoner, an officer appointed under regulations of the Secretary concerned to conduct the review under subsection (i)," and, after referral, the military judge.[160] Noticeably absent from this list is the 48-hour reviewing officer, unless that officer also happens to fit into one of the other categories. Moreover, whereas RCM 305(i)(2)(C) states that after completing the review, the 7-day reviewing officer

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[156] MCM, *supra* note 2, R.C.M. 305(h)(2)(C).
[157] GILLIGAN & LEDERER, *supra* note 16, § 4-64.00.
[158] *See* MCM, *supra* note 2, R.C.M. 305(f). It should be noted that the Court in *Gerstein* did not consider the review of pretrial confinement to be "a 'critical stage' in the prosecution that would require appointed counsel." *Gerstein*, 420 U.S. at 122 (distinguishing Coleman v. Alabama, 399 U.S. 1 (1970)). *But see* United States v. Jackson, 5 M.J. 223, 227 (C.M.A. 1978) ("[F]undamental fairness calls for such representation of all prisoners confined for more than a brief period of time."). Nonetheless, the right to counsel upon request exists under RCM 305, and failure to provide requested counsel renders the confinement illegal and results in administrative credit. Finnegan, *supra* note 103, at 21.
[159] MCM, *supra* note 2, R.C.M. 305(i)(2)(A)(i).
[160] *Id.* R.C.M. 305(g).

"shall approve continued confinement or order immediate release,"[161] there is no corresponding provision applicable to the 48-hour review. Does this mean that the 48-hour reviewing officer has no independent authority to order release?

Finally, the nature of the 48-hour and 7-day reviews appears to be different. Whereas the 48-hour reviewing officer is charged with reviewing only "the adequacy of probable cause to continue pretrial confinement,"[162] the 7-day reviewing officer is tasked to review "the probable cause determination *and* necessity for continued pretrial confinement."[163] This difference in language harkens back to Justice Fletcher's formulation of the reviewing officer's duties when the COMA first applied *Gerstein* to the military: "We believe, then, that a neutral and detached magistrate must decide more than the probable cause question. A magistrate must decide if a person *could* be detained and if he *should* be detained."[164] This expansion of the *Gerstein* concept of the probable cause review resulted from the absence of a bail system in the military, which in turn makes the question of whether an accused *should* be confined all the more critical at the pretrial confinement review stage.[165] Interpreting RCM 305 through this lens, it seems that the 48-hour review answers only the "could" question, while the 7-day review answers both the "could" and "should" questions.

These differences are puzzling, since the Supreme Court intended the *McLaughlin* rule to be merely a clarification of the *Gerstein* rule by defining "prompt" as being within forty-eight hours under most circumstances.[166] In fact, military justice scholars have opined that because *McLaughlin* made the 7-day period under RCM 305 presumptively unreasonable, "no readily apparent circumstances justify keeping a seven-day rule."[167] It stands to reason, then, that after *McLaughlin* and *Rexroat*, the 7-day review by an officer appointed in accordance with the respective service regulations should be conducted within forty-eight hours. It makes no sense to create an additional review with a lesser scope and fewer procedural protections. The current

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[161] *Id.* R.C.M. 305(i)(2)(C).
[162] *Id.* R.C.M. 305(i)(1).
[163] *Id.* R.C.M. 305(i)(2) (emphasis added).
[164] Courtney v. Williams, 1 M.J. 267, 271 (C.M.A. 1976) (emphasis added).
[165] *See id.*
[166] County of Riverside v. McLaughlin, 500 U.S. 44, 47 (1991) ("This case requires us to define what is 'prompt' under *Gerstein*.").
[167] Gilligan & Smith, *supra* note 47, at 54.

pretrial confinement framework provides for a 48-hour review that in many cases satisfies the constitutional requirement in name only.

2. Lack of Uniformity

The illogical framework in RCM 305 is compounded by the inconsistencies among the service regulations. The most significant and glaring of these differences is that the Army is the only service that requires the 7-day review to be conducted by a lawyer. In fact, none of the service regulations besides AR 27-10 even refers to the reviewing officers as "magistrates," which reduces their status as "judicial" officers both in name and qualifications. Prominent military law scholars have described the failure of the other services to use judge advocate magistrates "as a grudging compliance with *Gerstein*."[168]

This sentiment certainly rings true when one reflects on the history of the services' magistrate programs. Originally, both the Army and the Navy required their magistrates to be judge advocates when they established their programs in response to *Gerstein* and *Courtney*; the Marine Corps allowed but did not require its magistrates to be judge advocates; and the Air Force allowed *only* judge advocates to be appointed if the SPCMCA elected not to conduct pretrial confinement reviews personally.[169] After the 1984 *MCM* went into effect, however, the Navy and Marine Corps inexplicably regressed to using only line officers,[170] and the Air Force specifically *excluded* judge advocates from this function.[171] The latter change was likely the result of overcompensation by the Air Force in response to *United States v. Lynch*.[172] In *Lynch*, the COMA held that both a SPCMCA and a staff judge advocate (both explicitly authorized by the Air Force regulation to review pretrial confinements) were *per se* disqualified from reviewing pretrial confinement based on their inherent authority and responsibilities regarding the court-martial referral process.[173] The Air Force responded by banning all SJA office judge advocates from this task.

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[168] GILLIGAN & LEDERER, *supra* note 16, § 4-73.00.
[169] *See* Owen, *supra* note 107, at 44.
[170] Finnegan, *supra* note 103, at 22 n.60.
[171] *See* AFI 51-201, *supra* note 135, para. 3.2.4.
[172] 13 M.J. 394 (C.M.A. 1982).
[173] *See id.* at 396–97.

Another inconsistency among the service regulations is their guidance concerning the 48-hour review by a neutral and detached officer. While the Army makes no mention of this review in AR 27-10, and the Coast Guard simply paraphrases RCM 305, the Air Force and Navy/Marine Corps provide the best and worst procedures, respectively. The Air Force requires that the 48-hour review be in writing and included in the record of trial.[174] Moreover, AFI 51-201 incorporates case law to provide guidance in selecting a neutral and detached officer, including "whether the officer is the formal accuser on the charge sheet, is the officer who ordered the accused into confinement, or is directly or particularly involved in the command's law enforcement functions."[175] In sharp contrast, the very factors that appear to counsel *against* an Air Force commander who imposes pretrial confinement being considered "neutral and detached" for the purposes of the 48-hour review are used by the Navy JAGMAN to illustrate a common form of compliance with the rules. If a Navy or Marine Corps commanding officer complies with RCM 305(d) (by making an initial assessment of probable cause) and "personally orders the accused into confinement," no separate 48-hour review is needed.[176] The way the JAGMAN is written thus causes the commander to be the default 48-hour reviewing official, which is a meaningless "review" of what is typically his own decision. Although RCM 305(h)(2)(A) does contemplate situations in which a neutral and detached commander's compliance with the 72-hour review requirement may also satisfy RCM 305(i)(1) if done within forty-eight hours, a far more sensible interpretation of that rule is that it should apply only to circumstances in which someone other than the commander was the one who initially ordered the confinement.

While slight variations in the procedures specified by the respective services are tolerable, the fundamental differences between how the pretrial confinements of Soldiers, Airmen, Sailors, Marines, and Coastguardsmen are reviewed are inexcusable, particularly because these differences are not justified by the legitimate needs of the respective services. This is especially troublesome in today's joint operating environments, where servicemembers may find themselves under the command of other services. The need for uniformity in such

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[174] AFI 51-201, *supra* note 135, para. 3.2.2.

[175] *Id.* para. 3.2.2.2 (citing United States v. Rexroat, 38 M.J. 292 (C.M.A. 1993); United States v. Lynch, 13 M.J. 394 (C.M.A. 1982)).

[176] JAGMAN, *supra* note 142, para. 0127c(4). Moreover, the 48-hour review in the Navy and Marine Corps need not be in writing, though it is recommended. *Id.* para. 0127c(2).

environments is paramount to ensure the rights of the accused are protected. With regard to the needs of the particular services, the rule already contains exceptions for operational necessity and for situations in which the accused is confined while at sea.[177] Moreover, the Analysis to RCM 305 makes it clear that the rules are flexible enough to allow a telephonic hearing and review of an electronically-transmitted pretrial confinement packet.[178] The same logic applies to situations in which either a military defense counsel or a judge advocate magistrate is not co-located with the command seeking the pretrial confinement review.

3. A System Prone to Abuse

The *MCM*'s patchwork implementation of the constitutional requirements, coupled with service regulations that provide inadequate or faulty guidance, has created a system of pretrial confinement that is prone to both intentional and unintentional abuse. For example, in the Army, commanders typically make the initial decision for pretrial confinement after consulting with their assigned trial counsel, who is the prosecutor. The trial counsel or his paralegals often prepare the pretrial confinement documentation, including the commander's 72-hour memorandum required by RCM 305(h)(2)(C) and the memorandum (if any) signed by the "neutral and detached officer" documenting the 48-hour probable cause determination under RCM 305(i)(1). The danger of this routine practice is that the commander or the 48-hour reviewing officer is not making an independent assessment that the requirements for pretrial confinement are present, and, in many cases, will simply sign off on the paperwork to make the confinement "legal." This process does not provide a meaningful review because it is driven by the *ex parte* influence of the trial counsel, is conducted by individuals who generally have a desire to support the command's actions, and is often subsumed into the initial confinement decision.

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[177] *See* MCM, *supra* note 2, R.C.M. 305(m). This subparagraph allows the Secretary of Defense to suspend the provisions concerning advice of the accused's rights, military counsel, the 72-hour review by the commander, and the reviews under RCM 305(i) for operational necessity, and provides that the same provisions do not apply at sea but should resume their application upon transfer of the accused to a confinement facility ashore. *Id.*

[178] *See* MCM, *supra* note 2, R.C.M. 305(i) analysis, at A21-19 ("[T]he review may be conducted entirely with written documents, without the prisoner's presence when circumstances so dictate.").

Furthermore, because RCM 305 does not require notification of,[179] or any action by, the 7-day reviewing officer until the seventh day, trial counsel often seek out a member of the command to conduct the 48-hour review, either as an expedient means of "checking the block" or to buy the command some time when they believe it is likely that the reviewing magistrate will release the accused. Yet, such practices subvert the intent of the constitutional requirement and may constitute "a delay motivated by ill will against the arrested individual, or delay for delay's sake," which the Supreme Court in *McLaughlin* specifically condemned as unreasonable.[180]

Finally, although pretrial confinement is generally not warranted when the accused is "charged only with an offense normally tried by a summary court-martial"[181] and is "not authorized for individuals pending administrative discharge where no charges are awaiting disposition,"[182] some commands may nevertheless place individuals in pretrial confinement even when they anticipate dispositions other than trial by special or general court-martial.[183] In such cases, the accused may

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[179] Although AR 27-10 requires that "the SJA concerned . . . will be notified prior to the accused's entry into confinement or as soon as practicable afterwards" and that the GCMCA "will immediately cause the responsible magistrate to be notified of the case," in Army practice the magistrate commonly does not receive notice until several days after the confinement begins, and in some cases is not notified until the seventh day. AR 27-10, *supra* note 10, paras. 5-15a, 9-5a(2); Professional Experiences of the author as Part-Time Military Magistrate at Fort Drum, New York from 1 May 2004 to 1 December 2004, and at Fort Polk, Louisiana from 5 June 2007 to 15 July 2008 [hereinafter Professional Experience]. The Coast Guard has made an admirable effort to speed up the review process by requiring that the commander's 72-hour memorandum "be forwarded, by the most expeditious means, to the appropriate servicing legal office," which in turn "shall promptly pass the . . . memorandum to the [Initial Review Officer] appointed to review the confinement decision." COMDTINST M5810.1D, *supra* note 148, para. 3.C.4.d.

[180] County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

[181] UCMJ, art. 10 (2008).

[182] Finnegan, *supra* note 103, at 19 & n.37.

[183] At Fort Drum, New York, for example, Colonel David L. Conn, while serving as Military Judge, found that commanders were routinely abusing their authority by placing Soldiers in pretrial confinement as a "disciplinary expedient" and then disposing of the cases with summary courts-martial and administrative separations. E-mail from Colonel David L. Conn, Judge, U.S. Army Court of Criminal Appeals, to author (Jan. 22, 2009 16:15) (on file with author). Current procedures in the Army require the reviewing magistrate to ask the trial counsel or commander the anticipated level of disposition of the case, but there is no requirement that the magistrate be notified if the command later elects a disposition which would negate the continued legality of pretrial confinement. MILITARY MAGISTRATE SOP, *supra* note 15, at 13.

receive an inadequate remedy if he serves more time in pretrial confinement than he could receive as a sentence at a summary court-martial, or no remedy at all if his case never goes to trial. Without a review by a neutral and detached magistrate who is familiar with the legal limitations on pretrial confinement, the likelihood that an accused will be deprived of his liberty without an appropriate remedy increases dramatically.

The drafters of the original version of RCM 305 "proceeded from the premise that no person should be confined unnecessarily."[184] In the quarter century during which the Rules for Courts-Martial have existed, it has become apparent that the system is prone to abuse. It is therefore time to amend RCM 305 to ensure that the constitutionally-required, and most meaningful, review occurs as early as possible in the process.

B. Proposed Amendments to RCM 305

Amendment of RCM 305 is the best way to ensure compliance with the constitutional requirements for the prompt, meaningful judicial review of pretrial confinement by neutral and detached magistrates. The Appendix to this article contains proposed revisions to the rule, the primary goals of which are eliminating the multiple layers of review, ensuring consistency across the services, and bringing the procedures into clear compliance with the Constitution by mandating a review by a neutral and detached, legally-trained magistrate within forty-eight hours.

The most fundamental proposed change to RCM 305 involves replacing the multiple reviews in RCM 305(i) with a single 48-hour review conducted by a neutral and detached magistrate defined as a judge advocate who has been appointed under the respective service regulations for duty as a military magistrate, with judicial supervision. This proposal is designed to correctly implement the constitutional requirements of *Gerstein*, *McLaughlin*, and *Courtney* while eliminating the patchwork system of multiple reviews that currently exists under the rule. This change would also ensure consistency across the services in that all pretrial confinement cases would receive a truly neutral and detached review by a legally-trained officer. A judge advocate, as opposed to a line officer, is better able to correctly and consistently apply the required elements for pretrial confinement, and the judicial

[184] 1984 MCM, *supra* note 112, R.C.M. 305 analysis, at A21-14.

interpretations thereof, to the facts at hand and to recognize situations in which pretrial confinement is not appropriate. Furthermore, as attorneys, judge advocates have an independent duty to uphold the law under their applicable rules for professional conduct.[185]

The requirement that the magistrate be a judge advocate should not be overly burdensome for the services. One of the considerations that influenced the drafters in developing the original RCM 305 in 1984 was that the procedures for reviewing pretrial confinement must "be compatible with existing resources."[186] Given that most military installations now have judge advocates who are not engaged in prosecutorial functions, there should be little problem with appointing at least one magistrate per installation. The Army currently follows this practice with great success. Where that is not possible due to the shortage of judge advocates at a particular installation, pretrial confinement reviews could be conducted by judge advocate magistrates from other installations using telephonic hearings and electronically-transmitted documents.

The consolidation of the multiple "neutral and detached" reviews into one 48-hour magistrate review would necessitate an amendment to the requirement for the commander's 72-hour decision and memorandum under RCM 305(h)(2). The proposed amendment requires the commander to take these actions within twenty-four hours. Because the commander's reasons for placing an accused in pretrial confinement seldom change after the initial confinement decision, and commanders rarely, if ever, reverse themselves in what is essentially a meaningless self-review, there should be little impact from changing the rule in this manner. Furthermore, in the rare instances in which someone besides the commander orders the initial confinement, the rules currently require a report to the commander within twenty-four hours.[187] Under this proposal, the commander still has up to twenty-four more hours to ratify the confinement decision or to release the accused before the 48-hour magistrate review occurs.

The proposed change to RCM 305(h)(1) is designed to ensure that the command notifies the magistrate in a timely manner, either prior to

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[185] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS para. 6d. (1 May 1992) (discussing a lawyer's "duty to uphold legal process").
[186] 1984 MCM, *supra* note 112, R.C.M. 305 analysis, at A21-14.
[187] MCM, *supra* note 2, R.C.M. 305(h)(1).

the initiation of confinement or as soon as practicable thereafter. In all cases the magistrate may either conduct his review or grant an appropriate extension within forty-eight hours. This change is meant to encourage the constitutionally-required probable cause review to occur at the earliest possible time, which can be sooner than forty-eight hours in many cases, and thus avoid unnecessary delay. This procedure would also minimize the time that an accused is deprived of liberty in circumstances under which pretrial confinement is not warranted. Moreover, if the review is accomplished prior to initiation of confinement, it may save the command the logistical hassle of arranging for confinement, as well as the potential embarrassment of having the magistrate overturn the command's decision.

The last proposed substantive change regarding the timing of the review involves the extension provision of RCM 305(i)(2)(B). Authorizing the magistrate to grant an extension to the normal forty-eight hour timeline upon a showing by the Government of "the existence of a bona fide emergency or other extraordinary circumstance"[188] more accurately implements the *McLaughlin* concept of what constitutes a reasonable delay beyond forty-eight hours than does the current language ("for good cause").[189] This change will prompt the Government to specify, and the record to reflect, a particular reason for delay, which a court can later examine in determining appropriate confinement credit.

Finally, though *Gerstein* did not require the appointment of counsel for the probable cause review of pretrial confinement, this proposal would amend RCM 305(f) to require the appointment of military counsel prior to the magistrate review, since conducting the magistrate review within forty-eight hours would largely render moot the current standard of providing counsel within seventy-two hours. The rationale for the requirement for counsel is to add another layer of protection to the accused by assisting the accused in making his best case against pretrial confinement at the most meaningful opportunity for review. Furthermore, given that the military does not have a bail system, pretrial confinement review in the military functions as both the probable cause review (answering the question of whether the accused *could* be confined) and as a quasi-bail review (answering the question of whether the accused *should* be confined).[190] The Supreme Court has recognized

[188] County of Riverside v. McLaughlin, 500 U.S. 44, 57 (1991).
[189] MCM, *supra* note 2, R.C.M. 305(i)(2)(B).
[190] *See* Courtney v. Williams, 1 M.J. 267, 270–71 (C.M.A. 1976).

the right to counsel as an important component of a bail hearing where preventive detention is being considered.[191]

IV. Argument

This proposal for amending RCM 305 serves the interests of both the accused and military society in placing the most meaningful review of pretrial confinement (that is, the review that is most likely to result in the release of an accused who is illegally confined) at the earliest possible stage of the process. But it is also compelled by the Constitution. This Part argues that *Rexroat* was wrongly decided, and the pretrial confinement framework under RCM 305 is unconstitutional. This part further argues that under the Supreme Court's concept of a neutral and detached magistrate, only judge advocates can adequately provide the constitutionally-required level of review of pretrial confinement on a consistent basis.

A. *Rexroat* was Wrongly Decided

1. Improper Interpretation of Shadwick v. City of Tampa[192]

The COMA in *Rexroat* relied in part on *Shadwick v. City of Tampa* as Supreme Court precedent that "a non-lawyer may be constitutionally qualified to determine whether there is probable cause to detain a person."[193] The holding in *Shadwick*, however, should have been limited to its particular facts and should not have been used by the court in *Rexroat* to justify to the use of non-lawyers to review pretrial confinement in the military. First, the procedures at issue in *Shadwick* empowered non-lawyer clerks of court to issue arrest warrants *only* for violations of municipal ordinances; these clerks did not have the authority to issue search or arrest warrants for misdemeanors or felonies.[194] Second, even in the limited realm in which they could issue arrest warrants, the clerks' action was ministerial and nondiscretionary in nature, for the statute specified that the clerk "'*shall* issue a warrant'"

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[191] *See generally* United States v. Salerno, 481 U.S. 739, 750–52 (1987) (sustaining the constitutionality of the Bail Reform Act of 1984 and discussing its procedural protections).
[192] Shadwick v. City of Tampa, 407 U.S. 345 (1972).
[193] United States v. Rexroat, 38 M.J. 292, 297 (C.M.A. 1993).
[194] *Shadwick*, 407 U.S. at 347, 351.

upon an affidavit by a police officer that a person violated a city ordinance.[195] Third, the warrants issued by the non-lawyer clerks merely authorized arrest (and its inherent temporary detention), not the extended pretrial confinement that was at issue in *Gerstein* and *Rexroat*. At best, the clerks were only determining probable cause that the person committed a municipal violation,[196] whereas the commission of an offense is but one element of the inquiry for pretrial confinement in the military.[197]

Finally, even though the clerks in *Shadwick* were non-lawyers, they were nonetheless judicial officers,[198] unlike the commanders in *Rexroat* who were completely outside of the judicial branch. The Court in *Shadwick* was careful to limit its holding to the types of warrants in question, stating that had it instead been examining the question of "whether a State may lodge warrant authority in someone entirely outside the sphere of the judicial branch . . . [the] case would have presented different considerations."[199] In so doing, the Court noted that "[m]any persons may not qualify as the kind of 'public civil officers' we have come to associate with the term 'magistrate.'"[200]

This conclusion as to the limited application of the holding in *Shadwick* is bolstered by the fact that three years later when *Gerstein* dealt squarely with the issue of the review of probable cause for extended pretrial confinement beyond the initial arrest, the Supreme Court consistently spoke in terms of a "judicial determination"[201] by a "neutral and detached magistrate."[202] The opinion never once suggested that this magistrate could be a non-lawyer "[w]hen the stakes are this high" in depriving a person of liberty.[203] In fact, the *Gerstein* Court cited *Shadwick* only for the proposition that "a prosecutor's responsibility to

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[195] *Id.* at 346 (quoting the Charter of the City of Tampa, Section 495) (emphasis added).
[196] *Id.* at 351.
[197] *See* MCM, *supra* note 2, R.C.M. 305(h)(2)(B) (requiring a finding that pretrial confinement is necessary and that lesser forms of restraint are inadequate).
[198] *Shadwick*, 407 U.S. at 352.
[199] *Id.*
[200] *Id.* Furthermore, the reasons the Court noted for communities to delegate responsibility for issuing certain warrants to non-lawyers, such as a shortage of lawyers in small or rural communities, generally do not exist in the military, especially given the advances in technology that make possible the exercise of magistrate functions over a considerable distance. *See id.* at 352–53 & 352 n.10.
[201] Gerstein v. Pugh, 420 U.S. 103, 114 (1975).
[202] *Id.* at 112.
[203] *Id.* at 114.

law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate."[204] Moreover, in the military cases prior to *Rexroat*, the COMA specifically envisioned a judicial review by a legally-trained magistrate or judge.[205] Had it correctly interpreted *Shadwick*, the court in *Rexroat* would not have held that a non-lawyer completely outside the judicial branch could constitutionally review pretrial confinement.

2. Erroneous Comparison with Issuance of Search Authorizations

In addition to its faulty interpretation of *Shadwick*, the COMA in *Rexroat* further relied on its own precedent holding that non-lawyer commanders "may be constitutionally required to determine whether there is probable cause to search," and saw "no reason to treat the determination of probable cause for pretrial confinement differently."[206] The application of the law for search authorizations to pretrial confinement review, however, was flawed for two reasons. First, the court conceded that the case law on which it was relying, while upholding the authority of a commander to issue search authorizations, itself expressed reservations about equating commanders with magistrates.[207] Most notably, Chief Judge Fletcher, who wrote the opinion in *Courtney v. Williams* requiring a magistrate review of pretrial confinement in the military,[208] called the treatment of a commander as a magistrate for purposes of issuing search authorizations a "legal fiction" in his concurring opinion in *United States v. Ezell*.[209] Similarly, Chief Judge Everett wrote for the court in *United States v. Stuckey* that "a military commander—no matter how neutral and impartial he strives to be—cannot pass muster constitutionally as a 'magistrate' in the strict sense."[210]

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[204] *Id.* at 117–18.
[205] *See, e.g.*, United States v. Lynch, 13 M.J. 394, 397 (C.M.A. 1982) (stating the only persons constitutionally authorized to review pretrial confinement are military judges, military magistrates, and persons authorized by the UCMJ to confine who are not involved in the command's law enforcement function); United States v. Malia, 6 M.J. 65, 66 (C.M.A. 1978) (likening a magistrate to a judge); Courtney v. Williams, 1 M.J. 267, 270–71 (C.M.A. 1976) (using only the term "magistrate" and referencing the Army procedures, which called for a judge advocate to be magistrate).
[206] United States v. Rexroat, 38 M.J. 292, 298 (C.M.A. 1993).
[207] *See id.* at 296.
[208] *See* 1 M.J. 267 (C.M.A. 1976).
[209] 6 M.J. 307, 328 (C.M.A. 1979) (Fletcher, C.J., concurring).
[210] 10 M.J. 347, 361 (C.M.A. 1981).

Second, and more significantly, the COMA in *Rexroat* erroneously equated pretrial confinement review with the issuance of search authorizations by commanders.[211] In making such analogies, however, the issuance of a search authorization is more fittingly compared to the commander's initial probable cause determination to order a Soldier into confinement rather than to the legal review of a pretrial confinement decision already made by the command. A commander, in addition to playing a role in law enforcement, is charged with ensuring the health and welfare, as well as the good order and discipline, of his unit. Based on these responsibilities, there may exist a military necessity for a commander to be able to authorize searches and to order confinement, but there is no corresponding military justification to allow a non-magistrate to determine whether pretrial confinement should continue. Similarly, while there may be exigencies that require a commander to act swiftly on a search authorization, as well as constitutional rules that allow warrantless searches in exigent circumstances, there is no exigent circumstances exception justifying prolonged pretrial confinement without judicial review.

Moreover, the consequences of pretrial confinement, in terms of the deprivation of liberty, are more severe than the consequences of an unlawful search. The exclusionary rule[212] at trial, in effect, provides the outside review of the commander's decision to issue a search and seizure authorization based on his determination of probable cause. Whereas excluding improperly obtained evidence is generally an adequate remedy at trial and can even preclude a successful prosecution, an accused who suffers through illegal pretrial confinement only receives an appropriate remedy if he is ultimately convicted and sentenced to more confinement than he has already served. Those pretrial confinees whose sentence is less than the confinement already served receive an inadequate remedy, while those whose cases that do not go to trial receive no remedy at all. Thus, while military necessity may justify non-lawyer commanders to play the role of magistrates in the context of issuing search authorizations, there is no military necessity justifying a non-judicial review of pretrial confinement. Therefore, the *Rexroat* Court's comparison of pretrial confinement review to the issuance of search authorizations in holding that non-lawyers could constitutionally act in both instances was erroneous.

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[211] *See Rexroat*, 38 M.J. at 297–98.
[212] *See* MCM, *supra* note 2, MIL. R. EVID. 311.

3. Rexroat *Allows the Person Ordering Confinement to Review Himself*

Even if one accepts as correct the COMA's decision in *Rexroat* to allow non-lawyer magistrates to satisfy the *Gerstein* review, *Rexroat* undermined its result with its own faulty logic. It created an unacceptable and irrational result in specifically holding that "either the commander's probable-cause determinations required by RCM 305(d) or (h) can satisfy *Gerstein* if the commander is neutral and detached, and can satisfy *McLaughlin* if conducted within 48 hours."[213] By its nature, the RCM 305(d) probable cause determination is made by the person initially ordering the accused into pretrial confinement, and need not be a "detailed analysis of the necessity for confinement."[214] Similarly, the 72-hour review of RCM 305(h) is required by the commander even in the typical situation in which the commander is also the person ordering confinement.[215] These situations are clearly more akin to the initial probable cause determination by a police officer to arrest a suspect, which the Supreme Court in *Gerstein* distinguished from the independent magistrate review.[216] Yet the *Rexroat* court explicitly allows the officer ordering confinement to review his own decision as long as he is neutral and detached.[217] This reasoning is completely illogical, since the person ordering confinement is inherently *not* neutral *or* detached. Such a result could not be further from the constitutional standard for pretrial confinement review.

B. Only Judge Advocates Meet the Constitutional Standard for Magistrates

Not only is the proposed amendment to RCM 305 compelled by the erroneous application of the constitutional standard for pretrial confinement review by the court in *Rexroat*, it is also compelled by the

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[213] United States v. Rexroat, 38 M.J. 292, 298 (C.M.A. 1993), *cert. denied*, 510 U.S. 1192 (1994).
[214] MCM, *supra* note 2, R.C.M. 305(d) discussion.
[215] *Id.* R.C.M. 305(h).
[216] *See generally* Gerstein v. Pugh, 420 U.S. 103, 112–14 (1975) (distinguishing a police officer's on-scene assessment of probable cause from a magistrate's neutral and detached review).
[217] *See Rexroat*, 38 M.J. at 298. *But cf.* Gilligan & Smith, *supra* note 47, at 54 ("[T]he practical workings of imposing pretrial confinement may jeopardize the imposing commander's neutrality.").

constitutionally-required qualifications of a reviewing magistrate. In *Shadwick*, the Supreme Court declared that the "magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search."[218] Due to the realities of the military command structure and the nature of the probable cause determination for pretrial confinement, only judge advocates who have been officially designated as military magistrates can consistently meet the constitutional standard in the military.

1. The Meaning of "Neutral and Detached"

The first requirement is that the magistrate be a neutral and detached judicial officer, which the Supreme Court has held to mean "someone independent of police and prosecution."[219] "Whatever else neutrality and detachment might entail," the Court explained in *Shadwick*, "it is clear that they require severance and disengagement *from activities of law enforcement*."[220] It is important to realize that this detachment means disengagement from all law enforcement activities, not merely that the individual has refrained from engaging in law enforcement in the particular case at hand. Thus, the exclusive use as magistrates of judge advocates who are not involved in prosecutorial functions would ensure that the officer reviewing pretrial confinement is sufficiently neutral and detached. It would also avoid the legal fiction of detachment that the military case law has commonly employed.

The military case law often gives short shrift to the issue of whether a reviewing officer is neutral and detached, simply stating the conclusion with no analysis.[221] Even when the courts delve into the facts, their conclusions are frequently untenable and unsatisfactory. For example, in *United States v. Lipscomb*, the Coast Guard Court of Military Review found that the commanding officer who initially ordered the accused into confinement was sufficiently neutral and detached to satisfy the 48-hour

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[218] Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972).
[219] *Gerstein*, 420 U.S. at 118.
[220] *Shadwick*, 407 U.S. at 350 (emphasis added).
[221] *See, e.g.*, United States v. McLeod, 39 M.J. 278, 278 (C.M.A. 1994) (per curiam) (summarily concluding that the accused's brigade commander and the staff judge advocate were neutral and detached); United States v. Bell, 44 M.J. 677, 680 (N-M. Ct. Crim. App. 1996) (summarily concluding that the ship's duty officer and the accused's commander were "both neutral and detached").

review requirement of *McLaughlin*.[222] Even though this commander did not complete his 72-hour memorandum within forty-eight hours, the court, relying on *Rexroat*'s holding that the initial probable cause determination can satisfy *Gerstein* and *McLaughlin*, assumed that the commander considered the same reasons at the time he ordered confinement which he later reflected in the memorandum. Thus, he could constitutionally review himself simultaneously with the initial order![223] Moreover, the court was unfazed by the fact that this commander was also the convening authority who referred the accused's case to trial three days after ordering him into confinement, as well as by the fact that the trial counsel who subsequently prosecuted the accused assisted in preparing the 72-hour memorandum.[224] The court's finding that this commander was neutral and detached under these circumstances illustrates the flawed interpretation that military courts give to those words, erroneously believing them satisfied if the officer has no "personal interest that would have disqualified him under the accuser concept" and does not personally "participat[e] in any prosecutorial capacity."[225]

In *Rexroat* itself, the COMA reached constitutionally questionable conclusions with regard to the neutrality and detachment of the individuals it held could conduct the *Gerstein* review. Although the court ultimately found that it had insufficient facts to determine conclusively whether the accused's immediate commander was neutral and detached, the court seemed prepared to find him so since he was "not the formal accuser."[226] Furthermore, the court reasoned that because the commander formally ordered the accused into confinement under RCM 305(d) after the accused had already been taken into custody by security personnel for shoplifting at the local base exchange, he would not be reviewing his own decision.[227] With respect to the battalion commander

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[222] 38 M.J. 608, 609–10 (C.G.C.M.R. 1993).
[223] *See id.* at 610.
[224] *Id. But cf.* Gerstein v. Pugh, 420 U.S. 103, 117 (1975) (holding that a prosecutor's assessment of probable cause does not meet the requirements of the Fourth Amendment and is therefore insufficient to justify pretrial confinement).
[225] *Lipscomb*, 38 M.J. at 610.
[226] United States v. Rexroat, 38 M.J. 292, 298 (C.M.A. 1993).
[227] *Id.* at 294, 298. The court's faulty reasoning represents a fundamental misunderstanding of pretrial confinement review. When security personnel first took the accused into custody, this was an "apprehension" under RCM 302. *See* MCM, *supra* note 2, R.C.M. 302(a)(1) & discussion. The review requirements of RCM 305 were not triggered until the accused's commander ordered him into "pretrial confinement," which is legally distinct from the custody the accused was in as a result of the apprehension.

that reviewed the accused's confinement, the court found that he was neutral and detached even though he himself was a convening authority, because he was not in the *accused's* chain of command and "had no prosecutorial or law enforcement role in *this* case."[228] Applying this logic, a prosecutor who is not assigned to a particular criminal defendant's case could constitutionally act as a neutral and detached magistrate to approve that defendant's pretrial confinement, a result that few could plausibly contend is consistent with *Gerstein*.

The conclusions as to neutrality and detachment reached by the military courts in cases like *Rexroat* and *Lipscomb* represent a disregard of the nature and workings of the military justice system. In the military, the traditional prosecutorial functions are shared by the trial counsel, the chain of command, the staff judge advocate, and the convening authority. The trial counsel determines the sufficiency of the evidence, advises the command on the propriety of pretrial confinement, and drafts charges. Commanders at all levels make recommendations as to the disposition of charges, and in many cases also have the authority to convene courts-martial and refer charges to trial. Before a case may be referred to a general court-martial, the staff judge advocate must give his pretrial advice to the convening authority.[229] In fact, the COMA explicitly recognized in *United States v. Lynch* that "the pretrial obligations of the staff judge advocate place him in the posture of a prosecutor" in holding that "a magistrate's decision based upon the advice of such a person cannot realistically be considered neutral and detached."[230] The court further stated that "[a] commanding officer who refers cases to courts-martial must be considered similarly disqualified [from acting as a magistrate] as a matter of law."[231]

It follows that the ability of staff officers and other members of the command to qualify as truly "neutral and detached" is inherently suspect due to the obvious reality that they are often rated by the commanders

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Therefore, the commander's confinement decision under RCM 305(d), though prompted by the apprehension, was not a review of the apprehension, but rather was the very decision that itself needed to be reviewed under RCM 305(i).

[228] *Rexroat*, 38 M.J. at 298 (emphasis added).

[229] MCM, *supra* note 2, R.C.M. 406.

[230] 13 M.J. 394, 396 (C.M.A. 1982) (citing United States v. Hardin, 7 M.J. 399 (C.M.A. 1979)). The court further stated that the "institutional position" of staff judge advocate "is inextricably linked to the command function of policing and law enforcement in the military community." *Id.*

[231] *Id.* at 396–97.

and, in any event, have incentive to support the desires of the chain of command. This may be particularly true in a deployed environment, where the perceived exigencies of the situation may cause a reviewing officer to risk a stigma in recommending release against the wishes of the commander. As such, they are akin to agents of law enforcement who have as much interest in good order and discipline as their commanders and are predisposed to view the facts from the command's perspective. Such persons cannot be viewed as independent of police and prosecution and therefore cannot be constitutionally relied upon as a class to provide a meaningful review of pretrial confinement. Similarly, commanders in other chains, by virtue of being in the business of enforcing discipline themselves, have an incentive to support their fellow commanders and are predisposed to view cases from the command's perspective.

While the above reasoning does not necessarily exclude every member of a command from being neutral and detached, it nonetheless applies to such a significant portion of that population who may potentially be called upon under RCM 305 to conduct the 48-hour review that, taken as a whole, they cannot be said to provide fair and reliable reviews. It is therefore imperative that the rule be amended to entrust pretrial confinement review to judge advocates who fall outside of the command's law enforcement functions.

2. The Nature of the Probable Cause Determination

The second requirement for a magistrate under the constitutional standard is that they be capable of making the probable cause determination.[232] In other words, they must possess sufficient legal training and mental capacity to render reasoned decisions based upon the information presented to them. While some may argue that lay persons are routinely called upon to make legal conclusions as court members or investigating officers, in those instances such persons enjoy the benefit of a judge's instructions or the advice of a dedicated legal advisor to assist them in analyzing the law. For the second part of the constitutional test to be meaningful, it must require something more, such that not everyone would qualify.

Within the context of pretrial confinement review, a finding that the accused committed an offense under the UCMJ is but one element of the

[232] Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972).

probable cause determination under RCM 305(h)(2)(B); the reviewing officer must also determine the foreseeability that the accused is a flight risk or that the accused will continue to engage in serious criminal misconduct.[233] The determination of whether the accused is a flight risk can be enhanced when an officially designated military magistrate under judicial supervision has the benefit of perspective from seeing many cases for review, compared with the single case that most non-lawyer reviewing officers would see. Furthermore, "serious criminal misconduct" has a particular meaning under the analysis in the *MCM* and case law. Offenses that a line officer would typically view as serious, such as drug use, may not actually justify pretrial confinement.[234] Moreover, the ability to distinguish legal nuances, such as the distinction of a "quitter" from a mere "pain in the neck,"[235] warrants review by a legally-trained magistrate earlier in the process. Finally, the determination as to whether lesser forms of restraint would be inadequate is better made by a judge advocate, who understands the full range of pretrial restraint under RCM 304.

The reality that judge advocates serving as military magistrates overturn the judgment of commanders and non-lawyer reviewing officers in a significant number of cases underscores the inherent unreliability of the current system. In 2008, for example, military magistrates released over 22% of Soldiers ordered into pretrial confinement Army-wide.[236] This translates into ninety-one Soldiers who were illegally confined prior to trial.[237] In the author's own experience as a part-time military magistrate, the percentage of releases was substantially higher, at 54% (seven of thirteen cases reviewed).[238] With such a significant number of non-lawyers incorrectly ordering or ratifying pre-trial confinement, it is

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[233] MCM, *supra* note 2, R.C.M. 305(h)(2)(B).
[234] *See supra* note 11.
[235] MCM, *supra* note 2, R.C.M. 305(h)(2)(B) analysis, at A21-18.
[236] U.S. ARMY TRIAL JUDICIARY, 2008 PART-TIME MILITARY MAGISTRATE ROLLUP REPORT (2008) [hereinafter 2008 PART-TIME MILITARY MAGISTRATE ROLLUP REPORT] (on file with author). In the past three years for which the U.S. Army Trial Judiciary has maintained statistics, the percentage of releases has increased each year. In 2008, 22.5% (91 out of 405) confinees were released by part-time military magistrates. *Id.* In 2007, 14.3% (79 out of 551) confinees were released by part-time military magistrates. U.S. ARMY TRIAL JUDICIARY, 2007 PART-TIME MILITARY MAGISTRATES ROLLUP REPORT (2007) (on file with author). In 2006, 13% (67 out of 516) confinees were released by part-time military magistrates. U.S. ARMY TRIAL JUDICIARY, PART-TIME MILITARY MAGISTRATES REPORT–2006 (2006) (on file with author).
[237] *See* 2008 PART-TIME MILITARY MAGISTRATE ROLLUP REPORT, *supra* note 236.
[238] Professional Experience, *supra* note 179.

crucial that the system change to put the most meaningful review—the one where an accused who is illegally confined stands the best chance of release—as early in the process as possible.

V. Conclusion

The essence of the constitutional requirement for pretrial confinement is that it be a prompt, fair, and reliable judicial review by a neutral and detached magistrate.[239] Throughout history, the military has lagged behind its civilian counterparts in protecting the liberty interests of those who are confined prior to trial. Even when the military services grudgingly accepted the application of the constitutional standards pertaining to pretrial confinement, they have imperfectly implemented those standards. As this article has demonstrated, the result has been a system of pretrial confinement review that is illogical, inconsistent, and prone to abuse. The time has come to "lock down" pretrial confinement and bring it more perfectly in line with the Constitution by amending RCM 305 to require a judicial review by a neutral and detached judge advocate magistrate within forty-eight hours of the initiation of confinement. Such a change will ensure that servicemembers are not deprived of their liberty without a trial except in the most necessary of circumstances.

[239] *See* Gerstein v. Pugh, 420 U.S. 103, 124–25 (1975).

Appendix

Proposed Changes to RCM 305

This Appendix contains proposed changes to RCM 305. Absence of changes to a particular subsection is indicated by the title of the subsection and the bracketed words "[no change]." Proposed new language is shown in ***bold italics***, while proposed deletions are indicated in ~~strikethrough~~ type.

Rule 305. Pretrial Confinement

(a) *In general*. [no change]

(b) *Who may be confined*. [no change]

(c) *Who may order confinement*. [no change]

(d) *When a person may be confined*. [no change]

(e) *Advice to the accused upon confinement*. [no change]

(f) *Military counsel*. ~~If requested by the prisoner and such request is made known to military authorities, M~~***M***~~m~~ilitary counsel shall be provided to the prisoner before the ~~initial~~ ***magistrate*** review under subsection (i) of this rule ~~or within 72 hours of such request being first communicated to military authorities, whichever occurs first~~. Counsel may be assigned for the limited purpose of representing the accused only during the pretrial confinement proceedings before charges are referred. If assignment is made for this limited purpose, the prisoner shall be so informed. Unless otherwise provided by the regulations of the Secretary concerned, a prisoner does not have a right under this rule to have military counsel of the prisoner's own selection.

(g) *Who may direct release from confinement.* [no change]

(h) *Notification and action by commander*.

(1) *Report*. Unless the commander of the prisoner ordered the pretrial confinement, the commissioned, warrant, noncommissioned, or petty officer into whose charge the prisoner was committed shall, within 24 hours after that commitment, cause a report to be made to the

commander that shall contain the name of the prisoner, the offenses charged against the prisoner, and the name of the person who ordered or authorized confinement. ***In all cases, the commander or other person who ordered the confinement shall also report this information to the reviewing magistrate under subsection (i)(2) of this rule either prior to confinement or as soon as practicable thereafter, such that the reviewing magistrate may either review the confinement or grant an extension within 48 hours***.

(2) *Action by commander*.

(A) *Decision*. Not later than ~~72~~ ***24*** hours after the commander's ordering of a prisoner into pretrial confinement or, after receipt of a report that a member of the commander's unit or organization has been confined, whichever situation is applicable, the commander shall decide whether pretrial confinement will continue. ~~A commander's compliance with this subsection may also satisfy the 48-hour probable cause determination of subsection R.C.M. 305(i)(1) below, provided the commander is a neutral and detached officer and acts within 48 hours of the imposition of confinement under military control. Nothing in subsections R.C.M. 305(d), R.C.M. 305(i)(1), or this subsection prevents a neutral and detached commander from completing the 48-hour probable cause determination and the 72-hour commander's decision immediately after an accused is ordered into pretrial confinement.~~

(B) *Requirements for confinement*. [no change]

(C) ~~*72*~~ ***24****-hour memorandum*. If continued pretrial confinement is approved, the commander shall prepare a written memorandum that states the reasons for the conclusion that the requirements for confinement in subsection h(2)(B) of this rule have been met. This memorandum may include hearsay and incorporate by reference other documents, such as witness statements, investigative reports, or official records. This memorandum shall be forwarded to the ~~7-day reviewing officer~~ ***magistrate*** under subsection (i)(2) of this rule. If such a memorandum was prepared by the commander before ordering confinement, a second memorandum need not be prepared; however, additional information may be added to the memorandum at any time ***prior to review by the magistrate***.

(i) *Procedures for review of pretrial confinement*.

(1) ~~*48-hour probable cause determination*~~ ***Timing***. Review ***under this subsection*** ~~of the adequacy of probable cause to continue pretrial confinement~~ shall be made ~~by a neutral and detached officer~~ within 48 hours of imposition of confinement under military control. If the

prisoner is apprehended by civilian authorities and remains in civilian custody at the request of military authorities, reasonable efforts will be made to bring the prisoner under military control in a timely fashion.

(2) ~~*7-day review of pretrial confinement*~~ ***By whom made***. ~~Within 7 days of the imposition of confinement, a neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned shall review the probable cause determination and necessity for continued pretrial confinement. In calculating the number of days for purposes of this rule, the initial date of confinement under military control shall count as one day and the date of the review shall also count as one day.~~ ***The review under this subsection shall be made by a neutral and detached magistrate, defined as a judge advocate officer who is qualified and certified under Article 27(b), UCMJ and is appointed in accordance with the regulations prescribed by the Secretary concerned to perform the duties of a magistrate under the supervision of a military judge.***

(A) *Nature of the* ~~*7-day*~~ ***magistrate*** *review*.

(i) *Matters considered*. The review under this subsection shall include a review of the memorandum submitted by the prisoner's commander under subsection (h)(2)(C) of this rule. Additional written matters may be considered, including any submitted by the accused. The prisoner and the prisoner's counsel, if any, shall be allowed to appear before the ~~7-day reviewing officer~~ ***magistrate*** and make a statement, if practicable. A representative of the command may also appear before the ~~reviewing officer~~ ***magistrate*** to make a statement.

(ii) *Rules of evidence*. [no change]

(iii) *Standard of proof*. [no change]

(B) *Extension of time limit*. ***Upon the demonstration by the Government of the existence of a bona fide emergency or other extraordinary circumstance,*** ~~The 7-day reviewing officer~~ ***the magistrate*** may~~, for good cause,~~ extend the time limit for completion of the review ***as long as is reasonably necessary to accommodate such circumstances*** ~~to 10 days after the imposition of pretrial confinement~~. ***The magistrate shall document such extensions in the memorandum completed under subsection (i)(2)(D) of this rule.***

(C) *Action by* ~~*7-day reviewing officer*~~***magistrate***. Upon completion of review, the ~~reviewing officer~~ ***magistrate*** shall approve continued confinement or order immediate release.

(D) *Memorandum*. The ~~7-day reviewing officer's~~ ***magistrate's*** conclusions, including the factual findings on which they are based, shall be set forth in a written memorandum. A copy of the memorandum and of all documents considered by the ~~7-day reviewing officer~~ ***magistrate***

shall be maintained in accordance with regulations prescribed by the Secretary concerned and provided to the accused or the Government on request.

(E) *Reconsideration of approval of continued confinement.* The ~~7-day reviewing officer~~ ***magistrate*** shall upon request, after notice to the parties, reconsider the decision to confine the prisoner based upon any significant information not previously considered.

(j) *Review by military judge*. [no change]

(1) *Release*. The military judge shall order release from pretrial confinement only if:

(A) The ~~7-day reviewing officer's~~ ***magistrate's*** decision was an abuse of discretion, and there is not sufficient information presented to the military judge justifying continuation of pretrial confinement under subsection (h)(2)(B) of this rule;

(B) Information not presented to the ~~7-day reviewing officer~~ ***magistrate*** establishes that the prisoner should be released under subsection (h)(2)(B) of this rule; or

(C) The provisions of subsection (i)(1) or (i)(2) of this rule have not been complied with and information presented to the military judge does not establish sufficient grounds for continued confinement under subsection (h)(2)(B) of this rule.

(2) *Credit.* [no change]

(k) *Remedy*. [no change]

(l) *Confinement after release*. [no change]

(m) *Exceptions*. [no change]

(1) *Operational necessity*. [no change]

(2) *At sea*. [no change]

YES, WE CAN: THE AUTHORITY TO DETAIN AS CUSTOMARY INTERNATIONAL LAW

MAJOR ROBERT E. BARNSBY*

Many commentators assert customary international law as they would like it to be, rather than as it actually is.[1]

I. Introduction

Efforts to combat terrorism in the wake of September 11th reveal a "central legal challenge" to the "legitimate preventive incapacitation of uniformless terrorists who have the capacity to inflict mass casualties and enormous economic harms and who thus must be stopped *before* they act."[2] This necessary objective is a challenge precisely because modern terrorism operates in a manner that transcends the paradigm of uniformed opposing forces envisioned by the Geneva Conventions. Even though

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[1] John B. Bellinger, III, U.S. Dep't of State Legal Advisor, Lecture at the University of Oxford, Oxford Leverhulme Programme on the Changing Character of War (Dec. 10, 2007), *available at* http://www.state.gov/s/l/rls/96687.htm [hereinafter Bellinger Lecture].

[2] Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1081 (2008) (emphasis added).

the contemporary operational environment poses practical considerations not directly addressed within treaties or documented international laws, armed forces must nevertheless detain individuals who pose a threat in the context of armed conflict. This article will explore the customary international law (CIL)[3] sources of the initial right to detain individuals who pose such a threat.

Most international law scholars agree that CIL establishes standards for treatment of individuals detained by an armed force.[4] However, the logical precursor to these treatment principles—a rule describing a state's initial authority to lawfully detain individuals—does not currently exist as CIL.[5] Even in the present-day Global War on Terror (GWOT), where persons are regularly detained, "an increasing number of legal experts now acknowledge . . . the legal framework for conflicts with transnational terrorists like al Qaida is not clear."[6] Because the "Geneva Conventions were designed for traditional armed conflicts between States and their uniformed military forces, and do not provide all the answers for detention of persons in conflicts between a State and a transnational terrorist group[,]"[7] it is necessary to determine whether CIL adequately fills this legal gap.

This article argues that, regardless of the type of conflict in which states are engaged,[8] the authority to detain individuals rises to the level of

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[3] "The Statute of the International Court of Justice [ICJ] describes customary international law as 'a general practice accepted as law.'" INTERNATIONAL COMMITTEE OF THE RED CROSS [ICRC], 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, at xxxi (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter ICRC STUDY VOL. I] (quoting ICJ Statute, art. 38(1)(b)).

[4] *See infra* Part VI.

[5] *See infra* Part II.C.

[6] Bellinger Lecture, *supra* note 1. Although the phrase "Overseas Contingency Operation" may replace GWOT as a favored term of the Obama Administration, this article will utilize the GWOT term for ease of discussion, given the latter term's pervasive use by practitioners and scholars heretofore describing detention operations in present-day conflicts.

[7] *Id.* This conclusion is particularly useful when states are fighting transnational terrorists who do not adhere to the laws of war.

[8] The two main conflict types are international armed conflict (Geneva Convention Common Article 2) and non-international, or internal armed conflict (Geneva Convention Common Article 3). For a full discussion, see *infra* Part III. It should be noted that the authority to detain contemplated here refers only to lawful detention. This is in contrast to the "treatment" rules of CIL, described in Part VI, *infra*, which apply regardless of the legality of the initial detention of the individual. It should further be noted that this article does not seek to address specific aspects of due process to be provided to individuals. Importantly, a discussion of the specific framework of any particular

CIL.[9] In reaching this conclusion, Parts II and III of this article trace the background and common threads connecting detention law through various types of conflict, as seen in Additional Protocol I[10] and II[11] of the Geneva Conventions (AP I & II) and other recognized instruments of CIL.[12] Next, Part IV bridges the traditional gap between international and non-international armed conflict by demonstrating states' use of the "fundamental and accepted tool of detention in war."[13] Part V lays out a comprehensive test to determine whether the authority to detain rises to the level of CIL. This test includes not only the typical "state practice" and "*opinio juris*" prongs of CIL,[14] but also lesser known—yet equally important—aspects of CIL, including "specially affected" states (describing states with more practice than others in a particular aspect of armed conflict)[15] and "permissive rules" (describing state actions that are allowed, but not required, in armed conflict).[16] Lesser-known concepts like these are particularly helpful in evaluating the status of initial detention because they offer additional uncommon insights that test the "authority to detain" premise and arrive at the simple, universal rule of CIL.

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detention regime existing today is also outside of the scope of this article. Rather, this article focuses on developing a simple rule to demonstrate how a critical aspect of detention law—namely, the authority to detain—may achieve status as CIL.

[9] This argument contemplates only non-arbitrary detention, since arbitrary detention is clearly not authorized. As Part VI, *infra*, describes, the prohibition against arbitrary detention itself is already recognized as CIL. "The grounds for initial or continued detention have been limited to valid needs . . . ." ICRC STUDY VOL. I, *supra* note 3, at 345. Further, this article does not distinguish lawful from unlawful combatants, although clearly "a State engaged in armed conflict has at a minimum every right to capture and detain combatants acting unlawfully that it otherwise would have if the combatants were acting lawfully." Response of the United States to Request for Precautionary Measures—Detainees in Guantanamo Bay, Cuba (Apr. 15, 2002), 41 I.L.M. 1015, 1021 n.12 (2002) [hereinafter Precautionary Measures Response].

[10] Protocol Additional to the Geneva Conventions of Aug.12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

[11] Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 5, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

[12] *See infra* Part III.

[13] *See infra* Part IV.A. Further, as described in Part IV.B, the desire of states to hold commanders accountable for their actions regardless of the type of conflict in which they are engaged underscores the acceptance of detention as a fundamental tool in non-international armed conflict as well as international armed conflict.

[14] *See infra* Part V.A.

[15] *See infra* Part V.C.

[16] *See infra* Part V.B.

To answer the question of whether the authority to detain individuals rises to the level of CIL, this article adopts the perspective of a comprehensive study by the International Committee of the Red Cross (ICRC). While this study (ICRC Study) ostensibly codifies the rules and practice of internationally-recognized CIL, it does not contemplate whether the detention authority envisioned by this article rises to the level of CIL.[17] However, the ICRC Study gives valuable methods for testing and ultimately concluding what may constitute CIL.[18] These methods are particularly useful when viewed jointly with the common threads and fundamental command authority aspects of detention law. Part VI analogizes the rule proposed in this article to uncontroverted CIL through three critical rules of detention to demonstrate that the authority to detain must logically exist in CIL.[19]

Finally, Part VII addresses various counterarguments to the notion that the authority to detain individuals during conflict rises to CIL. Ultimately, in analyzing state practice in this critical area of international law, this article concludes that existing CIL does provide a legal basis for detention of individuals not falling neatly under the Third Geneva Convention (GC III)[20] as Prisoners of War (POWs)[21] or the Fourth

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[17] ICRC STUDY VOL. I, *supra* note 3, *passim*.

[18] As an example, the Study describes a "number of issues related to the conduct of hostilities [which] are regulated by the Hague Regulations, which have long been considered customary in international armed conflict." Jean-Marie Henckaerts, *Assessing the Laws and Customs of War: The Publication of* Customary International Law, 13 HUM. RTS. BRIEF 8, 11 (2006).

[19] Three critical rules of detention exist as a paradigm of CIL—the requirement for humane treatment, the prohibition against arbitrary detention, and the principle of non-refoulement. *See infra* Part VI. All three of these rules are triggered once individuals are in detention. For this reason, as argued in Part VI, a rule of CIL describing the *initial* authority to detain must logically exist in order to trigger the three established rules. That is, the written protections associated with treatment of detainees exist because of the unwritten CIL authority to detain individuals.

[20] Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].

[21] *Id.* art. 4. Article 4 defines a

> Prisoner of War as a member[] of the armed force of a Party to the conflict, as well as members of militias or volunteer corps . . . [or] organized resistance movement[] . . . provided that [the force fulfils the conditions of being] commanded by a person responsible for his subordinates . . . [wears] a fixed distinctive sign recognizable at a distance . . . carries arms openly . . . [and] conduct[s] operations in accordance with the laws and customs of war . . . [who falls] into the power of the enemy.

Geneva Convention (GC IV)[22] as civilians.[23] In this way, the article is useful for its implications in the GWOT and beyond. Above all, it will assist in enabling states to approach lawfully "the central legal challenge of modern terrorism."[24]

II. Background

Treaty law contemplates the detention of individuals during armed conflict.[25] However, the *initial* authority to detain is not explicitly stated in any body of law. Nevertheless, this article argues that this initial authority does exist in CIL. To properly assess this article's claim, one must first examine current treaty law in the detention arena. Treaty law can assist in determining CIL because treaties "help shed light on how states view certain rules of international law."[26] To further establish a background for analysis, this Part outlines the ability of CIL to function as a gap-filler for existing detention law. In addition, this Part describes in detail the landmark 2005 ICRC Study, the conclusions of which must weigh heavily in any discussion relating to the subject of CIL.

A. Gaps in Detention Law

During armed conflict, a state[27] may invariably need to detain individuals who pose a threat to its forces. For this reason, each state must seek a legal framework under which it can detain such individuals. Traditional law of war, including "[t]reaty law, principally reflected in the Geneva Conventions of 1949 and their Additional Protocols of 1977,

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Id.

[22] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

[23] *Id.* art. 4 (defining civilians as "persons [who] . . . find themselves . . . in the hands of a Party to the conflict or Occupying Power of which they are not nationals.").

[24] Chesney & Goldsmith, *supra* note 2, at 1081.

[25] *See, e.g.*, GC IV, *supra* note 22, arts. 4, 5, 42, 43, & 78.

[26] Henckaerts, *supra* note 18, at 10.

[27] For a thorough discussion of the term "state" in international law, see Captain Gal Asael, *The Law in the Service of Terror Victims: Can the Palestinian Authority Be Sued in Israeli Civilian Courts for Damages Caused by Its Involvement in Terror Acts During the Second Intifada?,* ARMY LAW., July 2008, at 1, 14–15 (defining a state as an entity with a permanent population, defined territory, government, and the "capacity to enter into relations with other states," as required by CIL).

is well developed and covers many aspects of warfare."[28] Specifically, these treaties address the detention, or internment,[29] of individuals during times of conflict. For example, GC III provides protections for those individuals detained by enemy forces as POWs.[30] Additionally, GC IV outlines rules for treatment of civilians who are interned, either for their own protection or as a security threat,[31] during times of conflict.[32]

However, the traditional law of war codified in the Geneva Conventions is inadequate in certain types of conflicts not falling neatly into the international/non-international armed conflict distinction described below.[33] For example, the U.S. Government's view of the members of transnational terror organizations in the GWOT is that they do not qualify for the protections of either GC III as POWs or GC IV as civilians.[34] In the U.S. Government's view, GC III only covers individuals who follow the law of war and other listed requirements for protection under Article 4 of GC III.[35] Consequently, because al Qaida,

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[28] Henckaerts, *supra* note 18, at 8. Henckaerts is "a Legal Advisor in the Legal Division of the International Committee of the Red Cross and co-editor of the [ICRC Study referenced throughout this article]." *Id.*

[29] A state may also need to intern civilians for their own protection. For the purposes of this article, the terms "detain" and "intern," and "detainee" and "internee," are used interchangeably.

[30] *See* GC III, *supra* note 20, *passim*. "Furthermore, Article 4(a)4 of the Third Convention . . . contemplates the detention of . . . civilians accompanying armed forces." Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT'L L. (forthcoming 2009).

[31] *Compare* GC IV, *supra* note 22, art. 4 (describing the protection of individuals "in the hands of a Party to the conflict or Occupying Power of which they are not nationals"), *with id.* art. 5 (outlining the internment of individuals "suspected of or engaged in activities hostile to the security of the State").

[32] *See id.* arts. 2 & 3. "[T]he Fourth Geneva Convention does, indeed, generally constitute the most analogous rules concerning detention of civilians. It thus provides the best approximation of IHL rules when interpretive gaps rise." Goodman, *supra* note 30. "Articles 5, 27, 41–43, and 78 of the Fourth Convention plainly permit the detention, or internment, of civilians who pose . . . a threat [to the security of a state]." *Id.*

[33] *See infra* Part III (distinguishing between international and non-international armed conflict).

[34] Presidential Memorandum on Humane Treatment of Taliban and al Qaida Detainees (Feb. 7, 2002, declassified June 17, 2004) (on file with author); *see also* Statement by White House Press Secretary, Ari Fleischer, on the Geneva Convention (May 7, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html.

[35] These requirements include having a fixed insignia, carrying arms openly, and following the command of a responsible person. *See* GC III, *supra* note 20, art. 4. Although the Taliban could be recognized as a state party to the Geneva Conventions (as the government of Afghanistan, which was a party to the Conventions), al Qaida and other international terrorist organizations could never be recognized as state parties to the

the Taliban, and other terrorist groups do not ostensibly follow these requirements, they do not qualify for protection under GC III.[36] Further, because the same individuals are often more than mere civilian bystanders—taking a direct part in hostilities, in contravention of the requirements of GC IV—they do not qualify for protection under the Fourth Geneva Convention.[37] Thus, a gap in coverage exists, according to the U.S. Government's view.[38]

Gaps in legal coverage can also result from "treaties [that] apply only to the states that have ratified them."[39] "Although the four Geneva Conventions of 1949 have been universally ratified, the same is not true for other treaties of humanitarian law, such as the Additional Protocols."[40] Nevertheless, the portions of these treaties for which there is universal agreement (i.e., from which countries have not persistently

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conventions. Thus, the members of these organizations could not be entitled to POW status.

[36] *See id.*

[37] *See* GC IV, *supra* note 22, *passim*.

[38] Many in the international community would disagree with this view. The ICRC argues that an individual must fall within one of the categories described by the Geneva Conventions. In its comprehensive study, the ICRC states:

> It should be noted, however, that all persons deprived of their liberty for reasons related to a non-international armed conflict must be given the opportunity to challenge the legality of the detention unless the government of the State affected by the non-international armed conflict claimed for itself belligerent rights, in which case enemy 'combatants' should benefit from the same treatment as granted to prisoners of war in international armed conflicts and detained civilians should benefit from the same treatment as granted to civilian persons protected by the Fourth Geneva Convention in international armed conflicts.

ICRC STUDY VOL. I, *supra* note 3, at 352. Further, as stated by panelist Deborah Pearlstein at the 2008 Creighton Law Review International Human Rights Symposium, "there is certainly nothing preventing the United States from drawing on [other] models in order to enhance the perceived international legitimacy of its operations, or simply to further clarify the contours of international human rights law applicable to the security detention it pursues." *International Human Rights Symposium*, 41 CREIGHTON L. REV. 663, 673 (2008) [hereinafter *International Human Rights Symposium*]. This article seeks to propose a rule that could serve the purpose of clarifying the U.S. view; namely, that the authority to detain is actually recognized as CIL, regardless of the type of conflict. Although this does not reconcile the differences between the United States and ICRC views of the application of Geneva Conventions, it may serve as a basic clarification for the legality of the initial detention of individuals.

[39] Henckaerts, *supra* note 18, at 8.

[40] *Id.*

objected from the time of a rule's inception),[41] and on which states act out of a sense of legal obligation,[42] are considered binding as instruments of CIL. For example, the United States did not ratify Additional Protocol I, but "expressed support for many of the principles set forth in that Protocol and believed that many of them should become customary law."[43] It is therefore necessary "to determine which rules of international humanitarian law are part of customary international law and therefore applicable to all parties to a conflict, regardless of their treaty obligations."[44]

In the detention arena it is particularly important to determine which rules constitute CIL, because treaty law does not provide full legal coverage. Yet, in the area of state practice, CIL is not always clear. "For example, although the terms 'combatants' and 'civilians' are clearly defined in international armed conflicts, [state] practice is ambiguous as to whether members of armed opposition groups are considered members of armed forces or civilians in non-international armed conflicts."[45] The next section explores the concept of state practice, which is critical for a particular rule of armed conflict to rise to the level of CIL and fill the legal gap described herein.

B. Customary International Law as Gap-Filler

Customary International Law maintains functional significance in modern times, in part, because "treaty law does not cover the entire spectrum of [the Laws of War]. Non-international armed conflicts, for example, are subject to far fewer treaty provisions than international armed conflict. Hence . . . 'customary law is of immense significance.'"[46] The International Court of Justice defines CIL as "a

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[41] *Id.* at 9.
[42] This concept is sometimes referred to as *opinio juris*. *See infra* Part V.A.2.
[43] Sabrina Balgamwalla, Conference Review, *The Reaffirmation of Custom as an Important Source of International Humanitarian Law*, 13 HUM. RTS. BRIEF 13, 15 (2006).
[44] Henckaerts, *supra* note 18, at 8.
[45] *Id.* at 11. The rules for combatants and civilians in international armed conflict derive from the Hague Regulations and Additional Protocol I, and have never been contradicted by official state practice. *See* ICRC STUDY VOL. I, *supra* note 3, at 11–19.
[46] Dennis Mandsager, *Introductory Note to Response of Jean-Marie Henckaerts to the U.S. Joint Letter From John Bellinger III, Legal Adviser, U.S. Department of State, and William J. Haynes, General Counsel, U.S. Department of Defense to Dr. Jakob Kellenberger, President, International Committee of the Red Cross, Regarding Customary International Law Study*, 46 I.L.M. 957, 957 (2007). The term "Law of War"

general practice accepted as law."[47] Legally, CIL is persuasive because "[r]ules of customary international humanitarian law . . . , sometimes referred to as 'general' international law, bind all States and, where relevant, all parties to the conflict, without the need for formal adherence."[48] Even though states may not repeatedly espouse the existence of the authority to detain in armed conflict, their consistent use of the practice, undertaken—or at least allowed—as a matter of law, suggests that it can still be considered CIL.[49] Therefore, by definition, CIL can be used to fill gaps in legal coverage such as those described in Part II.A above.

C. ICRC Study on CIL

In 2005, in response to a request from the international community ten years prior, the ICRC produced a comprehensive study "analyz[ing] issues in order to establish what rules of customary international law can

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is synonymous with the ICRC's use of the term "International Humanitarian Law." Dennis Mandsager, *Introductory Note of U.S. Joint Letter From John Bellinger III, Legal Adviser, U.S. Department of State, and William J. Haynes, General Counsel, U.S. Department of Defense to Dr. Jakob Kellenberger, President, International Committee of the Red Cross, Regarding Customary International Law Study*, 46 I.L.M. 511, 511 (2007) [hereinafter Mandsager, *Introductory Note of U.S. Government's Response*].

[47] Henckaerts, *supra* note 18, at 8 (quoting Rome Statute of the International Court of Justice, ch. II, art. 38, sec. 1(b) (June 26, 1945), *available at* http://www.yale.edu/lawweb/Avalon/decade/decad026.htm).

[48] Jakob Kellenberger, *Foreword to* INTERNATIONAL COMMITTEE OF THE RED CROSS [ICRC], 1 CUSTOMARY INT'L HUMANITARIAN L., at x (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

> It is generally agreed that the existence of a rule of customary international law requires the presence of two elements, namely State practice (*usus*) and a belief that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law (*opinion juris sive necessitates*).

ICRC STUDY VOL. I, *supra* note 3, at xxxi–ii. For a good recapitulation of the first conference in North America after the release of the ICRC Study, see Balgamwalla, *supra* note 43, at 13 ("[C]ustomary rules are considered binding upon all nations, regardless of whether or not they are signatories to the Geneva Conventions or its Additional Protocols.").

[49] *See* Int'l Committee of the Red Cross, Response of Jean-Marie Henckaerts to the Bellinger/Haynes Comments on Customary International Law Study (July 2007), 46 I.L.M. 959, 960 (2007) [hereinafter Henckaerts's Response to U.S. Government's Response] (arguing that the legal prong of the CIL test can be satisfied when a state believes a certain practice is allowed, vice required); *see also infra* Part V.A.

be found inductively on the basis of [s]tate practice in relation to these issues."[50] The ICRC Study is organized into a numerical listing of "rules" viewed as constituting CIL, followed by multiple examples of "practice" by states under the rubric of each general rule.[51] Overall, the ICRC Study "identifies 161 rules found to have attained the status of customary humanitarian law and seeks to provide a snapshot of custom today that is as accurate as possible."[52] This voluminous work, in the ICRC's view, "present[s] an accurate assessment of the current state of customary international humanitarian law."[53] Furthermore, the ICRC Study covers all types of conflicts, as it is "a report on customary rules of international humanitarian law applicable in [both] international and non-international armed conflicts."[54]

The ICRC Study is the first widely-recognized attempt to codify CIL, which had previously been limited by its nature to an unwritten, subjectively interpreted regime.[55] More than merely an internal ICRC project, the Study incorporated the views of many of the leading international law experts.[56] In its own words, the ICRC "spent nearly ten years on research and consultation involving more than 150 governmental and academic experts."[57] The intensity of this effort

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[50] ICRC STUDY VOL. I, *supra* note 3, at xxx. The ICRC is widely recognized as the most prominent non-governmental organization involved in armed conflicts throughout the world. The ICRC's mandate, given to it by states, to "work for the faithful application of international humanitarian law applicable in armed conflicts . . . [,]"is derived from the Geneva Conventions (for international armed conflicts) and the Statutes of the International Red Cross and Red Crescent Movement (for internal armed conflicts). Henckaerts's Response to U.S. Government's Response, *supra* note 49, at 961 (quoting Statutes of the Int'l Red Cross and Red Crescent Movement, adopted by the 25th Int'l Conference of the Red Cross, Geneva, Oct. 23–31, 1986, art. 5(2)(c), (g)); *see also* International Committee of the Red Cross (ICRC), *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/section_mandate (last visited Jan. 19, 2009).

[51] *See* ICRC STUDY VOL. I, *supra* note 3, *passim*; INTERNATIONAL COMMITTEE OF THE RED CROSS [ICRC], 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 2009 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter ICRC STUDY VOL. II]. The Study contains several thousand pages, encompassing the rules and examples illustrating each rule.

[52] Henckaerts, *supra* note 18, at 8.

[53] Kellenberger, *supra* note 48, at xi.

[54] Henckaerts's Response to U.S. Government's Response, *supra* note 49, at 959.

[55] *See* ICRC STUDY VOL. I, *supra* note 3, at xxix ("A study on customary international humanitarian law may also be helpful in reducing the uncertainties and the scope for argument inherent in the concept of [CIL].").

[56] *See* Henckaerts, *supra* note 18, at 10.

[57] Henckaerts's Response to U.S. Government's Response, *supra* note 49, at 959.

throughout the international community underscores the wide recognition of most rules identified by the Study.[58]

In response to the ICRC Study, in November 2006, the U.S. State Department Legal Advisor, John Bellinger III, and the U.S. Department of Defense General Counsel, William J. Haynes, wrote a joint letter to Dr. Jakob Kellenberger, the President of the ICRC.[59] This letter identified some methodological flaws viewed by the U.S. Government as undermining the credibility of the ICRC Study.[60] Although the U.S. Government recognized that "a significant number of the rules set forth in the Study are applicable . . . because they have achieved universal status . . . ,"[61] Bellinger and Haynes argued that "the United States is not in a position to accept without further analysis the Study's conclusions that particular rules related to the laws and customs of war in fact reflect customary international law."[62] In particular, the letter focused on the United States' disagreement with four of the ICRC-identified rules, involving the areas of humanitarian relief personnel, damage to the environment, the use of rounds designed to explode within the human body, and jurisdiction over war crimes.[63]

Finally, in July 2007, ICRC Legal Advisor and principal ICRC Study author, Jean-Marie Henckaerts authored his own rejoinder to the U.S. Government's response.[64] In his letter, Henckaerts responded to each of the United States' main points, ultimately concluding that "the formation of customary law is an ongoing process."[65] In this way, Henckaerts and the ICRC welcome the U.S. Government's response as "part of [the] dialogue"[66] necessary to further the development of CIL. Henckaerts

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[58] *But see* Letter from John B. Bellinger III, Legal Advisor, U.S. Dep't of State, and William J. Haynes, General Counsel, U.S. Dep't of Def., to Dr. Jakob Kellenberger, President, Int'l Comm. of the Red Cross (Nov. 3, 2006), *in* 46 INT'L LEGAL MATERIALS 514 *passim* (2007) [hereinafter U.S. Government's Response] (describing the U.S. Government's disagreement with some of the rules identified in the ICRC Study). However, even the U.S. Government's Response did not dispute the formulation of the majority of rules identified in the ICRC Study. *See* Mandsager, *Introductory Note of U.S. Government's Response*, *supra* note 46, at 511.

[59] U.S. Government's Response, *supra* note 58, at 514.

[60] *Id. passim*.

[61] *Id.* at 514.

[62] *Id.*

[63] *Id. passim*.

[64] Henckaerts's Response to U.S. Government's Response, *supra* note 49, at 959.

[65] *Id.* at 966.

[66] *Id.*

further noted that the ICRC Study "has already found its way into the jurisprudence of several States, including the [United States]."[67]

Most importantly for the purposes of this article, and despite several rules covering standards of treatment of detainees or interned individuals, the ICRC Study did not include, as a rule in CIL, the pure authority to detain in armed conflict.[68] Similarly, the U.S. Government's response did not discuss either the inclusion or exclusion of any detention-related rules found in the ICRC Study.[69] Yet the methods used by the ICRC in its study, as well as the contentions found in the U.S. Government response, illuminate any analysis of detention law as CIL. Both the ICRC and U.S. Government's viewpoints assist in assessing the strength of this article's conclusion that the authority to detain in any type of conflict rises to CIL.

