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SOVEREIGN, EMPLOYER, COMMUNITY: A THEORY OF MILITARY JUSTICE BEYOND DISCIPLINE, OBEDIENCE, AND EFFICIENCY

DAN MAURER*

Military justice is a widely misunderstood, class-restrictive criminal law and procedure. Its jurisdictional reach is based on temporary employment in a specialized public service profession within a highly bureaucratic branch of the federal government. Its structure and its effects often diverge from conventional criminal law and procedure in ways that can appear anachronistic, self-defeating, and even unconstitutional. These conditions are often criticized for their impracticality, their obsolescence, and apparent injustices. Yet, it is a system that endures bouts of public skepticism, judicial inquiry, and legislative reconsideration with remarkable resilience. It evolves just enough, but—in its fundamentals—retains its classic identity assumed to be the natural outgrowth of a categorical imperative: that discipline, obedience, and efficiency are core values of a military, necessary for its functionality and thus justify its separateness and distinctiveness. These values, however, do not always square with the type and content of military justice’s evolution—a meandering path that charts increasingly in the direction of civilian justice. This contradiction is unexplained; military justice lacks a coherent and well-developed normative and descriptive framework to justify its reforms or to rebuff its criticism. Unexplained, but it is not unexplainable.

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Unfortunately, when we look for such a theory to understand or legitimate the structure, foundational premises, and evolutionary path of the U.S. military’s separate criminal justice system, we find only a mirage—the blurry image of a super-rationale that simply evaporates the closer we inspect it. There is no theory that sheds light on why the system is what it is, nor how or why it could change further. This Article proposes such a theory.

Aside from breaking ground as the first comprehensive theory of military justice in the field’s storied history, it aims to contribute to legislators’, the courts’, commanders’, and the general public’s understanding of the American model of military criminal law in several novel ways. It places the unquestionable de-militarization of military justice in historical context, demonstrating that the changes to the character of this system are the result of a competition among the inharmonious values of military effectiveness, the fair administration of justice, and the vague but cliched “discipline.” It frames military justice at the most abstract of levels, for the first time, as a “strategy.” Along the way, the theory is constructed out of nine propositions, some of which are presented with a test suite of possible questions we might ask about the current system to validate that proposition’s correspondence to practical reality.

Significant among these propositions is a new idea: military justice reflects the conditions and constraints created by the government upon interacting with the individual servicemember in three distinct, but overlapping, relationships: as a sovereign, as an employer, and as a community. The consequence of framing it in these three relationship modes is the heart of another key proposition: that the coercive form of military law is better described as a set of “control features”—means and methods through which legal authority over servicemembers is exercised in each of the three relationship modes. This reframing of military justice for the first time suggests that—in light of these three relationship modes and their respective coercive control features—a legitimate military justice system makes substantive and procedural distinctions between “punishment,” “discipline,” and “censure.” Doing so reflects not only criminal law principles but reveals a surprising affinity with contract, agency, and tort law.
I. INTRODUCTION

By enlistment, the citizen becomes a soldier. His relations to the state and the public are changed. He acquires a new status, with correlative rights and duties.\(^1\)

Military law is not monolithic. Its unique jurisprudence is divided into distinct, though related, fields and practice areas, two of which are important to the discussion that follows. The international body of law that proscribes certain conduct in combat, and thereby establishes a baseline of proper or acceptable conduct for those state actors authorized to use lethal force on behalf of the

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1. United States v. Grimley, 137 U.S. 147, 152 (1890) (addressing whether a court-martial, which has jurisdiction to try soldiers for offenses proscribed by federal law specific to the Armed Forces, has proper jurisdiction to try a person who fraudulently enlisted, and was therefore not—legally—a soldier).
state, is complicated but well-known. It consists of treaties and statutes, customs followed by (and principles of law recognized by) most nations over long periods of time, and court opinions. It is, at its core, a recognition that legitimate state objectives (e.g., national self-defense) might require the resort to sanctioned violence balanced against a humanitarian objective of minimizing unnecessary harms, reducing risk to innocent bystanders and civilian property, and encouraging only objectively reasonable decisions by those using that force. Jus in bello’s principles and positive laws are grounded in the practical battlefield reality of making hard judgments on imperfect information under pressure of time and threat, accepted consequences of state sovereignty, self-defense, and morality.

The raison d’être for military law [is] the need to control the violence of war and impose discipline in the ranks. Its central theme is the tension between armed conflict and the rule of law, a tension that the substantive law and procedural rules of military law attempt to address.

A state’s mechanism for imposing that “discipline in the ranks” is traditionally referred to as its “military justice”—a type of criminal code within international law.


the meaning of “military law” that may adjudicate guilt and impose punishment through judicial proceedings called courts-martial or military tribunals, or through some other standing process based, more or less, on concepts of judgmental neutrality, independence, fairness, evidence, and transparency. The individual servicemembers capable of wielding violence on behalf of the state are thereby regulated in their personal and professional lives by a distinct criminal code separate from (and in addition to) civilian forms and norms of criminal justice. Like the law of armed conflict and international humanitarian law (jus in bello), the military justice (jus in disciplina militaras) body of procedures, authorities, rights, and rules is founded in statute, customs, and court opinions. Those principles and positive laws, just like those of international law, are also grounded in the practical battlefield reality of making hard judgments on imperfect information under pressure, accepted consequences of state sovereignty, self-defense, and morality. Or do they?

This is where the similarity and relationship between these fraternal bodies of public law stops. Superficially, this separate criminal code seems like a sensible and legitimate state-controlled system for the lawful “management of violence” expected of members of the Armed Forces during their application of armed force. A disciplined army, one that is deterred from engaging in unrestrained violence or uncontrolled conduct through threat of criminal punishment, is less likely to be uninhibited in its sanctioned violence. A disciplined Army, thus deterred, is more likely to be cautious in its treatment of civilians and their property, as well as of the enemy. But then how to explain


7. See, e.g., 10 U.S.C. § 934; M.C.M., supra note 6, pt. I, ¶ 91.c.(2)(b) (“[A] breach of a custom of the Service may result in a violation of clause 1 of Article 134 . . . [c]ustom arises out of long-established practices which by common usage have attained the force of law in the military or other community affected by them.”); William Winthrop, Military Law and Precedents 17–44 (2d ed. 1920) (discussing the sources of American military law: the Constitution, Acts of Congress, military regulations, orders from the President and chain-of-command, and customs and usages in the military).


the evolution of soldiering into a military profession: Why bother holding servicemembers accountable (to one another in a specialized community) to high standards of conduct and duty if behavior is already regulated by threat of court-martial and prison? How to explain the advent of procedures, authorities, rights, and rules that apply outside the field of battle and far from armed conflict, and during peacetime, that regulate behaviors unrelated to military objectives in any direct sense, and that are created, imposed, and reviewed in some ways functionally indistinguishable from civilian justice?

On the other hand, military justice departs from civilian justice in significant ways: in the preeminent role of the commander exercising forms of prosecutorial discretion, in single-handedly imposing “non-judicial punishment,” and in its criminalization of conduct purely martial in character but which would be protected by Constitutional rights if engaged in by a civilian. How are we to credibly justify when and how military justice deviates?

Despite centuries of practice, there is yet no comprehensive theory of American “military justice” that explains or justifies this apparent incongruity. This is a bold claim to make about a system of law first enacted by the Continental Congress, continually managed by the President as Commander in Chief, authoritatively interpreted by the federal courts, and insulated from civilian jurisprudence for much of its history. Nevertheless, lack of theory is not all that surprising for at least three reasons. First, it is a system self-consciously separated from “normal” civilian justice; second, it is defended on grounds of pragmatism, utility, and historical roots more than principle; and third, it is a system whose internal management (by military courts and commanders) is given exceptionally wide latitude by Congress and deference

10. See infra Section III.A.


12. For its current personal jurisdictional scheme, see 10 U.S.C. § 802.

13. Dan Maurer, Martial Misconduct and Weak Defenses: A History Repeating Itself (Except When It Doesn’t), 54 UIC L. REV. 867, 926–32 (2021) (categorizing two periods in which the status quo conventions of military justice practice were defended as a “sacred theology” and, later, as a “privileged position”).
from the Supreme Court. As a result, military justice has aged over the centuries in sporadic and inconsistent leaps—sometimes evolving in the face of external threats and environmental conditions like warfare and public scrutiny, sometimes stubbornly rejecting reform and clinging to tradition.

In either case, its structure and practices—the rules of procedure, rules of evidence, personal and subject matter jurisdiction, for example—conformed to a basic two-part idea that seemed to legitimate it: military leaders rely on disciplined, obedient troops to accomplish military objectives—most missions cannot be accomplished without them; and military leaders are ipso facto best positioned to regulate and punish behavior they deem dangerous to that state of discipline. But these presumptions fail to explain adequately, or prescribe persuasively, what can be punished, who can be punished, how they can be punished, and who can impose that punishment in the modern American military justice system. More precisely, no theory based on an internally consistent body of principles and legal duties and constraints has yet justified a modern democracy’s choice to erect a separate criminal justice system for its professional armed forces, described its nature or purpose, or rationalized the body of substantive and procedural law.

Without such a theory, military justice as a legal regime is weakly bounded by ambiguous borders. That porous and fluid perimeter fails to offer principled grounds for expanding, contracting, reforming, or leaving alone the inventory of specific conduct made criminally punishable under its jurisdiction. It fails to offer principled grounds for the roster of who falls within its jurisdiction. It fails to fully justify the arsenal of authorities granted to government agents enforcing

14. Karen A. Ruzic, Military Justice and the Supreme Court’s Outdated Standard of Deference: Weiss v. United States, 70 CHI.-KENT L. REV. 265, 289 (1994) (“Traditionally, the Supreme Court has displayed a ‘hands off’ attitude toward military matters. . . . Seldom has the Court found a military practice unconstitutional. . . . [I]ts decisions have also reflected a great deal of deference to the military’s authority over its personnel.”) (internal citations omitted); Steven B. Lichtman, The Justices and the Generals: Critical Examination of the U.S. Supreme Court’s Tradition of Deference to the Military, 1918-2004, 65 MD. L. REV. 907, 915 (2006).

15. See Maurer, supra note 13, at 893–926; James M. Hirschhorn, The Separate Community: Military Uniqueness and Servicemen’s Constitutional Rights, 62 N.C. L. REV. 177, 243 (1984) (concluding that “[e]xperience abroad and in the United States has demonstrated the possibility that the military authorities will not adjust their practices to changing social conditions” on their own initiative).

its jurisdiction. Finally, it fails to explain the shield of rights and privileges protecting servicemembers from those agents.

Part II of this Article brings the reader up to speed, tracing the theory’s origin back to prequel arguments made in three earlier publications that incorporated a thought experiment, an analysis of a recent (and unusual) Supreme Court case addressing the nature of military justice, a survey of military justice’s ancient lineage—what it criminalized and why, and who played roles in it—and the unsuccessful but common counterarguments placed in front of advocates of reform. Part III describes how reasons for existing in parallel with civilian criminal justice systems remain controversial and this controversy rages with no obvious or universally accepted resolution. Part IV sets out what a “theory” ought to answer. It proposes five primary questions that a theory of military justice should help resolve. It criticizes the default reliance on tropes like “good order and discipline,” “justice,” and other “purposes of military law” (individually or collectively), arguing that they—despite an uncertain lineage and their inconsistency—mislead us into thinking a theory already exists. Finally, it recounts the four foundational principles that underlie any selection of prospective military justice rules and processes. Part V articulates a theory broken into teleological, procedural, substantive, and punishment conditions, each further defined by a number of propositions. Suitably sketched, these propositions can both describe the generic but fundamental elements of a military justice system in a liberal constitutional democratic republic, characterized by civilian control over its armed forces, and provide a rational basis for prescribing the particulars of such a system.