III. Common Legal Threads Connecting Detention Law

Although a full history of detention frameworks and regimes in armed conflict is outside of the scope of this article, it is important to take note of some legal threads present in generic detention law for the two main conflict types: international armed conflict (Geneva Convention Common Article 2)[70] and non-international, or internal, armed conflict (Geneva Convention Common Article 3).[71] In both types of conflict, states "have the right to capture and detain enemy combatants, whether or not the combatants are POWs."[72] This section

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[67] *Id.* (citing Hamdan v. Rumsfeld, 548 U.S. 557, 620 n.48 (2006)).

[68] *See* ICRC STUDY VOL. I, *supra* note 3, *passim*; ICRC STUDY VOL. II, *supra* note 51, *passim*.

[69] U.S. Government's Response, *supra* note 58, at 514.

[70] *See, e.g.*, GC III, *supra* note 20, art. 2 (describing international armed conflict as "armed conflict which may arise between two or more of the High Contracting Parties [to the Conventions], even if the state of war is not recognized by one of them . . . [and applying to] all cases of partial or total occupation of the territory of a High Contracting Party . . . ."). Article 21 of GC III authorizes a "[d]etaining power [to] subject prisoners of war to internment." *Id.* art. 21.

[71] *See, e.g.*, *id.* art. 3 (describing internal armed conflict as "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . . ."). Common Article 3 requires parties to such a conflict to, at a minimum, humanely treat "[p]ersons . . . placed hors de combat by sickness, wounds, *detention*, or any other cause . . . ." *Id.* (emphasis added).

[72] Precautionary Measures Response, *supra* note 9, at 1021. The terms international humanitarian law, IHL, and Law of War are used interchangeably throughout this article.

traces common legal threads apparent throughout both (traditional) types of armed conflict to clarify the need for a simple rule of CIL describing the authority to detain in any type of conflict.

A. International Armed Conflict (IAC)

All four Geneva Conventions contain rules governing reasons "for which persons may be deprived of their liberty by a party to an international armed conflict."[73] For example,

> The First Geneva Convention (GC I) regulates the detention or retention of medical and religious personnel[;] the Second Geneva Convention (GC II) regulates the detention or retention of medical and religious personnel of hospital ships[;] the Third Geneva Convention (GC III) is based on the long–standing custom that prisoners of war may be interned for the duration of active hostilities[; and,] . . . [t]he Fourth Geneva Convention (GC IV) specifies that a civilian may only be interned or placed in assigned residence if "the security of the Detaining Power makes it absolutely necessary" (Article 42) or, in occupied territory, for "imperative reasons of security" (Article 78).[74]

Under the rubric of international armed conflict, it is certain that "detention in accordance with GC III and IV does not violate the customary norm against arbitrary deprivation of liberty."[75] Additionally, AP I, a recognized legal instrument of international armed conflict, contemplates detention. For example, Article 75 of AP I states that "[p]ersons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict."[76]

However, as Part VII.B *infra* demonstrates, international human rights law is quite distinct from these interchangeable terms, and will be treated as such.

[73] ICRC STUDY VOL. I, *supra* note 3, at 344.

[74] *Id.* at 344–45.

[75] Chesney & Goldsmith, *supra* note 2, at 1090 n.55.

[76] AP I, *supra* note 10, art. 75. Interestingly, as the U.S. Department of State Legal Advisor, John Bellinger, III, notes: "[m]any would also argue that Article 75 of Additional Protocol I provides other relevant protections as customary international law

Although these international legal rules governing reasons "for which persons may be deprived of their liberty"[77] exist, they do not apply as a matter of law in every conflict. As stated above, these rules may not apply in the GWOT. For situations in which international armed conflict rules do not apply, U.N. Security Council Resolutions (UNSCRs) often form the legal basis for detaining individuals.[78] Naturally, UNSCRs do not always exist or explicitly cover detention in a given situation. This may result in conflicts not covered by either the law of international armed conflict or internationally-supported mandates such as UNSCRs. Thus, it remains extremely useful to determine whether the actual authority to detain itself constitutes CIL, thereby applying to all types of conflict regardless of how such conflicts are viewed or whether they are covered by UNSCRs.

B. Non-International Armed Conflict (NIAC)

In general, international law is less codified in non-international armed conflicts than in international armed conflicts.[79] For example, Common Article 3 provides the only Geneva Conventions-based guidance in NIACs.[80] Article 3, common to all four Geneva Conventions, prohibits acts such as torture, outrages upon personal dignity, and violence toward individuals detained in non-international (internal) armed conflict.[81] Also, Article 5 of AP II—a recognized legal instrument for non-international armed conflicts—lists provisions to be respected "with regard to persons deprived of their liberty for reasons related to [] armed conflict, whether they are interned or detained."[82] However, these rules only address treatment of detainees once in custody, vice the initial authority to detain. As Bellinger states, "we are

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in *non–international armed conflict*." Bellinger Lecture, *supra* note 1 (emphasis added). Perhaps this is because Article 75 outlines basic protections for when a person is in the power of a party to a conflict; these protections may be so basic that they would apply regardless of the characterization of the conflict.

[77] ICRC STUDY VOL. I, *supra* note 3, at 344.

[78] *See infra* notes 174, 195–98 and accompanying text.

[79] Perhaps states are unwilling to allow international laws to dictate conduct in internal armed conflict, given the infringement on states' sovereignty that would likely accompany such an outside legal intrusion.

[80] *See, e.g.*, GC III, *supra* note 20, art. 3.

[81] *See, e.g.*, *id*.

[82] AP II, *supra* note 11, art. 5. As described throughout this article, the "obligation[s] to protect persons deprived of their liberty" are customary as reflected in various provisions throughout Additional Protocol II. Henckaerts, *supra* note 18, at 12 n.19.

left in a situation where Common Article 3, and depending on a [s]tate's treaty obligations and the nature of the non-state actor, Additional Protocol II, provide the only treaty-based rules governing detention of [individuals]."[83] In many ways, "the application of [international humanitarian law] to non-international armed conflicts, and the conflict with al Qaida in particular, is often an exercise in analogical or in deductive reasoning."[84]

International humanitarian law (IHL) "is uniformly less restrictive in internal armed conflicts than in international armed conflicts."[85] For this reason, in general, "whatever is permitted in international armed conflict is permitted in non-international armed conflict. Hence, if IHL permits states to detain civilians in the former domain, IHL surely permits states to pursue those actions in the latter domain."[86] Moreover, despite the limited amount of legal guidance on detention in non-international armed conflicts, there are numerous examples of "state practice in the post-1949 era . . . in which international armed conflict-style detention frameworks have been used during [non-international armed conflict]."[87]

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[83] Bellinger Lecture, *supra* note 1.
[84] Goodman, *supra* note 30.
[85] *Id.*
[86] *Id.* (footnotes omitted).
[87] Chesney & Goldsmith, *supra* note 2, at 1086.

> The case studies reported by the Civil War Project established by the American Society of International Law in 1966 provide numerous examples [of international armed conflict-style detention frameworks being used during NIAC]. See Kathryn Boals, The Relevance of International Law to the Internal War in Yemen, in the International Law of Civil War 196 (Richard A. Falk, ed., 1971) (discussing the detention of prisoners by both France and the FLN); Arnold Fraleigh, The Algerian Revolution as a Case Study in International Law, in The International Law of Civil War, supra, at 315 (discussing the detention of prisoners in Yemen); Donald W. McNemar, The Postindependance War in the Congo, in The International Law of Civil War, supra, at 264 (discussing the detention of prisoners in the Congo); see also Allan Rosas, The Legal Status of Prisoners of War: A Study in International Humanitarian Law Applicable to Armed Conflicts 196 (1976) (observing that during the Nigerian Civil War (1967–1970) the "number of military prisoners seems to have amounted to several thousand").

Id. at 1086 n.29. See Part V.A.1 *infra* for a complete discussion of state practice under the 'authority to detain' rubric.

The most recent, and perhaps strongest, examples of legal support for the authority to detain individuals in the course of NIACs can be seen in two decisions by the U.S. District Court for the District of Columbia. These decisions, in the April 2009 case, *Gherebi v. Obama*,[88] and May 2009 case, *Hamlily v. Obama*,[89] provide that, "[a]t a minimum, . . . States engaged in non-international armed conflict can detain those who are 'part of' enemy armed groups."[90] For example, the *Hamlily* court "concludes that the authority claimed by the government to detain those who were 'part of . . . Taliban or al Qaida forces' is consistent with the law of war."[91] The *Gherebi* court adds that "Common Article 3 is not a suicide pact; it does not provide a free pass for the members of an enemy's armed forces to go to and fro as they please so long as, for example, shots are not fired, bombs are not exploded, and planes are not hijacked."[92] Although the questions presented in both of these recent federal district court cases involve the limits of the U.S. Government's ability to define membership of enemy organizations, both courts regard as fundamental a state's authority to detain in non-international armed conflict.[93]

IV. Bridging IACs & NIACs—Commander's Authority to Detain

Customary International Law has the ability to exist in various types of conflict, despite the fact that it is more developed in international than in non-international armed conflict. For example, "[p]ractice has [] filled important gaps in the regulation of internal conflicts parallel to those in Additional Protocol I [covering international armed conflicts], but applicable as customary law to non-international armed conflicts." [94] With this in mind, any distinction between the two types of conflict is

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[88] No. 04-1164, 2009 U.S. Dist. LEXIS 34649 (D.D.C. Apr. 22, 2009) (adopting the U.S. Government view that "the President has the authority to detain persons who were part of, or substantially supported, the Taliban or [al Qaida] forces . . . .").

[89] No. 05-0763, 2009 U.S. Dist. LEXIS 43249 (D.D.C. May 19, 2009) (mere support of hostilities not a valid ground for detention).

[90] *Id.* at *26.

[91] *Id.* at *28.

[92] 2009 U.S. Dist. LEXIS 34649, at *112.

[93] *Id.* at *93 ("detention is, as the plurality noted in *Hamdi*, 'a fundamental incident of waging war.'"). Although the *Hamdi* decision recognizes detention as a fundamental incident of waging war *in general*, as described *infra* in Part IV.A, the two recent D.C. District Court decisions are noteworthy in that they specifically regard detention *in NIAC* as fundamental.

[94] Henckaerts, *supra* note 18, at 10.

becoming increasingly irrelevant. As Jakob Kellenberger, President of the ICRC, observes, "State practice goes beyond what those same States have accepted at diplomatic conferences, since most of them agree that the essence of customary rules on the conduct of hostilities applies to *all* armed conflicts, international and non-international."[95] Since the majority of conflict today is of the non-international variety,[96] any near-universal rules must be capable of application in the state versus non-state, civil war, or otherwise internal (i.e. non-international) setting. Most importantly, any legal framework (and its accompanying rules) must recognize the reality of all types of conflict; namely, the commander's need to detain individuals who may pose a threat to his or her forces. It is this notion to which this article now turns.

A. Detention as "Fundamental and Accepted Tool of War"

Regardless of the characterization of a particular conflict, commanders require the tool of detention in order to effectively wage war. The detention of individuals, when employed lawfully, is recognized in both treaty law[97] and in case law. As the United States Supreme Court explained in the 2004 *Hamdi*[98] opinion, the detention of individuals until the cessation of hostilities, without charge or trial, is a "fundamental and accepted [tool of war designed to] prevent captured individuals from returning to the field of battle and taking up arms once again."[99] The Court went on to state, "[w]e understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict, and our

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[95] Kellenberger, *supra* note 48, at x.

[96] *See infra* Part IV.B (quoting Jean-Marie Henckaerts's assertion that the most endemic form of conflict today is of the internal, or non-international, variety).

[97] *See supra* Part II (discussing Geneva Conventions of 1949 and Additional Protocols of 1977).

[98] Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) (holding that "due process demands that that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."). In this case the Supreme Court also upheld "status-based detention until end of hostilities for U.S. citizen Taliban captured in Afghanistan." Chesney & Goldsmith, *supra* note 2, at 1121 n.205.

[99] Chesney & Goldsmith, *supra* note 2, at 1084 (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004)). Although "Hamdi had little direct impact because its holding was technically limited to U.S. citizens and the United States at the time detained only two U.S. citizens as enemy combatants." *Id.* at 1110. "Capturing and detaining enemy combatants is an inherent part of warfare." *Hamdi*, 542 U.S. at 515 (quoting Hamdi v. Rumsfeld, 316 F. 3d 450, 467 (4th Cir. 2003)).

understanding is based on longstanding law-of-war principles."[100] Courts also recognize the authority of the commander to intern civilians "as a protective measure"[101] and "place under guard all those who endanger the security of his forces."[102] Further examples of case law recognizing the lawful detention of individuals can be seen in the "decisions of national and international tribunals—including the International Criminal Tribunal for the former Yugoslavia and the Inter-American Human Rights Commission."[103]

Specific state practice reflecting detention of civilians as an accepted tool of waging war is best described by Ryan Goodman, Harvard Law Professor of Human Rights and Humanitarian Law. Professor Goodman observes,

> post-1949 U.S. practice in coalition and other military campaigns—including in Korea, Vietnam, Grenada, Panama, Iraq I, Somalia, Haiti, Bosnia and Herzegovina, Kosovo, and Iraq II—has essentially treated civilian detention as an incident of waging war. So has the practice of U.S. allies, enemies, and other states in historical and contemporary conflicts.[104]

Finally, as the International Human Rights Symposium declares:

> There is little question that a state involved in an "armed conflict" . . . is permitted to detain a variety of

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[100] Chesney & Goldsmith, *supra* note 2, at 1122 n.208 (quoting *Hamdi*, 542 U.S. at 519–21).

[101] Goodman, *supra* note 30 (quoting Coard v. United States, Case 10.951, Inter-Am. C.H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc.6 rev. ¶ 52 (1999)).

[102] *Id.* (quoting Leah Tsemel et al. v. Minister of Defense, HCJ 593/82 [1983], *reprinted in* 1 PALESTINE Y.B. INT'L L. 164, 171 (1984)).

[103] *Id.*

[104] *Id.* (citations omitted). Most recently, Article 78 of GC IV provided the basis for the United Nations Security Council Resolution (UNSCR) establishment of internment of civilians in Iraq, beginning in 2004. Panel Discussion, Chatham House International Law Discussion Group, *Treatment of Detainees in Iraq*, Sept. 28, 2006, http://www.chathamhouse.org.uk/files/3361_il280906.pdf. *See* S.C. Res. 1546, U.N. DOC. S/RES/1546 (June 8, 2004). U.N. Security Council Resolution 1546 authorized the Multi–National Forces in Iraq to "take all necessary measures to contribute to the maintenance of security and stability in Iraq[;] . . . [including] internment [when] necessary for imperative reasons of security." S.C. Res. 1546, ¶ 10, U.N. DOC. S/RES/1546 (June 8, 2004) (quoting letter from U.S. Sec'y of State, Colin Powell, annexed to the resolution).

> individuals, including combatants wearing the uniform of a party to the conflict, anyone who takes a "direct part in hostilities" (whether uniformed or not, military or civilian), and broadly, anyone who the detaining power believes is "absolutely necessary" to hold "for imperative reasons of security."[105]

It is instructive that the members of the International Human Rights Symposium admit that states, represented by their commanders on battlefields in armed conflict, require the tool of (lawful) detention as part of their warfighting capability. The simple rule of CIL suggested below[106] observes this authority, already recognized by the international community to be an inherent part of warfighting.

B. States' Desire to Hold Commanders Accountable, Regardless of Conflict Type

Although there may be significantly more CIL apparent in IAC than NIAC, the "divide between the law [in these two areas] . . . [on] the treatment of persons in the power of a party to the conflict [] has largely been bridged."[107] This is because, as the ICRC notes, "[states] have wanted the law to apply to non-international armed conflicts and they have wanted commanders to be responsible and accountable."[108] In this way, the commander's authority to detain, as described above, is constrained by the responsibility to behave lawfully. As ICRC Study author Jean-Marie Henckaerts states,

> the expectations of lawful behavior by parties to non-international armed conflicts have been raised to coincide very often with the standards applicable in international armed conflicts. This development, brought about by States, is to be welcomed as a significant improvement for the legal protection of victims of what is the most endemic form of armed conflict, non-international armed conflicts.[109]

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[105] *International Human Rights Symposium*, *supra* note 38, at 666 (quoting GC III, AP I, and GC IV, respectively).
[106] *See infra* Part V.D.
[107] Henckaerts's Response to U.S. Government's Response, *supra* note 49, at 965.
[108] *Id.*
[109] *Id.*

As a result of the ever-decreasing gap between IAC and NIAC, it is possible to describe one simple rule covering both types of conflicts, which can then be tested to determine whether the entire authority to (non-arbitrarily) detain rises to the level of CIL. Ultimately, recognition of the mutual desire of both states and commanders to detain individuals during armed conflict, along with the common threads described above, serve as the foundation on which the authority to detain can actually be viewed as rising to the level of CIL.

V. Testing Whether "Authority to Detain" Rises to the Level of CIL

This Part applies the authority to detain rule to the traditional CIL test. In each subsection, a portion of the test is described, with the corresponding aspect of the proposed rule applied to that portion of the test. More importantly, because an overwhelming number of international legal scholars contributed to the compilation of rules in the ICRC Study, underscoring the wide recognition of its legitimacy,[110] the tenets cited in the ICRC Study can also be applied to form an even more thorough test of the rule envisioned by this article.

A. Requirements for CIL

For a rule to rise to CIL, one must typically look for "unequivocal support for the rule, either in the form of [s]tate practice or of *opinio[] juris*."[111] However, as the ICRC Study recognizes,[112] two additional components of CIL analysis may further assist in ascertaining the degree to which the state practice and *opinio juris* prongs demonstrate unequivocal support for a given rule. The first additional component is the nature of the rule. Specifically, a rule can by nature be "prohibitive, obligatory or permissive."[113] This Part argues that the "authority to detain" rule is, by nature, permissive.[114] Permissive rules are easier to quantify and more capable of satisfying the "state practice" prong than prohibitive or obligatory rules. The second additional concept is the notion of "specially affected" states. With this notion, certain states'

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[110] *See supra* Part II.C.
[111] U.S. Government's Response, *supra* note 58, at 522.
[112] Henckaerts's Response to U.S. Government's Response, *supra* note 49, at 960–63.
[113] *Id.* at 960.
[114] *See infra* Part V.B.

practices can be weighted more heavily, adding to the overall "density"[115] of the practice and increasing the likelihood of satisfying the state practice prong of CIL analysis. This section describes the two traditional aspects of CIL—state practice and *opinio juris*—to ensure proper application of the two additional, ICRC-recognized aspects of CIL[116] in the subsequent section.

1. State Practice

States' consistent use of certain practices may satisfy the "state practice" prong of CIL analysis. It is important to note that "custom-generating practice has always consisted of actual acts of physical behavior and not of mere words, which are, at most, only promises of a certain conduct."[117] In addition, state practice has to be "sufficiently 'dense' to create a rule of [CIL], which means that it has to be virtually uniform, extensive, and representative."[118] As a definition, "to be virtually uniform means different states must not have engaged in substantially different conduct."[119] In practical terms, because even "training manuals, instructor handbooks and pocket cards for soldiers [can be considered to reflect] State practice,"[120] actions consistent with these materials are more important than the mere existence of the words on paper. Applying this article's rule to the test, as described above,[121] it can be seen that states routinely demonstrate a willingness to detain. This detention occurs even when individuals do not fall neatly into the definition of either a combatant or a civilian, and often without a UNSCR authorizing such detention.[122] States do not generally engage in substantially different conduct in the detention arena, which itself is characterized by physical behavior, and not mere words.[123]

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[115] *See infra* Part V.C.
[116] "Nature of the rule" and "specially affected states." *See infra* Parts V.B and V.C.
[117] U.S. Government Response, *supra* note 58, at 530 n.77 (quoting K. Wolfe, *Some Persistent Controversies Regarding Customary International Law*, 24 NETH. Y.B. INT'L L. 1 (1993)).
[118] Henckaerts, *supra* note 18, at 9.
[119] *Id.*
[120] Henckaerts's Response to U.S. Government's Response, *supra* note 49, at 964.
[121] *See supra* Part III.
[122] *See id.*
[123] *See supra* note 117 and accompanying text.

2. Opinio Juris

The second element of traditional CIL analysis is *opinio juris*, which "refers to the legal conviction that a particular practice is carried out 'as of right.'"[124] Interestingly, according to the ICRC, it may not be "necessary to demonstrate . . . the existence of an *opinio[] juris*"[125] when a sufficiently *dense* state practice exists. Specifically, the ICRC suggests that the same action can satisfy both the *opinio juris* and state practice prongs.[126] As applied to the rule suggested by this article, it is therefore possible to satisfy the "*opinio juris*" element of CIL rule-making by referring to the density of state practice in the area. Thus, simply by viewing the history and sufficiency of states engaging in detention of individuals in armed conflict, it is possible to satisfy the requirement that the practice be carried out as a legal obligation.

B. "Permissive Rules" in CIL

As described above, the ICRC identifies three types of rules in CIL—prohibitive, obligatory, and permissive. Prohibitive rules are those "supported not only by statements recalling the prohibition in question but also by abstention from the prohibited act."[127] For example, the CIL rule prohibiting the use of blinding laser weapons is supported by states abstaining from using such weapons.[128] Obligatory rules, naturally, "establish the existence of an obligation, for example, the rule that the wounded and sick must be cared for . . . ."[129] Finally, "[p]ermissive rules . . . are supported by acts that recognize the right to behave in a given way but that do not, however, require such behavior[.] This will typically take the form of States taking action in accordance with those rules, together with the absence of protests by other States."[130]

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[124] Henckaerts, *supra* note 18, at 9.
[125] *Id.* "It is usually not necessary to demonstrate separately the existence of an *opinio[] juris* because it is generally contained within a particularly dense practice." *Id.*
[126] The U.S. Government's Response disagrees with this notion, arguing that the two prongs should be assessed separately. *See* U.S. Government's Response, *supra* note 58, at 515.
[127] Henckaerts's Response to U.S. Government's Response, *supra* note 49, at 960.
[128] *Id.*
[129] ICRC STUDY VOL. I, *supra* note 3, at xl.
[130] Henckaerts's Response to U.S. Government's Response, *supra* note 49, at 960.

In the context of "authority to detain," we can apply the permissive rule concept, because detaining individuals logically is allowed, but not required. It is neither obligatory nor prohibitive for states to detain individuals. Clearly a state does not have an obligation to detain. Yet, it also cannot be prohibited from lawful detention; therefore, the rule cannot be prohibitive in nature. For example,

> it would be absurd to accept an interpretation of IHL that results in a state possessing the legal authority to purposefully kill Actor X but lacking the legal authority to detain Actor X. States would otherwise have a perverse incentive to kill individuals who pose a military threat if the alternative was to let them go free.[131]

For this reason, the rule described herein does not appear to be either obligatory or prohibitive in nature. Rather, states have the right to act in a given way (i.e., detain), but are not required to engage in that behavior (i.e., a state is not required to detain anyone). This suggests that, of the three possibilities, an authority to detain rule best fits a permissive construct. Appropriately constructed as a permissive rule, the "authority to detain" concept proposed by this article becomes increasingly recognizable as a rule of CIL.[132]

C. Specially Affected States

Next, it must be noted that the state practice prong will be weighted toward specially affected states in a given area. As ICRC Study author Henckaerts states, "[n]o precise number or percentage [of states practicing the rule] is required [for a rule to become CIL] because it is not simply a question of how many states participated in the practice, but also *which* states participate."[133] As a brief example, the ICRC Study declares a rule of CIL to prohibit "means and methods of warfare expected to cause widespread and severe damage to the environment[,] . . . notwithstanding objections in whole or in part by the United States, the United Kingdom, and France, which the [s]tudy considers 'specially–

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[131] Goodman, *supra* note 30 (footnote omitted).

[132] This article's proposed rule highlights a key point argued by Professor Ryan Goodman. Namely, if states have a right to kill an individual on the battlefield, they must implicitly have the right to a less coercive measure, such as the right to detain the same individual. *See id.*

[133] Henckaerts, *supra* note 18, at 9.

affected' with respect to possession of nuclear weapons."[134] This is because the practice of nations with the capacity to inflict such devastation on a significant portion of the environment—that is, nations with nuclear capability—must be weighed more heavily than the practice of those without such a capability.

In the U.S. Government's Response to the ICRC Study, however, the United States argues that the ICRC did not follow its own doctrine on the issue of specially affected states.[135] Although the U.S. diplomats allow that "[t]he study recognizes that the practice of specially affected States should weigh more heavily when assessing the density of State practice . . . [,]"[136] according to Bellinger and Haynes, in actuality,

> the Study tends to regard as equivalent the practice of States that have relatively little history of participation in armed conflict and the practice of States that have had a greater extent and depth of experience or that have otherwise had significant opportunities to develop a carefully considered military doctrine. The latter category of States, however, has typically contributed a significantly greater quantity and quality of practice.[137]

The U.S. Government's Response also argues that states are not simply "specially affected" only when the ICRC finds their practice to be relevant. Rather,

> specially affected States generate practice that *must* be examined in order to reach an informed conclusion regarding the status of a potential rule. As one member of the [ICRC] Study's Steering Committee has written, "The practice of 'specially affected states'—such as nuclear powers, other major military powers, and occupying and occupied states—which have a track record of statements, practice and policy, remains particularly telling."[138]

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[134] Balgamwalla, *supra* note 43, at 14.
[135] U.S. Government's Response, *supra* note 58, at 521.
[136] *Id.* (citing ICRC STUDY VOL. I, *supra* note 3, at xxxviii).
[137] *Id.* at 515.
[138] *Id.* at 517 n.3 (quoting Theodore Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 249 (1996)).

The ICRC adds: "it is clear that there are States that have contributed more practice than others because they have been 'specially affected' by armed conflict. Whether, as a result of this, their practice *counts more* than the practice of other States is a separate question."[139]

Regardless of whether the ICRC Study actually adhered to its authors' stated belief on the issue, all sides agree that the practices of specially affected states are extremely important in assessing the likelihood of a rule becoming CIL. In general terms, certain states are more experienced with armed conflict than others. For instance, "[b]ecause of its experience with armed conflict, the United States, in particular, has contributed a significant amount of practice to the formation of customary humanitarian law."[140] In the context of "authority to detain," this reality places certain states ahead of others in weighing their practices. For example, because the United States is clearly an experienced nation in terms of detention operations, its practices should carry more weight than those states which have little or no practice in the area. The U.S. Government's practice demonstrates a clear willingness to detain individuals during any type of armed conflict,[141] thereby bolstering the CIL claim that states have a right to detain.

D. Simplicity Requirement for Proposed Rule

A rule of CIL must be unequivocally supported.[142] Because of the need for near-universal agreement, and in order to avoid debate over terms and their meanings, such a rule must be simple. As ICRC Study author Jean-Marie Henckaerts notes, "[a]ny description of customary rules inevitably results in rules that in many respects are simpler than the detailed rules to be found in treaties."[143] A simply-stated rule also increases the likelihood of its application in both international and non–international armed conflict.[144] Conversely, an overbroad rule will be of little use. For these reasons, the simply-stated rule that *CIL authorizes*

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[139] Henckaerts's Response to U.S. Government's Response, *supra* note 49, at 963.
[140] *Id.*
[141] *See supra* Part III.
[142] *See supra* Part V.A.
[143] Henckaerts's Response to U.S. Government's Response, *supra* note 49, at 964.
[144] *See, e.g.*, *id.*, discussing access for humanitarian relief missions: "The problem lay in the formulation of a rule that would cover both international and non-international armed conflicts." *Id.*

the detention of individuals during armed conflict is highly effective in that it is understood easily, is not overbroad, and is applicable regardless of the characterization of the conflict.

VI. Unwritten CIL: The "Authority to Detain" Concept as a Logical Prerequisite to Established Principles of CIL[145]

As a further test of this article's proposed rule, it is helpful to analogize the rule to other established tenets of CIL. Expectedly, several aspects of detention law are already recognized as CIL.[146] Three of the most significant, clearly-established rules in this area include the requirement for humane treatment, the general prohibition against arbitrary detention, and the principle of non-refoulement.[147] Yet, the initial authority to detain—that is, the authority required as a predicate to the three significant rules—has previously not been recognized as CIL.[148] As this Part illustrates, however, the authority for non-arbitrary detention must logically exist in order for a state to accede to the three above-cited rules. This logical inference, along with the evidence provided throughout this article, underscores the assertion that the authority to detain actually constitutes CIL.

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[145] This is analogous to the well-known torts doctrine of Res Ipsa Loquitur, the Latin phrase meaning "the thing speaks for itself." BLACK'S LAW DICTIONARY 1311–12 (7th ed. 1999). The well-known torts doctrine can be applied here; specifically, if these recognized aspects of CIL—all three of which require an individual to be in detention before they can apply—exist, then logically the initial authority to (lawfully) detain can be presumed to exist as CIL.

[146] *See* ICRC STUDY VOL. I, *supra* note 3, at 428–51.

[147] *See infra* Part VII. In terms of the latter concept,

> *Non-refoulement* is a principle of international law that precludes states from returning a person to a place where he or she might be tortured or face persecution. The principle [is] codified in Article 33 of the 1951 Refugee Convention [and] . . . is part of international human rights law and international customary law. . . .

Aoife Duffy, *Expulsion to Face Torture? Non-Refoulement in International Law*, 20 INT'L J. OF REFUGEE L. 373 (2008), http://ijrl.oxfordjournals.org/cgi/content/abstract/20/3/373. The author argues that, although accepted as CIL, "the evidence that *non-refoulement* has acquired the status of a *jus cogens* norm is less than convincing." *Id*. *See* Geneva Convention Relating to the Status of Refugees art. 33, July 28, 1951, 189 U.N.T.S. 2545.

[148] *See supra* Part I.

A. Humane Treatment

The principle of humane treatment is recognized as CIL in the recent ICRC Study.[149] For example, Rule 118 of CIL, according to the ICRC, states that "[p]ersons deprived of their liberty must be provided with adequate food, water, clothing, shelter and medical attention."[150] Apart from the ICRC Study, Article 5 of AP II states that "[p]ersons . . . whose liberty has been restricted in any way whatsoever for reasons related to the armed conflict shall be treated humanely . . . ."[151] Additionally,

> [i]n its General Comment on Article 4 of the International Covenant on Civil and Political Rights [ICCPR], the UN Human Rights Committee declared Article 10, which requires that persons deprived of their liberty be treated with humanity and respect for the inherent dignity of the human person, to be non-derogable and therefore applicable at all times.[152]

Most importantly, "the great majority of the provisions of the Geneva Conventions of 1949, including [C]ommon Article 3, are considered to be customary law."[153] In particular, humane treatment principles are embodied throughout GC III and GC IV.[154] Related concepts, including but not limited to ICRC visits,[155] the safeguarding of detainees in a combat zone,[156] the segregation of both women and men[157] and children and adults,[158] and the requirement to respect religious practices,[159] can also be viewed under the rubric of humane treatment, according to the ICRC Study.[160] Finally, similar humane treatment concepts are found in countless other international legal instruments,

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[149] ICRC STUDY VOL. I, *supra* note 3, at 428–51.
[150] *Id.* at 428.
[151] AP II, *supra* note 11, art. 5.
[152] ICRC STUDY VOL. I, *supra* note 3, at 307.
[153] *Id.* at xxx. As the editors further state, "the same is true for the 1907 Hague Regulations. . . ." *Id*.
[154] *See, e.g.*, *id.* at 428–51.
[155] ICRC STUDY VOL. I, *supra* note 3, at 442.
[156] *Id.* at 435.
[157] *Id.* at 431.
[158] *Id.* at 433.
[159] *Id.* at 449.
[160] *Id.* at 428–51.

including the 1863 *Lieber Code*,[161] 1874 Brussels Declaration,[162] 1880 *Oxford Manual*,[163] 1948 American Declaration on the Rights and Duties of Man,[164] the 1987 European Prison Rules,[165] military manuals of different nations,[166] and various instruments of national legislation and case law,[167] to name a few widely, recognized sources of CIL.

B. Prohibition Against Arbitrary Detention

As with humane treatment, multiple ICRC-recognized rules of CIL can be found under the general prohibition against arbitrary detention.[168] Most obviously, Rule 99 states that "[a]rbitrary deprivation of liberty is prohibited. . . . State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts."[169] As the ICRC states, "both international humanitarian law and human rights law aim to prevent arbitrary detention by specifying the grounds for detention based on needs, in particular security needs, and by providing for certain conditions and procedures to prevent disappearance and to supervise the continued need for detention."[170] Further, "[t]he [International Covenant on Civil and Political Rights (ICCPR)] makes clear that detainees are entitled to, among other things, protection against 'arbitrary arrest or detention.'"[171] Additionally, "the ICRC's study of the customary law of war . . . does

[161] ICRC STUDY VOL. II, *supra* note 51, at 2009 (providing, in Article 76, that "prisoners of war shall . . . be treated with humanity").
[162] *Id.* (providing, in Article 23(2), that "POWs must be treated humanely").
[163] *Id.* (providing, in Article 63, that "POWs must be treated humanely").
[164] *Id.* (declaring, in Article XXV, that "every individual who has been deprived of his liberty has the right to . . . humane treatment during the time he is in custody").
[165] *Id.* (stating, in Rule 1, that "the deprivation of liberty shall be effected in material and moral conditions which ensure respect for human dignity and are in conformity with these rules").
[166] *Id.* at 2010–15 (discussing "national practice" in the humane treatment aspect of customary international law).
[167] *Id.* at 2015–16 (listing various states with penal code sections punishing inhumane acts against prisoners of war).
[168] Although arbitrary detention is prohibited, clearly non-arbitrary detention is not. *See supra* note 9 and accompanying text.
[169] ICRC STUDY VOL. I, *supra* note 3, at 344. For a thorough listing of state practice in this area, see ICRC STUDY VOL. II, *supra* note 51, at 2328–62.
[170] ICRC STUDY VOL. I, *supra* note 3, at 344.
[171] *International Human Rights Symposium*, *supra* note 38, at 671–72.

note that detention in accordance with GC III and IV does not violate the customary norm against arbitrary deprivation of liberty."[172]

Specifically in terms of non-international armed conflicts, "[t]he prohibition of arbitrary deprivation of liberty . . . is established by State practice in the form of military manuals, national legislation and official statements, as well as on the basis of international human rights law."[173] Relatedly, in the ICRC's exhaustive search of state practices in this area, "[n]o official contrary practice was found with respect to either international or non-international armed conflicts. Alleged cases of unlawful deprivation of liberty have been condemned. The U.N. Security Council, for example, has condemned 'arbitrary detention' in the conflicts in Bosnia and Herzegovina and Burundi."[174] It is apparent that, should a state choose to exercise its detention authority, it must simultaneously ensure that it does not become arbitrary in nature. Administrative reviews, trials, and other due process-type mechanisms may assist in the prevention of an arbitrary detention regime (although a full discussion of these topics is outside the scope of this article).[175]

C. Non-refoulement

Yet another example of established CIL can be seen in the concept of non-refoulement.[176] This concept is best articulated in the Convention Against Torture (CAT) and Article 45 of GC IV.

> Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) provides that no state shall expel, return ("refouler") or extradite a person to another state where there are substantial grounds for believing that he or she

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[172] Chesney & Goldsmith, *supra* note 2, at 1090 n.55 (citing ICRC STUDY VOL. I, *supra* note 3, at 344).
[173] ICRC STUDY VOL. I, *supra* note 3, at 347.
[174] *Id.* (citing UNSCRs 1019, 1034, and 1072).
[175] *See supra* note 8.
[176] The ICRC does not include the concept of non-refoulement in its study. For a detailed discussion of this omission, see Jamieson L. Greer, Comment, *A Critique of the ICRC's Customary Rules Concerning Displaced Persons: General Accuracy, Conflation, and a Missed Opportunity*, 3 HUM. RTS. L. COMMENTARY (2007), *available at* http://www.nottingham.ac.uk/shared/shared_hrlcpub/Greer.pdf (discussing ICRC's "omission of a customary rule relating to states' *non-refoulement* obligation in wartime").

> would be in danger of being subjected to torture. To make such determinations, the CAT requires states to examine all relevant factors, including a consistent pattern of gross or flagrant violations of human rights in the country in question.[177]

Similarly, this notion is captured in Article 45 of GC IV: "In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs."[178]

States consistently adhere to the principle of non-refoulement despite the serious logistical issues associated with such adherence during times of conflict. For example, the prohibition against returning individuals to countries where the sending state believes they may be tortured presents significant challenges in the GWOT context.[179] As John Bellinger, Legal Advisor to the U.S. Secretary of State, explained in a recent lecture at Oxford, "[t]his problem grows in magnitude when the detainees we wish to repatriate express fears of mistreatment or persecution upon return."[180] Bellinger further states:

> In the current conflict with al Qaida, the United States has . . . establish[ed] the firm policy not to turn over detainees where it is more likely than not they will be tortured. This policy, central as it is to Western values, has meant that dozens of detainees who cannot be repatriated, such as the Uighurs to China, have remained at Guantanamo for years after we have wished to transfer them.[181]

The strict adherence to non-refoulement, along with the principles of humane treatment and prohibition against arbitrary detention, is

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[177] Human Rights Watch, Briefing to the 60th Session of the U.N. Comm'n on Human Rights (Jan. 28, 2004), *available at* http://www.hrw.org/en/news/2004/01/28/torture-and-non-refoulement. In its briefing, Human Rights Watch "questions the legal sufficiency of diplomatic assurances [that receiving countries will not torture suspects after they are transferred], particularly in cases where the receiving government engages in widespread or systematic torture." *Id*.

[178] GC IV, *supra* note 22, art. 45.

[179] Bellinger Lecture, *supra* note 1.

[180] *Id.*

[181] *Id.*

consistently practiced by states in spite of the clear logistical challenges related to each requirement. As a result of states' consistent adherence to these principles, this article's rule gains further credence as a reflection of CIL.

D. "The Thing Speaks For Itself"[182]

In spite of its searching inquiry in 2005, the ICRC acknowledges "that the formation of customary international law is an ongoing process."[183] As suggested throughout this article, "it cannot be concluded that any particular treaty rule is *not* customary merely because it does not appear as such in this study."[184] This characterization of the inexact nature of CIL, especially by the ICRC and all of the attendant international law experts providing input to the ICRC Study, supports the existence of the initial authority to detain. Nevertheless, in spite of the ICRC's admission, more than an application of the logical paradigm described in this Part is required for a rule to become CIL.[185]

It is important to note that policy considerations reflected in existing detention regimes[186] must be separated from a pure analysis of legal framework to determine whether the authority to detain constitutes CIL. The above discussion does not consider the impact of policy. Instead,

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[182] BLACK'S LAW DICTIONARY 1311–12 (7th ed. 1999) (definition of *res ipsa loquitur*).
[183] Kellenberger, *supra* note 48, at xi; *see also* Greer, *supra* note 176 ("[C]ustomary law is inherently vague because it is not the product of deliberate processes but rather is the sum of many parts.").
[184] ICRC STUDY VOL. I, *supra* note 3, at xxx.
[185] In particular, the analysis under the paradigm described here necessarily requires a consistent reference point. One must apply all three established principles discussed in this Part—humane treatment, the prohibition against arbitrary detention, and non-refoulement—to the same type of individual before asserting the logical 'authority to detain' predicate. This 'individual' will be either a combatant (GC III), a civilian (GC IV), or the transnational terrorist contemplated elsewhere in this article. In order for this paradigm to be accurate—for example, to conclude that the authority to detain transnational terrorists constitutes CIL—the requirement to humanely treat, not arbitrarily detain, and not "refoul" even transnational terrorists must also rise to the level of CIL. Thankfully, it does. *See* discussion *infra* Part VI. In this way, the logic of this section is sound and significantly bolsters the overall argument of this article; namely, that the authority to detain exists in CIL. In other words, the three principles of CIL described in this Part do not necessarily have to be CIL for the overall argument of this article to succeed. For example, these three principles could be based solely on treaty law without derailing the overall argument that the authority to detain is CIL. Nevertheless, it helps our understanding for these aspects of law to be firmly entrenched as CIL.
[186] *See supra* note 8.

when viewed through a paradigm for authority to detain as CIL, established international law concepts such as the inherent authority of commanders "to incapacitate [individuals] in order to prevent future harm in battle . . . ."[187] can ultimately be reflected in a simple, workable rule of CIL. When viewed through the lens of established concepts such as the preventive nature of detention[188] and the inherent authority of the commander, the paradigm described here becomes most useful.

VII. Counterarguments

As with any proposed rule, there will not be instant, unchallenged acceptance of this article's thesis. For example, the protections outlined in Part VI *supra*, (humane treatment, prohibition against arbitrary detention, and the principle of non-refoulement), may not necessarily indicate universal acceptance for the authority to detain. One could argue that these protections exist because the international community knows that states will engage in *unlawful* detentions. Of course, this article is premised on the notion of only lawful authority to detain rising to the level of CIL.[189] Thus, if a state is willing to engage in unlawful detention, then rules describing lawful acts—regardless of whether the rules involve authority to detain or standards of treatment during detention—are unlikely to deter it. Furthermore, as Henckaerts states, "[w]hen there is overwhelming evidence of state practice in support of a rule, alongside repeated evidence of violations of that rule, such violations do not challenge the existence of the rule in question."[190]

Jack Goldsmith and Bobby Chesney, both of whom are recognized detention law scholars, articulate another counterargument to the proposed rule: "it would be difficult to show that any particular set of procedures used in actual [detention law] practice reflects [*opinio juris*] rather than practical or political expediency."[191] The ICRC appears to

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[187] Chesney & Goldsmith, *supra* note 2, at 1082 (citing Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004)). Although, as the authors make clear, this incapacitation "in no way implies condemnation of those detained." *Id*.

[188] *Id.* at 1093 ("[t]he detention framework under the laws of war has always been oriented toward prevention.").

[189] *See supra* note 8.

[190] Henckaerts, *supra* note 18, at 9.

[191] Chesney & Goldsmith, *supra* note 2, at 1092. Discussing various models offering procedural safeguards in the detention arena, the authors state "[t]he variability of these frameworks . . . belies any claim that a specific set of procedural safeguards is mandated by the customary laws of war." *Id.*

agree with this assessment, arguing that the international community can never be certain of the motivations of a state in taking certain actions.[192] However, as described in Part V.A.2, according to the ICRC the same state action may satisfy both the "state practice" and "*opinio juris*" prongs of the CIL analysis. Thus, it might not be necessary to observe separate proof, apart from its practice, of a state's belief that it has a legal obligation to act a certain way. For this reason, a state's motivations, whether based on political expediency or other factors, may hold little weight in the overall analysis of whether this article's proposed rule rises to CIL.

Another argument against the rule proposed in this article is perhaps the most obvious: If the authority to detain during armed conflict is CIL, the ICRC would have included it in its study. But, the ICRC acknowledges that rules not included in its study may nevertheless constitute CIL. As described in Part II.C, Henckaerts acknowledges that the ICRC Study is merely the beginning of the "dialogue"[193] necessary to further the development of CIL. By recognizing that other rules may constitute CIL, the ICRC tacitly acknowledges the possibility that the authority to detain may rise to CIL.

Notwithstanding the above challenges to this article's thesis, two significant aspects of international law provide the most compelling counterarguments to the rule envisioned by this article. The first of these disputes considers a state's authority to detain as inherent within its power of self-defense, rather than as a permissive rule of CIL. The second disagreement focuses on whether an application of human rights law is more appropriate than a pure international humanitarian law view of a state's authority to detain.

A. Detention as Inherent in States' Power of Self-Defense

A counterargument to this article's proposed rule characterizes a state's power to detain as inherent in its authority of self-defense. For example, the U.S. Government has expressed a view that detention is

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[192] *See, e.g.*, Henckaerts's Response to U.S. Government's Response, *supra* note 49, at 963 ("[I]t can never be proven that a [s]tate votes in favour of a resolution condemning acts of sexual violence, for example, because it believes this to reflect a rule of law or as a policy decision (and it could be both).").

[193] *See supra* Part II.C.

inherent within the power of self-defense. As President George W. Bush stated in his November 2001 Military Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, "[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained . . . ."[194] Also, the NATO-led International Security Assistance Force (ISAF) mission, which includes the United States, derives authority from UNSCR 1386[195] and, most recently, UNSCR 1833,[196] as a basis for operating in Afghanistan. These UNSCRs authorize member states "participating in the International Security Assistance Force to take all necessary measures to fulfil its mandate."[197] Although not explicitly authorizing detention, this statement—worded exactly the same in both UNSCRs—can be viewed as authorizing the detention of individuals constituting a threat to the security of ISAF forces.[198]

While it is clear that self-defense can form the basis for the authority to detain individuals in conflict, this does not preclude CIL from

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[194] Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, §§ 2(a)(1) & (2) (Nov. 16, 2001). This statement defines

> (a) The term "individual subject to this order [to] mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:
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> (1) there is reason to believe that such individual, at the relevant times,
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> (i) is or was a member of the organization known as al Qaida;
>
> (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
>
> (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and
>
> (2) it is in the interest of the United States that such individual be subject to this order.

Id.

[195] S.C. Res. 1386, U.N. DOC. S/RES/1386 (Dec. 20, 2001).

[196] S.C. Res. 1833, U.N. DOC. S/RES/1833 (Sept. 22, 2008).

[197] S.C. Res. 1386, *supra* note 195, ¶ 13(3); S.C. Res. 1833, *supra* note 196, ¶ 24(2).

[198] S.C. Res. 1386, *supra* note 195, ¶ 11.

providing similar authority. Customary international law is most useful in assisting in the interpretation of other legal instruments. As ICRC President Jakob Kellenberger states, "[CIL] can help in the interpretation of . . . law."[199] Thus, CIL can assist in interpreting actions undertaken by states in self-defense. This article's rule can therefore be seen as amplifying the discussion of authority in a given area. The rule, as with other tenets of CIL, need not exist in place of certain authority such as the self-defense bases described above. Rather, a rule of CIL such as the one contemplated by this article can be relied upon to not only fill legal gaps (described elsewhere in this article) but also to assist in interpreting the self-defense authority, such as the U.S. Government's GWOT view and the United Nations' ISAF mandate, described above.

B. Application of Human Rights Law

Support also exists to suggest that human rights (HR) law comprises the most relevant body of law in the detention arena.[200] At a minimum, as Professor Goodman points out, "state actions during wartime constitute relevant practice for customary international law of both IHL and human rights law."[201] Additionally, "[b]oth U.S. and international courts have agreed that international human rights law . . . appl[ies] in situations of armed conflict."[202] Issues involving the length of detention can also be viewed under the heading of HR law, despite the GC III declaration that POWs be "released and repatriated without delay after the cessation of active hostilities."[203]

However, HR Law does not take precedence over international humanitarian law. As the U.S. Government states, "[i]t is humanitarian

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[199] ICRC STUDY VOL. I, *supra* note 3, at x.

[200] "Some have [even] argued that the laws of war are silent on the question of military detention during [non-international armed conflict], permitting states to employ military detention in that context insofar as domestic legal authorities so provide (subject to international human rights law norms governing detention)." Chesney & Goldsmith, *supra* note 2, at 1085 n.25.

[201] Goodman, *supra* note 30.

[202] *International Human Rights Symposium*, *supra* note 38, at 671 n.26.

[203] GC III, *supra* note 20, art. 118. An interesting viewpoint, outside of the scope of this article, might suggest that commanders themselves merely want individuals removed from the battlefield for a temporary period of time—perhaps as short as twenty-four hours—in order for them to accomplish the mission in their particular battlespace. In other words, commanders might not argue for long-term detention but do not necessarily have the choice once an individual is detained.

law, and not human rights law, that governs the capture and detention of [individuals] in armed conflict."[204] Likewise, "the U.S. State Department has taken the position that IHL, and not international human rights law, governs its current operations against 'al Qaida, the Taliban, and their supporters.'"[205] This is because the generic HR law is superseded by the particularized body of international humanitarian law applicable in armed conflict. As the U.S. Government states, "human rights law, to the extent it is applicable during armed conflict, must be interpreted in the light of relevant *lex specialis* as set forth in the body of humanitarian law."[206]

Human Rights law establishes certain minimum standards below which states must not fall in the detention arena. For example, "a party to a conflict that is unable or unwilling to respect the strictures of Common Article 3 with regard to conditions of confinement has no authority to detain."[207] Further, clearly "IHL requires a specific determination that each civilian who is detained poses a threat to the security of the state."[208] Otherwise, such detention would be arbitrary.[209] However, it is clear that "even international human rights law—which one might expect to apply a heightened level of rights protection—does not foreclose the preventive detention of civilians under certain circumstances."[210] In addressing the concerns over duration of detention, the U.S. Government's view is that "the detainees are being held in an armed conflict that is ongoing."[211] Because of this, "the *lex specialis* would be international humanitarian law because the detainees were captured in the context of an ongoing armed conflict."[212] While HR law can and must be observed to the extent that it establishes minimum standards for the detention of individuals, it does not trump the IHL authority described, and supplemented by the rule of CIL, throughout this article.

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[204] Precautionary Measures Response, *supra* note 9, at 1021.
[205] *International Human Rights Symposium*, *supra* note 38, at 671 n.26 (quoting United States Responses to Selected Recommendations of the Human Rights Committee (Oct. 10, 2007), http://www.state.gov/documents/organization/100845.pdf).
[206] Precautionary Measures Response, *supra* note 9, at 1021.
[207] Goodman, *supra* note 30.
[208] *Id.* (citing ICRC Commentary to Article 42 of GC IV, *supra* note 22).
[209] *See supra* Part VI.B.
[210] Goodman, *supra* note 30.
[211] Precautionary Measures Response, *supra* note 9, at 1021.
[212] *Id.* at 1022.

VIII. Conclusion

Although the concepts of "detention authority" and "treatment during detention" seem inextricably linked,[213] they are not traditionally viewed as such in the field of CIL. The former is not typically included in the field of CIL, while the latter, encompassing concepts such as humane treatment, the prohibition against arbitrary detention, and non-refoulement, is well-known to constitute CIL. Yet, there are instances in which individuals must be detained absent authority under GC III, GC IV, or UNSCR language. Self-defense may provide the authority in a given regime, as in the ISAF example, but CIL is both broader and more helpful in providing the overall legal authority to detain. Above all, CIL assists in interpreting actions undertaken by states, regardless of whether such actions are based in treaty law, self-defense, or any other type of basis on which the state relies.

When the "permissive rule" and "specially affected states" concepts[214] are applied in addition to the required prongs of "state practice" and "*opinio juris*," the authority to detain can be seen as rising to the level of CIL. This is particularly true when the authority to detain is further viewed as a logical predicate ("unwritten rule")[215] to the other written rules regarding treatment of detainees. As states retain the fundamental and accepted[216] tool of detention regardless of the type of conflict in which they find themselves, the gap in detention law between international and non-international armed conflict begins to close. Finally, after applying the same principles used by the ICRC in its groundbreaking study[217] to the "authority to detain" paradigm, a simple, yet workable, rule emerges. As with all aspects of CIL, this rule—that the authority to detain, regardless of the type of conflict in which the detention occurs, is CIL—actually closes the remaining gap in detention law coverage.

The closing of the gap between the Third and Fourth Geneva Conventions[218] is particularly important with the GWOT and future conflicts seemingly shifting away from the classic international armed conflict model. Not only are rules of CIL "binding on all states

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[213] *See* discussion *supra* Part VI.
[214] *See supra* Part V.
[215] *See supra* Part VI.
[216] *See supra* Part IV.A.
[217] *See supra* Part II.C.
[218] *See supra* Part II.A.

regardless of the ratification status of treaties,"[219] but also "in the case of those rules applicable to all parties in non-international armed conflicts, [the same rules are binding] *on armed opposition groups* as well."[220] This application of CIL to stateless individuals, such as transnational terrorists, is critical. Because "[c]hallenging work will follow, not only for U.S. Government lawyers, but for all who are tasked to articulate what the current law of war is and how to apply it[,]"[221] the simple rule envisioned by this article seeks to advance in a meaningful way the "ongoing dialogue"[222] critical to further the development of CIL.

Ultimately, a rule describing the initial authority to detain further develops CIL and, more importantly, assists in the efforts to resolve the "central legal challenge" of present-day armed conflict—namely, the "legitimate incapacitation of uniformless terrorists" not contemplated by the Geneva Conventions.[223]

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[219] Henckaerts, *supra* note 18, at 11.

[220] *Id.* (emphasis added); *see also* Balgamwalla, *supra* note 43, at 16 (citing remarks of Professor Jordan Paust, Law Foundation Professor at the University of Houston Law Center, Sept. 28, 2005) ("[b]ecause [CIL] applies to individuals, non-states, and belligerent entities . . . [in other words,] its provisions also apply to stateless insurgents and binds them . . . .").

[221] Mandsager, *Introductory Note of U.S. Government's Response*, *supra* note 46, at 512.

[222] Henckaerts's Response to U.S. Government's Response, *supra* note 49, at 966.

[223] Chesney & Goldsmith, *supra* note 2, at 1081.

SOVEREIGNTY, MEET GLOBALIZATION: USING PUBLIC-PRIVATE PARTNERSHIPS TO PROMOTE THE RULE OF LAW IN A COMPLEX WORLD

MAJOR CHRISTOPHER E. MARTIN*

The international system—as constructed following the Second World War—will be almost unrecognizable by 2025 owing to the rise of emerging powers, a globalizing economy, an historic transfer of relative wealth and economic power from West to East, and the growing influence of nonstate actors.[1]

I. Introduction

For hundreds of years, nation-states enjoyed a unique legal status as sovereign actors on the international scene.[2] The post-World War II formation of the United Nations, followed by the rise of U.S. hegemony after the Cold War, solidified nation-states' positions as the primary actors in world affairs.[3] But the emerging trends toward multi-polarity and disaggregation, where power is distributed more broadly among nation-states, international organizations,[4] and non-state actors, cause

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[1] NAT'L INTELLIGENCE COUNCIL, GLOBAL TRENDS 2025: A WORLD TRANSFORMED, at vi (2008) [hereinafter GLOBAL TRENDS 2025].

[2] Jessica T. Matthews, *Power Shift*, FOREIGN AFF., Jan.–Feb. 1997, at 50.

[3] ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 9 (2004).

[4] This article uses the phrase "international organizations" to refer specifically to organizations created under traditional international law instruments, such as treaties. As for (legitimate) non-state actors, many commentators recognize two broad categories: "experts," and "enthusiasts." Or, put another way, those driven by "profits" (such as multinational corporations), and those driven by "passions" (such as human rights

many observers to question the old assumption that states hold a monopoly over the power to shape international events.[5]

In light of these emerging power shifts,[6] nation-states need new tools and strategies for managing their global relationships and exerting influence. United States security strategy is no exception.[7] The ongoing struggles in Iraq and Afghanistan demonstrate that overwhelming military force cannot by itself guarantee security and stability in the emerging world order.[8] Other U.S. and non-U.S. entities, including international organizations and non-state actors, have real stakes in building, or destroying, the needed political, economic, and social stability in post-conflict environments.[9]

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organizations and other non-governmental organizations). *Id.* at 9 (quoting Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, 8 IND. J. OF GLOBAL LEGAL STUD. 369, 369 (2001)).

[5] As one analyst notes, "[T]he multipolar movement has arrived ahead of schedule." A. Wess Mitchell, Op-Ed., *Obama's Multipolar Moment,* L.A. TIMES, Nov. 23, 2008, at C1; *see also* Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept.–Oct. 1997, at 183. Some scholars, although they are in the minority view, even portend the end of the sovereign state system altogether. *See, e.g.*, Eric A. Engle, *The Transformation of the International Legal System: The Post-Westphalian Legal Order*, 23 QUINNIPIAC L. REV. 23, 23 (2004) ("The rise of private rights and duties under international law enforced through universal jurisdiction and supranational trading systems both global and regional mark the end of the Westphalian state system.").

[6] There remains considerable debate about the extent of the power shifts described in the opening to this article, as well as how power is exerted on an international scale. *See, e.g.*, David Kennedy, *The Mystery of Global Governance*, 34 OHIO N.U. L. REV. 827, 827 (2008) ("Global governance remains a mystery because so much about global society itself eludes our grasp. . . . How is public power exercised, where are the levers, who are the authorities, how do they relate to one another?").

[7] *See, e.g.*, Shawn Brimley, *Crafting Strategy in an Age of Transition*, PARAMETERS, Winter 2008–09, at 27, 32 ("The ongoing shift to a multipolar world characterized by increasingly powerful state and nonstate actors is already impacting the operational environment for America's joint force. Beyond . . . sustainable stability in both Iraq and Afghanistan, the broader operational challenges associated with likely twenty-first century threats are as daunting as the strategic inheritance.").

[8] As one author notes, "In recent years, many observers have concluded that the United States excels at winning wars, but has failed to develop interagency capabilities to win the peace." Colonel David W. Shin, *Narrowing the Gap: DOD and Stability Operations*, MIL. REV., Mar.–Apr. 2009, at 23, 23. *See also* Mick Ryan, *The Military and Reconstruction Operations*, PARAMETERS, Winter 2007–08, at 58, 58 ("The post-Cold War trend of convergence between military and nonmilitary tasks has accelerated over the past six years as western nations seek to defeat the insurgencies in Afghanistan and Iraq. One result . . . is an increased role for military forces in . . . humanitarian missions previously viewed as the sole preserve of nongovernmental organizations.").

[9] As U.S. Defense Secretary Robert M. Gates remarked in 2007:

This unruly, unpredictable world order poses new challenges to domestic and international efforts to build rules-based frameworks for managing the rights, responsibilities, and interrelationships of individuals and institutions—what could be termed the "rule of law."[10] However, at just the time that more rule of law is needed at every societal level to address these complex international relationships,[11] rule of law practice, as it is traditionally understood, seems to be scattered in every direction with major players forging their own ways through their own programs with little coordination.[12]

> One of the most important lessons of the wars in Iraq and Afghanistan is that military success is not sufficient to win: economic development, institution-building and the rule of law, promoting internal reconciliation, good governance, providing basic services to the people, training and equipping indigenous military and police forces, strategic communications, and more—these, along with security, are essential ingredients for long-term success.

Sec'y of Def. Robert M. Gates, Remarks at the Landon Lecture, Kansas State Univ. (Nov. 26, 2007) (available at http://www.defenselink.mil/speeches/speech.aspx?speechid =1199).

[10] Anne-Marie Slaughter calls this twenty-first century governance problem the "globalization paradox." SLAUGHTER, *supra* note 3, at 8. A complicated, disaggregated world actually *needs* more government on a regional and global scale, but groups ranging from individual states to multi-national corporations (MNCs) generally resist the "centralization of decision-making power and coercive authority so far from the people to be actually governed." *Id.*

[11] As co-authors Ashraf Ghani and Clare Lockhart note in the opening to their important book:

> We have a collective problem: Forty to sixty states, home to nearly two billion people, are either sliding backward and teetering on the brink of implosion or have already collapsed. While one half of the globe has created an almost seamless web of political, financial and technological connections that underpin democratic states and market-based economies, the other half is blocked from political stability and participation in global wealth.

ASHRAF GHANI & CLARE LOCKHART, FIXING FAILED STATES: A FRAMEWORK FOR REBUILDING A FRACTURED WORLD 3 (2008). They go on to note: "A glaring gap–what we call the sovereignty gap–exists between the de jure sovereignty that the international system affords such states and their de facto capabilities to serve their populations and act as responsible members of the international community." *Id.* at 3–4. The authors call for a "citizen-based" approach to rebuilding states and the rule of law, "[A] new legal compact between citizen, state and the market, not a top-down imposition of the state." *Id.* at 7.

[12] For one example of scholarship addressing the disparate approaches to rule of law practice, see Randy Peerenboom, *The Challenge of Rule of Law: Challenges and Prospects for the Field*, 1 HAGUE J. RULE OF L. 5 (2009), http://journals.cambridge.org

As with other global issues, the challenges arising from the spontaneous unfolding of globalization have left the rule of law without a "coherent frame of reference."[13] From a macro-view, rule of law efforts worldwide are scarred by a lack of coordination,[14] lack of local ownership,[15] and a perceived inability to demonstrate tangible results.[16] Many rule of law practitioners have failed to ask the hard questions about whether these programs are actually effective in the long run.[17] Worst of all, though the major international players[18]—states, international organizations, and non-state actors—are involved in rule of law efforts, none of these entities seems able to comprehensively define the rule of law or agree on how to achieve it.[19]

The rising challenges of the twenty-first century will require new ways of looking at the rule of law. The blurring of public and private authority and the resulting need for closer public-private cooperation, for example, may portend some previously unlikely rule of law partnerships.

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[13] GHANI & LOCKHART, *supra* note 11, at 10.

[14] Using the huge bureaucracy of aid to Afghanistan as an example, Ghani and Lockhart note: "The thousands of projects, each with their own rules, procedures, and requirements, fragment the rule of law." *Id.* at 100.

[15] *See* Wade Channell, *Lessons not Learned About Legal Reform* (2005), *reprinted in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 139 (Thomas Carothers ed., 2006). Channell decries the "hasty transplant syndrome," where outside advisors plug in quick, externally-developed laws or legal solutions to local problems as a "critical problem in legal reform assistance." *Id.* at 139–40.

[16] As the authors Jane Stromseth, David Wippman, and Rosa Brooks lament, after detailing a brief history of interventions ranging from Haiti to Kosovo to Iraq and Afghanistan, "With so much consensus on the value of building the rule of law in troubled societies, why have rule of law promotion efforts been so disappointing?" JANE STROMSETH ET AL., CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 62–68 (2006).

[17] Thomas Carothers, *The Problem of Knowledge* (2003), *reprinted in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 16 (Thomas Carothers ed., 2006).

[18] This article uses the term "major players" as a shorthand reference to the major spheres of influence in a multi-polar, disaggregated world: nation-states, international organizations, and non-state actors such as nongovernmental organizations (NGOs) and multi-national corporations. This shorthand is not meant to oversimplify the complex interrelationships at play in this globalized context, but rather to serve as a useful point of reference for the discussions in this article.

[19] Rachel Kleinfeld, *Competing Definitions of the Rule of Law* (2005), *reprinted in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 32 (Thomas Carothers ed., 2006) ("Read any set of articles discussing the rule of law, and the concept emerges looking like the proverbial blind man's elephant—a trunk to one person, a tail to another."). *Id.*

Public-private partnerships (PPPs), when permitted to flourish with voluntary participation and clear intentions, can effectively provide rule of law solutions where government efforts alone would otherwise fail. This article suggests that one type of unlikely partnership, PPPs between nation-states and private entities such as multi-national corporations (MNCs), is emblematic of the new approaches needed for rule of efforts in the twenty-first century. On one hand, MNCs are widely present and hugely influential on the international scene, with a reach that exceeds sometimes even that of states.[20] On the other hand, MNCs are underappreciated and underutilized rule of law players, as very few rule of law scholars or practitioners have accounted for their significant influence. If states and MNCs can successfully partner to promote the rule of law, these successes may provide models for other types of rule of law partnerships, including in post-conflict military operations.

Part II of this article delves into the unfinished challenges of Iraq and Afghanistan to demonstrate why PPPs can and should be a part of post-conflict stability operations. Part III lays a conceptual foundation for PPPs by expanding on the challenges inherent in promoting the rule of law in the current world order. It then devotes considerable time to exploring the different ways that the major players define the rule of law. Even when addressed from a practical bent, a widely-accepted framework for understanding the rule of law is the minimum normative umbrella for any meaningful rule of law progress on an international scale. As this article suggests, networks[21] of PPPs could then help apply such a framework to particular rule of law projects or challenges. Part IV discusses practical theories on how to leverage the major rule of law players, in particular states and MNCs, to achieve cooperative rule of law progress. It delves both into the "soft power" increasingly utilized by MNCs, as well as the use of incentives for MNCs to partner in rule of law operations. By viewing MNCs as strategic actors, this article considers *why* MNCs, as well as any other actor, should care about the

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[20] According to a report released by the United Nations (U.N.) Conference on Trade and Development in 2002, twenty-nine of the world's largest one hundred largest economies entities were transnational corporations, as opposed to nation-states. Press Release, U.N. Conf. on Trade & Dev., Are Transnationals Bigger than Countries? U.N. DOC. TAD/INF/PR/47 (Dec. 8, 2002), *available at* http://www.unctad.org/Templates/webflyer.asp?docid=2426&intItemID=2079&lang=1 [hereinafter UNCTD Press Release].

[21] In the international relations field, "networks" refer to the groups of both state and non-state actors that converge through overlapping interests and objectives to resolve a particular issue. *See* Anne-Marie Slaughter, *America's Edge: Power in the Networked Century*, FOREIGN AFF., Jan.–Feb. 2009, at 94, 95.

rule of law. Part V analyzes practical examples of ongoing efforts, through various forms of PPPs, to promote the rule of law. Finally, Part VI briefly examines potential criticisms of PPPs, and makes a reasoned plea for further inquiry into the use of PPPs to promote the rule of law.

II. Post-Conflict Rule of Law: Opportunities and Shortcomings

If recent history is a reliable guide, then the United States will likely find itself involved in humanitarian and other military interventions for the foreseeable future.[22] Post-conflict societies often present some of the most compelling rule of law challenges, as efforts in Iraq and Afghanistan illustrate. After years of rule of law projects in both countries, unequivocal successes are still hard to find. Both interventions demonstrate that sheer volume of effort cannot substitute for unity of effort, or at least unity of purpose. These interventions help illustrate why a networked approach to rule of law efforts is especially important to achieving lasting progress in post-conflict environments.

A. Contractors in Iraq: A Missed Rule of Law Opportunity

The U.S. military already relies on a massive PPP of sorts to support its operations in Iraq: civilian contractors.[23] Deployed civilian contractors are likely to play a key role in any future U.S. military intervention, however infrequent one may hope that these interventions will be.[24] The sheer volume and extent of involvement by U.S. Government contractors in nearly every aspect of Iraq operations, military and non-military, should indicate that their operations will impact the rule of law. Civilian contractors' reach in Iraq goes far

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[22] *See* Ivo Daalder & Robert Kagan, Op.-Ed., *The Next Intervention*, WASH. POST, Aug. 6, 2007 at A17 (explaining that "Between 1989 and 2001, Americans intervened with significant military force on eight occasions—once every 18 months.").

[23] At the height of Iraq stability operations in December 2006, for example, the United States had an estimated 100,000 civilian contractors in Iraq, not including sub-contractors. Marc Lindemann, *Civilian Contractors Under Military Law*, PARAMETERS, Autumn 2007, at 83, 85.

[24] FRANK CAMM & VICTORIA A. GREENFIELD, HOW SHOULD THE ARMY USE CONTRACTORS ON THE BATTLEFIELD?, at xv (2005). Military contractors are, in fact, not only a U.S.-centric phenomenon; any military force involved in humanitarian interventions in the future is also likely to have large contingents of military contractors. *See, e.g.*, John Rossant, *Military Contractors: On the Defensive*, BUS. WK. ONLINE, Feb. 3, 2003, http://www.businessweek.com/magazine/content/03_05/b3818171.htm.

beyond a mere contractual relationship; they represent, at least in the eyes of some observers, "an unholy merger of two hated institutions: capitalism and warfare."[25] In the midst of concerted efforts to "win hearts and minds" and restore law and order, perceptions as to the behavior of outsiders go a long way. Even though they may be "paid" partners, a more deliberate emphasis on PPPs with contractors could help ensure that these contractors enhance, rather than take away from, rule of law efforts.[26]

High profile incidents with U.S. contractors in Iraq reveal the direct impact that poor decisions can have on efforts to promote the rule of law. One blogger who participated in a USAID-led rule of law mission to the Suleymania University College of Law, for example, recounts how the overbearing, gun-in-the-face approach of USAID contractor security guards resulted, ironically, in a chilling of efforts to further engage the university in rule of law efforts.[27] And in perhaps the most infamous incident, Blackwater contractors escorting a State Department convoy on 16 September 2007 were suspected of indiscriminately gunning down eleven Iraqi civilians.[28] The resulting scramble by both U.S. and Iraqi officials revealed just how little the role of such contractors had previously been considered. A joint U.S.-Iraqi panel launched an investigation into the matter.[29] The Iraqi Interior Ministry banished Blackwater from operating in Iraqi, but was soon overturned by the Iraqi Prime Minister.[30] The U.S. House Committee on Oversight and Reform

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[25] Andrew Garfield, Op-Ed., *The Rule of Law—Good for Blackwater and Iraqis*, SAN DIEGO UNION-TRIB., Oct. 3, 2007, http://www.signonsandiego.com/uniontrib/20071003/news_lz1e3garfield.html. The total number of contractors of all types exceeds the number of U.S. forces in Iraq. *See* Richard Lardner, *180,000 Private Contractors Flood Iraq*, USA TODAY, Sept. 19, 2007, http://www.usatoday.com/news/washington/2007-09-19-1477663470_x.htm.

[26] Accountability for U.S. contractors in Iraq has been so haphazard that the United States did not even have an accurate account of their numbers during the first three years of Operation Iraqi Freedom. Lindemann, *supra* note 23, at 85.

[27] Haider Ala Hamoudi, The Rule of Law and Lawless Contractors, http://opiniojuris.org/2008/06/18/the-rule-of-law-and-lawless-contractors/ (June 18, 2008, 9:51 EDT). As Hamoudi recounts, "[T]he Dean barred them [USAID] from campus thereafter, indicating he would rather lose funding than deal with the local consequences of another visit." *Id.*

[28] Sidney Blumenthal, *Red, White, and Mercenary in Iraq*, SALON.COM, Oct. 4, 2007, http://www.salon.com/opinion/blumenthal/2007/10/04/private_military_in_iraq/print.html.

[29] Garfield, *supra* note 25.

[30] Blumenthal, *supra* note 28.

launched its own hearings into Blackwater operations in Iraq.[31] Five Blackwater employees were criminally charged in the United States with seventeen killings related to the incident.[32] And on 27 November 2008, the Iraqi Parliament ratified the new U.S.-Iraq Security Agreement, which strips U.S. contractors of immunity from Iraqi criminal law for their actions.[33]

The haphazard way by which the aftermath of this incident was addressed suggests that a PPP, among at least the contractors and U.S. and Iraqi governments, could have laid the groundwork for managing expectations and operating constraints in a way that would contribute to the overall mission of restoring peace and security, rather than polarizing public opinion.[34] The U.S. Government could have, for example, initiated a PPP to bring together key players interested in the operations of contractors in Iraq, including Iraqi diplomatic and security officials, contractors' representatives, and even NGOs. The United States, as the predominant occupying power, had unique leverage to control the terms of the arrangement. At a minimum, the United States could have required contractors to adhere to specified rule of law standards as a condition of their contract. The United States, through a PPP, could also require regular disclosure and reporting by contractors of their activities. Such requirements could run parallel to any separate discussions about, for example, criminal liability. A PPP in this situation is premised on the idea that some dialog is better than none.

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[31] *See* Hearing on Private Security Contracting in Iraq and Afghanistan Before the H. Comm. on Oversight & Gov't Reform, 110th Cong. (2007); *see also* Hearing on Private Security contracting in Iraq and Afghanistan, Oct. 2, 2007, http://oversight.house.gov/story.asp?ID=1509 (providing links to documents related to the hearing).

[32] Ivan Watson, *Iraqi Forces Agreement Ends Contractor Immunity*, REUTERS.COM, Dec. 8, 2008, http://www.reuters.com/article/topNews/idUSTRE4B73YS20081208.

[33] Status of Forces Agreement, N.Y. TIMES, http://topics.nytimes.com/top/news/international/countriesandterritories/iraq/status-of-forces-agreement/index.html (last visited Mar. 14, 2009). A link to the agreement itself is available on the site.

[34] From the beginnings of the U.S. occupation of Iraq, the Coalition Provisional Authority's order granting contractors immunity from Iraqi law was controversial. *See* Blumenthal, *supra* note 28 (discussing CPA Order 17, the order which originally granted immunity).

B. Afghanistan: Incomplete Rule of Law Partnerships

The unsatisfactory, hodgepodge efforts to promote the rule of law in Afghanistan have led to much soul-searching among international and national entities alike. The U.S. Army documents the situation as well as any organization.[35] The U.S. Army Judge Advocate General's Corps' 2008 *Rule of Law Handbook*, for example, devotes forty-seven pages, nearly twenty percent of its total, to simply describing the huge number of national and international organizations involved in rule of law efforts in Afghanistan.[36] Responding to such challenges, the U.S. Secretary of State in 2005 created the Office of the Coordinator for Reconstruction and Stabilization (S/CRS), which is designed to take the lead in U.S. rule of law operations.[37] But as one researcher laments, "Unfortunately,

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[35] In post-conflict environments where the U.S. military is heavily involved, rule of law practitioners and scholars often overlook the fact that substantial rule of law work is done by U.S. military lawyers. This work is often done by default, rather than choice. Simply put, in dangerous environments like Iraq, often only the military possesses enough security and transportation assets to regularly engage in business outside of secure compounds. The U.S. military seems to cautiously recognize this reality. The Preface of the U.S. Army Judge Advocate General's Corps' *Rule of Law Handbook* states:

> There are divergent, and often conflicting, views among academics, various USG agencies, US allies and even within the Department of Defense (DOD) as to whether to conduct rule of law operations, what constitutes a rule of law operation, how to conduct a rule of law operation, or even what is meant by the term "rule of law."

THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH. & CTR. FOR LAW AND MILITARY OPERATIONS, RULE OF LAW HANDBOOK: A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES, at i (2008) [hereinafter ROL HANDBOOK]. It continues:

> While acknowledging the above challenges, the Judge Advocate General's Corps leadership still recognizes the inevitability that Judge Advocates on the ground under extraordinarily difficult conditions will be called upon to support, and even directly participate in and lead, rule of law operations.

Id.

[36] *Id.* at 23–70.

[37] Office of the Coordinator for Reconstruction and Stabilization, http://www.state.gov/s/crs/ (last visited Dec. 6, 2009). Specifically,

> The Core Mission of S/CRS is to lead, coordinate and institutionalize U.S. Government civilian capacity to prevent or prepare for post-conflict situations, and to help stabilize and reconstruct societies in transition from conflict or civil strife, so they can reach a sustainable path toward peace, democracy and a market economy.

neither the establishment of S/CRS nor any other initiative by [the] Department of Defense, Department of State, or any other agency has been sufficient to create a synchronized approach to rule of law in Afghanistan, even after almost seven years of rule of law operations."[38]

The United States' most direct attempt at fostering a rule of law PPP in Afghanistan occurred in 2007, when U.S. Secretary of State Condoleezza Rice launched the Public-Private Partnership for Justice Reform in Afghanistan (Afghan PPP).[39] The Afghan PPP invites the U.S. private sector to "extend a hand of friendship by joining the United States to support Afghanistan's vision for a free, democratic, and prosperous state based on the rule of law."[40] The Afghan PPP is currently co-chaired by the Assistant Secretary of State for International Narcotics and Law Enforcement Affairs and Mr. Robert C. O'Brien, a partner at the U.S. law firm Arent Fox LLP.[41] The Department of State welcomes financial "donations at all levels" to the PPP, but no real progress is documented on the website.[42] It is still unclear, unfortunately, whether the Afghan PPP will amount to more than a token effort. Only a few press releases, and very little additional information, are available on the Afghan PPP's State Department home page.[43] The

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Id.

[38] Eric T. Jensen & Amy M. Pomeroy, Afghanistan Lessons Learned: Army Rule of Law Operations 12 (Sept. 28, 2008) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1274963.

[39] Public-Private Partnership for Justice Reform in Afghanistan, http://www.state.gov/p/inl/narc/partnership/index.htm (last visited Dec. 6, 2009) [hereinafter Afghan Partnership]; *see also* Public-Private Partnership for Justice Reform in Afghanistan Hosts Afghan Women Lawyers Training Conference in United States (Jan. 7, 2009), http://www.innovations.harvard.edu/news/141931.html [hereinafter Afghan Training Program].

[40] Afghan Partnership, *supra* note 39.

[41] Afghan Training Program, *supra* note 39; *see also* Arent Fox's Robert C. O'Brien Speaks at United Nations on Legal Reform Mission in Afghanistan, http://www.arentfox.com/newsroom/index.cfm?fa=pressReleaseDisp&content_id=1542 (last visited Mar. 15, 2009).

[42] Afghan Partnership, *supra* note 39. The website goes on to say, "Partner firms and lawyers—those contributing $50,000 or more over two years—will join senior Department of State officials and other interagency partners for a press conference, regular briefings from the U.S. Coordinator for Counternarcotics and Justice Reform in Afghanistan, and various other special events." How to Donate, http://www.state.gov/p/inl/narc/partnership/c30625.htm (last visited Dec. 6, 2009).

[43] The most recent press release discusses the sponsorship of three Afghan legal professionals to complete LL.M. degrees at U.S. law schools. Press Release, Dep't of State, Afghan Legal Professionals to Study in the U.S. (Oct. 1, 2009), *available at* http://www.state.gov/r/pa/prs/ps/2009/oct/130166.htm.

most substantive project to date appears to be a three-week training project for sixteen Afghan prosecutors hosted at the University of Utah law school.[44] The Afghan PPP website offers no information as to what, if any, follow-on resulted from this training.

In a complex post-conflict situation like Afghanistan, a stand-alone partnership like the Afghan PPP is likely to achieve only limited success. Multiple levels of partnerships will likely be needed for large-scale advancement of rule of law objectives. Some efforts are underway. In addition to the Afghan PPP, for example, the U.S. Department of State also employs contractors as rule of law technical advisors.[45] Sub-national government networks, such as between the U.S. Department of Justice and Afghan Ministry of Justice, also collaborate to bring about legal reform.[46] International organizations, such as the U.N. and NATO, help provide the security and administration framework.[47] What is missing, however, is any significant crosstalk between these stove-piped missions. Both horizontal and vertical networks of PPPs are needed to help coordinate these efforts to achieve lasting solutions.

III. A Rule of Law Framework for the Changing World Order

As Iraq and Afghanistan illustrate, current rule of law challenges cannot be resolved using only traditional state tools like diplomacy and military force. In this information-intensive age, many global interactions are handled through regulatory or other means, at levels below that of traditional state diplomacy.[48] One leading scholar coins this networked approach the "real new world order,"[49] in which a complex web of interrelated and interconnected organizations project

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[44] Eric Ray, *Afghan Prosecutors Receive Training at U of U*, KPCW NEWS, June 26, 2008, https://kcpw.org/article/6232; *see also* Press Release, Univ. of Utah, Afghan Prosecutors Go to Summer Law School at the University of Utah (June 20, 2008), http://unews.utah.edu/p/?r=062008-1.

[45] Walter Pincus, *Private Contractors' Role in Afghanistan to Grow with Awarding of Latest Contracts*, WASH. POST, July 28, 2008, at A15.

[46] *See* U.S. DEP'T OF JUST., THE ACCOMPLISHMENTS OF THE U.S. DEPARTMENT OF JUSTICE 2001–2009 39–40 (2009).

[47] Note that even these international organizations in turn enter into their own networks, with components of the Afghan government, to accomplish their purposes.

[48] The opposite extreme, global *government,* seems to have fallen out of fashion both in academia and reality. There is, however, robust discussion about the rise of global *governance*. *See* SLAUGHTER, *supra* note 3, at 4.

[49] Slaughter, *supra* note 5, at 183.

power and influence in international affairs, beyond just the sovereign nation-state.[50] Although state sovereignty seems in no danger of going extinct, there also seems little doubt that states increasingly share power and influence with international organizations and non-state actors in certain spheres of influence.[51] Non-states, such as MNCs, bring their own sets of tools and leverage to these spheres of influence: soft law and soft power.[52]

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[50] Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283 (2004).

[51] *See generally* GLOBAL TRENDS 2025, *supra* note 1 (predicting the continued dispersion of power among not only nation-states, but also non-state actors ranging from businesses to criminal enterprises). World observers, ranging from journalists to international law scholars, have also noted this trend. *See, e.g.*, FAREED ZAKARIA, THE POST-AMERICAN WORLD 2 (2008) ("We are now living through the third great power shift of the modern era. It could be called 'the rise of the rest.'") (referring to the first power shift as the rise of the Western world, and the second shift as the rise of the United States). Zakaria continues:

> The "rest" that is rising includes many nonstate actors. Groups and individuals have been empowered, and hierarchy, centralization, and control are being undermined. Functions that were once controlled by governments are now shared with international bodies like the World Trade Organization and the European Union. Non-governmental groups are mushrooming every day on every issue in every country. Corporations and capital are moving from place to place, finding the best location in which to do business, rewarding some governments while punishing others. . . . Power is shifting away from nation-states, up, down, and sideways. In such an atmosphere, the traditional applications of national power, both economic and military, have become less effective.

Id. at 4; *see also* Daniel Caruso, *Private Law and State-Making in the Age of Globalization*, 39 N.Y.U. J. INT'L L. & POL. 2, 2 (2006) ("The current world order is characterized by an intricate mix of cross-border dealings between individuals and public entities. The sovereign nation-state, as we have come to know it for over three centuries, is not necessarily central to this picture."); James N. Rosenau, *Governing the Ungovernable: The Challenge of a Global Disaggregation of Authority*, 1 REG. & GOVERNANCE 88, 88 (2007) ("[T]he disaggregation of power into myriad spheres of authority is the central tendency in world affairs."); GHANI & LOCKHART, *supra* note 11, at 9 ("[T]oday's global networks and actors are wielding powers that had been held for generations by states. The weight and combination of these forces have overwhelmed our traditional frameworks of understanding.").

[52] SLAUGHTER, *supra* note 3, at 178. As one scholar notes, soft law is basically "everything that is not hard international law (namely treaties and state-sanctioned custom)." Janet Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 YALE J. INT'L L. 393, 413 (2007); *see also* Anna Di Robilant, *Genealogies of Soft Law*, 54 AM. J. COMP. L. 499, 499 (2006) ("In its broadest scope, the formula 'soft law' labels those regulatory instruments and

Closely related to the trend toward multi-polarity is what has been called the "disaggregation" of state sovereignty.[53] Under this view, state sovereignty itself may not have diminished, but the way this sovereignty is exercised has changed. Under the Westphalian model, nation-states were "unitary" sovereigns that spoke with only one voice on the international scene—that of their heads of state.[54] Under a disaggregated state, the picture is more complicated. State actors at the sub-national level, such as ministers, judges, and legislators, utilize global networks to regularly reach across borders, sometimes on their own authority, to plan, negotiate, share information, and even create precedents.[55] Non-state actors likewise exercise their own networks. While there may be issues, such as security, for which the state must speak with one voice, there are many other areas where non-state actors also exert influence.

In such a complicated global system, it makes sense to view the major players as strategic actors committed to advancing their respective positions.[56] One scholar convincingly demonstrates how, in the negotiations leading to a PPP to promote human rights in the extractives industry, which encompasses international oil and gas corporations, each of the players involved stayed true to their organizational characteristics in the negotiated positions they held.[57] Nongovernmental organizations (NGOs) in general, for example, may have some "private moral authority" when they advocate for a "socially progressive cause," but they nonetheless "operate as strategic actors aiming at particular policy outcomes."[58] Transnational (multinational) corporations, for their part,

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mechanisms of governance that, while implicating some kind of normative commitment, do not rely on binding rules or on a regime of formal sanctions."). Joseph S. Nye describes power as "the ability to alter the behavior of others to get what you want." Joseph S. Nye, *Think Again: Soft Power*, FOREIGN POL'Y, Feb. 2006, http://www.foreignpolicy.com/story/cms.php?story_id=3393. Soft power, then, is essentially the power of attraction. *Id.* Both states and non-states use soft power.

[53] SLAUGHTER, *supra* note 3, at 5.

[54] *Id.*

[55] *Id.*

[56] *See* Thomas H. Hansen, Governing the Extractive Industries: The Extractive Industries Transparency Initiative and the Voluntary Principles on Security and Human Rights 5, Feb. 15, 2009 (unpublished manuscript), *available at* http://research.allacademic.com/one/www/research/).

[57] *Id.*

[58] *Id.* Military planners also recognize the influential role of NGOs. *See* JOINT CHIEFS OF STAFF, JOINT PUB. 3-57, CIVIL MILITARY OPERATIONS IV-14 (8 July 2008) ("The sheer number of lives they affect, the resources they provide, and the moral authority conferred by their humanitarian focus enable NGOs to wield a great deal of influence within the interagency and international communities."). The U.S. Army's doctrine on civil-

are "not moral entities," and "CSR [Corporate Social Responsibility] is secondary to the pursuit of profits."[59] States, for their part, can have any number of motivations, and "use global governance mechanisms as a means of expanding their problem-solving capabilities."[60] To generalize then, NGOs leverage their moral authority, MNCs leverage their profit motive, and states leverage their political and strategic ends. None of these motives are necessarily morally suspect. It could be argued, for example, from a shareholder perspective, that MNCs should indeed be committed to the relentless pursuit of profit. In the rule of law context then, a PPP should be targeted not to change these ingrained organizational character traits, but rather to leverage them where interests converge, to achieve the maximum possible common good.[61]

A. Defining the Rule of Law

It is an open secret that the rule of law, while spurring a growth industry among governments and development organizations alike, remains singularly difficult to define.[62] Some scholars have called for an

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military operations (CMO) also extensively incorporates the need to engage NGOs in order to achieve U.S. objectives when interacting with civilian populaces. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 3-05.40, CIVIL AFFAIRS OPERATIONS 1-3, 1-7 (Sept. 2006) [hereinafter FM 3-05.40].

[59] Hansen, *supra* note 56, at 6. Corporate Social Responsibility (CSR), a widely-used term in academic discussions of corporations' social responsibilities, refers to "actions voluntarily taken by a company beyond what is legally required and which meets societal expectations under dynamic sociopolitical conditions." S. Prakash Sethi, *Defining the Concept of Good Corporate Citizenship in the Context of Globalization: A Paradigm Shift from Corporate Social Responsibility to Corporate Social Accountability*, *in* HANDBOOK OF RESEARCH ON GLOBAL CORPORATE CITIZENSHIP 74–75 (Andreas G. Scherer & Guido Palazzo eds., 2008). The two major scholarly arguments for *why* corporations should apply heightened standards of corporate responsibility, which can be related to rule of law concerns, are "intrinsic rightness," (a normative approach) and "business case," (which seeks to empirically prove that more responsible businesses yield higher profits). Klaus A. Leisigner, *Capitalism with a Human Face: The UN Global Compact*, J. CORP. CITIZENSHIP, June 2007, at 1, 12. Intrinsic rightness, like any normative standard, can be argued in circles until some broader consensus emerges. Business case, for its part, is "far from easy" to establish empirically. *Id.* at 13.

[60] Hansen, *supra* note 56, at 7.

[61] As U.S. Army CMO doctrine recognizes, "Rule of law operations will rarely, if ever, be exclusively a military or even a USG activity. Rule of law operations must be a collaborative effort . . . ." FM 3-05.40, *supra* note 58, at 2-18.

[62] *See*, *e.g.*, Carothers, *supra* note 17, at 19, *reprinted in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 16 (Thomas Carothers ed., 2006) ("Rule-of-law

end to the Western-centric effort to arrive at a consensus or normative definition of the rule of law and instead urge practitioners to focus on local definitions suited to local problems.[63] Yet public and private actors in the international community, including those from vastly different perspectives, seem to agree that the rule of law as broadly defined is a desirable, and perhaps necessary, trait of modern governance.[64] Prominent public and private organizations such as the United Nations Development Programme and the American Bar Association have even formally partnered to promote the rule of law.[65] At least in the West, the rule of law is said to be "enjoying a new run as a rising imperative of the era of globalization."[66]

The elusive search for an overall normative definition of the rule of law, if it even exists, is not unlike the ongoing effort to standardize

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aid practitioners know what the rule of law is supposed to look like in practice, but they are less certain what the essence of the rule of law is.").

[63] *See, e.g.*, Peerenboom, *supra* note 12, at 7 ("It is time to give up the quest for a consensus definition or conception of rule of law and to accept that it is used by many different actors in different ways for different purposes."); *see also* Kleinfeld, *supra* note 19, at 32 ("[T]he phrase is commonly used today to imply at least five separate meanings or end goals.").

[64] The 2006 United States' National Security Strategy, for example, mentions the "rule of law" sixteen times. *See* OFFICE OF THE PRESIDENT OF THE UNITED STATES OF AMERICA, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 1–49 (2006). Private organizations such as Amnesty International also call for the rule of law. *See, e.g.*, Press Release, Amnesty International, Justice and Rule of Law Key to Afghanistan's Future Prosperity (June 29, 2007), *available at* http://www.amnesty.org/en/library/asset/ASA11/007/2007/en/dom-ASA110072007en.html.

[65] *See* ABA-U.N. DEV. PROGRAM INT'L LEGAL RES. CTR., 2007 ANNUAL REPORT (2007). The report opens:

> The International Legal Resource Center (ILRC) was established in December 1999, based upon the common commitment of the United Nations Development Programme (UNDP) and the American Bar Association (ABA) to advocate for democratic governance and the rule of law on a global scale. . . . The ILRC, which is housed within the ABA Section of International Law, identifies experts for UNDP requests relating to technical legal assistance projects, knowledge management, and advisory services worldwide. The ILRC also conducts assessments of draft and current legislation, gauging its compliance with international standards where appropriate, and provides substantive advice to governments on policy formulation.

Id. at 2.

[66] Thomas Carothers, *The Rule-of-Law Revival* (1998), *reprinted in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 3 (Thomas Carothers ed., 2006).

international human rights. Over sixty years after the Universal Declaration of Human Rights made history,[67] the world still lacks consensus on how to promote or enforce human rights on the international level.[68] A widely-accepted understanding of the rule of law, which shares some of the language and fundamental concepts of human rights, is arguably even further behind on this trajectory. Similar to human rights, the international community should continue to seek consensus on fundamental rule of law standards that apply in every situation. The details of implementing these standards will require coordination among the major rule of law players.

The ongoing challenges in defining the rule of law seem to be part practical confusion, part politics. Rule of law practitioners tend to vociferously promote the rule of law, without being able to pin down exactly what this phrase means.[69] Nation-states such as China and Russia voice support for the rule of law, but seek to define it in a way that does not impinge on state sovereignty and their internal affairs.[70] Many rule of law scholars suggest that the rule of law encompasses both substantive components (i.e., the good that rule of law brings) and institutional components, such as democratic governments, courthouses, police forces, and free markets.[71] A one-size-fits-all definition of the rule of law is unlikely given these divergences. One solution is PPPs: by drawing together networks of the various players involved in a rule of law project, PPPs can act as an interface to work out competing views through information exchange, negotiation, and harmonization.

This article proposes a hybrid approach to the rule of law, to serve as a bridge between normative aspirations and on-the-ground realities. On the international level, the rule of law could simply be defined as any

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[67] *See* United Nations, 60th Anniversary of Universal Declaration of Human Rights, http://www.un.org/events/humanrights/udhr60/ (last visited May 19, 2009).

[68] As the Secretary-General said during the 10 December 2008 Human Rights Day celebration, marking the sixtieth anniversary of the Declaration, "The challenges we face today are as daunting as those that confronted the Declaration's drafters." U.N. Message of the Secretary-General on Human Rights Day (Dec. 10, 2008), *available at* http://www.un.org/events/humanrights/2008/statementssg.shtml.

[69] *See* Carothers, *supra* note 17, at 3, *reprinted in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 16 (Thomas Carothers ed., 2006).

[70] *See, e.g.*, China's comments at a 2008 UN Generally Assembly Sixth Committee hearing, where it stated that "each Government had a right to choose the rule of law model most suited to conditions in its country." U.N. GAOR, 6th Comm., 63d Sess., 6th mtg. at 9, U.N. Doc. A/C.6./63/SR.6 (Oct. 29, 2008).

[71] Kleinfeld, *supra* note 19, at 33; *see also* STROMSETH, *supra* note 16, at 58.

rules-based framework for managing the rights, responsibilities, and interrelationships of individuals and institutions. Ideally, this framework should encompass minimum substantive components recognized by the international community; a rule of law definition that is entirely defined by the whims of local actors and local conditions is really no definition at all. But the details of this framework do need to be filled in by local actors, who understand the relevant social, political, cultural, and religious implications of a particular rule of law project. This is a coordinating task that PPPs on the ground could be well-suited to perform. It moves the rule of law from being a static end state to a multi-step process that is "more open-ended and tolerant of institutional innovations and differences in norms, practices, and outcomes."[72]

1. International Organizations and the Rule of Law

Applying a hybrid approach, international organizations are in the best position to implement a basic rule of law framework. A broad consensus on the meaning of the rule of law among major international organizations is an essential umbrella concept for real progress. As the preeminent international organization, the United Nations (U.N.) seems to be paying increasing attention to the rule of law. In 2004, then-U.N. Secretary-General Kofi Annan provided a heady definition of the rule of law:

> The "rule of law" is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty,

[72] Peerenboom, *supra* note 12, at 6.

> avoidance of arbitrariness and procedural and legal transparency.[73]

Secretary-General Annan's definition encompasses both procedural regularities, such as public transparency and equal enforcement, as well as normative aspirations, such as compliance with international human rights norms. Although the U.N. General Assembly never formally adopted the Secretary-General's proposed definition, it represents an authoritative view as to the commonly-understood rule of law components.

The U.N. seems poised to assume an even greater focus on the rule of law in the near future. Pursuant to a General Assembly Resolution issued after the 2005 World Summit, the Secretary-General formed the Rule of Law Coordination and Resource Group, to consolidate and coordinate U.N. rule of law programs and resources.[74] In 2007, members of the General Assembly's Sixth Committee (Legal), during debates on the rule of law, raised the need to define the rule of law on the national and international levels.[75] In 2008, the Secretary-General submitted three reports previously requested by the General Assembly, on how to better coordinate U.N. rule of law efforts.[76] But, even as the U.N. more frequently discusses the rule of law, no umbrella definition has yet been adopted.[77]

Another significant international organization, the World Bank, seems to increasingly incorporate rule of law research and analysis into its stated mission of alleviating poverty.[78] A 2006 informal World Bank

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[73] The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* 4, U.N. Doc. S/2004/616 (Aug. 23, 2004) [hereinafter RoL Report].

[74] G.A. Res. 60/1, ¶ 134, U.N. Doc. A/RES/60/1 (Oct. 24, 2005); *see also* The Secretary-General, *Report of the Secretary-General on Revised Estimates Relating to the Programme Budget for the Biennium 2008–2009 Related to the Rule of Law Unit* 1, U.N. Doc. A/63/154, at 1 (July 21, 2008).

[75] Press Release, General Assembly, As Legal Committee Begins Debate on Rule of Law, Delegates Discuss Differences in National, International Implications, U.N. Doc. GA/L/3326 (Oct. 25, 2007) [hereinafter U.N. Rule of Law Press Release].

[76] *See id.*; *see also* The Secretary-General, *Report of the Secretary-General on the Rule of Law at the National and International Levels*, U.N. Doc. A/63/64 (Mar. 12, 2008); The Secretary-General, *Report of the Secretary General on Strengthening and Coordinating United Nations Rule of Law Activities*, U.N. Doc. A/63/226 (Aug. 6, 2008).

[77] U.N. Rule of Law Press Release, *supra* note 75.

[78] *See, e.g.*, World Bank, Law and Development, http://web.worldbank.org/WBSITE/EX

working paper adopts a well-regarded scholarly definition of the rule of law: "(i) a government bound by law (ii) equality before the law (iii) law and order (iv) predictable and efficient rulings, and (v) human rights."[79] As another example, a 2009 World Bank report on development in Afghanistan makes repeated references to the rule of law, including an acknowledgement that "the rule of law has been repeatedly highlighted as a core driver of economic development."[80] The rule of law, therefore, seems integral to the World Bank's view of how to accomplish its mission, although it has never explicitly adopted a definition.

Even an international organization with an entirely different mission, the World Trade Organization (WTO),[81] can help advance rule of law concepts. The WTO's cornerstone document, the General Agreement on Tariffs and Trade (GATT), arguably reflects rule of law principles in Article 10 of its text:

> (a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings . . . .
> (b) Each contracting party shall maintain, or institute as soon as practical, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement . . . .[82]

TERNAL/TOPICS/EXTLAWJUSTICE/0,,menuPK:445640~pagePK:149018~piPK:149093~theSitePK:445634,00.html (last visited Mar. 15, 2009) ("Effective legal frameworks and institutions are pivotal for alleviating poverty."). The World Bank also releases rule of law-related publications through its Law, Justice, and Development Series. *See* the World Bank, Law, Justice, and Development Series, http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,contentMDK:21085521~pagePK:210058~piPK:210062~theSitePK:445634,00.html (last visited Mar. 15, 2009).

[79] Kirsti Samuels, *Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt* 15 (World Bank, Working Paper No. 37, 2006) (quoting Kleinfeld, *supra* note 16, at 33).

[80] William Byrd & Stéphane Guimbert, *Public Finance, Security, and Development: A Framework and an Application to Afghanistan* 2 (World Bank, Pol'y Research Working Paper No. 4806, 2009).

[81] The WTO's mission is essentially to help regulate trade between nations. *See* Understanding the WTO, http://www.wto.org/English/thewto_e/whatis_e/tif_e/fact1_e.htm (last visited May 19, 2009).

[82] General Agreement on Tarrifs and Trade art. 10, Oct. 30, 1947, 61 Stat. A5, T.I.A.S. No. 1700, 55 U.N.T.S. 194.

These provisions, discussing uniformity, impartiality, reasonableness, and independent tribunals, "read a lot like law school textbooks on the Rule of Law."[83] In other words, these provisions help promote rule of law standards even if that is not their explicit goal. Even entities only indirectly concerned with the rule of law can end up promoting fundamental rule of law values through their own mechanisms. A universally regarded, rule of law framework could help synchronize international organizations' complementary and overlapping objectives.

2. Nation-States and the Rule of Law

Nation-states naturally have divergent views on the rule of law, sometimes even within their own governments.[84] Nonetheless, it is possible to identify common threads. The United States, China, and Russia, for example, each espouse support for the rule of law, though according to their own definitions. In response to a U.N. General Assembly resolution requesting him to do so, the Secretary-General in 2007 compiled the views of member states as to the rule of law and international efforts to promote it.[85] The United States, in its comments, noted its commitment to advancing the rule of law by reference to "the extensive resources we devote to assisting States in their efforts to *strengthen their legal, judicial and law enforcement institutions*. These programs, along with parallel efforts undertaken by the U.N. and other States, make significant contributions to advancing the rule of law."[86] Therefore, the rule of law includes, in the U.S. view, certain institutions. Collaboration is also a necessary component of rule of law advancement.

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[83] Martin G. Hu, *WTO's Impact on the Rule of Law in China*, *in* RULE OF LAW: PERSPECTIVES FROM THE PACIFIC RIM 101, 102 (2000), *available at* www.mansfieldfdn.org/programs/program_pdfs/08hu.pdf.

[84] *See, e.g.*, Major Tonya L. Jankunis, *Military Strategists are from Mars, Rule of Law Theorists are From Venus: Why Imposition of the Rule of Law Requires a Goldwater-Nichols Modeled Interagency Reform*, 197 MIL. L. REV. 16, 30 (2008) (explaining that various U.S. government agencies define the rule of law differently, and comparing and contrasting USAID and DoD definitions).

[85] The Secretary-General, *Report of the Secretary-General on the Rule of Law at the National and International Levels: Comments and Information Received from Governments* 2, U.N. Doc. A/62/121 (July 11, 2007).

[86] *Id.* at 34 (emphasis added).

The Russian Federation, as part of a rule of law discussion during a 2008 hearing of the U.N. General Assembly's Sixth Committee (Legal), urged the Committee to consider the topic of "the importance of the implementation of international obligations through technical assistance and capacity-building."[87] As to providing technical assistance to States, "Tangible progress could be made by structuring the services offered and fostering cooperation among all partners."[88]

At an earlier session of the same Committee hearings, China noted, "With regard to the rule of law at the national level, each Government had a right to choose the rule of law model most suited to conditions in its country."[89] States could, China stated, "Swap experiences and learn from each other how to make the models work better."[90] While maintaining due regard for the principles of "sovereign equality" and "non-interference in the internal affairs of other countries," States could "strengthen cooperation with a view to enhancing the rule of law at the national level."[91] China seems to be promoting cautious rule of collaboration, though in the context of protecting national sovereignty.

3. Private Sector Views of the Rule of Law

For their part, MNCs seem willing to publicly voice support for and even help define the rule of law, when it suits their business objectives. In a November 2005 symposium hosted by the American Bar Association, the General Counsel of General Motors (GM), the former General Counsel of Microsoft, and the General Counsel of the multinational Swiss corporation ABB, Ltd., shared their companies' views on the rule of law. The former Microsoft General Counsel proposed the following working definition: "a rules-based system of self-government which includes a strong and accessible legal process featuring an independent bench and bar."[92] This process, he believes, should be adapted to the "unique characteristics of the various

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[87] U.N. GAOR, 6th Comm., 63d Sess., 7th mtg. at 11, U.N. Doc. A/C.6/63/SR.7 (Nov. 11, 2008).
[88] *Id.*
[89] U.N. GAOR, 6th Comm., 63d Sess., 6th mtg. at 9, U.N. Doc. A/C.6./63/SR.6 (Oct. 29, 2008).
[90] *Id.*
[91] *Id.*
[92] *How the Private Sector Can Promote the Rule of Law—The General Counsel Perspective*, METROPOLITAN CORP. COUNSEL, May 2006, at 38.

communities."[93] The GM General Counsel, in turn, remarked that, from a Western point of view, the rule of law included "respect for contracts, protection of private property and a protection of basic human rights."[94] But acknowledging different preferences across the world, he expressed the bottom-line goal of the rule of law as "promoting predictability, codification of laws and a judiciary that, while not necessarily independent, has integrity in terms of resolution of specific disputes."[95] The ABB, Ltd. General Counsel, in turn, advocated moving away from "one model" when describing the rule of law.[96] He also noted that MNCs are "in for the long and not the short term," which suggests a view that MNCs ought to maintain a basic modicum of social responsibility, even if only for their own interests.[97]

But, other than the occasional symposium, the "rule of law" as a term of art is not part of the everyday language of business. State and non-state rule of law actors should recognize that, in the business world, the "rule of law" can better be implemented through the language of business—best practices, principles of Corporate Social Responsibility,[98] and the like—rather than as a grand normative concept.[99]

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[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *See* Sethi, *supra* note 59.
[99] The 2006 U.S. congressional hearings concerning Google in China are one example where MNCs tried to frame rule of law-related concepts in more practical terms. Earlier that year, Google in China was ordered by the Chinese Government to hand over certain files after a Chinese dissident forwarded an anti-government message to an NGO overseas. The U.S. Congress held scathing public hearings criticizing Google's actions as possible human rights violations, and implicating other major technology corporations. Tom Zeller, Jr., *Web Firms Are Grilled on Dealings in China*, N.Y. TIMES, Feb. 16, 2006, http://www.nytimes.com/2006/02/16/technology/16online.html?pagewanted=print. Representatives of these MNCs made statements espousing their companies' respective positions on promoting human rights and related concerns. One persistent theme of these representatives was that government must play a prominent role in these efforts. The Senior Vice President and General Counsel of Yahoo!, for example, acknowledged that companies must identify appropriate practices to promote positive principles specific to particular markets, but also stated that there is a vital role for government-to-government dialogue. *The Internet in China: A Tool for Freedom or Suppression? J. Hearing Before the Subcomm. on Africa, Global Human Rights, and Int'l Operations and the Subcomm. on Asia and the Pacific of the H. Comm. on Int'l Relations*, 109th Cong. 55–57 (2006) [hereinafter China Hearing] (testimony of Michael Callahan, Senior Vice President and General Counsel, Yahoo! Inc.). Although MNCs could engage in collective action and adhere to compliance practices, the greatest leverage lies with governments. *Id.* The

One organization that could help close the rule of law gap between the public and private sectors is the International Organization for Standardization (ISO). As a private entity with multiple public entities among its membership, the ISO is uniquely poised to help shape perceptions on corporate responsibility and respect for the rule of law.[100] As a self-described "bridge between the public and private sectors,"[101] the ISO publishes thousands of International Standards for everything from goods to services. With a network in 157 countries, no organization has greater reach. [102]

Interestingly, the ISO is now moving toward the realm of Corporate Social Responsibility with a non-binding standard (ISO 26000) due to be released in 2010.[103] This new, voluntary standard is intended to, among other goals, "assist organizations in addressing their social responsibility while respecting cultural, societal, environmental and legal differences and economic development conditions."[104] The ISO 26000 standard is intended for "organizations of all types in both public and private sectors, in developed and developing countries."[105] While this ISO standard is not explicitly about the rule of law, it advances complementary objectives. Given the ISO's pervasive influence, this new standard will hopefully move MNCs toward business practices that favorably support the rule of law.

Associate General Counsel of Microsoft Corporation, in turn, noted that "cultural and political values may clash with standards of openness and free expression." *Id.* at 65 (statement of Jack Krumholtz, Managing Director of Federal Government Affairs and Associate General Counsel, Microsoft Corporation). Microsoft, he continued "cannot substitute itself for national authorities in making the ultimate decisions on such issues." *Id.* Google's Vice President for Corporate Communications and Public Affairs, for his part, acknowledged that there is a role for joint industry action to promote common principles such as disclosure and transparency, but that government also plays a key role. *Id.* at 67 (testimony of Elliot Shrage, Vice President for Corporate Communications and Public Affairs, Google, Inc.).

[100] About ISO, http://www.iso.org/iso/about.htm (last visited May 19, 2009).

[101] *Id.*

[102] *Id.*

[103] ISO Social Responsibility, http://isotc.iso.org/livelink/livelin/feth/2000/2122/83049/3934883/3935096/home.html (last visited May 19, 2009).

[104] ISO Social Responsibility, About the Standard, http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/07_gen_info/aboutStd.html (last visited May 19, 2009).

[105] INT'L STANDARDS ORG., ISO AND SOCIAL RESPONSIBILITY 1 (2008), *available at* http://www.iso.org/iso/socialresponsibility.pdf.

4. A Networked Definition of the Rule of Law

Analogous to the recognition of fundamental human rights, the world needs a basic consensus definition of the rule of law to provide a framework for future progress. A framework definition of the rule of law, like the Universal Declaration of Human Rights, could begin with a statement of objectives to be pursued by governments, rather than binding international law.[106] Networks of the major rule of law players could then fill in the details with definitions and understandings that account for their competing interests and perspectives of the major players. Under a networked model, various players in a PPP, while all adhering to the same overall rule of law definition, may contribute different inputs to achieve the ultimate desired income.[107]

A recent rule of law event exemplifies the effort to define the rule of law in a way that accounts for all of the major players. In July of 2008, the American Bar Association launched the World Justice Project (WJP) in Vienna, Austria.[108] The initial forum was attended by leaders ranging from former heads of state, to U.S. Supreme Court justices, to global

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[106] U.N. Association in Canada, Questions and Answers About the Universal Declaration, http://www.unac.org/rights/question.html (last visited May 19, 2009). The Universal Declaration of Human Rights entreats "[E]very individual and every organ of society . . . to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance . . . ." The Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 pmbl., *available at* http://www.un.org/en/documents/udhr/ (last visited May 19, 2009).

[107] Along these lines, another panel during the previously mentioned 2005 American Bar Association symposium brought informal spokespersons from three major interests into one room to discuss the rule of law: nation-state, international organization, and private sector. Thomas Pickering, former U.S. Ambassador to Russia and India, suggested in his comments that in addition to the usual mantra of predictability, the rule of law also required legitimacy. *Beyond the Rule of Law: The Route to Sustainability*, METROPOLITAN CORP. COUNSEL, Dec. 2006, at 76 [hereinafter *Beyond the Rule of Law*]. The former World Bank General Counsel, Robert Danino, noted that even though the World Bank is a financial and not political institution, that the World Bank's de facto mandate to alleviate poverty by necessity entailed social equity, including human rights. *Id.* Samuel Fried, Senior Vice President of Limited Brands, Inc., noted that globalization has made the worldwide economy "less transactional, and more strategic." He went on to say that "[g]lobal corporations have a much larger stake in being a socially responsible part of the civil society of the countries in which they have a long-term presence." *Id.*

[108] The World Justice Project, https://www.abanet.org/wjp/about.html (last visited Dec. 25, 2009).

business leaders.[109] The WJP identifies itself as a "multinational, multidisciplinary initiative to strengthen the rule of law worldwide," by "mainstreaming the rule of law into the thinking and activities of a broad range of fields."[110] Sponsors of the WJP include major MNCs such as the Boeing Company, Intel Corporation, and Microsoft Corporation.[111] Under the WJP's "Universal Principles," the rule of law has four principle components:

> [1] The government and its officials and agents are accountable under the law;
> [2] The laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property;
> [3] The process by which the laws are enacted administered and enforced is accessible, fair and efficient; [and]
> [4] The laws are upheld, and access to justice is provided, by competent, independent, and ethical law enforcement officials, attorneys or representatives, and judges who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.[112]

This four-part definition seems to offer something for everyone, as it includes both substantive and institutional components. Whether the World Justice Project will wield substantial impact or simply become a rule of law vanity project among many others is beside the point. This forum, like others, recognized the need for a workable framework understanding of the rule of law. The U.N. General Assembly should seek to adopt this or a similar definition of the rule of law as a way to harmonize basic rule of law efforts worldwide. The implementing details of such a definition would of course vary depending on the

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[109] *Id*. The second World Justice Forum was held recently held in Vienna, Austria, from 11–14 November 2009. *See* http://www.worldjusticeproject.org/ (last visited Dec. 25, 2009).
[110] About the World Justice Project, https://www.abanet.org/wjp/about.html (last visited Mar. 15, 2009).
[111] World Justice Project Supporters, https://www.abanet.org/wjp/supporters.html (last visited Mar. 15, 2009).
[112] About the WJP, http://www.worldjusticeproject.org/about (last visited Mar. 15, 2009). For additional background information, see *The World Justice Project: A Sustained Commitment to the Rule of Law*, METROPOLITAN CORP. COUNSEL, Oct. 2008, at 14.

players involved in the project. As will be discussed below, networked PPPs are well-suited to achieve these localized solutions.

B. Public-Private Partnerships

Public-private partnerships are organizational vehicles that are uniquely suited to bring together public and private interests in promoting the rule of law. In its broadest form, a Public-Private Partnership (known as a PPP or P3) is a contractual arrangement between the public and private sector, whereby each side contributes its unique assets to accomplish a mutual goal.[113] Each side in turn shares in the risks and rewards of the arrangement.

The idea of using PPPs to promote social or development reform is not new, and is an initiative discussed at all levels of governance, including the U.N.[114] Given the rise of trans-border social awareness as a result of globalization, this trend seems set to continue.[115] Some U.S.

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[113] The National Council for Public-Private Partnerships (NCPPP), How Partnerships Work, http://www.ncppp.org/howpart/index.shtml#define (last visited Mar. 15, 2009). The NCPPP offers the following definition of a PPP:

> A contractual agreement between a public agency . . . and a private sector entity. Through this agreement, the skills and assets of each sector (public and private) are shared in delivering a service or facility for the use of the general public. In addition to the sharing of resources, each party shares in the risks and rewards potential in the delivery of the service and/or facility.

Id.

[114] The U.N. Office for Partnerships, for example, "serves as a gateway for partnership opportunities with the United Nations family. It promotes new collaborations and alliances in furtherance of the Millennium Development Goals (MDG) and provides support to new initiatives of the Secretary-General." U.N. Office for Partnerships, http://www.un.org/partnerships/ (last visited Mar. 15, 2009).

[115] The Institute for Public-Private Partnerships (IP3), for example, has since 1994 "advised over 175 countries on economic, financial, legal, and technical aspects of public-private partnerships. . . ." IP3, President's Welcome, http://www.ip3.org/about/a_president.htm (2008). The IP3 President states:

> At IP3, we believe that the resources of the public and private sectors fused in partnership represent the new paradigm for economic development in the 21st century. Public-private partnerships are increasingly being used as a policy tool to transform the role of national and local governments in public service delivery,

Government agencies, such as the Department of State, have already delved into this area.[116] Some corporate leaders also seem to recognize the value of partnerships across all sectors.[117] In the rule of law context, the goal of PPPs is to bring these interests together both through horizontal networks of peer organizations, and vertical networks with states and international organizations.[118]

The cornerstone of PPPs is their voluntary nature. The goal of PPPs is not negative, to deter undesirable conduct, but rather positive, to proactively engage MNCs in dialog and practices that promote the rule of law. Public-private partnerships, when applied against the definition of the rule of law provided above, can help overcome rule of law reform's greatest critique: its lack of results. Too often, rule of law projects strive under timelines or standards that never seem to be met. Multi-national companies, on the other hand, are "in it for the long

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> infrastructure development, poverty alleviation, capital market development, and governance around the world.

Id.

[116] For example, the U.S. Department of State website, through its Bureau of International Narcotics and Law Enforcement (INL), calls for private sector investment and partnership for justice reform in Afghanistan, in areas such as supporting the Afghan bar, supporting Afghan prosecutors, and helping to expand legal aid services. *See* Afghan Partnership, *supra* note 39.

[117] For example, at a 2005 American Bar Association Symposium, Mr. Samuel P. Fried, a Senior Vice President for Limited Brands, Inc., a global corporation with over 90,000 employees and products in over forty countries, predicted a new era of cooperation between corporations and non-governmental organizations (NGOs):

> The good news is that after ten years of a fierce fighting between global businesses and anti-globalization NGOs and activists, a new synthesis seems to be developing. Very serious, very responsible, very credible NGOs–both international NGOs and NGOs on the ground in developing countries–recognize that business could pave the way for a better future. . . . Private sector actors ought to find NGOs to partner with on projects in developing countries. I believe we have a moral obligation to do this for poverty alleviation, as well as for our own security.

Beyond the Rule of Law, supra note 107, at 76; *see also* Limited Brands, About Our Company, http://www.limitedbrands.com/about/index.jsp (last visited Mar. 15, 2009). The company is, according to its website, "committed to being a responsible member of the global community." Limited Brands, Social Responsibility, http://www.limitedbrands.com/social_responsibility/index.jsp (last visited Mar. 15, 2009).

[118] SLAUGHTER, *supra* note 3, at 13.

term."[119] Public-private partnerships can help redefine rule of law progress as a process and not just an absolute end-state, such as by establishing monitoring and compliance regimes. Most importantly, PPPs, when arranged in the context of global networks, recognize the reality that the rule of law does not really take root until local conditions are ready for it. Public-private partnerships can help identify and respond to these local conditions.

IV. Leveraging the Major Rule of Law Players

The major players in the current world order, regardless of how the distribution of power may shift, still have ingrained organizational character traits that are unlikely to change significantly in the near future.[120] Understanding how these players wield power in accordance with their organizational character traits is crucial in deciding how to structure and approach rule of law PPPs.

A. Soft Law and Its Use by MNCs

As "non-states," MNCs, by definition, do not have direct access to the sovereign tools of "hard" diplomatic pressure and hard law. But it would be a mistake to assume that soft power and soft law are ineffective means of exercising private authority.[121] Soft law often develops independently of state actors and can create its own norms, often through the use of networks.[122] On the other hand, when strategic interests

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[119] *Beyond the Rule of Law*, *supra* note 107, at 76.

[120] *See supra* pp. 217–18.

[121] Private authority refers to "an individual or organization not associated with government institutions exerting decision-making power which is regarded as legitimate over a particular issue area. Private institutions can become authoritative because of perceived expertise, historical practice, or an explicit or implicit grant of power by states." Stephen J. Kobrin, *Private Political Authority and Public Responsibility: Transnational Politics, Multinational Firms and Human Rights*, BUS. ETHICS Q. (July 2009).

[122] Private law can exert a "state-breaking" function by de-emphasizing the vertical subordination of citizens to their sovereigns, and pointing towards horizontal relations between equally situated actors. Caruso, *supra* note 51, at 3. As Caruso continues: "Network theory postulates that private legal orders generate new regulatory dynamics in a global economy, where spontaneous law-making replaces state-based hierarchies of norms." *Id.* at 3 n.4. And MNCs can and do function as autonomous actors in international politics. In the 1994 World Trade Organization negotiations over intellectual property (known as the Agreement on Trade Related Aspects of Intellectual

interact, private law does not operate completely independently of state power.[123] Private law can, in fact, lend support to centralized institutions, by helping ensure the "uniform and predictable enforcement of individual promises."[124] In other words, voluntary adherence to an agreed-upon principle can help bolster the underlying legitimacy of the public entities involved. This bolstering also works in the other direction, from state to private entity. Whereas soft law agreements are based on the "binding force of consent," states provide the enforcement tools necessary to establish such soft law as binding law.[125]

The inherent strategic interests of the major players also shed light on how they wield their power. If MNCs are driven by the profit motive, for example, then the soft power they exert must mean the ability to access markets, and stimulate investment and development. Focused

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Property Rights (TRIPS), private organizations participated directly in negotiations. Essentially, "twelve corporations made public law for the world." Kobrin, *supra* note 121, at 13. Multi-national corporations could presumably also become lobbyists or even direct actors in areas such as human rights, labor practices, and environmental standards. For discussions on the trend toward increasing use of non-binding norms, see Dinah Shelton, *Introduction* to COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 8–9 (Dinah Shelton ed., 2000) [hereinafter COMMITMENT AND COMPLIANCE] ("The half century since the end of the Second World War has witnessed the proliferation of international norms, not only in traditional areas of international regulation, but in new fields once thought in the exclusive domestic jurisdiction of states.").

[123] Caruso *supra* note 51, at 8.

[124] *Id.* at 9. As Shelton explains, it is often hard to draw the line between hard and soft law:

> The line between law and non-law may appear blurred. Treaty mechanisms are including more 'soft' obligations, such as undertakings to endeavor to strive to cooperate. Non-binding instruments in turn are incorporating supervisory mechanisms traditionally found in hard law texts. Both types of instruments may have compliance procedures that range from soft to hard. The result seems to be a dynamic interplay between hard and soft obligations similar to which exists between international and national law. . . . This is part of an increasingly complex international system . . . . with the common purpose of regulating behavior within a rule of law framework.

COMMITMENT AND COMPLIANCE, *supra* note 122, at 10.

[125] Caruso, *supra* note 51, at 64. Private law can also evolve into more than just voluntary commitments. In an effort to preserve "efficient" and "desirable" products of private law arrangements, these products are often later codified, or at least permitted to develop into a persistent norm (such as business "best practices"). *Id.* at 65.

through the lens of a PPP, the soft power assets of MNCs—their ability to negotiate locally and think globally—in turn become useful assets for promoting the rule of law. In a world economy, where any company or individual with enough dollars (or Euros or yen) to do business overseas can likely find an opportunity to do so, money, and the cooperation it brings, will find places to flow. Even a country such as China, which holds a non-interventionist view of the rule of law,[126] finds itself very open to foreign investment. This places MNCs in an ideal position to wield positive influence. When leveraged for positive benefit through a PPP, the profit motive can help MNCs gain access in instances where other actors cannot. Public-private partnerships can help avoid a "state-centered, 'top-down'" approach to rule of law reform that often minimizes support for civil society or capacity-building.[127] The goal is not to back-door rule of law progress to evade authoritarian regimes, but rather to engage key interests of such regimes, including business interests, in ongoing dialogue to help render them as part of the solution, rather than part of the problem.

It is by engaging strategic interests that MNCs, through PPPs, can best contribute to rule of law efforts. Two rule of law thresholds can be applied to MNCs or other private actors through such partnerships. At the most basic level, such partnerships can ensure that the partner organizations themselves adhere to overall, as well as agreed-upon, rule of law principles. At a higher, and more desirable level, these partnerships can help ensure that the efforts of MNCs actually help advance the rule of the law in the areas where they are operating. Multi-national corporations will be most effective in PPPs when they have freedom to leverage their own solutions within these boundaries. MNCs espouse, and should be allowed to utilize, "a ground-up approach, [through which] globalization can contribute to advancing the rule of law and a just government."[128]

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[126] *See supra* Part III.A.2.

[127] Stephen Golub, *A House Without a Foundation* (2003), *reprinted in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 105 (Thomas Carothers ed., 2006). Even former Secretary-General Annan seemed to recognize that the rule of law, however it is defined, cannot be applied as a universal template. As he stated, "We must learn as well to eschew one-size-fits-all formulas and the importation of foreign models, and, instead, base our support on national assessments, national participation, and national needs and aspirations." RoL Report, *supra* note 73, at 1.

[128] *Beyond the Rule of Law, supra* note 107, at 76.

B. Networked for Rule of Law Reform

Networks form when state and non-state actors converge due to overlapping interests and objectives to resolve a particular issue.[129] This theory of networks is a useful model for explaining how interests can converge to promote the rule of law in PPPs.[130] Although the leading network scholar, Anne Marie-Slaughter, focuses in her book on three types of trans*governmental* networks,[131] these categories are equally useful constructs for the private sector. Interactions among the major players do not only happen through formal channels. In a globalized world where power and influence travel "up, down, and sideways,"[132] even state power does not always travel in a linear fashion. No single state has the power, reach, or influence to affect the outcome of every global situation.[133] Increasingly, the interactions of the major players are understood in terms of networks among counterparts in governments, international organizations, and industry.[134]

The precise organization of networked PPPs for rule of law projects will naturally vary tremendously depending on the type of project, the location of the project, and the particular players involved. The three most recognized types of networks—information networks, enforcement networks, and harmonization networks—often also overlap. This section

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[129] Anne-Marie Slaughter, for example, explains how everything from war, to the media, to business, and even religion are networked to achieve their aims. As she states, "In this world, the measure of power is connectedness." Anne-Marie Slaughter, *America's Edge: Power in the Networked Century*, FOREIGN AFF., Jan.–Feb. 2009, at 94, 95.

[130] Even when not explicitly described as "networks," the concept of multiple competing interests on the international and domestic scene is widely recognized in international relations. *See, e.g.*, Rosenau, *supra* note 51, at 88–89 (discussing "spheres of authority").

[131] SLAUGHTER, *supra* note 3, at 10.

[132] ZAKARIA, *supra* note 51, at 4.

[133] These networks are both horizontal and vertical. On the horizontal plane, for example, governments do not only communicate through formal channels, through representatives of heads of state. Ministers talk to ministers, legislators to legislators, judges to judges, all across borders on the sub-national level. Domestically, what we think of as "government" is actually an "aggregate of different institutions," ranging from the courts, to Congress, to regulatory agencies, to the White House. SLAUGHTER, *supra* note 3, at 13. The same concept applies on the international scene. In what we think of as the "global economy," MNCs, for example, cooperate with other MNCs, states, and local entities to reach local business solutions. On the vertical plane, international institutions communicate with governments on all matters ranging from human rights to trade harmonization.

[134] *Id.*

introduces these several types of networks, and suggests how networked PPPs could help advance the rule of law.

1. Information Networks

An information network is fundamentally about the exchange of information and ideas,[135] which is a recurring challenge in rule of law projects. Rule of law practitioners often seem to suffer from a poverty of knowledge about local conditions.[136] Even worse, is that when information is gained, it is often transmitted inefficiently, if at all, among organizations involved in rule of law efforts.[137] Under a networked model, organizations of governments, international institutions, NGOs, and MNCs could share their databases of knowledge and information gained over time. Public-private partnerships could act as a bridge to transmit and disseminate knowledge among all of the relevant players.[138]

The most basic information networks simply compile information as their goal.[139] Some information networks also "actively collect and distill information about how their members do business," resulting in codes of best practices.[140] Information networks can cooperate to "uncove[r] new information of value to all members," as well as exchange information about each other.[141] As a result of this information exchange, the reputation of members matters. Compliance so as not to harm one's reputation can be a powerful motivational tool for members of the group.[142] Information networks can also exert external influence

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[135] *Id.* at 52.
[136] *See generally* Carothers, *supra* note 17, *reprinted in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 16 (Thomas Carothers ed., 2006) (discussing shortcomings and challenges of current rule of law practice).
[137] *Id.*
[138] For an example of an existing rule of law network, see Welcome to the International Network to Promote the Rule of Law (INPROL), http://www.inprol.org/visitorhome (last visited May 17, 2009) (describing INPROL as a project of the U.S. Institute of Peace that is designed to act as an information exchange for rule of law practitioners).
[139] *See, e.g.*, Global Legal Information Network, http://www.glin.gov/search.action (last visited May 17, 2009) ("The Global Legal Information Network (GLIN) is a public database of official texts of laws, regulations, judicial decisions, and other complementary legal sources contributed by governmental agencies and international organizations."). The GLIN network counts thirty-five nation-states as contributing members, including the United States. *Id.*
[140] SLAUGHTER, *supra* note 3, at 53.
[141] *Id.* at 54.
[142] *Id.*

by attempting to use information they gather to "shame" their external targets into compliance.[143]

The private sector can also wield the power of information to achieve positive reform. Even in cautiously protective states like China, MNCs can effect local change when those changes are couched in "business logic."[144] For example, the U.K. consulting firm IMPACTT concluded after a three-year study in China that "more progressive standards in electronics and apparel factories actually improved productivity, while allowing manufacturers there to reduce hours and increase pay."[145] Such information-sharing gives local partners a vested interest in change. Public-private partnerships between states and MNCs could help facilitate information exchange about these types of benefits.

2. Enforcement Networks

Enforcement networks focus on "enhancing cooperation . . . to enforce existing . . . laws and rules."[146] While enforcement is largely the purview of governments, such networks can certainly affect the private sector. Enforcement networks are a useful dovetail of hard and soft power.

Although it still has far to go, the U.N. Global Compact is the most prominent example of a voluntary, self-enforcement network. The Global Compact is the "largest corporate citizenship and sustainability initiative in the world," with 7700 corporate participants, and stakeholders in over 130 countries.[147] Membership is entirely

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[143] *See, e.g.*, Business Human Rights Resource Centre, A Brief Description, http://www.business-humanrights.org/Aboutus/Briefdescription (last visited May 17, 2009) (describing the Centre as a non-profit, collaborative partnership that tracks the positive and negative effects of over 4000 companies worldwide).

[144] *Beyond the Rule of Law*, *supra* note 107, at 76.

[145] *Id.* The actual IMPACTT report, entitled *Changing Over Time: Tackling Supply Chain Labour Issues Through Business Practice*, is available for download at http://www.impacttlimited.com/resources/changing-overtime-tackling-supply-chain-labour-issues-through-business-practice (last visited Mar. 15, 2009).

[146] SLAUGHTER, *supra* note 3, at 55.

[147] Overview of the U.N. Global Compact, http://www.unglobalcompact.org/AboutTheGC/index.html (last visited Nov. 22, 2009) [hereinafter Overview of the U.N. Global Compact]. On 10 December 2008, nearly 250 corporate chief executives signed a statement in support of the Global Compact, which was published in all editions of the Financial Times. *See* 250 CEOs Issue Global Human Rights Statement, http://www.un

voluntary.[148] The Global Compact has two objectives. First, to "mainstream" its ten principles of corporate responsibility,[149] which include human rights, labor, environment, and anti-corruption standards derived from key U.N. documents, such as the Universal Declaration of Human Rights. [150] The Global Compact's second objective is to "catalyze actions in support of broader U.N. goals."[151] The Global Compact posts updates on its website, at least annually, as to whether members have voluntarily self-reported compliance with the Global Compact.[152] This is again a useful tool for managing reputations. As an example that reputation does matter, Microsoft Corporation maintains its own website detailing its commitment to corporate citizenship, affirming its commitment to the Global Compact and compliance with its measures.[153]

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globalcompact.org/NewsAndEvents/news_archives/2008_12_10.html (last visited Mar. 15, 2009). The statement itself is available through a link on this page same web page.

[148] Overview of the U.N. Global Compact, *supra* note 147.

[149] *Id.*

[150] *Id.* The ten principles are:

> Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights;
> Principle 2: make sure that they are not complicit in human rights abuses;
> Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
> Principle 4: the elimination of all forms of forced and compulsory labor;
> Principle 5: the effective abolition of child labor;
> Principle 6: the elimination of discrimination in respect of employment and occupation;
> Principle 7: Businesses should support a precautionary approach to environmental challenges;
> Principle 8: undertake initiatives to promote greater environmental responsibility;
> Principle 9: encourage the development and diffusion of environmentally friendly technologies; and
> Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.

The Ten Principles, http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html (last visited Mar. 15, 2009).

[151] Overview of the U.N. Global Compact, *supra* note 147.

[152] *Id.*

[153] Microsoft, Responsible Leadership, http://www.microsoft.com/About/Corporate Citizenship/US/ResponsibleLeadership/HumanRights.mspx (last visited Mar. 15, 2009).

The Global Compact's corporate-oriented principles illustrate how attempts to define the rule of law can and should move beyond a narrow focus on legal institutions. The Global Compact's principles are different from traditional rule of law definitions, but advance complementary objectives. Multi-national corporations who respect the Global Compact will in turn respect the rule of law in many aspects. From a networked point of view, MNCs should be oriented toward contributing to the rule of law in areas they impact, as opposed to broader normative goals un-rooted in any business models. [154] Networked organizations such as the Global Compact can help translate rule of law principles into business practices.

Ultimately, voluntary enforcement networks help fill gaps where hard law does not exist, and would perhaps preferably be avoided. For example, a growing academic discussion concerns whether, and how, corporations as international legal personalities should be held liable for human rights abuses under some universal standard.[155] Although accountability may be necessary in some cases, the ultimate goal of PPPs is to help avoid such violations in the first place. None of the traditional enforcement regimes, whether host states, home states, or international law, currently provides a holistic, satisfactory mechanism for governing the conduct of corporations.[156] By actually involving MNCs in the compliance process along the way, networked PPPs could help establish self-compliance as a first and best resort.

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[154] Another type of network not discussed here concerns "capacity-building." SLAUGHTER, *supra* note 3, at 57. In the rule of law context, where the phrase is often used, capacity-building means assistance to help bring legal systems up to an expected baseline standard, such as the capacity to investigate and try criminal cases. As MNCs interact through legal and economic channels, they can also contribute to capacity-building.

[155] *See, e.g.*, Kobrin, *supra* note 121, at 3–4 (arguing that transnational corporations should be held liable for human rights violations, ideally through a hybrid regime of public and private actors using soft law enforcement mechanisms).

[156] Simon Chesterman, *Oil and Water: Regulating the Behavior of Multinational Corporations Through Law*, 36 N.Y.U. J. INT'L L. & POL. 307, 308 (2004) ("The recent turn to voluntary codes of conduct . . . are an admission that efforts to regulate multinational corporations through legal regimes have failed.").

3. Harmonization Networks

Networks also form to harmonize standards.[157] For governments, this often includes regulatory standards, such as product-safety standards.[158] For private organizations, the ISO is the best example of harmonization, as it promulgates thousands of standards that enable cross-border business to be done with uniformity and predictability. The upcoming ISO 26000 corporate responsibility standard is the latest frontier.[159] From a rule of law perspective, harmonization networks could be used to set appropriate standards for rule of law reform, given local conditions. The U.S. Institute of Peace-founded International Network to Promote the Rule of Law (INPROL), for example, purports to play a harmonization role for on-the-ground practitioners.[160] But truly effective harmonization needs both public and private input to account for the full range of state and non-state actors.

Carefully networked PPPs could help overcome many of the communication and coordination problems that currently plague rule of law efforts. Rule of law programs in post-conflict environments provide a poignant example. These efforts tend to be dominated by foreign governments and NGOs. Because both groups feel political or donor-led pressure to demonstrate "results," there is often an overemphasis on humanitarian relief versus a real emphasis on reconstruction of the society and infrastructure.[161] In the worst cases, donor agencies even end up essentially doing projects themselves, rather than instilling real capacity in local institutions. [162] Charity aid work by NGOs can unwittingly remove critical functions from the developing state to outside agencies, depriving the state of its legitimacy.[163] The net result of this international activity is often a "web of relationships" that actually undermines, rather than supports, the rebuilding of state institutions.[164]

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[157] SLAUGHTER, *supra* note 3, at 59.
[158] *Id.*
[159] *See supra* Part III.A.3 (discussing the ISO and upcoming ISO 26000 corporate responsibility standard).
[160] *See supra* note 138 (describing INPROL).
[161] *See* AHMED RASHID, DESCENT INTO CHAOS: THE UNITED STATES AND THE FAILURE OF NATION BUILDING IN PAKISTAN, AFGHANISTAN, AND CENTRAL ASIA 177 (2008).
[162] *Id.*
[163] GHANI & LOCKHART, *supra* note 11, at 28. The budget of the largest NGOs exceeds the GDP of many African countries and even some European countries. *Id.* at 62.
[164] *Id.* at 97–98.

Public-private partnerships in such rule of law operations should involve both international and local actors to better share the inherent sense of urgency. By facilitating the exchange of information and harmonization of standards and practices, networked rule of law PPPs must strive to overcome the tendency toward parallel bureaucracies, where aid or rule of law donors in a country work inside an intellectual and physical cocoon, insulated from the real needs of the very country where they are located to assist.[165] Public-private partnerships could help structure projects in ways that incorporate local interests and concerns.

C. Leveraging Incentives for Rule of Law Participation

If MNCs are viewed as strategic actors, then a greater focus on incentives could help leverage their compliance with rule of law objectives. If MNCs' primary motive is profit, then at least four incentives can be leveraged against this motive: reputation, the desire to continue business, enhancing profitability, and avoiding liability. All of these incentives can be structured into PPPs to promote the rule of law.

The incentive of enhanced reputation is the one most often incorporated into partnerships that affect the rule of law. The U.N. Global Compact, for example, incentivizes the enhanced reputation that comes from voluntary membership.[166] Other existing PPPs respond to the incentive to simply keep doing business. This is especially true when political or other outside interests threaten to restrain MNCs' behavior due to perceived human rights or other violations.[167] Entering into voluntary PPPs is a way to ease scrutiny and enable MNCs to continue to engage in profitable activities.

The remaining incentives, enhancing profitability and avoiding liability, have the most opportunity for further development in the context of PPPs. If and until greater international consensus emerges on how to regulate the behavior of MNCs, these incentives are best advanced by domestic efforts of individual states. Transgovernmental

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[165] *Id.* at 19.
[166] *See supra* Part IV.B.2.
[167] *See infra* Part V.1–2 (discussing voluntary networks in the extractives industry, and the formation of the Global Network Initiative in the aftermath of the Google in China hearings).

networks could, in turn, assist in efforts to harmonize incentives among like-minded states.

In the United States, the Overseas Private Investment Corporation (OPIC) is ideally situated to leverage MNC involvement in ways that both enhance profitability and advance rule of law objectives. The stated mission of OPIC is to facilitate economic and social development in over 150 countries, including Iraq and Afghanistan.[168] OPIC incentivizes MNC involvement in its projects through three primary means: financing, political risk insurance, and investment funds.[169] In addition to offering favorable terms in these areas, OPIC's statutory investment policy requires that it work with MNCs to ensure that all OPIC-sponsored projects apply "consistent and sound environmental standards," "consistent and sound worker rights standards," "observe and respect human rights," have "no negative impact on the U.S. economy," and "encourage positive host country development effects."[170] These standards are important, but vague. The 2007 Annual Report for OPIC outlines projects with a combined billions of dollars throughout the world, and is deliberately devoted to expanding its reach.[171] OPIC could

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[168] *See* OPIC, About Us, http://www.opic.gov/about/index.asp (last visited Mar. 15, 2009) [hereinafter About Us]; Doing Business with Us, List of All Countries, http://www.opic.gov/doingbusiness/ourwork/countrylist.asp (last visited Mar. 15, 2009). In its dealings, OPIC also acts as a sort of intermediary between host governments and overseas investors, which is an ideal role for involvement in PPPs. The OPIC has completed similar agreements with the respective Ministries of Commerce in Iraq and Afghanistan, for example, regarding its investment activities in these countries. Its terms include, for example, that investors in OPIC projects "shall be accorded tax treatment no less favorable than that accorded to the investment support of any other national or multilateral development institution which operates in [Afghanistan]." Investment Incentive Agreement Between the Government of the United States of America and the Government of the Islamic Republic of Afghanistan, U.S.-Afg., art. 2, Apr. 17, 2004, *available at* http://www.opic.go/doingbusiness/ourwork/asia/documents/Afghanistan 2004.pdf; *see also* Investment Incentive Agreement Between the Government of the United States of America and the Government of the Republic of Iraq, U.S.-Iraq, July 11, 2005, *available at* http://www.opic.gov/doingbusiness/ourwork/africa/BL_Iraq-07-11-2005.pdf. As a next step, such agreements could be used to incorporate basic human rights or rule of law principles.

[169] About Us, *supra* note 168.

[170] Doing Business with Us: Investment Policy, http://www.opic.gov/doingbusiness/investment/index.asp (last visited Mar. 15, 2009).

[171] *See* OVERSEAS PRIVATE INV. CORP., 2007 ANN. REP. 26–31 (2007). One example of OPIC's growing outreach is the Enterprise Development Network (EDN), initiated in 2007. The EDN is "a strategic alliance with qualified financial institutions, business consultants, associations, law firms, and regional investment promotion agencies, all of

further enhance its role in rule of law PPPs by requiring more explicit commitments to human rights and the rule of law in its contracts, at the same time that it sweetens the pot by offering favorable terms for investment.

The final incentive, avoiding liability, is currently the least addressed in the context of PPPs, even in the midst of growing discussion about whether and how MNCs should be held responsible for human rights violations.[172] Because international consensus on this issue seems less than imminent, states are best positioned to take the lead on ways to incentivize good behavior that avoids liability. One possibility, currently unexplored in the context of rule of law partnerships, is domestic safe harbor legislation, which could limit the liability of MNCs involved in rule of law projects, provided they adhere to certain conditions. The intent is not to avoid responsibility, but rather to encourage responsible behavior in a way that avoids poor behavior that could lead to liability in the first place.

A relatively recent environmental safe harbor provision in the United States offers a good comparative example. In 1995, a U.S.-based NGO, the Environmental Defense Fund, and the U.S. Fish and Wildlife Service (FWS) developed a safe harbor program to "encourage private landowners to restore and maintain habitat for endangered species without fear of incurring additional regulatory restrictions."[173] Under this program, landowners can voluntarily enter into safe harbor agreements to ensure that if, for example, they conserve their land in a way that may attract endangered species, they will not then be subject to additional restrictions under the Endangered Species Act if such species do in fact enter their land.[174] This regulatory solution is designed to avoid "punishing" landowners for doing good deeds that benefit conservation.[175]

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whom have been trained in how to originate more projects for OPIC's consideration." *Id.* at 4.

[172] *See, e.g.*, Kobrin, *supra* note 121, at 3–4.

[173] Environmental Defense Fund, Safe Harbor (May 16, 2008), http://www.edf.org/page.cfm?tagID=87 [hereinafter Environmental Defense Fund].

[174] *Id.*; *see also* Fish and Wildlife Service, Safe Harbor Agreements Program (Mar. 12, 2009), http://www.fws.gov/ventura/endangered/safeharbors. An accompanying fact sheet is available at the same link.

[175] Environmental Defense Fund, *supra* note 173.

In the rule of law setting, an analogously designed program could offer contractual assurances to MNCs operating in risky environments, where there has historically been less observance of human rights, labor, or other standards that concern the project. Like in the FWS safe harbor program, a state and an MNC involved in such a PPP could first determine a "baseline" for current conditions, such as labor standards, in the operating environment. Participating MNCs could be offered safe harbor protection as long as their behavior did not dip below this baseline. These MNCs could then qualify for incentives for behavior that actually encouraged improving the baseline. Particular safe harbor provisions could include, for example, reduced liability under U.S. domestic law, such as the Foreign Corrupt Practices Act, as long as the MNC concerned exercised due diligence, operated in good faith, or performed to some other established standard. The intent, though, is not to shelter bad behavior. In cases where MNCs become suspected of activity that could invoke civil or criminal liability, safe harbor provisions could include agreements to jointly investigate such allegations, and/or first refer such allegations to arbitration before any civil or criminal penalties are pursued.

Ideally, such safe harbor provisions could even incorporate host state authorities where the MNC is operating. They could, for example, include agreements to jointly investigate allegations in the state where they allegedly occurred or to resort to third-party arbitration as the first resort to minimize disputes and limit liability for operations in the host nation. In cases of disagreement, the sending state, such as the United States, could even agree to represent its MNC if charged with violations in the host country, as long as the MNC could demonstrate that it had adhered to the agreed-upon standards. Although such an arrangement could threaten to politicize PPPs, the goal would be to facilitate communication throughout the process, and thus minimize or eliminate surprises.

V. Exploring When and Where

The main benefit of PPPs is that, because they are inherently flexible, they can be adapted to any rule of law requirement, from post-conflict to non-conflict environments. It could be argued that external access to a state's public and private institutions bears an inverse relationship to the development status of that state. At one end of the spectrum are developed and developing countries, where the barriers to

private entry (such as foreign investment) tend to be lower, and barriers to direct foreign government influence (i.e., the need to use diplomacy rather than a stick) tend to be higher. At the other extreme are post-conflict societies,[176] where barriers to MNC entry are likely to be high (due to corruption and a lack of security) and the barriers to foreign government influence or control are comparatively low (due to the destruction of the country's infrastructure). All of these situations present opportunities for PPPs.

Some of the most successful examples of PPPs to date have occurred not in post-conflict environments, but in societies with relatively stable, functioning governments. These stable governments would presumably be the least receptive to outside efforts to reform their behavior, but PPPs have achieved success when they are able to narrow their focus to issues of mutual interest to all of the parties involved. One example concerns a foreign company investing in Russia, in which the public partner was a state-owned company and the private partner was an MNC. In this case, "the contract clauses negotiated by foreign investors dealing with largely state-owned Russian companies force[d] the Russian Government to embrace standards of corporate accounting and transparency that have no domestic equivalent in formerly soviet regimes."[177] A private standard, in other words, effectuated a positive change, transparency, that ultimately provides a positive rule of law benefit. This type of reform is soft law at its best.

1. Voluntary Measures in the Extractive Industry

The extractives industry, namely oil and gas companies, provide ideal case studies for PPPs in action. According to a 2002 U.N. Conference on Trade and Development ranking of the world's 100 largest economic entities (including nation-states), ExxonMobil, Royal Dutch/Shell and BP ranked 45, 62, and 68, respectively, meaning they dwarf the economies of many states.[178] At the same time, the wide involvement of oil and gas MNCs in developing countries has publically

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[176] For a discussion of U.S. efforts in post-conflict Iraq and Afghanistan, see *supra* Part II.

[177] Caruso, *supra* note 51, at 1 n.63 (citing Doreen McBarnet, *Transnational Transactions: Legal Work, Cross-Border Commerce and Global Regulation, in* TRANSNATIONAL LEGAL PROCESSES: GLOBALISATION AND POWER DISPARITIES 98, 105–06 (Michael B. Likosky ed., 2002)).

[178] UNCTD Press Release, *supra* note 20.

implicated them in issues ranging from environmental degradation, to human rights violations, to the unfair distribution of wealth in "resource-rich-but-poor" countries.[179] The public and industry response to such criticisms has led to two innovative examples of PPPs.

The Voluntary Principles on Security and Human Rights[180] (Voluntary Principles) and the Extractive Industries Transparency Initiative[181] (EITI) are two separate, wide-ranging initiatives that could be considered PPPs. Although very different in their form and implementation, both initiatives exhibit several key traits that are probably important for any effective PPP. First, state involvement was necessary to motivate substantive development in both cases.[182] Second, both initiatives reflect a reality that all parties involved, including states, MNCs, and NGOs, are driven by clearly defined, and sometimes divergent, interests.[183] Rather than being aspirational documents, both arose, at least in the view of one scholar, from "interest-based bargaining" between the governments, MNCs, and NGOs involved.[184] And finally, both initiatives are arguably somewhat successful because they both narrowed their fields of agreement to issues that could be accepted by all parties involved.

The Voluntary Principles are unique in the extractives industry in that they are a direct attempt to regulate behavior.[185] The Governments of the United States and United Kingdom launched consultations leading to the Voluntary Principles in 2000, in light of rising concerns about the complicity of extractive industry MNCs in human rights abuses in countries where they operated.[186] For MNCs operating in often unstable

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[179] Cynthia A. Williams, *Civil Society Initiatives and "Soft Law" in the Oil and Gas Industry*, 36 N.Y.U. J. INT'L L. & POL. 457, 458 (2004).

[180] Voluntary Principles on Security and Human Rights, http://www.voluntaryprinciples.org/ (last visited Mar. 15, 2009) [hereinafter Voluntary Principles Overview].

[181] Extractive Industries Transparency Initiative, http://eitransparency.org/ (last visited Mar. 15, 2009).

[182] Williams, *supra* note 179, at 480, 486.