In its descriptive function, a theory can serve as a benchmark for debating the merits or flaws of a current military criminal code and its administration. In its normative or prescriptive function, a theory may suggest the specific features of future potential reforms in a manner that best reflects the core interests of the executive, legislative, and judicial branches, all of whom have a significant role to play in a military justice system’s design and operation. Part VI begins to preview potential implications this theory raises for current procedural and substantive rules, authorities, rights, and systems in American military justice. This Article concludes by outlining some justifications for criticizing various approaches to the design and management of military justice.
II. Prequels: A Thought Experiment, an Argument Deconstruction, and Historical Context

This Article culminates a line of argument beginning in three earlier articles. The articles, in sum, intend to demonstrate that there is no common theory and to illustrate the consequences of its absence that have pock-marked military justice system design and practice as a result. They contextualize and describe the common errors made when attempting to ground justifications for military justice’s idiosyncratic substantive and procedural law in constitutional, pragmatic, and historical evidence. They demonstrate that anti-reform advocates of the status quo fall into a solipsistic fallacy: ignoring the “civilianization” trends of modern military justice, these advocates believe that a military criminal justice system unique in its distribution of rights and authorities is unquestionably justified because the military itself is unique. Such a position is not without support from the Supreme Court.17

These articles ultimately describe the fundamental organizing principles and necessary conditions for a comprehensive prescriptive and descriptive theory of American military justice. In one article,18 reasons for suspecting a lacuna in military justice theory were described. From increasingly successful Congressional calls for reforming19 the tradition-bound Uniform Code of Military Justice (UCMJ)20 to a recent Supreme Court opinion that inadvertently (but radically) shifted the “purpose” of military’s criminal law from satisfying a commander’s need for disciplined troops to one of “justice,”21 the legitimacy

17. Parker v. Levy, 417 U.S. 733, 743 (1974) (“This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history.”).
18. See Maurer, supra note 16.
of the American military justice system as currently constituted—in whole or in part—has been under scrutiny. A comprehensive list of tacit and explicit premises about military justice was introduced in that article, drawn from centuries of military legal (or quasi-legal) practice, court opinions describing the nature of that practice, and expert commentators (military leaders and scholars). These premises were described as a loose collection of assumptions, presumptions, descriptive facts, speculations, and normative judgments, often presented to the public and within the military as self-evident. The article surmised that a lack of logical coherence and justification was a critical flaw, begetting the difficulty the military has in explaining to the public and justifying to its members the system’s more distinctive elements, like the mix of martial and civilian-type crimes, the long-arm personal jurisdiction of the UCMJ, and the outsize role that commanding officers play in investigating, prosecuting, and—in some types of cases—judging misconduct. These remain controversial and poorly understood notwithstanding their extensive pedigree: these elements have long been determined by the President under authorities granted by Congress and ultimately accorded extraordinary and usually “uncritical”


deference by the courts—bordering on the rhetorical. Nevertheless, they seem the antithesis of military law’s increasingly “civilianized” or “de-militarized” character. Such confusion calls attention to the absence of basic, generic principles upon which this criminal justice system’s structure should turn and on which all the relevant parties should agree.

In the second article, a novel thought experiment was introduced to uncover what those principles might be. From a Rawlsian-like “original position” (from the point of view of hypothetical Congress, a President, the senior-most military officer, and the “ideal recruit”), it concluded that just four principles “formed [the] organizing tenets for the profession’s method of self-discipline and internal control.” These four principles—non-repulsion, retention, mission risk-reduction, and compliance—revealed an underlying contradiction. All four principles are based, at least in part, on balancing the natural egoistic self-interest of a soldier against an externally imposed duty of self-negation and sacrifice for the benefit of larger interests like group safety or mission accomplishment. This delicate balance is inherently unstable when rules of procedure and substance, including the awkward relationship between

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28. Id. at 984.

29. Id. at 945.

30. Use of the word “soldier(s)” and “troop(s)” will be used interchangeably with “servicemember”; in this Article, they are generic shorthand for all members of the Armed Forces, whether they are in the Army, Navy, Marine Corps, or Air Force, or Coast Guard. UCMJ personal jurisdiction attaches to all such members. See 10 U.S.C. § 802.

31. Goldman v. Weinberger, 475 U.S. 503, 508 (1986) (holding that an Air Force regulation prohibiting the wear of a yarmulke indoors, along with other non-religious headgear, was not an unconstitutional First Amendment free exercise restraint on the petitioner, a Jewish Rabbi; the Court deferred to the judgment of military officials that “subordination of personal preferences and identities in favor of the overall group mission” is a valid virtue protected by such regulations and unobjectionable on constitutional grounds).
legal restraints on law enforcement authorities and servicemember duties as community members, are attempted. This instability, in turn, creates a paradox:

Taken to its logical extreme, there would be no demand signal in the system of military justice, or in the tactical application of it case-by-case, for what we know are commonly accepted principles and values protecting, among other things, due process rights of defendants, the rights of certain victims . . . [y]et, such principles and values are observed, both in the rules of procedure in military codes . . . 32

The article concluded that if the balance is to be enforced with a penal code that satisfies constitutional and public scrutiny, and the paradox of balancing self-negation with systemic protection of individual rights is to be resolved, instability can be calmed (and some long-held confusions abated) with a defensible justification—a general theory. Though not quite a theory, the American military seems to accept a standard defense already: “The reasons for a separate system are primarily grounded in the rationale that world-wide deployment of large numbers of military personnel with unique disciplinary requirements mandates a flexible, separate jurisprudence capable of operating in times of peace or conflict.”33

But that oversimplifies. Once a separate system exists, more questions follow. Does this same set of reasons justify who has certain prosecutorial and judicial authorities, the extent to which those authorities are reviewable, what rights are protected or revised, or what acts or omissions are criminally culpable? The answers to those questions were the very premises criticized in

32. Maurer, supra note 27, at 986; see also infra Section IV.C.

33. DAVID SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE 4 (2012); Mark A. Visger, The Canary in the Military Justice Mineshaft: A Review of Recent Sexual Assault Courts-Martial Tainted by Unlawful Command Influence, 41 MITCHELL HAMLINE L.J. PUB. POL’Y & PRAC. 59, 62 (“[M]ilitary commanders view the court-martial power as an instrument of command, essential to ensuring discipline in the unit, so that the commander is able to achieve the mission—ultimately victory in war.”). This view presumes without questioning the belief that all crimes currently proscribed by military law—regardless of severity, type of harm, locus of the offense, identity of the victim—undermine the commander’s ability to sustain a disciplined force; it also presumes that a commander is the only person with both a duty and capability to take actions that defend against these actions; and it presumes that if commanders were removed from the process, losing this “instrument of command,” they would be incapable of achieving their ultimate mission. These are three presumptions that call out for factual or principled justification in developing any theory of military justice. See infra Section III.B.
the first article. That second article left these normative questions hanging, suggesting that such a super-rationale was articulable but not yet articulated.

But before that theory could be fully introduced, the third article considered the long history of military justice as it evolved across the centuries and emigrated from European battlefields to the American continent. It traced government attempts to define, deter, and punish martial misconduct from Rome to the end of World War I. It highlighted a maturing sense of due process and rights protection manifesting eventually as a “civilianization” of military justice since the 1950 enactment of the UCMJ. But it also revealed certain unmistakable continuities in military justice’s form and function. There is a certain sense of enduring stability across four issues: (1) in the types of authorities entrusted to commanding officers; (2) the formal procedure of criminal adjudication; (3) the character of the wrongdoing that has been deterred and punished through military justice systems; and—most notably—(4) the justifications proffered for all of it. The consistency in these areas beget a consistency in the grounds for criticism. The article noted that the popular anti-reform arguments a century ago were ultimately rejected and surmised that a similar fate awaits the parallel anti-reform arguments made today.

The present Article is summative. It proposes a normative and descriptive theory of military justice—a project surprisingly without precedent. The theory’s conclusions are drawn from the philosophical inquiry into basic principles, the assessment of the “logical” premises underlying its current practice, and the historical themes presented in the earlier three articles. It is not a modest goal, but it is certainly a necessary one. Such a unique form of penal law, one intrinsically tied to professional employment, that can deprive a person of life, liberty, and property like any other criminal law, needs a firmer undergirding of principles—a superstructure of theory. Military justice, to borrow a phrase from another context, “has suffered from too little

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34. Maurer, supra note 16.
35. Maurer, supra note 27, at 989–90.
36. Maurer, supra note 13.
37. Id. at 872; see also Brett J. Kyle & Andrew G. Reiter, Military Courts, Civil-Military Relations, and the Legal Battle for Democracy 197–214 (2021) (summarizing the evolution of American military justice as a function of the nation’s response to “security threats” like the Civil War and “War on Terror”).
38. See Maurer, supra note 13.
theorizing... [resulting in] a confused and unsystematic set of assumptions and beliefs.”

How can we be convinced that such a lacuna exists? Scholars cannot seem to define to anyone’s satisfaction the fundamental maxims of American military justice like “good order and discipline,” nor do they agree on whether it—however defined—has priority over the equally slippery concept of “justice.” The Supreme Court has confused the matter even more so, and Congress’s recent interrogation and reform of the UCMJ has re-weighed the virtue of traditional commander prosecutorial discretion over “serious” crimes. This should suggest a profound bewilderment with respect to the proper aims (and therefore the proper means and methods to achieve those aims) of military criminal law.

A legitimate theory of American military justice should reflect accurately the complicated relationships among three independent branches of civil government, all of which share some responsibility for the creation, raising, and

39. HUNTINGTON, supra note 8, at vii (explaining why a comprehensive, if novel, theory was needed to describe civil-military relations and prescribe preferred attributes of those relationships).


42. See Ortiz v. United States, 138 S. Ct. 2165, 2176 n.5 (2018) (suggesting that good order and discipline is not the primary purpose of military justice and only incidentally beneficial to the chain-of-command).

future course of military justice. But it must also explain the logical and principled basis on which its rules and rights depend. In doing so, a theory should suggest areas in which current practices, rules, and interpretations are not consistent with one another or with the theory itself. It should point in the direction of course corrections to amend what may be intolerably inconsistent into a system of law that is useful, reasonable, and defensible.

In finishing what the first three started, this Article will offer a theory that involves nine basic propositions. They begin with identifying a trinity of alternating, but sometimes overlapping, relationship modes that government engages in with an individual servicemember. The propositions further claim that, at its most generic and broadest level of abstraction, military justice is a strategy, and that strategy involves the political use of legal structures to set desirable military conditions for achieving national security objectives. Along the way, the propositions discuss the various forms of what I will refer to as “control features” and “coercive authority,” and what turn out to be meaningful distinctions between “punishment,” “discipline,” and “sanction”—each of which are exercised in a corresponding mode of the relationship between government and the individual, for different purposes. Ultimately, all three relationship modes and their individual tactical methods share a common unifying theme: a self-regulating Armed Force (subject to the demands of civilian principals) of self-regulating individuals (subject to rules, norms, and customs enforced by military principals) presenting the most favorable

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44. This observation of how actual parties actually engage in the formation, management, and review of courts-martial processes and outcomes belies the standard separation-of-powers formalist trope that each of the three coordinate branches is responsible for one, and only one, type of “power”—that they are independent and autonomous (Congress is only responsible for using legislative power and the other two branches cannot share it; the Executive is only responsible for executive power [and Commander in Chief duties, a separate clause] and the other two branches cannot share it). See, e.g., Thomas W. Merrill, The Constitutional Principle of the Separation of Powers, 1991 SUP. CT. REV. 225, 231–33 (explaining “formalism” as holding that each branch has its own exclusive functions: “each of the three branches has exclusive authority to perform its assigned function,” and “each function is uniquely assigned to one branch”); see also Aziz Huq, Separation of Powers Metatheory, 118 COLUM. L. REV. 1517, 1518 (2018) (explaining that formalism “emphasizes the categorical separation and autonomous functioning of each branch”). Instead, it is more accurate, even if it agrees with formalism in principle, to describe military justice as an interbranch symphonic exercise of non-exclusive powers wielded by one or more branches for some elements of military justice and exclusive powers wielded by one or more branches of government for some other elements of military justice. See Ilan Wurman, Nonexclusive Functions and Separation of Powers Law, 107 MINN. L. REV. 736–37 (2022).
conditions possible for the use of reliable armed force by the chain-of-command.