[183] Hansen, *supra* note 56, at 5.

[184] *Id.* at 3.

[185] Williams, *supra* note 179, at 498. Currently participants include the Governments of the United States, United Kingdom, the Netherlands and Norway, eighteen companies including heavy-hitters such as Chevron, BP, ExxonMobil, and Shell, and influential NGOs including Amnesty International, Human Rights Watch, and Oxfam. Voluntary Principles Participants, http://www.voluntaryprinciples.org/participants/index.php (last visited Mar. 15, 2009).

[186] Hansen, *supra* note 56, at 11. Specific criticisms, largely from NGOs, were that these MNCs did not leverage their political clout to deter host governments from committing

environments, security was the overriding concern: the preamble to the Voluntary Principles states that their purpose is "to guide Companies in maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms."[187]

One unique feature of the Voluntary Principles is that they explicitly incorporate reference to human rights and U.N. documents, including the Universal Declaration of Human Rights, the U.N. Code of Conduct for Law Enforcement Officials, and the U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.[188] The Voluntary Principles, by incorporating these documents, "clearly subject companies to the norms and treaty obligations and, thus, serve to advance the goals of international human rights protection."[189] In substance, the Voluntary Principles establish a regime of compliance and reporting, including requirements for MNCs to: conduct risk assessments in countries where they operate, which account for human rights and rule of law concerns; to regularly consult with host governments on the impact of public security arrangements and to report any credible human rights violations; and to ensure that any private security that they retain follow the policies of that MNC regarding ethical conduct and human rights, as well as international human rights standards.[190] In other words, the onus is heavily on participating MNCs for compliance with the Voluntary Principles.

According to a five-year overview prepared by the Voluntary Principles Information Working Group (IWG), this system of informal accountability has achieved some limited results.[191] The Voluntary Principles lack any empirical means to measure progress among

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violations; that MNC staff had direct involvement in human rights violations; and that the MNCs indirectly supporting human rights violations through security force operations. *Id.*

[187] Voluntary Principles Overview, *supra* note 180.

[188] The Voluntary Principles, http://www.voluntaryprinciples.org/principles/index.php (follow links on the right of the page to view the principles) (last visited Mar. 15, 2009) [hereinafter Voluntary Principles].

[189] Williams, *supra* note 179, at 481.

[190] Voluntary Principles Overview, *supra* note 180.

[191] *See generally* Five-Year Overview of the Voluntary Principles on Security and Human Rights, Executive Summary, http://www.voluntaryprinciples.org/reports/2005/index.php (last visited Mar. 15, 2009) [hereinafter VP Executive Summary].

participants, and, instead, focus on largely anecdotal assessments.[192] In compiling reports from all of the participating MNCs, the 2005 IWG report noted that the Voluntary Principles "are seen as genuinely filling a critical void for companies seeking guidance" about managing risks "related to their security and human rights practices."[193] As a first step, the Voluntary Principles simply helped put human rights on the agenda.[194] Other measured successes included an increased interest among MNCs in training the Voluntary Principles and human rights concerns and an increased emphasis on processes for anonymously reporting human rights abuses and providing "whistle-blower" protection.[195] As far as tangible results, the report noted an emerging best practice that the "Voluntary Principles are incorporated into all private security contracts, agreements with governments and standard company risk assessments."[196] Most impressively, the Voluntary Principles were explicitly incorporated in agreements with government representatives in Indonesia and Columbia.[197]

The Voluntary Principles are not, of course, without their shortcomings. The IWG report, itself, noted deficiencies such as the "lack of an audit mechanism," and the fact that most participating MNCs

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[192] The Voluntary Principles in fact seem intent on avoiding legally enforcement commitments. *See* Amendments Approved at VPs 2009 Oslo Plenary, http://www.voluntaryprinciples.org/files/vp_amendments_200905.pdf (last visited Nov. 22, 2009) ("Participants acknowledge that implementation of the Principles is continuously evolving and agree that the Voluntary Principles do not create legally binding standards. . . .").

[193] *Id.*

[194] As the report later notes, **"**Most companies had general social responsibility policies in place prior to implementing the Voluntary Principles, but few had specific extant human rights policies." Five-Year Overview, General Overview of Company Efforts to Implement the Principles, http://www.voluntaryprinciples.org/reports/2005/company-efforts-overview.php (last visited Mar. 15, 2009). Since then, "Some companies have specifically incorporated the Voluntary Principles into their policies and commitments, or plan to do so in the near future. A few companies have also adopted a security standard to provide specific guidance on their approach to managing security issues." *Id.*

[195] VP Executive Summary, *supra* note 191.

[196] *Id.*

[197] *Id.* The report notes, "Five energy companies involved in the Indonesian working group have signed MOUs with BP Migas, which is the Indonesian Government's oil and gas coordinating body, and the Area Police Command (Polda) that include adherence to the Voluntary Principles." *Id.* In Columbia, "[t]he Colombian Ministry of Defense agreed to include language on human rights protection, including a commitment to the Voluntary Principles, in agreements that the state-owned oil company, Ecopetrol, signs with the Colombian armed Forces to provide protection for oil operations with which it is involved." *Id.*

had not set specific timelines for the implementation of the Voluntary Principles.[198] The primary outsider critique of the Voluntary Principles is simply that they lack any real enforceability.[199] This critique, of course, applies to all voluntary compliance regimes, but this does not mean such regimes are without value. As one scholar notes, voluntary or soft law regimes can help "coordinate action towards a focal point," and through the use of shame and pressure have "much of the effect of hard law."[200]

One lesson of the Voluntary Principles is that they arose out of the crucible of necessity and politics, rather than any spontaneous, communal desire to better the cause of humanity. The Governments of the United States and United Kingdom, Hansen observes, "had the primary objective of ensuring continued oil company operations in problematic environments and the secondary objective of improving human rights in resource-rich regions."[201] Participating MNCs "shared an outcome preference of ensuring the sustainability and security of operations and minimizing political and reputational risks."[202] And NGOs, for their part, "shared an outcome preference for as binding a regulatory framework as possible that would then turn resource companies into promoters of human right vis-à-vis host state governments and private security providers."[203] One could observe that none of these positions, when juxtaposed with predictable organizational characteristics, is necessarily morally "wrong." The lesson is that even divergent or competing interests can be leveraged to achieve an end result that ultimately contributes to the common good, regardless of the initial triggering mechanism. Negotiating PPPs in this framework of reality is much more likely to account for the positions of all of the players involved, which in turn may increase the likelihood of their ultimate compliance.

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[198] *Id.*
[199] Hansen, *supra* note 56, at 22 ("The Voluntary Principles do not create 'legally binding standards' and failure to implement them cannot be used in legal proceedings according to the 2007 participation criteria text."). Hansen also criticizes the Voluntary Principles for shifting the onus for compliance too heavily toward participating MNCs, as opposed to host governments. *See id.* 21–24.
[200] Williams, *supra* note 179, at 496.
[201] Hansen, *supra* note 56, at 12.
[202] *Id.*
[203] *Id.*

Like the Voluntary Principles, the EITI was born out of politics and competing interests, though it represents a very different approach to voluntary compliance. The effort to launch the EITI was started by an NGO, although like the Voluntary Principles, negotiations did not make significant headway until the U.K. Government became seriously involved.[204] The EITI now enjoys fairly broad participation: as of 2008, 25 countries have achieved "EITI Candidate" status; "40 of the world's largest oil, gas and mining companies support and actively participate in the EITI process," major NGOs and international organizations including the World Bank are involved, and the United States and United Kingdom, among other governments, support the EITI.[205]

The EITI, rather than attempting to influence behavior, establishes a disclosure regime for payments made by extractive industry MNCs to host governments, to promote revenue transparency.[206] Unlike the Voluntary Principles, the negotiation of the EITI standards included participants from host governments, and the resulting standards put the onus on host governments for monitoring and enforcement.[207] The EITI is based on country-by-country implementation rather than a broad standard, which also leads to its primary shortcoming: its absolute reliance on host governments for compliance.[208] Like the Voluntary Principles, the noted "achievements" of the EITI are not empirical; they

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[204] *Id.* at 15.

[205] EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, FACT SHEET (2008), *available at* http://www.eitransparency.org/files/Fact%20Sheet.pdf.

[206] Williams, *supra* note 179, at 498; *see also* Hansen, *supra* note 56, at 15. As to its overall purpose, "[t]he Extractive Industries Transparency Initiative (EITI) supports improved governance in resource-rich countries through the verification and full publication of company payments and government revenues from oil, gas and mining." EITI Summary, Sept. 23, 2007, http://eitransparency.org/eiti/summary. The actual EITI criteria, which must be adopted by individual host states, are exceedingly broad, and include

> Regular publication of all material oil, gas and mining payments by companies to governments ("payments") and all material revenues received by governments from oil, gas and mining companies ("revenues") to a wide audience in a publicly accessible, comprehensive and comprehensible manner;" credible, independent audits, and that "Civil society is actively engaged as a participant in the design, monitoring and evaluation of this process and contributes towards public debate.

The EITI Criteria, Nov. 20, 2007, http://eitransparency.org/eiti/criteria.

[207] Hansen, *supra* note 56, at 15, 26.

[208] *Id.* at 28.

focus anecdotally on progress toward host nation implementation and validation of EITI requirements.[209] Citing the EITI's newness, some scholars have reserved ultimate judgment as to whether the EITI will ultimately be effective.[210]

Both the Voluntary Principles and the EITI managed to bring together diverse players and generate standards in areas that likely could not have been achieved through traditional hard law channels, such as treaty negotiation. When it comes to contentious or high-profile issues, self-regulation may be better than no regulation, as long as this self-regulation supports basic normative human rights or rule of law values. This, again, points to the need for a clear rule of law definition, ideally in the form of a U.N. resolution. Entities like the Voluntary Principles and the EITI can advance rule of law objectives in substance, even if they are not explicitly recognized as such. But bringing such efforts under the umbrella of a common understanding of the rule of law would help achieve more sustainable progress.

2. The Google in China Hearings: Coercion Versus Participation

The Google in China hearings present an example where politics trumped on opportunity for public-private cooperation on an important rule of law matter. State pressure extracted a desirable outcome, but one whose ultimate solution ironically excluded state participation. As described earlier, the U.S. Congress in 2006 threatened the Google parent company, which is headquartered in the United States, with sanctions for the actions of Google in China in handing over dissident files.[211] In a corresponding reaction, a member of the U.S. House of Representatives introduced the Global Online Freedom Act (GOFA).[212] The GOFA, if passed, would have imposed civil and criminal penalties[213]

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[209] *See generally* EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, PROGRESS REPORT 2007–2009 (2009), *available at* http://eitransparency.org/ (click on "Resources" at the top of the page, and then click on "Progress Report" in the middle of the page that loads) (describing achievements such as increasing the number of country participants, and the increase in validation reports produced).

[210] *See, e.g.*, Williams, *supra* note 179, at 502 (stating that as of her 2004 article, it was too soon to evaluate the EITI's effectiveness).

[211] Zeller, *supra* note 99.

[212] Global Online Freedom Act, H.R. 4780, 109th Cong. (2006) [hereinafter GOFA 2006]. A substantially similar act was recently reintroduced. *See* Global Online Freedom Act, H.R. 2271, 111th Cong. (2009).

[213] GOFA 2006 § 207.

for the very types of actions that Google in China engaged in, such as curtailing search engine results,[214] and handing over personally-identifiable user information to Chinese law enforcement pursuant to Chinese law.[215] The U.S. Department of Justice, opining from afar, would determine exceptions for "legitimate foreign law enforcement purposes."[216] Although never passed to date, such a bill would have "effectively preclude[d] U.S. information technology companies from operating in any countries with such internal restrictions."[217]

While the Google in China hearings and the GOFA's introduction ultimately amounted to little more than political sideshows, they did indirectly influence a desirable outcome. Not coincidentally, major participants in the hearings, including Google, Microsoft and Yahoo!, launched the Global Network Initiative (GNI) on 28 October 2008, after eighteen months of collaboration.[218] In addition to other Information Technology companies, GNI participants include academics, NGOs (including Human Rights Watch, which had also supported the GOFA), and a U.N. Observer.[219] The GNI does not, notably, include representatives from the U.S. or any other government.[220] The GNI is outlined in three core documents: Principles; Implementation Guidelines; and the Governance, Accountability, and Learning Framework.[221] The GNI's Principles are "based on internationally recognized laws and standards for human rights, including the Universal Declaration of Human Rights ('UDHR'), the International Covenant on Civil and Political Rights ('ICCPR') and the International Covenant on Economic, Social and Cultural Rights ('ICESCR')."[222] The GNI requires, notably, commitments from participating companies to "avoid

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[214] *Id.* § 202.
[215] *Id.* § 206.
[216] *Id.*
[217] Jade Miller, The Internet in China Hearing and The U.S. Technology Corporation: Soft Power and State-Firm Diplomacy 8 (Nov. 14, 2007) (unpublished manuscript, available at http://www.allacademic.com/meta/p_mla_apa_research_citation/1/9/3/7/4/p193746_index.html).
[218] Global Network Initiative, http://www.globalnetworkinitiative.org/ (last visited Mar. 15, 2009).
[219] Global Network Initiative Participants, http://www.globalnetworkinitiative.org/participants/index.php (last visited Mar. 15, 2009).
[220] *Id.*
[221] Global Network Initiative Core Commitments, http://www.globalnetworkinitiative.org/corecommitments/index.php (last visited Mar. 15, 2009).
[222] Global Network Initiative Principles, http://www.globalnetworkinitiative.org/principles/index.php (last visited Mar., 15, 2009).

or minimize the impact of government restrictions on freedom of expression," and to "respect and protect the privacy rights of users when confronted with government demands, laws or regulations that compromise privacy in a manner inconsistent with internationally recognized laws and standards."[223] It wisely, however, falls short of demanding civil disobedience.[224] Because the GNI is so new, the Government, Accountability, and Learning Framework will be implemented in three yet-to-be-completed phases, including the incorporation of independent reviews.[225]

The GNI is too new to yet measure its compliance or impact.[226] But its adoption illustrates the value of applying a multi-lateral, multi-stakeholder approach to problems of global concern, such as Internet censorship and privacy. Whereas the GOFA effort tried to force the U.S. Government into a politically infeasible, unrealistic role as the sole arbiter of a multi-lateral concern, the GNI casts a wider net that incorporates as many multi-lateral players as possible, though without state involvement. A voluntary association seems to have succeeded where heavy-handed government threats failed. Perhaps a next step would be for the GNI, like the EITI, to work to incorporate host-nation involvement. The GNI is ripe for further refinement over key issues, such as the involvement of Chinese joint venture partners, over which MNCs lack operational control.[227] China, or any nation, is likely to resist external attempts to legislate conduct within its own borders, such as the GOFA. The GNI's multiple-stakeholder approach, on the other hand, may stand a greater chance of gradually securing host government acceptance or compliance.

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[223] *Id.*

[224] The Global Network Initiative, http://www.circleid.com/posts/20081028_global_network_initiative/ (Oct. 28, 2008, 16:20 PDT).

[225] Global Network Initiative, Governance, Accountability, and Learning Framework, http://www.globalnetworkinitiative.org/governanceframework/index.php#36 (last visited Mar. 15, 2009).

[226] *But see* Anick Jesdanun, *Internet Companies Embrace Human Rights Guidelines*, USA TODAY.COM, Oct. 28, 2008, http://www.usatoday.com/tech/news/2008-10-28-net-human-rights_N.htm. As stated by Morton Sklar, Executive Director of the World Organization for Human Rights USA, "What's disappointing is that the amount of effort . . . didn't produce something more substantial." *Id.*

[227] Posting of Geoffrey A. Fowler to China Journal Blog, http://blogs.wsj.com/chinajournal/2008/10/28/parsing-the-google-yahoo-microsoft-global-network-initiative (Oct. 28, 2008, 8:10 EST).

VI. The Future of Public-Private Partnerships

Public-private partnerships can be an effective tool to promote the rule of law largely because they already exist, in the form of formal and informal networks.[228] The concerns of this article are less about suggesting something entirely new, and more about better leveraging the emerging governance tools of the twenty-first century. Part of the needed adjustment is a recognition that rule of law success stories may look different than initially expected. The rule of law is too vast of a concept to pursue in blanket fashion in a given country or problem set; depending on the need, the rule of law may mean criminal law, civil law, property rights, law-abiding labor practices, or other rules-based systems that meet immediate needs. Because PPPs are inherently flexible and situation-dependent, they are uniquely situated to respond to relevant regional, national, and local interests.[229] And in areas or projects where the rule of law may be a controversial concept, collaboration with local efforts can help dislodge resistance and work through concerns as they arise.

A. Overcoming Criticisms:

Public-private partnerships are ultimately a method to achieve progress, not a stand-alone solution. Critics of voluntary arrangements offer views that must be carefully assessed in light of the changing world order. When contrasting hard and soft law mechanisms, it may be time to recognize that in a networked environment, substance is more important than form, and that hard law measures must increasingly share space with other types of compliance regimes.

1. Meeting for the Sake of Meeting

In a networked, multi-polar world, it is crucial for all major players involved in the rule of law to recognize that communication and

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[228] *See supra* Part IV.B.

[229] As two scholars note, "[t]he the absence of effective national and intergovernmental regulation to ameliorate global environmental and social problems, "private" alternatives have proliferated, including self-regulation, corporate social responsibility, and public-private partnerships." Steven Bernstein & Benjamin Cashore, *Can Non-State Global Governance Be Legitimate? An Analytical Framework*, 1 REG. & GOVERNANCE 347, 347 (2007).

facilitation can themselves contribute to rule of law objectives, such as transparency, monitoring, and public accountability.[230] The point is not to avoid the hard questions of whether the rule of law is actually progressing in any particular situation, but rather to recognize that, in a networked world, solutions will only find their way when local conditions are ready for them. Networked PPPs can act as a sort of catalyst to help speed along local conditions.

2. Lack of Enforcement

Public-private partnerships could be criticized as a method for MNCs to avoid accountability, such as fines or prosecution, for issues such as human rights violations. But sanctions are a question of timing more than substitution. Rather than avoiding accountability, the goal of PPPs is to avoid questionable situations in the first place. If states feel inclined to punish MNCs for violations after a PPP fails, this is a process that should remain outside of, and be separate from, the PPP process itself. Public-private partnerships will be most effective if understood, and applied, in terms of soft power. Hard power and state sovereignty undoubtedly have their role in a multi-polar, disaggregated system. But to pin heavy-handed enforcement on PPPs risks upsetting the delicate balance that often only PPPs are able to achieve, between local and international interests.

B. Politicizing Business: Drawing the Line Between Individual and Corporate Responsibility

Apart from the narrower issue of enforcement, PPPs raise a broader concern about politicizing business. Multi-national corporations in PPPs should avoid becoming tools of state interests, and thereby compromising their legitimacy in the field of business. This is not to say that PPPs should not hold positions in important but sensitive areas such as human rights, but rather that these positions should be arrived at through negotiation and interaction in the forum of the PPP, rather than imposed externally. PPPs must avoid inhibiting the free movement of

[230] The U.S. Army Judge Advocate General's *Rule of Law Handbook*, for example, recognizes that rule of law projects must focus on bringing about particular effects, as opposed to merely institutional objectives. ROL HANDBOOK, *supra* note 35, at 21.

information, goods, and capital, which is the unique advantage that MNCs in PPPs have over governments.

VI. Conclusion

In the changing world order, states that lack the rule of law will likely fall even further behind in joining the global community. But these states also have the most to gain from the rule of law assistance of PPPs.

From a security perspective, the U.S. military simply cannot afford to ignore the need to leverage new types of partnerships in support of U.S. interests. The United States' competitors, most notably China, are already doing so in support of their own objectives.[231] Wars of the future may be waged not only for military superiority, but also for economic, social, and political influence.[232]

Some specific steps by each of the major players could help advance the use of PPPs to promote the rule of law.

First, international organizations should seek to act as clearinghouses of information and facilitators for indentifying global rule of law standards, rather than assuming a role as top-down enforcers. The U.N., for its part, should continue to seek a General Assembly resolution that reflects international consensus on a framework definition of the rule of law. The U.N. could also more explicitly recognize in its rule of law planning the role of PPPs in promoting the rule of law. An international framework for understanding the rule of law is desperately needed before serious harmonization and collaboration among networks can be expected.

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[231] *See*, *e.g.*, Chris Zambelis & Brandon Gentry, *China through Arab Eyes: American Influence in the Middle East*, PARAMETERS, Spring 2008, at 60, 61–71 (describing China's "soft power" effort to "establish a political, economic, and cultural foothold in the energy-rich and strategically central region" of the Middle East). *See also* Felix H. Chang & Jonathan Goldman, *Meddling in the Markets: Foreign Manipulation*, PARAMETERS, Spring 2008, at 43, 48–52 (discussing the security risk of market manipulation, and citing China as an example based on its growing economic power).

[232] One commentator, for example, analyzes modern insurgencies in the context of a "conflict market." *See* Steven Metz, *New Challenges and Old Concepts: Understanding 21st Century Insurgency*, PARAMETERS, Winter 2007–2008, at 20, 23 ("Contemporary insurgencies are less like traditional war where the combatants seek strategic victory, they are more like a violent, fluid, and competitive market.").

Second, states involved in rule of law promotion should further explore the use of safe harbor provisions and other methods to incentivize MNC involvement in PPPs. Safe harbor provisions would leave enforcement, if any need happen, at the state level. The goal of safe harbor provisions is not to avoid accountability, but rather to proactively avoid the issues that create violations in the first place. Harmonization networks could be particularly important for cross-border collaboration on safe harbor provisions. These networks could provide both uniformity, and predictability, two key conditions for encouraging MNC involvement. States who desire PPPs with MNCs need to find effective ways to encourage, rather than chill, participation.

For non-state actors, and MNCs in particular, industry should continue its voluntary, internal dialogue on corporate "best practices," and socially responsible investment. In particular, industry should consider broadening its participation in the U.N. Global Compact, as well as acceptance of the ISO 26000 standard, as significant first steps. From a self-interested point of view, this may help MNCs head off calls for hard law accountability, in areas such as human rights and labor practices. But from a broader point of view, such entities can go a long way toward actually instilling a corporate culture of linking sustainability with profits.

Although overall normative solutions for the rule of law may remain elusive, there is still ample opportunity for practical, on-the-ground action. Public-private partnerships are one method to achieve positive results. Although rule of law theory still has many unanswered questions, its pursuit, informed by day-to-day experience, is simply too important to ignore.

Author's Disclaimer: Divergent views on Posttraumatic Stress Disorder (PTSD) are underscored by recent efforts to revise the clinical diagnostic criteria. As a result of inconsistent perspectives on diagnosis or treatment, authors are hard-pressed to identify a single or perfect solution to the problem. Legal organizations may desire to approach the attorney's role in a cautious manner, limiting the attorney's response to decisional impairments that stem from PTSD symptoms. This article represents only the individual views of the author. The author was not directed to write this article in his military capacity and wrote it on his own time. By surveying assessment and counseling techniques and suggesting how attorneys might benefit from them, this article does not suggest that these approaches must or should be adopted by all attorneys providing legal services to clients. This article previews the possibilities of an enhanced client counseling role with the hope that consideration of these ideas will enrich the dialogue in the military and civilian sector on the best ways to serve clients with unique needs.

ATTORNEYS AS FIRST-RESPONDERS: RECOGNIZING THE DESTRUCTIVE NATURE OF POSTTRAUMATIC STRESS DISORDER ON THE COMBAT VETERAN'S[*] LEGAL DECISION-MAKING PROCESS[†]

Captain Evan R. Seamone[‡]

[*] The term "veteran," as used in this article, refers to any person who has previously served or who is currently serving in the armed forces. Combat veterans consequently include servicemembers on active duty who have prior deployments.

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I. Introduction

Posttraumatic Stress Disorder (PTSD) is a stress and anxiety condition that results from exposure to an overwhelming traumatic event combined with feelings of utter helplessness.[1] At the most general level, PTSD exists when the trauma resurfaces over time in intrusive ways causing disruption in a person's thoughts and behaviors.[2] As a "signature" disability evaluation characterizing the Iraq and Afghanistan campaigns,[3] PTSD has transformed many legal assistance and trial defense attorneys into first responders in the quest to ensure the well-being of these combat veterans.[4] While some definitions limit the term "first responder" to emergency response personnel based on the entities

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[1] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 467–68 (text rev., 4th ed. 2000) [hereinafter DSM-IV-TR]; *infra* Part II (exploring the diagnostic criteria for PTSD); *infra* Captain Evan R. Seamone, *The Veteran's Lawyer as Counselor: Using Therapeutic Jurisprudence to Enhance Client Counseling for Combat Veterans with Posttraumatic Stress Disorder*, 202 MIL. L. REV. 185, 241–44, app. A (2009) (reprinting diagnostic criteria).

[2] *See infra* Part II; Seamone, *supra* note 1, app. A, at 241–42.

[3] *E.g.*, J. Ford Huffman, *True Stories of PTSD, Brain Injury Victims and Those Who Try to Help*, ARMY TIMES, http://www.armytimes.com/entertainment/books/offduty_book_battles_081409/ (last visited Dec. 18, 2009) (describing how clinicians now define the "combination of mild [Traumatic Brain Injury] with PTSD" as the "signature injury" of the wars in Afghanistan and Iraq").

[4] In this sense, attorneys are much like Chaplains, who are also often forced to act as de facto counselors in order to compensate for the difficulty of mental health professionals in treating servicemembers with PTSD. Steven J. Danish & Bradley J. Antonides, *What Counseling Psychologists Can Do to Help Returning Veterans*, 37 COUNSELING PSYCHOLOGIST 1076, 1078 (2009).

that employ these professionals[5] or official training completed,[6] other definitions that consider the first responder's role cover a much broader spectrum of individuals. Just as Congress considers victim advocates first responders based on the fact that they are often the first persons to have contact with sexual assault victims,[7] disaster planners and others recognize that attorneys sometimes serve as first responders.[8] It is the lawyer's unique function in providing necessary legal services,[9] or the relationship between the attorney's service and the client's relief from hardship and personal strife[10] that accords this weighty title. Even those attorneys who prevent potential emergencies can nevertheless attain the status of first responder.[11]

While mental health clinicians surely have the training to diagnose and treat combat veterans with PTSD, common obstacles prevent them from identifying and treating all servicemembers with this condition.[12] In fact, a great many Soldiers, Sailors, Airmen, and Marines are slipping

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[5] *E.g.*, FLA. STAT. § 112.1815(1) (2009) (defining a "first responder" as "a law enforcement officer . . . , a firefighter . . . or an emergency medical technician or paramedic employed by the state or local government").

[6] *E.g.*, N.Y. PUB. HEALTH LAW § 3001(5) (Consol. 2009) (defining a "certified first responder" as one who has met "minimum [training] requirements" and "who is responsible for administration of initial life saving care of sick and injured persons").

[7] *E.g.*, National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 596(b)(1)(A), 119 Stat. 3136 (2006) (defining sexual assault first responders as "criminal investigators, medical personnel responsible for rape kit evidence collection, and victims advocates").

[8] *E.g.*, Scott Wylie, *"After September 11: Disaster Preparedness: Document Protection Guidance for Lawyers and Their Clients*, 44 ORANGE COUNTY LAW. 42, 44 (2002) ("Lawyers are often among the first responders after any major disaster in the United States–a fact unknown to many in our country.").

[9] *E.g.*, Sudha Shetty, *Equal Justice Under the Law: Myth or Reality for Immigrants and Refugees?*, 2 SEATTLE J. SOC. JUST. 565, 566–67 (2004) (recognizing that, the legal first responder has a responsibility to triage just like the medical first responder, which is satisfied in refugee cases when attorneys "assess . . . clients in . . . underserved communities where language and cultural barriers act as major barriers to accessing equal justice").

[10] *E.g.*, Nancy Cook, *Hurricane Katrina: The Storm Still Rages*, 56 R.I. B.J. 43, 43 (2008) (observing attorneys' status as first responders in the provision of various legal services to victims of Hurricane Katrina).

[11] *See* Shetty, *supra* note 9, at 566-67 (recognizing the attainment of first responder status is warranted when an attorney performs the function of "triage" in a population where existing legal problems have evaded conscious attention).

[12] Laura Savitsky et al., *Civilian Social Work: Serving the Military and Veteran Populations*, 54 SOCIAL WORK 327, 336 (2009) ("It is insufficient to assume that the care of service members, veterans, and their families will be adequately provided for by military and governmental systems.").

through the cracks.[13] Whether an undiagnosed client's condition resulted from Delayed Onset PTSD, which was dormant for months before its symptoms surfaced,[14] or the client's intentional efforts to mask her symptoms in an effort to appear strong or loyal to members of her military unit,[15] these factors can easily transform her attorney into a PTSD First Responder. In these instances, first responder status arises from the legal counselor's uncommon access to the client's decision processes, personal history, and behavior, a combination of which can easily reveal PTSD symptoms or influence the client's evaluation of the attorney's advice.[16] In fact, whether the visit to the lawyer's office comes as a result of domestic violence, financial issues, or abuse of controlled substances, both civilian and military attorneys will see an increasing number of PTSD victims due to the interrelationship between PTSD symptoms and these typical legal disputes.[17]

Many attorneys may not desire PTSD first responder status because the title implies a responsibility to "respond" to matters normally in the domain of licensed clinicians.[18] Even for those few attorneys who do litigate matters facially related to PTSD, such as in the defense to a

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[13] "[A]lthough approximately 80% of Iraq and Afghanistan service members with a serious mental health disorder such as PTSD acknowledged that they had a problem, only approximately 40% stated that they were interested in receiving help." Brett T. Litz, *Research on the Impact of Military Trauma: Current Status and Future Directions*, 19 MIL. PSYCHOL. 217, 222 (2007). Of the respondents, "[o]nly 26% reported receiving formal mental health care." *Id.*

[14] Delayed Onset PTSD describes a condition in which symptoms begin more than a month following the trauma. DSM-IV-TR, *supra* note 1, at 467–68. For further discussion see BRIDGET C. CANTRELL & CHUCK DEAN, DOWN RANGE TO IRAQ AND BACK 71–72 (2005).

[15] *See* discussion *infra* note 54 and accompanying text.

[16] *See infra* Part II.E.

[17] Savitsky et al., *supra* note 12, at 329–34 (identifying, amongst other issues with obvious legal ramifications, interpersonal domestic violence, child abuse and neglect, substance abuse, and financial considerations, which could potentially lead to incarceration).

[18] Such sentiments are representative of attorneys' general reluctance to transform into the role of a social worker. *E.g.*, Susan Diacoff, *Law as a Healing Profession: The "Comprehensive Law Movement,"* 6 PEPP. DISP. RESOL. L.J. 1, 59 (2006) (recognizing that "[t]he dominant, traditional approach found in the profession usually downplays, if not ignores," the client's feelings, emotions, and an attorney's involvement in addressing them"); Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1311 (2008) (noting that "attorneys should not become therapists," even in heated family law disputes involving non-legal counseling).

criminal charge or efforts to obtain disability benefits,[19] the condition is normally addressed solely through expert witnesses with the responsibility of diagnosis falling exclusively on the shoulders of the trained clinician.[20] The critics might argue that in those instances where PTSD is tied to the client's legal cause, the attorney meets her obligations of first response by advocating for the client's rights in a court of law. This article advocates otherwise. While PTSD sometimes falls squarely within the substantive legal matters in a case, it is more likely to arise beneath the surface, influencing the client's evaluation of the attorney's advice and the client's priorities in resolving the legal dispute. By virtue of the attorney's duties to maintain confidentiality, communicate information clearly, and maximize the client's well-being, it will forever remain the attorney's obligation to dispense legal advice independent of mental health professionals, thereby cementing the obligation of first (and sometimes only) response.[21]

At its heart, the problem is one of "framing," i.e., how lawyers perceive and identify important issues in a case.[22] Inevitably, when we adopt a vantage point for viewing a legal issue or a decision, "our frames tend to focus on certain things while leaving others obscured."[23] Limited frames often and easily "force [us] to choose the wrong alternatives."[24]

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[19] *E.g.*, Rory E. Riley, *Preservation, Modification, or Transformation?: The Current State of the Department of Veterans Affairs Disability Benefits Adjudication Process and why Congress Should Modify, Rather than Maintain or Completely Redesign, the Current System*, 18 FED. CIR. B.J. 1, 9 (2008) (observing the increase in PTSD disability claims related to the campaigns in Iraq and Afghanistan and the highly complex nature of these cases).

[20] *E.g.*, 38 C.F.R. § 3.159(a)(1) (2009) (articulating the VA's minimum standards for competent medical evidence from a person qualified to diagnose mental illness).

[21] *E.g.*, Brigid Coleman, Note, *Lawyers Who are Also Social Workers: How to Effectively Combine Two Different Disciplines to Better Serve Clients*, 7 WASH. U. J. L. & POL'Y 131, 144 (2001) (revealing that while attorneys have a duty provide clients with advice on personal courses of action, mental health providers operate from an opposing "self-determination" model that eschews an advisory role).

[22] Not only is issue framing considered a "hallmark" of legal education, e.g., Adam Neufeld, *Costs of an Outdated Pedagogy? Study on Gender at Harvard Law School*, 13 AM. U. J. GENDER SOC. POL'Y & L. 511, 512–13 (2005) (observing the engrained nature of the "issue-spotter examination" in legal education), it is also indispensable in legal practice. *E.g.*, Kathryn M. Stanchi, *Resistance is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices*, 103 DICK. L. REV. 7, 23 (1998) ("Framing or characterizing the issue in law is an extremely important tool of advocacy because it dictates what facts are relevant, what law applies, and who wins.").

[23] J. EDWARD RUSSO & PAUL J.H. SCHOEMAKER, DECISION TRAPS: THE TEN BARRIERS TO BRILLIANT DECISION-MAKING & HOW TO OVERCOME THEM 19 (1989).

[24] *Id.* at 15.

By focusing on the ultimate legal issues in a case, lawyers may fail to consider less obvious issues that are nevertheless still related to the legal problem.[25] In the context of PTSD, this Ultimate Legal Issue frame concerns itself with expert testimony on the causal link between PTSD and military service or the client's past behavior but leaves little room for considerations of how PTSD might influence the client's legal decisions during legal counseling.[26] The resulting lack of concern for or knowledge of the effects of this disorder create a substantial risk that the attorney will be misled into believing that a client with PTSD either does not have the disorder or is not impaired by it.[27] Through this limited frame, even a well-meaning attorney can unknowingly contribute to the aggravation of a client's condition while believing she has fully satisfied her professional responsibilities.[28] In fact, attorneys who fail to

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[25] The prioritization of ultimate legal issues, combined with lack of training on the intersection of mental health and client counseling, generates insensitivity to underlying mental health issues. *See, e.g.*, Judy H. Kluger et al., *The Impact of Problem Solving on the Lawyer's Role and Ethics*, 29 FORDHAM URB. L.J. 1892, 1918 (2002) (comments of Susan Hendricks) (observing that defense attorneys do not routinely attend training in "types of mental illness and their treatment" and, if polled "on their own knowledge of [mental health] issues, . . . a proud and significant percentage would tell you that they do not need to know about these topics because they are attorneys, defense attorneys, not social workers"); *id.* (observing that lack of knowledge of mental health issues "mak[es] it harder for [these same attorneys] to meet their ethical obligations to counsel clients fully").

[26] In criminal practice, the ultimate PTSD issue is normally limited to severity of the condition and the impact of the condition on the client's understanding of the charged criminal conduct. *E.g.*, Major Timothy P. Hayes, Jr., *Post-Traumatic Stress Disorder on Trial*, 191 MIL. L. REV. 67, 85–100 (2007) (describing standards for lack of mental responsibility or partial mental responsibility negating specific intent). In disability cases, the ultimate PTSD issue concerns the question of whether the onset of the condition is related to the client's military service. *E.g.*, Heathcote W. Wales, *Causation in Medicine and Law: The Plight of Iraq Veterans*, 35 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 376–89 (2009) (describing the evidentiary hurdles posed by the causation requirements in establishing service connection for mental illness, including PTSD); VETERANS BENEFITS MANUAL 146–168 (Barton F. Stichman & Ronald B. Abrams eds., 2007) (describing a complex series of special considerations that apply to the evaluation of PTSD disability claims).

[27] *E.g.*, Rebecca J. Covarubias, *Lives in Defense Counsel's Hands: The Problems and Responsibilities of Defense Counsel Representing Mentally Ill or Mentally Retarded Capital Defendants*, 11 SCHOLAR 413, 443 (2009) (observing that counsel are often unable to discover a client's mental condition because "the attorney does not know how to identify the symptoms"); *see also* Evelyn Lundberg Stratton, *Solutions for the Mentally Ill in the Criminal Justice System*, 32 CAPITAL U. L. REV. 90, 102 (2004) (noting that the attorney's "perceptions are more accurate to the extent that he is trained and knows how to look for distortions in viewing and interpreting even simple behavior").

[28] Consider, for example, the trial defense counsel who advises an active duty servicemember regarding nonjudicial punishment. The attorney may believe that the

acknowledge their clients' PTSD symptoms or counter the effects of stress responses can cause harm beyond their clients' legal cause. Chief among other potential harms, the compounded stress of litigation alone can increase the risk of suicidal behavior.[29]

Although this article considers many statistics, it is particularly noteworthy that the number of Soldiers who lost their lives to suicide in recent years, at times, topped the number of Soldiers killed in action,[30] with 2009 marking the highest number of suicide deaths to date.[31] In the

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issue is isolated, and fail to detect a pattern of conduct related to symptoms of PTSD. If the client continues to engage in risky behavior related to symptoms of the untreated condition, the recidivism could lead to a discharge under other than honorable conditions that eliminates or substantially limits his ability to receive necessary medical treatment upon separation, even if he is diagnosed with PTSD at the time. *E.g.*, 38 C.F.R. § 3.12(b) (2009) (barring eligibility for veterans' benefits under several circumstances related to misconduct or characterization of discharge unless the veteran was "insane at the time of committing the offense"); Brittany Cvetanovich & Larkin Reynolds, Note, *Joshua Omvig Veterans Suicide Prevention Act of 2007*, 45 HARV. J. ON LEGIS. 619, 634 (2008) ("Receiving a less-than-honorable discharge, even for offenses linked to PTSD (such as drug abuse, being absent without leave, and assault), renders a veteran ineligible to receive medical benefits."); Amy N. Fairweather, *Compromised Care: The Limited Availability and Questionable Quality of Health Care for Recent* Veterans, 35 HUM. RTS. 2, 24 (2008) (observing the "limited eligibility for federal benefits" and a "particularly cruel outcome for many veterans who suffer from PTSD and are kicked out of the military for behavior stemming from their combat injury"). All the while, the attorney, who had no knowledge of PTSD symptoms, could go on thinking that she did everything within her power and responsibility to assist the client when she counseled him on the legal issues related to the initial minor infraction.

[29] Savitsky, *supra* note 12, at 333 ("When mental health issues are not addressed, the results may be deadly."); *id.* ("Without treatment and support, PTSD-related stress may lead to divorce, substance abuse, family violence, unemployment . . . and other related issues that can have a lasting, detrimental effect on family life and society."). *See generally* Cvetanovich & Reynolds, *supra* note 28, at 620 ("Numerous studies have linked suicide to PTSD and other mental illnesses.").

[30] *E.g.*, Chuck Crumbo, *Military Moms Meet on Somber Occasion; Gold Star Mother Chapter Opens in Columbia*, HERALD (Rock Hill, S.C.), Aug. 2, 2009, at 28 (observing that, in 2008, "[t]hrough mid-July, 129 soldiers had died from suicide, exceeding the combat death toll").

[31] *Compare* Grace Vuoto, *Wounds of War; Army Suicides at Record Pace*, WASH. TIMES, July 2, 2009, at B02 (predicting a suicide rate in which "the tally for 2009 will likely eclipse last year's total of 140 suicides, the highest rate since the Pentagon began recording suicide rates 28 years ago"), *with* Mark Mueller & Tomãis Dinges, *The Wounds Within: Suicide in the Military*, STAR LEDGER (Newark, N.J.), Nov. 22, 2009, at 1 (noting that by October 2009, the Marine Corps matched its prior year's suicide record of forty-two and by 16 November 2009, the Army had matched its own record of 140 cases); *see also* Elizabeth A. Stanley & Amishi P. Jha, *Mind Fitness: Improving Operational Effectiveness and Building Warrior Resilience*, 8 JOINT FORCE Q. 144, 144 (2009) (noting "the growing number of suicides, with the Marine Corps experiencing

same year, litigation in the Ninth Circuit Court of Appeals highlighted the Veterans Administration's (VA) statistics showing that eighteen veterans take their lives each day, with another one thousand, solely under the care of the VA, attempting suicide each month.[32] Considering that legal problems have been ranked as the second risk factor for suicide, next to relationship problems at home and during military operations, the attorney's office or courtroom may be no different from the front line of a major disaster for a traditional first responder.[33] Even a civilian who has never deployed to combat will face harmful stress responses to litigation, which can sometimes last for months, causing lack of sleep, depression, and other undesirable symptoms.[34] For a population already susceptible to taking their own lives due to PTSD, clients who suffer from PTSD will face heightened stress and anxiety. This requires the attorney to know even more about the influence of PTSD on a client, even if such knowledge serves the limited purpose of informing an attorney when referral for diagnosis is more appropriate.

The PTSD First Responder frame proposed by this article considers PTSD's effects on a client's decision-making before, and in addition to, consideration of the substantive legal issues in the case. At a minimum, knowledge of PTSD symptoms will enable the attorney to identify the need for referral. Furthermore, conscious awareness of the many ways in which PTSD can distort legal advice will enable the attorney to anticipate conditions that are likely to aggravate PTSD symptoms or the need for additional measures to improve the client's evaluation of legal information.[35] This article, which is the first in a series,[36] will provide an overview of major decisional impairments and how they can be identified during the course of legal counseling. Whether solutions to these problems originate with the attorney, a mental health provider, or the collaboration of both professionals, only this new perspective will

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more suicides in 2008 than since the war began and the Army logging its highest monthly total in January 2009 since it began counting in 1980").

[32] *See, e.g.*, Bob Egelko, *Federal Court Hears Vets' Appeal on Mental Health*, S.F. CHRON., Aug. 13, 2009, at A7 (revealing Veterans Administration statistics that "reported 18 suicides a day among veterans and 1,000 suicide attempts a month among the 30 percent of veterans under VA care").

[33] Savitsky et al., *supra* note 12, at 333 ("The leading suicide risk factors were problems with relationships at home and in combat, followed by legal actions . . . .").

[34] *E.g.*, Larry J. Cohen & Joyce H. Vesper, *Forensic Stress Disorder*, 25 L. & PSYCHOL. REV. 1, 17–19 (2001) (describing harmful symptoms of this litigation-induced disorder).

[35] *See generally* Seamone, *supra* note 1 (providing further analysis of possible measures individual attorneys can take to improve client counseling).

[36] *Id.*

meet the unique demand for "interdisciplinary" and "collaborative" action to address the mental health needs of a growing population of combat veterans.[37]

II. PTSD and Its Influence on Client Decisions

Posttraumatic Stress Disorder is a condition caused by an overwhelming traumatic event that "distressingly recurs" in various manifestations leading to impairment lasting more than a month.[38] Although the Text Revision of the *Diagnostic and Statistical Manual of Mental Disorders IV* (DSM-IV-TR) recognizes PTSD as a "stress disorder," the condition "contains the components of both stress and anxiety."[39] Anxiety is most apparent in the "chronic feeling of dread, apprehension, and hypervigilance" experienced by victims of PTSD.[40] A synopsis of the seventeen diagnostic criteria is provided in the Appendix to the second article in this series.[41] Traumatic combat experiences that commonly result in PTSD include:

> [W]itnessing the violent death of a buddy or valued leader, being responsible for the death of unarmed children, failing to save a buddy from death or serious injury, friendly fire, witnessed atrocities, or surviving an unexpected assault in which many friendly casualties were suffered, such as a vehicle-borne IED attack or a large ambush.[42]

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[37] Savitsky et al., *supra* note 12, at 337. In a recent task force report on the Army's medical evaluation process, General (Ret.) Frederick Franks, Jr., recognized attorneys and paralegals as "stakeholders in the disability evaluation system" and emphasized how all stakeholders must endeavor "never [to] leave a fallen comrade," even in addressing potential unseen injuries like PTSD or TBI." GENERAL (RET.) FREDERICK FRANKS, JR., I WILL NEVER LEAVE A FALLEN COMRADE: FINAL TASK FORCE RECOMMENDATIONS TO BETTER FULFILL THE ARMY'S DUTY IN MEB/PEB 1, 27 (29 Apr. 2009).

[38] DSM-IV-TR, *supra* note 1, at 467–68.

[39] ASHLEY R. HART II, AN OPERATOR'S MANUAL FOR COMBAT PTSD: ESSAYS FOR COPING 6 (2000).

[40] *Id.*

[41] Seamone, *supra* note 1, app. A, at 241–42.

[42] William P. Nash, *Combat/Operational Stress Adaptations and Injuries*, *in* COMBAT STRESS INJURY: THEORY, RESEARCH, AND MANAGEMENT 33, 51 (Charles R. Figley & William P. Nash eds., 2007) [hereinafter COMBAT STRESS INJURY].

This information is significant considering 39% of Afghanistan and 95% of Iraq veterans reported "seeing dead bodies or remains" and 43% of Afghanistan and 86% of Iraq veterans reported "knowing someone seriously injured or killed."[43] While "the symptoms of PTSD are part of the *normal reaction* to trauma,"[44] the symptoms translate into Acute Stress Disorder when experienced for four weeks, Acute PTSD when they last beyond four weeks, and Chronic PTSD when they persist beyond three months.[45]

Among veterans, reactions to trauma differ. Approximately one-third of those with PTSD "can begin to move on within the first year of treatment."[46] More specifically, "half the vets with PTSD are likely to recover within two years while another 20 to 30 percent will recover within five years."[47] In a great majority of cases, veterans experience the first signs of symptoms three to four months after redeploying from combat, which would qualify as Delayed Onset PTSD.[48] When left untreated, PTSD can lead veterans to behave irresponsibly, impulsively, violently, and self-destructively, which has created significant concern for their own well-being and the well-being of others.

The Army's interest in PTSD is necessarily high, due to the increasing number of Soldiers diagnosed with the disorder. In the five years between 2003 and 2008, the Army saw more than 28,000 Soldiers diagnosed with PTSD, with a jump from 6800 cases in 2006 to

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[43] LAURIE B. SLONE & MATTHEW J. FRIEDMAN, AFTER THE WAR ZONE: A PRACTICAL GUIDE FOR RETURNING TROOPS AND THEIR FAMILIES 23 (2008) ("Frequent Combat Experiences Reported by Members of the U.S. Army and Marines"). A detailed breakdown can be found in Charles W. Hoge et al., *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 NEW. ENG. J. MED. 13, 18 tbl.2 (2004) (accounting for "Combat Experiences Reported by Members of the U.S. Army and Marine Corps After Deployment to Iraq or Afghanistan").

[44] Albert "Skip" Rizzo et al., *Virtual Reality Applications for the Treatment of Combat-Related PTSD, in* COMBAT STRESS INJURY, *supra* note 42, at 183, 184.

[45] ERIC NEWHOUSE, FACES OF COMBAT PTSD & TBI: ONE JOURNALIST'S CRUSADE TO IMPROVE TREATMENT FOR OUR VETERANS 18–19 (2008).

[46] *Id.* at 12; Rizzo et al., *supra* note 44, at 184–85 (observing "[t]he majority of trauma victims naturally recover as indicated by a gradual decrease in PTSD symptom severity over time").

[47] NEWHOUSE, *supra* note 45, at 19 (citing an interview with Dr. Matthew Freidman, Executive Director of the Veterans' Administration National Center for PTSD).

[48] *E.g.*, CANTRELL & DEAN, *supra* note 14, at 71–72. Delayed Onset PTSD describes symptoms that begin more than a month after the trauma. NEWHOUSE, *supra* note 45, at 19.

approximately 10,000 cases in 2007.[49] In general, between 15% and 40% of combat veterans develop PTSD.[50] The incidence of PTSD is even higher among those who have deployed multiple times.[51] Multiple deployments, in fact, account for practically half of Iraq and Afghanistan combat veterans.[52] True PTSD figures are expected to be higher than the current estimates[53] because many combat veterans intentionally mask their symptoms,[54] live in denial,[55] or remain unaware of their symptoms until long after experiencing the traumatic event.[56] While the military's medical institutions have incorporated cutting-edge clinical treatments[57] and developed methods to reduce the stigma of help-seeking behavior,[58]

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[49] Pauline Jelinek, *Wartime PTSD Cases Jumped Roughly 50% in 2007*, May 27, 2008, http://www.huffingtonpost.com/2008/05/27/wartime-ptsd-cases-jumped_n-103779.html.

[50] Rachel Dekel & Zahava Solomon, *Secondary Traumatization Among Wives of War Veterans with PTSD*, *in* COMBAT STRESS INJURY, *supra* note 42, at 137, 138.

[51] NEWHOUSE, *supra* note 45, at 18 ("Soldiers on their third/fourth deployments are at particular risk of reporting mental health problems."); Danish & Antonides, *supra* note 4, at 1082 ("With increased deployments, the likelihood of greater levels of PTSD, depression, and TBI increases.").

[52] *E.g.*, Dan Heilman, *Returning Veterans with Post Traumatic Stress Disorder Present Unique Challenges for the Criminal Justice System*, MINN. LAW., Oct. 27, 2008 (observing "[w]e've had 1.7 million people deployed in Iraq and Afghanistan, and almost half of them have gone back more than once"). It is not uncommon now to encounter military members who have deployed five times. *E.g.*, Savitsky et al., *supra* note 12, at 327; Danish & Antonides, *supra* note 4, at 1082 ("As of August 2008, one third of those deployed have served at least two tours in a combat zone, more than 70,000 have been deployed three times, and more than 20,000 have been deployed at least five times.").

[53] *E.g.*, Rand Center for Military Health Policy Research, *Research Highlights: Invisible Wounds: Mental Health and Cognitive Care Needs of America's Returning Veterans* (2008), at 3 ("Our survey found that only 53% of returning troops who met the criteria for PTSD or major depression sought help from a provider for these conditions in the past year.").

[54] *E.g.*, Covarubias, *supra* note 27, at 442 (observing that "[m]entally ill individuals often choose to hide their symptoms because of the stigma associated with their illness"). For a survey of leading reasons why servicemembers with PTSD refuse to obtain the services they so desperately need, see Litz, *supra* note 13, at 222–23.

[55] *E.g.*, George W. Reilly, *Second Wind Foundation Offers New Help for PTSD Sufferers*, PROVIDENCE J. (Rhode Island), Feb. 4, 2008, at C-06 ("Many veterans either do not recognize the signs of PTSD or are in denial out of fear of being stigmatized.").

[56] *E.g.*, Wales, *supra* note 26, at 374 ("[M]any service members will not be symptomatic, or aware that they are symptomatic, until sometime after leaving active duty.").

[57] *See infra* Parts II.E.1–3 (discussing various therapies including Virtual Reality Therapy).

[58] "[O]ur American, and especially our military, culture can make it difficult to admit that you have psychological pain and even more difficult to seek mental health treatment if you do need help." SLONE & FRIEDMAN, *supra* note 43, at 137. Soldiers may "fear that they will be labeled as weak or 'mental,' or that others will think less of them because they have sought professional assistance." *Id.* In an effort to combat these perceptions,

the time has come to better address the impact of PTSD in the provision of legal services.

A. Inevitably, Military and Civilian Lawyers Will Serve a High Proportion of Clients with PTSD

Attorneys working in the fields of legal assistance and criminal justice will inevitably see clients who have PTSD because the condition often leads to marital discord[59] and criminal behavior.[60] Within the military household, spouses witness as their combat veteran counterparts become less engaged and more withdrawn.[61] Research reveals that

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the Army has launched a number of efforts. Changes in security clearance protocols now recognize that it is perfectly normal for a Soldier to seek mental health counseling in relation to combat experiences. *E.g.*, Editorial, *Army is Tracking Stress Disorders in the Field*, MIAMI HERALD (Sun. ed.), July 27, 2008 (recognizing that "[t]he pentagon no longer treats visits to a counselor as an adverse factor in giving security clearances"). Furthermore, general officers, such as General Carter Ham, Commander of the Army's European Command, and Major General David Blackledge, have publicly shared their own experiences recovering from PTSD in an effort to demonstrate that this condition can influence just about anyone, and help is necessary to combat its negative effects. *E.g.*, Editorial, *A Four-Star General Admits to Suffering from PTSD*, REG.-GUARD (Eugene, Ore.), Dec. 1, 2008, at PA8 (describing General Ham's experience); Editorial, *Marching Toward Wellness*, WASH. TIMES, Dec. 3, 2008, at B01 (describing Major General Blackledge's experiences). Some military programs even permit servicemembers to receive mental health treatment at primary care facilities to avoid the stigma of going to a mental health center for treatment. *E.g.*, Less Spivey, *New Approach to PTSD Offers Service Members Greater Privacy, Reduced Stigma*, U.S. DEP'T OF DEF., MIL. HEALTH SYS., July 15, 2009, http://www.health.mil/Press/Release,aspx?ID=822 (describing a pilot program instituted at Lackland Air Force Base). Despite these efforts, some Soldiers are still reluctant to seek help for their symptoms because they "fear that psychological problems can't be fixed or believe they should just be able to get over it on their own." SLONE & FRIEDMAN, *supra* note 43, at 137–38.

[59] *E.g.*, Lynne Gold-Bilin & Jonathan W. Gould, *Post Traumatic Stress Disorder and the Practice of Family Law*, 19 J. AM. ACAD. MATRIMONIAL L. 17, 31 (2004) ("As troops return from such hotspots as Iraq and Afghanistan, the issue of PTSD will become more important to the family law attorney.").

[60] *E.g.*, Casey T. Taft et al., *Risk Factor for Partner Violence Among a National Sample of Combat Veterans*, 73 J. CONSULTING & CLIN. PSYCHOL. 151 (2005) (observing significant rates of partner violence among combat veterans as high as one third); Savitsky et al., *supra* note 12, at 329 ("[I]nability to moderate aggression postdeployment may result in misplaced, inappropriate aggression and lead to family violence.").

[61] KEITH ARMSTRONG ET AL., COURAGE AFTER FIRE: COPING STRATEGIES FOR TROOPS RETURNING FROM IRAQ AND AFGHANISTAN AND THEIR FAMILIES 31 (2006) (observing that avoidance is a common symptom of PTSD which affects all members of the family by causing them to feel rejected); *see also* Dekel & Solomon, *supra* note 50, at 137, 141 ("[W]ives of PTSD veterans report greater spousal conflict, less intimacy, less cohesion,

military wives can actually develop conditions that mirror their husbands' PTSD symptoms as a result of constant exposure to anxious reactions or physical violence.[62] As a result of these complications, a 2006 study indicated that nearly 20% of servicemembers planned on separation or divorce.[63]

The link between PTSD and criminal activity is also well documented.[64] Commonly, veterans with the disorder knowingly participate in dangerous behavior in attempts to recreate the rush of combat.[65] This could include anything from driving at extremely fast speeds,[66] to provoking road rage,[67] and starting fist-fights.[68] While the

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and less martial satisfaction than wives of non-PTSD veterans, as well as more verbal and physical violence by their husbands.")

[62] *E.g.*, Dekel & Solomon, *supra* note 50, at 137 ("[W]ives of traumatized veterans are one of the various groups of persons who have been identified as suffering psychological consequences of traumatic events which they did not experience at first hand, but through their close proximity to a direct victim."). The authors note that secondary traumatization of wives may result in the "transmission of nightmares, intrusive thoughts, flashbacks, and other symptoms." *Id.* at 138.

[63] U.S. DEP'T OF DEF. TASK FORCE ON MENTAL HEALTH, AN ACHIEVABLE VISION: REPORT OF THE DEPARTMENT OF DEFENSE TASK FORCE ON MENTAL HEALTH 36 (2007). In a related statistic, "The yearly divorce rate in the U.S. Army nearly doubled for enlisted personnel and tripled for officers between 2001 and 2004." Danish & Antonides, *supra* note 4, at 1082. *See also* HART, *supra* note 39, at 10 ("Many combat veterans report some initial difficulty in adjustment but develop severe problems later in life when there are other psychosocial complications which include increased responsibility at work, family dynamic issues such as divorce, separation, and challenging teenagers for example."). The return to the household after redeployment often leads to such a response. *Id.*

[64] "Estimates put the number of service veterans under some form of correctional supervision at more than 500,000." Rhonda McMillion, *Sending in Reinforcements*: *A New ABA Group Will Coordinate Efforts to Bolster Legal Services for Veterans*, A.B.A. J., Apr. 2009, at 62, 62; *see also* Heilman, *supra* note 52 (observing "About 600,000 of those people have PTSD and TBI . . . and less than half of them get the help they need. Those are the ones who end up in the criminal courts."); C. Peter Erlinder, *Post-Traumatic Stress Disorder, Vietnam Veterans and the Law: A Challenge to Effective Representation*, 1 BEHAV. SCI. & L. 25, 30 (1983) ("Some authorities have suggested, that 25% to 30% of Vietnam veterans who saw heavy combat have been arrested on criminal charges.").

[65] *E.g.*, CANTRELL & DEAN, *supra* note 14, at 32–33. *See also* Larry R. Decker, *Combat Trauma: Treatment From a Mystical, Spiritual Perspective*, J. HUMANISTIC PSYCHOL. 30, 32 (2007) ("Many combat veterans found war to be the most meaningful experience of their lives and frequently long for a return to the intensity of the horror.").

[66] CANTRELL & DEAN, *supra* note 14, at 32.

[67] *Id.* at 33.

[68] Heilman, *supra* note 52 (recounting the story of a combat veteran who "gets in fights in bars because he can't stop wanting to fight"). Early studies of Vietnam veterans revealed

use of illegal narcotics can also supply a desired adrenaline rush that simulates combat, drug abuse is also common among those who desire to escape feelings of guilt or shame over losses they suffered in combat.[69] Ultimately, criminal activity can result from

> (1) Overreaction to danger cues;
> (2) Behavioral re-experiencing while in a dissociative state;
> (3) Stimulation-seeking behavior to overcome numbness and emotional nonreactivity; and
> (4) Engaging in dangerous behavior to alleviate survivor guilt.[70]

The above "flashback" scenario in number two, which is commonly cited in legal publications, is quite possible[71] but hardly demonstrates all possible criminal manifestations of PTSD. For many of these reasons, "military trial practitioners are likely to encounter PTSD in some fashion in future trials involving combat veterans."[72]

B. The Effects of PTSD on the Attorney-Client Relationship Have Been Neglected in Legal Discussions

While PTSD can be addressed from several perspectives, this article is concerned with a single dimension of the disorder—its effects on the

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that those with PTSD "reported an average of 20 acts of violence in the past year compared to less than one act reported by combat veterans without PTSD." Matthew Jakupcak et al., *Anger, Hostility, and Aggression Among Iraq and Afghanistan War Veterans Reporting PTSD and Subthreshold PTSD*, 20 J. TRAUMATIC STRESS 945, 946 (2007). Like the earlier studies, more recent ones confirm that "symptoms of PTSD are associated with anger, hostility and aggression among Iraq and Afghanistan war veterans." *Id.* at 947–50.

[69] HART, *supra* note 39, at 11 ("Nearly seventy percent of veterans with combat PTSD also have other diagnosable mental health problems. The two most prominent are affective disorder and substance abuse."). Such substance abuse normally includes pain killers, alcohol, and marijuana, all of which are abused to meet the "expectation that the intoxicant will create a change in mood." *Id.*

[70] Constantina Aprilakis, Note, *The Warrior Returns: Struggling to Address Criminal Behavior by Veterans with PTSD*, 3 GEO. J. L. & PUB. POL'Y 541, 553 (2005).

[71] *E.g.*, Erlinder, *supra* note 64, at 33–35 (discussing a Louisiana trial in which a long-range reconnaissance veteran successfully argued temporary insanity to a murder charge based on a PTSD flashback episode where he went into a defensive mode as if in combat).

[72] Hayes, *supra* note 26, at 78.

attorney-client relationship. More specifically, what obligation does an attorney have to ensure that a client with PTSD fully considers available options and makes informed decisions, especially if that client is suffering from distorted thinking or other adverse effects of the disorder? The resolution of this question extends beyond interviewing and reaches the counseling strategies the attorney adopts throughout the entire legal process.

The considerations addressed in this article are intended for all lawyers who regularly deal with criminal and family law. Although defense counsel and legal assistance attorneys are the only Army attorneys authorized to form attorney-client relationships,[73] prosecutors may also benefit from these suggestions to the extent that they interview and counsel victims or witnesses who suffer from the disorder.[74]

To date, like civilian scholars, military legal institutions have focused almost exclusively on the substantive legal issues surrounding PTSD.[75] They have paid surprisingly little attention to the manner in which this widespread disorder impairs client decisions and limits attorneys in their roles as effective counselors. On occasion, military appellate courts have addressed the obligations of attorneys to investigate the possibility that a client has PTSD[76] or their obligation to present

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[73] U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS R. 1.13(b) (1 May 1992) [hereinafter AR 27-26] ("An Army lawyer shall not form a client-lawyer relationship or represent a client other than the Army unless specifically assigned or authorized by a competent authority.").

[74] *E.g.*, Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465, 474 (2003) ("One study of victims involved in the criminal court system found that almost 40% met formal diagnostic criteria for PTSD. Victims experiencing PTSD may have extreme difficulty concentrating, feel constantly on guard or jumpy, and experience unpredictable outbursts of rage."). *See also* Hayes, *supra* note 26, at 101–02 (discussing attempts to discredit witnesses at courts-martial based on their diagnoses of PTSD).

[75] *E.g.*, Captain Daniel E. Speir, *Application and Use of Post-Traumatic Stress Disorder as a Defense to Criminal Conduct*, ARMY LAW., June 1989, at 17; Samuel P. Menefee, *The "Vietnam Syndrome" Defense: A "G.I. Bill of Criminal Rights"?*, ARMY LAW., Feb. 1985, at 1. For example, in the most recent *Military Law Review* article focusing on PTSD, the author's "main emphasis" was "an analysis of PTSD within the military courtroom." Hayes, *supra* note 26, at 69. This article supplements that common objective with an analysis of PTSD *within the attorney's office*.

[76] *E.g.*, United States v. Ashby, No. NMCCA 2000000250, 2007 CCA LEXIS 235, at *37–49 (N-M. Ct. Crim. App. June 27, 2007) (addressing the claim that defense counsel were ineffective when "they failed to recognize, secure, and present evidence and expert testimony concerning the impact that post-traumatic stress disorder (PTSD) and/or acute

evidence of PTSD during the course of a court-martial.[77] However, such opinions are limited to claims of ineffective assistance of counsel[78] and fail to offer needed guidelines for attorneys who desire to overcome the negative effects of PTSD during the course of the legal representation.

C. Veterans' Treatment Courts Provide Necessary Lessons for Attorneys Representing Combat Veterans

The influx of veterans in need of mental health services has been recognized as an epidemic in many cities, calling for drastic measures.[79] In some states, for example, public service announcements targeted to law enforcement officers provide education about the link between PTSD and criminal behavior.[80] As part of a coordinated response,

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stress disorder (ASD) had upon the appellant's ability to form the specific intent required for [the charged offenses]").

[77] *E.g.*, United States v. Green, No. NMCCA 200600843, 2007 CCA LEXIS 413, at *6–8 (N-M. Ct. Crim. App. Sept. 27, 2007) (addressing the claim that the defense counsel failed to introduce evidence of PTSD beyond the accused Marine's statement that he was taking medication for PTSD).

[78] *E.g.*, *id.*

[79] Observers note that returning Iraq and Afghanistan veterans have placed a greater tax on the criminal justice system because of the unique aspects of these conflicts. *E.g.*, Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 357, 357 (2009) ("With the increase of [Afghanistan and Iraq] veterans with serious needs in our criminal justice system, comes the need for the system to develop innovative ways of working to address these issues and needs."). For example, in the advent of effective life-saving measures, far more Soldiers have survived to return home with serious mental health complications from their combat injuries. *E.g.*, ILONA MEAGHER, MOVING A NATION TO CARE: POST-TRAUMATIC STRESS DISORDER AND AMERICA'S RETURNING TROOPS, at xxi (2007):

> [I]n today's theaters of war, where troops are dealing with extended and multiple deployments, twenty-four hour operations with no opportunity to unwind, sleep deprivation, ever changing mission goals and guerilla warfare conditions where enemies and civilians blend together, it has been estimated that cases of PTSD may be higher than in past conflicts.

See also Candice M. Monson et al., *Cognitive Processing Therapy for Veterans with Military-Related Posttraumatic Stress Disorder*, 74 J. CONSULTING & CLIN. PSYCHOL. 898, 898 (2006) ("[R]esearch with active duty personnel in Iraq and Afghanistan suggests that we are creating a new generation of veterans with high levels of PTSD and related mental health symptoms.").

[80] *E.g.*, Christopher Hawthorne, *Bringing Baghdad into the Courtroom*: *Should Combat Veterans be Part of the Criminal Justice Equation*, 24 CRIM. JUST. 4, 6 (2009) (describing the ten-minute Video Public Service Announcement, "Beyond the Yellow Ribbon:

legislators have increasingly recognized the need to respond to the unique circumstances facing combat veterans. In California[81] and Minnesota,[82] for example, statutes require courts to incorporate veteran status in criminal sentences. The diversionary provisions of these programs recognize that treatment for PTSD often provides a meaningful alternative to incarceration.

In January 2008, the first Veterans' Treatment Court was established in Buffalo, New York, in the chambers of Judge Robert T. Russell.[83] Observing that veteran-offenders represented a majority of cases on his criminal docket, Judge Russell developed a specialized program to address their unique concerns.[84] Diagnosis and treatment for PTSD was a large part of this specially-tailored program, which combined the efforts of prosecutors, defense attorneys, and mental health professionals.[85] In a span of months, similar veterans' courts began in eight other jurisdictions,[86] including Wisconsin,[87] Oklahoma,[88]

PTSD and Veterans," created by the Norfolk County District Attorney's Office in Clinton, Massachusetts, "which explains to law enforcement the 'natural reactions to unnatural events' that cause post-combat trauma in veterans").

[81] CAL. PENAL CODE § 1170.9 (LexisNexis 2009). This legislation "lets judges depart from presumptive prison sentences in cases involving veterans with PTSD, and, when suitable, order treatment in lieu of jail time." Heilman, *supra* note 52.

[82] MINN. STAT. § 609.115 (LexisNexis 2009). Under this legislation, "If the defendant is a veteran and has been diagnosed as having a mental illness, the court may consult with the federal or state Department of Veterans Affairs to determine treatment options in lieu of or along with a jail sentence." Heilman, *supra* note 52.

[83] Russell, *supra* note 79, at 364.

[84] *Id.* at 363:

> As presiding judge over Buffalo's Drug Treatment and Mental Health Treatment courts, I noticed that many of the participants on my docket had something in common—They were veterans. In fact, it was the noticeable rise in the numbers of veterans on the city treatment dockets that ultimately led to the advent of a specialized Veterans Treatment Court.

[85] Judge Russell observes the dramatic change in traditional courtroom roles. "To facilitate the veterans' progress in treatment, the prosecutor and the defense counsel shed their traditional adversarial courtroom relationship and work together as a team." *Id.* at 365.

[86] Mary Ellen Schneider, Broadcast, *Treatment Courts Aimed at Getting Vets Back on Track* (Int'l Med. News Group Broadcast, June 26, 2009).

[87] *E.g.*, Jane Pribek, *Reaching Out to Returning Vets: Veterans' Treatment Court Moves Forward in Wisconsin*, WIS. L. J. (Milwaukee, Wis.), Feb. 2, 2009 (describing the Wisconsin Veterans Intervention Program).

[88] Editorial, *Helping Vets*, TULSA (OKLA.) WORLD (Final ed.), Dec. 10, 2008, at A22.

California,[89] and Alaska,[90] with the prospect of thirty states planning future initiatives[91] and federal legislation to fund such programs.[92]

Despite the difference between military courts and civilian criminal courts,[93] veterans' treatment court programs offer several important lessons to the military legal system and attorneys representing combat veterans. First, by requiring judges, prosecutors, and defense attorneys to learn more about psychological aspects and interventions tailored to PTSD, these programs confirm the need for lawyers to adopt a specialized approach to cases involving PTSD.[94] Attorneys in these courts cannot effectively advise their clients without knowledge of

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[89] Hawthorne, *supra* note 80, at 12.
[90] Editorial, *supra* note 88, at A22.
[91] Schneider, *supra* note 86.
[92] *E.g.*, Services, Education, and Rehabilitation for Veterans Act, H.R. 7149, 110th Cong. § 2 (2008) (proposing federal funding for veterans treatment courts throughout the nation).
[93] Foremost, on active duty, narcotics pose special dangers due to operational conditions, including access to weapons and multimillion dollar equipment. *E.g.*, Murray v. Haldeman, 16 M.J. 74, 78 (C.M.A. 1983):

> The increased incidence of drug abuse in the Armed Forces poses a substantial threat to the readiness and efficiency of our military forces. Unlike the civilian population, the military forces are charged with the responsibility of continuously protecting the nation's interests both on the domestic and international level. Widespread use of marihuana, hashish and other drugs can have a serious debilitating effect on the ability of the Armed Services to perform their mission.

Additionally, the structure of the court-martial systems makes it far less likely that a court-martial could implement probationary terms or monitor the treatment of a particular Soldier. Military scholars observe that even though "probation is the most common criminal sentence adjudged today," "a military judge or panel is not authorized to adjudge probation." Major Tyesha E. Lowery, *One "Get out of Jail Free" Card: Should Probation be an Authorized Courts-Martial Punishment?*, 198 MIL. L. REV. 165, 166–67 (2008). Commanders have articulated the major reason for this limitation: "[O]ur legal system is pretty efficient in comparison to the civilian system. From flash to bang—it's pretty quick. The overhead [i.e., manpower required to supervise the Soldier] would be debilitating. We don't have the overhead to monitor Soldiers." *Id.* at 197–98 (citing Interview with Colonel David Clark, Commander, Training Support Brigade, Fort Sam Houston, Tex. (Feb. 29, 2008)).
[94] *E.g.*, Pribek, *supra* note 87 (recognizing that veterans' treatment court programs require "a comprehensive training program for defense attorneys, prosecutors, judges, [and others]," focused on "the effects of PTSD, and how to effectively interact with veterans with it, and other service-related disorders").

rehabilitative options.[95] These programs also signify that PTSD requires modification of procedures in the way cases are handled and a modification of traditional courtroom relationships.[96] Because these new programs exist mainly to address the specialized needs of Iraq and Afghanistan combat veterans, they signify that our current legal assistance and criminal practice may benefit from similar considerations. Ultimately, these new programs signify the need for the attorney's further education about PTSD.

D. Certain Attributes of Law Practice Will Aggravate a Client's PTSD

As long as attorneys practice criminal and family law, they will serve clients with PTSD. Common issues within these two practice areas can aggravate the client's symptoms, trigger anxious responses, or produce other obstacles in client representation.[97] Psychologists have shown that "the litigation process itself" or "the issues underlying the litigation" often produce(s) negative effects on a person similar to post-traumatic stress.[98] "Forensic stress disorder" (FSD), which contains many of the same diagnostic criteria as PTSD,[99] manifests symptoms that include obsessive thinking, panic attacks, fear, and "intrusive thoughts of the legal case [that] can invade daily activities and disrupt evening dreams."[100] However, the symptoms of FSD normally persist six months

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[95] *E.g.*, Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLIN. L. REV. 605, 613 (2007) ("The criminal defense lawyer . . . must possess the psychological skills necessary to understand when the client's problem is the product of alcoholism or substance abuse, mental illness, or some behavioral disorder, all of which may respond to treatment or rehabilitation in an appropriate community program."); Kluger et al., *supra* note 25, at 1918 (recognizing that "problem-solving courts," like veterans' treatment courts, "are . . . changing the parameters with respect to client counseling" by requiring attorneys to develop expertise in alcoholism, substance abuse, and mental illness for the purpose of fulfilling "ethical obligations") (comments of Susan Hendricks).

[96] *E.g.*, Russell, *supra* note 79, at 365 (recognizing that veterans' treatment courts require both prosecutors and attorneys to "shed their traditional adversarial courtroom relationships and work together as a team").

[97] *E.g.*, Katrina J. Eagle & Steve R. Binder, *Veterans Facing Criminal Charges: How a Community of Professionals Can Serve Those Who Served Our Country*, 16 NEV. LAW. 16, 16 (2008) ("The veteran's trauma is compounded by the threat of a criminal charge and punishment for the offense.").

[98] Cohen & Vesper, *supra* note 34, at 2.

[99] *Id.* at 17–19 (describing diagnostic criteria for FSD).

[100] *Id.* at 5; *see also* Bruce Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, 37 CAL. W. L. REV. 105, 109 (2001) ("Criminal and similar kinds of legal

or less following the conclusion of the legal action.[101] Importantly, the client who is already suffering from PTSD prior to litigation is far more likely to experience acute stress reactions to litigation, which can "lead to an inability to manage the uncertainty and frustration of the legal process."[102]

Yet another complication may occur when the client's PTSD is related to the charged offense or the charged offense involves a traumatic event powerful enough to cause PTSD independently. For example, "the act of killing another human being, even under circumstances that render the homicide a criminal offense, carries a high risk that the perpetrator will experience a severe case of PTSD."[103] The link between PTSD and the subject matter in a criminal trial will inevitably lead to additional impediments in the attorney-client relationship:

> The avoidance of the triggers by the defendant who has self-inflicted PTSD will be severely tested by defense counsel who must actively implore the defendant to revisit the circumstances of the charged crime and discuss in detail with counsel the defendant's thoughts, feelings, and recollections of the homicide or violent assault. Additionally, the accused is forced throughout the pretrial and trial stages of a criminal prosecution to relive, often as a passive spectator, the traumatic experience of the crime through the testimony of witnesses, photographs, exhibits, and legal arguments. All of these circumstances, routine to the criminal trial process, have the potential to stimulate and aggravate the accused's PTSD.[104]

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proceedings are intensely stressful and can create feelings of fear, anxiety, and depression.").

[101] Cohen & Vesper, *supra* note 34, at 4 ("Although litigants may suffer symptoms found in individuals diagnosed with acute or posttraumatic stress disorder, the psychological disturbance for litigants usually abates within six months after the legal case has concluded.").

[102] *Id.* at 14 ("[I]ndividuals who witnessed violent or life threatening-events as well as those people who were involved in traumatic accidents prior to litigation experience acute stress reactions.").

[103] J. Vincent Aprile II, *PTSD: When the Crime Punishes the Perpetrator*, 23 CRIM. JUST. 39, 39 (2009).

[104] *Id.* at 40.

The common danger posed to the attorney-client relationship in each of these situations is the effect of compounded trauma.

The convergence of traumatic events can easily aggravate clients' symptoms in a variety of ways and can seriously impede effective communication. Attorneys who wish to limit psychological harm during client counseling commonly emphasize simple alterations to their standard approach. Among immigrants applying for asylum or victims of domestic violence, for example, it is valuable to assist clients in regaining a sense of lost control. An attorney can do this by empowering clients to set the time of, the location of, and the content to be discussed during meetings involving sensitive issues.[105] As one researcher recommends:

> To avoid or reduce retrauma, try to reverse the dynamics of the trauma in your work with your client. . . . The question is how the lawyer can help [the client] regain some control . . . It may be as simple as giving the client power to make some decisions in the representation. Tell her you are going to talk about this matter and you know how difficult it is. Ask her *when* she would like to talk about it. Or, when she decides she is ready to talk about it, offer breaks to give her the opportunity to decide how she tells you about it, and how long the sessions are. . . [L]isten deeply, use her own words back, try to authentically understand her story.[106]

These alterations to client counseling can produce positive effects during litigation by increasing the client's comfort level with disturbing issues. However, it is doubtful that these measures, alone, would effectively

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[105] *E.g.*, Diacoff, *supra* note 18, at 55:

> Lawyers working with traumatized clients can help reverse the effects of trauma, by using excellent interpersonal skills. For example, if the client was raped and experienced degradation and humiliation, the lawyer can provide the client with an additional measure of respect, autonomy, and control. The attorney can ask the client when and for how long she wants to talk about the event, listen well, and treat her with respect.

[106] Symposium, *Stress, Burnout, Vicarious Trauma, and Other Emotional Realities in the Lawyer/Client Relationship: A Panel Discussion*, 19 TOURO L. REV. 847, 860–61 (2004) (comments of Professor Peters).

assist a client forced to confront a particularly traumatic issue, such as an individual who, as part of his trial, must view photographs of the Iraqi child he accidentally shot while deployed. These simple suggestions also fail to address the client who, as a result of PTSD, desires to forfeit legal rights or an important defense as an outgrowth of self-hatred. In these examples, and countless others, the attorney must be prepared to consider how these issues could complicate the client's decision-making process and evaluation of legal advice.

E. The Attorney's Basic Understanding of PTSD and Treatment Approaches

An attorney who does not understand how PTSD affects a client is helpless to prevent its symptoms from infecting the attorney-client relationship.[107] Oftentimes, "[c]lients who have experienced trauma also have difficulty during trial preparation, exhibiting patterns of forgetfulness and avoidance."[108] These common problems can impede attorney-client communication, and thus effective representation, if the attorney does not anticipate and counteract them. In this context, "it would behoove lawyers to understand basic psychological concepts, not so that we may become therapists, but so that we might be better legal counselors."[109]

Where trauma is common, attorneys have recognized the need to undergo specialized training to effectively represent clients with PTSD. Such training necessarily includes

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[107] *E.g.*, SANFORD M. PORTNOY, THE FAMILY LAWYER'S GUIDE TO BUILDING SUCCESSFUL CLIENT RELATIONSHIPS 19 (2000) ("Obviously the first step in management of your client is recognition of what needs to be managed."); Covarrubias, *supra* note 27, at 443 (observing that counsel are often unable to discover a client's mental condition because "the attorney does not know how to identify the symptoms"); *see also* Evelyn Lundberg Stratton, *Solutions for the Mentally Ill in the Criminal Justice System*, 32 CAPITAL U. L. REV. 90, 102 (2004) (noting that the attorney's "perceptions are more accurate to the extent that he is trained and knows how to look for distortions in viewing and interpreting even simple behavior").

[108] Lynette M. Parker, *Increasing Law Students' Effectiveness When Representing Traumatized Clients: A Case Study of the Katharine & George Alexander Community Law Center*, 21 GEO. IMMIGR. L.J. 163, 171 (2007).

[109] Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLIN. L. REV. 259, 275 (2000); *see also* Erlinder, *supra* note 64, at 26 (recognizing that "few attorneys are likely to recognize that a wide range of client problems from criminal charges and substance abuse to family problems and employment disputes may be related to PTSD . . . .").

> mechanisms . . . to interview and prepare a client's case with minimal retraumatization, . . . techniques for working with emotional clients . . . ways to keep a client focused or to re-focus a client who is avoiding talking about his or her traumatic experience . . . [and] techniques for building trust with clients who have suffered trauma.[110]

While such attorney training may exceed even the subject matter required for many masters' level psychology students,[111] it is nevertheless necessary "to fulfill the duty of care which requires lawyers to obtain specialized training in order to provide zealous representation to their clients."[112] Learning about PTSD, therefore, requires far more than reviewing a handy copy of the *Diagnostic and Statistical Manual of Mental Disorders*. It requires further understanding of the many ways in which PTSD manifests in a client's behavior.

Lack of trust of others and self-destructive tendencies, which are common characteristics of PTSD, can seriously affect legal representations. As one researcher notes, "Since self-abuse is common among trauma victims, you may see it acted out in the form of settlement suggestions that are self-defeating or self-destructive behaviors such as not showing up for court appearances."[113] Attorneys must be prepared to explore aspects of the client's legal decision-making process—objectives, prioritization of issues, and the weighing and balancing of decisions—to identify the presence of otherwise unseen distorting forces. In the strategic vernacular, the attorney must endeavor to get inside the

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[110] Parker, *supra* note 108, at 182.

[111] *Id.* at 190 ("The area of trauma, PTSD, and vicarious trauma is a specialized course not necessarily taken by all psychology master students.").

[112] *Id.* at 167. Others, such as Professor Erlinder, recognize the attorney's duty to learn about PTSD for service to all clients in general:

> PSTD can affect virtually every aspect of a veteran/client's behavior. Additionally, the effects may be subtle, and the . . . effects may not appear to be related to combat at all. For attorneys untrained in psychology or psychiatry, this implies a duty to examine a veteran client's psychological history for a PTSD connection with particular care, even when the relationship is not readily apparent.

Erlinder, *supra* note 64, at 30.

[113] PORTNOY, *supra* note 107, at 31.

client's defective OODA loop, and counter it with in a way that permits effective evaluation of legal options.[114]

Too often, combat veterans who experience a traumatic event suffer from shattered beliefs about the world around them.[115] Before the overwhelming event, the client, like all functioning adults, likely operated from five "fundamental assumptions common to all people at all times":

> (1) [T]he world is benevolent;
> (2) the world is meaningful;
> (3) the self is worthy;
> (4) [I am safe and my life] will not be snuffed out in the next few seconds; and
> (5) a moral order exists in the universe that discriminates right from wrong.[116]

The traumatizing event has the effect of challenging one or more of these assumptions, often resulting in destruction of the capacity for trust.[117]

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[114] The term "OODA loop" originated with Air Force strategist Colonel R. Boyd. John R. Boyd, *Patterns of Conflict*, lecture notes (1986), *available at* http://www.d-n-i.net/boyd/pdf/poc.pdf. As an acronym for the repeated steps "Observe, Orient, Decide, and Act," the OODA loop relates to accurate "situational awareness." Doug Richardson, *Network-Centric Warfare: Revolution or Passing Fad?*, 28 ARMADA INT'L 62, 62 (2004). The victorious force will be triumphant over its opposition because it has a faster and more continuous OODA loop. *Id. See also* Zheyao Li, Note, *War Powers for the Fourth Generation: Constitutional Interpretation in the Age of Asymmetric Warfare*, 7 GEO. J.L. & PUB. POL'Y 373, 399 & n.144 (2009). Colonel Boyd's theory has been applied in varied contexts including the portrayal of the United States in the media. *E.g.*, Newt Gingrich & Mark Kester, *A Security Strategy of Transforming Societies: From Stabilizing to Transforming Societies as the Key to American Security*, 28 FLETCHER F. WORLD AFF. 5, 11 (2004). In the context of combating PTSD's many distortions, the attorney can effectively neutralize the client's distorted thinking and prevent complications throughout the litigation if she routinely checks for signs of PTSD and then intervenes promptly after spotting the signs.

[115] *E.g.*, Nash, *supra* note 42, at 53 (recognizing that traumatic stress has the ability to "shatter necessary and deeply held beliefs"); Decker, *supra* note 65, at 31 (observing that "[t]he very nature of trauma is such that it attacks our basic beliefs and challenges our processes of accommodation and assimilation" and that "most trauma survivors' beliefs (including combat veterans') are deconstructed and set into disarray").

[116] Nash, *supra* note 42, at 53. In this recognition, Nash recounts the three core fundamental assumption recognized by Dr. Janhoff-Bulman, and adds the additional two fundamental assumptions based on his clinical experience. *See generally* RONNIE JANHOFF-BULMAN, SHATTERED ASSUMPTIONS: TOWARD A NEW PSYCHOLOGY OF TRAUMA (1992).

Depending on the extent of the trauma suffered and the intensity of the disorder, the client's new assumptions could unknowingly or intentionally sabotage his well-being. Clients may desire to use litigation to punish themselves as an outgrowth of the belief that they do not deserve to live happy lives when, for example, their subordinates died at their hands. Much like a capital client may initially be inclined not to offer evidence in mitigation, the PTSD client may desire a self-defeating result.[118]

An understanding of defeated beliefs and distrusting predispositions is only one component of PTSD awareness. Another component involves knowledge of the physiological dimension, including the events that trigger anxious responses, the duration of hyper-aroused states, and the limitations of comprehension that result from such states. Veterans with PTSD respond differently to external stimuli based on their unique circumstances. A loud noise, the sound of a helicopter, the smell of oil or gas, or even the sight of children in a crowd may all be triggers.[119] Other common examples include the anniversary of traumatic events[120] or news of the deaths of military service members in Iraq or Afghanistan.[121]

A response to a triggering event causes a physiological response in which "adrenaline . . . becomes a neurotransmitter which overrides the decision making and executive processes of [the] cerebral cortex, or smart brain."[122] While it is possible to decrease a response in the

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[117] Nash, *supra* note 42, at 53–54.

[118] *See* A.B.A. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES cmt. to Guideline 10.5 (rev. ed. 2003).

[119] *E.g.*, ARMSTRONG ET AL., *supra* note 61, at 17. In the most general terms, "Triggers can come through any of the senses and include sounds, sights, tastes, and smells." *Id.*

[120] *E.g.*, *id.* at 17–18:

> An anniversary date of a traumatic event can also bring back thoughts, feelings, and physical reactions related to the trauma. For instance, a veteran may experience an "anniversary reaction" or an increase in posttraumatic stress symptoms at Thanksgiving, as she recalls a mortar blast that happened on Thanksgiving Day, killing one of her buddies. Anniversary reactions can cause intense peaks in anxiety or depression and may occur even before [the Soldier] consciously remembers that a particular traumatic event even happened on that date.

[121] *Id.* at 17.

[122] HART, *supra* note 39, at 17.

beginning stages using relaxation techniques, the lack of effective and early intervention usually leads to a period of heightened arousal that lasts between three-and-a-half to four days.[123] In such a state, concentration and communication become impaired and intrusive thoughts increase.[124]

Even though PTSD causes severe debilitating effects, effective treatment is often possible. Approximately 50% of veterans treated for PTSD recover within two years, and between 20% and 30% more may recover within five years.[125] Effective treatment normally involves a combination of medication and psychotherapy.[126] In 2004, the Department of Defense collaborated with the Department of Veterans Affairs to create the *VA/DoD Clinical Practice Guideline for the Management of Post-Traumatic Stress*.[127] The *Guideline* recommends three primary options for the clinical treatment of PTSD, which include (1) Exposure Therapy (ET), (2) Cognitive Processing Therapy (CPT), and (3) Eye Movement Desensitization Reprocessing (EMDR).[128] Attorneys should be familiar with the mechanics of these therapies because a client's reactions to issues raised in therapy can easily influence legal counseling. Furthermore, knowledge of specific treatment techniques will enable attorneys to explore ways that clinicians might address the client's negative reactions to legal issues in a case.

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[123] *Id.* ("It will typically take an individual three and a half to four days before the adrenaline is exhausted within the body.").

[124] Clinicians sometimes refer to this heightened state of arousal as a "wild ride" because it generates a physiological response that often leaves the client with continuous "strong urges to fight or flee," and uncomfortable nervous shaking. *Id.*

[125] NEWHOUSE, *supra* note 45, at 19

[126] *E.g.*, SLONE & FRIEDMAN, *supra* note 43, at 164 ("Typical PTSD treatment usually involves assessment, [educating the patient about the disorder], and, depending on the severity and the particular set of symptoms, therapy, medication, or both."); NEWHOUSE, *supra* note 45, at 223 ("Most conventional modes of treatment, including those used by the VA, involve a combination of group therapies, cognitive behavioral therapies, and/or medicines to realign the chemistry of the brain."); HART, *supra* note 39, at 76–79 (describing the effects of various medications and highlighting the fact that "[m]edication for combat PTSD is utilized because of changes in the biological functioning of the individual exposed to trauma").

[127] U.S. DEP'T OF VETERANS AFFAIRS & DEP'T OF DEF., VA/DOD CLINICAL PRACTICE GUIDELINE FOR THE MANAGEMENT OF POST-TRAUMATIC STRESS (2004) [hereinafter VA/DOD PRACTICE GUIDELINE].

[128] *Id.* at I-18 (strongly recommending EMDR, PE, CPT, and Stress Inoculation).

1. Exposure Therapy

Exposure therapy is based on the theory that a patient with PTSD will benefit from re-experiencing trauma in a controlled environment where his or her fears can be explored with the guidance of a nonthreatening clinician.[129] In a very real way, lawyers engage in exposure therapy when they take reluctant clients or witnesses to visit a courtroom and sit in the witness chair to aid in easing the anxiety of providing live testimony. Some clinicians have hailed exposure therapy as the most effective among the treatment choices.[130]

Prolonged Exposure (PE) is a popular and effective method in which patients "vividly imagine" traumatic events, by speaking or writing about them, often in the first-person, present tense format, with a focus on "the most distressing aspects."[131] Patients then revisit their accounts, which are either written or recorded, and observe subtle differences in the way the event is recounted over time.[132] By revisiting the event with the guidance of the clinician, the patient is able to develop more accurate statements or images over time. Studies reveal that PE can have as much as a 70% success rate in reducing PTSD symptoms

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[129] *E.g.*, William P. Nash & Dewleen G. Baker, *Competing and Complementary Models of Combat Stress Injury*, *in* COMBAT STRESS INJURY, *supra* note 42, at 65, 73 ("[Exposure] treatments all make use of controlled reexperiencing of traumatic cures both in imagination and in real life in order to facilitate desensitization and extinction of conditioned fear responses.").

[130] *E.g.*, Editorial, *Virtual Reality Brings Therapy to PTSD Patients*, U.S. Dep't of Def., MIL. HEALTH SYS., June 10, 2008, http://www.health.mil/Press/Release.aspx?ID=238 (relating the comments of Dr. Greg Reger, Clinical Psychologist, Telehealth and Technology Center of the Defense Center of Excellence, who states, "The standard-of-care treatment for PTSD is exposure therapy").

[131] Allison G. Harvey et al., *Cognitive Behaviour Therapy for Posttraumatic Stress Disorder*, 23 CLIN. PSYCHOL. REV. 501, 502 (2003).

[132] Nash & Baker, *supra* note 129, at 73 ("In PE, for example, traumatized individuals are asked to record on audiotape the story of their traumatic experiences in detail and in the present tense. They are then asked to listen to these tapes on a daily basis while practicing relaxation techniques."). Exposure can be real, rather than imagined. The practice of "in vivo" exposure calls for patients to participate in an event that they had previously been avoiding. In one example, veterans who feared the presence of helicopters based on their combat experiences reduced these fears over time by riding in helicopter flights with the supervision of their therapists. *See generally* Raymond M. Scurfield et al., *An Evaluation of the Impact of "Helicopter Ride Therapy" for In-Patient Vietnam Veterans with War-Related PTSD*, 157 MIL. MED. 67 (1992).

after nine sessions of treatment.[133] Attorneys should seek to learn whether a client is receiving exposure therapy treatment at the time of legal counseling. By synchronizing calendars with the clinician, the attorney can avoid scheduling meetings close in time to the days when the client will revisit vivid traumatic experiences.

Another form of clinician-supervised exposure therapy includes Virtual Reality (VR) Therapy, which exposes veterans to computer-simulated images that resemble their own traumatic experience.[134] Virtual environments commonly depict streets, homes, and scenes encountered in Iraq.[135] In some pilot programs, clinicians can reproduce smells common to combat environments and other effects that make the experience extremely realistic.[136] Virtual Reality programs are not yet mainstream, but attorneys in the near future may represent clients undergoing PE or VR clinical trials during the course of the representation.

2. Cognitive Behavior Therapy

Cognitive Behavior Therapy (CBT) involves clinical exploration of the link between the client's distorted thoughts and his maladaptive behavior.[137] During CBT, a therapist helps the client explore these links by making the client complete charts and other written assignments.[138]

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[133] *E.g.*, Edna B. Foa & Shawn P. Cabill, *Matching Survivors to the Appropriate Modality*, *in* TREATING TRAUMA SURVIVORS WITH PTSD 34, 53 (Von Rachel Yehuda ed., 2002).

[134] *See generally* Rizzo et al., *supra* note 44. As of June 2009, "There [were] about 40 Virtual Iraq systems in Defense Department and Veterans affairs hospitals and clinics," with the Air Force and Navy operating most of the active duty systems. Geoff Ziezulewics, *Military Uses Virtual Therapy to Help Troops Heal Wounds*, STARS & STRIPES (Mideast ed.), June 29, 2009, at 3, *available at* http://www.stripes.com/article.asp?article=63509&section=104.

[135] *E.g.*, Ziezulewics, *supra* note 134, at 2 (reproducing photographs from the University of Southern California's Institute of Creative Technologies).

[136] *E.g.*, *id.* at 4 (noting that during the use of the virtual simulations, "the smell of fire, diesel, cordite, body odor and burning rubber are also used to facilitate memory recall and emotional processing").

[137] SLONE & FRIEDMAN, *supra* note 43, at 165 ("CBT involves working with your cognitions, or thoughts, to change your emotions, thoughts, and behaviors.").

[138] *See generally* MICHAEL A. TOMPKINS, USING HOMEWORK IN PSYCHOTHERAPY: STRATEGIES, GUIDELINES, AND FORMS 1–6 (2004) (describing the nature of psychotherapy homework and its many benefits); DAVID D. BURNS, THE FEELING GOOD HANDBOOK, at xxxiii–xxxvi (rev. ed. 1999) (describing how he and his patients are able to understand

The goal is to assist the client in challenging faulty assumptions or beliefs and to permit the client to adopt corrected beliefs.[139] Scholars describe a "feedback loop" that explains how unchecked thoughts can result in ongoing impairments:

> In the case of painful feelings, a negative feedback loop can be set up in which an uncomfortable feeling itself becomes an "event," the subject of further thoughts, which produce more painful feelings, which become a larger event inspiring more negative thoughts, and so on. The loop continues until you work yourself into a rage, an anxiety attack, or a deep depression.[140]

Cognitive Behavior Therapy practitioners use a common three-column "A-B-C Worksheet" to identify the interrelationship of thoughts, situations, and feelings.[141] The first column, which represents "the activating event," requires the patient to identify an event that triggers an undesired emotional response. The second column represents the "belief" underlying the emotion. The third column represents the "consequence" of the trigger and resulting belief, which is the emotion or feeling that is generated. In Figure 1 below, a hypothetical Soldier, Specialist Tracy Melvin, was initially traumatized by the detonation of an improvised explosive device that seriously injured a fellow Soldier. The event occurred near a schoolyard. Recently, her response to seeing a group of children was fear that an attack similar to the one she witnessed in combat was about to take place, even though she was nowhere near a combat zone.[142]

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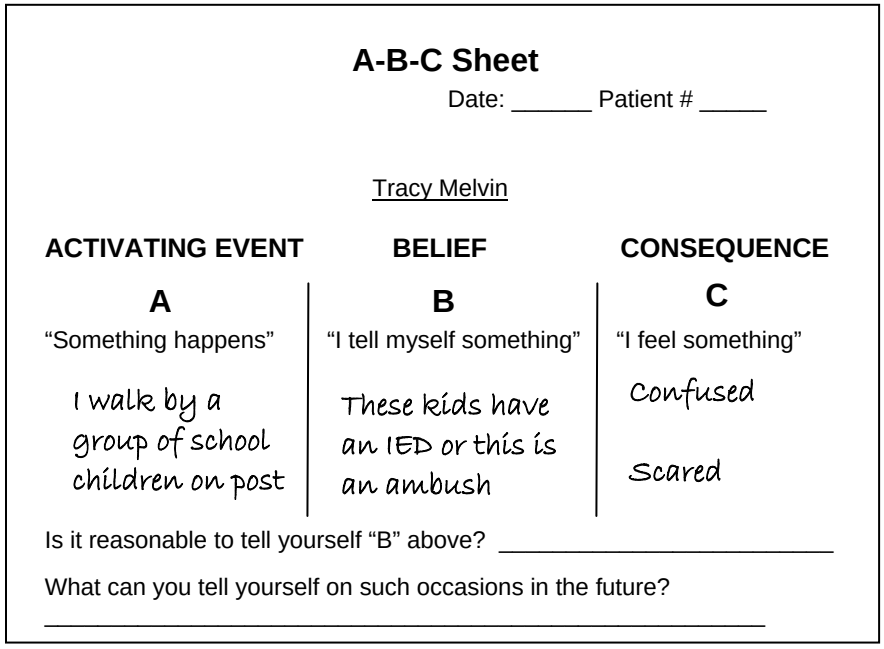
the application of psychological concepts at a personal level when they put pen to paper and provide individualized information).

[139] *E.g.*, DENNIS GREENBERGER & CHRISTINE A. PADESKY, MIND OVER MOOD: CHANGE HOW YOU FEEL BY CHANGING THE WAY YOU THINK 109 (1995) (describing the value of considering alternative and balanced thoughts and how consideration of such thoughts provides new insights and feelings).

[140] MATTHEW MCKAY ET AL., TAKING CONTROL OF YOUR MOODS AND YOUR LIFE: A THOUGHTS AND FEELINGS WORKBOOK 18 (1997).

[141] PATRICIA A. RESICK ET AL., COGNITIVE PROCESSING THERAPY VETERAN/MILITARY VERSION: THERAPISTS MANUAL 63 (Dept. Veterans Affairs 2007) [hereinafter CPT THERAPISTS MANUAL] (describing how the worksheets help patients to "see the connection between . . . thoughts, and feelings following events").

[142] *E.g.*, ARMSTRONG ET AL., *supra* note 61, at 17 (observing that "[b]eing around children who remind you of kids in the war zone" is a specific reminder "that may trigger responses for returning veterans").



A-B-C Sheet

Date: _____ Patient # _____

Tracy Melvin

ACTIVATING EVENT	BELIEF	CONSEQUENCE
A	**B**	**C**
"Something happens"	"I tell myself something"	"I feel something"
I walk by a group of school children on post	These kids have an IED or this is an ambush	Confused Scared

Is it reasonable to tell yourself "B" above? _____

What can you tell yourself on such occasions in the future?

_____

Fig. 1 "A-B-C Worksheet"

Because it is sometimes difficult to identify underlying feelings and Soldiers with PTSD often experience emotions first, without seriously considering their thoughts,[143] the patient might complete the "B" column as the final step for the worksheet.

The information identified on the A-B-C Worksheet presents a foundation upon which clinicians can build to further explore the connection between thoughts, feelings, and situations. In more detailed thought records, patients rate the intensity of their thoughts by percentage from zero to one-hundred.[144] They, likewise, identify statements that challenge or balance the initial responses, and re-rate the intensity of their original feelings after considering alternative viewpoints.[145]

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[143] *E.g.*, *id.* at 101 (describing how Soldiers with PTSD often use "emotional reasoning," in which they "reason things out based on how [they] feel").

[144] *E.g.*, MCKAY ET AL., *supra* note 140, at 42 (reproducing a completed "Thought Journal"); GREENBERGER & PADESKY, *supra* note 139, at 100–01 (same).

[145] *E.g.*, GREENBERGER & PADESKY, *supra* note 139, at 100–01.

Specialist Melvin's thought above ("These kids have an IED or this is an ambush,") can represent three of eight types of distorted thinking—"overgeneralization," "catastrophizing," or "magnifying"—which are defined in Figure 2, below.[146]

1. **Filtering:** You focus on the negative details while ignoring all the positive aspects of a situation.

2. **Polarized Thinking:** Things are black or white, good or bad. You have to be perfect or you're a failure. There's no middle ground, no room for mistakes.

3. **Overgeneralization:** You reach a general conclusion based on a single incident or piece of evidence. You exaggerate the frequency of problems and use negative global labels.

4. **Mind Reading:** Without their saying so, you know what people are feeling and why they act the way they do. In particular, you have certain knowledge of how people think and feel about you.

5. **Catastrophizing:** You expect, even visualize, disaster. You notice or hear about a problem and start asking, "What if?" What if tragedy strikes? What if it happens to you?

6. **Magnifying:** You exaggerate the degree or intensity of a problem. You turn up the volume on anything bad, making it loud, large, and overwhelming.

7. **Personalization:** You assume that everything people do or say is some kind of reaction to you. You also compare yourself to others, trying to determine who is smarter, more competent, better looking, and so on.

8. **Shoulds:** You have a list of ironclad rules about how you and other people should act. People who break the rules anger you, and you feel guilty when you violate the rules.

Fig. 2. Eight Forms of Distorted Thinking

Distorted thoughts commonly associated with PTSD, and which could influence legal representation, include the following:

- "It's not worth my time and energy to plan for the future because I may be redeployed"[147]
- "I never think beyond today, much less tomorrow or

[146] MCKAY ET AL., *supra* note 140, at 32 ("Summary"). These eight patterns represent most of the dysfunctional thoughts exhibited by patients, although they might go by different names. Elsewhere, for example, polarized thinking has been called "All-or-nothing thinking" and "Magnifying" has been called "Overfocusing on the Negatives." *E.g.*, STEVEN TAYLOR, CLINICIAN'S GUIDE TO PTSD: A COGNITIVE BEHAVIORAL APPROACH 193 (2006) ("Handout 10.1, Cognitive Distortions Associated with PTSD").
[147] ARMSTRONG ET AL., *supra* note 61, at 132.

the next day. I won't live much longer."[148]
- "Grieving means I'm weak."[149]
- "If I move on with my life, I will stop thinking about those I lost."[150]

With knowledge of such limitations, the client can conduct further self-analysis, acting as a personal scientist, to substitute dysfunctional thoughts with more productive ones.[151] The process can work equally well in permitting the client to evaluate errors in the interpretation of legal advice.

Cognitive Processing Therapy (CPT) is an adaptation of CBT which combines traditional exercises with an element of exposure therapy. During CPT, the patient revisits a traumatic experience by writing about it over the course of time, evaluates changes in the descriptions of the event, and explores the feelings and beliefs related to the changing descriptions.[152] Success rates for CBT treatment of PTSD have been consistently high, leading many clinicians to suggest that CBT represents one of the most successful approaches to the clinical treatment of PTSD.[153]

3. Eye Movement Desensitization Reprocessing

Eye Movement Desensitization Reprocessing (EMDR) Therapy is an eight-phase treatment which combines visualization techniques with optical stimulation. Based on the recognition that PTSD affects the two hemispheres of the brain,[154] EMDR requires the clinician to move a

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[148] *Id.*
[149] *Id.* at 119.
[150] *Id.*
[151] *E.g.*, Harvey et al., *supra* note 131, at 503 ("Cognitive restructuring involves teaching patients to identify and evaluate the evidence for negative automatic thoughts as well as helping patients to evaluate their beliefs about the trauma, the self, the world, and the future.").
[152] VA/DOD PRACTICE GUIDELINE, *supra* note 127, at I-21.
[153] SLONE & FRIEDMAN, *supra* note 43, at 165 ("Cognitive Behavioral Therapy . . . has been shown to be the most effective treatment for PTSD. In fact, CBT has been designated the treatment of choice in all evidence-based clinical practice guidelines for the treatment of PTSD published to date.").
[154] HART, *supra* note 39, at 30:

finger back and forth across the patient's field of vision to promote an exchange of information across the left and right hemispheres.[155] This stimulation normally occurs while the patient considers a selected unsettling image related to a traumatic experience.[156] At a neurological level, "[i]t is thought that this technique allows the emotional response of these traumatic and pictoral memories to be reduced to just a flashbulb memory, a picture with an emotional response no longer, but rather just a feeling of sadness and a sense of loss."[157]

Therapists repeat this process and deal with newly emerged images and statements, comparing levels of emotional distress.[158] In the process above, the "desensitization" component of EMDR represents the visualization of the target image and its transformation into new images and sensations.[159] The "reprocessing" component occurs when "clients generally report new memory associations and change of

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> Recent research has shown that when individuals are traumatized, there appears to be marked lateralization of activity in the right hemisphere. There is also a decrease in activation or stimulation to a part of the brain in the left hemisphere responsible for language . . . There appeared to be a decrease in oxygen utilized by this part of the brain in the left hemisphere during the activation of a traumatic memory.

[155] *E.g.*, Harvey et al., *supra* note 131, at 512 (discussing patients' visual "tracking" of the therapists movements while focusing attention on traumatic events); Howard J. Lipke & Allan T. Botkin, *Case Studies of Eye Movement Desensitization and Reprocessing (EMDR) with Chronic Post-Traumatic Stress Disorder*, 29 PSYCHOTHERAPY 591, 591 (1992):

> EMDR calls for the patient to visualize the most distressing moment of a traumatic incident and the concomitant physical distress while . . . repeating the [associated] negative self-statement . . . . [Next], the patient is asked to follow, with his or her eyes, the therapist's finger as it rapidly moves back and forth a distance of approximately 12 inches across the patient's field of vision approximately 12 inches from the face. Twelve to 24 back-and-forth eye movements are made at a rate of two complete cycles per second. When the movements are completed the patient is asked to "blank" the scene out of mind and take a deep breath.

[156] Commander Mark C. Russell, *Treating Combat-Related Stress Disorders: A Multiple Case Study Using Eye Movement Desensitization and Reprocessing (EMDR) with Battlefield Casualties from the Iraq War*, 18 MIL. PSYCHOL. 1, 3 (2006).
[157] HART, *supra* note 39, at 31.
[158] *Id.*
[159] Russell, *supra* note 156, at 3.

somatic/emotional content and valence as well as insights and shifts of cognitive content."[160]

An applied example involves a Marine, who had been medically evacuated for shrapnel wounds received in Iraq. This patient experienced deep feelings of sadness in response to witnessing a fellow Marine (and new father) mutilated by the same RPG attack that injured him.[161] His target image was "his buddy's horrific death," accompanied by the thoughts, "He will never see his family," and "I might not ever see my family again."[162] During the first eye movements, the patient recalled more details about the events leading to the explosion accompanied by the new thought, "I am going to die."[163]

As eye movements continued, the scene again transformed into an unrelated vision of "an elderly 'ragtag' civilian soldier armed with an AK-47 exiting a car shooting,"[164] then to a positive one—"rolling into south Baghdad and being greeted by what appeared to be starving children who were smiling."[165] The patient now visualized an occasion when he handed a boy food, and the boy responded, "America OK."[166] This new image was associated with feelings that he was a hero.[167] After observing these developments, the therapist had the patient return to the target image of friend's severed torso. While there were still feelings of loss, resonation between the target image and the new, more positive one finally resulted in concluding thoughts that "His family will be taken care"[168] of and "he won't see his family again, but I survived and will be back with them tomorrow."[169] After the "exhausting" EMDR session, the patient reported that he was able to sleep well "for the first time in a long time."[170]

Soldiers undergoing EMDR therapy have similar experiences to the Marine in the above example. In explaining how she did not initially know what to expect, a patient related her response to the eye

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[160] *Id.*
[161] *Id.* at 8.
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.* at 9.
[169] *Id.*
[170] *Id.*

movements: "It was amazing what came out, things from Iraq, things from Bosnia, and things from my childhood."[171] It is said that treatment such as this "can bring out [encoded] memories, strip them of their emotional content, and store them away again in a less threatening form," thus completing a formerly blocked process of experiencing.[172] While some clinicians may be skeptical of EMDR, based on its dissimilarity to standard psychological approaches, organizations of mental health professionals have endorsed EMDR as a legitimate treatment tool because of its high success rates in the treatment of combat veterans with PTSD.[173] Clinicians may be able to modify EMDR treatment to address a client's litigation-related fears at the attorney's request.

With the availability of treatments including PE, CPT, and EMDR, most combat veterans are expected to improve with effective treatment.[174] Attorneys should endeavor to learn: (1) the type of technique the client is using during the legal representation and how far along he is; (2) whether the client unsuccessfully attempted treatment in the past with a different technique; and (3) the types of relaxation methods the clinician has demonstrated to the client or which the client has been practicing to limit the adverse effects of the disorder. Once aware of the techniques a client has been practicing, the attorney can work with clinicians to tailor complementary exercises that address the effects of Forensic Stress Disorder or triggers unique to the legal representation.

III. Fostering Productive Relationships with Mental Health Professionals

While the diagnosis and treatment of mental health conditions are functions of licensed mental health professionals, attorneys must

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[171] NEWHOUSE, *supra* note 45, at 247 (describing the experiences of Heather Kryszak).
[172] *Id.* at 252 (describing Dr. Shapiro's theory).
[173] *E.g.*, Russell, *supra* note 156, at 2 (observing positive treatment recommendations from the International Society for Traumatic Stress Studies, the U.S. DVA/DoD, The American Psychiatric Association, and the Israeli National Counsel for Mental Health).
[174] Regardless of whether a client is undergoing CPT, EMDR, or PE therapy, the recommended treatment lasts approximately twelve weeks. *E.g.*, Kent A. Corso et al., *Helping Military Personnel and Recent Veterans Manage Stress Reactions*, 31 J. MENTAL HEALTH COUNSELING 119, 119 (2009) (observing that "effective treatment protocols are rigorous and time-consuming—as much as 12 weeks of 60-90 minute sessions"). In line with this protocol, for example, the Army's CPT program consists of twelve sessions. *See generally* CPT THERAPISTS MANUAL, *supra* note 141.

nevertheless deal with the impact of a client's mental health conditions in fulfilling their legal duties.[175] Overlap between the psychological and legal spheres is inevitable as mental health providers also face the patient's legal issues from the therapist's couch.[176] Despite some incongruence between professional approaches and standards of professional responsibility between disciplines, there is a necessity for collaboration in the best interests of a client with a mental illness like PTSD.[177]

There are legitimate concerns that may prevent full collaboration. A common issue in cross-disciplinary work is child abuse reporting requirements: "[A]ttorney confidentiality and privilege differ from social worker confidentiality and privilege in that the mandatory child abuse reporting statute abrogates both privilege and confidentiality with respect to social workers, but not with respect to attorneys."[178] In such situations, the attorney and clinician can establish measures to ensure that their different sets of professional responsibilities are met. They can generally develop procedural safeguards, such as (1) educating the client about different professional duties; (2) requiring consent from the client to share certain information; and (3) using "shadow files, in which protected information is kept apart from other case information."[179] Criminal attorneys can also request the clinician as a consultant to the defense team in order to limit the possibility that certain communications will be disclosed.[180] An active duty client who is already in treatment

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[175] *E.g.*, PORTNOY, *supra* note 107, at 19 & 158.

[176] *See generally* Anthony Bertelli, *Should Social Workers Engage in the Unauthorized Practice of Law*, 8 B.U. PUB. INT. L.J. 15 (1998) (identifying inevitable legal overlap in the functions of mental health providers who treat low-income populations).

[177] Veterans' treatment courts have recognized this overwhelming benefit and structured their programs accordingly. *See supra* Part II.C.

[178] Jacqueline St. Joan, *Building Bridges, Building Walls: Collaboration Between Lawyers and Social Workers in a Domestic Violence Clinic and Issues of Client Confidentiality*, 7 CLIN. L. REV. 403, 430–31 (2001). The Army rule is no different. *See* U.S. DEP'T OF ARMY REG. 608-18, THE ARMY FAMILY ADVOCACY PROGRAM app. G-4 (30 Oct. 2007) ("A military lawyer has no obligation to make a report of spouse or child abuse that comes to his or her attention as a result of privileged communication unless the communication clearly contemplates the commission of a future crime.").

[179] St. Joan, *supra* note 178, at 440. *See also* Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-Examining the Nature and Potential of the Relationship*, 67 FORDHAM L. REV. 2123, 2147–53 (1999) (discussing various methods to remove impediments to collaboration between lawyers and social workers).

[180] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 703(d) (2008) (providing standards for the appointment of an expert consultant). *See generally* Major Will A. Gunn, *Supplementing the Defense Team: A Primer on Requesting and Obtaining*

may pose fewer concerns, as his records are likely releasable to the command upon request, creating concerns only with new information related to the representation not yet revealed in medical files.[181] In each situation, the growing scholarship on interdisciplinary practice in children's law, elder law, and mental health law provides a range of safeguards to protect the client.[182]

Simply from the perspective of limited resources, it is infeasible to expect that the attorney will have access to a mental health provider during all client counseling sessions.[183] Accordingly, the collaborative process is often incremental and iterative. In her role as first responder to the cognitive problems presented by legal issues, the attorney conducts triage: she evaluates the client's behavior, seeks feedback from mental health personnel or resources, and considers how to compensate for the client's decisional impairments.

An attorney representing a client already in treatment for PTSD should endeavor to learn whether the client is using EMDR, CPT, or PE methods and how such treatment might complicate legal counseling sessions scheduled close in time. With knowledge of the client's legal concerns and aspects of litigation that will pose the greatest amount of stress on the client, the attorney should consider how the mental health professional can address legal stressors with therapeutic intervention. If, for example, a client is already using A-B-C worksheets as part of a CPT regimen, attorneys could also use the worksheets to assist in identifying distorted litigation-related thoughts.[184] Even where a clinician is unable

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Expert Assistance, 39 A.F. L. REV. 143 (1996) (providing practical guidance on how to meet R.C.M. 703(d)'s requirements).

[181] *See, e.g.*, SLONE & FRIEDMAN, *supra* note 43, at 142 (discussing accessibility of Soldiers' medical records, especially relating to mental health treatments for PTSD). There are so many exceptions to the military's psychotherapist-patient privilege established by Military Rule of Evidence 513 that defense counsel have been cautioned not to expect protection of client communications with mental health providers. *E.g.*, Lieutenant Colonel R. Peter Masterton, *The Military's Psychotherapist-Patient Privilege: Benefit or Bane for Military Accused?*, ARMY LAW., Nov. 2001, at 21–22.

[182] *E.g.*, ABA COMMN. ON L. & AGING & AM. PSYCHOLOGICAL ASSN., ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS 3 (2005) (LEXIS Course No. SM054) (exploring various alternatives that will not compromise the attorney's role or violate the client's best interests).

[183] *E.g.*, Coleman, *supra* note 21, at 142 (identifying common limitations on multidisciplinary legal teams including coordination difficulties and "time pressure[s]").

[184] *See supra* Part II.E.2 (reviewing key attributes of the A-B-C Worksheet). Similar collaboration between the attorney and clinician has been proposed by forensic psychologist Astrid Birgden, who envisions cross-disciplinary application of a

to address uniquely legal concerns, an attorney can still work with the provider to modify client counseling on sensitive legal topics or plan responses to a client's stress responses in the legal office.[185]

Whether the attorney explores mental health concerns in relation to a specific case or in an effort to address all potential cases involving PTSD, the first responder frame requires interaction with healthcare providers to improve the quality of client counseling.

IV. Conclusion

This article has introduced a new perceptual frame for attorneys representing combat veterans. From this vantage point, the attorney acknowledges her role as a potential first responder to PTSD. She accepts the fact that, for many reasons, a client may be suffering from this disorder without having been diagnosed or treated; she recognizes that, as a lawyer representing the combat veteran, she has an obligation to act in the best interests of her client.[186] While the PTSD First Responder frame does not require the attorney to don a lab coat and prescribe medication, it does require knowledge of PTSD symptoms as

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psychological technique by an attorney and mental health professional. Astrid Brigden, *Dealing With the Resistant Criminal Client: A Psychologically-minded Strategy for More Effective Legal Counseling*, 38 CRIM. L. BULL. 225, 237 (2002) ("A joint defense attorney and mental health professional strategy is proposed to maximize cooperation in the resistant client; the attorney applies motivational techniques [during three stages of the counseling process] while the mental health professional applies cognitive behavioral intervention and relapse prevention at the [other two additional] stages."). In this joint model, "[t]echniques previously designed for the mental health professional regarding motivating change and techniques for the defense attorney regarding enhanced decision-making are combined." *Id*. at 238–39 & 238 tbl.4 (depicting attorney and mental health professionals' respective roles).

[185] *E.g.*, Christina A. Zawisza & Adela Beckerman, *Two Heads are Better Than One: The Case-Based Rationale for Dual Disciplinary Teaching in Child Advocacy Clinics*, 7 FL. COASTAL L. REV. 631, 679–80 (2006) (identifying several crucial ways social workers and other mental health professionals can assist attorneys in meeting their duties, including overcoming barriers to effective communication during client counseling); Seamone, *supra* note 1 (addressing enhanced counseling methods that permit attorneys to effectively represent servicemembers with PTSD).

[186] Few can doubt the fundamental proposition that "[a]ll attorneys have an ultimate responsibility to act in the best interests of their clients." Christopher J. Mealing & Donald Stepner, *Court Annexed Arbitration—The Northern Kentucky Experience*, 81 K.Y. L.J. 1155, 1163 (1993). *See, e.g.*, Friedman v. Comm'r of Pub. Safety, 473 N.W.2d 828, 834–35 (Minn. 1991) (addressing the attorney's obligation to maximize an alcoholic client's well-being by exploring treatment options for his condition).

they relate to a client's participation in the legal representation. Without such knowledge the attorney will be unable to see signals that the client suffers from a decisional impairment as a result of these symptoms. Like a medical first responder, the veterans' attorney should conduct triage.[187]

In line with the prevailing research, the attorney need not presume that every combat veteran who visits her office is afflicted with PTSD.[188] When the attorney pays conscious attention to the subtle indicators of potential problems, the need for further analysis will be evident. Sometimes the cues will be obvious. In military settings, if a client is wearing a Combat Infantryman Badge, a Marine Combat Aircrew Badge, a Combat Action Badge, a Combat Medical Badge, a ribbon or medal with a "V" device, or other signs of engagements with an enemy,[189] these visual indicators provide conversational starting points for the attorney. In civilian settings, other casual questions probing prior or multiple deployments can easily serve the same function. Missed appointments or problems keeping track of information can also be signals.[190] Ultimately, in every scenario, aside from considering the legal questions presented by a case, veterans' counsel should first consider the foundational questions of whether the client is capable of understanding their advice and whether some sort of corrective action will be necessary for successful client counseling on the legal issues or the client's well-being in general.

While this first responder frame surely requires education in areas that are unfamiliar to many attorneys, the legal profession imposes an ethical obligation to gain knowledge necessary to the effective representation of a client.[191] Veterans' treatment courts may become the

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[187] Shetty, *supra* note 9, at 566–67.

[188] *See supra* Part II (discussing the prevalence of PTSD in combat veterans and the fact that a majority of veterans will not have this condition). The population of veterans facing legal problems will likely contain a higher percentage of veterans with PTSD than the entire veteran population. *Id.*

[189] For example, the combination of a deployment patch and indicators of service in the Explosive Ordinance Disposal military occupational specialty would suggest, at the least, that the servicemember has had increased exposure to traumatic combat events. The same can be said of flight surgeons or others who are charged with treating combat injuries.

[190] *E.g.*, ARMSTRONG ET AL., *supra* note 61, at 142 (describing common signals, such as problems organizing information).

[191] *E.g.*, MODEL RULES OF PROF'L CONDUCT cmt. to R. 1.1 (2006) ("A lawyer can provide adequate representation in a wholly novel field through necessary study or consultation with a lawyer of established competence in the field in question."); AR 27-26, *supra* note

first to develop a formal PTSD training regimen for attorneys,[192] but historic parallels can also be drawn to criminal and civil cases involving DNA analysis. For the most part, attorneys are normally unprepared to evaluate the merits and validity of cases involving DNA.[193] Yet, they must nevertheless engage in extensive study to meet their legal duties in these cases.[194] In the context of PTSD, attorneys have even more incentive to learn about the related scientific issues, if for no reason other than the fact that this unseen condition may be lurking in the backdrop of any case involving a combat veteran. Attorneys working on cases involving PTSD and DNA also share important limitations. The similarities continue. Just as learned criminal law attorneys must reserve laboratory analysis for the forensic serologist, veterans' counsel must also reserve formal diagnosis and treatment for the licensed clinician. In either case, the attorney must have independent knowledge of scientific principles and the ability to effectively incorporate them in legal analysis.

73, cmt. to R. 1.1 (same). In cases involving the representation of children, for example, courts have imposed supplemental rules requiring attorneys to become conversant in psychology and the clinical assessment of their clients. Zawisza & Beckerman, *supra* note 185, at 679.

[192] *See supra* Part II.C.

[193] *E.g.*, Steve Lash, *Require "DNA 101" for Lawyers, Justices Urged*, CHI. DAILY LAW BULL., Oct. 14, 2005, at 1 (reporting the efforts of the American Bar Association to "urge[ ] the justices to require that defense attorneys either understand DNA and other biological evidence or consult with experts" to prevent wrongful convictions); Myrna S. Raeder, *Cost-Benefit Analysis, Unintended Consequences, and Evidentiary Policy: A Critique and Rethinking of the Application of a Single Set of Evidence Rules to Civil and Criminal Cases*, 19 CARDOZO L. REV. 1585, 1589 (1998) (identifying a pervasive "math phobia" in the legal profession and observing that "the discomfort some feel with the *Daubert* standard (requiring the court to determine the reliability of new technological advances) stems from the inability of many trial lawyers and judges to understand hard science").

[194] *E.g.*, Gregory W. O'Reilly & Allan Sincox, *Forensic DNA Case Evaluation and* Litigation, 28 LITIG. 43, 43 (2001) (noting that "the two most important skills necessary in trying DNA cases are to learn the science well enough that you can not only cross-examine a[n] . . . expert but also explain the technology to a lay jury"). Joelle Anne Moreno, *Beyond the Polemic Against Junk Science: Navigating the Oceans that Divide Science and Law with Justice Breyer at the Helm*, 81 B.U. L. REV. 1033, 1081 (2001) ("Legal scholars and practitioners who must assess the quality of scientific evidence must also acquire a basic understanding of core statistical concepts."). Professor Moreno identifies the need for scientific sophistication by identifying several common errors that attorneys must correct from the misuse of terminology to the misunderstanding of scientific methodology. *Id.* at 1064–81.

This new frame for client counseling and case evaluation comes at an opportune time for attorneys serving servicemembers. Combat veterans with PTSD who find themselves in a criminal defense attorney or a family law attorney's office are usually experiencing the direct results of their symptoms. They come to attorneys for advice, guidance, and solutions to very real and immediate problems. The ramifications of their legal problems may have lifetime or life-ending implications. In many cases, such as the common scenario where a veteran is reluctant to seek help, the attorney's office is the frontline in the fight for effective representation. Whether in the form of referral or through enhanced counseling techniques, military and civilian attorneys owe it to their clients to intervene early and meaningfully.

Author's Disclaimer: Divergent views on Posttraumatic Stress Disorder (PTSD) are underscored by recent efforts to revise the clinical diagnostic criteria. As a result of inconsistent perspectives on diagnosis or treatment, authors are hard-pressed to identify a single or perfect solution to the problem. Legal organizations may desire to approach the attorney's role in a cautious manner, limiting the attorney's response to decisional impairments that stem from PTSD symptoms. This article represents only the individual views of the author. The author was not directed to write this article in his military capacity and wrote it on his own time. By surveying assessment and counseling techniques and suggesting how attorneys might benefit from them, this article does not suggest that these approaches must or should be adopted by all attorneys providing legal services to clients. This article previews the possibilities of an enhanced client counseling role with the hope that consideration of these ideas will enrich the dialogue in the military and civilian sector on the best ways to serve clients with unique needs.

THE VETERANS'[*] LAWYER AS COUNSELOR: USING THERAPEUTIC JURISPRUDENCE TO ENHANCE CLIENT COUNSELING FOR COMBAT VETERANS WITH POSTTRAUMATIC STRESS DISORDER[†]

Captain Evan R. Seamone[‡]

[*] The term "veteran," as used in this article, refers to any person who has previously served or who is currently serving in the armed forces. Combat veterans consequently include servicemembers on active duty who have prior deployments.

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I. Introduction

As the campaigns in Iraq and Afghanistan continue, both military and civilian lawyers will encounter an increasing number of clients with Posttraumatic Stress Disorder (PTSD).[1] Some of these clients will still need clinical diagnosis and treatment at the time they visit the attorney's office.[2] Whether the lack of clinical involvement stems from the problems of an overtaxed medical system[3] or the veteran's own

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[1] For a concise description of PTSD as it relates to client counseling, see, e.g., Captain Evan R. Seamone, *Attorneys as First-Responders: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veteran's Legal Decision-Making Process*, 202 MIL. L. REV. 144, 152–59, 162–78 (2009). An appendix containing the diagnostic criteria is reproduced *infra* Appendix A for ease of reference. *See generally* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 467–68 (4th ed. Text Revision 2000) [hereinafter DSM-IV-TR].

[2] Seamone, *supra* note 1, at 146–47 (describing reasons why "a great many Soldiers, Sailors, Airmen, and Marines are slipping through the cracks").

[3] *E.g.*, Laura Savitsky et al., *Civilian Social Work: Serving the Military and Veteran Populations*, 54 SOCIAL WORK 327, 336 (2009) (describing limitations on the ability to provide adequate services to combat veterans); Roy R. Reeves, *Latest Strategies in the Diagnosis and Treatment of PTSD*, 85 MED. ECON. 42, 42 (2008) ("Unfortunately, the diagnosis of PTSD is often missed in the primary care setting."). As Savitsky and her colleagues demonstrate, misdiagnosis can often prevent Soldiers with PTSD from receiving treatment. *Id.* For an example from the Army, see, e.g., Radio Broadcast, *Crew and VoteVets.org ask House Armed Services to Investigate Army Misdiagnoses of Service Members and Veterans with PTSD—As Cost Cutting Measure* (5 May 2009 3:43 PM GMT) (reporting the alleged tape-recorded confession of Army Psychologist Douglas McNich, "[A]ll clinicians up here are being pressured not to diagnose PTSD and diagnose Anxiety Disorder NOS instead . . . . I think it's not fair. I think it's a horrible way to treat soldiers . . . ."). For an example from the Department of Veterans Affairs, see, e.g., Mark Dombeck, *Why the VA Doesn't Want to Diagnose Iraq War Veterans' PTSD*, MentalHelp.net, *available at* http://www.mentalhelp.net/poc/view_doc.php?type=doc&id=15324 (last visited Dec. 20, 2009) (explaining policy and

reluctance to seek treatment,[4] systemic failures are transforming attorneys into PTSD "first responders."[5] The first article of this series proposed a new perceptual frame, which acknowledges not only that the attorney can play a role in detecting PTSD symptoms and encouraging clinical diagnosis, but also that the attorney may be contending with a client whose decisions are impaired by the same condition.[6] This article provides practical tools for the lawyer confronted with such dilemmas, including a simple screening method for PTSD and Traumatic Brain Injury (TBI), exercises to identify and neutralize a client's distorted thoughts, and resources to avoid retrauma and stress responses in the office or the courtroom.

Many of the methods proposed in this article originate from the discipline of psychology. In response to concerns that such tools are reserved for licensed mental health professionals, this article recognizes that mental health providers are clearly in the best position to diagnose and treat PTSD. While this article does not suggest the attorney is a substitute for a licensed clinician, it recognizes that attorneys are in a unique position to encourage clients to seek mental health assistance and to help clients understand legal issues in a way mental health professionals simply cannot.[7] This article explores the contours of the attorney's enhanced counseling role with the hopes that an ethic of care comes naturally in the legal services provided to veterans with PTSD.

This article challenges a common approach to client counseling. All too often, attorneys adopt a "too much information" perspective when presented with a client's emotional baggage.[8] Some may be brilliant on

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budgetary reasons for misdiagnoses and reprinting excerpts of an e-mail by Norma Perez to fellow VA employees: "Given that we are having more and more compensation seeking veterans, I'd like to suggest that you refrain from giving a diagnosis of PTSD straight out. Consider a diagnosis of Adjustment Disorder . . . . Additionally, we really don't have the time to do the extensive testing that should be done to determine PTSD . . . .").

[4] Seamone, *supra* note 1, at 154 n.54.

[5] *Id*. at 145 ("As a 'signature' disability evaluation characterizing the Iraq and Afghanistan campaigns, PTSD has transformed many legal assistance and trial defense attorneys into first responders in the quest to ensure the well-being of these combat veterans.").

[6] *See generally id.*

[7] *Infra* text accompanying note 97.

[8] In family law practice, for example, many attorneys

> . . . often avoid responding to clients' characterizations of their spouse or of some event during the marriage; they try to discourage

matters of legal interpretation but, nevertheless, incompetent in the ways they relate to clients.[9] Many lawyers have begun to recognize the values of an enhanced approach to client counseling where they must address emotional influences as part of their legal role.[10] In certain areas of law, courts have mandated this role in the provision of legal services.[11] They have incorporated "therapeutic jurisprudence," as a baseline for representation.[12] As a subset of the comprehensive law movement,[13] therapeutic jurisprudence is a philosophy of law practice in which the attorney is "sensitive to the therapeutic and antitherapeutic consequences

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> the expression of emotion in or through the divorce and make a professional practice of being emotionally unresponsive to what are for many of their clients the central issues in the divorce. In this sense, "clients largely talk past their lawyers." Lawyers seek to define or redefine the divorce dispute by focusing on the financial rather than the emotional aspects of the dispute and by trying to get their clients to talk about the future rather than the past.

Austin Sarat, *Lawyers and Clients: Putting Professional Service on the Agenda of Legal Education*, 41 J. LEGAL EDUC. 43, 47–48 (1991).

[9] Marjorie A. Silver, *Supporting Attorneys' Personal Skills*, 78 REV. JUR. U.P.R. 147, 151 (2009) (describing the problem of the attorney who is a "legal automaton, perhaps brilliant in the traditional knowledge and skills of his profession, but lacking in the emotional competence necessary to comprehend, let alone be responsive to, the depth of his client's pain").

[10] *E.g.*, Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UKMC L. REV. 965, 982 (2007) ("To ignore fear, anger, anxiety, sadness, denial, or any other psychological states of mind is to leave the client in a condition that makes rational informed decision-making difficult, if not impossible. Extreme stress interferes with the ability to receive information and store that information in working memory.").

[11] *E.g.*, Christina A. Zawisza & Adela Beckerman, *Two Heads are Better Than One: The Case-Based Rationale for Dual Disciplinary Teaching in Child Advocacy Clinics*, 7 FL. COASTAL L. REV. 631, 651–52 (2006) (observing that "[s]tate courts have increasingly adopted detailed practice norms or guidelines for lawyers representing children," which incorporate therapeutic jurisprudence).

[12] *Id.* at 651 (observing how various rule provisions are "quintessentially therapeutic jurisprudential in [their] approach").

[13] *E.g.*, Susan Diacoff, *Law as a Healing Profession: The "Comprehensive Law Movement,"* 6 PEPP. DISP. RESOL. L.J. 1, 1–2 (2006) (identifying several areas of law within the comprehensive law movement, including "collaborative law," "transformative mediation," and "therapeutic jurisprudence"). All of the diverse theories share two characteristics common to the comprehensive law movement: "(1) a desire to maximize the emotional, psychological and relational well-being of the individuals and communities involved in each legal matter; and (2) a focus on more than just strict legal rights, responsibilities, duties, obligations, and entitlements." *Id.* at 5.

that sometimes flow from legal rules, legal procedures, and the roles of legal actors."[14]

In the representation of a client, therapeutic jurisprudence includes an exploration of the "law's healing potential" and maximization of the client's emotional well-being.[15] A component of this general framework includes the concept of "lawyer as counselor"[16] and "client-centered" counseling,[17] terms which recognize that the attorney's obligation to a client includes far more than gathering facts, litigating in court, or performing administrative tasks.[18] In this therapeutic role, the attorney becomes a part of the client's world to better assist the client in making raw, real-life, hard decisions.[19] Criminal defense attorneys practice therapeutic jurisprudence when they work with clients to develop a relapse prevention plan that can be offered to the court to address the danger of recidivism after the case is long over.[20] Family law attorneys

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[14] Dennis P. Stolle & David B. Wexler, *Therapeutic Jurisprudence and Preventive Law: A Combined Concentration to Invigorate the Everyday Practice of Law*, 39 ARIZ. L. REV. 25, 25 (1997).

[15] Bruce Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, 37 CAL. W. L. REV. 105, 108 (2001).

[16] *E.g.*, David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies,* 67 REV. JUR. U.P.R. 317, 318–19 (1998) (recognizing that "[t]herapeutic jurisprudence . . . can give true structure and substance to the notion of the lawyer as counselor . . . .").

[17] Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLIN. L. REV. 605, 606 (2007) ("Therapeutic jurisprudence is committed to client-centered counseling.").

[18] Client-centered counseling, for example, is a method "characterized by the client playing a strong role in attorney-client decision-making, and by the lawyer filtering information and alternatives through empathizing with the client and figuring out how to best serve the true needs of the client as defined by the client." Kimberly O'Leary, *Evaluating Clinical Law Teaching—Suggestions for Law Professors Who Have Never Used the Clinical Teaching Method*, 29 N. KY. L. REV. 491, 497 n.22 (2002) (discussing DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 19–23 (1991)).

[19] Here, the practitioner of therapeutic jurisprudence goes beyond analysis of the law, taking into "account the external ramifications to the person's physical and mental health affected by a decision." Leslie Larkin Cooney, *Heart and Soul: A New Rhythm for Clinical Externships*, 17 ST. THOMAS L. REV. 407, 408 (2005). From this perspective, the attorney welcomes "insights and techniques drawn from psychology . . . and social work" while addressing the client's legal issues. Winick & Wexler, *supra* note 17, at 605 ("Therapeutic jurisprudence is committed to client-centered counseling.").

[20] *E.g.*, David B. Wexler, *Criminal Law: Relapse Prevention Planning Principles for Criminal Law Practice*, 5 PSCYHOL. PUB. POL'Y & L. 1028, 1032 (1999):

practice therapeutic jurisprudence when they investigate with a testator the potential turmoil that may result for the family when one of many children is excluded from a will.[21]

Despite the fact that there are no military regulations or pamphlets spelling-out how to incorporate therapeutic jurisprudence in the representation of a client, military and civilian attorneys often make do. They practice therapeutic jurisprudence, perhaps without even labeling it as such, every time they coordinate with a commander to ensure that an accused can go on leave before a court-martial or interview beneficiaries of an elderly testator to better anticipate the likelihood of a will contest. The thrust of this article is that therapeutic jurisprudence and client-centered practice is not elective or optional when attorneys represent combat veterans affected by Posttraumatic Stress Disorder (PTSD) but rather an obligation.

This article has six parts. Part II explores the necessary overlap between the spheres of psychology and the law. It addresses the general reluctance of attorneys to approach issues from a psychological perspective and identifies situations in which attorneys must nevertheless venture into such territory alone, without the guidance of mental health professionals. It examines the positions of various organizations on an attorney's "work of a psychological nature," including state legislatures, psychology licensing boards, and professional associations. It concludes that much leeway is accorded to use psychological tools when the tools relate to the provision of necessary legal services, when attorneys provide appropriate disclaimers, and when they remain within the bounds of legal professional responsibility rules. Part II also provides a sample client disclaimer to provide adequate notice of the attorney's limitations and lack of psychological expertise when using psychological exercises or charts.

> By engaging the client to think through his or her behavioral patterns that lead to criminality, by engaging the client then to devise ways both to avoid high-risk situations and also to cope with such situations should they arise, a criminal lawyer in essence is engaging the client in the cognitive-behavioral change process of relapse prevention planning.

[21] Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLIN. L. REV. 259, 294 (2000). Here, especially, "a lawyer sensitive to Therapeutic Jurisprudence might have explored with the mother the likely reaction of her son to being excluded from the will." *Id.*

Having established the attorney's freedom to use psychological techniques, Part III draws an important comparison between veterans' counsel and elder law attorneys who must often screen their clients for decisional impairment and mental conditions. This Part identifies two simplified screening tools that fall short of official clinical diagnosis but still provide enough information about PTSD and TBI to assist the attorney from a legal perspective. This Part also provides a checklist, modified from the recommendations of the American Bar and American Psychological Associations, to help veterans' counsel determine whether referral to a mental health provider is necessary as a result of diminished capacity, rather than PTSD symptoms which normally do not mandate court intervention.

Part IV identifies practical steps attorneys can take to neutralize PTSD's negative influences on the representation. This Part focuses exclusively on planning considerations that anticipate "psycholegal soft spots"—aspects of a case that are likely to trigger stress responses—during the course of trial preparation or court proceedings.[22] This Part introduces a series of questions and prompts to increase both the attorney and client's awareness of potential PTSD triggers and measures to limit their aggravating effects. It also introduces the concept of notebooks, in which the client will keep all information related to the case, and peer support networks that will overcome the common problems of information mismanagement and missed appointments.

In crossing the threshold from prevention of PTSD triggers to PTSD trigger responses, Part V offers prophylactic measures to ensure that attorneys remain within the boundaries of legal counseling. Although statutes impose few restraints,[23] the enhanced counseling function of veterans' counsel envisions numerous limitations on a lawyer. The techniques offered in this article are limited to breathing and relaxation exercises, cognitive behavioral therapy forms and worksheets, and self-guided audio-recordings. Where any techniques are similar to ones used by licensed clinicians, this article adopts simplified versions that have been evaluated by therapists and vetted for public consumption in the form of self-directed guides. In other words, while many of the techniques recommended by this article have their roots in psychological studies and clinical practice, the specific tools featured in these pages are drawn from self-help books that can be found in most bookstores. The

[22] *Infra* text accompanying note 39.
[23] *Infra* Part II.C.

coupling of these resources with appropriate notice to clients will ensure that attorneys fulfill their legal counseling function and do not inadvertently become clinical psychologists or social workers.

II. Preliminary Considerations for the Attorney's Use of Psychological Techniques

A. The Stigma of Using Psychological Methods in Law Practice

Although many clinicians and legal practitioners recognize a pressing need for lawyers to learn about psychology, address clients' emotional reactions, and counsel on nonlegal matters, military and civilian lawyers lack uniform guidance.[24] Failure to incorporate such considerations in law practice is best explained by a general reluctance to tackle psychological issues.[25] Attorneys may fear professional consequences for practicing psychology without a license.[26] They may believe that their lack of training and experience could hurt, instead of help, the client.[27] Or, they might believe that referral of the client to a qualified mental health provider satisfies their professional obligation to

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[24] Larry O. Natt Gantt, II, *More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365, 419 (2005) ("Nonlegal counseling remains an elusive concept in the context of the attorney-client relationship."); *see also* Diacoff, *supra* note 13, at 6 (explaining how attorney approaches to address clients' emotional concerns "(if it occurs at all) happens haphazardly and without direction").

[25] Diacoff, *supra* note 13, at 59; *id* at 5 (recognizing that "[t]he dominant, traditional approach found in the profession usually downplays, if not ignores," the client's feelings, emotions, and an attorney's involvement in addressing them").

[26] *E.g.*, Symposium, *Stress, Burnout, Vicarious Trauma, and Other Emotional Realities in the Lawyer/Client Relationship: A Panel Discussion*, 19 TOURO L. REV. 847, 867–68 (2004) (comments of Professor Silver):

> [T]raditionally lawyers have felt that in order to do their job right they have to keep a certain distance . . . if you go further that might invite charges of malpractice. There are definite boundaries to be drawn in terms of what is appropriate and what is not. I believe that you don't cross that boundary in terms of you don't try and become a social worker for your client.

[27] James R. Elkins, *A Counseling Model for Lawyering in Divorce Cases*, 53 NOTRE DAME L. REV. 229, 264 (1978) ("Unlike other helping professionals, such as marriage counselors, psychiatrists, and social workers, the attorney often lacks training in human relations skills and therefore feels unprepared to adopt the counseling model of the attorney-client relationship.").

address any psychological issues. In military justice circles, attorneys of this mindset may very well believe that their obligation ends with the results of a sanity board.[28]

Many desire to avert the risk that the client will become dependent on the attorney for guidance in *all* things, seriously confusing the attorney's legal function.[29] Under this view, while the attorney must necessarily be a legal counselor, she should not attempt to be the client's "social worker."[30] A combination of these concerns has resulted in a

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[28] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 706(c)(2)(A)–(D) (2008) [hereinafter MCM]:

> When a mental examination is ordered under this rule, the order shall contain the reasons for doubting the mental capacity or mental responsibility, or both, of the accused, or other reasons for requesting the examination. In addition to other requirements, the order shall require the board to make separate and distinct findings as to each of the following questions:
>
> (A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? . . .
>
> (B) What is the clinical psychiatric diagnosis?
>
> (C) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct?
>
> (D) Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense?

In addressing the provisions of Rules for Court-Martial 706, a military author observes that defense attorneys often request sanity boards despite the fact that the reports usually "contain[ ] anti-climactic results declaring the accused sane at the time of the offense and fit to stand trial." Major Jeff A. Bovarnick, *Trying to Remain Sane Trying an Insanity Case:* United States v. Captain Thomas S. Payne, ARMY LAW., June 2002, at 12, 14.

[29] *E.g.*, Lynette M. Parker, *Increasing Law Students' Effectiveness When Representing Traumatized Clients: A Case Study of the Katharine & George Alexander Community Law Center*, 21 GEO. IMMIGR. L.J. 163, 169 (2007) (explaining that problems arise when the client turns to the attorney "for help with more than just the specific legal issue").

[30] *E.g.*, Symposium, *supra* note 26, at 867–68 (comments of professor Silver) (explaining that it crosses an impermissible boundary for an attorney to become a client's social worker); Judy H. Kluger et al., *The Impact of Problem Solving on the Lawyer's Role and Ethics*, 29 FORDHAM URB. L.J. 1892, 1918 (2002) (comments of Susan Hendricks) (identifying this position as a reason why defense attorneys do not desire training in matters regarding mental health disorders or their treatment).

uniform approach to the attorney-client relationship that seeks to avoid these issues.[31]

A hands-off approach is quite valid in many areas of legal practice. For instance, few psychological issues are likely to arise during the drafting of contracts or transfer of real property.[32] However, other legal matters are prone to evoke raw emotions, such as "child abuse, domestic violence, criminal defense, immigration, matrimonial practice, and representation of mentally ill persons."[33] For example,

> The depressed client, preoccupied with the prospect of a divorce, is no longer able to make decisions due to an inability to think and concentrate. In addition, the low self-esteem and guilt associated with depression may prompt an attitude of "I don't care what happens to me," which can seriously undermine the attorney's efforts to achieve a result in accordance with the client's best interest.[34]

Particularly in these areas, where emotions run high, it is impossible for the attorney to exercise her duties unless she uses psychological techniques during the course of the representation.[35] Attorneys, in fact,

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[31] *E.g.*, Diacoff, *supra* note 13, at 5 (recognizing that "[t]he dominant, traditional approach found in the [legal profession] usually downplays, if not ignores [extralegal] concerns").

[32] *E.g.*, Silver, *supra* note 21, at 261:

> A lawyer's representation of a client for a real estate closing may not be especially fraught with intensity. Yet a client seeking to avoid deportation, incarceration, or loss of custody of a child is likely to demand a great deal of attention from her attorney, not all of which will be of a legal nature.

[33] *Id*. at 299.

[34] Elkins, *supra* note 27, at 257.

[35] *E.g.*, Robin Wellford Slocum, *The Dilemma of the Vengeful Client: A Prescriptive Framework for Cooling the Flames of Anger*, MARQ. L. REV. 481, 511–12 (2009) (observing that when a client suffers from "perceptual distortions and a limited ability to engage in effective problem-solving," it is "naïve to suggest that a lawyer could competently advise such a client without addressing humanistic concerns that are so clearly imbedded within the legal decisions"); Andrew S. Watson, *The Lawyer as Counselor*, 5 J. FAM. L. 7, 7 (1965) ("[F]or better or for worse, the very nature of a lawyer's activities forces him into [a counseling] role."). The attorney must know how to identify and overcome mental issues that can impede effective representation. Mark K. Schoenfield & Barbara Pearlman Schoenfield, *Interviewing and Counseling Clients in a*

regularly engage in some level of psychological analysis, often without even knowing it, when they reach the opinion that "something about my client has changed"[36] or when they must overcome a client's state of denial over an unsettling issue.[37] In explicitly recognizing this unspoken truth, the "comprehensive law" movement, including therapeutic jurisprudence, has emerged to challenge this status quo and promote the use of psychology to improve the well-being of all persons involved in litigation.[38] This practical approach to lawyering provides extremely useful insights to veterans' counsel.

B. The Attorney's Enhanced Client Counseling Role

Therapeutic jurisprudence uses the term "psycholegal soft spots" to describe phases of litigation or legal representation that are known to cause anxiety and displeasure, such as cross-examination or preparing for discovery.[39] These soft spots are confirmed by physiological research demonstrating that "the litigation process itself" or "the issues underlying the litigation" often produce(s) negative effects on a person similar to

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Legal Setting, 11 AKRON L. REV. 313, 314 (1978) ("The interviewer must know the psychological factors which impede the accurate flow of information."); Elkins, *supra* note 27, at 230 ("Only by being aware of the client's emotional trauma during [the transitional nature of divorce and separation] can the attorney begin to understand and appreciate the dynamics of his relationship with the client.").

[36] ABA COMMN. ON L. & AGING & AM. PSYCHOLOGICAL ASSN., ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS 3 (2005) [hereinafter DIMINISHED CAPACITY HANDBOOK] (LEXIS Course No. SM054). *See also* ANDREW S. WATSON, THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS 11 (1976) ("While lawyers may not often arrive at the depth of understanding about clients which the psychologist or psychiatrist might, at the very least they can have human awareness about the complex and relatively invisible motives that drive their clients into conflict.").