The contradictory process of modernizing the American military justice system (if its civilianization can be called modernizing) overlaying some fundamental continuities has challenged those attempting to explain, defend, or amend military justice. As one former civilian judge on the U.S. Court of Appeals for the Armed Forces wrote: “The diminished attention to the roots of contemporary military law may reflect the difficulty busy lawyers and public officials face in assimilating, digesting, and applying the rapidly expanding array of information available to the modern practitioner.”

As the character of military crime and punishment has changed erratically over time, there is an increasingly voluminous debate about what military justice is “for.” Simplified, it is often reduced to a debate between justice or obedience, as if they are mutually distinctive and cannot co-exist. That is as wrong as asserting that a civilian criminal justice system (as a whole, or in its particulars) cannot have both utilitarian and retributive goals and individual component pieces that reflect either or both of those goals.

III. TOWARD A THEORY OF JUS IN DISCIPLINA MILITARAS

A. The Changing Character of Military Justice

In terms of due process norms (like the presumption of innocence and fair notice), constitutional protections (like protections from unreasonable searches and seizures), and statutory rights (like the right to a speedy trial, a trial by panel, and to be informed of the right to counsel and the privilege against self-incrimination), American military law has never been static. It has evolved by taking essential elements from civilian law and adapting them, translating them, and in some ways warping them into field-expedient measures that account for the operational demands and risks of warfare and the presumptive necessities involved in commanding troops preparing for or fighting in that war. This is not to say that military justice evolved hand-in-hand with its civilian counterpart, in lockstep marching to the same cadence. The Articles of War

45. See, e.g., Andrew S. Effron, Military Justice: The Continuing Importance of Historical Perspective, 2000 ARMY LAW. 1, 1 (2000). At the time he wrote this, Effron was an active judge on the U.S. Court of Appeals for the Armed Forces.

46. See generally SCHLUETER, supra note 33.
underwent no substantive changes from 1806 to 1920, during which time the country fought the War of 1812, the Mexican-American War, the Civil War, the Spanish American War, and the First World War. Even the U.S. Constitution had been amended six times in that same period. But this was a period in which—but for these intense outbreaks of conflict—the U.S. almost never had a standing military of “regulars,” in keeping with the framers’ original fears and tracing back to Sir William Blackstone’s belief that a free nation should not, and need not, employ such a professional army.

For Blackstone, and the Constitution’s framers, there was a sharp and necessary, and admittedly ugly and painful, version of law to govern the military just as war itself was sometimes a sharp and necessary, ugly and painful, version of normal social and civil conventions and dispute resolution.

[T]he necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in [a] time of peace, when the king’s courts are open for all persons to receive justice according to the laws of the land . . . . [These forms of discipline, like war itself, are] temporary excrescences bred out of the distemper of the state . . . .


50. 2 WILLIAM BLACKSTONE, COMMENTARIES *395.

51. John Adams drafted the first revision of the American Articles of War, updating the initial attempt enacted by Continental Congress in 1775. In a letter to his wife, he wrote, “[I]f I were an Officer I am convinced that I should be the most decisive [d]isciplinarian in the [a]rmy . . . . Discipline in an [a]rmy, is like the ([l]aws, in a civil [s]ociety. There can be no ([l]iberty, in a [c]ommonwealth, where the laws are not revered and most sacredly observed, nor can there ([h]appiness or ([s]afety in an [a]rmy, for a single ([h]our, where [d]iscipline is not observed.” Letter from John Adams to Abigail Adams (Aug. 24, 1777), https://www.masshist.org/digitaladams/archive/doc?id=L.17770824ja [https://perma.cc/Z94T-9255].

52. BLACKSTONE, supra note 50, at *400.
Nevertheless, the United States tolerated such deviations, largely institutionalizing them—in effect, having a more stable, durable body of military law than a stable, durable body of military personnel. This was a standard view of American military commanders by the second half of the nineteenth century, like General William Tecumseh Sherman, the famed Civil War combat commander who served before his retirement as General-in-Chief (the commanding general) of the Army. He was also a lawyer.\(^53\) His views on the distinction between civil and military law are telling:

\[\text{[I]t [would] be a grave error if by negligence we permit the military law to become emasculated by allowing lawyers to inject into it the principles derived from their practice in the civil courts, which belong to a totally different system of jurisprudence . . . . The object of military law is to govern armies . . . of strong men, so as to be capable of exercising the largest [amount] of force at the will of the nation.}\(^54\)

The U.S. military did not have an independent trial judiciary staffed with actual lawyers serving as judges, or an independent military service appellate court, until 1968.\(^55\) Up to that point, “general courts-martial” were presided over by the senior-ranking lay officer on the panel, advised by a “law officer” who may or may not have been a practicing attorney; and this was the same kind of military tribunal that could adjudge life in prison or death sentences for the most severe of offenses.\(^56\) The lower court, a “special court-martial,” could adjudge up to six months of confinement, but had no law officer, no verbatim record of trial was required, and the accused had no right to the assistance of a government-appointed lawyer.\(^57\) It was not until 1983 that the U.S Supreme Court could review, by writ of certiorari, decisions from the lower Court of Appeals for the Armed Forces (then called the Court of Military Appeals).\(^58\)


As unusual as all that seems, from the comparative vantage point of civilian justice, it gets weirder still. For example, a commanding general—say, the Commander of the 101st Airborne Division and its home base at Fort Campbell, Kentucky—can issue an order that applies to all active duty servicemembers assigned to her division, and even all servicemembers not assigned to that division but temporarily transiting through or temporarily on duty at Fort Campbell. 59 Failure to obey order or regulation is a crime carrying a maximum punishment of up to two years of confinement and a dishonorable discharge. 60 There are three theories of culpability or ways of committing this offense:

Any person subject to this chapter who—
(1) violates or fails to obey any lawful general order or regulation;
(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or
(3) is derelict in the performance of his duties . . . . 61

But notice that it has to be, as a first threshold matter, a “lawful” order. The President’s explanation of this power (in the series of executive orders that collectively make up the Manual for Courts-Martial)—apparently through the implicit authority as the military’s Commander in Chief 62—describes it as one that is far from limitless. It has imposed various constraints on that power to “legislate” into existence an entire body of criminal prohibitions through a simple order. To be “lawful,” that order cannot be “contrary to the Constitution,” “[contrary to] the laws of the United States,” “[contrary to] lawful superior orders,” or “beyond the authority of the official issuing it.” 63 For more meaning, the definition of another offense, “willfully disobeying superior commissioned officer,” 64 is instructive. An order is presumed lawful

59. For example, if various off-base commercial establishments are widely known for being home to illicit activities or pose unreasonable risks to safety and health of servicemembers, the commanding general can make these locations “off-limits.” If a servicemember nevertheless frequents these establishments, he violates the general order. U.S. DEP’T OF ARMY, REG. 190-24, ARMED FORCES DISCIPLINARY CONTROL BOARDS AND OFF INSTALLATION LIAISON AND OPERATIONS 3 (2006).

60. 10 U.S.C. § 892; M.C.M., supra note 6, at pt. IV, ¶ 18.d.


63. M.C.M., supra note 6, at pt. IV, ¶ 18.c.(1)(c).

64. 10 U.S.C. § 890.
so that a soldier “disobey[s] at [his own] peril” (unless patently illegal); the officer giving the order must have the authority to give such an order; the order must be based on a law, regulation, custom of the service, or—if not so directly derived—at least relate to the direction, coordination, or control of the subordinate’s duties, activities, health, welfare, morale, or discipline; and—as a final necessary precondition of lawfulness—the order must relate to a “military duty.” Such a duty encompasses “all activities reasonably necessary to accomplish a military mission” or activities that “safeguard or promote the moral, discipline, and usefulness of members of [that] command . . . provided it is directly connected [to] the maintenance of good order and discipline.” Further, it must be a specific mandate to do or not do a specific act and cannot violate personal rights or private affairs in the absence of such a “valid military purpose.” Finally, “a person’s conscience, religious belief, or personal philosophy cannot [be used to] justify or excuse . . . disobey[ing] . . . an otherwise lawful order.”

Indeed, Congress too has played a role in tempering the conventional martial elements of military justice. It has often ensured that the military was several steps ahead of the civilian justice system in securing to its members certain rights in advance of those finally guaranteed to defendants at state felony trials. Servicemembers’ Fifth Amendment privilege against self-incrimination had been protected by Article 32 of the UCMJ for sixteen years before the Supreme Court required civilian police to give what became known as the Miranda rights. The Court even cited positively to the military’s protection as an exemplar in rationalizing that such rights applied to suspects. Article 27 of the UCMJ, beginning in 1950, guaranteed the accused’s right to a lawyer as defense counsel (at least for general courts-martial) twelve years before the Supreme Court said that the Sixth Amendment guaranteed a defendant legally-qualified counsel in state court felony trials in Gideon v. Wainwright.

66. Id.
67. Id.
68. M.C.M, supra note 6, at pt. IV, ¶ 16.c.(2)(a)(iv). One distinction between this offense and that described by Article 92 is that the latter offense does not require the accused’s actual knowledge of the order or regulation, whereas Article 90 does. Id. ¶ 16.c.(2)(c).
70. Id.
Various expectations of civilian due process—public hearings, representatives or defense counsel, evidentiary standards, legally-trained judges, majoritarian (or unanimous) decisions on guilt and punishment, appellate rights, and democratically-elected civilian control over the military, to name but a few—became accepted parts of military justice.\textsuperscript{72} Nevertheless, several martial features have remained largely intact, though certainly more fragile (but also more transparent) than ancient military customs traditionally considered useful. The essence of military discipline, whether used as a verb or as a noun, is creating conditions for obedient, brave, self-sacrificing duty in the face of unnatural dangers to achieve some military objective. Permitting maximum discretion by the senior commander in the field, military justice was more of an administrative and managerial set of authorities institutionalizing flexibility to choose when, where, and how to discipline (the verb) thereby instilling discipline (the abstract noun). It emphasized speed and deterrence.\textsuperscript{73}

Two corollaries followed from this emphasis. First, bad conduct or ill-discipline outside the realm of military affairs or military tasks was once absent from military law, subject only to civil law processes and judgments. Up until the U.S. Civil War, no non-martial common law crimes (e.g., murder, rape, assault, robbery) were punishable by court-martial. Beginning in 1863, civilian-type capital crimes committed by soldiers during wartime could be tried by court-martial and could be punished with a death sentence.\textsuperscript{74} In 1916, Congress expanded court-martial jurisdiction over all common law offenses, except that rapes and murders alleged to have occurred in “peacetime” and in the continental United States would be tried by civilian courts.\textsuperscript{75} Military discipline, whether harsh and cruel or flexible and forgiving, only concerned itself with certain types of transgressions and wrongdoing. Military offenses (primarily those with no civilian analogue, or what I will call “martial offenses”) are still concerned with only these types. We can divide them into seven categories:\textsuperscript{76}

\begin{itemize}
  \item \textsuperscript{72} See Schlueter, supra note 11, at 165 (noting that “[o]n the whole, the changes in this century to the American court-martial system have kept pace with similar innovations in the civilian courts . . . [and] more often than not, reflected the current view towards justice, civil and military”).
  \item \textsuperscript{73} See generally Maurer, supra note 13, at 873–94.
  \item \textsuperscript{74} Loving v. United States, 517 U.S. 748, 753 (1996) (citing Act of Mar. 3, 1863, \$ 30, 12 Stat. 736, Rev. Stat. \$ 1342, Art. 58 (1875)).
  \item \textsuperscript{75} Articles of War of 1916, ch. 418, \$ 3, arts. 92–93, 39 Stat. 664.
  \item \textsuperscript{76} This list first appeared in Maurer, supra note 24, at 43–44.
\end{itemize}
1. Acts or omissions that render the individual servicemember less ready to do his duty or perform the mission (e.g., modern codes prohibit and punish absence without leave, unfitness because of excessive alcohol consumption or drugs, and certain types of self-injury and recklessness);\(^77\)