[37] *E.g.*, Bruce J. Winick, *Client Denial and Resistance in the Advance Directive Context: Reflections on How Attorneys Can Identify and Deal with a Pscyholegal Soft Spot*, 4 PSCYH. PUB. POL. & L. 901, 905 (1998) ("A preventive lawyer attempting to present the client the advantages of having advance directive instruments for various purposes should therefore be prepared to confront denial and similar psychological mechanisms used to avoid thinking about these anxiety-provoking eventualities."). In this respect, "Although lawyers are not clinicians, they can learn much from how clinicians deal with patients in similar circumstances." *Id.* at 906.

[38] *E.g.*, Diacoff, *supra* note 13, at 1–4.

[39] *E.g.*, Winick, *supra* note 15, at 108 ("The litigation process is riddled with 'psycholegal soft spots,' a therapeutic jurisprudence term for potential trouble points that can produce anger, anxiety, stress, hurt, hard feelings, or other strongly negative emotional reactions that diminish the client's psychological wellbeing.").

post-traumatic stress.[40] Studies of "Forensic stress disorder" (FSD), reveal that the stress of litigation can inevitably amplify existing conditions, such as PTSD, increasing the risk of harm to clients.[41] Given the rising suicide rate among active duty personnel,[42] the staggering statistics on suicide attempts by all of the nation's veterans,[43] and the identification of legal problems as a leading suicide risk factor,[44] attorneys representing combat veterans simply cannot ignore the influence of psycholegal soft spots on their clients.[45]

While "simple alterations" in client counseling practice can often assist clients,[46] practitioners of therapeutic jurisprudence recognize that many situations often demand an enhanced counseling role.[47] To effectively assist clients with PTSD, military and civilian attorneys should adopt a comprehensive approach to counseling. The PTSD First-Responder frame meets the first two objectives: a basic understanding of PTSD and treatment approaches and relationships with mental health professionals that incorporate legal considerations in the treatment of the client.[48] The sections below explore three additional components of the comprehensive approach: (1) screening tools to identify PTSD and TBI "red flags"; (2) methods to identify PTSD psycholegal soft spots; and (3) techniques to clarify a client's thinking and enhance the attorney-client relationship. In each of these new areas, it will be crucial to understand the difference between "clinical assessment," which is rightfully in the realm of the clinician, and "legal assessment," which is at the heart of the lawyer's obligation.

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[40] Larry J. Cohen & Joyce H. Vesper, *Forensic Stress Disorder*, 25 L. & PSYCHOL. REV. 1, 2 (2001).

[41] *Id.* at 14 ("[I]ndividuals who witnessed violent or life threatening-events as well as those people who were involved in traumatic accidents prior to litigation experience acute stress reactions.").

[42] *E.g.*, Mark Mueller & Tomãis Dinges, *The Wounds Within: Suicide in the Military*, STAR LEDGER (Newark, N.J.), Nov. 22, 2009, at 1 (observing statistics showing all-time record highs for the Army and Marine Corps in 2009).

[43] *E.g.*, Bob Egelko, *Federal Court Hears Vets' Appeal on Mental Health*, S.F. CHRON., Aug. 13, 2009, at A7 (reporting Veterans' Administration (VA) statistics that eighteen veterans commit suicide every day and one thousand more, within the VA's care attempt suicide every month).

[44] *E.g.*, Savitsky et al., *supra* note 3, at 333.

[45] Seamone, *supra* note 1, at 145–52 (highlighting prevention of harm to a client as a chief reason why attorneys must adopt a new perceptual frame as PTSD first-responders).

[46] *Id*. at 164.

[47] *See infra* Part II.C.

[48] Seamone, *supra* note 1, at 145–52, 165–81 (identifying these considerations as key aspects of the PTSD First-Responder perspective).

C. The Practice of Law Inevitably Overlaps with Psychology

Ethical rules and court opinions that address counseling by lawyers make two things clear. First, the lawyer's role as counselor often requires the attorney to counsel clients on matters outside of the law.[49] Second, non-legal counseling by an attorney is governed by the framework of Rules 1.1,[50] 1.2(A),[51] 1.4(b),[52] and 2.1. Collectively, these rules require the attorney to be competent when providing non-legal counsel,[53] to respect the client's autonomy on objectives of the representation,[54] and to adopt measures to ensure that the attorney's communication is effective.

Aside from these requirements, there are few hard-and-fast rules. To a large extent, attorneys are expected to undertake independent study to determine when an issue is beyond their ability.[55] As of 2005, a scholar recognized that "no reported decision has disciplined an attorney for addressing a client's nonlegal matters when the attorney did not have the training needed to handle those matters."[56] Despite this,

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[49] American Bar Association Model Rule 2.1 states: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but also to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation." MODEL RULES OF PROF'L CONDUCT R. 2.1 (2006) [hereinafter ABA MODEL RULES]. The Army Rule is identical. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS R. 2.1 (1 May 1992) [hereinafter AR 27-26]. *See also* John M. Burman, *Advising Clients About Non-Legal Factors*, WYO. LAW., Feb. 2004, at 40–41 ("It is seldom possible to explain the 'practical implications' of a client's legal rights without referring to non-legal factors.").

[50] The military rule, AR 27-26, *supra* note 49, R. 1.1, is analogous to the American Bar Association Rule: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

[51] *Id.* R. 1.2(A) (directing, in part, "[a] lawyer shall abide by a client's decisions concerning the objectives of representation").

[52] *Id.* R. 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation.").

[53] *E.g.*, Natt Gantt, *supra* note 24, at 388 ("Lawyers must first consider whether, in offering nonlegal advice, they are violating their duties under Model Rule 1.1 to provide 'competent representation to a client.'").

[54] *E.g.*, *id.* at 406 ("Lawyers are authorized under Rule 2.1 to counsel clients on moral considerations; however, lawyers who simply fail to abide by the client's decisions involving objectives may be disciplined under Rule 1.2.").

[55] *See* AR 27-26, *supra* note 49, cmt. to R. 1.1 ("A lawyer can provide adequate representation in a wholly novel field through necessary study or consultation with a lawyer of established competence in the field in question.").

[56] Natt Gantt, *supra* note 24, at 389.

he concluded, "Lawyers are potentially subject to professional discipline for their nonlegal counseling whether it occurs at the church altar or in the county courthouse."[57]

Because work of a psychological nature has an indirect bearing on the resolution of a legal issue, Rule 2.1 provides the ethical basis for the attorney's discussions and implementation of psychological techniques in the attorney-client relationship. However, the purpose for using these techniques extends beyond Rule 2.1 to Rule 1.4(b), which addresses the attorney's duty to communicate effectively with the client. Like its civilian counterpart, Army Rule of Professional Conduct 1.4 indicates that attorneys have an obligation to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[58] The techniques addressed in this article are designed to enable effective communication with clients who have a condition that inevitably leads to distorted thoughts.

In many cases, attorneys must use methods of psychological analysis or intervention to carry out the representation of their clients.[59] For example, when a divorce client is angry and seeks to use the legal process to exact vengeance on a spouse, the attorney "must in fact address the client's underlying emotional pain in order to provide competent representation."[60] The need to engage in some level of psychological analysis is most evident in the field of elder law, where the issues of competence and diminished capacity often arise. Elder law

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[57] *Id.* at 410.
[58] AR 27-26, *supra* note 49, at R. 1.4(b).
[59] Winick, *supra* note 37, at 918.

> Attorneys are not clinicians and should not try to function as such. Yet, attorneys need to understand the ways clinicians function and transplant some of those learnings into the attorney-client relationship. They need to understand the insights of psychology and apply those insights into their professional dealings, because lawyers, like clinicians, often function as counselors. Effective counseling skills are something that no good lawyer should be without.

Professor Winick, for example, surveys clinical responses to a client's denial and recommends that attorneys borrow techniques that have been successfully incorporated by clinicians to overcome such resistance. *Id.* at 908 ("Some of these management techniques are beyond the ability of lawyers without clinical training, but many attorneys will be able to adapt one or more of these approaches in dealing with client denial in the law office.").
[60] Slocum, *supra* note 35, at 487.

attorneys are expected to carefully observe a client to "ensure that [the client] understands why he is at the office and that he has the mental capacity to provide the information needed for competent counseling."[61] Not only must "the attorney . . . be vigilant for hints that the retiree cannot fully remember, comprehend, or adequately assess his situation,"[62] the attorney must often visit the client's home and family to fully assess the situation.[63] The relative inexperience of some legal assistance attorneys in the military does not excuse them from having to make the same observations.[64] Additionally, the checklists and resources developed for elder law attorneys rely heavily on evaluations of client behavior and the incorporation of psychological considerations, which further highlights the need for psychological examination.[65] Even an attorney's decision to seek or forego a competency assessment represents some level of psychological analysis by that attorney.[66]

While veterans' courts and other specialized courts have promoted awareness of psychological conditions in the legal process, professional legal organizations have identified lawyers' individual obligation to incorporate psychology into their legal practice. Nowhere is this mandate clearer than in the field of capital litigation, where defense attorneys are expected to counter clients' self-destructive thoughts and take affirmative measures in support of their clients' best interests, despite the deficient thoughts. The American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, for example, explains,

> Some clients will initially insist that they want to be executed—as punishment or because they believe that

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[61] Colonel Gene S. Silverblatt & Lieutenant Colonel Linda K. Webster, *Legal Assistance Issues for Retirees: A Counseling Primer on Old Age, Disability, and Death Issues*, ARMY LAW., Aug. 2004, at 19, 24.

[62] *Id.*

[63] *Id. See also* DIMINISHED CAPACITY HANDBOOK, *supra* note 36, at 21 ("If the lawyer has the ability to interview clients in their home setting, there is a definite advantage in being able to see some of their functioning in their natural and familiar environment.").

[64] Silverblatt & Webster, *supra* note 61, at 19 (observing "[l]egal assistance attorneys are often the least experienced attorneys in a staff judge advocate's (SJA) office"); *id.* at 35 ("Legal assistance attorneys must realize that older clients often need additional care and concern.").

[65] *E.g.*, DIMINISHED CAPACITY HANDBOOK, *supra* note 36, at 29–33 (presenting a four-part "Capacity Worksheet for Lawyers").

[66] *Id*. at 3 (observing that attorneys are making "preliminary assessment[s] of capacity" when they decide whether or not to refer a client for professional evaluation).

> they would rather die than spend the rest of their lives in prison; some clients will want to contest their guilt but not present mitigation. It is ineffective assistance for counsel to simply acquiesce to such wishes, which usually reflect overwhelming feelings of guilt or despair rather than a rational decision . . . .[67]

Rather than blindly following clients' self-destructive wishes, attorneys are expected to, and regularly do, exert pressure on their clients by double-teaming with other attorneys or enlisting the help of clergy or relatives to encourage the consideration of alternative, disfavored approaches.[68] These tactics often include involvement of the client's mother to induce an extreme degree of guilt at the prospect of the client's execution.[69] As one experienced defense attorney explains, attorneys have a duty to bully and manipulate clients, even if clients experience emotional trauma as a result of the attorney's intimidating or downright coercive tactics.[70]

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[67] ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES cmt. to Guideline 10.5 (rev. ed 2003) [hereinafter DEATH PENALTY GUIDELINES].

[68] *Id.*

[69] The case of *United States* ex. rel. *Brown v. LaVallee*, 424 F.2d 457 (2d. Cir. 1970), for example, addressed a situation where the capital defendant's mother was enlisted to help convince the defendant to abandon a bogus self-defense claim that his seasoned attorneys believed would fail miserably. In the "stormy and emotional" encounter between the client and his mother, she repeatedly warned him that he would be going to the electric chair and pleaded with him not to force her to claim his electrocution-charred remains after the sentence. *Id.* at 459. After he pleaded guilty, the defendant later complained that he had not made his decision voluntarily due to his mother's behavior. The court, in condoning such conduct, recognized that, originating from his counsel and his mother, the tactics, while extremely unpleasant, nevertheless amounted to sound advice rather than "coercion."

[70] As an expansion on Professor Abbe Smith's observation that effective representation requires the attorney's deliberate use of "trust, fear, guilt, sadness . . . grief . . . ganging up, hounding, and outright bullying," Abbe Smith, *The Lawyer's "Conscience" and the Limits of Persuasion*, 36 HOFSTRA L. REV. 479, 481 (2008), she goes on to clarify some of these terms:

> By bullying, I mean applying pressure. Forceful language is sometimes necessary, even verbal abuse, even yelling. Badgering, cajoling, needling, filing, inciting—are all methods that might help a client finally see the light. Again, I seldom worry about exerting too much pressure. I worry instead about failing to exert enough. By manipulation, I mean a range of techniques that might work to get under the client's skin, get them to lower their defenses, and ultimately get them to change their minds.

The attorney's obligation to adopt psychological counseling perspectives in legal representation extends to the practice of family law as well. While the American Academy of Matrimonial Law Attorneys observes that "few attorneys are qualified to do psychological counseling," its standards, nevertheless, indicate that the attorney can, and should, address the emotional issues expected to arise from litigation.[71] Lawyers cannot ignore the psychological impact of marital proceedings because, often, "[u]ntil the client is emotionally stabilized, he/she will not be able to digest and understand the legal aspects of the divorce."[72] Outside of these contexts, courts have also recognized the attorney's independent obligation to address a client's known substance abuse problem in a realistic way.[73]

Considering the frequency at which attorneys intentionally inflict psychological harm on their clients—with the approval of the courts[74]—one might reasonably question whether the converse is also true. That is, shouldn't an attorney be able to use psychological techniques to heal the client and improve the client's well-being so far as it relates to the representation? The answer has been clarified in the affirmative, not by legal ethics opinions, but in a combination of state statutes addressing the practice of psychology and the prerequisites for licensure. Military and civilian lawyers can draw much from the careful and comprehensive analysis of these statutes.

Id. 493.

[71] AM. ACAD. OF MATRIMONIAL LAWYERS, BOUNDS OF ADVOCACY cmt. to Standard 1.2 (Nov. 2000), *available at* http://www.aaml.org/go/library/publications/bounds-of-advocacy/1-competence-and-advice/.

[72] Marsha B. Freeman & James D. Hauser, *Making Divorce Work: Teaching a Mental Health/Legal Paradigm to a Multidisciplinary Student Body*, 6 BARRY L. REV. 1, 18 (2006). *See also* Slocum, *supra* note 35, at 491 ("[S]o long as the client is operating from a reactive emotional state, neither the client nor the lawyer can accurately assess just how realistic the client's concerns may be.").

[73] For example, in *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 834-35 (Minn. 1991), a case involving driving under the influence, the Minnesota Supreme Court commented on the defense attorney's obligation to address the client's well-being:

> A good lawyer is not only interested in protecting the client's legal rights, but also in the well-being, mental and physical health of the client . . . A lawyer has an affirmative duty to be a counselor to his client. . . . The lawyer may be able to persuade a problem drinker to seek treatment.

[74] *See supra* discussion accompanying notes 69–70.

Surprisingly, many state legislatures have already articulated the standard that has long eluded legal scholars and bar associations. Their rules address attorneys' use of psychological techniques as part of their legal duties. While the jurisdictions differ in the scope of these rules, the general principles and precautions adopted by leading states offer veterans' counsel many valuable lessons.

In several jurisdictions, statutes permit professionals from outside the field of psychology to use techniques that fall within the definition of psychology practice. While the great majority of these jurisdictions leave the category of professionals open,[75] at least ten states explicitly

[75] *E.g.*, ALASKA STAT. § 08.86.180(b)(3) (Michie 2009) (referring to "a qualified member of another profession"); ARIZ. REV. STAT. § 32-2075(c) (2008) (referring to "other recognized professionals that are licensed, certified, or regulated under the laws of this state"); ARK. CODE ANN. § 17-97-103(a)(3) (Michie 2009) (referring to "members of other professions licensed under the laws of Arkansas"); COLO. REV. STAT. § 12-43-306(2) (2008) (referring to "members of other professions licensed under the laws of this state"); DEL. CODE ANN. tit. 34 § 3519(b) (2009) (referring to "qualified members of other recognized professions"); FLA. STAT. ch. 490.014(1)(b) (2009) (referring to "qualified members of other professions"); GA. COMP. R. & REGS. R. 510-10-.04 (2009) (referring to "a person with a license issued by another professional board" who "is currently authorized by state law to practice"); HAW. REV. STAT. ANN. § 465-3(a)(5) (Michie 2009) (referring to "[a]ny person who is a member of another profession licensed under the laws of this jurisdiction to render or advertise services"); IDAHO CODE § 54-2303(5) (Michie 2009) (referring to "qualified members of other professions licensed or registered by the state of Idaho"); KAN. STAT. ANN. § 74-5344(a) (2008) (referring to "qualified members of other professional groups"); KY. REV. STAT. ANN. § 319.015(3) (Michie 2009) (referring to "[p]ersons licensed, certified, or registered under any other provision of the Kentucky Revised Statutes"); LA. REV. STAT. ANN. § 37:2365A (West 2009) (referring to "[m]embers of other professions which are licensed or certified under the laws of this state"); MISS. CODE ANN. § 73-31-27(1)(d) (2008) (referring to "members of other professional groups licensed or certified by the state of Mississippi"); NEB. REV. STAT. ANN. § 38-3113(2) (Michie 2009) (referring to "[m]embers of other recognized professions that are licensed, certified, or regulated under the laws of this state"); N.C. GEN. STAT. § 90-270.4(e) (2009) (referring to "a qualified member of other professional groups, licensed or certified under the laws of this State"); N.M. STAT. ANN. § 61-9-16D (Michie 2009) (referring to "qualified members of other professional groups who are licensed or regulated under the laws of this state"); OKLA. STAT., tit 59, § 1353(2) (2009) (referring to "qualified members of other professions"); OR. REV. STAT. § 675.090(1)(d) (2007) (referring to "A person who is licensed, certified or otherwise authorized by the state of Oregon to render professional services"); 63 PA. CONS. STAT. § 1203(3) (2009) (referring to "qualified members of other recognized professions"); R.I. GEN. LAWS § 5-44-23(a) (2009) (referring to "members of other recognized professions that are licensed, certified, or regulated"); S.C. CODE ANN. § 40-55-90(A)(1) (Law. Co-op. 2008) (referring to "A licensed member of another profession who is regulated by the Department of Labor, Licensing and Regulation"); UTAH CODE ANN. § 58-1-307(1)(f) (2009) (referring to "an individual

identify attorneys among the non-psychological professionals who may use psychological techniques in the course of law practice.[76] For example, California's statute states,

> Nothing in this chapter shall be construed to prevent qualified members of other recognized professional groups licensed to practice in the State of California, such as, but not limited to, physicians, clinical social workers, educational psychologists, marriage and family therapists, optometrists, psychiatric technicians, or registered nurses, or attorneys admitted to the California State Bar, or persons utilizing hypnotic techniques . . . . from doing work of a psychological nature consistent with the laws governing their respective professions . . . .[77]

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licensed under the laws of this state, other than this title"); VA. CODE ANN. § 54.1-1-3601(9) (Michie 2009) (referring to "[a]ny person performing services in the lawful conduct of his particular profession or business under state law"); WASH. REV. CODE ANN. § 18.83.200(4) (West 2009) (referring to "[a]ny person who must qualify under the employment requirements of a business or industry . . . when such person is carrying out the functions of his or her employment"); WIS. STAT. ANN. § 455.02(2m)(a) (West 2008) (referring to "[a] person lawfully practicing within the scope of a license, permit, registration, certificate or certification granted by this state"); WYO. STAT. ANN. § 33-27-114(a) (Michie 2009) (referring to "members of other recognized professions who are licensed, certified or regulated under the laws of this state").

[76] *E.g.*, CAL. BUS. &. PROF. CODE § 2908 (Deering 2009) (including "attorneys admitted to the California State Bar"); MASS. ANN. LAWS ch. 112 § 125 (Law. Co-op. 2009) (including "attorneys-at-law"); MICH. COMP. LAWS § 333.18214(4) (2009) (including a "lawyer"); MO. REV. STAT. § 337.045(1) (2009) (including "attorneys"); MONT. CODE ANN. § 37-17-104(1) (2007) ("including "lawyers"); N.J. STAT. ANN. § 45:14B-8 (West 2009) (including "attorneys at law"); N.Y. EDUC. § 7605(4) (consol. 2009) (specifically including "any individual who is credentialed under any law, including attorneys"); S.D. CODIFIED LAWS § 36-27A-2(7) (Michie 2009) (including "attorneys"); TEX. OCC. CODE ANN. § 501.004(a)(3)(A) & (b)(2) (Vernon 2009) (including "an attorney"); VT. STAT. ANN. tit. 26, § 3005(a) (2009) (including "lawyers"); W. VA. CODE ANN. § 30-21-2(e)(5) (Michie 2009) (including "lawyers").

[77] CAL. BUS. &. PROF. CODE § 2908 (Deering 2009). New Jersey's statute contains practically identical language. N.J. STAT. ANN. § 45:14B-8 (West 2009):

> Nothing in this act shall be construed to prevent qualified members of other professional groups such as physicians, osteopaths, chiropractors, members of the clergy, authorized practitioners, attorneys at law, social workers or guidance counselors from doing work of a psychological nature consistent with the accepted standards of their respective professions . . . .

In recognizing the expansiveness of the attorney's duty to counsel, the Michigan statute explains:

> This part does not prohibit a certified, licensed, registered, or other statutorily recognized member of any profession including a lawyer, social worker, school counselor, or marriage counselor from practicing his or her profession as authorized by law.[78]

Among the states where the statutes define an open category of professionals, judicial opinions have taken the liberty to clarify that attorneys are necessarily included in this group. For example, in *Alonzo v. Blue Cross of Greater Pennsylvania*,[79] the court for the Eastern District of Pennsylvania explained that the statute, which applies to "qualified members of other professions," equally applies to attorneys:

> [T]his section . . . allows individuals like [plaintiff] . . . to offer psychological services without first obtaining a license from the state as long as he does not hold himself out to the public as a "psychologist." It similarly permits ministers, lawyers, and other professionals to do "work of a psychological nature" without first obtaining a license from the State of Pennsylvania.[80]

The provisions that allow attorneys and other professionals to use psychological techniques, despite the lack of required training and licensure, nearly all recognize these rules as exemptions[81] or exceptions[82] to a licensing requirement. In some jurisdictions, the statutes recognize that attorneys and other professionals are permitted to use psychological

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[78] MICH. COMP. LAWS § 333.18214(4) (2009).
[79] 611 F. Supp. 310 (E.D. Pa. 1984).
[80] *Id.* at 314.
[81] *E.g.*, ARIZ. REV. STAT. § 32-2075(c) (2008) (permitting nonpsychologist professionals to use psychological techniques as an "exemption" to the rule); CAL. BUS. &. PROF. CODE § 2908 (Deering 2009) (same); HAW. REV. STAT. ANN. § 465-3 (Michie 2009); IDAHO CODE § 54-2303 (Michie 2009) (same). The state of Vermont, for example, elected to place attorneys in an exempt status, while it classified other persons within a category of exceptions. *Compare* VT. STAT. ANN. tit. 26, § 3005(a) (2009) (listing lawyers as exempt), *with id.* § 3004 (identifying exceptions).
[82] *E.g.*, GA. COMP. R. & REGS. R. 510-10-.04 (2009) (titling the provision "Exception to Unlicensed Practice").

techniques, recognized as such.[83] Others, however, explain that these methods are properly defined as the practice of the other profession by virtue of the fact that the techniques are necessary to carry-out the non-psychologist's professional duty.[84] In West Virginia, for example, a lawyer who uses "certain psychological techniques, procedures, methods, and principles," is not considered to be engaged in the "practice of psychology," as long as she is engaging in the profession of law in good faith.[85]

Despite the different approaches, almost all of the definitions recognize the reality that psychology necessarily "overlaps" with nonpsychological professional disciplines and that a literal reading of psychology licensing laws would actually prevent the operation of these other professions.[86] In the Illinois Clinical Psychologist Licensing Act, the legislature observed that the strict interpretation of the law could prevent even self-help groups or programs from functioning.[87] Consequently, no matter how detailed a jurisdiction's definition of psychology, those that recognize the necessary overlap nevertheless authorize professionals, like attorneys, to use psychology techniques.

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[83] *E.g.*, HAW. REV. STAT. ANN. § 465-3(a) (Michie 2009) (permitting professionals like attorneys to render services such as "psychotherapy") & 465-3(b) (allowing "any psychological activities" defined in the Act); ALASKA STAT. § 08.86.180(b)(3) (Michie 2009) (permitting qualified members of other professions to perform "work of a psychological nature"); MISS. CODE ANN. § 73-31-27(1)(d) (2008) (same); CAL. BUS. &. PROF. CODE § 2908 (Deering 2009) (same); IDAHO CODE § 54-2303(5) (Michie 2009) (same); N.J. STAT. ANN. § 45:14B-8 (West 2009) (same); 63 PA. CONS. STAT. § 1203(3) (2009) (same); KAN. STAT. ANN. § 74-5344(a) (2008) (same).

[84] *E.g.*, KY. REV. STAT. ANN. § 319.015 (Michie 2009) (distinguishing that "services consistent with the laws regulating their professional practice and the ethics of their profession" are "activities not included in the practice of psychology").

[85] W. VA. CODE ANN. § 30-21-2(e)(5) (Michie 2009).

[86] *E.g.*, MISS. CODE ANN. § 73-31-27(1) (2008) ("The practice of psychology as defined by this act overlaps with the activities of other professional groups and it is not the intent of this act to regulate the activities of these professional groups.").

[87] *E.g.*, 225 ILL. COMP. STAT. 15/3-(g) (2009):

> Nothing in this Act shall prohibit individuals not licensed under the provisions of this Act who work in self-help groups or programs or not-for-profit organizations from providing services in those groups, programs, or organizations, provided that such persons are not in any manner held out to the public as rendering clinical psychological services . . . .

Among state legislatures that allow the use of psychological methods by non-psychologist professionals, they have also imposed various limitations on this excepted use of psychology. The minimal prerequisites include (1) that an attorney's use of the psychological technique occurs "within that person's scope of practice";[88] (2) that the attorney must be guided by the ethical guidelines of his or her own profession in implementing any psychological technique;[89] and (3) that the attorney must not claim to be a psychologist, possess a psychology license, or have the training to enable the practice of psychology.[90]

On the issue of holding one's self out as a psychologist, some of the statutes recognize that any attorney could implicitly lead a client to believe she is a licensed psychologist even if this is never explicitly clarified.[91] Court opinions suggest that this may occur if the attorney talks about having received some college training in psychology without providing the proper disclaimers.[92] The notice requirements of various jurisdictions provide a framework for the successful protection of client autonomy and compliance with the state statutes. The script in Appendix B incorporates these requirements in a useful example.

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[88] ARIZ. REV. STAT. § 32-2075 (2008). Hawaii modifies the language by permitting the attorney to use psychological techniques, so long as "such activities are incidental to the person's lawful occupational purpose." HAW. REV. STAT. ANN. § 465-3(b) (Michie 2009).

[89] *E.g.*, MO. REV. STAT. § 337.045(1) (2009) (requiring that attorneys' "work of a psychological nature" must be "consistent with their training and consistent with any code of ethics of their . . . profession").

[90] *E.g.*, ALASKA STAT. § 08.86.180(b)(3) (Michie 2009) (permitting use of psychological techniques:

> If the person does not hold out to the public by a title or description of services incorporating the words "Psychology," "Psychological," "Psychologist," "Psychometry," "Psychometrics," "Psychometrist," "Psychotherapist," "Psychoanalysis," "Psychoanalyst," or represents to be trained, experienced, or qualified to render services in the field of psychology.

In a far less detailed manner, Arizona's statute simply prohibits a nonpsychologist from "claim[ing] to be a psychologist." ARIZ. REV. STAT. § 32-2075 (2008).

[91] *E.g.*, CAL. BUS. &. PROF. CODE § 2908 (Deering 2009) (requiring that attorneys not "state or imply that they are licensed to practice psychology"); DEL. CODE ANN. tit. 34 § 3519(b) (2009) (prohibiting the implication that one is a psychologist or so licensed); N.J. STAT. ANN. § 45:14B-8 (West 2009) (same).

[92] *E.g.*, Markis v. Bureau of Prof'l & Occupational Affairs, 599 A.2d 279, 282 (Pa. Commw. Ct. 1991) (addressing a situation where the massage therapist who provided advice expected that the recipient of such advice would know he was not licensed based on "common sense").

With these considerations in mind, military and civilian attorneys should feel more comfortable exploring and exercising the duty to assist clients with PTSD. The following subsections provide an integrated approach to evaluation and intervention.

III. A Screening Method to Identify PTSD "Red Flags" for Planning Counseling Interventions or Possible Referrals to Mental Health Professionals

Because veterans with PTSD are often unaware of or mask their symptoms, lawyers may be the first to identify the need for evaluation and treatment.[93] In the field of military justice, active duty clients with PTSD are often labeled "problem Soldiers" by their chain-of-command based on irresponsible behavior stemming from PTSD.[94] During mandatory legal counseling for non-judicial punishment,[95] defense attorneys are in a unique position to observe PTSD "red flags."[96] Here, even before the servicemember has seen a clinician, the attorney often has the benefit of past counseling statements and information about prior behavior and infractions.[97] By identifying criminal behavior trends and

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[93] Seamone, *supra* note 1, at 147–48.

[94] *E.g.*, ERIC NEWHOUSE, FACES OF COMBAT PTSD & TBI: ONE JOURNALIST'S CRUSADE TO IMPROVE TREATMENT FOR OUR VETERANS 4 (2008) (recounting the comment of Steve Robinson, Director of Veterans Affairs for Veterans for America, who said, "Too many vets suffering from PTSD are being treated with disciplinary action.").

[95] U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE ¶ 3-18*c*, at 8–9 (16 Nov. 2005) [hereinafter AR 27-10] (recognizing the Soldier's right to consult with a defense attorney prior to the acceptance or rejection of company or field grade–imposed nonjudicial punishment).

[96] While attorneys may not be capable of diagnosing PTSD, a working knowledge of the condition will permit the attorney to identify "red flags"—indications that further analysis will help determine the extent of the client's condition—during the course of their interaction with clients. *E.g.*, DIMINISHED CAPACITY HANDBOOK, *supra* note 36, at 4.

[97] Defense attorneys, by virtue of their function, often learn more about a client, in the full context of that client's behavior and criminal history, than mental health professionals will learn given the limitations of the clinicians' professional relationship with the same client. *E.g.*, James A. Cohen, *The Attorney-Client Privilege, Ethical Rules, and the Impaired Criminal Defendant*, 52 U. MIAMI L. REV. 529, 537 (1998) ("The defense lawyer, unlike the mental health expert, judge, or prosecutor, observes the client in the context of the particular facts and law of the case, and, thus, is in a position to know the extent to which the client can rationally understand and cooperate."). *See also* Major Jeremy A. Ball, *Solving the Mystery of Insanity Law: Zealous Representation of Mentally Ill Service Members*, ARMY LAW., Dec. 2005, at 1, 5 ("Unlike the members of a

assisting the combat veteran in receiving necessary treatment, the attorney can intervene early on, *before* the command initiates separation proceedings.[98] Otherwise, some active duty servicemembers may only have the opportunity to visit with mental health professionals during the chapter process, when it is too late for meaningful intervention.[99]

In addressing family law issues as well, the legal assistance attorney is also in a unique position to observe PTSD "red flags." The veteran's family history may provide deep insights into his or her condition. A servicemember contemplating divorce or responding to the spouse's initiation of divorce can describe transformation of the marriage since the return from combat, including his or her own behaviors. If the veteran has become distant from the family or experienced other behavior symptomatic of PTSD, these "red flags" can also be persuasive indicators of the need for clinical intervention.

A. The Lawyer's Capacity Analysis Model for Elder Law Issues

A criminal defense attorney, who represents a client but fails to learn of existing PTSD, may have engaged in malpractice, simply by failing to discover evidence that would contribute to that client's defense.[100] This rule imposes some obligation on the criminal attorney to detect the existence of psychological conditions and potentially to evaluate the extent of the condition with the aid of a qualified clinician. This is little different from the personal injury attorney's obligation to consider whether her client suffered from PTSD as a result of an accident.[101]

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sanity board, who may observe the accused for only a handful of hours, the defense counsel works with the accused on a regular basis over an extended period of time.").

[98] This assumes that the client has consented to such efforts. *See* AR 27-26, *supra* note 49, R. 1.6(a) (mandating nondisclosure of "information relating to the representation of a client" absent the client's consent).

[99] U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED SEPARATIONS ¶ 1-32*b*, at 14 (6 June 2005) [hereinafter AR 635-200] (mandating "mental status evaluations conducted by a psychologist, or master level, licensed clinical social worker" prior to any separation of a Soldier for misconduct); *see also* Seamone, *supra* note 1, at 150 n.28 (discussing the provisions of 38 C.F.R. § 3.12(b) (2009), which bar veterans benefits based on characterization of discharge or acts of misconduct, and commentators' reflections on the effects of these regulatory provisions).

[100] *E.g.*, Seidel v. Merkle, 146 F.3d 750, 755–57 (9th Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999) (finding defense counsel "constitutionally ineffective" for failing to investigate the defendant's PTSD symptoms and organic brain damage).

[101] *E.g.*, Robert H. Aaronson et al., *Attorney-Client Confidentiality and the Assessment of Claimants who Allege Post Traumatic Stress Disorder*, 76 WASH. L. REV. 313, 341

Even in the latter scenario, the plaintiff's attorney is expected to know the diagnostic criteria for PTSD and resort to a PTSD checklist to identify the need for further investigation.[102]

Legal assistance and trial defense attorneys should preliminarily screen clients for PTSD and Traumatic Brain Injury (TBI) based, first, on the prevalence of undiagnosed conditions, and second, on the potential for these conditions to adversely affect the attorney-client relationship. While TBI is not the focus of this article, TBI can appear in tandem with PTSD[103] and can influence a client's judgment in a number of ways.[104] Screening for TBI can be done quickly, in a manner that could indicate further need for a full neuropsychological workup.[105] Given the ease of screening, evaluation for TBI should also be included in the lawyer's initial PTSD screening.

For good reason, this article does not advocate the use of complex psychological testing instruments by attorneys. Attorneys should avoid formal testing because they lack the training to accurately interpret results or to attach proper weights to factors that can affect the test outcomes.[106] These variables often include "limits to the validity of tests; impact of mental status; education level; [and] environmental variables (*e.g.*, lighting, noise . . .)."[107] There is also always a danger that

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(2001) (observing that "[d]iscussion with the client's attorney about potential [PTSD] symptoms may be necessary to protect the client's rights").

[102] *Id.* at 317 (expecting lawyers to evaluate PTSD criteria in a checklist format).

[103] *E.g.*, LAURIE B. SLONE & MATTHEW J. FRIEDMAN, AFTER THE WAR ZONE: A PRACTICAL GUIDE FOR RETURNING TROOPS AND THEIR FAMILIES 193 (2008) (recognizing the potential that Soldiers will develop both PTSD and TBI, especially after sustaining a physical injury).

[104] *E.g.*, KEITH ARMSTRONG ET AL., COURAGE AFTER FIRE: COPING STRATEGIES FOR TROOPS RETURNING FROM IRAQ AND AFGHANISTAN AND THEIR FAMILIES 142 (2006) ("Survivors of TBI can have extreme difficulty taking in new information and retrieving it when needed. They can also have problems with attention, concentration, and organizing information.").

[105] *See* 3 Question DVBIC TBI Screening Tool Instruction Sheet, *available at* http://dvbic.gbkdev.com/images/pdfs/3-Question-Screening-Tool.aspx [hereinafter MTBI Instruction Sheet] (explaining that "the purpose of [the DVBIC TBI] screen is to identify service members who may need further evaluation for mild traumatic brain injury (MBTI)" and that "a clinical interview is required," regardless of the results, because, "[t]he MBTI screen alone does not provide diagnosis of MBTI").

[106] DIMINISHED CAPACITY HANDBOOK, *supra* note 36, at 4 ("It is generally not appropriate for lawyers to use formal clinical assessment instruments . . . as they are not trained in using and interpreting these tests, the information yielded is limited, and the results may be misleading.").

[107] *Id*. at 28.

attorneys will attach far too much weight to test results that clinically-trained professionals would interpret differently in light of other clinical impressions.[108] This article, instead, advocates the middle-ground recommended by the American Bar Association's Committee on Aging and by the American Psychological Association. Their guidance for attorneys who assist elderly patients is particularly useful in distinguishing a permissible role in lawyer assessment of mental conditions.

These two organizations have recognized that elderly clients require attorneys to be detectives, regularly searching for signals of impaired decision-making capacity and competence.[109] While attorneys have a role in assessing clients' behavior and cognition, this role is limited to the use of preliminary *legal* screening techniques.[110] Much like the rationale behind the psychology licensing statutes, the legal screening technique is necessary insofar as it assists attorneys in carrying out their official duties.[111] While clinicians could easily criticize attorney screening as incomplete or perfunctory, to lawyers, the results of attorney screening are acceptable because they meet legal standards and do not have significance at a clinical level.[112] In recognizing the attorney's limited assessment function, one clinician observed,

> While you will be directly addressing and responding to the client's emotional and psychological state, your goal is clearly to achieve the best outcome you can and keep the client as focused toward that goal as you are able. All your work around the client's affective needs are in

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[108] *Id*.

[109] *Id.* at 21; *see also* Silverblatt & Webster, *supra* note 61, at 24.

[110] Lynne Gold-Bilin & Jonathan W. Gould, *Post Traumatic Stress Disorder and the Practice of Family Law*, 19 J. AM. ACAD. MATRIMONIAL L. 17, 28 (2004):

> The diagnosis of PTSD is beyond the expertise of most attorneys who do not have training in diagnosis of mental disorders. While it is important for family law attorneys to be familiar with interview-based assessment procedures designed to screen for family violence, a diagnosis such as PTSD must be made by a competent mental health professional.

[111] DIMINISHED CAPACITY HANDBOOK, *supra* note 36, at 9 (distinguishing between "legal" and "clinical" assessment); Gold-Bilin & Gould, *supra* note 110, at 32 ("[T]he more that is known about this syndrome, how to recognize and how it impacts clients, the better attorneys can serve those they represent.").

[112] DIMINISHED CAPACITY HANDBOOK, *supra* note 36, at 9.

> service of that goal. This is different from having a primary objective of helping the client deal with his feelings and personal problems.[113]

To this end, the attorney's assessment function includes "having the tools to understand your client's psychological state and the situations that unfold, and to understand the relationship between you and your client well enough to know when and how to step in with management techniques."[114]

If a client has deployed to combat and experienced a traumatic event or injury, military attorneys should determine whether the client has been diagnosed or is currently receiving treatment.[115] If the client is not in treatment or indicates that he did not take the Post Deployment Health Assessment or follow-up assessments seriously,[116] the attorney should use two preliminary screening devices to address the potential for undiagnosed PTSD or TBI. Despite the potential value of these tools, this article does not support automatic screening of all combat veterans. It expects that attorneys will identify the potential value of screening when there is reason to be concerned for the client's well-being, such as indications that the client has been influenced by multiple deployments, the display of behaviors that are characteristic of PTSD symptoms, or identification of distorted and self-defeating thoughts during the course of client counseling.[117]

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[113] SANFORD M. PORTNOY, THE FAMILY LAWYER'S GUIDE TO BUILDING SUCCESSFUL CLIENT RELATIONSHIPS 58 (2000).

[114] *Id.* at 51.

[115] Seamone, *supra* note 1, at 180–82.

[116] While screening processes exists to probe for signs of combat trauma, results of these tests are of limited value when respondents conceal information. *E.g.*, SLONE & FRIEDMAN, *supra* note 103, at 50:

> Although this screen is mandatory, it is acknowledged that once service members are back in the States, just about the only thing you want to do is go home. You are also bombarded with information and paperwork during this time period. This makes the results of the PDHA somewhat hard to interpret. Some returning troops will deny any problem on the PDHA, because, if they admit to them, they believe their return home may be delayed.

[117] *E.g.*, Seamone, *supra* note 1, at 182 (discussing the concept of "triage" in the attorney's function as PTSD first-responder, the value of military badges and awards as visual cues, and the value of "casual questions probing prior or multiple deployments").

B. The PTSD Checklist-Military Version

Attorneys should consider the PTSD Checklist-Military Version (PCL-M) as a preliminary screening tool for PTSD.[118] This checklist is a 17-question test, which roughly corresponds to the diagnostic criteria in the DSM-IV-TR.[119] The checklist requires subjects to rate symptoms experienced within a period of time, e.g., whether, in the last month, the client suffered "[r]epeated, disturbing *memories*, *thoughts*, *or images* of a stressful military experience from the past."[120] Subjects then rate the frequency of the symptom addressed with numerical scores from 1 ("Not at all") to 5 ("Extremely"). Persons interpreting the test can use the cumulative numerical values as indications of the effectiveness of treatment or the need for more comprehensive PSTD testing.[121] While studies have explored the accuracy and validity of the PCL-M as a tool for PTSD diagnosis, a more accurate and valid test is the Clinician-Administered PTSD Scale (CAPS) or structured clinical interviews that explore a subject's symptoms in far greater detail.[122]

The simplicity of the PCL-M and its striking similarity to the DSM-IV-TR's diagnostic criteria make it far less likely that a client might read into the questions and fake the disorder when tested. Critics of attorneys who use PTSD as part of their litigation strategy often remark that

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[118] The "M" designation in "PCL-M" represents the test version which has been tailored to the military. *E.g.*, Frank W. Weathers et al., *The PTSD Checklist (PCL): Reliability, Validity, and Diagnostic Utility* 1 (Paper Presented at the Annual Meeting of International Society for Traumatic Stress Studies (San Antonio, Tex., Oct. 1993)), *available at* www.pdhealth.mil/library/downloads/PCL_sychometrics.doc (last visited Jan. 7, 2010) (noting that the PCL-M contains "reexperiencing symptoms written specifically for military experience" as opposed to the PCL-C civilian version).

[119] *E.g.*, *Primer, PCL: Post-Traumatic Stress Disorder (PTSD) Checklist*, PDH-CPG Tool Kit Pocket Cards ver. 1.0, at 1 (Dec. 2003) ("The PCL is a standardized self-reporting scale for PTSD comprising 17 items that correspond to key symptoms of PTSD.").

[120] PTSD Checklist-Military Version (PCL-M), question 1, *available at* http://www.pdhealth.mil/guidelines/appendix4.asp; *see also* Appendix C to this article.

[121] Weathers et al., *supra* note 118, at 1 ("For example, in order to assess symptom severity repeatedly in the context of a treatment protocol, the time frame of one month can be changed to 'the past week' instead of 'the past month.'").

[122] *E.g.*, Aaron Levin, *VA to Keep Using DSM to Diagnose PTSD in Vets*, PSYCHIATRIC NEWS, July 21, 2006, at 1, 1 (noting the benefits of "structured or semistructured interviews such as the Clinician-Administered PTSD Scale (CAPS), the Structured Clinical Interview for DSM-IV (SCID), the PTSD Symptom Scale-Interview Version (PSS-I)").

patients can study-up on the disorder and fake it for their own benefit.[123] However, even the staunchest critics of attorney involvement in assessment distinguish impermissible behavior from genuine attempts at assessment. Their concerns revolve around those lawyers who discuss testing validity measures with a client, provide the client with copies of the test to study, feed answers to the client, or coach the client on techniques to use during a mental health assessment.[124] In these situations, "[t]o the extent that lawyers assist in the *creation* of symptoms that did not otherwise exist, they violate the Rules of Professional Conduct."[125] These impermissible and unethical measures are far removed from legitimate inquiry into the client's existing condition and symptoms:

> Lawyers may properly provide information about the diagnosis and symptoms of PTSD so that clients might determine whether they have experienced such symptoms. A plane-crash victim who has had nightmares or is afraid to take airplane trips may not realize such effects can form the basis for a PTSD diagnosis or resulting damages. Discussion with the client's attorney about potential symptoms may be necessary to protect the client's rights. For example, the attorney might ask specific questions about unusual fears, dreams, relationship problems, inability to engage in certain activities, and other difficulties that occur post-trauma.[126]

Attorney use of the PCL-M in a non-suggestive manner should provide the attorney with a preliminary identification of PTSD "red flags" for further investigation. A copy of the PCL-M and its instructions are reproduced at Appendix C for ease of reference.

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[123] *E.g.*, Aaronson et al., *supra* note 101, at 335 ("Individuals can malinger PTSD symptoms on their own, with the assistance of reading material, or with the benefit of coaching by relatives, friends, or counsel.").

[124] *Id.* at 341 ("[A]n attorney actually telling a client to study a list of symptoms, a book on PTSD, or sample depositions of clients who successfully obtained a PTSD diagnosis would appear to constitute impermissible coaching.").

[125] *Id.*

[126] *Id.*

C. The Defense & Veterans Brain Injury Center TBI Screening Tool

Attorneys with awareness that a client suffered any type of injury during a deployment or training exercise should use the Three Question TBI Screening Tool developed by the Defense and Veterans Brain Injury Center (DVBIC) to assess clients who potentially suffer from TBI.[127] The brief form inquires into the client's history of injury during combat and the attributes of the injury that require a more intensive clinical analysis.[128] The developers of the instrument emphasize that it is not a means of diagnosis, but rather a means to "identify service members who may need further evaluation for mild traumatic brain injury (MBTI)."[129] For the same reasons as the PCL-M, the DVBIC screening tool is an ideal way for the attorney to identify "red flags" without substantial risk of improper suggestion or misinterpretation. A copy of the DVBIC TBI Screening Tool and its instructions are reproduced at Appendix D.

In an environment where trial defense attorneys are likely to see clients with PTSD or TBI, and one in which both of these conditions can potentially have value at a court-martial, administration of these two brief assessment tools can assist in meeting that counsel's duty of preliminary inquiry into a client's mental condition. By documenting the attorney's efforts to meet this responsibility, these preliminary screens can also help avert claims of ineffective assistance because of a failure to investigate, especially where the attorney has determined that a sanity board is not desirable under the individual circumstances of the case.

D. Competency Determinations Under Rule 1.14

A diagnosis of PTSD is not the same as incompetence or insanity. Even if a client suffers from severe PTSD that results in a brief psychotic episode, he may still be found to "appreciate the nature and wrongfulness" of such behavior.[130] Posttraumatic Stress Disorder

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[127] *See* 3 Question DVBIC TBI Screening Tool, *available at* www.DVBIC.org, (reproduced at *infra* Appendix D).

[128] *Id.*

[129] MTBI Instruction Sheet, *supra* note 105.

[130] Major Timothy P. Hayes, Jr., *Post-Traumatic Stress Disorder on Trial*, 191 MIL. L. REV. 67, 94 (2007) (discussing the sanity board's conclusion in *United States v. Thomas*, 56 M.J. 523, 525 (N-M. Ct. Crim. App. 2001)). For this reason, "The accused must recognize that his chances for success when raising PTSD as a defense are slim." *Id.* at 104.

screening must, therefore, be distinguished from the determination of whether the client's condition is a detriment to his or her representation. Questions of competency may never arise with a particular PTSD client, and this article does not recommend conducting a competency determination as a matter of course in every preliminary interview. Regardless of how PTSD fits into a particular case, attorneys may have an ethical obligation under Rule of Professional Conduct 1.14 or its civilian analogue to inquire into the competence of the client when there is a basis to believe the client cannot meaningfully assist in his own defense. Severe cases of PTSD may, at some point, necessitate the attorney's consideration of the client's competency.

To this end, Army Rule of Professional Conduct 1.14 provides:

> **Rule 1.14 Client Under a Disability**
>
> *(a)* When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
> *(b)* A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.[131]

The Army text and comments are lifted practically verbatim from the ABA's *Model Rules of Professional Responsibility*[132] and do not seem to reflect any modification due to the unique nature of military service.[133] Rule 1.14 imposes an obligation on legal assistance attorneys and criminal defense attorneys alike, especially considering the mandate to carry on as normal an attorney-client relationship as possible even when the client suffers from a mental affliction.

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[131] AR 27-26, *supra* note 49, R. 1.14.
[132] The only difference between the ABA Rule and the Army's Rule is the removal of a portion of the final comment, in which the ABA rules describe the impact of an attorney's consideration of the disposition of property.
[133] AR 27-26, *supra* note 49, at 1, Item 7*b*, describing how the ABA rules were "the basis" for the Army Rules and explaining various military-based reasons for deviations from the ABA Rules.

Military attorneys who observe serious effects of PTSD on their clients must consider how the condition might impact the attorney-client relationship. This requires a degree of work on the attorney's part. Prior to 2002, ABA Rule 1.14 was criticized for its lack of specific guidance on how to make a preliminary determination of competence, which would indicate the need for expert consultation or other action.[134] The ABA's 2002 revisions to the Model Rules finally provided much-needed guidance.[135] The Army Rules have not yet incorporated these revisions, but attorneys might benefit from these new standards.

The revised ABA Rule 1.14 now states:

> **1.14 Client With Diminished Capacity**
>
> (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator or guardian.
>
> (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to

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[134] *E.g.*, DIMINISHED CAPACITY HANDBOOK, *supra* note 36, at 8 (recognizing that revisions to the Rule provide recommendations "for the first time" since the Rule's inception).
[135] *Id.*

> reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.[136]

The most significant revisions to the Rule occurred in its comments, which provide attorneys with practical guidance for evaluating whether the client's condition is sufficient to warrant referral to a mental health professional.[137] Comment 6, which is directly incorporated from an elder law article by Peter Margulies,[138] states:

> In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of the state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.[139]

Together, the revisions to the Rule and its comments "acknowledge the lawyers' assessment functions, and, indeed, suggest a duty to make informal capacity judgments in certain cases."[140]

In 2005, the American Bar Association Commission on Law and Aging teamed with the American Psychological Association to create an assessment tool for attorneys investigating client competency.[141] Addressing the concerns raised by Rule 1.14, the "Competency Worksheet for Lawyers" is a formal checklist, which requires the attorney to observe the client's functioning at a cognitive, emotional, and behavioral level.[142] After appraising the client's understanding of legal concepts and decisions in the case, the attorney rates the severity of

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[136] ABA MODEL RULES, *supra* note 49, R. 1.14.
[137] *Id.* cmts. to R. 1.14.
[138] *See generally* Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 FORDHAM L. REV. 1073 (1994).
[139] *Id.* cmt. 6 to R. 1.14.
[140] DIMINISHED CAPACITY HANDBOOK, *supra* note 36, at 8.
[141] *See generally id.*
[142] *Id.* at 29–33.

mental problems and identifies specific actions to address them, which can include consultation or referral to a mental health professional.[143]

The Competency Worksheet for Lawyers was initially tailored to address legal issues that commonly arise during the representation of older patients in a civil law capacity, such as contractual, donative, or testamentary capacity.[144] Because the framework is equally viable in addressing the capacity of a PTSD client to make crucial decisions in a family or criminal law matter, a modified PTSD Competency Worksheet for Lawyers is included with these materials at Appendix E.[145] Together, the PCL-M, the DVBIC Screening Tool, and the PTSD Competency Worksheet for Lawyers (if needed) offer a comprehensive package to meet the attorney's responsibilities to preliminarily screen clients for PTSD-related issues.

More challenging than screening, however, is the attorney's method for dealing with limiting symptoms of PTSD that arise during the course of legal representation. The following section describes how attorneys can effectively plan for such occasions with a focus on the individual needs of a PTSD client.

IV. A Method to Identify PTSD "Psycholegal Soft Spots"

A "psycholegal soft spot" is any phase or issue in the legal process that could subject a client to stress or tension.[146] In criminal law, these

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[143] *Id.*

[144] *Id.* at 31–32 (addressing a range of elder law issues and legal transactions).

[145] Without specific reference to the modified rule or its standard, in addressing the assessment of an R.C.M. 706 sanity board, one military author has recognized, "only the defense counsel has the ability to assess whether or not the accused is truly able to assist in the defense of the case over a longer period of time." Ball, *supra* note 97, at 5. Major Ball further suggests that counsel can use a similar list of questions to assist them in making their individual determination. *Id.*

[146] *E.g.*, Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 43 (1997):

> Whereas the concept of legal soft spots refers to factors in a client's affairs that may give rise to future legal trouble, the concept of psychosocial soft spots might include the identification of social relationships or emotional issues that ought to be considered in order to avoid conflict or stress.

soft spots normally include withstanding cross-examination or any type of procedure that poses a threat to the client's autonomous decision-making.[147] In family law, they may include "a request to modify a child custody agreement,"[148] the drafting of a will in which family members are intentionally excluded,[149] or a host of other events.[150] Based on the intense dread that arises from their condition, veterans with PTSD will likely encounter all of the non-military soft spots facing litigants.[151] Throughout the representation, in fact, the PTSD client may be predisposed to view even "minor events" in "an intensely negative light."[152] However, in addition to standard psycholegal soft spots, the client will likely face "PTSD soft spots" uniquely oriented to their combat experience.

Similar to the self-sabotaging capital defendant,[153] a client with PTSD may view the negative effects of the court-martial process or a pending divorce as a form of deserved punishment, to which he or she will easily acquiesce without attorney intervention. Without careful self-assessment, a client may not be able to identify these soft spots in advance.[154] Despite this obstacle, an attorney can gain a better understanding of litigation-specific PTSD soft spots by exploring the

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Here, the authors further distinguish that such a soft spot may "simply be a recognition that a particular type of legal proceeding . . . often places clients under severe psychological or emotional distress." *Id.*

147 Astrid Birgden & Tony Ward, *Pragmatic Psychology Through a Therapeutic Jurisprudence Lens: Psycholegal Soft Spots in the Criminal Justice System*, 9 PSYCH. PUB. POL'Y & L. 334, 356–57 (2003) (identifying "parole decisions based on risk assessments" and hearings addressing the client's "competence to stand trial" as psycholegal soft spots).

148 Stolle et al., *supra* note 146, at 43.

149 Dennis P. Stolle, *Advance Directive, AIDS, and Mental Health: TJ Preventive Law for the HIV-Positive Client*, 4 PSCYH. PUB. POL'Y & L. 854, 862 (1998).

150 *E.g.*, PORTNOY, *supra* note 113, at 69–70 (identifying eight "common junctures in the legal process that set off reactions in clients, ranging from the "serving of papers" to "conferences involving spousal contact").

151 "Combat PTSD victims have an expectation for the worst case scenario. It is not necessarily the moment that is so troubling but rather an expectation of what will happen in the future." ASHLEY R. HART II, AN OPERATOR'S MANUAL FOR COMBAT PTSD: ESSAYS FOR COPING 6 (2000).

152 *Id.* at 53. At the same time, such dread, if detected early during the planning process, can "be relabeled as a cue to use coping techniques. . . ." *Id.* at 54.

153 *See* DEATH PENALTY GUIDELINES *supra* note 67, cmt. to Guideline 10.5.

154 ARMSTRONG ET AL., *supra* note 104, at 85 ("Particular issues or situations that upset [a Soldier] more easily than others are called "red flag moments." Making a list of these red flag moments can prepare [the Soldier] to be on alert for an intense reaction of anger before it happens.").

client's reactions to previews of the litigation phases and developing contingency plans. In a very real way, the planning process can often prevent a client from experiencing overwhelming reactions to PTSD triggers or moderate the intensity of such reactions.[155] In this context, "The mere acknowledgement of uncomfortable feelings may suffice to render such feelings more manageable."[156]

Clinician Keith Armstrong and his colleagues, in their practical text *Courage After Fire*, recommend various considerations for an effective PTSD trigger awareness plan. These suggestions can easily be modified to address a client's PTSD-related psycholegal soft spots. Figure 5, below, provides categories of triggers that attorneys should explore with clients for this purpose.[157]

Prompts for PTSD Trigger Awareness Plan

Litigation Trigger List: (Evaluate Issues that Would Cause Anxiety if Those Matters Arose; Rate Expected Anxiety Level from 1-10; Identify the Physical Reaction You Expect to Experience for Each Trigger) (Identify Related Thoughts During Reactions.):

- Photographs (Specify) (Rate) (Physical Reactions) (Related Thoughts)
- Letters
- Content of Testimony
- Seeing a Witness
- Seeing a Spectator in the Courtroom
- Discussions of Potential Defenses by Judge, Prosecutor, Plaintiff, Defendant, Attorney
- Smells or Sounds
- Anniversary Dates Expected During Representation
- Mental Images Unrelated to Litigation Expected

Measures to Decrease Anxiety: (For each of the above issues, propose a method that could reduce or eliminate the anxiety specific to each of these issues and rate the expected success rate for the measure. For example, if substituting a positive mental image, like a trip to the beach, would decrease anxiety indicate the positive image and the rating for it.)

External Factors (List the Expected Frequency of Activities and the Expected Level of Adherence to Estimated Frequency 1-10):

- Daily Hours of Sleep Planned (Specify) (Rate)
- Types of Exercise Planned
- Social Activity Planned
- Participation in Group or Individual Therapy Planned

Fig. 5. Prompts for PTSD Trigger Awareness Plan

[155] *Id.* (observing that the planning process can be used to "prevent" red flag moments).
[156] Silver, *supra* note 21, at 296.
[157] These measures were adapted from ARMSTRONG ET AL., *supra* note 104, at 72–73, 77, 80, 83, 88–89.

As depicted above, the attorney should ask the client to consider his anticipated reactions to particular pieces or evidence or segments of testimony that may inevitably come to light at trial. With such knowledge, the attorney can identify areas to approach in a more cautious manner, limiting the potential for retrauma of the client.

Attorneys can further explore specific responses with similar tools. If a client already reacted to a litigation trigger, such as an emotional response to the reading of the charges or the receipt of the petition for divorce or separation, each reaction can be evaluated with a rating sheet like the "Anger Rating Sheet" summarized in Figure 6, below:[158]

Anger Rating Sheet

General Likes and Dislikes About my Anger:

- Likes: *E.g., "It gives me a rush, makes me feel 'pumped.'"*
- Dislikes: *E.g., "Sometimes I feel out of control."*

For a Specific Situation, *e.g.*, "A coworker accidentally spilled some of his coffee onto my shoe. I yelled, called him an idiot, and then left the meeting." Anger Ruler Rating (1-10) = 6:

What I did (behaviors): *e.g.,* "I yelled and stormed out of the room."
What I said (statements/words): *e.g.,* "You idiot."
What I thought (thoughts): *e.g.,* "That idiot is so clumsy. He could make a serious mistake."
What I felt (emotions): *e.g.,* "Unsure, maybe scared, very irritated and annoyed."
What I felt in my body (physical reactions): "I tightened my arms and fists like I was going to hit him, and I could feel my heart racing."

What I Could Have Done Differently?

What could I have done to decrease my anger? (behaviors): *e.g.*, "I could have taken a time-out."
What could I have said to decrease my anger (statements/words): *e.g.*, "I could have made a joke about it like: 'My shoe doesn't drink coffee, it would prefer some water.'"
What could I have thought that would have decreased my anger? (thoughts): *e.g.*, "It was an accident—he didn't do it on purpose. Anyone could make that mistake. It doesn't mean that he's dangerous to be around."
What could I have done to help decrease the tension in my body? (physical reactions): *e.g.*, "I could have done some deep breathing or concentrated on relaxing my arms and hands."

Fig. 6. Sample Completed Anger Rating Sheet

[158] Abbreviated from *id.* at 88–89. The complete Anger Rating Sheet and its instructions are contained in *Courage After Fire: Coping Strategies for Troops Returning From Iraq and Afghanistan and Their Families* © 2006, authored by Keith Armstrong, LCSW, Suzanne Best, Ph.D., and Paula Domenici, Ph.D. Ulysses Press granted permission to reprint these contents.

As in the case of the PTSD Trigger Awareness Plan, the Anger Rating Sheet furthers the objective of addressing productive alternatives to dysfunctional behavior that can impair the representation.

Clients and attorneys can benefit greatly from periodically revisiting the same questions over the course of the representation to determine whether the client's concerns and reactions have transformed in any measurable way.[159] If the client's ratings on certain issues reflect a decrease in anxiety, the attorney should devote more time to the areas where high levels of anxiety and dread have remained constant or increased.

The client's bodily sensations matter as much as words to the attorney and client alike. When clients consider potential sources of discomfort in the litigation process, or their lives in general, there will inevitably be physical and emotional responses that are difficult to define in concrete ways. These raw and undefined responses constitute the "felt sense" of a problem.[160] As one trauma clinician recognizes, "The felt sense encompasses a complex array of ever-shifting nuances. The feelings we experience are typically much more subtle, complex, and intricate than what we can convey in language."[161]

Because these senses originate from the unconscious, clients may only be able to articulate that an issue causes a particular physical sensation or makes them feel uncomfortable.[162] Attorneys and their clients, therefore, must remain receptive to unsettling bodily sensations that arise during discussions of a case. Without simple interventions to explore felt sensations, unrecognized feelings may accumulate into cognitive distortions and other obstacles to effective communication and decision-making.[163] Simple methods exist to unpack and explore "felt

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[159] *E.g.*, Robert S. Redmount, *Humanistic Law Through Legal Counseling*, 2 CONN. L. REV. 98, 111 (1970) ("A total and thorough legal counseling function should contemplate the retrospective appraisal of the process at every stage. That is to say, there is a need to appraise the appropriateness and effectiveness of perception and intelligence, of calculation and decision, of planning and operation, and adjustment and outcome.").

[160] *E.g.*, EUGENE T. GENDLIN, FOCUSING 53 (Bantam Books 2d ed. 1981) (1978).

[161] PETER A. LEVINE, HEALING TRAUMA: A PIONEERING PROGRAM FOR RESTORING THE WISDOM OF YOUR BODY 49 (2005).

[162] *E.g.*, *id*. at 50 (observing that the notion of "not so good," can actually be defined in terms of bodily sensations as "[m]y head feels heavy[,] [m]y left shoulder is tingly[,] [a]nd my hand is warm").

[163] *Id.* at 54:

senses" of a problem. These methods are all based on identifying physical sensations, crystallizing them into tangible feelings, and appreciating the situations in which they arise.[164]

Having a PTSD Trigger Awareness Plan in hand partially meets the attorney's planning responsibilities. Because veterans with TBI or PTSD often have problems maintaining concentration, the planning process must also foresee the possibility that the client will lose focus on key issues in the representation. The biggest recurring issues are missed appointments and the failure to track developments in a case.[165] Two specialized interventions can effectively address these issues: (1) encouraging the client to develop a notebook or journal specific to the litigation; and (2) enlisting the assistance of persons close to the client to act as a litigation support network when the attorney is not able to be present.

The client's litigation notebook exists to "record contemporaneously the occurrence of significant events" and maintain continuity in the representation.[166] Clients can use the notebook as a single location to record appointment times and dates, express concerns about the litigation, and complete homework assignments provided by the attorney. Because clients with PTSD and TBI respond particularly well to written

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> By bringing yourself back to your body, you can track the effect of [a] thought on your bodily sensations. When you're not able to recognize the thought as a thought, the unpleasant sensations that the thought invokes may increase until you are feeling fear, anxiety, or panic. . . . If you tighten up without noticing the thought that caused tightening, your response tends to be more catastrophic, leading you to believe that something bad is going to happen.

[164] Effective guided exercises can be found on the fourth and fifth tracks of Peter Levine's CD, *Healing Trauma*, respectively titled, "From 'Felt Sense' to Tracking Specific Sensations" and "Tracking Activation: Sensations, Images, Thoughts, and Emotions." HEALING TRAUMA (Peter A. Levine & Sounds True 2004). An attorney could easily use this or other resources to orient a client to effective litigation planning. *E.g.*, ANN WEISER CORNELL, THE POWER OF FOCUSING: A PRACTICAL GUIDE TO EMOTIONAL SELF-HEALING (1996).

[165] *E.g.*, Parker, *supra* note 29, at 170 (describing "missed appointments, chronic lateness, failure to produce requested documents, and avoidance of the [attorney's] questions" as common occurrences in the representation of traumatized clients).

[166] J. Sherrod Taylor et al., *Preparing the Plaintiff in the Mild Brain Injury Case*, 15 TRIAL DIPL. J. 65, 67 (1992).

instructions,[167] attorneys can also use the notebook to emphasize important trial preparation tasks.

Involvement of trusted third-parties is particularly important in the case of a combat veteran with PTSD or TBI:

> In most TBI cases, lawyers should consider establishing a strong relationship with at least one member of the client's family or with one of the client's close friends. The family member or friend, who is not saddled with the [cognitive] impairments, is better able to promote the interests of the case than the client may be. Additionally, family members and friends may be used to reinforce the actions of counsel to ensure that the client understands more fully what is involved in this sort of litigation.[168]

Such recommendations also apply to elder law attorneys because they address the cognitive impairments that result from the aging process.[169]

This comprehensive planning approach permits veterans' counsel to preview the litigation landscape, identifying sensitive terrain that may require attorney or clinical intervention. It also provides the attorney with a method to demonstrate genuine concern for the client's situation from the outset of the representation, which is essential to a trusting relationship. Involvement of trusted third-parties permits the attorney to monitor the client and reinforce key instructions, even when the attorney is not present to keep the client on task. The next Part explores specific interventions the attorney can use to reverse the effects of cognitive distortions, anxiety, or unwanted influences on the client.

V. Techniques to Clarify the Client's Thinking and Enhance the Attorney-Client Relationship

"When client expectations are unrealistic or distorted, they may severely interfere with the attorney-client relationship."[170] At the heart

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[167] *Id.* at 69 ("Giving written direction increases the probability that the TBI client will actually follow them.").
[168] *Id.* at 68.
[169] *E.g.*, Silverblatt & Webster, *supra* note 61, at 24.

of the representation is always assisting the client in reaching an informed legal decision. To meet this goal, after the attorney has identified a client's distorted thoughts, she must intervene to enable meaningful representation:

> You must be able to contain a client who is in a heightened state of excitability, whose affects are intense enough to derail the work, when acting out of inappropriate behavior or impulses has occurred or might occur, or whenever you perceive that you need to intervene in a more forceful way to hold a client in place.[171]

While many attorneys do not envision their role as one of "intervention," effective representation requires precisely this.[172]

At the very least, the attorney's obligation to a PTSD client requires techniques to help the client recognize impediments to full comprehension. In their description of attorney "reality orienting" activities, researchers observe how attorneys often expose clients to "situational realities" by identifying faulty patterns of thought and grounding the client in a more realistic alternative.[173] To this end, attorneys commonly help clients identify personal, legal, and emotional objectives through definition and redefinition of their goals.[174]

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[170] Elkins, *supra* note 27, at 239.
[171] PORTNOY, *supra* note 113, at 99.
[172] *Id.* at 70 ("I *want* you to think of yourself intervening. It will help you to focus on the moments and the circumstances that require you to actively choose what to say or do in response to a client. It's that active thought process that will enhance your client relationship skills.").
[173] Schoenfield & Schoenfield, *supra* note 35, at 317–20. Importantly, reality orienting can occur without concern for coming up with a cure for the client's mental condition. *Id.* at 317.
[174] Hugh Brayne, *Counselling Skills for the Lawyer: Can Lawyers Learn Anything from Counsellors?*, 32 L. TCHR. 137, 154 (1998) (explaining that it is necessary to specify "not just factual information," but also "emotional information," from the client because "vagueness of understood information leads to poor advice").

Attorneys also regularly help clients identify cognitive "blind-spots" in their own recitation of issues by pointing-out and exploring the client's:

- Failure to own a problem;
- Failure to define problems in solvable terms;
- Faulty interpretation of critical experiences . . . and feelings;
- Evasions, distortions, and game playing;
- Failure to identify or understand the consequences of behavior; or
- Hesitancy or unwillingness to act on new perspective.[175]

These functions are little different from a counselor's functions when guiding a patient through Cognitive Behavioral Therapy (CBT) exercises.[176] However, the attorney has additional obligations to a client that a counselor does not. While the counselor "accept[s] responsibility toward a client but not for the client," the attorney must often go further to "take responsibility for the client's problem. . . ."[177]

Beyond these standard interventions, more intensive measures are often required by the nature of a case. In situations involving defendants who have been charged with sexually molesting children, accused persons often display a higher degree of denial.[178] Whether this response is due to internal factors, such as extreme guilt, or external factors, such as fear of being labeled a pedophile, attorneys must often force the client to recognize and reverse the client's "cognitive distortions" insofar as these distortions relate to the facts or the law.[179] Sometimes, such

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[175] *Id.* at 147.

[176] Seamone, *supra* note 1, Part II.E.2 (reproducing the A-B-C worksheet and describing the aims and methods of cognitive behavioral therapy).

[177] Brayne, *supra* note 174, at 147. *See also* Brigid Coleman, Note, *Lawyers who are Also Social Workers: How to Effectively Combine Two Different Disciplines to Better Serve Clients*, 7 WASH. U. J. L. & POL'Y 131, 144 (2001) (describing a prevailing "self-determination" model of therapeutic counseling that rejects therapist advice to patience).

[178] *E.g.*, David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279, 284 (1994) ("One of the most striking features of sex offenders, particularly child molesters, is their heavy 'denial and minimization.'").

[179] *Id.* Professor Wexler observes that these distortions often take the form of "nothing happened," "something happened but it wasn't my idea," or "something happened and it was my idea but it wasn't sexual." *Id.*

attorneys engage in role-playing where clients assume the roles of alleged victims so they can identify otherwise unacknowledged facts:

> [T]he law . . . induce[s] defense lawyers to engage clients in an exercise of "cognitive restructuring," including role reversal. For example, the defense attorney may ask the sex offender how he would vote as a juror in the case. In therapeutic jurisprudence terms, the result would be a revised legal arrangement that would restructure the role of the defense lawyer in a way that would promote therapeutic values.[180]

Although role-playing and other methods of psychodrama normally require the use of a trained mental health professional in a clinical setting,[181] individual attorneys might require the technique to effectuate their individual legal responsibilities.[182] As is the case with the attorney's use of other psychological techniques, "The tools of counseling are to be used only for the purposes defined in the professional obligations of lawyers."[183] Common approaches for reversing the effects of cognitive distortions should be considered and implemented to address PTSD soft spots identified during the planning process.

Although various techniques are used in the clinical treatment of PTSD, this article does not advocate wholesale or indiscriminate use of Exposure Therapy (ET), Cognitive Processing Therapy (CPT), and Eye Movement Desensitization Reprocessing (EMDR) by the attorney.[184] While Exposure Therapy is included in the military and Department of Veterans Affairs's approach to therapeutic PTSD intervention, the essential element of reexperiencing highly traumatic events can, and

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[180] *Id.* at 286.

[181] Dana K. Cole, *Psychodrama and the Training of Lawyers: Finding the Story*, 21 N. ILL. U. L. REV. 1, 37 (2001) (noting concerns that "use of psychodrama by someone other than a therapist trained in psychodrama would be inappropriate and could result in unintended consequences, such as psychological harm to the participants").

[182] Wexler, *supra* note 178, at 283 (describing how it can require a "role-reversal" exercise to overcome the child molester's denial). In fact, attorneys have been encouraged to use the method for their own professional development, to improve their identification with clients or troubling aspects of a case. *See generally* Cole, *supra* note 181.

[183] Brayne, *supra* note 174, at 147.

[184] For basic descriptions of these clinical techniques, see Seamone, *supra* note 1, at II.E.1–3.

does, lead to behavioral consequences. Clients can easily become overwhelmed, and require additional interventions or medications simply to recover from the taxing effect of an exercise.[185] While clinicians have the ability to design stepped programs, which regulate the amount of exposure to trauma over the course of extended treatment, we cannot expect attorneys to reach this calculus as part of their legal counseling duties.[186] Nor should we expect attorneys to respond to negative exposure reactions the way a trained clinician would.

Although many psychology licensing statutes permit an attorney to use advanced clinical interventions,[187] this article recommends a more conservative approach. Attorney interventions to address the byproducts of PTSD in the course of legal representation should be limited to relaxation techniques and specialized CBT worksheets to counteract distorted thoughts. If a lawyer desires to use a technique without the guidance of a trained clinician, she can permissibly turn to a variety of commercially produced self-help texts developed by clinicians for non-clinical use. If the attorney desires to implement more advanced approaches, she should first consult with a trained clinician for guidance or incorporation of legal concerns in the therapist-client relationship.

A. Relaxation Techniques

At the most general level, relaxation techniques include a variety of physical exercises ranging from meditation to yoga. Relaxation and meditation exercises are valued for clearing a client's mind and bringing the client into the moment, so he has the enhanced ability to focus on the matters at hand.[188] In the context of PTSD, some exercises significantly

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[185] *E.g.*, U.S. DEP'T OF VETERANS AFFAIRS & DEP'T OF DEF., VA/DOD CLINICAL PRACTICE GUIDELINE FOR THE MANAGEMENT OF POST-TRAUMATIC STRESS, at I-22 (2004) (observing the risk that exposure therapy can actually increase a patient's "level of distress" in some cases).