2. Acts or omissions that endanger or harm other servicemembers or government military property (e.g., hazarding a vessel, dangerous flying, maltreating subordinates, hazing);\(^78\)

3. Acts or omissions that interfere with command’s self-policing law enforcement authorities (e.g., resisting arrest, obstructing the police, allowing prisoners to escape, false official statements);\(^79\)

4. Acts or omissions that interfere with or degrade the command’s ability to execute its mission (e.g., AWOL, desertion, making false records, contravention of standing orders, disobedience to lawful commands, disrespecting non-commissioned officers);\(^80\)

5. Acts or omissions that aid the enemy in a time of conflict (e.g., desertion, misconduct as a sentry or guard, disclosure of information useful to the enemy, mutiny, sedition, espionage);\(^81\)

6. Acts or omissions that depict, for no other reason than their inherent scandalous, shocking or immoral nature, the servicemember as something other than morally upstanding, or which embarrass the service itself (e.g., “disgraceful conduct of a cruel or indecent kind,” “conduct unbecoming an officer,” “conduct of a nature to bring discredit upon the armed forces”);\(^82\)

7. Acts or omissions that prejudice “good order and discipline” for some other case-specific, fact-dependent reason.\(^83\)

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\(^77\) See, e.g., 10 U.S.C. §§ 886, 912, 914, 934; see also, e.g., M.C.M. supra note 6, at pt. IV, ¶¶ 100, 107 (describing the latter); British Armed Forces Act 2006, 52, § 20.

\(^78\) See, e.g., 10 U.S.C. §§ 893, 910; see also, e.g., British Armed Forces Act 2006, 52, §§ 22, 33.


\(^81\) See, e.g., 10 U.S.C. §§ 885, 894–895, 903; see also, e.g., British Armed Forces Act 2006, 52, § 17.

\(^82\) See, e.g., 10 U.S.C. §§ 933–934; see also, e.g., British Armed Forces Act 2006, 52, § 23.

\(^83\) See, e.g., 10 U.S.C. § 934; see also, e.g., British Armed Forces Act 2006, 52, § 19.
Over time, however, military law proponents have found increasing virtue in the practice of having a virtuous military that goes beyond merely demonstrating martial values in training or on the battlefield. Virtuous, duty-bound servicemembers share, and are held responsible for internalizing, civilian community morals and values even though the law generally considers the military a separate community, or specialized society, altogether. The civilian courts have also recognized this, accepting it as a near maxim of military affairs: “[T]o accomplish its mission, the military must foster instinctive obedience, unity, commitment, and esprit de corps.” Through the deterrent effects thought to be implicit in an expansive set of criminal prohibitions, the government began to regulate a much wider range of behavior, both “on” and “off” duty regardless of where the misconduct occurred and regardless of whether civil society was victimized. The government’s ability to effectively and efficiently prepare for war, and fight on demand, remained critical; but now having a wider range of ways to regulate behavior was thought as necessary to sustain that fighting ability as was having a wide range of weapons and large professional pool of personnel. In other words, the American system has expanded its subject matter criminal jurisdiction far beyond the seven traditional categories of martial misconduct that were universally proscribed.

The second corollary implicated the role of the commander in the justice system. Afforded various degrees of power akin to prosecutors, legislators, and judges, this role has remained a deeply ingrained expectation within the military itself. There is no one better situated and competent than the unit commander, it is argued, to know what conduct might defeat his or her military purposes,

86. Though deterrence is generally cast in terms of the certainty and severity of the punishment, some argue that deterrence is more effectively understood and applied in terms of certainty of apprehension, or the perceived risk of being caught before, during, or after the wrongful act. See generally Daniel S. Nagin, Deterrence in the Twenty-First Century, 42 CRIME & JUST. 199 (2013). This distinction is immaterial to the theory’s proposition involving “punishment.” See infra Sections V.C–D.
88. Jim Garamone, Top Service Lawyers: Commanders Crucial to Attacking Sexual Assault, Harassment, U.S. DEF’T DEF. (Apr. 4, 2019),
prejudice the atmosphere of obedience and respect for authority, or damage unit cohesion and morale. Likewise, it is argued that there is no one better situated and competent to determine what conduct (and who) deserves punishment, what behavior needs to be prevented and deterred, and what behavior earns the possibility of professional rehabilitation. These presumptions underlie certain high-ranking commanders’ authority to issue legislative-like “general orders” or “general regulations” that prohibit specific conduct not otherwise criminalized anywhere else and that subject violators to criminal punishment through court-martial. Indeed, it is the same set of presumptions underlying Article 133’s prohibition on “conduct unbecoming an officer” and Article 134’s bar on conduct that is, under the circumstances, “to the prejudice of good order and discipline.”

These corollaries have had a significant shaping effect on how military rules of conduct, articles of war, or military-specific criminal codes have evolved, and how they have been interpreted by the common law courts, both military and civilian—and in the court of public opinion. Military legal history


89. Mackay v. The Queen, [1980] 2 S.C.R. 370, 403 (Can.) (“From the earliest times, officers of the armed forces in this and, I suggest, all civilized countries have had this judicial function. It arose from practical necessity and, in my view, must continue for the same reason.”); Arthur W. Lane, The Attainment of Military Discipline, 55 J. MIL. SERV. INST. 1, 15 (“[E]very breach of discipline decreases the efficiency of the army; hence it is the duty as well as the right of those in command to administer such punishment as will tend to prevent a repetition of the offense by anyone in the military service.”).

90. 10 U.S.C. § 933; M.C.M., supra note 6, at pt. IV, ¶ 90.c.(2).

91. 10 U.S.C. § 934; M.C.M., supra note 6, at pt. IV, ¶ 91.c.(2)–(3). I do not think the same can be said about clause (2) of Article 134—the terminal element of the offense being a requirement that “conduct [is] of a nature to bring discredit upon the armed forces.” 10 U.S.C. § 934. Rather than the commander’s relative position and mission-specific needs being the relevant source of criminal culpability, this element is proven by demonstrating, to a “rational trier of fact,” that the conduct was “of a nature” to possibly discredit the armed forces in the eyes of the public (even if there is no evidence that anyone in the public knew of it). United States v. Phillips, 70 M.J. 161, 165–66 (C.A.A.F. 2011).

92. See, e.g., ROBERT SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC 42 (1970) (“The chaos and the often ridiculous inconsistencies of military justice are largely the fault of a tradition by which a command[er] is allowed to run his own outfit with all the autonomy of a medieval fiefdom.”); see generally id. (acknowledging that his work was “not a detached, scholarly analysis” but rather a journalistic “effort to experience through [court-martial and prison confrontations] the ordeal of military justice, for whatever common sense conclusions can be drawn”). In 1970, it was safe for Yale Law Professor Joseph Bishop to lament that the “normal attitude of the American public toward military justice is compounded of equal parts of indifference and ignorance.”
has been like a slow mitosis resulting in a severance of process from
punishment—an evolution from practices like Roman decimation, where
process and punishment were basically unified. But just as mitosis is the
division of one cell into two daughter cells each with the same chromosomes
as their parent’s nucleus, both military justice process and military justice
punishment retain the original core, fundamental element: the commander and
its military objectives.

Yet, if military justice is to include the penalization of non-martial offenses
and continue to accept its gradual “civilianization” of its processes, then there
is a contradiction at the heart of military justice that must be explicitly resolved:
the Supreme Court long ago opined that military law must be limited by the
principle that power exercised by the government to enclose a person within its
criminal jurisdiction should be “the least possible power adequate to the end
proposed.” That principle—vague as it must necessarily be—was never rebuffed, modified, or caveted in subsequent cases. So it is entirely


93. Maurer, supra note 13, at 873–76; see also KYLE & REITER, supra note 37, at 10 (summarizing the process of reform, across 120 nations studied, as playing out in “fits and starts, with important reforms separated by periods of stability until interrupted by new reforms, often due to significant court rulings or resurgent pressure from civil society following high-profile human rights violations”).


95. In Solorio v. United States, 483 U.S. 435, 440 n.3 (1987), the Court very weakly referenced this principle in a footnote, citing to Toth, explaining that it was merely a dictum whose application was limited to the facts of Toth (post-military service court-martial jurisdiction over ex-servicemembers for crimes committed while they were on active duty). Because the Solorio Court hedges, in this footnote, over the breadth of that principle’s applicability beyond the facts of Toth, I am comfortable saying that Solorio’s pseudo-cabining of this principle is also within the family of dicta.
appropriate—even necessary—to ask what that “end proposed” actually is: What purpose and rationale justifies such a system that grants a lay commander investigative, prosecutorial, and adjudicatory powers relative to crimes that have no discernible or foreseeable consequence on the affairs that most matter to a commander? After all, it was only conduct that degraded a commander’s ability to perform a mission effectively that justified, in the first place, granting them significant power in a military-specific criminal justice system.96

B. Competition Between Values

Courts-martial are still very much instruments of command authority, and their ultimate purpose is to protect the military effectiveness of the armed forces.97

A code of military justice cannot ignore the . . . circumstances under which it must operate but we are equally determined that it must be designed to administer justice.98

Military law is, in many respects, harsh law which is frequently cast in very sweeping and vague terms. It emphasizes the iron hand of discipline more than it does the even scales of justice.99

Solorio v. United States, 483 U.S. 435, 440 n.3 (1987) (“Broadly read, this dictum applies to determinations concerning Congress’ authority over the courts-martial of servicemen for crimes committed while they were servicemen. Yet the Court in Toth v. Quarles was addressing only the question whether an ex-serviceman may be tried by court-martial for crimes committed while serving in the Air Force. Thus, the dictum may be also interpreted as limited to that context.”). Broadly read, this note expresses uncertainty, not a refutation, of this principle; in a limited reading, it is not clear to me how this note’s “broad reading” of Toth or its “limited” reading differ in any meaningful way. See id.

96. JOSEPH W. BISHOP, JR., JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW 55 (1974) (“If the justification for a separate system of military justice is the need to maintain discipline among soldiers, there is no reason for courts-martial to try civilians, and no compelling reason why they should even try soldiers for crimes that have no effect on military discipline.”).

97. BRAY, supra note 11, at xiii.


These quotes are representative of three elusive, but nevertheless widely referenced concepts: military effectiveness; (efficient) administration of justice; and good order and discipline. Three competing values, each offered independently to justify and explain why a separate code of criminal law for military members is necessary, why it looks the way it does, and why it should (or should not) evolve toward a more civilianized criminal justice system. At least two of these values seem related: “good order and discipline” seems like a quality that sets the necessary conditions for military effectiveness. But that is, at best, a broad generalization and readily subject to contradiction. One can lose a battle, or war, despite well-ordered and disciplined troops. And what about “justice?” Does it modify the other two values by constraining martial excesses? Is it the case that “military effectiveness depends on justice?” Or does justice create conditions for good order and discipline? For that matter,
is the administration of justice a *form* of good order and discipline itself?\textsuperscript{104} Once a case is before a court-martial, does the government’s interest (personified by the commander?) necessarily shift from one of policing the obedient discipline of servicemembers to one of ensuring justice under the law?\textsuperscript{105} Is it improper to say that a military court-martial has a dual function as an instrument of discipline and as an instrument of justice? Or is it more accurate and appropriate to describe it as an “instrument of justice and in fulfilling this function it will promote discipline”?\textsuperscript{106}

Some military justice systems, America’s version included, further blur the matter by emboldening commanders with an extraordinary range of administrative and punitive authorities to address a spectrum of undesirable conduct. This spectrum includes basic soldierly deficiencies like inattention to detail or sloppiness, untrustworthiness, lack of promptness, undisciplined interpersonal misbehavior, and the indiscipline of criminal misconduct ranging from misdemeanor to felony.\textsuperscript{107} It blurs the matter further still by creating a complicated arrangement of checks and balances, within a commander’s own legal staff and the military’s judiciary.\textsuperscript{108} To counterbalance the commander’s competing impulses for decisiveness, expediency, and deterrence, Congress and the courts have fueled an ever-expanding expectation for accoutrements of civilian due process.\textsuperscript{109}

Due in part to this confusion, in part to historical side-stepping deference by the judiciary,\textsuperscript{110} and in part due to political acquiescence and often unhelpful
deference to military leaders, there is no standard model of what these three ideal values signify for the principled structure and principled use of military criminal law. That is, there is no theory that can describe, explain, and defend fundamental attributes of a separate military justice code that arms lay commanders with quasi-prosecutorial and quasi-judicial functions, given the nature of military organization and its raison d’être.