[186] *Id.* at I-20.

[187] *See supra* Part II.C.

[188] *See, e.g.*, Evan M. Rock, Note, *Mindfulness Meditation, The Cultivation of Awareness, Mediator Neutrality, and the Possibility of Justice*, 6 CARDOZO J. CONFLICT RESOL. 347, 350-51 (2005):

> The goal of mindfulness meditation has been described as trying to see what is. In other words, meditation is a means of cultivating an awareness of what exists in the present moment, without objective, ambition, or judgment. Practicing mindfulness meditation allows the

improve cognitive functioning. Exercises that increase breathing can undo the body's natural response to anxiety, which is to seize-up and prevent the flow of oxygen to the brain.[189] Another benefit of deep-breathing exercises is their value in stopping obsessive thoughts when a patient is asked to think about breathing and speak about breathing simultaneously: "[A]s cognitive science has demonstrated, we can't focus on thoughts about the past and the future and at the same time experience two or more sensations in the body at the present moment."[190] Furthermore, because patients who are physically relaxed have greater awareness of their physical state at a given time, they are more likely to gain early awareness of negative bodily sensations that could advance into serious cognitive disturbances.[191]

As a result of these benefits, progressive muscle relaxation and deep-breathing are usually incorporated prior to, during, and after therapy sessions with PTSD patients.[192] The attorney can choose from among dozens of effective techniques with a client at any time to improve the client's receptiveness to legal information. Appendix F reproduces a lengthy muscle relaxation exercise recommended for combat veterans with PTSD.[193] Detailed techniques like this can easily be incorporated into the attorney's practice through verbal instructions or reference to a book. Alternatively, shorter techniques, such as Fred Miller's "Quieting

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> development of a person's innate ability to recognize thoughts and emotions as they arise.

Professor Leonard Riskin, an advocate for the practice of mindfulness meditation by lawyers, has explained in detail the benefits of being in the present moment. *See* Leonard Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and their Clients*, 7 HARV. NEGOT. L. REV. 1 (2002).

[189] *E.g.*, ARMSTRONG ET AL., *supra* note 104, at 38; *id.* at 39 ("Relaxation drills reverse the 'fight-or-flight' response.").

[190] PAUL HANNAM & JOHN SELBY, TAKE CHARGE OF YOUR MIND: CORE SKILLS TO ENHANCE YOUR PERFORMANCE, WELL-BEING, AND INTEGRITY AT WORK 50 (2006). Breathing while counting each exhalation backwards from fifteen has also been recognized as an effective way to quiet the mind based on the same principles. FRED L. MILLER, HOW TO CALM DOWN: THREE DEEP BREATHS TO PEACE OF MIND 23–24 (2002).

[191] LEVINE, *supra* note 161, at 54.

[192] *E.g.*, STEVEN TAYLOR, CLINICIAN'S GUIDE TO PTSD: A COGNITIVE BEHAVIORAL APPROACH 161–64 (2006) (describing the clinical use of applied relaxation techniques for patients with PTSD, including tense-release relaxation, release-only relaxation, and rapid relaxation).

[193] ARMSTRONG ET AL., *supra* note 104, at 45–49.

the Mind by Counting Backward" exercise in Figure 7, below, can still produce results when a client is consumed with wandering thoughts:[194]

- Sit comfortably and close your eyes. Then take three deep breaths to calm down and clear your mind.
- Breathing easily, inhale. Now exhale, silently saying, "fifteen."
- Inhale again. This time while exhaling, silently say, "fourteen."
- Continue inhaling and counting down a number with each exhale.
- After you reach zero, take a few gentle breaths, all the while noticing how you feel. When you are ready, open your eyes.

Fig. 7. Miller's Steps to "Quiet the Mind"

For examples of other valuable relaxation techniques, the attorney can consult a number of publications with step-by-step instructions.[195] Furthermore, if the attorney is uncomfortable guiding a client through a relaxation technique, she can also use audio recordings to supplement legal counseling.[196] Attorneys who have these recordings loaded on an iPod or MP3 player can simply ask the client to take a short break with an exercise when needed.

Although the concept of directed breathing may, at first, seem foreign to an attorney, those familiar with military service can easily find official recognition of its benefits in marksmanship (trigger squeeze),[197]

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[194] MILLER, *supra* note 190, at 23–24.

[195] *E.g.*, MATTHEW MCKAY ET AL., TAKING CONTROL OF YOUR MOODS AND YOUR LIFE: A THOUGHTS AND FEELINGS WORKBOOK 57–64 (1997) (discussing relaxation techniques specifically designed for patients with dysfunctional thoughts); MILLER, *supra* note 190; MARK THORNTON, MEDITATION IN A NEW YORK MINUTE SUPER CALM FOR THE SUPER BUSY (2004); C. ALEXANDER SIMPKINS & ANNELLEN M. SIMPKINS, MEDIATION: FROM THOUGHT TO ACTION (1998) (reviewing over forty exercises); MARTHA DAVIS ET AL., THE RELAXATION AND STRESS REDUCTION WORKBOOK (5th ed. 2000).

[196] Many books not only describe relaxation techniques but include CD's with guided meditation exercises. *E.g.*, SIMPKINS & SIMPKINS, *supra* note 195.

[197] *E.g.*, U.S. DEP'T OF ARMY, FIELD MANUAL 23-35, COMBAT TRAINING WITH PISTOLS AND REVOLVERS ¶ 2-5, at fig.2-7 (3 Oct. 1988) [hereinafter FM 23-25] (addressing "Breath Control": "The firer must learn to hold his breath properly at any time during the breathing cycle if he wishes to attain accuracy that will serve him in combat . . . . To hold the breath properly the firer takes a breath, lets it out, then inhales normally, lets a little out until comfortable, holds, and then fires.").

physical fitness (oxygen intake),[198] and warfighting.[199] The sophisticated pistol firing cycle depicted below, in Figure 8, is not so different from techniques that can be used in the attorney's office during counseling.

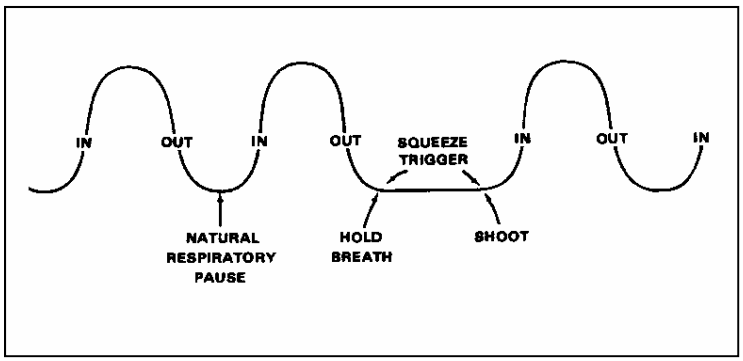

Fig. 8 Breath Control, Firing at a Single Target[200]

Recognizing the value of such exercises, the Army's *Leaders' Manual for Combat Stress Control* recommends, "[e]veryone should learn at least two relaxation techniques (and preferably more),"[201] and outlines "brief or progressive muscle relaxation," "visual imagery self-relaxation," "abdominal breathing," and "breathing meditation" as methods to mitigate stress responses, "steady the nerves," and "refocus attention."[202] Ultimately, whether breathing exercises occur at the firing range, on the running track, in combat, or in the attorney's office, these techniques can enhance individual performance and counter the physiological effects of stress.[203]

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[198] *E.g.*, U.S. DEP'T OF ARMY, FIELD MANUAL 21-20, PHYSICAL FITNESS TRAINING 2–10 (10 Oct. 1998) (describing the benefits of "increased maximum oxygen consumption (VO_2max)").

[199] *E.g.*, DAVE GROSSMAN & LOREN W. CHRISTENSEN, ON COMBAT: THE PSYCHOLOGY AND PHYSIOLOGY OF DEADLY CONFLICT IN WAR AND PEACE 39–43 (3d ed. 2008) (explaining how "[o]ne additional tool to control physiological response is the tactical breathing exercise" and providing several examples).

[200] FM 23-35, *supra* note 197, fig.2-6, at 2–7.

[201] U.S. DEP'T OF ARMY, FIELD MANUAL 22-51, LEADERS' MANUAL FOR COMBAT STRESS CONTROL ¶ 11-3, at 11-2 (29 Sept. 1994).

[202] *Id.* at 11-2 to 11-3.

[203] *E.g.*, Fines & Madsen, *supra* note 10, at 982 (addressing the effects of stress in impairing the reception of an attorney's advice).

Another group of audio resources has emerged in response to EMDR. In recognition of the therapeutic benefits of stimulating both hemispheres of the brain, clinicians have composed music to achieve this objective.[204] Robert Yourell's audio composition *Evolucid©* is commonly used by therapists to enhance work with traumatized patients.[205] The client is encouraged to listen to the music at a low volume and let his mind wander prior to any exercise that requires deep personal insight.[206] Attorneys can experiment with *Evolucid©* or similar bilateral sounds[207] to enhance the effectiveness of legal counseling in numerous ways. For example, clients could listen to the recording prior to a meeting in which they must discuss the basis for a guilty plea, before writing a letter of remorse, or before discussing a particularly unsettling experience that relates to a legal topic.

B. Cognitive Behavioral Therapy Worksheets and Exercises

The raw elements of CBT involve pen and paper exercises and specifically-tailored worksheets.[208] Among these worksheets, the "Thought Record" is a simple, efficient, and brief method to identify clients' thoughts, emotions, and underlying beliefs related to any troubling aspect of litigation. The example below highlights the ease

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[204] Robert A. Yourell, *Sounds to Set you Free* (insert distributed with Robert A. Yourell's audio materials), at 1 (describing the benefits of the recording in therapy and noting that it "improves the experience of EMDR-inspired methods, mental rehearsal, awareness work, and guided visualization").

[205] *E.g.*, Interview with Sandra Ward, LCSW, DCSW, Family Advocacy Program Specialist, Supreme Headquarters Allied Powers Europe, in Garmisch, F.R.G. (Apr. 29, 2009) (describing the benefits of *Evolucid* in assisting Soldiers with PTSD, particularly in reducing their headaches and clarifying thoughts during the course of therapy); *see also* EVOLUCID: EVOLVING BILATERAL SOUND (Robert A. Yourell 2000).

[206] Yourell, *supra* note 204, at 1–2.

[207] *See, e.g.*, UPLEVEL: EMDR-INSPIRED STABLE BILATERAL SOUNDSPACE (Robert A. Yourell 1997); BIOLATERAL CD-1: BY INTUITION (David Grand 1999); CALM AND CONFIDENT: BASED ON EMDR (Mark Grant n.d.).

[208] In the language of CBT these "homework" assignments "help clients better understand the roots of the problems for which they sought help; the effects of the problems on themselves and others, and the contribution their environments make to the form, intensity, and frequency of the problems." MICHAEL A. TOMPKINS, USING HOMEWORK IN PSYCHOTHERAPY: STRATEGIES, GUIDELINES, AND FORMS 4 (2004); *see generally id.* (presenting several examples of homework assignments).

with which a defense client's faulty and destructive litigation-related belief can be replaced with a productive one.[209]

In this realistic, yet hypothetical, example, First Sergeant Dale Davis is an active duty Soldier with twenty-two years in the Army, during which he has deployed to combat four times. First Sergeant Davis has been charged with a sexual offense that would require sex offender registration if he is ultimately convicted. The trial defense attorney, Captain Ben Dewig, must necessarily plan a sentencing case as part of First Sergeant Davis' defense. In initial discussions, Captain Dewig notices great hesitance from First Sergeant Davis to discuss any matters related to sentencing. When he raises the issue directly, First Sergeant Davis explains, "Sir, if I get convicted, and registered as a sex offender, my life will be over—plain and simple. There is nothing more to talk about at that point." Captain Dewig understands that First Sergeant Davis is exhibiting several signs of distorted thinking. At the very least, this includes polarized thinking and catastrophizing.[210] Captain Dewig uses a modification of the Thought and Evidence Worksheet from a recommended self-help text, *Taking Control of Your Moods and Your Life*, to assist First Sergeant Davis in identifying the hidden assumptions associated with his distorted thoughts.[211] The headings for the seven-column form appear immediately below in Figure 9.

Situation When? Where? Who? What Happened?	**Automatic Thoughts** What were you thinking before the feeling?	**Feelings** One-word summaries Rate 0-100%	**Evid. For**	**Evid. Against**	**Balanced or Alternative Thoughts** Rate 0-100%	**Re-rate Feelings** 0-100%
1	**2**	**3**	**4**	**5**	**6**	**7**

Fig. 9. Thought and Evidence Worksheet

[209] While this example involves a criminal case, Professor Robin Wellford Slocum offers a different line of cognitive inquiry attorneys can use to help divorce clients identify the "relationship between . . . thoughts and emotions" and the source of their distorted and distressing thoughts. Slocum, *supra* note 35, at 534–48.

[210] For definitions of these and six other common forms of distorted thinking, see Seamone, *supra* note 1, fig.2, at 174.

[211] MCKAY ET AL., *supra* note 195, at 54.

Captain Dewig first orients First Sergeant Davis to the worksheet, explaining that he is neither a psychologist nor a trained therapist but that he believes it would be helpful for First Sergeant Davis to explore his comment in greater detail because it is likely to come up repeatedly as long as the charges are pending.[212] After obtaining consent from First Sergeant Davis to proceed with the exercise, Captain Dewig asks First Sergeant Davis to think about specific situations that have led him to believe his life will be over if he is convicted and registered as a sex offender. After some time, First Sergeant Davis remarks that he has these thoughts most often when he helps his business partners, three other Noncommissioned Officers, to promote music concerts, a financial venture they have undertaken on their off-time. First Sergeant Davis also experiences such thoughts when he goes on outings with his three children.

Captain Dewig identifies these two situations, "promoting concerts with business partners" and "outings with children," under the heading "Situation" in column 1. In the second column, "Automatic Thoughts," Captain Dewig directs First Sergeant Davis to write "If I get convicted my life will be over" as one automatic thought and "If I am registered as a sex offender, my life will be over" as a separate one. Captain Dewig next seeks to identify the feelings related to these two thoughts, and the intensity of each separate thought. He inquires, "First Sergeant Davis, I want you to think about the first thought, 'If I get convicted, my life will be over.' What emotions do you feel when you think of this statement?" First Sergeant Davis states that he feels anxious and depressed. Later, when asked to rate the intensity of these two emotions, he indicates in Column 2, "Feelings," that he feels anxiety at a level of 100% and depression at a level of 95%. First Sergeant Davis goes through the same process in rating the intensity and emotions associated with the second thought, "If I am registered as a sex offender my life will be over."

Armed with these responses, Captain Dewig moves to Column 4 of the worksheet, asking First Sergeant Davis to consider evidence that supports each of his statements. Sergeant Davis considers the first statement, "My life will be over if I am convicted," and indicates the evidence supporting the statement, "I will not be able to get a job on the outside," "I will shame my family and my friends," and "No one will

[212] For sample model language, see *infra* Appendix B.

take me seriously." The three sections of the worksheet addressing employment concerns appear in Figure 10, below.[213]

Situation When? Where? Who? What Happened?	**Feelings** One-Word Summaries Rate 0-100%	**Automatic Thoughts** What were you thinking before the feeling?	**Evidence For**
Promoting Concerts with Business Partners	Anxious (100%) Depressed (95%)	If I get Convicted my life will be over.	I will not be able to get a job on the outside.

Fig. 10. 1SG Davis's Thought and Evidence Worksheet (Partial)

In a respectful and empathic manner, Captain Dewig reminds First Sergeant Davis that their function in completing this exercise is a lot like a panel's function during a court-martial, which is to put First Sergeant Davis's "thoughts on trial" and see what evidence supports and does not support them.[214] To perform this role, Captain Dewig encourages First Sergeant Davis to think of evidence that does not support each of the statements. They talk for several minutes about each statement, during which time Captain Dewig relates information from his experiences as a trial attorney.

For example, when First Sergeant Davis talks about his statement, "I will not be able to get a job on the outside," Captain Dewig explains that a panel or a judge does not necessarily have to sentence a convicted Soldier to a punitive discharge.[215] He further explains that if the Soldier is retained, it is unlikely the command will separate the Soldier for a

[213] To conserve space, only the first issue of joblessness is previewed in the examples that follow.

[214] Cognitive Processing Therapy trainer Todd L. Benham recommends using the analogy to a trial as an effective means of communicating with patients about this methodology. Todd L. Benham, Psy.D, Address at the Garmisch, F.R.G., Cognitive Processing Therapy Course (Apr. 29, 2009).

[215] *E.g.*, United States v. Phillips, 52 M.J. 268, 273 (C.A.A.F. 2000) (Effron, J., dissenting) (distinguishing between homosexual conduct mandatory discharge provisions and all other criminal offenses, which do not have such provisions). "In the Armed Forces . . . [t]here is no requirement to discharge service members who engage in adultery, heterosexual sodomy, fraternization, sexual harassment, or child abuse." *Id.*

court-martial-based offense with a characterization of less than a General Under Honorable Conditions discharge.[216] While Captain Dewig points out that he cannot guarantee any results, he identifies the fact that senior noncommissioned officers with years of service and families pose different considerations than privates, and panels or judges are obligated to look at these factors when making determinations about whether or not to sentence the Soldier to a punitive discharge.[217]

Captain Dewig also takes time to address the fact that Soldiers who are punitively discharged often do obtain employment, despite the stigma of a punitive discharge and the limitation of employment options. To this end, Captain Dewig asks First Sergeant Davis to consider his part-time job as a concert promoter, and whether being in the Army or serving honorably was a prerequisite to his employment there. First Sergeant Davis responds that these were not considerations. Captain Dewig then asks First Sergeant Davis whether he would be capable of working that same part-time job on a full-time basis. First Sergeant Davis responds that he could do it.[218] The resulting evidence against the original automatic thought is: "I am still qualified to work as a concert promoter," "Jobs like concert promotion are open to me even if I get convicted and punitively discharged," and "I could be retained, in which case I would be administratively discharged under honorable conditions." After obtaining similar ratings for the second comment on sex offender status, Captain Dewig then goes back to the automatic

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[216] AR 635-200, *supra* note 99, ¶ 14-3b, at 94 ("When the sole basis for separation is a serious offense resulting in a court-martial that does not impose a punitive discharge, the Soldier's service may not be characterized as under other than honorable conditions unless approved by HQDA . . . .").

[217] *See*, *e.g.*, U.S. DEP'T OF ARMY, PAM 27-9, MILITARY JUDGES' BENCHBOOK ¶ 2-6-11, at 99–100 (15 Sept. 2002) (providing standard instructions for court-martial panel members that they must consider a host of sentencing factors, including "[t]he accused's good military character," "[t]he accused's (record) (reputation) in the service for (efficiency) (bravery)," as well as the combat record and behavioral disorders of the accused).

[218] Redacted from this account for the sake of brevity is the Socratic dialogue resulting in these responses. When attorneys use these exercises, the goal is not to force an answer on the client, but rather for the client to discover the answers for himself, thus opening-up the prospect of valid alternative viewpoints. *E.g.*, TAYLOR, *supra* note 192, at 180 ("[T]he Socratic approach encourages patients to do most of the work in questioning their beliefs and in coming up with alternatives. The goal is not to provide the patients with all the answers, but instead to help them think for themselves."). Any attorney who has graduated law school is more than familiar with the Socratic concept, and should employ an empathic version of it when addressing responses to CBT homework assignments such as this. Professor Taylor provides detailed examples as well. *Id.* at 180–81.

thoughts on the worksheet and asks First Sergeant Davis to re-rate the intensity of the emotions he originally indicated.

With the benefit of considering alternative accurate statements, First Sergeant Davis now arrives at an alternative/balanced thought for the statement that his life will be over: "I will have to work hard to get a job if I am convicted, but there are still opportunities open to me," which he rates with 92% level of belief. He then rerates his anxiety at 10% and depression at 50%. The conclusion of his worksheet is displayed in Figure 11, below:

Evidence Against	**Balanced or Alternative Thoughts Rate 0-100%**	**Re-rate Feelings 0-100%**
I am still qualified to work as a concert promoter. Jobs like concert promotion are still open to me if I get convicted and punitively discharged. I could be retained, in which case I would be administratively discharged under honorable conditions.	I will have to work hard to get a job if I am convicted, but there are still opportunities open to me. (92%)	Anxious (10%) Depressed (50%)

Fig. 11. 1SG Davis's Thought and Evidence Worksheet (continued)

After using the worksheet for 40 minutes and exploring the accuracy of thoughts and related feelings, Captain Dewig and First Sergeant Davis are able to discuss sentencing aspects of the case with much greater ease. During discussions of a piece of evidence, First Sergeant Davis, in fact, asks if he can use the Worksheet to explore his feelings about it.

The present example is one of many CBT exercises that can be adapted by legal assistance and trial defense attorneys to effectively approach cognitive distortions related to PTSD. While CPT contains

similar worksheets, attorney exercises do not require the exposure elements of CPT, which require clients to repeatedly revisit the traumatic experiences responsible for causing PTSD. The attorney's CBT worksheets and exercises recommended in this article are published in self-help handbooks like *Taking Control of Your Moods and Your Life*, which have been vetted for public and unsupervised consumption by the trained clinicians who authored the text. *Taking Control of Your Moods and Your Life* can be adapted to address everything from obsessive worry, panic attacks, and challenging core beliefs with visualization. Similar books offer worksheets and tests for self-help with PTSD-events, specifically. In *Courage After Fire*, for example, specific techniques are offered to deal with the problem of intrusive images, a situation commonly experienced by veterans with PTSD that can easily interfere with essential preparation for trial.[219] Attorneys who are not familiar with measures to address this condition can easily exacerbate it because merely suggesting "avoid[ance] [of] uncomfortable images or memories tends to strengthen them."[220]

Worksheets and exercises that have special appeal in addressing activated litigation triggers include procrastination cost-benefit analyses;[221] risk assessments for worry;[222] the "Responsibility Pie" method to apportion responsibility for an event causing guilt or shame;[223] thought stopping;[224] and stress inoculation.[225] Attorneys should carefully review the CBT workbooks and other resources to determine which techniques and worksheets would be particularly useful in individual cases.

Inevitably, there are psychological issues beyond the capabilities of even the most well-meaning attorney.[226] The key becomes recognizing

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[219] ARMSTRONG ET AL., *supra* note 104, at 75–77.
[220] *Id.* at 75.
[221] DAVID D. BURNS, THE FEELING GOOD HANDBOOK 184–95 (rev. ed. 1999).
[222] MCKAY ET AL., *supra* note 195, at 67–71.
[223] DENNIS GREENBERGER & CHRISTINE A. PADESKY, MIND OVER MOOD: CHANGE HOW YOU FEEL BY CHANGING THE WAY YOU THINK 201–05 (1995).
[224] MCKAY ET AL., *supra* note 195, at 76–81.
[225] *Id.* at 119–34.
[226] *E.g.*, PORTNOY, *supra* note 113, at 48 (explaining that a family law attorney who confronts a client with mental illness and emotional dysfunction is "neither a diagnostician nor a mental health provider, and . . . should not expect . . . to provide those services").

when consultation or referral is necessary.[227] Consultation with mental health professionals can surely enhance the attorney's use of these tools. The completion of a PTSD Trigger Awareness Plan will go a long way to identify issues for follow-up by mental health practitioners. Rather than adopting a generic approach, the information permits the clinician to address PTSD psycholegal soft-spots in an individualized way that can improve the attorney's communication with and representation of the client. Potential benefits will be maximized to the extent that the attorney is willing to consider the clinician's input and the clinician is willing and able to address psychological matters linked specifically to the litigation process. Attorneys must be mindful that unique considerations related to issues of privilege or confidentiality may prevent the potential for full collaboration.[228]

Attorneys with knowledge of the therapeutic tools used by the clinician at the time of the legal representation can explore the potential of specific therapeutic techniques to aid the legal representation.[229] If the client is undergoing EMDR therapy, the attorney could request that the therapist address the most distressing images related to the trial or the crime to improve communication during pretrial preparation. Attorneys could also identify valuable exercises they could use with clients in their offices. For example, some physical exercises can create EMDR benefits without the supervision of a therapist. Clinicians offer the following guidance on self-directed eye movement: "By interlocking your hands, placing them behind your head so that [your] elbows are in your respective right and left visual field, it is possible to begin an eye movement desensitization routine yourself."[230]

With knowledge of effective techniques that do not require clinical supervision, the attorney can develop her own assortment of tools to address cognitive impasses during the course of legal counseling and decision-making. With knowledge of the client and his particular success with the therapy, the therapist can guide the attorney to effectively use the method, thereby satisfying the attorney's obligation to

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[227] *Id.* (observing that the attorney's "awareness that a client has symptomatic markers of a disorder helps [the attorney] know when to refer to a trained professional").
[228] Seamone, *supra* note 1, Part III.
[229] *Id*. at 180 (discussing the benefits of using A-B-C worksheets related to the litigation).
[230] HART, *supra* note 151, at 31. *See also* FRED FRIEDBERG, DO-IT-YOURSELF EYE MOVEMENT TECHNIQUES FOR EMOTIONAL HEALING 6 (2001) (providing EMDR and eye-movement-technique exercises for self-direction that are not associated with "unique dangers and risks" that would require the guidance or supervision of a clinician).

abide by Rule of Professional Conduct 1.1 or its civilian analogue. Such collaboration can also occur in the context of PE or CPT therapy.[231]

VI. Conclusion

This article explored the need and obligation for military attorneys to (1) identify impediments to the representation of clients with PTSD and (2) implement psychological interventions to remove such impediments. Although this article encourages attorneys to conduct some work of a psychological nature, it respects the boundaries surrounding social workers and other trained clinicians. It complies with the restrictions of psychology licensing statutes that permit members of nonpsychology professions to use psychological techniques.[232] By grounding all recommended interventions in self-help workbooks and guides approved for unlimited use, the attorney should feel confident in her implementation of these recommendations. Use of the notice contained in Appendix B should also eliminate any misapprehension on the client's part that the attorney is anything but a counselor *at law*.[233] Whether in the form of PTSD Trigger Awareness Plans, relaxation exercises, CBT worksheets, or referral to a qualified mental health practitioner, military and civilian attorneys must be proactive in identifying likely PTSD triggers and maximizing the client's well-being throughout the course of the representation. Not only can an attorney conduct triage as a first responder to PTSD, but, in many cases, she may be able to render life sustaining first-aid in the front lines of her office or the courtroom.[234]

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[231] An example of a counseling model in which the attorney shares responsibility with the clinician in the use of psychological techniques may be found in Astrid Brigden, *Dealing With the Resistant Criminal Client: A Psychologically-minded Strategy for More Effective Legal Counseling*, 38 CRIM. L. BULL. 225, 237–42 (2002) (exploring how attorneys can benefit from the use of "stages of change" and "motivational interviewing," therapeutic techniques, when counseling defensive clients).

[232] *See supra* Part II.C (reviewing statutes).

[233] *See infra* Appendix B (providing a script to effectively inform a client about the limitations of the attorney's counseling role when using a psychological technique).

[234] This approach embodies the concept recently emphasized by General (Ret.) Frederick Franks, Jr., that attorneys are not only "stakeholders in the disability evaluation system," but their duties encompass the mandate "never [to] leave a fallen comrade." GENERAL (RET.) FREDERICK FRANKS, JR., I WILL NEVER LEAVE A FALLEN COMRADE: FINAL TASK FORCE RECOMMENDATIONS TO BETTER FULFILL THE ARMY'S DUTY IN MEB/PEB, at 1, 27 (29 Apr. 2009).

Appendix A

DSM-IV-TR Criteria for Posttraumatic Stress Disorder[235]

Diagnostic criteria for 309.81 Posttraumatic Stress Disorder

A. [Traumatic Stressor:] The person has been exposed to a traumatic event in which both of the following have been present:

(1) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others

(2) the person's response involved intense fear, helplessness, or horror. **Note:** In children, this may be expressed instead by disorganized or agitated behavior

B. [Reexperiencing:] The traumatic event is persistently reexperienced in one (or more) of the following ways:

(1) recurrent and intrusive distressing recollections of the event, including images, thoughts, or perceptions. **Note:** In young children, repetitive play may occur in which themes or aspects of the trauma are expressed.

(2) recurrent distressing dreams of the event. **Note:** In children, there may be frightening dreams without recognizable content.

(3) acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur upon awakening or when intoxicated). **Note:** In young children, trauma-specific reenactment may occur.

(4) intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event

(5) physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event

C. [Avoidance and numbing:] Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by three (or more) of the following:

(1) efforts to avoid thoughts, feelings, or conversations associated with the trauma

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[235] DSM-IV-TR, *supra* note 1, at 467–68. Bold titles in brackets reflect the description and emphasis provided by TAYLOR, *supra* note 192, at 5. Reprinted with permission from the *Diagnostic and Statistical Manual of Mental Disorders, Text Revision, Fourth Edition* © 2000 American Psychiatric Association.

(2) efforts to avoid activities, places, or people that arouse recollections of the trauma
(3) inability to recall an important aspect of the trauma
(4) markedly diminished interest or participation in significant activities
(5) feeling of detachment or estrangement from others
(6) restricted range of affect (e.g., unable to have loving feelings)
(7) sense of a foreshortened future (e.g., does not expect to have a career, marriage, children, or a normal life span).

D. [Hyperarousal:] Persistent symptoms of increased arousal (not present before the trauma), as indicated by two (or more) of the following:

(1) difficulty falling or staying asleep
(2) irritability or outbursts of anger
(3) difficulty concentrating
(4) hypervigilance
(5) exaggerated startle response

E. Duration of the disturbance (symptoms in Criteria B, C, and D) is more than one month.

F. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Specify if:
Acute: if duration of symptoms is less than 3 months

Chronic: if duration of symptoms is 3 months or more

Specify if:
With Delayed Onset: if onset of symptoms is at least 6 months after the stressor

Appendix B

Sample Client Notification for Work of a Psychological Nature

This script uses the "thought record" as an example for sufficient client notice.[236] Attorneys may substitute other suitable techniques in its place.

I would like to use a form called the "thought record," to help you make a better decision about the legal choices you have to make. Before I do this, I want to make sure you understand that I am your lawyer and I have a responsibility to make sure you understand your legal options, choices, and decisions. I am not trained as a psychologist or a social worker. I do not have any license, training, or certification that qualifies me to practice psychology like a person working in a mental health facility.

I want to use this form as a tool to help you understand the law, and only for that purpose. If this looks similar to something you may have seen from a licensed mental health professional, I do not have the training to use the "thought record" for a clinical purpose.[237] In fact, I am using a form that comes from a book designed for self-help use that you could buy in a bookstore if you wanted. I am using this book mainly because I don't want to cross over into an activity that requires the expertise or supervision of a mental health professional.

If it is uncomfortable to use the "thought record," we don't have to use it and you can stop at any time.

With all of this in mind, do you want to use the "thought record?"

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[236] For a description of the "Thought Record," see *supra* Part V.B (providing detailed descriptions and examples).

[237] Reference to products clients may have seen during clinical treatment should assist in eliminating inferences that the attorney is qualified to practice psychology or a related mental health discipline that requires licensing.

Appendix C

PTSD Checklist—Military Version (PCL-M)[238]

Patient's Name: _____

Instruction to patient: Below is a list of problems and complaints that veterans sometimes have in response to stressful life experiences. Please read each one carefully, put an "X" in the box to indicate how much you have been bothered by that problem *in the last month*.

No.	Response	Not at all (1)	A little bit (2)	Moder-ately (3)	Quite a bit (4)	Extre-mely (5)
1	**Repeated, disturbing *memories, thoughts, or images* of a stressful military experience from the past?**					
2	**Repeated, disturbing *dreams* of a stressful military experience from the past?**					
3	**Suddenly *acting* or *feeling* as if a stressful military experience *were happening* again (as if you were reliving it)?**					
4	**Feeling *very upset* when *something reminded* you of a stressful military experience from the past?**					
5	**Having *physical reactions* (e.g., heart pounding, trouble breathing, or sweating) when *something reminded* you of a stressful military experience from the past?**					
6	**Avoid *thinking about* or *talking about* a stressful military experience from the past or avoid *having feelings* related to it?**					
7	**Avoid *activities* or *situations* because they *remind you* of a stressful military experience from the past?**					
8	**Trouble *remembering important parts* of a stressful military experience from the past?**					

No.	Response	Not at all (1)	A little bit (2)	Moder -ately (3)	Quite a bit (4)	Extre- mely (5)
9	Loss of *interest in things that you used to enjoy*?					
10	Feeling *distant or cut off* from other people?					
11	Feeling *emotionally numb* or being unable to have loving feelings for those close to you?					
12	Feeling as if your *future* will somehow be *cut short*?					
13	Trouble *falling* or *staying asleep*?					
14	Feeling *irritable* or having *angry outbursts*?					
15	Having *difficulty concentrating*?					
16	Being *"super alert"* or watchful on guard?					
17	Feeling *jumpy* or easily startled?					

[238] PCL-M, *supra* note 120. The PCL-M, as reprinted in this appendix, is a "Government document in the public domain." *Id*.

Appendix D

3 Question DVBIC TBI Screening Tool[239] Instruction Sheet

Purpose and Use of the DVBIC 3 Question TBI Screen

The purpose of this screen is to identify service members who may need further evaluation for mild traumatic brain injury (MTBI).

Tool Development

The 3 Question DVBIC TBI Screening Tool, also called the Brief Traumatic Brain Injury Screen (BTBIS), was validated in a small, initial study conducted with active duty service members who served in Iraq/Afghanistan between January 2006 and January 2005.

Schwab, K.A., Baker. G., Ivins, B., Sluss-Tiller, M., Lux, W., & Warden D. (2006). The Brief Traumatic Brain Injury Screen (BTBIS): Investigating the validity of a self-report instrument for detecting traumatic brain injury (TBI) in troops returning from deployment in Afghanistan and Iraq. *Neurology*, 66(5) (Supp. 2), A235.

Who to Screen

Screen should be used with service members who were injured during combat operations, training missions or other activities.

Screening Instructions

Question 1: A checked [√] response to any item A through F verifies injury.

Question 2: A checked [√] response to A-E meets criteria for a positive (+) screen. Further interview is indicated. A positive response to F or G does not indicate a positive screen, but should be further evaluated in a clinical interview.

Question 3: Endorsement of any item A-H verifies current symptoms which may be related to an MTBI if the screening and interview process determines a MTBI occurred.

Significance of Positive Screen

A service member who endorses an injury [Question 1], as well as an alteration of consciousness [Question 2 A-E], should be further evaluated via clinical interview because he/she is more highly suspect for having sustained an MTBI or concussion. The MBTI screen alone does not provide a diagnosis of MTBI. A clinical interview is required.

For more information contact:

Telephone: 1-800-870-9244 Email: info@DVBIC.org Web: www.DVBIC.org

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[239] MTBI Instruction Sheet, *supra* note 105 (reprinted with permission of the Defense and Veterans Brain Injury Center).

3 Question DVBIC TBI Screening Tool[240]

1. Did you have any injury(ies) during your deployment from any of the following? (Check all that apply):

A. ☐ Fragment
B. ☐ Bullet
C. ☐ Vehicular (any type of vehicle, including airplane)
D. ☐ Fall
E. ☐ Blast (Improvised Explosive Device, RPG, Land mine, Grenade, etc.)
F. ☐ Other specify: _____

2. Did any injury received while you were deployed result in any of the following? (check all that apply):

A. ☐ Being dazed, confused or "seeing stars"
B. ☐ Not remembering the injury
C. ☐ Losing consciousness (knocked out) for less than a minute
D. ☐ Losing consciousness for 1-20 minutes
E. ☐ Losing consciousness for longer than 20 minutes
F. ☐ Having any symptoms of concussion afterward (such as headache, dizziness, irritability, etc.)
G. ☐ Head injury
H. ☐ None of the above

NOTE: Endorsement of A-E meets criteria for a positive TBI Screen

NOTE: Confirm F and G through clinical interview

3. Are you currently experiencing any of the following problems that you think might be related to a possible head injury or concussion (check all that apply):

A. ☐ Headaches
B. ☐ Dizziness
C. ☐ Memory problems
D. ☐ Balance problems
E. ☐ Ringing in the ears
F. ☐ Irritability
G. ☐ Sleep problems
H. ☐ Other specify: _____

Schwab, K.A., Baker. G., Ivins, B., Sluss-Tiller, M., Lux, W., & Warden D. (2006). The Brief Traumatic Brain Injury Screen (BTBIS): Investigating the validity of a self-report instrument for detecting traumatic brain injury (TBI) in troops returning from deployment in Afghanistan and Iraq. *Neurology*, 66(5) (Supp. 2), A235.

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[240] 3 Question DVBIC TBI Screening Tool, *supra* note 127 (reprinted with permission of the Defense and Veterans Brain Injury Center). For further questions regarding this tool, the direct phone line for the DVBIC is (202) 782-6345. *See also* Karen A. Schwab et al., *Screening for Traumatic Brain Injury in Troops Returning from Deployment in Afghanistan and Iraq: Initial Investigation of the Usefulness of a Short Screening Tool for Traumatic Brain Injury*, 22 J. HEAD TRAUMA REHABILITATION 377 (2007).

Appendix E

PTSD Competency Worksheet for Lawyers[241]

A. OBSERVATIONAL SIGNS

Cognitive Functioning	Examples
Short-term Memory Problems	• Repeats questions frequently • Forgets what is discussed within 15-30 min. • Cannot remember events of past few days
Language/Communication Problems	• Difficulty finding words frequently • Vague language • Trouble staying on topic • Disorganized • Bizarre statements or reasoning
Comprehension Problems	• Difficulty repeating simple concepts • Repeated questioning
Lack of Mental Flexibility	• Difficulty comparing alternatives • Difficulty adjusting to changes
Calculation/Financial Management Problems	• Addition or subtraction that previously would have been easy for the client • Bill paying difficulty
Disorientation	• Trouble navigating office • Gets lost coming to office • Confused about day/time/ year/season

Emotional Functioning	Examples
Emotional Distress	• Anxious • Tearful/distressed • Excited/pressured/manic
Emotional Lability	• Moves quickly between laughter & tears • Feelings inconsistent with topic

[241] In this Appendix, the author modified portions of the "Capacity Worksheet for Lawyers" from *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers, by the ABA Commission on Law and Aging and the American Psychological Association* © 2005, at pages 23–26 (DIMINISHED CAPACITY HANDBOOK, *supra* note 36, at 29–33 (LexisNexis® version)). The author modified "Ways to Address/ Accommodate" and "mitigating/qualifying factors" in Part A and Parts B and D of the original worksheet. Permission was granted by the American Bar Association to reprint the copied portions of the Capacity Worksheet for Lawyers.

Behavioral Functioning	Examples
Delusions	• Feels others out "to get" him/her, spying or organized against him/her • Fearful, feels unsafe
Hallucinations	• Appears to hear or talk to things not there • Appears to see things not there • Misperceives things
Poor Grooming/Hygiene	• Usually unclean/unkept in appearance • Inappropriately dressed

Other Observations/Notes of Functional Behavior

Other Observations/Notes on Potential Undue Influence

Mitigating/Qualifying Factors Affecting Observations	Ways to Address/ Accommodate
Stress, Grief, Depression, Recent Events affecting stability of client	• Ask about recent events, losses • Allow some time • Relaxation Exercises • CBT Exercises (if related to legal matter) • Refer to mental health professional
Medical Factors	• Ask about [sleep], nutrition, medication, hydration • Refer to a physician
Time of Day Variability	• Ask if certain times of day are best • Try a different appointment from usual meeting time
Forensic Stress	• Use of a Litigation Workbook • Conduct PSTD Psycholegal Soft-Spot Planning • Relaxation Exercises • CBT Exercises • Refer to mental health professional
Educational/Cultural/Ethnic Barriers	• Be aware of race and ethnicity, education, long-held values and traditions

B. RELEVANT LEGAL ELEMENTS – The legal elements of capacity vary somewhat among states and should be modified as needed . . .

Legal Factors	**Notes on Client's Understanding/Appreciation**
Criminal **Does client understand the nature of the offense?** **1. How s/he came to be charged.** **2. The reason why such acts are criminal.** **3. The strength of the evidence against the accused.** **4. Existence of a defense.** **5. The strength of evidence supporting a defense.** **6. The potential sentencing exposure.** **7. Factors in mitigation or extenuation.**	
Civil **Does client understand the nature of the action?** **1. How it came that resolution is contemplated through legal action.** **2. The opposing rights and remedies at stake in the legal action.** **3. The evidence supporting the client's cause.** **4. Existence of any causes/ defenses.** **5. The strength supporting causes/ defenses.** **6. The potential financial or other loss if applicable.** **7. Impact on third-parties, such as beneficiaries, spouses, children, etc.**	

C. TASK-SPECIFIC FACTORS IN PRELIMINARY EVALUATION OF CAPACITY

The more serious the concern the following factors. . .	**The higher the function needed in the following abilities. . .**
Is decision consistent with client's known long-term values or commitments?	• **Can the client articulate reasoning leading to this decision?**
Is the decision objectively fair? Will anyone be hurt by the decision?	• **Is client's decision consistent over time?** • **Are primary values client articulates consistent over time?**
Is the decision irreversible?	• **Can client appreciate consequences of his/her decision?**

D. PRELIMINARY CONCLUSIONS ABOUT CLIENT CAPACITY – After evaluating A, B, and C above:

[ ] <u>Intact</u> – No or very minimal evidence of diminished capacity	***Action*: Proceed with representation and legal cause.**
[ ] <u>Mild Problems</u> – Some evidence of diminished capacity	***Action*:** **(1) Proceed with representation/ legal cause, or** **(2) Consider medical referral if medical oversight is lacking, or** **(3) Consider consultation with a mental health professional, or** **(4) Consider referral for formal clinical assessment (including R.C.M. 706 sanity board) to substantiate conclusion, with client consent.**

[ ] <u>More than mild Problems</u> – Substantial evidence of diminished capacity	***Action*:** **(1) Proceed with representation/legal cause with great caution, or** **(2) Medical referral if medical oversight is lacking, or** **(3) Consultation with a mental health professional, or** **(4) Referral for formal clinical assessment (including R.C.M. 706 sanity board), with client consent.**
[ ] <u>Severe problems</u> – Client lacks capacity to proceed with representation and legal cause.	***Action*:** **(1) Referral to mental health professional (including R.C.M. 706 sanity board) to confirm conclusion.** **(2) Seek assistance from the court; do not proceed with case; or withdraw, after careful consideration of how to protect client's interests, depending on type of action; or** **(3) Consider protective action consistent with Rule 1.14(b).**

Appendix F

Muscle Relaxation Exercise for Clients with PTSD Excerpted from Armstrong et al.'s *Courage After Fire*[242]

Another useful relaxation drill is called *Muscle Relaxation*. This exercise is especially helpful for reducing muscle tension and worry. It involves tensing different sets of muscles in your body and then relaxing them. The goal is to become aware of the difference between tension and calmness in your body. This drill will help you learn first to detect tension in your body and then to reduce anxiety before it rises to higher levels.

Read the following script aloud, or ask someone else to do it and tape record it. Decide whether you want to use your voice or whether you'd be more relaxed listening to someone else's voice on the recording. Then play the tape to guide you through the drill.

While listening to the tape, envision a state of relaxation spreading throughout your body, step-by-step, from your feet up through your stomach, your chest, and finally to your face. This drill will take about 20 to 30 minutes to complete. For each muscle group, first focus for 10 seconds in a tensed state, then focus for 20 seconds in a relaxed state.

1. Get into a comfortable sitting position where your head leans back against a wall. You can choose to close your eyes or keep them open, whichever is most comfortable for you.

2. Rate your level of anxiety on a scale of 0 to 10, where 0 is feeling totally calm and 10 is feeling extremely anxious. . . .

3. Take a few moments to get focused.

4. First, focus on your breathing. Make sure it's slow and smooth. Breathe in smoothly and say, "1." Breathe out easily and say, "Relax." Focus on your breaths. Breathe in and say, "2." Breathe out and say, "Relax." Continue this smooth and easy breathing. Feel the cool air as you breathe in and the warm air as you breathe out.

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[242] ARMSTRONG ET AL., *supra* note 104, at 45–49. This relaxation exercise originally appeared in *Courage After Fire: Coping Strategies for Troops Returning From Iraq and Afghanistan and Their Families* © 2006, authored by Keith Armstrong, LCSW, Suzanne Best, Ph.D., and Paula Domenici, Ph.D. Ulysses Press granted permission to reprint these contents.

5. Now focus on the muscles in your lower legs and feet. Concentrate intensely on this set of muscles for a few moments. Now build tension in your lower legs by flexing your feet and pulling your toes up towards the ceiling. Hold this position for 10 seconds. Feel the tightness and tension spreading throughout your toes, feet, ankles, shins, and calves. After 10 seconds, release the tension by deflexing your feet and letting your legs relax comfortably onto the chair. Focus on the difference between the state of tension you felt when you flexed and the state of relaxation now moving through your feet and lower legs. Enjoy the sense of warmth, heaviness, and comfort spreading through your feet and lower legs, for 20 seconds.

6. Next move to your upper legs. Concentrate intensely on the muscles in your upper legs for a few moments. Now build tension in your upper legs by pulling your knees together and lifting your legs off the chair or couch. Hold this position for 10 seconds. Feel the tightness and tension spreading through your upper legs. After 10 seconds, release the tension by letting your legs drop down onto the chair. Focus on the difference between the state of tension you felt when flexing and the state of relaxation now moving through your upper legs. Enjoy the sense of warmth, heaviness, and comfort spreading through your upper legs, for 20 seconds.

7. Continue to move up your body, to the muscles in your stomach and chest. Concentrate intensely on this muscle group for a few moments. Now build tension in your stomach and chest by taking in a deep breath and holding it as you pull your stomach toward your spine. Hold this position for 10 seconds. Feel the tightness and tension spreading throughout your stomach and chest. After 10 seconds, let go of the tension by releasing your stomach. Focus on the difference between the state of tension you felt and the state of relaxation now filling your stomach and chest. Enjoy the sense of warmth, heaviness, and comfort spreading throughout your stomach and chest, for 20 seconds.

8. Now move to the muscles in your shoulders. Concentrate intensely on the muscles in this area for a few moments. Now build tension in your shoulders by pulling them up as close to your ears as you can. Hold this position for 10 seconds. Feel the tightness and tension spreading through your shoulders. After 10

seconds, release the tension by dropping your shoulders down and letting them droop comfortably. Focus on the difference between the state of tension and the state of relaxation now moving through your shoulders. Enjoy the sense of warmth, heaviness, and comfort spreading though your shoulders, for 20 seconds.

9. Next move your attention to your hands and arms. Concentrate intensely on the muscles in your hands and arms for a few moments. Build tension in your hands and arms by making fists with both your hands. Bend your wrists up to pull your fists up. Hold this position for 10 seconds. Feel the tightness and tension spreading through your hands and arms. Now release the tension by letting go of your fists and unbending your wrists. Focus on the difference between the state of tension and the state of relaxation emerging in your hands and arms. Enjoy the sense of warmth, heaviness, and comfort spreading though your hands and arms, for 20 seconds.

10. A sense of relaxation is spreading more and more throughout various muscles in your body. Let's move on to the muscles in your neck. Concentrate intensely on those muscles for a few moments. Build tension in your neck by pulling your chin down toward your chest as far as you can. Hold this position for 10 seconds. Feel the tightness and tension spreading through your neck. After 10 seconds, release the tension and let your head rest against the wall. Focus on the difference between the state of tension and the state of relaxation emerging in your neck. Enjoy the sense of warmth, heaviness, and comfort spreading through your neck, for 20 seconds.

11. Now focus on different parts of your face. First, attend to your mouth and jaw, concentrating intensely on those muscles for a few moments. Build tension by clenching your teeth together tightly for 10 seconds. Feel the tightness and tension spreading through your mouth and jaw. After 10 seconds, release the tension, unclenching your teeth and letting your mouth and jaw drop. Focus on the difference between the state of tension and the state of relaxation now moving in your mouth and jaw. Enjoy the sense of warmth, heaviness, and comfort spreading through your mouth and jaw, for 20 seconds.

12. As a state of relaxation spreads around your face, focus on your eyes. Concentrate intensely on the muscles around and behind your eyes for a few moments. Build tension in your eyes by squeezing them tightly together. Hold this position for 10 seconds. Feel the tightness and tension spreading through your eyes. After 10 seconds, release the tension by relaxing your eye muscles. Focus on the difference between the state of tension and the state of relaxation now moving around and behind your eyes. Enjoy the sense of warmth, heaviness, and comfort spreading through your eyes, for 20 seconds.

13. Continue to relax the muscles in your face by focusing on your upper forehead. Concentrate intensely on those muscles for a few moments. Build tension in your upper forehead by raising your eyebrows up as high as possible. Hold this position for 10 seconds. Feel the tightness and tension spreading throughout your upper forehead. After 10 seconds, release the tension by letting your eyebrows down. Focus on the difference between the state of tension and the state of relaxation now moving in your upper forehead. Enjoy the sense of warmth, heaviness, and comfort spreading through your forehead, for 20 seconds.

14. At this point, relaxation has spread throughout your whole body. Starting with your feet and legs, relaxation then moved to your stomach and chest. Next, the relaxation spread into your hands and arms, then to your neck, and to your face. Let your whole body become more and more relaxed. Let *all* the tension leave your body. If you feel remaining tension in any muscle, envision it floating away. Sink deeper and deeper into a state of peace and warmth, with relaxation deepening further and further throughout your body. Feel heaviness and comfort filling each of your muscle groups more and more. Enjoy this state of deep relaxation. Continue to focus on your breathing. Make sure it's slow and smooth. Feel the cool air as you breathe in and the warm air as you breathe out.

15. Now, counting from 1 to 10, you will gradually become more awake and alert. When you reach the number 10, sit up and open your eyes in a wakeful, alert state.

16. Now, rate your level of anxiety on a scale from 0 to 10, where 0 is feeling totally calm and 10 is feeling extremely anxious. . . .

17. Having completed this exercise, reflect on how it was for you to do this muscle relaxation procedure:

    - Were there any particular muscle groups that were hard for you to relax?
    - Do you feel more relaxed after this exercise than before?
    - Did you find it hard to concentrate on certain sets of muscles?

Practice this drill at regularly scheduled times, at least once a day, for at least one week, using the tape to guide you until you get good at it.

In a journal or notebook, keep track of when you practice this drill by recording the date and time . . . Over time, you should notice a reduction in your anxiety ratings.

THIRD GEORGE S. PRUGH LECTURE IN MILITARY LEGAL HISTORY[1]: ABRAHAM LINCOLN IN LAW AND LORE: THE LINCOLN CONSPIRATORS' TRIAL BY MILITARY COMMISSION

CHIEF JUDGE FRANK J. WILLIAMS[*]

[1] This is an edited transcript of a lecture delivered on 29 April 2009 by Chief Justice (Ret.) Frank J. Williams to the members of the staff and faculty, distinguished guests, and officers attending the 57th Graduate Course at The Judge Advocate General's Legal Center and School, Charlottesville, Va. The chair lecture is named in honor of Major General George S. Prugh (1920–2006).

[*] Chief Judge, U.S. Court of Military Commission Review; Chief Justice, Supreme Court of Rhode Island (2001–2008); Frank Williams was born in Cranston, R.I., where he attended public schools. He received his commission as a Second Lieutenant upon graduation from Boston University, where he was a member of the Army Reserve Officers' Training Corps. Justice Williams served for three years in Germany along the East/West German border with the 1st Reconnaissance Squadron, 2d Armored Cavalry Regiment, as a Tank Platoon Leader, S3 Air, Commanding Officer for C Troop, and Adjutant of the Squadron. Justice Williams was then transferred to Ban Me Thuot, Republic of Vietnam, in December 1965, where he served with Advisory Team 33, Military Assistance Command–Vietnam, and as an advisor to the 23d ARVN Infantry Division for one year. During this time he was promoted to Captain.

Justice Williams's military decorations include, in addition to the Combat Infantryman's Badge, the Bronze Star Medal, three Air Medals, two Vietnam Campaign Medals, the Army Commendation Medal, and the Aircraft Crewman Badge. His foreign awards and decorations include both the Vietnam Gallantry Cross (with Silver Star for Valor) and the Vietnam Staff Service Medal (First Class).

Justice Williams separated from the service in March 1967 and attended Boston University School of Law from which he graduated in 1970. He was in private practice for twenty-five years in Providence, Rhode Island, and was selected as a Superior Court Judge in December 1995. In February 2001, he was nominated by Governor Lincoln Almond to be Rhode Island's 50th Chief Justice and was unanimously confirmed by the General Assembly. Chief Justice Williams has been named one of the top 500 American judges (out of 30,000) by Lawdragon, an organization that rates judges and lawyers throughout the United States.

On 30 December 2003, the President of the United States, through the Secretary of Defense, invited Chief Justice Williams to be a member of the then-Military Commissions Review Panel for tribunals to be held in Guantanamo Bay, Cuba, with the rank of Major General. The Military Commissions Act of 2006 created the Court of Military Commission Review on which Justice Williams serves as a civilian appellate judge.

On 21 November 2007, the Secretary of Defense appointed Chief Justice Williams Chief Judge of the U.S. Court of Military Commission Review.

Chief Justice Williams is also a nationally recognized authority on the life and times of Abraham Lincoln. He is the author and editor of over thirteen books and lectures widely. His *Judging Lincoln* was published by Southern Illinois University Press in 2002. *See* FRANK J. WILLIAMS, JUDGING LINCOLN (2002). In 2006, Louisiana State University Press published *The Emancipation Proclamation: Three Views,* with Harold

Thank you very much, Colonel Borch, ladies and gentlemen, General Chipman. Mrs. Prugh and your family, thank you so much for the opportunity to be the third lecturer in honor of your late husband, a true patriot. When I go around the country speaking to young lawyers and citizens—our fellow citizens—I remind them that they all enhance certain values. There are values and characteristics that many of our fellow citizens think of as old-fashioned. You know them, don't you? Loyalty, friendship, patriotism, family, and nation. It's unfortunate that our fellow countrymen have to be reminded of these values from time to time. This is why I remain so inspired about Abraham Lincoln. Just as Colonel Borch indicated, Lincoln saw the vision of America as enshrined in the Declaration of Independence, and a vision that you fulfill every day.

I hope that all of you who serve in the Judge Advocate General's (JAG) Corps, and who are being taught here, realize how lucky you are to have these opportunities. I wanted to go into JAG from a combat branch. I had always wanted to be a lawyer. When I was thirteen in junior high school, I recognized what a good lawyer Abraham Lincoln was and wanted to be just like him. We didn't have a Reserve Officers' Training Corps then, as you do now. Nor did we have programs that allowed an officer to transfer to another branch like JAG after completing an initial tour of duty. I regret that very much. So, I went to law school and practiced law for twenty-five years. Much like Abraham Lincoln, I engaged in a very general law practice doing litigation. I decided that I was tired of being the 800-pound gorilla. I wanted to become a judge—a trial judge—who could mediate cases. Lincoln, believe it or not, was a great mediator and believed in alternative dispute

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Holzer and Edna Greene Medford. *See* HAROLD HOLZER ET AL., THE EMANCIPATION PROCLAMATION: THREE VIEWS (2006). His latest book, *Lincoln Lessons: Reflections on America's Greatest Leader*, with William D. Pederson, was published by Southern Illinois University Press in 2009. *See* LINCOLN LESSONS: REFLECTIONS ON AMERICA'S GREATEST LEADER (Frank J. Williams & William D. Pederson eds., 2009) [hereinafter LINCOLN LESSONS]; *see also* Frank J. Williams, *The Compleat Lincolnator: Enthusiast, Collector, and Scholar*, *in* LINCOLN LESSONS, *supra*, at 160.

In addition to teaching at the Naval War College, Chief Justice Williams is an Adjunct Professor at Roger Williams University School of Law. Annually, he hosts the international students of the Naval Command College at the Rhode Island Courts.

The author would like to acknowledge Captain Evan R. Seamone for his research assistance and Colonel (Ret.) Fred L. Borch for the invitation to present the 3rd Annual Prugh Lecture.

resolution before that term was ever invented.[2] As a judge I mediated disputes, and we continue to mediate in our courts in Rhode Island. I am proud of each and every one of you for your service to our country. I think about you every day; you and the men and women in arms, across the seas.

I would like to recognize the members of the Afghan delegation and the Afghan National Army. Everyone in this room, and many millions across the United States, wish peace for you and your country. We have found in our own history, before that peace can be obtained, certain things have to be done and they are not pleasant. Abraham Lincoln did not win the Civil War with a powder puff, and unfortunately that's what your beloved country is undergoing right now. I'm glad we are there to help you.

General Malinda E. Dunn and General Clyde "Butch" Tate, thank you for being with us today. You honor me with your presence. Dean, Colonel Robert A. Burrell, it is good to have you with us. My co-author, Bill Bader is here. He and I are working on a book together. It is not on the most distinguished Supreme Court justices—but rather the undistinguished Supreme Court justices. We are having fun doing it, aren't we, Bill?

[To which Mr. Bader responds, "Yes."]

My wife Virginia told me you're a tough group. She suggested, "Don't try to be charming, witty, or intelligent—just be yourself." So, I'm glad to be here to talk about one aspect—really, a subset of—the Lincoln story. It is one for which you may see parallels today. I intend for you to notice these parallels and I hope there will be a heated, or at least a good discussion about them in the Q & A period that will follow. Today, I belong to you. You can ask me anything you want; tomorrow, when you're in my court, you belong to me.

As the twenty-first century lurches forward, it is tempting to wonder, who among the presidents, that have served and that will serve, will ever

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[2] For example, Lincoln recommended, "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time." Notes for a Law Lecture (July 1, 1850), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 81 (Roy P. Basler ed., 1953–55) [hereinafter COLLECTED WORKS].

join Abraham Lincoln in the rarified ranks of Monday holidays. How can a culture that picks apart its president's infirmities—that looks for dye in the hair or clay on the feet and writes books on dysfunctional first families—compete for heroes with one that nourished the image of the rail-splitter? In the avalanche of intense mourning that greeted Lincoln's death 144 years ago this month, Americans pursued a dual, and not entirely compatible, course of revenge and mythification. On the one hand, his admirers elevated Abraham Lincoln to the status of icon, a transfiguration into secular sainthood that was as swift as it was sure.[3] On the other hand, concurrently, Americans thirsted for revenge against the conspirators who had perpetrated the murder of the man they now mourned.[4]

Through the summer of 1865, the public was entirely able to sanctify the memory of Lincoln, the forgiver, the preserver of American democracy, while simultaneously encouraging the trial of his assassins by questionable military means and in conditions that would ordinarily have been repugnant to lovers of liberty.[5] Precisely what did the military trial of the Lincoln assassination conspirators mean in law, culture, and history? Despite the intense and widespread hatred for Lincoln that existed during the War, even in the North, there was an avalanche of intense mourning for him when he was assassinated.[6] No doubt, some Lincoln haters experienced a strong, emotional reaction in his favor,[7] but

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[3] *E.g.*, Don E. Fehrenbacher, *The Anti-Lincoln Tradition*, 4 J. ABRAHAM LINCOLN ASS'N 15, ¶ 18 (1982), *available at* http://www.historycooperative.org/journals/jala/4/fehrenbacher.html ("The apotheosis of Lincoln thus began as soon as he died. Savior of the Union, liberator of a race, struck down on Good Friday . . . he was readily assimilated to the universal myths of the fallen hero and the dying god."). In fact, "The majority of Northern preachers compared Lincoln to Moses . . . [and] . . . the biblical leader who after leading his people to the Promised Land was denied entry himself." EDWARD STEERS JR., BLOOD ON THE MOON: THE ASSASSINATION OF ABRAHAM LINCOLN 14–15 (2001).

[4] *E.g.*, ANTHONY S. PITCH, "THEY HAVE KILLED PAPA DEAD!: THE ROAD TO FORD'S THEATRE, ABRAHAM LINCOLN'S MURDER, AND THE RAGE FOR VENGEANCE 166 (2008) (describing how "[r]age quickly overtook grief" in the public's reaction to Lincoln's assassination).

[5] *E.g.*, JAMES L. SWANSON & DANIEL R. WEINBERG, LINCOLN'S ASSASSINS: THEIR TRIAL AND EXECUTION AN ILLUSTRATED HISTORY 20–23 (2001) (describing serious limitations on the defense's ability to prepare and present its case).

[6] *E.g.*, STEERS, *supra* note 3, at 15 ("The deification of the man who had once been reviled as 'the original gorilla' and 'Abraham Africanus the First' was being proclaimed from church pulpits all across the land.").

[7] *E.g.,* Feherenbacher, *supra* note 3, at 15, ¶ 18 ("Many of his critics at home and abroad hastened to revise their estimates of his worth and scramble, as it were, aboard the funeral train. . . . [T]here was George Bancroft, who had earlier called the President 'ignorant' and 'incompetent,' now delivering the principal funeral oration in New York City.").

others would have found it impossible to forgive him his despotism and championship of a despised race simply because of his death.[8] Like Booth, they would have thought he had it coming to him and that the assassination served a patriotic end.

But who can stand against an avalanche? Most of the individuals who continued to hate Lincoln were smart enough to keep quiet about it; so quiet that it soon came to seem that mourning for him had been universal. In his first and beautifully written chapter in *Lincoln in American Memory*, titled, "Apotheosis," Merrill Peterson, who taught right here at the University of Virginia, gives this precise impression.[9] Another friend, Californian William Hanchett, who taught in San Diego too, made this point. He also stated that some of the ostentatious grief displayed was not sincere, as many pronounced Copperheads in the North, who believed in the justice of the Southern cause and who were virulently anti-Lincoln, sought to appease Republican mourners by overdecorating their houses and businesses with flags and mourning crepe and by solemnly attending memorial services.

Professor David Donald at Harvard wrote, "Within eight hours of his murder, Republican congressmen, in secret caucus agreed that his death was a godsend to their cause because Andrew Johnson, the new President, would punish the errant South in ways that Lincoln was resisting . . . politicians of all parties were apparently startled by the extent of the national grief over Lincoln, and, politician-like, they decided to capitalize upon it."[10] Of course, the mourning was very real, and the long train ride to Springfield moved Americans in a way that is still reflected in the Lincoln myth. But the President who led the North to victory is more admirable than the myth. And, this is the President whose death silenced, but did not convert, all his enemies. The fact that Americans elevated Lincoln to secular sainthood, while, at the same time, sought to discover and punish those responsible for his murder may not be incompatible. In fact, love for Lincoln would strengthen determination that those who took his life not be allowed to get away with it. This is one explanation of the military trial which permitted a wide-ranging investigation of the assassination conspiracy in an attempt

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[8] STEERS, *supra* note 3, at 16. In one noteworthy example, the editor of the *Texas Republican* wrote, "It is certainly a matter of congratulations that Lincoln is dead because the world is rid of a monster that disgraced the form of humanity." *Id.*

[9] MERRILL D. PETERSON, LINCOLN IN AMERICAN MEMORY 3–35 (1994).

[10] David H. Donald, *Getting Right with Lincoln* (1956), *reprinted in* DAVID H. DONALD, LINCOLN RECONSIDERED: ESSAYS ON THE CIVIL WAR ERA 3, 4 (3d rev. ed. 2001).

to implicate the Confederate government, not just the band of John Wilkes Booth, and the use of a military trial as opposed to a civil trial, which would have had to confine itself to the guilt and innocence of the accused.[11]

As it turned out, the U.S. Government could not prove a Confederate conspiracy. It was four o'clock on the morning of April 15th, 1865, when John Wilkes Booth and David E. Herold turned their horses onto the narrow, rutted lane which led to the home of Dr. Samuel A. Mudd, a quarter of a mile off the main road to Bryantown in Southern Maryland's Charles County.[12] After a few minutes, the riders could make out the doctor's plain, two-story, clapboard house silhouetted against the sky at the top of a long rise. They stopped at the edge of the lawn, and Herold, who had ridden ahead of Booth, dismounted and pounded on the door while Booth sat hunched on his horse. Booth was the very image of misery and discomfort. The doctor and his wife were asleep in a back room on the first floor of the house and were startled by the heavy pounding on their door. So, the 31-year-old doctor rose and trudged wearily to the door in his nightshirt. Without opening the door, he asked who was there and was told, he would later insist, that his callers were two strangers on their way to Washington.[13] One of their horses had fallen, the voice said, and the rider believed his leg had been strained or fractured.[14] Dr. Mudd opened the door and helped the dismounted rider bring the injured man into the parlor where they laid him on a sofa. Trouble—big trouble—had descended on the little household of Dr. Samuel A. Mudd.

With the exception of Mrs. Mary Surratt, a woman tried as a conspirator in the Lincoln assassination and the first woman to be sentenced to death in the federal system,[15] no other person punished for complicity in the Lincoln plot has been so steadfastly and vociferously defended as an innocent victim of the Federal Government's thirst for

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[11] Thomas R. Turner, *What Type of Trial? Civil Versus a Military Trial for the Lincoln Assassination Conspirators*, 4 J. ABRAHAM LINCOLN ASS'N 35, ¶ 20 (1982), *available at* http://www. historycooperative.org/journals/jala/4/ turner.html ("Since a military trial had wider rules of evidence than a civil trial, many looked upon it as almost a Warren Commission that could get to the bottom of the conspiracy.").

[12] *See*, *e.g.*, STEERS, *supra* note 3, at 144–45.

[13] *See, e.g.*, JIM BISHOP, THE DAY LINCOLN WAS SHOT 277 (1955).

[14] *Id*.

[15] *See generally* KATE CLIFFORD LARSON, THE ASSASSIN'S ACCOMPLICE: MARY SURRATT AND THE PLOT TO KILL ABRAHAM LINCOLN 169–95 (2008) (describing aspects of her hearing and the resulting sentence).

vengeance as has Dr. Mudd. Not only has an elementary school in Maryland been named in his honor,[16] in 1936, for example, 20th Century Fox released a film, "The Prisoner of Shark Island," which sympathetically portrayed the doctor's imprisonment.[17] In 1973, the Michigan legislature, at the urging of Dr. Richard Mudd, who spent a lifetime trying to clear his grandfather's name, adopted a resolution stating that Dr. Samuel A. Mudd was innocent of any complicity in the assassination of President Abraham Lincoln.[18] In 1979, President Jimmy Carter declared his personal belief in Dr. Mudd's innocence, as did President Ronald Regan, shortly thereafter, but the federal circuit in Washington dead-ended any further change in the conviction of Samuel Mudd.[19]

Mudd is remembered as a kind and gentle country doctor who was sucked into the whirlwind of violence by his innocent administrations to an injured nighttime visitor who, unbeknownst to him, had shot the President of the United States only a few hours earlier.[20] Dr. Mudd, his supporters maintain, was the American Dreyfus,[21] an innocent man

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[16] *See* About Us, *available at* http://www2.ccboe.com/mudd/aboutus.cfm (last visited Nov. 4, 2009). In part, the school's website explains:

> For over 130 years his descendants have fought to have his name cleared from all charges. This debate continues to this day. Despite both Presidents Carter and Reagan's statements of belief in his innocence, only the Army can overturn his conviction. Currently, there is a lawsuit pending in U.S. Circuit Court fighting for his innocence.

Id. Despite the courts' determinations that the conviction should stand, proclamations like these recognize the continuing current action to prove the Dr. Mudd's innocence in courts of law.

[17] *See generally* THE PRISONER OF SHARK ISLAND (20th Century Fox 1936).

[18] *See* Mich. H. Con. Res. 126, A Concurrent Resolution Expressing the Sentiment of the Michigan Legislature that Dr. Samuel A. Mudd was Innocent of any Complicity in the Assassination of President Abraham Lincoln (July 17, 1973).

[19] *See*, *e.g.*, Robert Aitken & Marilyn Aitken, *The Long, Strange Case of Dr. Samuel Mudd: The Assassination of Abraham Lincoln*, 31 LITIG. 51, 55–56 (2005) (describing presidential sentiments and their inability to overcome jurisdictional hurdles of setting aside the conviction).

[20] STEERS, *supra* note 3, at 145 (describing Mudd's desire to be remembered as "an unsuspecting doctor who innocently provided medical care to an injured stranger in need of help"); *id.* at 239 (explaining the adoption of this view approximately fifty-five years after his conviction when researchers and writers "accepted the sympathetic view put forward by Richard Mudd and other members of the Mudd family").

[21] *See, e.g.*, Rebecca Roiphe, *Lawyering at the Extremes: The Representation of Tom Mooney, 1916–1939*, 77 FORDHAM L. REV. 1731, 1742 (2009) (discussing the wrongful

convicted and sent to prison for a crime he did not commit by an unconstitutional military commission comprised of second rate officers who were on a Government-sanctioned blood quest. Even his place of confinement, Fort Jefferson and the Dry Tortugas, smacks of Devil's Island.[22] But that's one side of the story.

Others, both at the time of the Lincoln assassination and more recently, have investigated and uncovered that Dr. Mudd was a cruel slave owner and a strong Confederate sympathizer who passed mail back and forth between North and South.[23] Being among the largest slave owners in Maryland, Mudd and his relatives increased their existing opposition to Lincoln after the signing of the Emancipation Proclamation.[24] Mudd had prior contacts with Booth, before the assassination, that revealed closer contact than a chance visit on the night of Lincoln's shooting.[25] These were contacts that Mudd obviously wanted to hide. Mudd also apparently aided Booth and Herold in their flight and misled the forces that were conducting the pursuit.[26] Mudd escaped the death penalty by one vote.[27] According to a number of

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conviction of Captain Alfred Dreyfus and noting its "symbolism for French nationalism" and national redemption).

[22] *See, e.g.*, OSBORN H. OLDROYD, THE ASSASSINATION OF ABRAHAM LINCOLN: FLIGHT, PURSUIT, CAPTURE, AND PUNISHMENT OF THE CONSPIRATORS 150 (1901) (describing conditions of confinement so deplorable that someone had written "Leave hope behind who enters here" at the entrance to the facility).

[23] *E.g.*, Aitken & Aitken, *supra* note 19, at 53–54 (describing issues raised by witnesses during the hearing of Dr. Mudd).

[24] *E.g.*, THE LIFE OF DR. SAMUEL A. MUDD 23, 28 (Nettie Mudd ed., 1906) (describing how Mudd's father, Henry Low Mudd, was "a wealthy planter and slave owner" with an estate spanning over a mile and how, following the Emancipation Proclamation, the Mudd family was forced to pay high wages to emancipated slaves "in order to make even a partial crop"); BISHOP, *supra* note 13, at 276 (noting of Mudd, "[u]ntil the Emancipation Proclamation, he owned eleven slaves" and that "[h]e owned a five-hundred-acre farm, and worked it").

[25] *E.g.*, WILLIAM HANCHETT, THE LINCOLN MURDER CONSPIRACIES 47 (1983) (observing that Mudd had Booth as a visitor overnight and even "introduced Booth to John Harrison Surratt, who became Booth's closest associate in the abduction conspiracy"); *see generally* EDWARD J. STEERS, HIS NAME IS STILL MUDD: THE CASE AGAINST DR. SAMUEL ALEXANDER MUDD (1997) (describing various indications of Mudd's involvement in the conspiracy).

[26] *E.g.*, STEERS, *supra* note 3, at 145–46 (describing how Mudd's actions to assist Booth and Herold were, in truth, motivated by his role as a "strong Confederate sympathizer and member of the Confederate underground").

[27] *E.g.*, James H. Johnston, *Swift and Terrible: A Military Tribunal Rushed to Convict After Lincoln's Murder*, WASH. POST, Dec. 9, 2001, at F01 ("Mudd was saved from the death sentence because a vote by two-thirds of nine was required for death. Only five of the required six thought Mudd should die.").

historians, the four years that he served in prison at Fort Jefferson was just about the right number of years of incarceration for the crime he committed.[28]

Dr. Mudd's conviction, along with seven others obtained by military tribunal instead of a trial before a civil court, has been one of the most persistent complaints of his supporters.[29] Because a civil jury failed to convict John H. Surratt, Jr., using the same evidence in 1867, two years later, this view has strongly reinforced supporters in their belief that the military commission was a hanging court.[30] F. Lee Bailey, remember him, co-counsel for Dr. Samuel Mudd in a replication of the trial and in an appeal at the University of Richmond Law School, predicted that the conspirators would not have been convicted by a civil jury.[31] But, given the inflamed conditions of 1865, it appears that a civil trial would also have found the conspirators guilty.[32]

By 1867, the interest of the public had moved on from the Lincoln murder to reconstruction policy, the power struggle in President Johnson's cabinet, and the possible impeachment of the President.[33] The Government's list of defendants, some of whom were held here at the Old Capitol Prison, and ultimately brought to trial at what is now Fort Lesley J. McNair, for the murder of Abraham Lincoln, was a curious one. It was curious not so much because U.S. citizens were dragged before this military body, as it was for the fact that so many individuals who might recently—or reasonably—have been indicted were not. The

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[28] *E.g.*, ELIZABETH LEONARD, LINCOLN'S AVENGERS: JUSTICE, REVENGE, AND REUNION AFTER THE CIVIL WAR 289 (2004).