A staunch advocate for military justice, Joseph Bishop Jr., wrote in 1974 that military discipline’s “demands justify a procedure that does [not] lessen the chance of unjust acquittal, while it need not, and should not, increase the possibility of an unjust conviction.” He believed that a system that might accept the occasional conviction of an innocent soldier—or at least a not-completely guilty one—was probably warranted given the challenging circumstances in which such a system would operate.

Bishop’s was an exceptionally troubling claim—that, because of the context in which military members live and work, basic presumptions about due process and burdens of proof may be relaxed. Apparently, the precept that “it is better that ninety-nine... guilty [persons] go free than that one innocent be convicted is not easily squared with the need to maintain efficiency, obedience and order in an army, which is an aggregation of [people] (mostly in the most criminally prone age brackets) who have strong appetites, strong passions, and ready access to deadly weapons.” Such a view, if it is widely believed, needs far more than a vague series of assertions to prop up its credibility.

Bishop’s broad stroke defense came at the end of the draft era and the end of the Vietnam War. The most current attempt to establish and defend its credibility, though, is David Schlueter’s Military Justice Conundrum in 2013. After comprehensively cataloguing twenty-one approaches or “themes” taken by courts and commentators to describe the balance between the two values of justice and discipline, Schlueter concludes that we can definitely say that military justice has a singular primary purpose and that this


112. BISHOP, supra note 96, at 23.

113. Id.

114. Schlueter, supra note 41.
purpose is to maintain good order and discipline within the ranks. These themes represent different formulas for calculating the “purpose and function” of military justice. But all of these themes are based on the same underlying variables or values, just arranged and weighted differently.

IV. WHAT A THEORY SHOULD ADDRESS

A. Five Questions (and Some Derivatives)

A “theory” provides a framework for making cogent, consistent, and reasoned answers to five basic questions about the descriptive and normative shape of American military justice. The theory does this by providing a basis for determining:

1. When and where does this application of sovereign governance, as opposed to other criminal law regimes, apply—peacetime, wartime, both? Only while deployed abroad when no U.S. court is available? Only “in the field,” where immediate resolution of certain allegations is necessary to avoid interference with the unit’s ongoing mission? Anywhere the servicemember happens to commit a proscribed harm?

2. What acts or omissions should be prohibited—only those which degrade military effectiveness? Combat-related offenses? “Common-law” mal en se offenses? Violations of others’ rights, or violations of community or institutional values too?

3. Who plays roles in this governance—if courts, what kind? If commanders, to what extent, and which commanders? If lawyers, with what guarantees of independence from executive authorities?

4. What limits, constraints, discretion, oversight, and power to review are permitted or denied to those commanders, courts, or other military officials—a conditional authority of commanders to search and seize servicemember property? Appellate review? Independence of judges and lawyers?

115. See id. at 16–43.
116. Id. at 5.
117. This cataloguing of themes is described and criticized in Maurer, supra note 16, at 733–37.
118. In addition to what culpable conduct ought to be proscribed, it is possible that the so-called “general part” of the criminal law may also be answered by a theory of military justice. See GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 393–408 (1978) (summarizing the essential nature and ambiguities of the “general part”).
5. What limits or constraints on individual liberties will operate on accused servicemembers’ due process and on victims’ access to justice—a limitation on freedom of expression? A narrow view of what “reasonable expectation of privacy” means? Personal jurisdiction over retirees or civilians accompanying the armed forces? A right to a randomly selected jury of one’s peers drawn from a fair cross-section of the community who must decide guilt by unanimous verdicts? A right to notice and appeal?

There is one important matter such a theory does not address, nor should it be expected to: it provides no prosecutorial or punitive guidance in particular matters. It is not intended to guide the choices and decisions that ought to be made about a specific allegation of misconduct or how to punish a specific person once determined to be guilty through some legitimate adjudicative process. Instead, the theory would be a super-rationale overtly concerned with articulating a clear purpose and which conveys an understandable set of common principles for determining what conduct is to be punishable generally, who is liable to be punished generally, who may decide if that conduct occurred and whether the person is to be subject to a process that can result in punishment generally, who may inflict the punishment generally, and what protections and rights are preserved and enforced generally. It does not answer these questions, but rather provides a rubric for grading the merit and acceptability of possible answers.

Current military law provides answers to each of these questions singularly. For example, the U.S. military criminal code’s personal and territorial jurisdiction extend worldwide, during peacetime and in war.\(^\text{119}\) It proscribes conduct that is definitively martial in character, like disobeying a lawful order, desertion, and dereliction of duty, as well as conduct criminalized in every other civilian jurisdiction, like murder, rape, kidnapping, and fraud, regardless of its nexus to military service.\(^\text{120}\) It provides for a hierarchical system of trial and appellate courts, independent of the accused’s chain-of-command,\(^\text{121}\) with military and civilian judges presiding over the classically adversarial courtroom in which a lawyer representing the government\(^\text{122}\) must prove the allegations.

\(^{119}\) 10 U.S.C. § 805.

\(^{120}\) See generally 10 U.S.C. §§ 877–934.


\(^{122}\) 10 U.S.C. § 827(b) (describing qualifications); 10 U.S.C. § 838(a) (describing duties).
beyond a reasonable doubt\textsuperscript{[123]} and in which the accused is represented by
counsel of choice.\textsuperscript{[124]} It provides for a statute of limitations,\textsuperscript{[125]} constraints on
pre-trial punishment,\textsuperscript{[126]} constraints on search and seizure authority,\textsuperscript{[127]} and
protections against self-incrimination.\textsuperscript{[128]} It provides commanders with
authority to investigate, to judge, and to punish “minor” misconduct\textsuperscript{[129]} and to
make prosecutorial-like indictment decisions upon the advice from military
lawyers (in a shrinking class of cases).\textsuperscript{[130]}

Notwithstanding these answers, American military justice lacks a
consistent, historically informed but contemporaneously reasonable, set of
principles to serve as the yardstick for determining whether these answers tie
together coherently, assuaging doubt about their merit and acceptability.
Apparent departures from “normal” justice remain, as does their lack of
justification. Soldiers have a statutory right to be judged by a panel of best
“qualified” members drawn from the chain-of-command\textsuperscript{[131]} but not a Sixth
Amendment right to jury of peers drawn from a fair cross-section of the

\begin{footnotesize}
\begin{enumerate}
\item[123.] 10 U.S.C. § 851(c); M.C.M., \textit{supra} note 6, at pt. II, ¶ 135; \textit{see also} United States v. Long, 81 M.J. 362, 367–68 (C.A.A.F. 2021) (discussing the de novo standard of review for legal sufficiency of the evidence at trial).
\item[124.] 10 U.S.C. § 827(b) (describing qualifications of defense counsel); \textit{id.} § 838(b) (describing duties of defense counsel); \textit{see also} United States v. Watkins, 80 M.J. 253, 258 (C.A.A.F. 2020) (describing relationship between Articles 27 and 38 and the Sixth Amendment).
\item[125.] 10 U.S.C. § 843; \textit{see also} United States v. Briggs, 141 S. Ct. 467, 468 (2020) (interpreting Article 43, UCMJ, in light of capital punishment’s inapplicability to rape convictions under the Eighth Amendment).
\item[126.] M.C.M., \textit{supra} note 6, at pt. II, ¶ 23; \textit{see also} United States v. Regan, 62 M.J. 299, 302 (C.A.A.F. 2006).
\item[128.] 10 U.S.C. § 831(a) (“[N]o person . . . may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.”); \textit{see also} United States v. Evans, 75 M.J. 302, 303 (C.A.A.F. 2016) (describing the relationship between Article 31, UCMJ, and the Fifth Amendment).
\item[129.] 10 U.S.C. § 815; \textit{see also} M.C.M., \textit{supra} note 6, at pt. V.
\item[130.] 10 U.S.C. § 834; \textit{see also supra} note 43 (providing comments on recent statutory reforms to the scope of the commander’s traditional prosecutorial authority).
\item[131.] 10 U.S.C. § 825 (describing selection and qualifications of panel members); \textit{see also} United States v. Moreno, 63 M.J. 129, 132 (C.A.A.F. 2006) (explaining a servicemember’s right to “qualified, properly selected, and impartial members”).
\end{enumerate}
\end{footnotesize}
community,132 which means the senior commanding officer who decided to refer the case to a court-martial is the same one that hand-picked the members of the panel.133 Soldiers have a statutory right to an independent, pre-trial, probable cause hearing by a neutral military lawyer,134 but not a Fifth Amendment right to a grand jury indictment.135 Soldiers are protected against undue and unjustified influence from commanders in the investigative and adjudicative phases of the prosecution,136 but it remains a system that—at the highest level of abstraction—is unburdened by a skeptical, strictly scrutinizing Supreme Court.137 It is subject to review by the Supreme Court,138 but preconditions for granting certiorari are so stringent and narrow that exceedingly few arguments are ever made to the Court from claims arising from courts-martial.139 Finally, military justice has identified “purposes” but it is the President, not Congress, that has articulated them, and nobody—not the Commander in Chief, not Congress, not the courts, nor military doctrine, nor

132. United States v. McClain, 22 M.J. 124, 128 (C.M.A. 1986) (distinguishing the Sixth Amendment right to a jury from the Article 25, UCMJ, right to a panel), see also United States v. Riesbeck, 77 M.J. 154, 162 (C.A.A.F. 2018).
134. 10 U.S.C. § 832; see also M.C.M., supra note 6, at pt. V, ¶ 19 (rules implementing the procedure for pre-trial hearings).
137. See Weiss v. United States, 510 U.S. 163, 167–77 (1994); United States v. Eliason, 41 U.S. 291, 301 (1842) (“[T]he power of the executive to establish rules and regulations for the government of the army, is undoubted.”); Swaim v. United States, 156 U.S. 553, 558 (1897) (discussing that the “very nature” of the office yields inherent authority to convene general courts-martial, separate and apart from any Congressional authorization to do so); see also United States v. Scheffer, 523 U.S. 363, 312 (1998) (discussing deference to the President’s decision to promulgate a particular rule of court-martial procedure).
legal scholars have formed any consensus on what these terms mean or how to prioritize them. ¹⁴⁰

B. Purposes v. Theories

The most concise defense for the idiosyncrasies of American military justice is that from David Schlueter, mentioned earlier, but it is at the most general of levels: the “world-wide deployment of large numbers of military personnel with unique disciplinary requirements mandates a flexible, separate jurisprudence capable of operating in times of peace or conflict.”¹⁴¹ This is, no doubt, a valid and quite important observation, for it readily emphasizes the most obvious distinguishing hallmarks of the military’s raison d’être and reminds the skeptic of the harrowing and dangerous context in which some military members work. But it leaves far too many questions about the specifics for the skeptic. Is this system, for instance, similarly justified for those military personnel who do not deploy or serve overseas, but rather live and work in a U.S. jurisdiction with fully open and functioning courts? Is it similarly justified if only a small number of servicemembers deploy for limited periods of time? What, exactly, are the “unique” disciplinary requirements—and for that matter, why should we think they are actually unique to the military? Why does it assume that the same system should operate identically regardless of whether it functions in times of peace or conflict? Schlueter’s generalization says nothing about prohibiting martial and civilian-type crimes; it says nothing about the degree of punishment for violations; it says nothing about the role of the commander relative to lawyers and courts; it says nothing about the choice to depart from constitutional expectations and standards; it says nothing about the constraints imposed on commanders designed to protect due process; it says nothing about how courts-martial are to be structured nor how they ought to be supervised by the civilian judiciary (if at all) and managed by the executive branch through the military chain-of-command. What he does conclude is that the various combinations of rights, constraints, ideals of justice, and mechanisms for commander decision-making can be best classified as fitting,


¹⁴¹. SCHLUETER, supra note 33, at 4.
to some degree, Herbert Packer’s “crime control” model and his “due process” model of criminal justice systems’ core functions.  

Schlueter spends great effort in examining two key and potentially opposing concepts at the heart of this defense: that of justice and that of good order and discipline—the same conflict described by the Court in *Ortiz*. He draws those concepts from historical practice, condensed and articulated by the President in the Preamble to the Manual for Courts-Martial. It is therefore worth a moment to examine the weight such “purposes” may have and whether they round out a “theory” that both describes and prescribes coherently. “The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”

Granted, this prefatory Section announces that American military justice has one “purpose,” but it might equally be said to have one ultimate end-state with three “purposes.” It is not an exemplar of clarity.

It does not tell us why these purposes (or prongs of a single purpose)—and not others—are that which “strengthen the national security.” For example, is the inculcation of virtue (by punishing only those whose acts or omissions manifest a defined “vice,” we reward those who exhibit, through their conduct, some defined virtuous character) excluded from the military’s vision of military law, or is it actually tacitly implied by these? Nor do we have a clear and

142. *Id.* at 45–71 (referring to Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964)).

143. *Id.* at 71–74.

144. 138 S. Ct. at 2175.


146. *Id.*

147. An example in a martial context: Pete and Adam are members of the same seven-person infantry squad. During an intense firefight, Pete is wounded and lays bleeding profusely on the ground. Adam sees his comrade and knowing full well that an attempt to attend to Pete and move him to safety would place him within range of enemy gunfire, he decides to rescue Pete anyway. During a later ceremony in which a Silver Star medal is awarded to Adam for his conspicuous bravery, he explains his decision thusly: “I would never leave a fallen soldier behind. He’s my brother (in arms); I did the only thing I knew was right in that moment.” Such an attitude is reflected in the U.S. “values” (loyalty, duty, respect, selfless service, honor, integrity, and personal courage) and its “warrior ethos.” *The Army Values*, U.S. ARMY, https://www.army.mil/values/ [https://perma.cc/DH7S-4B7A]; *Warrior Ethos*, U.S. ARMY, https://www.army.mil/values/warrior.html [https://perma.cc/3B9D-CV8Y]. One
accepted definition—in case law, statute, scholarship, or military doctrine—of any of these terms.\footnote{\textsuperscript{148} Even if we did, we do not have a clear answer as to whether each purpose is interlinked such that they each form necessary but alone insufficient prongs of a single purpose. We do not know whether the military prioritizes one value over another or how to address a case in which these values conflict with one another (and even attempting to do so probably assumes we agree on what these terms mean). Finally, we are left to speculate (and surely the courts have done this in spades) what the connection is between “strong national security” and criminal justice in the military.\footnote{\textsuperscript{149} Weber, supra note 40, at 123, 156.}

\textsuperscript{148} The Court has long made such sweeping conclusions, as if axiomatic, both before and after the mid-twentieth Century enactment of the UCMJ. See, e.g., Martin v. Mott, 25 U.S. 19, 30 (1827) (“A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases, every delay, and every obstacle to an efficient and immediate compliance, necessarily, tend to jeopardize the public interests.”); Ex Parte Milligan, 71 U.S. 2, 123 (1866) (“The discipline necessary to the efficiency of the army and navy, required other and swifter modes than are furnished by the common law courts.”); In re Grimley, 137 U.S. 147, 153 (1890) (“An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer, and confidence among the soldiers in one another, are impaired if any question be left open as to their attitude to each other.”); United States \textit{ex rel.} Creary v. Weeks, 259 U.S. 336, 343 (1922) (“[M]ilitary tribunals are as necessary to secure subordination and discipline in the army as courts are to maintain law and order in civil life.”); United States \textit{ex rel.} Toth v. Quarles, 350 U.S. 11, 17 (1955) (“[T]rial of soldiers to
Whether they are individuated or ingredients to be combined, each can be said to represent an *ideal*. However, none of these ideals, alone or combined, imply or require the very choices that we expect a full theory of military justice to implicate. A few brief examples may illustrate why. They do not help us understand when and where *this* form of sovereign governance applies, nor justify when and where it *should*. Is it economically efficient for a resource-constrained and mission-focused commander to exercise her lawful prosecutorial authority only when real-world overseas missions are not foreseeable? Or are her soldiers more effective in combat if they see her enforce conditions of good order and discipline resolutely notwithstanding mission accomplishment, or might this actually undermine cohesion and readiness? Is justice served for a victim of a soldier’s crime when that crime can only be prosecuted when the unit returns from an overseas deployment? Is “discipline” served if a commander suspends investigation and potential punishment—that is, foregoing an immediate resolution—in order to avoid interfering with his unit’s ongoing mission?

These ideals do not help us understand what conduct is proscribed, nor do they justify particular choices about what *ought* to be proscribed. If good order, discipline, efficiency, and effectiveness are paramount, why bother punishing misconduct that has no relationship to military effectiveness, combat, morale, or cohesion? If the violation of community or institutional values is to be proscribed, should it be so only for officers, or would it relate to any enlisted leader too? In what sense do common-law *mal en se* offenses undermine military effectiveness or the good order and discipline of a unit?

Nor do these ideals explain who plays roles in this governance, nor do they suggest who *should* do so. If justice is an ideal—even if not the first among equals—why permit lay commanders in the executive branch as a whole to have a significant role in the day-to-day management of military justice? Does efficiency and effectiveness warrant granting the court-martial convening authority power to also select the factfinders, or would such an apparent conflict of interest violate our sense of justice? If good order and discipline matter, to maintain discipline is merely incidental to any army’s primary fighting function.”); Reid, 354 U.S. at 36 (“Because of its very nature and purpose the military must place great emphasis on discipline and efficiency.”); see also M.C.M., supra note 6.

150. See Major Franklin D. Rosenblatt, *Non-Deployable: The Court-Martial System in Combat from 2001 to 2009, 2010 ARMY L. 12, 12* (2010) (using empirical data and feedback from commanders to argue that commanders found practical ways to avoid, and reasons to justify avoiding, using the full extent of the military justice system during operational deployments).
what extent (if any) ought the legislature decide which conduct is to be proscribed and what degree of due process (if any) obtains? For that matter, how does making military prosecutors independent of the chain of command balance justice against the commander’s responsibility for good order and discipline? Does a civilian appellate court, created by Congress but operating within the executive branch and subject to review by the Supreme Court, satisfy all three ideals? Would such a court have a duty to explain the prioritization and meaning of these values, even if they were promulgated by the Chief Executive?

These ideals, moreover, do not explain the current limits, constraints, discretion, oversight, and power to review permitted or denied to those commanders, courts, or other military officials; nor do they justify potential preferences for such. Is it justice or is it efficiency and effectiveness that undergird a conditional authority of commanders to search and seize servicemember property? Does good order and discipline suggest a more narrow or minimal degree of scrutiny during appellate review, or does justice demand similar standards of review to those of civilian jurisdictions?

Finally, these ideals say nothing about what limits or constraints on individual liberties operate on accused servicemembers’ due process and on victims’ access to justice, nor what limits or constraints are rationally justified or even plausibly reasonable. Is national security strengthened by a limitation on a soldier’s freedom of expression? Is justice improved or denied by a narrow view of what a “reasonable expectation of privacy” means? How does a commanding officer’s ability to promote good order and discipline change for the better (or worse) if the military justice system expands its personal jurisdiction over retirees or civilians accompanying the armed forces? How do any of these values, singularly or combined, justify a particular rule for the selection a jury or “panel” as factfinders?

The most that can be said for these concepts is that they are like other ideals meant to promote a certain kind of military action on an individual basis and help to create military self-identity: fidelity, bravery, sacrifice, respect for authority, and honor.\textsuperscript{151} Like those martial values, the ideals of good order and discipline, efficiency and effectiveness, and justice (and strong national security) are more appropriately thought of as important—and potentially inspirational—rhetorical devices. They may guide decision-makers faced with case-by-case judgments about whether or not to employ their authorities, and

\textsuperscript{151} See \textit{The Army Values}, supra note 147; \textit{Warrior Ethos}, supra note 147.
they may self-describe the military justice system’s identity, distinguishing it from that of Oklahoma’s criminal justice system, or Montana’s, or Vermont’s. But they are no more a *theory* of military justice than fidelity, bravery, sacrifice, and honor are components of a theory of warfare.

**C. Four Basic Principles**

More than simply providing a framework for answering the five multi-part questions suggested above in Section III.A, an intellectually coherent theory should acknowledge a baseline for drawing comparisons among various possible answers. The four fundamental principles derived from a Rawlsian thought experiment[^152] might provide that starting point for judgment about a particular system’s particular answers. The approach used to generate those principles accounted for just four generic (and hypothetical) perspectives or what that article called, in homage to Rawls, “original position[s].”[^153] All four are thought relevant to a military criminal justice system operated by a representative democracy whose supreme law is that of a constitution and whose chief military leader is the elected civilian chief executive officer. The objective was to isolate the reasons and the reasoner, who is on a course of deciding whether and how to arrange a military justice system, from complicating contextual factors like entangling professional and personal relationships, costs, tendency toward institutional inertia, political ideology, personal ambitions, partisan capture[^154], and other variables.[^155]

As related in that article, “*all four positions are idealized—that is to say, simplified and unrealistic [in order to] clarify fundamental considerations and what a reasonable actor, from each of those vantage points, would think about and demand of a military criminal law system if starting from scratch.*”[^155] The first perspective was that of the national legislature, which would consider the state of international security and determine that an organized and in some sense bureaucratically-specialized and separately-managed military would be necessary to wield the specialized means and methods of protecting national interests by force or threat of force during the uncertain and risky conditions of warfare.[^156] Such a legislature would probably conclude it would

[^153]: *Id.* at 957.
[^154]: *Id.* at 963 n.46.
[^155]: *Id.* at 953–54.
[^156]: *Id.* at 963.
be reasonable and wise to enact a separate system to govern the conduct of military service members through some sort of hierarchical command and control arrangement for the division of specialized labor, the qualification and duties of its specialized employees, and the oversight of their performance in conditions that are physically dangerous, emotionally strenuous, and beset by challenges best described as morally ambiguous. \footnote{157}{Id. at 965–66.} The obligation to fight and to be prepared to fight in such conditions would—the legislature would reason—naturally fall to those who are best equipped by virtue of training and experience in its technical, physical, and visceral requirements. Moreover, the legislature would realize that promulgating the specific rules and designing the specific structures of such a system would reasonably follow the consultation with those military leaders claiming professional expertise. Some of those rules would assign discretionary authority—a limited scope of responsibility—to make decisions and to take actions independent of the direct monitoring and regulation of the civilian lawmakers. \footnote{158}{Id. at 966–67.}

The second perspective was that of the executive. It assumed that the overarching constitution, like ours, assigns responsibility for the funding and structuring of the military to the Congress but assigns responsibility for the use and implementation of the military’s armed force to the civilian elected President as Commander in Chief. \footnote{159}{Id. at 967.} Given that role, what would the Commander in Chief expect of a military justice system? Despite variances in presidential personality and combat contexts, it is likely that “some expectations are universal.” \footnote{160}{Id. at 968.} The controlled application of violence according to political intent, for example, is best accomplished (here, the President would be agreeing with our hypothetical legislature) by a professional cadre of experts who hold themselves bound by professional norms and duties, given some discretion and authority to act independently of the Commander in Chief. \footnote{161}{Id. at 968 n.66.} However, the President would be reasonable in wishing to “retain veto-proof ability to dictate, based on the evolving circumstances of a particular armed conflict or contemporary trends, what conduct would have deleterious effect on military missions or on the martial functions of the individual and the unit.” \footnote{162}{Id. at 969.}
But even then, the President is sensitive to public opinion as an elected official. He knows he would need volunteers from the body politic to serve. He would, therefore, be reasonable in preferring a system that “prevents, deters, or punishes behavior that would discredit the reputation, perceived character, and moral standing of the military, or respect for its individual members.” Such discretion would also, in practice, imply a President’s influence over procedures that adjudicate outcomes: the more efficient, the better because they avoid distracting the unit from its mission or detracting from its warfighting capabilities unnecessarily. However, the President would be incentivized to prefer a system that accounts for and protects certain civil liberties and due process expected by volunteers—it would need to be a system that could “survive assaults on its legitimacy and not result in recurring injustices that discredit the military in the eyes of the public”—and in so doing might avoid unreasonable micromanaging scrutiny by Congress.