[29] STEERS, *supra* note 3, at 239 (describing the favorable results of the Mudd family's "crusade" to clear Dr. Mudd's name).

[30] Turner, *supra* note 11, at 44, ¶ 37 ("When his trial before a civil court ended in a hung jury, the simple conclusion seemed to be that since the jury had heard basically the same case as was presented in 1865, that the 1865 trial was a miscarriage of justice.").

[31] Commenting that "the jurisdiction issue was the key," Mr. Bailey convinced a panel of distinguished judges that "Mudd's prosecution was one sledgehammer after another upon the constitution." Editorial, *Doctor Who Aided Lincoln's Killer Is "Cleared,"* N.Y. TIMES (Sun. Ed.), Feb. 14, 1993, at 40.

[32] The public widely criticized the decision to try the Lincoln conspirators with a military commission because they believed that an incensed civil jury would be more harsh and quicker to convict. *E.g.*, PITCH, *supra* note 4, at 312 (describing strong opposition to Stanton's decision).

[33] *See* MICHAEL LES BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON (1973) (providing a detailed account of the developments leading to President Johnson's impeachment).

Government decided not to prosecute Samuel Cox,[34] Thomas Jones,[35] and William Rollins,[36] all known to have aided Booth's escape or to have obstructed justice. There were also others who almost certainly knew about the conspiracy, but against whom no hard evidence had been garnered. Booth's brother, Junius Brutus, Jr., was the author of and recipient of some suspicious correspondence with John Wilkes Booth.[37] Other evidence suggested that Anna Surratt, the daughter of Mrs. Mary Surratt and sister of John Surratt, Jr., cannot have been unaware of the plotting going on around her at her mother's boarding house.[38] Furthermore, eighteen-year-old Private William ("Willie Jett") Starke was a commissary agent for the Confederate Army who dropped Booth off at Garrett Farm on his escape route.[39] Despite these questionable circumstances surrounding the assassination, not a single one of these individuals was indicted. Ultimately, the Government settled on nine conspirators: David E. Herold, Lewis Payne, George Atzerodt, Mary E. Surratt, Edman Spangler, Samuel B. Arnold, Michael O'Laughlen, and Dr. Samuel A. Mudd, all of whom were in custody. John H. Surratt, Jr., who had fled to Canada, would later go to Britain, Italy, and Egypt, until he was extradited back.[40]

However, a major question loomed: Before what tribunal should the conspirators be tried? For this answer, President Andrew Johnson turned to Attorney General James Speed, an Abraham Lincoln appointee, who wrote an opinion justifying trial by commission.[41] On 28 April 1865, Edwin Stanton, the Secretary of War, convinced the President that trial before a military commission, rather than before a civil court, was

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[34] MICHAEL W. KAUFFMAN, AMERICAN BRUTUS: JOHN WILKES BOOTH AND THE LINCOLN CONSPIRACIES 332 (2004) (describing how witness testimony could have supported the prosecution of Cox).

[35] *Id.* (describing how witness testimony could have supported the prosecution of Jones).

[36] *Id.* at 307 (describing how Rollins offered Booth and Herold assistance in crossing a river).

[37] *Id.* at 327–28.

[38] *See*, *e.g.*, VAUGHAN SHELTON, MASK FOR TREASON: THE LINCOLN MURDER TRIAL 82–83 (1965) (reprinting trail transcripts of the examination of Anna Surratt on her knowledge of visitors to the household).

[39] *See id.* at 294–95, 311–19 (providing further accounts of Willie Jett's involvement).

[40] *See*, *e.g.*, STEERS, *supra* note 3, at 232 (describing how Surratt was captured in Alexandria, Egypt, in February of 1867 and returned to the United States).

[41] Opinion on the Constitutional Power of the Military to Try and Execute the Assassins of the President, Op. Att'y Gen. 14 (July 1865), *available at* http://www.surratt.org/documents/Bplact16.pdf [hereinafter Opinion].

not only proper but necessary.[42] This was not a universally accepted opinion. Gideon Welles, Secretary of the Navy, was of the opinion that the Secretary of War, Stanton, had pressured Speed into this opinion. Welles wrote in his diary on 9 May, "The rash, impulsive, and arbitrary measures of Stanton are exceedingly repugnant to my notions, and I am pained to witness the acquiescence they receive."[43] Former Attorney General Bates, also appointed by President Lincoln, shared the view that Stanton was behind Speed's opinion. He wrote in his diary on 25 May 1865, "I am pained to be led to believe that my successor, Attorney General Speed, has been wheedled out of an opinion to the effect that such a trial is lawful. If the offenders are done to death by that tribunal, however truly guilty, they will pass for martyrs with half the world."[44] Bates exhibited an incredible sense of clairvoyance. Although Dr. Samuel A. Mudd was spared execution, his martyrdom began with the question of the jurisdiction of the military commission.

Questions arise from the fact that no real precedent existed for what the Government faced: the trial of civilian U.S. citizens engaged in paramilitary actions at the close of a civil war.[45] Military commissions were created during the Mexican War by General Winfield Scott to try civilians for crimes committed during a period of martial law and for violations of the laws of war.[46] Little restraint was imposed on the officials in charge of the conspirators.[47] Consequently, the tribunal commissioners' conduct illustrates the dangers inherent in the use of courts organized to convict. Even today, it calls for a more detailed examination of the military commission convened to try these particular eight civilians for the assassination of Abraham Lincoln.

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[42] *E.g.*, William C. Edwards & Edward Steers Jr., *Introduction* to THE LINCOLN ASSASSINATION: THE EVIDENCE, at xx–xxi (William C. Edwards & Edward Steers Jr. eds., 2009) ("The contention that Stanton was the force behind a military trial is supported by the fact that the original draft of Johnson's executive order, including the editorial changes, was in Stanton's handwriting on War Department stationary.").

[43] 2 DIARY OF GIDEON WELLES, SECRETARY OF THE NAVY UNDER LINCOLN AND JOHNSON 303–04 (Howard K. Beale ed., 1960).

[44] THE DIARY OF EDWARD BATES 1859–1866, at 483 (Howard K. Beale ed., 1933).

[45] *E.g.*, Edwards & Steers, *supra* note 42, at xxi ("While Congress had passed legislation on several occasions between 1862 and 1864 that recognized the use of military tribunals, the laws referred only to military personnel who were subject to the Articles of War.").

[46] *E.g.*, Elbridge Colby, *Courts-Martial and the Laws of War*, 17 AM. J. INT'L L. 109, 111 (1923) (discussing General Scott's motivations in issuing General Order 20, which was amplified by General Order 267).

[47] SHELTON, *supra* note 38, at 7 ("It isn't denied that the prosecutors violated every rule and tradition of impartial justice to obtain convictions and that the judges collaborated.").

The President was shot on the evening of 14 April 1865, and died the following morning at the Petersen House, where everyone who was anyone claimed to be present.[48] The small room in the Peterson House in which Lincoln was attended is only 9½-by-17.[49] Some of you have visited this building, which stands just feet across from Ford's Theatre. A co-author and I call this "the rubber room" because it has expanded exponentially with how the painters portrayed those who visited the dying President during the night.[50]

Five days later, the War Department had handbills distributed throughout the country offering fifty thousand dollars for J. Wilkes Booth and twenty-five thousand each for John H. Surratt and David E. Herold.[51] Persons harboring or assisting these fugitives would be treated as accomplices and subject to trial before a military commission and the punishment of death.[52] Both the type of trial and punishment were laid out in this poster.[53] Although the handbill was dated 20 April 1865, it was not until eight days later that the Attorney General of the United States submitted that brief note to President Andrew Johnson, stating the opinion, with no other rationale, that persons charged with the murder of the president can be rightfully tried by a military court.[54]

Secretary of War Stanton and Major General Joseph Holt, The Judge Advocate General, selected the officers who would sit on the commission named to try the accused.[55] At the first meeting of the commission on 8 May 1866, Commissioner, Major General C.B.

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[48] *See generally* BISHOP, *supra* note 13 (providing a detailed description of the events occurring at the Peterson house and the close attention paid to them).

[49] HARLOD HOLZER & FRANK S. WILLIAMS, LINCOLN'S DEATHBED IN ART AND MEMORY: THE "RUBBER ROOM" PHENOMENON 11 (1998)

[50] *See generally id.* (evaluating subtle and apparent differences in verbal and visual accountings of the evening's events).

[51] *See* Handbill, War Department, Washington (Apr. 20, 1865), *reprinted in* SWANSON & WEINBERG, *supra* note 5, at 50.

[52] *Id.* ("All persons harboring or secreting the said persons, or either of them, or aiding or assisting their concealment or escape, will be treated as accomplices in the murder of the President and the attempted assassination of the Secretary of State, and shall be subject to trial before a Military Commission and the punishment of DEATH.").

[53] *Id*.

[54] For further discussion of the context surrounding this communication, see THOMAS REED TURNER, BEWARE THE PEOPLE WEEPING: PUBLIC OPINION AND THE ASSASSINATION OF ABRAHAM LINCOLN 138 (1982).

[55] *See* PITCH, *supra* note 4, at 313–14 (suggesting that Speed's opinion provided a "shield" for the appointment of the commission and discussing President Johnson's delegation of selection to the Adjutant General).

Comstock, who was convinced that the Lincoln conspirators should be tried in a civilian court, aired these concerns.[56] Holt, who was advising the commission, and would sit with them, even in deliberations, responded that the Attorney General had decided they had jurisdiction.[57] On the next morning when Comstock appeared at the court, he as well as another officer, unhappy with the prospect of a military trial of civilians, received an order relieving both from this assignment.[58] Later that day, Stanton sent word through General Ulysses S. Grant—these were Grant's own staff members—that the action represented no reflection on the officers. Rather, removal was justified by the possibility of a conflict, as both men were members of his staff and the general had been an object of the assassination.[59]

The secret sessions ended abruptly when, responding to pressure in the press, President Johnson, on the recommendation of General Grant, ordered the trial open to the public.[60] The trial itself displayed little evidence of a presumption of innocence of the accused and strict impartiality on the part of the judges.[61] Critics explain that the members of the military commission prejudged the accused, most having rather undistinguished careers prior to their selection.[62] As Major General Comstock described the defendants' first appearance in court, they were brought before court, heavily chained and staggering, with black linen

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[56] *Id.* at 315 ("Unable to hold his tongue, Comstock questioned the Chief Military Prosecutor, Judge Advocate General Joseph Holt, about the legitimacy of the court's jurisdiction"); *id.* (describing how Comstock and Holt "clashed" over various issues).
[57] *Id*.
[58] *Id*.
[59] *Id.* In his diary, Comstock noted, "We were both very much delighted," at the prospect of being removed from the commission. *Id.* (citing diary).
[60] *E.g*., Johnston, *supra* note 27, at F01:

> It was Grant who caused the commission to abandon secrecy. He had been called as a witness on May 12 to establish the fact that the District of Columbia was under martial law. Reporters corralled him outside the courtroom to complain about their exclusion. Grant led them to the White House to talk with the president. The proceedings were opened the next day.

[61] *E.g.*, Turner, *supra* note 11, at 37, ¶ 25-6 (observing, "The military commission which was finally convened has been stereotyped by historians as a vindictive group of military officers who were given a license to legally execute, and seized it willingly.").
[62] *E.g*., SHELTON, *supra* note 38, at 60–61 ("All appeared to be qualified largely by their prejudices, total ignorance of the law, and subservience to the will of the prosecutors.").

masks covering their faces, except tips of their noses and mouths.[63] It was a horrible sight.[64]

The military officers comprising the court displayed their prejudice on several occasions. When General Edward Johnson, Confederate States of America, was called to testify, one officer on the commission moved that Johnson be ejected from the court as an incompetent witness on account of his notorious infamy.[65] Because Johnson had been educated at West Point and then had resigned from the Army and bore arms against the United States, he appeared before the court with red hands covered with the blood of his loyal countrymen.[66] The motion to oust him was seconded.[67] However, before Johnson could be removed, Judge Advocate General Holt, who also served as the chief prosecutor for the commission,[68] intervened, advising the commission that the rule of law did not authorize the court to declare the ex-Confederate an incompetent witness, however unworthy of credit he may be.[69]

Holt was also obliged to intervene when a member of the court challenged the right of Senator Reverdy Johnson, one of the great lawyers of that period,[70] to appear as counsel for one of the defendants.[71] After some debate, the commission allowed a stunned Johnson to represent his client.[72] Holt, nevertheless, presented testimony that had nothing to do with the charges against the defendants but would serve to influence adversely the judges and the public at large against the Confederacy as well as the defendants. Holt introduced evidence that concerned plots by the Confederate Secret Service to stage raids from

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[63] PITCH, *supra* note 4, at 314.

[64] Brevet Major General August Kautz, one of the judges, compared the sight of the hooded accused to his worst imagination of the improprieties of the Inquisition. *Id.* at 314–15.

[65] THE TRIAL OF ASSASSINS AND CONSPIRATORS AT WASHINGTON CITY, D.C., MAY AND JUNE 1865 FOR THE MURDER OF PRESIDENT ABRAHAM LINCOLN 113 (1865), *available at* http://www.archive.org/details/trialofallegedas00unit [hereinafter VERBATIM ACCOUNT] (detailing General Howe's motion to eject General Johnson as an incompetent witness was).

[66] *Id*.

[67] *Id.* (providing General Ekin's additional justifications).

[68] KAUFFMAN, *supra* note 34, at 340 (observing that General Holt served as both the commission's prosecutor and its legal advisor).

[69] VERBATIM ACCOUNT, *supra* note 65, at 113.

[70] PITCH, *supra* note 4, at 320 ("Johnson . . . was a distinguished member of the US Senate from Maryland and a former attorney general of the United States.").

[71] VERBATIM ACCOUNT, *supra* note 65, at 21.

[72] *Id.* at 22–23.

Canada on U.S. cities, the attempt to burn New York City, the effort to spread disease throughout the Union Army by use of contaminated clothing, and, perhaps most unfair of all, witness testimony recounting the starvation of federal Army prisoners at Libby, Belle Isle, and Andersonville prisons.[73] The chained and hooded prisoners accused of complicity in the murder of President Lincoln were somehow connected with these atrocities, if one could believe Judge Advocate General Holt.

In the closing statements of the attorneys, Reverdy Johnson challenged the right of the military to sit in judgment of the eight defendants.[74] The Constitution allowed the *writ of habeas corpus* to be suspended, but, in no way, permitted the suspension of other rights secured to the accused. The Constitution and the laws determine in which court civilians would be tried, but the defendants in the Lincoln conspiracy trial were doomed. As a Holt biographer concluded, the judge advocates exercised an undue influence upon the decision of the untrained military officers.[75] An example of the advantage enjoyed by the judge advocate is particularly telling. Using the printed transcript of the fifty-three-day trial, a friend of mine, Professor Joseph George, Jr., found the special judge advocate John A. Bingham had raised objections to evidence introduced by the defense on thirty-four occasions.[76] In all instances, the objections were sustained.[77] Comparatively, defense attorneys raised objections fifteen times, which were overruled on thirteen occasions.[78] When the military officers, along with Holt and Bingham, deliberated the fate of the defendants behind closed doors at the end of the trial, the judge advocates were evidently under the influence of the Secretary and wanted all eight defendants hanged. The commission voted, however, to condemn only four to the gallows and the remaining four to prison terms. The judge advocates were also very much put out when five of the officers sitting on the commission signed a paper recommending clemency for Mary Surratt, one of the defendants sentenced to be hanged.[79]

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[73] BENN PITMAN, THE ASSASSINATION OF PRESIDENT LINCOLN AND THE TRIAL OF THE CONSPIRATORS 46–62 (1954).
[74] VERBATIM ACCOUNT, *supra* note 65, at 158.
[75] *See*, *e.g.*, LEONARD, *supra* note 28, at 79.
[76] PITTMAN, *supra* note 73, at 42–62.
[77] *Id.*
[78] *Id.*
[79] Some suggest that the act of recommending clemency for Mrs. Surratt "indicates that [the commission's] portrayal as being cruel and insensitive is not accurate." Turner, *supra* note 11, at 29, ¶ 4.

After the sentencing recommendations were completed, the next step was for The Judge Advocate General to take the commission's findings either to the Secretary of War or, as in this instance, to the President himself as capital offenses were involved. In this case, Holt made a slight but significant change in his procedure. Holt's note to President Johnson, dealing with the conviction of the Lincoln conspirators, urged the President to approve the findings of the court but said nothing of the recommendation for clemency on behalf of Mrs. Surratt.[80] Holt later insisted that he had included the petition with the record of the trial when he delivered the documents to the President.[81] Johnson claims that he never saw that petition.[82] But, whether or not Holt included the request for clemency, he should have informed the President of that fact in his covering statement, as he had done on previous occasions.

Attorney General James Speed, who was requested by the President to review the legality of the commission's proceedings, had previously given the opinion that trials of civilians by military commissions were legal in time of war.[83] However, it was not until July 1865, after the trial was completed, that Speed issued his detailed opinion justifying the legality of the military commission. In Speed's analysis, Booth and his associates were secret, active, public enemies, and when Booth said, while mortally wounded, "Say to my mother that I died for my country," after citing the Virginia motto, "*Sic Semper Tyrannis*,"[84] Booth demonstrated that he was not an assassin from private malice but that he acted as a public foe.[85] As such, Speed said:

> If the persons who are charged with the assassination of the President committed the deed as public enemies, as I believe they did—and whether they did or did not is a question to be decided by the tribunal before which they are tried—they not only can, but ought to be tried before a military tribunal. If the persons charged have offended

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[80] ELIZABETH STEGER TRINDAL, MARY SURRATT: AN AMERICAN TRAGEDY 203 (1996) ("It would seem that on Mary Surratt's sentencing pages there would have been a note stating that a plea for clemency was attached! However, no such notification existed!").
[81] STEERS, *supra* note 3, at 227 ("Holt was . . . emphatic, claiming that he had shown the petition to Johnson who ignored it.").
[82] *Id.* ("When word eventually leaked out that a clemency plea was rejected by Johnson, he emphatically denied ever seeing a copy of it and claimed that he was not made aware of it until some time after the hanging.").
[83] Opinion, *supra* note 41.
[84] Military Commissions, 11 OP. ATT'Y GEN. 297–317 (1865) (Opinion on the Constitutional Power of the Military to Try and Execute the Assassins of the President).
[85] *Id.*

> against the laws of war, it would be as palpably wrong for the military to hand them over to the civil courts, as it would be wrong in a civil court to convict a man of murder who had, in time of war, killed another in battle.[86]

This opinion was written after the four defendants had been executed.[87]

One desperate attempt was made on the morning of the execution to save Mrs. Surratt.[88] Her attorneys went before Judge Andrew Wylie of the District of Columbia Trial Court requesting him to issue a *writ of habeas corpus* and demanding that the U.S. Army surrender Mrs. Surratt to the court.[89] General W.S. Hancock, accompanied by Attorney General Speed, returned the writ and refused to surrender Mrs. Surratt following instructions of the President.[90] When Hancock refused to give up his prisoner, Wylie was powerless to take any further action. Thereafter, Mrs. Surratt was doomed.

Hindsight is always twenty-twenty, as we know. We now know that with Lee's surrender of the Army of Northern Virginia at Appomattox on April 9th, the soldiers of the Confederacy marched off the battlefield into the peaceful glory of the legend of the lost cause.[91] But, in late April and early May of 1865, the direction of the Rebel soldiers' march was not nearly so certain. Had Lee or some other charismatic Southern leader issued the call to guerilla warfare, other still-armed and still-angry Southern soldiers may well have taken up the call on the very outskirts of the nation's capital.[92] Civil wars historically end in this fashion far more commonly than did the American Civil War.[93]

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[86] *Id.*
[87] James Speed, *Legality of the Conspiracy Trial: Opinion of Attorney-General Speed*, N.Y. TIMES, Aug. 13, 1865, at 3.
[88] *See*, *e.g.*, DAVID MILLER DEWITT, THE ASSASSINATION OF ABRAHAM LINCOLN AND ITS EXPIATION 138–41 (1909) (describing efforts to halt the execution).
[89] *Id*. at 138.
[90] *Id.* at 139.
[91] *E.g.*, STEERS, *supra* note 3, at 108 ("After Lee's surrender and with the government on the run, the remaining Confederate forces still at large were helpless to offer any serious continued resistance . . . . rational people knew that the end had come.").
[92] *Id.* (observing that "there were still nearly 175,000 Confederate Soldiers scattered throughout the South who had not yet surrendered").
[93] For example, consider the long-running conflict between Ireland and Great Britain.

At the time of Attorney General Speed's opinion, the trial before a military commission was proper[94] and President Johnson's order establishing the military commission—the idea that a state of war existed in Washington, D.C.—was not a mere fanciful notion. One of the myths that surrounds the assassination of President Lincoln is that his death was uniformly mourned throughout the South where it was seen as a catastrophe, at least by all but the most ardent firebrands.[95] In truth, Southerners reacted to Lincoln's death much the same as Americans reacted to the news of the deaths of Hitler, Mussolini, and Stalin, seeing the assassination as the fitting end for a tyrant.[96]

Washington, D.C., remained a fortified city and headquarters for directing military operations against the Rebels during the trial, with Union sentries controlling the flow of people into and out of the nation's capital.[97] The war was still in effect, and President Andrew Johnson did not declare martial law over and peace within the United States until August 20, 1866, over a year after the trial.[98] Whether it was politically astute to try the conspirators before a military commission, or whether the conspirators received fair trials before the commission—which we now know they had not—are not the issues here. The question initially is whether the United States had the legal right to try the conspirators before a military commission in the first place. The attention to due process, protocol, and other processes would come next.

After the 1866 *Milligan* decision,[99] in which the U.S. Supreme Court disavowed military tribunals in favor of trials in civil courts where they were in operation,[100] Samuel Mudd sought a writ of habeas corpus from

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[94] *See* Opinion, *supra* note 41 (describing the basis for military jurisdiction to try the conspirators).

[95] *See* discussion accompanying notes 5–10.

[96] STEERS, *supra* note 3, at 16 ("To many in the South, Lincoln's death was nothing more than tyrannicide.").

[97] *E.g.*, DEWITT, *supra* note 88, at 102–03 (describing the activation of "a brigade of volunteers and a detachment of the veteran reserve corps," as well as the involvement of other armed soldiers as the commission proceeded).

[98] E.B. LONG & BARBARA LONG, CIVIL WAR DAY BY DAY 696 (De Capo Paperback 1983) (reprinting 1971 Doubleday) (reprinting President Johnson's order, "I do further proclaim that said insurrection is at an end and that peace, order, and tranquility, and civil authority now exist in and throughout the whole of the United States of America.").

[99] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866) (mem.).

[100] *Id.* at 118–19, 126 ("[I]t is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could well be said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so.").

Chief Justice Salmon P. Chase, who turned him down.[101] Dr. Mudd petitioned the Florida courts, arguing that the military court lacked jurisdiction and that he and the other prisoners held at Fort Jefferson should go free. In denying the appeal, Judge Thomas J. Boynton upheld the military trial.[102] The heart of his opinion is that the President was assassinated not from private animosity nor any reason other than a desire to impair the effectiveness of military operations and enable the rebellion to establish itself into a government.[103] The act was committed in a fortified city, which had been invaded during the war and to the northward as well as the southward of which battles had many times been fought.[104] This same city was also the headquarters of all the armies of the United States from which daily and hourly went military orders.[105] The President is the Commander-in-Chief of the Army and the President who was killed had many times made distinct military orders under his own hand without the formality of employing the name of the Secretary of War or commanding general.[106] Ultimately, then, it was not Mr. Lincoln who was assassinated, but the Commander-in-Chief.

For military reasons, I find no difficulty, therefore, in classing the offense as a military one and with this opinion arrive at the necessary conclusion that the proper tribunal for the trial of those engaged in it was a military one. In retrospect, Boynton's arguments, like some of Speed's, have validity. The longtime reaction against the military commission comes from a failure to prove a Confederate conspiracy

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[101] It is thought that Justice Chase's reason for denying the appeal was the existence of the President's 1869 pardon, which rendered the decision moot. Susan Low Bloch & Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia*, 90 GEO. L.J. 549, 559 n.43 (2002).

[102] *See Ex parte* Mudd, 17 F. Cas. 954 (S.D. Fla. 1868) (No. 9899).

[103] Although the case materials have been lost, part of the Judge's opinion was reproduced, in which he refused to provide any relief on the following grounds:

> The President was assassinated not from private animosity, nor any other reason than a desire to impair the effectiveness of military operations, and enable the rebellion to establish itself into a Government; the act was committed in a fortified city, which had been invaded during the war . . . . [This] offense [was] a military one . . . [and] the proper tribunal . . . was a military one.

Bloch & Ginsburg, *supra* note 101, at 558 n.42 (citing a newspaper clipping retained by the Surratt Society in which portions of the opinion were reproduced).

[104] *Ex parte* Mudd, 17 F. Cas. 954.

[105] *Id*.

[106] *Id*.

beyond Booth and his friends. Some, like assassination scholar Edward Steers, Jr., believe that such a conspiracy did, in fact, exist, and that within a few years we may look differently upon the military trial of the Lincoln conspirators and upon military tribunals generally.[107]

Today, the nation finds itself questioning the Government's policies regarding military tribunals. And, despite the passage of time, the questions themselves are the same: is it appropriate to try enemy combatants, removed from the field of battle, in military, as opposed to civilian, courts? And, if so, what would constitute constitutional due process? How can we ensure that such trials protect the civil liberties of the accused, while protecting our national security?[108]

Despite the fact that the threat to national security today is at least as great as Lincoln encountered during the Civil War, and President Johnson encountered just after Lincoln's assassination, the administration of President George W. Bush had come nowhere as close to Lincoln in affecting civil liberties afforded by the Constitution to persons tried by military commissions. During the Civil War, under the aegis of the Lincoln Administration, 75,961 Union Army trials took place.[109] Of these, 5460 were trials before military commissions and all were trials of civilian United States citizens.[110] In stark comparison, the Bush administration used commissions to prosecute only three foreign detainees charged with committing terrorist acts.[111] Only thirteen of the remaining 225 detainees at the Guantanamo Bay detention facility have even been assigned to prosecution by military commission.[112]

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[107] *See generally* STEERS, *supra* note 3; *see also* Turner, *supra* note 11, at 33, ¶ 16 (describing various views that "the assassination was a wider plot against the government and one in which the South was involved").

[108] For cases discussing such considerations, see, for example, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), and *Rasul v. Bush*, 542 U.S. 466 (2004); *see also* Frank J. Williams et al., *Still a Frightening Unknown: Achieving a Constitutional Balance Between Civil Liberties and National Security During the War on Terror*, 12 ROGER WILLIAMS U. L. REV. 675 (2007) (addressing various related concerns).

[109] E-mail from Thomas P. Lowry, historian, to author (8 Dec. 2005, 17:33 EST) (on file with author) (reporting his research in National Archives Record Group 153).

[110] *Id.*

[111] *See* United States v. David M. Hicks (Commission); United States v. Salim Hamdan (Commission); United States v. Ali Hamza Ahmad Suliman al Bahlul (Commission).

[112] Randy James, *A Brief History of Military Commissions*, TIME, May 18, 2009, *available at* http://www.time.com/time/nation/article/0,8599,1899131,00.htm.

On 20 January 2009, Barack Obama took the oath of office as the forty-fourth President of the United States, setting the stage for a new approach to balancing civil liberties and national security. President Obama often invokes the words and images of Lincoln.[113] Indeed, President Obama can claim many similarities to Lincoln: both were lawyers who came from humble beginnings; both are veterans of the Illinois Legislature; both are accomplished orators and masters of the English language; and both were, at least at first, seemingly unlikely candidates for president.[114]

During his presidential campaign, Obama routinely challenged the military commissions system. As he stated in August 2008, rather than rely on military commissions, "It's time to better protect the American people and our values by bringing swift and sure justice to terrorists through our courts and our Uniform Code of Military Justice."[115] President Obama's plan was based, at least in part, on the ideal that such a shift from the Bush Administration would "create a global wave of diplomatic and popular goodwill that could accelerate the transfer of some detainees to other countries."[116]

True to his campaign promises, shortly after taking office in January 2009, the new President signed several executive orders aimed at closing the detention facility at Guantánamo Bay within one year;[117] ending the Central Intelligence Agency's worldwide network of secret rooms to imprison terror suspects; as well as imposing the requirement that all U.S. personnel conduct interrogations that "follow the noncoercive methods of the Army Field Manual."[118] In addition, the President ordered a 120-day suspension of the military commissions.[119] President

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[113] *See*, *e.g.*, Susan Schulten, *Barack Obama, Abraham Lincoln, and John Dewey*, 86 DENV. U. L. REV. 807 (2009) (comparing imagery as well as historical facts).
[114] *Id.*
[115] Peter Finn, *Guantánamo Closure Called Obama Priority*, WASH. POST, Nov. 12, 2008, at A1.
[116] *Id.*
[117] Exec. Order No. 13,492, § 3, 74 Fed. Reg. 4897 (Jan. 22, 2009).
[118] Scott Shane et al., *Obama Reverses Key Bush Policy, but Questions on Detainees* Remain, N.Y. TIMES, Jan, 23, 2009, at A16; *see also* Exec. Order No. 13,491, § 3(b), §74 Fed. Reg. 4893 (Jan. 27, 2009) (prohibiting "any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3"); U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS (6 Sept. 2006).
[119] Peter Finn, *Obama Set to Revive Military Commissions: Changes Would Boost Detainee Rights*, WASH. POST, May 9, 2009, at A1.

Obama declared that such executive orders would send to the world the message that the "United States intends to prosecute the ongoing struggle against violence and terrorism . . . vigilantly . . . in a manner that is consistent with our values and ideals."[120]

The President also directed that each detainee's case be reviewed to determine who could be repatriated to third-party nations or referred to an American civilian court.[121] President Obama personally reviewed the case of Ali al-Marri, detained without charge in a military jail in South Carolina.[122] The presidential check on the commission system was as prominent in the Lincoln Administration. President Lincoln, too, personally reviewed certain cases before the military commissions of the Civil War.[123] After the Sioux uprising in Minnesota that killed hundreds of white settlers in 1862, the military court had sentenced 303 Sioux to death.[124] These cases came before Lincoln to review as final judge.[125] Yet, despite great pressure to approve these verdicts, Lincoln ordered that the complete records of the trials be sent to him.[126] Working deliberately, Lincoln reviewed each case, one-by-one.[127] Even though he was embroiled in the task of administering the government during the Civil War, Lincoln carefully worked through the transcripts for a month to sort out those who were guilty of serious crimes.[128] Ultimately, Lincoln commuted the sentences of 265 defendants, and only thirty-nine of the original 303 were executed.[129] Although Lincoln was criticized for this act of clemency, he responded, "I could not afford to hang men for votes."[130]

Despite President Obama's criticism of the military commissions system, and his suspension of its use, the commissions did remain, as his

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[120] Bobby Ghosh, *Obama Orders Gitmo Closed: Now the Hard Part*, TIME, Jan. 22, 2009, *available at* http://www.time.com/time/nation/article/0,8599,18 72158,00.html.
[121] Jess Bravin & Siobhan Gorman, *Obama Closes Detention Network*, WALL ST. J., Jan. 23, 2009, at A3.
[122] Shane et al., *supra* note 118, at A16.
[123] DAVID HERBERT DONALD, LINCOLN 394 (1996).
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id*.
[130] *Id.* at 394–95.

Secretary of Defense stated, "very much on the table."[131] Then, only a few months after he suspended such tribunals, President Obama brought them back—but not without changes. The new rules and procedures of the commissions were intended to "offer terrorism suspects greater legal protections."[132] Such protections would "block the use of evidence obtained from coercive interrogations, tighten the admissibility of hearsay testimony and allow detainees greater freedom to choose their attorneys."[133] Most detainees would be transferred from Guantánamo to some domestic United States prison where they would remain until they receive a *habeas corpus* hearing (although those who pose the highest security risk would remain at Guantánamo to be tried by a military tribunal).[134] The President declared that these changes were "the best way to protect our country, while upholding our deeply held values."[135]

President Obama stated that he would also consider following Lincoln's example of employing preventive detention measures to hold members of foreign terrorist organizations before they are able to carry out attacks. During the Civil War, the Lincoln administration detained some 13,000 citizens in northern states—not even foreign detainees—preemptively, under the fear that they either would engage in or encourage acts of rebellion against the Union. He defended the detentions with his ever-keen understanding of military necessity:

> Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wiley [sic] agitator who introduces him to desert? This is none the less injurious when effected by getting a father, or brother, or friend, into a public meeting, and there working upon his feeling, till he is persuaded to write the soldier boy, that he is fighting in a bad cause, for a wicked administration of contemptible government, too weak to arrest and punish him if he shall desert. I think that in such a case, to silence the agitator, and save the boy is not only constitutional, but, withal, a great mercy.[136]

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[131] William Glaberson, *U.S. May Revive Guantánamo Military Courts*, N.Y. TIMES, May 2, 2009, at A12.
[132] Finn, *supra* note 119.
[133] *Id.*
[134] James, *supra* note 112.
[135] *Id.*
[136] Letter from President Abraham Lincoln to Hon. Erastus Corning and Others (June 12, 1863), *reprinted in* 6 COLLECTED WORKS, *supra* note 2, at 266–67.

Undoubtedly, President Obama learned the impracticalities of trying certain terrorist suspects in civilian courts. But he seems to have realized that certain rights enjoyed in a civilian tribunal are impossible to maintain in the face of the current national security threat. In sensitive cases involving evidence secretly compiled by an intelligence agency, for example, it is imprudent to have such information aired in an open, civilian court. Justice can still be served under a different framework that protects national security interests but ensures a fair and impartial hearing. Abraham Lincoln knew of this necessity during the Civil War, as did Franklin Roosevelt during the Second World War.[137] It appears President Obama has, himself, embraced this necessity today.

Reversing his original determination to end the military commissions was an act of political courage for President Obama. Surely, the president, feeling the loneliness of command, knew the ire such a decision would draw—especially from his most ardent campaign supporters. One human rights advocate declared that by "resurrecting this failed Bush administration idea, President Obama is backtracking dangerously on his reform agenda."[138] Yet, as Justice Oliver Wendell Holmes wisely noted, "[w]ar opens dangers that do not exist at other times. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that no court could regard them as protected by any constitutional right."[139]

Such was true during Lincoln's presidency, and such was true in the atmosphere surrounding the trial of the assassination conspirators. The lessons of yesterday serve as a useful guide to the very similar questions of today. We must take care that the mistakes of the past, brought about by passion and outrage, are not repeated, but that our very security is not sacrificed in the process.

On 12 February 1866, both houses of Congress convened to commemorate the emancipator's birth and here the historian, George Bancroft, praised him as a leader who was molded by events rather than one who made the times take shape in accordance with his will.[140] And

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[137] *See Ex Parte* Quirin, 317 U.S. 1 (1942) (addressing the trial of German saboteurs captured on U.S. soil with explosives).
[138] Editorial, *Anger at Obama Ruling*, BBC NEWS, *available at:* http://news.bbc.co.uk/2/hi/8052999.stm.
[139] Schenck v. United States, 249 U.S. 47, 52 (1919).
[140] *See generally* GEORGE BANCROFT, MEMORIAL ADDRESS ON THE LIFE AND CHARACTER OF ABRAHAM LINCOLN (Feb. 12, 1866).

today, and this year, we celebrate the 200th birthday of Abraham Lincoln and recognize his great leadership and skill in leading our country.

Thank you very much.

7 DEADLY SCENARIOS[1]

REVIEWED BY MAJOR ANN B. CHING[2]

In Greek mythology, Apollo cursed Cassandra with the ability to accurately predict disasters, but the inability to convince anyone to believe her.[3] Perhaps that is how Andrew Krepinevich felt as he testified before the House Budget Committee in 1999.[4] "[F]uture challenges to our security are likely to be very different from those we face today," he stated, referring to the Department of Defense (DoD) fiscal year 2000 budget request.[5] Krepinevich criticized the DoD's request to fund "submarines, aircraft carriers, and fighter jets" without considering the need for weapons and equipment to better respond to the coming century's "revolutionary times."[6]

Ten years later, his testimony seems eerily prescient as the United States struggles with how to fund, and fight, a war where modern technology must compete with C4 and cell phones. Against this backdrop, Krepinevich takes his concerns from the halls of Congress to American bookstores in *7 Deadly Scenarios*.[7] This book is a no-holds-barred look at a future where everything that can go wrong, will. Krepinevich creates richly detailed scenarios that add a thrill factor the casual reader can appreciate.[8] He falls short, however, in providing a methodology to prioritize planning for the various catastrophes he describes. Ultimately, *7 Deadly Scenarios* is most valuable as a starting point when thinking about the various issues that may arise during any

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[1] ANDREW F. KREPINEVICH, 7 DEADLY SCENARIOS (2009).

[2] U.S. Army. Student, 58th Judge Advocate Officer Graduate Course, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.

[3] *Cassandra*, ENCYCLOPÆDIA BRITANNICA ONLINE, http://www.britannica.com/EBchecked/topic/98088/Cassandra (last visited Aug. 31, 2009).

[4] Katherine McIntire Peters, *Grave New World*, GOV'T EXECUTIVE, Aug. 30, 1999, *available at* http://www.govexec.com/features/99top/08a99s3.htm.

[5] *Id.*

[6] *Id.*

[7] KREPINEVICH, *supra* note 1. This is the author's second book. His first was published while he was still an active duty Army officer. ANDREW F. KREPINEVICH, THE ARMY AND VIETNAM (1988). Krepinevich has also written for *Foreign Affairs*, *Issues in Science and Technology*, and other journals. *See* Ctr. for Strategic & Budgetary Assessments, Andrew F. Krepinevich, Jr., http://www.csbaonline.org/2006-1/5.AboutUs/Staff_Directory.dir/Krepinevich,_Andrew.php (last visited Sept. 5, 2009).

[8] Indeed, the publisher states this book is "[a]s riveting as a thriller." Random House Inc., *7 Deadly Scenarios*, http://www.randomhouse.com/catalog/display.pperl/9780553805390.html (last visited Sept. 5, 2009).

given catastrophic event. Serious study on this topic, however, requires additional research to place these scenarios in their proper context.

The premise of *7 Deadly Scenarios* is not unique. Throughout the decades, sounding the doomsday alarm has been a recurring theme among fiction and non-fiction writers alike. Any child of the 1980s will remember losing sleep over the coming nuclear war, the Soviet-Cuban invasion, or the economic dominance of the Japanese.[9] These predictions ultimately fizzled, which might shed doubt upon the fortune-telling genre's utility in practical strategic planning. In *7 Deadly Scenarios*, however, Krepinevich takes pains to remind his readers that his scenarios are not "an attempt to predict the future."[10] Rather, he chooses to create "stories about how future events *might* come to pass."[11] A fine distinction, perhaps, but one that allows him latitude in crafting his attention-getting scenarios.

Krepinevich opens with a cautionary tale that emphasizes the importance of creating, and heeding, scenarios. He recounts the U.S. Army's decision to dismiss the results of a 1932 war game that predicted a catastrophic air attack on Pearl Harbor, based on the belief that "it was improper to begin a war on a Sunday."[12] Failures such as these, Krepinevich argues, are based on planning for the last war, rather than the next.[13] One way to work around this barrier, he posits, is to "reduce the range of uncertainty surrounding the future" through vignettes that build upon "certain trends—political, economic, social, military-technical, etc."[14]

To demonstrate this thesis, the bulk of the book consists of the promised "deadly scenarios." Rather than stray into the fantastic, Krepinevich focuses on issues of contemporary concern: domestic terrorism, pandemic flu, and the collapse of Iraq, among others.[15] To

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[9] *See, e.g.*, *The Day After* (ABC television broadcast Nov. 20, 1983) (aftermath of nuclear war); RED DAWN (United Artists 1984) (Soviet-Cuban invasion of America); GUNG HO (Paramount Pictures 1986) (Japanese corporation takes over an American car manufacturing plant).

[10] KREPINEVICH, *supra* note 1, at 285.

[11] *Id.* at 10 (emphasis added).

[12] *Id.* at 3.

[13] *Id.* at 10–12.

[14] E-mail from Andrew Krepinevich to author (Aug. 31, 2009, 09:28 EST) [hereinafter Krepinevich e-mail] (on file with author).

[15] The seven scenarios are "The Collapse of Pakistan," "War Comes to America," "Pandemic," "Armageddon: The Assault on Israel," "China's 'Assassin's Mace'," "Just

address these issues, *7 Deadly Scenarios* essentially creates seven parallel universes in which each scenario unfolds without the influence of the others.[16] Thus, readers looking for a comprehensive study of the global future will have to look elsewhere.[17] This structure does, however, allow the author to focus exclusively on each chapter's main issue.

Further enhancing the uncertain nature of the scenarios is Krepinevich's choice to use a quasi-fictional narrative style. Each scenario is grounded in present day events and circumstances, but then fast-forwards to the near future—2010, 2011, and beyond.[18] In this imagined future, U.S. Presidents named Norville Dickson and John Dannemeyer deal with avian flu and (yet more) crises in the Middle East.[19] Although his style occasionally veers toward melodrama,[20] for the most part Krepinevich effectively weaves actual history, present-day facts, and projected events into his scenarios.

A brief conclusion follows the scenarios.[21] Do not expect to find concrete solutions; Krepinevich specifically states that the scenarios exist only "to help military planners reduce the risk inherent in their work."[22] The author identifies what he terms "barriers to good strategy," such as "mistaking objectives for strategy," failing "to understand the enemy," and the "varying competence of senior national security decision-makers."[23] To counteract these barriers, Krepinevich's primary suggestion is to create a latter-day version of Eisenhower's Planning

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Not-on-Time: The War on the Global Economy," and "Who Lost Iraq?" KREPINEVICH, *supra* note 1, at 30–284.

[16] The scenarios take place in roughly the same timeline, somewhere between 2008 and 2020, but no scenario mentions the others. *See id.*

[17] *See, e.g.*, GEORGE FRIEDMAN, THE NEXT 100 YEARS: A FORECAST FOR THE 21ST CENTURY (2009) (taking a decade-by-decade look at how global fortunes may rise and fall over the next century); ROBERT J. SHAPIRO, FUTURECAST (2008) (discussing, among other issues, global energy crises and climate change in the coming decade).

[18] *See supra* note 16.

[19] *See* KREPINEVICH, *supra* note 1, at 109, 246.

[20] *See, e.g.*, *id.* at 69 n.11 ("The searing image of Susan Davis, sobbing and on her knees in despair, as she vainly begs National Guard troops to let her enter the contaminated area to search for her two missing children, will long remain part of the nation's consciousness.").

[21] *See id.* at 285–317 (comprising thirty-two of 317 pages, or a little over ten percent of the total text).

[22] *Id.* at 286.

[23] *See id.* at 291–93.

Board.[24] In the final pages, Krepinevich applies his years of experience as a military planner and defense strategist as he details his vision to revitalize "concepts of operations," training, and facilities.[25] Most likely, only those experienced in defense planning will fully comprehend the more technical suggestions. Any reader, however, can appreciate his salient theme: "time is growing short, and a sense of urgency is needed."[26]

Indeed, Krepinevich's zeal to create this "sense of urgency" contributes to both the strengths and weaknesses of his work. At his best, the author uses recent events as a plausible point from which his future world quickly spirals downward. For example, in his scenario "Just Not-on-Time," the author begins with the fascinating look at the founder of today's "global shipping network"—Malcolm McLean, the man who created standardized shipping containers.[27] Krepinevich then demonstrates the vulnerabilities of this network by piling on disasters. First, an attack by rebels severely disrupts Nigerian oil production, triggering subsequent attacks by various nonstate actors against oil production in Mexico and Indonesia.[28] These incidents culminate in a catastrophic attack by "radical Muslim elements" on Saudi oil fields, producing "the mother of all oil fires."[29] Just when things seem bad, they get worse: a "dirty bomb" in a shipping container detonates in Norfolk, Virginia, virtually shutting down the nation's ports,[30] and a cyberattack on "Black Friday" deals a sharp blow to the U.S economy.[31]

Krepinevich's discussion of cyberattacks and their ramifications is the highlight of this chapter—and perhaps the book. In his subsection "The Cyberblockade," he discusses some real-life incidents, including

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[24] *Id.* at 295–97 (describing Eisenhower's Planning Board, a group "which developed policy papers to be considered by the [National Security Council]").
[25] *See id.* at 300–02, 307–14. A retired Army officer and director of the Center for Strategic and Budgetary Assessments, a defense "think tank," Krepinevich has an M.P.A. and Ph.D. from Harvard University. *See* Author Spotlight, Andrew Krepinevich, http://www.randomhouse.com/author/results.pperl?authorid=78735 (last visited Sept. 6, 2009).
[26] KREPINEVICH, *supra* note 1, at 306.
[27] *See id.* at 212–17.
[28] *Id.* at 220–24.
[29] *Id.* at 230–32.
[30] *Id.* at 240.
[31] *Id.* at 236–38.

the 2007 cyberattacks on Estonia.[32] Krepinevich expertly dissects the economic and political consequences of "cross-border digital warfare," even touching on issues of interest to military lawyers.[33] Furthermore, the effects he describes are alarmingly realistic.[34] Overall, Krepinevich achieves his "sense of urgency" in "Just Not-on-Time" while avoiding hyperbole.

In contrast, the fear-mongering in the scenario "Pandemic" detracts from its credibility.[35] This is disappointing, as the contemporary threat of a "swine" flu pandemic makes this chapter one of *7 Deadly Scenario*'s most relevant.[36] Although the chapter contains helpful background on the development of pandemics,[37] as well as an overview of some issues the United States faces when dealing with vaccine and anti-viral production and stockpiling,[38] its overall tone foregoes the rational and instead plays upon readers' anxiety. During the avian flu pandemic of 2011, mothers commit suicide *en masse*; a Yankees pitcher collapses in convulsions on the pitcher's mound; and New York's mayor jumps from

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[32] *Id.* at 235; *see also* Joshua Davis, *Hackers Take Down the Most Wired Country in Europe*, WIRED, Aug. 21, 2007, *available at* http://www.wired.com/politics/security/magazine/15-09/ff_estonia?currentPage=all (describing the distributed denial-of-service (DDoS) attack that nearly shut down Estonia's computer infrastructure).

[33] *See* KREPINEVICH, *supra* note 1, at 236. One prominent issue for legal scholars is the attribution of cyberattacks to state or non-state actors. The difficulty in identifying the source of cross-border cyberattacks complicates the legal analysis of the victim-state's response, either post-attack or in anticipatory self-defense. *See* Lieutenant Commander Matthew Sklerov, *Solving the Dilemma of State Responses to Cyberattacks: A Justification for the Use of Active Defenses Against States Who Neglect Their Duty to Prevent*, 201 MIL. L. REV. 1 (2009).

[34] *See* KREPINEVICH, *supra* note 1, at 236–37 (describing the serious blow to the U.S. economy dealt by a fictional cyberattack on the day after Thanksgiving). The cyberattack in "Just Not-on-Time" is especially ominous, given recent attacks that have exposed the U.S. Government's vulnerabilities. *See, e.g.*, Choe Sang-Hun & John Markoff, *Cyberattacks Jam Government and Commercial Web Sites in U.S. and South Korea*, N.Y. TIMES, July 9, 2009, at A4, *available at* http://www.nytimes.com/2009/07/09/technology/09cyber.html (reporting a 4 July 2009 attack on several U.S. Government websites, including those of "the Treasury Department, Secret Service, Federal Trade Commission and Transportation Department").

[35] *See* KREPINEVICH, *supra* note 1, at 91–124.

[36] *See, e.g.*, *Talk of the Nation: College Campuses Prepare for Swine Flu* (NPR radio broadcast Sept. 4, 2009), *available at* http://www.npr.org/templates/story/php?storyId=112557402 (transcript of *Talk of the Nation Science Friday* interview with James Turner, "president of the American College Health Association and executive director of the Department of Student Health at the University of Virginia").

[37] *See* KREPINEVICH, *supra* note 1, at 103–07.

[38] *See id.* at 108–14.

his fourteenth-floor hospital window.[39] Meanwhile, images of corpses stacked in the streets lead to an 8-1 Supreme Court decision upholding "tight censorship" of media broadcasts.[40]

Perhaps most disturbing is Krepinevich's decision to link what he views as lax immigration laws to an eventual flood of infected Mexicans trying to overrun U.S. land and maritime borders.[41] Without citing any authority to support his position, Krepinevich conflates the immigration issue with the flu crisis.[42] Aside from smacking of xenophobia, this twist in the scenario belies the author's political leanings and distracts the reader from his discussion of how to protect Americans from a pandemic flu.[43] As President Dickson considers authorizing deadly force to repel Mexican civilians at the border, it is unclear whether Krepinevich ultimately considers avian flu or Mexican immigration to be the greater threat.[44]

The tactics employed in "Pandemic" further reveal a flaw in the overall work—the reliance on fear in lieu of rational analysis. As noted by Harvard law professor Cass Sunstein in his 2007 book *Worst-Case Scenarios*, such "visceral reactions" to catastrophic scenarios "operate[ ]

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[39] *Id.* at 93–94, 97 n.11.
[40] *See id.* at 98.
[41] *See id.* at 100–01. Krepinevich cites no specific laws; rather, he refers to "periodic amnesties" and "American laws that grant citizenship to children born in the United States." *Id.* at 101. As these two pages contain no footnotes (other than the fictional footnotes further discussed at note 42, *infra*), it is unclear whether the author is criticizing the current, or an imagined future, state of American law. Arguably, Krepinevich is criticizing the Citizenship Clause of the Fourteenth Amendment: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1.
[42] Besides using fictional footnotes, Krepinevich also used entirely imagined events as storytelling devices. In all seven scenarios, the author cites "future" speeches, news reports, and even the White House web page. *See, e.g.*, KREPINEVICH, *supra* note 1, at 84 n.38, 128 n.5, 145 n.47. The occasional "real" footnote can be difficult to discern, given that all "citations with dates later than the fall of 2008 have been created solely to enhance the narrative." *Id.* at 29. Furthermore, even the "real" footnotes frequently cite Wikipedia—a source with dubious reliability. *See id.* at 64 n.2, 95 n.6, 151 n.59, 195 n.46, 217 n.14, 231 n.60.
[43] Krepinevich argues that failing to physically secure the nation's borders will lead to the "human tidal wave" of infected Mexicans during the 2011 pandemic. *Id.* at 92. Tellingly, the author also uses the term "illegals," denounced by pro-Hispanic and liberal groups as pejorative. *Id.* at 101; *see Day to Day: How Words Shape the Immigration Debate* (NPR radio broadcast Apr. 26, 2006), *available at* http://www.npr.org/templates/story/story.php?storyId=5364267.
[44] *See* KREPINEVICH, *supra* note 1, at 124.

as a mental shortcut for a more deliberative or analytic assessment of the underlying issues."[45] Aside from being a logical fallacy,[46] the appeal to fear tends to lead people to place excessive weight on low-probability events that carry dire consequences.[47] This so-called "One Percent Doctrine," as defined by Vice President Cheney after 9/11, states that even a one percent chance of a "high impact" event must be treated "as a certainty."[48] Sunstein points out at least two problems with this doctrine: one, the potential misallocation of finite resources,[49] and two, the possibility that aggressive responses to low-probability risks "can have worst-case scenarios of their own."[50] The better way to go about assessing catastrophic risks, Sunstein argues, is to assign the proper weight to potential risks in order to take rational precautions.[51] "The real problem with the [One Percent Doctrine] is that it offers no guidance—not that it is wrong, but that it forbids all courses of action . . . ."[52]

Not only does *7 Deadly Scenarios* incite fears that trigger irrational responses like the One Percent Doctrine, it neglects to assign any probabilities to the scenarios at all. It therefore limits its utility as a tool for rational planning and policymaking. To be fair, assigning probabilities to these scenarios never appeared to be the author's intent. Rather, he wrote this book to be a wake-up call to "defense planners"[53] —a vivid demonstration of the consequences when uncertainty intersects unpreparedness. Krepinevich succeeds in this endeavor, and offers concrete, reasoned suggestions to the defense planning community along the way.[54] A thorough understanding of the proposed scenarios,

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[45] CASS R. SUNSTEIN, WORST-CASE SCENARIOS 51 (2007).

[46] *See* RICHARD PAUL & LINDA ELDER, THE THINKER'S GUIDE TO FALLACIES: THE ART OF MENTAL TRICKERY AND MANIPULATION 21 (2006) (describing the "appeal to fear" fallacy).

[47] SUNSTEIN, *supra* note 45, at 50–54 (describing how triggering fear physically affects decision-making by stimulating certain cognitive reflexes in the human brain). Conversely, events that have negative consequences, but which trigger relatively little fear, may fail to provoke necessary action. In *Worst-Case Scenarios*, Professor Sunstein compares terrorism and climate change to illustrate this phenomenon. *Id.* at 17–70.

[48] *Id.* at 1.

[49] *See, e.g.*, *id.* at 143–45 (discussing the "costs and tradeoffs" associated with trying to eliminate catastrophic risks).

[50] *Id.* at 4.

[51] *See id.* at 118–75 (discussing a variation of the One Percent Doctrine called the Precautionary Principle, and methodologies for assessing risk and acting accordingly).

[52] *Id.* at 125.

[53] *See* Krepinevich e-mail, *supra* note 14.

[54] Apparently the author has succeeded in one of his primary goals—getting the attention of Secretary of Defense Robert M. Gates. Krepinevich reports that Gates has read *7*

however, requires a broader, more nuanced look at the political, social, military, and economic issues behind them—a point of view that no one author can provide.[55]

Taken for what it is, *7 Deadly Scenarios* is most useful to judge advocates as a series of vignettes that raise intriguing legal issues.[56] Again, judge advocates seeking a broad understanding of these issues would benefit from consulting more academic treatments of the book's main topics. Sunstein's *Worst-Case Scenarios* for example, would be a good starting point for military lawyers seeking a greater understanding of how to assess the costs and benefits of taking a given course of action to forestall a potential harm.[57]

Cheeky though it may sound, one might say that reading *7 Deadly Scenarios* to understand the complexities of twenty-first century global politics is like reading *The Da Vinci Code* to learn about Catholicism.[58] Krepinevich provides just enough realism—mixed with a healthy dose of fiction—to intrigue, provoke, stimulate, and yes, scare. Appetites thus whetted, judge advocates and others in the defense community can then conduct further research to better prepare for the types of scenarios Krepinevich describes. If Andrew Krepinevich can accomplish such a feat, he may shed the Cassandra curse once and for all.

Deadly Scenarios and has asked him to serve on the Defense Policy Board. Krepinevich e-mail, *supra* note 14.

[55] A brief look at the future of U.S.–China relations illustrates this point. In *7 Deadly Scenarios*, Krepinevich posits that by 2017, an aggressive China will conduct a blockade of Taiwan that will bring the United States and China to the brink of war. KREPINEVICH, *supra* note 1, at 169–209. In comparison, George Friedman, another respected national security analyst, claims that China's "invading Taiwan might be tempting in theory but is not likely to happen." FRIEDMAN, *supra* note 17, at 98. A third analyst writes that "China's military planning is overwhelmingly directed at one target—the use of force in the Taiwan Strait to prevent formal Taiwan independence," but declines to predict either conflict or capitulation. SHAPIRO, *supra* note 17, at 236–41 (quoting Jeffrey Bader, Director of the Brookings Institution's China Center).

[56] For example, the scenario "War Comes to America" raises domestic operational law issues, such as using National Guard units both to detect terrorists and to deal with domestic riots. *See* KREPINEVICH, *supra* note 1, at 85. As discussed earlier, "Pandemic" touches on the use of deadly force to close borders (or maintain a quarantine), and "Just Not-on-Time" raises international law issues regarding victim-state responses to cross-border cyberattacks. *See supra* notes 34, 44 and accompanying text.

[57] *See* SUNSTEIN, *supra* note 45.

[58] DAN BROWN, THE DA VINCI CODE (2003).

THE TOKYO WAR CRIMES TRIAL: THE PURSUIT OF JUSTICE IN THE WAKE OF WORLD WAR II[1]

REVIEWED BY MAJOR JENNIFER A. NEUHAUSER[2]

He was in command of the Army responsible for these happenings. He knew of them. He had the power, as he had the duty, to control his troops and to protect the unfortunate citizens of Nanking.[3]

I. Introduction

Before there were Rwanda and Yugoslavia, there was Tokyo.[4] Often derided by contemporary Japanese and American Scholars as "the product of vengeance"[5] and "racism,"[6] Japanese nationalists continue to use the Tokyo War Crimes Trial as a "tool for a present-tense political agenda far removed from the late 1940s."[7] Yuma Totani's book scrutinizes primary source material including trial transcripts and U.S. Government documents[8] in an effort to get beyond political agendas and long-simmering resentment. In this material, Totani discovers the Tokyo Tribunal's true nature and reveals the trial's legacy in shaping present-day international law.

Totani begins the book by giving a brief overview of the contemporary debate regarding the significance of the trial. Japanese nationalists and Japanese conservatives believe the trial served the Allies as retribution under the banner of justice.[9] Conversely, liberal critics contend the Allied powers failed the Asian people by intentionally ignoring the devastation the Japanese military wrought against members

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[1] YUMA TOTANI, THE TOKYO WAR CRIMES TRIAL: THE PURSUIT OF JUSTICE IN THE WAKE OF WORLD WAR II (2008).
[2] Judge Advocate, U.S. Army. Student, 58th Judge Advocate Officer Graduate Course, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.
[3] TOTANI, *supra* note 1, at 135 (quoting the judgment against General Matsui Iwame).
[4] *Id.* at 4.
[5] *See*, *e.g.*, TIMOTHY P. MAGA, JUDGMENT AT TOKYO: THE JAPANESE WAR CRIMES TRIALS, at x (2001).
[6] *Id.*
[7] *Id.*
[8] TOTANI, *supra* note 1, at 4.
[9] *Id.* at 2.

of their own race.[10] Totani believes the primary source material contradicts both assertions.

Both sides misconstrue some information and ignore other facts outright.[11] The author concludes contemporary scholars overlooked or ignored the original source material, instead relying on shoddy research, hearsay, and blatant falsehoods.[12] Rather than serving as "victor's justice,"[13] Totani describes in detail the measures the Allies took to ensure a fair and orderly trial.[14] Uchida Rikizō, a Japanese law professor observing the trial, wrote: "Here rests the pride of Anglo-American law that, if one were to put it in extreme terms, is prepared to save ninety-nine guilty ones in order to save one innocent man."[15]

II. Leadership, Logistics, and Language

Though often discussed in tandem, the Tokyo Tribunal differed from the tribunal at Nuremberg in the races, nationalities, and languages of the parties involved.[16] While the four countries represented by the prosecution and defense in Nuremberg shared common linguistic and cultural roots,[17] the Tokyo trial team brought together eleven nationalities, each with their own agendas, cultural biases, and language distinct from the accused.[18] Though "lesser powers" like India and Philippines contributed to a full accounting of the Japanese carnage, complications and discord inevitably surfaced.[19] Difficulties translating

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[10] *Id*. at 3 (describing historian Awaya Kentarō's assertion that Allied powers purposefully withheld evidence of certain sensitive war crimes cases).
[11] *Id*. at 2–5.
[12] *Id.* at 3.
[13] *See generally* RICHARD MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL (1971).
[14] TOTANI, *supra* note 1, at 208 (noting the beliefs of some Japanese scholars that the principle of a fair trial, the protection of defense rights, and the presumption of innocence were important lessons for improving legal practice in Japan).
[15] Uchida Rikizō, *Significance of the Far Eastern Trial to Legal Theory: Primarily from the Viewpoint of the Field of Anglo-American Law,* CHŌRYŪ, Sept. 1948, at 22–30.
[16] TOTANI, *supra* note 1, at 11 (comparing the linguistic commonalities between German and Allied languages versus the lack thereof between Japanese and the Allied countries' languages).
[17] *Id.* at 12.
[18] *Id.*
[19] *Id.* Even the judges at Tokyo had trouble maintaining unity, producing a majority opinion of eight judges, two separate concurring opinions, and three separate dissenting opinions. *Id.*

materials for all participants and defense's lack of familiarity with Anglo-American court techniques, such as cross-examination, resulted in a lengthier and more complex trial process than in Nuremberg.[20]

Compounding these difficulties, a delay in evidence collection caused irreparable harm to the case-in-chief.[21] The two week delay between the end of hostilities and the occupation of Japan, specifically Tokyo, led to the destruction of an estimated 70% of Japanese military documents.[22] In addition, Joseph Keenan, lead counsel for the prosecution, focused on fruitless interrogations instead of collecting the remaining documentary evidence.[23] According to Totani, Keenan's failure to act, tactical blunders, and frequent absences, greatly complicated the task before the prosecution team at Tokyo.[24]

III. Practical and Political Considerations

Both political and pragmatic choices influenced the selection of the accused and the charges they faced before the Tokyo War Crimes Tribunal. In addition to exigencies of proof, prosecutors worried about the rapidly diminishing educational value of the trial for the Japanese people. "[A]t the present moment we understand that the Japanese themselves support the prosecution, [but] if the trial is delayed or prolonged, they may swing around in their sympathy and end by regarding as martyrs the men whom at present they wish to see condemned."[25] Rather than "indulging in a prolonged war crimes investigation or even try to develop charges against all suspects,"[26] the prosecution selected a representative sample of the most egregious offenses with the "goal of . . . secur[ing] the ruling that planning and waging aggressive war constituted a crime under international law."[27]

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[20] *Id.* at 7.
[21] *Id.* at 32.
[22] *Id.* at 105.
[23] *Id.* at 31. The author characterizes Keenan as a hard-drinking political animal who was not well liked by associate counsel and implies that this condition led Keenan to ignore repeated pleas to secure Japanese government files. *Id.* at 33–36.
[24] *Id.* at 32–41; *but see* JOSEPH B. KEENAN & BRENDON F. BROWN, CRIMES AGAINST INTERNATIONAL LAW 18 (1950).
[25] TOTANI, *supra* note 1, at 67.
[26] *Id.* at 66.
[27] *Id.* The Allies planned a series of trials for "Class A" accused (those accused of crimes against peace) and "Class BC" accused (ordinary war criminals). Although there were several trials throughout the Pacific of Class BC cases, the Tokyo Tribunal was the sole

Strategy and time constraints heavily influenced the prosecution's presentation of evidence.[28] However, expediency came at a cost. Prosecutors rarely called more than one or two witnesses per event and relied heavily on written synopses of testimony to support the charges.[29] To Totani, aside from significantly diminishing the impact of the evidence on Japanese spectators, these practices also contributed to present-day misconceptions about the evidence presented.[30]

Chapter Six's "Rape of Nanking" and the "Burma-Siam Death Railway" emphatically demonstrate the difference between a sanitized written synopsis and live witness testimony.[31] The author's graphic and gripping retelling of the savagery committed against the Chinese people following the fall of Nanking in December 1937 makes abstract arguments over the legality of war insignificant in comparison.[32] Instead of the normal one or two witnesses per crime, Allied prosecutors brought in a dozen witnesses for the Nanking portion of the trial.[33] The shocking episodes recounted by these witnesses, and the defense's clumsy attempts in cross examination to justify them as reprisal for war crimes committed by Chinese soldiers,[34] added a human dimension to the suffering. Despite a working example of effective presentation of

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trial of "Class A" accused. A number of government officials were included in this category along with military accused. *Id.* at 23, 66–77.

[28] *Id.* at 115–17 (describing pressure by General MacArthur and responsive efforts of Keenan to expedite the hearing).

[29] *Id.* at 112–15.

[30] *Id.* at 118. The author believes that, over time, academics have heavily relied on secondary or tertiary sources which fail to describe important evidence that was made available to factfinders. These mistaken assumptions have been used to support theories of cover-ups by the Allies and other prosecutorial misconduct. *Id.* at 2–7.

[31] *Id.* at 119.

[32] *See generally* IRIS CHANG, THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II (1997) (providing a respresentative example of the type of vivid description that was available to the prosecution by virtue of the evidence it did have).

[33] TOTANI, *supra* note 1, at 121.

[34] *Id.* at 121–27.

> I took this girl to the hospital at some time in February 1938 . . . . They killed her brother's wife because she resisted rape; they killed her older sister because she resisted rape. In the meantime her father and mother were kneeling before them, and they killed them, all of these people being killed with a bayonet . . . . The first month she was raped repeatedly, daily . . . . After that she became so diseased, they were afraid of her, and she was sick there for a whole month.

Id. at 126–27.

witness testimony about Nanking, the prosecution abandoned this strategy for the sake of expediency in the remainder of the tribunal by summarizing vast amounts of documentary evidence and witness testimony. Pragmatism, however, came at the cost of educating the Japanese public or giving a voice to the victims of this tragedy.

Throughout the book Totani repeatedly raises the theme of the tribunal as an educational tool.[35] Even the setting of the trial in a former Japanese military academy communicated to the Japanese people a "symbolic end to the unquestioned authority of the Japanese military establishment."[36] Unfortunately, the prosecution's failure to properly convey the substance of the documentary evidence and written testimony to the general public ultimately shaped later debates about the nature of the trial and its legitimacy.[37] For example, though critics charge the Allies covered-up the "comfort system" used by the Japanese military to enslave and molest Asian women, documentary evidence confirms the Allies substantiated these crimes.[38]

The author acknowledges some valid opposing viewpoints. For example, the Allies tried only members of the defeated powers, whereas Allied nations enjoyed "blanket immunity."[39] The Allies also chose to overlook Emperor Hirohito's culpability in the decision to wage war for the sake of political expediency, in spite of extensive evidence to the contrary.[40] Unfortunately, in his efforts to acknowledge and counter the critics, Totani merely repeats prior positions without exploring why his views are correct.

Nonetheless, the legacy of the Tokyo and the Nuremberg trials survives in "codifying new legal principles and developing the international criminal justice system."[41] Not only did these trials inspire the United Nations to codify prohibitions on "crimes against humanity,

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[35] *Id.* at 10.
[36] *Id.* at 9.
[37] *Id.* at 118.
[38] *Id.* at 3, 253. Military sexual slavery by the Japanese soldiers of Asian women in Japanese-occupied areas was largely tolerated by the military leadership. *Id.* at 120.
[39] *Id.* at 236.
[40] *Id.* at 43–62. "For the Allied powers, Hirohito was as much a politico-military problem as a legal one because of the immense authority he continued to wield—based on his claim to divinity—over the Japanese people." *Id.* at 43.
[41] *Id.* at 258.

genocide, and the crime of aggression,"[42] the Tokyo trial also exposed the Japanese public to the "pride of Anglo-American law,"[43] including the impartiality of judges, the presumption of innocence, the right to cross-examination, and the need to have trials open to the public.[44]

IV. Lessons for Judge Advocates

Despite the enormous challenges facing the prosecution, the Tokyo trial succeeded.[45] The lessons for judge advocates in trial strategy, problem solving, and operating in tandem with our coalition partners have all withstood the test of time. Consider this remarkable feat: lacking any statutory or legal precedents, the prosecutors defined the crime of participating in an "aggressive war" and proved the accused guilty of the corresponding legal elements of the offense. Although the Kellogg-Briand Pact outlawed war in 1928,[46] nothing in the pact stated "whether a war waged in violation of it constituted an international offense."[47]

The prosecution defeated the defense's argument that "crimes against peace was a postwar creation of victor nations," and was inapplicable specifically because it would have to be applied *ex post facto*.[48] The prosecution likewise defeated the defense's argument that jurisdiction was lacking over Japanese military members because only states, rather than individuals, are capable of waging a war.[49] The courts' rejection of both arguments provides a worthy lesson for judge advocates contemplating the introduction of novel legal concepts in military proceedings.

Aside from countering defense arguments, the prosecution overcame obstacles related to evidentiary proof. For example, the Japanese

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[42] *Id.* at 206.
[43] *Id.*
[44] *Id.*
[45] The trial succeeded by punishing the wrongdoers and by validating the existence of war crimes. *But see* KINGSLEY CHIEDU MOGHALU, GLOBAL JUSTICE, THE POLITICS OF WAR CRIMES TRIALS 42 (2006) (casting the Tokyo Tribunal as a failure to achieve the significance of the Nuremberg Tribunal).
[46] *See* General Pact for the Renunciation of Wars, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57, *reprinted in* AM. J. INT'L L. SUPP. 171–73 (1928).
[47] TOTANI, *supra* note 1, at 20.
[48] *Id.* at 84.
[49] *Id.* (describing the defense's invocation of the act-of-state doctrine).

government's destruction of documentary evidence severely challenged the prosecution's ability to prove that Japanese officials knew of and condoned Japanese soldiers' war crimes.[50] The prosecution team relied on the *modus operandi* of different officials, establishing a widespread pattern of atrocities so similar as to show "those in leadership circles must have authorized the commission of war crimes as a general policy of the Japanese war and military occupation."[51] This lesson for advocates remains clear: sometimes you have to "go to war with the Army you've got."[52] While evidence is inevitably misplaced and memories inevitably fade, good advocates demonstrate the mental dexterity to adapt and implement a winning trial strategy.

Most importantly, the prosecution's evolved trial strategy was sufficient to meet and defeat the defense's contentions of "plausible deniability." Throughout the trial, Japanese officials and military leaders repeatedly disavowed responsibility for their soldiers' war crimes. General Matsui Iwane, the commander of the Central China Army, claimed he lacked responsibility for the atrocities his troops took part in because he lay sick in bed 140 miles away when his forces captured the city.[53] Yet, Matsui's argument did not carry the day. The prosecution demonstrated that a commander in the field is accountable for a subordinate's lack of compliance with the laws of war, despite physical separation[54] Hence, the tribunal found that Matsui had "the power, as he had the duty, to control his troops and to protect the unfortunate citizens of Nanking."[55] This important lesson emphasizes that judge advocates must develop a sense of duty in soldiers to confront those leaders who choose to look away. As Totani notes, "this verdict is recognized as a valid precedent at international criminal courts today."[56]

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[50] *Id.* at 105.
[51] *Id.* at 108.
[52] Beth Teitell, *What's a Guy Gotta Do to Get Canned*, BOSTON HERALD, Dec. 26, 2004, at 42 (citing former Defense Secretary Donald H. Rumsfeld's response to a Soldier who asked about the safety of military equipment)
[53] TOTANI, *supra* note 1 at 132. Matsui later admitted he had knowledge of what he termed "unpleasant outrages," to include "rape, looting, forceful seizure of materials" and "murder." *Id.*
[54] *Id.* at 135.
[55] *Id.*
[56] *Id*.

IV. Conclusion

Although often derided as a "poor cousin" to the Nuremberg War Crimes Tribunal,[57] the Tokyo War Crimes Tribunal stands on its own as an important benchmark in the history of international law. As one historian writes:

> The judgment of the Tokyo trial is regularly cited in war crimes trials around the world today—on issues such as military command responsibility for the failure to stop the perpetration of war crimes by subordinate troops; the level of knowledge required of political leaders to hold them accountable for their failure to exercise their authority to prevent international crimes; the definition of the international crime of aggression; and the appropriate test for the limits of anticipatory self-defense as an exception to aggression.[58]

Totani has not yet surveyed the entire proceedings, noting that massive amounts of historical documents from the 2200 trials against 5600 suspects are still awaiting consolidation, translation, and analysis,[59] Totani's volume nevertheless serves as an excellent starting place for judge advocates wishing to familiarize themselves with one of the early instances of the international law of war in action.

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[57] *See* Tim McCormick, *Lest We Forget the Atrocities of War*, *available at* http://www.theage.com.au/opinion/lest-we-forget-the-criminal-atrocities-of-war-20081109-5kv.html?skin=text-only (last visited Sept. 6, 2009).
[58] *Id.*
[59] TOTANI, *supra* note 1, at 262.

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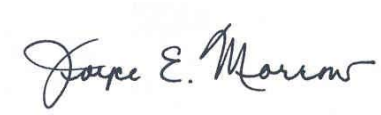

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