The President would likely want military professionals bound by a system that itself inculcates and encourages valuable martial traits: loyalty, camaraderie, morale, obedience, self-sacrifice, integrity, courage, taking responsibility, competence, and adherence to the laws of war. At the same time, the President would expect that same system to discourage other traits: preferencing self over service, shirking duty, disrespecting lawful authority, dismissive of customs, neglect and inattention, indifference to outcomes, and unresponsiveness to training. Before coming around to concluding that a separate and distinct criminal justice system is advisable for the military she ultimately commands, and deciding what rules ought to be enforced in it, the President would—like Congress—likely consult first with the professional experts in the military.

The third perspective was that of the nation’s senior ranking military officer, standing in as a proxy for the average military commander’s interests and expectations, but by virtue of his position is aware of the military’s organizing structure, experienced in executing a variety of military missions, and is surrounded by senior civilian political principals. Those interests of the commander include a reliance upon groups of individuals that—at the
extreme but foreseeable end of a servicemembers’ professional duty—must harmonize their efforts collectively, even at the risk of pain or death, to achieve a military objective in combat. These commanders would likely expect prompt compliance with lawful commands, even when they run contrary to the self-interested survival instinct of those receiving them or when they disagree. Such fidelity requires of each servicemember a disciplined state of mind, and—sometimes—the possibility of punitive discipline as a deterrent.¹⁶⁸ This senior ranking officer, along with each commanding officer in the hierarchy beneath him, rightly acknowledges that some conduct by servicemembers might undermine the commander’s ability to effectively prepare for or engage in the mission for which he or she is responsible, as when a junior member disobeys an order, shows disrespect to the chain-of-command personally, is derelict in his duties, or deserts his unit. But, in reality and in this hypothetical, that military leader has no a priori knowledge of the “individual character, bearing, discipline, and personal desires of those who volunteer to serve”;¹⁶⁹ but would know, at least, that those volunteers may be called upon to “use their training, instincts, and efforts in concert with other members to achieve certain military effects . . . in times of peace and in places of hostility where the risk of injury or death is high.”¹⁷⁰ As a student of human nature, and based on experience, he also concludes that some of those volunteers will “damage, impede, or frustrate” the chain-of-command’s ability, but has “no foreknowledge of when or where these offenses will occur, who will commit them or why, or what consequences (if any) for his mission will follow.”¹⁷¹

If a commander is to be responsible for his unit’s mission accomplishment, and to be effective in that regard is to maintain unit cohesiveness, morale, technical competence, discipline, and readiness, then a commander (this officer would reasonably surmise) must have certain tools at his or her ready disposal. For example, some degree of professional autonomy to make decisions tailored to particular unit needs and problems; a flexible but easily executable set of procedures for investigating and adjudicating certain kinds of misconduct; clear guidance or policy from above that aids that commander in making discretionary judgments and in knowing when not to exercise punitive authorities; methods for inculcating a sense of personal accountability and

¹⁶⁸ Id. at 974–76.
¹⁶⁹ Id. at 979.
¹⁷⁰ Id.
¹⁷¹ Id.
integrity in each member, as well as inspiring a willingness to prioritize group security over personal comfort; and finally the discretion to decide—under certain circumstances with no analogy to civilian justice—whether a “crime” has possibly been committed at all (as when the soldier’s conduct occurs in combat itself or when it undermines that commander’s ability to accomplish a mission).\footnote{172}

Given these reasonable observations, the senior military officer—again, as a proxy for the myriad commanders of all ranks across the armed services below—would desire a system of military discipline and justice appropriate for a military of volunteers, whose managerial administration worldwide and use of lethal force are both ultimately subject to the legal authority of civilian elected and appointed officials.

The fourth and final perspective was that of a reasonable recruit considering whether or not to voluntarily join this military organization and submit to a separate criminal code. What would that civilian on the cusp of enlisting expect of the military’s method for maintaining good order and discipline?\footnote{173} The senior ranking officer described above would be concerned for the entire “ecosystem of rules and processes” that help manage an institutional bureaucracy and the disaggregated units under a hierarchical chain-of-command under in extremis conditions.\footnote{174} But this “ideal recruit” is unfamiliar with that bureaucracy and its operations, and still must make a reasonable decision—somewhat blindly. Though unfamiliar with its demands (from lack of personal experience), this reasonable recruit would form some expectations based largely on common sense and what she assumes about the function of the military. First, she would expect that she—like all civilian recruits—would undergo rigorous training in specific skills thought critical for general professional competence (e.g., physical fitness and marksmanship);\footnote{175} second, she would infer that military objectives are by their nature fraught with risk, and that overcoming or compensating for that risk requires significant coordination; this, in turn, suggests that those fighting will be subject to a fairly uniform set of controls imparted by a hierarchical chain-of-command.\footnote{176} These rigorous and taxing conditions also suggest to her that individuals are not

\footnote{172} Id. at 975–77 n.80–86.\footnote{173} Id. at 980.\footnote{174} Id.\footnote{175} Id. at 981.\footnote{176} Id.
fighting *qua* individual agents, but rather as part of a cohesive team with a common objective.\textsuperscript{177} Even without prior experience in the armed forces or any clear notion of what it entails day-to-day, these are relatively easy inferences to make.

Hypothesizing what reasonable assumptions and preferences would fall out from these four original positions, if each had been permitted to start from scratch, was suggestive. The article concluded that four basic principles emerged—in this thought experiment, the four principles would form a foundational set of parameters upon which a military justice system would likely take shape: “the principle of nonrepulsion, principle of retention, principle of mission risk reduction, and principle of compliance.”\textsuperscript{178}

*Non-repulsion* can be taken to mean that any proposed set of procedures, authorities, rights, and rules (PARR) defining a military justice system in a representative democracy with civilian control of military force must not *repel* prospective volunteers under any reasonably foreseeable circumstances intersecting the life and professional work of a servicemember.\textsuperscript{179} They “must make up part of the ‘package’ of benefits and opportunities that attract civilians into the service, or at least not be a factor that discourages their enlistment by fear or ignorance of its rules.”\textsuperscript{180}

*Retention* can be taken to mean that any proposed set of PARR defining a military justice system in a representative democracy with civilian control of military force “must account for satisfying and keeping those members best suited and fitted” for the anticipated use of their professional skills.\textsuperscript{181} It too must account for any reasonably foreseeable circumstances distinctive from civilian life encountered by that servicemember.

*Mission risk reduction* can be taken to mean that any set of PARR defining a military justice system in a representative democracy with civilian control of military force “must effectively reduce the danger” of, and minimize the harm caused by, conduct that “would tend to degrade the favorable conditions necessary for the commander’s accomplishment” of a lawful military

\textsuperscript{177} Id.
\textsuperscript{178} Id. at 983.
\textsuperscript{179} Id. at 979–80.
\textsuperscript{180} Id. at 979.
\textsuperscript{181} Id. at 980.
mission.182 This principle, too, must account for the widest possible set of foreseeable military missions, regardless of their proximity to lethal combat.

Compliance can be taken to mean that any set of PARR defining a military justice system in a representative democracy with civilian control of military force “must discourage disobedience and encourage duty fulfillment by those members who have subjected or will subject themselves” to this system.183 Like the previous principle, this principle must account for the widest possible set of foreseeable military duties assigned to servicemembers.

Two things can be said about these principles. Primarily, any set of proposed answers to the quintet of questions forming the framework of a theory of military justice should not violate these four cardinal principles—there is no other standard: if any of the principles are violated, the proposed military justice system is per se illegitimate; if all four are satisfied, the proposed military justice system is not illegitimate (whether it is practically workable or wise is another matter). Second, at a minimum, “[e]very rule of criminal procedure, adjudication standard, and substantive military criminal law . . . should then be derived from and measured by one or some combination of these four principles.”184 In that sense, they serve as a baseline for judging the reasonableness and consistency of those answers.

D. Summary of the Theory

Identifying and cross-examining classic assumptions about military justice185 permits us to generate a theory of what military justice is, one that provides a sound basis for prescribing acceptable attributes of a military justice system—attributes of both the substantive “primary” criminal law and its

182. Id.
183. Id.
184. Id.
185. Unfounded assumptions about military justice, expressed by persons both outside and inside the military, are largely drawn from a superficial familiarity with only discrete aspects of the system they have either seen or been subjected to. See Schlueter, supra note 103, at 6–7. Other than the legitimate critical views captured in court opinions and scholarship discussed infra, those practicing in the military justice domain often hear erroneous claims that “the Constitution does not apply if you’re a soldier,” “military courts are not real courts,” and the “Uniform Code of Military Justice exists to keep the military from executing a coup d’état.” As described infra, none of these claims are true, though the system (at least the American model of military justice) itself unintentionally creates the impression that there could be grounds for believing these claims. See, e.g., Brief of Professor Aditya Bamzai as Amicus Curiae in Support of Neither Party, Ortiz v. United States, 138 S. Ct. 2165 (2018) (No. 16-1423), 2017 WL 5495453; cf., Maurer, supra note 21.
procedural “secondary” rules. In Part IV below, this theory is explicated through nine propositions, but as a preview and summary, this theory states that any military justice system is justified and defensible when it functions strategically as the political use of legal structures to set desirable military conditions for achieving national security objectives. By relating to military members in alternating but often overlapping roles as “sovereign,” “employer,” and “community,” civil government attempts to achieve various distinguishable objectives. These objectives include: (1) consistency with legal requirements for, and norms of, due process and fundamental fairness to the accused and victims; (2) a sustainable state of positive morale, effective teamwork, and impartial and respectful and respected chain-of-command; (3) efficient accomplishment of duties and the mission at both the individual level and within a given military unit; (4) the appropriate use of coercive power (whether legal or administrative authority) that promotes, or at least does not violate, the first three objectives. Ultimately, the animating motive, in all three relationship roles, behind these objectives is to create a self-regulating armed force of self-regulating individuals presenting the most favorable conditions possible for the use of reliable armed force by the chain-of-command, on behalf of legitimate civilian political authority for whom the military serves as an agent. In setting these desirable military conditions, military justice provides an answer to a “command and control paradox.”

The nine propositions are essential descriptive and prescriptive claims. If sound, these claims carry significant implications for what constitutes the military’s substantive criminal law and its procedures—what criminal law scholar Meir Dan-Cohen categorized as “conduct rules” and “decision rules.”

V. THE THEORY OF MILITARY JUSTICE

To recap Section III.A, supra, the theory must provide a framework for answering five questions: (1) When and where does this application of sovereign governance, as opposed to other criminal law regimes, apply? (2) What conduct should be proscribed? (3) Who plays roles in this governance? (4) What limits, constraints, discretion, oversight, and power to review are permitted or denied to those actors? (5) What limits or constraints

186. For the distinction between, and definitions of, primary and secondary rules, see H.L.A. Hart, THE CONCEPT OF LAW 79–99 (2d ed. 1994).

on individual liberties will operate on accused servicemembers’ due process and on victims’ access to justice? It bears repeating that the theory is not intended to answer those questions directly. In addressing these five questions, a theory will address teleological conditions, procedural and substantive conditions, and punishment conditions.

A. Teleological Conditions

Teleological conditions are those propositions that describe circumstances of the development of legal particulars (e.g., specific answers to one or more of the five questions above) in terms of that legal system’s purpose. The purpose may or may not be explicitly acknowledged by the actors designing those particulars or managing that system. The purpose may be avowedly political or even partisan, or may be sectarian or secular, or essentially pragmatic or utilitarian. The purpose may be articulated at various degrees of generality and specificity depending on the place of the legal particular or the role of the actor managing the system. In any such case, the purpose is the goal to which these particulars contribute and advance; the correctness or value of those particulars is judged by their consequences: to what extent do they contribute to or undermine that purpose? In Section IV.D, infra, propositions 1, 3b, 8, and 9 reflect teleological conditions of the theory.

B. Entangled Procedural and Substantive Conditions

Some conditions provide opportunity for consciously crafting specific procedural and substantive decisions and then enacting, enforcing, and interpreting rules based on those procedural and substantive decisions. These conditions manifest as the most obvious public characteristics of a legal system, those which distinguish it from other legal regimes or act as points of comparison between other legal regimes. For example, these rules identify particular legal constraints or opportunities: subject-matter, personal, and territorial jurisdiction; classifications of crimes; elements of the offenses; qualifications for factfinders and appellate authorities; evidentiary permissions and standards; notice; discretionary judgment by non-judicial authorities; assignment of duties to particular actors; burdens of proof and persuasion; transparency and publication; and rules for making more rules.

It is more accurate, at least for a theory of military justice, to consider procedural and substantive conditions as “entangled,” rather than distinctive fields, for two reasons. First, the answers derived from one may influence answers derived from the other. Imagine encoding a prohibition for disobeying
an otherwise lawful command and precluding one’s moral or theological disagreement as a defense to that charge of disobedience, or prohibiting willful dereliction of one’s martial duties, or malingering, or physically hazing new recruits so as to “toughen them up” during basic training, or using recreational drugs even if off-duty, or failing to victoriously accomplish a tactical mission. These are possible answers derived from substantive conditions—the justifications (whatever they might be) for barring specific conduct. Each could very well suggest the propriety of a procedural rule granting a senior commanding officer authority to establish an ad hoc court-martial, effectively indicting a particular servicemember for any such conduct when it undermines her ability to achieve, satisfactorily, military objectives that are realistically reliant upon a soldier’s obedience and disciplined performance of assigned tasks.

But they all could also very well suggest the imprudence of a rule granting that senior commander a procedural authority to indict unless the specific misconduct in question actually did “prejudge good order and discipline” in a definite and direct way, rather than criminalize the breach of an abstract value. Likewise, imagine encoding a rule that prohibits a commander from imposing “cruel and unusual” punishment, or a rule that prohibits a commander’s interference in a criminal investigation or court proceeding. These are possible answers derived from procedural conditions—the justifications (whatever they might be) for granting or limiting the actions of those actors responsible for managing the military justice system. Each suggests that substantive standards ought to be extant to guide the commander away from such “wrongful” acts, as well as explicit substantive prohibitions that deter commanders from (and permit punishments for) those procedural abuses or deviations from the scope of their authorities.

Second, they are best considered entangled in the sense that the procedural and substantive conditions could be derived from, or help define, the system’s teleological conditions. If successful military operations, and elevated national security, contribute to the telos of a military justice system, it is intuitively sensible to assign non-judicial or non-legal authorities, like commanders, roles in managing the process of military justice systematically and in making certain discretionary judgments case-by-case, provided that those roles and judgments further that telos. It is another way of saying that the ways and means employed to satisfy certain ends must be reasonably related to each other and actually contribute to, and remain consistent with, those ends. It is not an ironic coincidence that this relationship between ways, means, and ends and assuring
that they holistically cohere is the well-known process of formulating military strategy taught to senior military officials.\textsuperscript{188} Propositions 2, 3a, 5, 6, and 7, \textit{infra}, reflect these entangled procedural and substantive conditions.

\textbf{C. Punishment Conditions}

Finally, a criminal justice system—even if a niche jurisdiction like the military—necessarily addresses \textit{harms} and what to do about them.\textsuperscript{189} Harms may be defined broadly or narrowly (including the adverse consequences from consummated, attempted, or inchoate offenses, or possibly just the creation of unjustifiable risk of some harm occurring), and they imply various classes of “victim” (e.g., a person, an institution, a process, or property; public damages and private injuries) but they necessarily relate to undesirable consequences of certain actions or inactions that the government wishes would not occur—that is to say, a cost imposed on some identifiable governmental interest.\textsuperscript{190} The military’s telos, whatever it may be, influences what could be considered a “harm” either abstractly and universally (as in, all desertion from a unit in combat is wrongful) or contextually (as in, fraternization between officers and enlisted soldiers is wrongful if and only if that conduct adversely affects morale, cohesion, discipline, trust, or mission accomplishment in the parties’ military unit(s)). “What to do” about such harms in part is asking what forms of penalty are to be made available, to \textit{whom} they are made available (who may impose them by order), under \textit{what conditions} they may be imposed (only for certain offenses? only during wartime?), and imply a justification for that choice (utility? denunciation? retribution?).\textsuperscript{191}

These answers might be purely pragmatic in the sense that they overtly enable military officials to accomplish a military goal: it is a \textit{utility} inspired by the military’s telos. By proscribing certain conduct and reinforcing it by the


\textsuperscript{189} The original formulation of the “Harm Principle” is in \textit{JOHN STUART MILL, ON LIBERTY} 21–22 (2d ed. 1859) (“[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”). Hart defined “punishment” as involving “pain or other consequences normally considered unpleasant . . . for an offence against legal rules.” H.L.A. Hart, \textit{Prolegomenon to the Principles of Punishment}, in H.L.A. HART, \textit{PUNISHMENT AND RESPONSIBILITY ESSAYS IN PHILOSOPHY OF LAW} 4–5 (1968).

\textsuperscript{190} \textit{See generally JOEL FRIENBERG, HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW} (1984).

\textsuperscript{191} JOSHUA DRESSLER, \textit{UNDERSTANDING CRIMINAL LAW} 16–21 (8th ed. 2018).
threat of penalty, deterrence is achieved saving the unit and its commander from the effect of the harmful conduct and the burden of dealing with the harm in its wake. Or, in a similar way, penalizing certain harms in certain ways might incapacitate the offender, effectively creating a barrier between the offender and the commander’s mission, protecting it from further risk or actual harm. Penalizing certain harms in certain ways may, instead, serve to rehabilitate the offender, correcting martial or moral deficiencies to improve the servicemember’s individual capacity and capability, thereby improving the commander’s capacity and capability for achieving mission objectives.

Alternatively, these answers might reflect a slightly different goal that is not necessarily moored to fighting wars well, but rather to sustaining public trust in those that fight those wars: the goal of virtue inculcation or character-building—specifically, martial virtues of bravery, fidelity, self-sacrifice, respect for authority, honor, and the like. Further, the answers might serve a purpose of stigmatization or social condemnation from within the community of specialized professionals to which the servicemember, guilty of an offense, belongs. Or the penalty (and who is permitted to apply it) may just be selected because, under the circumstances, the harm and the harm-causer deserve that penalty.

It could be the case, of course, that the answers (to “what is a harm?” and the various responses to “what to do?” about those harms) are a medley of penalty purposes, taking cues from utilitarianism (the penalty as a tool for deterrence, rehabilitation, or incapacitation¹⁹²) and retribution. It is not a foregone conclusion that a military justice system must have only one.¹⁹³ A military justice system’s punishment regime could be grounded in a duty to act virtuously because it deters others from breaching certain martial imperatives thereby improving operational effectiveness. In any case, the answers ought to be rationally related to the objectives or justifications of penalizing in general (given the answers above) and penalizing particular servicemembers in particular instances when they have caused some criminalized “harm.”

Proposition 4, infra, reflects these conditions; notably, it sub-classifies the subject into three distinct forms. This recognizes the myriad possible answers derived from the teleological conditions and relates to possible answers derived from the entangled procedural and substantive conditions. Each of these three

¹⁹³. HART, supra note 189, at 10.
forms (punishment, discipline, and censure) is defined further as both a noun and verb.

D. Nine Propositions

In this Section, I make nine general claims. Analytical support for their content was assembled and discussed in depth in the previous three articles highlighted in the Introduction, but where additional explanation is valuable or helpful, I include it in this Article’s discussion or footnotes below. For some of the early propositions, I offer some ways to test both their relevance and legitimacy—a way to validate components of the general theory by relating them to observable real-world legal phenomena, rules, or structures—called a “test suite.”194 For some of the latter, more abstract and probably controversial, propositions, I provide some preliminary explanatory comments or examples. These nine claims ought to cohere as the distinguishing features and qualities underlying choices deliberately and reasonably made in creating, managing, and reforming a practical system of military justice—one reflecting the principles of nonrepulsion, retention, mission risk reduction, and compliance195—by which it is possible to offer defensible solutions to the five general, theory-aimed questions described above in Section III.A.

**Proposition 1.** A professional armed force, subject to civilian control by a democratic government, functions in three relationships simultaneously with its members: that of sovereign-to-citizen, that of employer-to-employee, and that of a self-normalizing and self-policing civic community of practice tied together not by place of residence, culture, or faith, but by self-adopted and community reinforcing identities.196 As a shorthand, these might be referred to as simply the “sovereignty,” “employment,” and “community” relationships.

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194. This is similar to the tool of a “test suite” used by software code developers to demonstrate or test the proposed functionality and capabilities of a new software program. To be clear, the questions posed in the various test suites, infra, are individually and collectively non-dispositive—one positive answer does not necessarily validate the truth of the proposition, nor does a positive answer to all of them. Likewise, one negative answer within each “suite” does not invalidate the proposition but would be suggestive that either this part of the theory does not adequately embrace all of that particular military justice system under review, or that the military justice system under review should be amended to reflect the core proposition.

195. Maurer, supra note 27, at 983.

196. Even the Supreme Court seems to recognize this. Speaking of the various types of nonjudicial punishments and administrative consequences available for commanders to use under the UCMJ, the Court observed: “The availability of these lesser sanctions is not surprising in view of the
Test suite:

- Does the military self-identify as a “profession”? Do its members claim to belong to an organization that expects them to perform and serve specialized, relatively technical functions that are restricted to its membership?
- Do its members claim to belong to an organization that adopts a body of cultural norms and customs, unique to that line of work?
- Do its members self-regulate and self-police through selective administrative entry, retention, and separation procedures?
- Do rules establish standards of technical competence by which servicemembers’ performance is evaluated and positions of increasing responsibility are merited?
- Does civilian leadership, elected or appointed, ultimately approve, ratify, and authorize those rules?\textsuperscript{197}
- Does the military rely on laws, rules, standards, customs, norms, and professional culture—including the elevation and praise of certain traits like loyalty, honor, and subordination—to distinguish itself from civilian employment and civilian communities?\textsuperscript{198}
- Does the civilian public believe that the individual servicemembers adhere to a unique code of ethical behavior or system of morals\textsuperscript{199} that demands greater obedience, self-sacrifice, and service to the different relationship of the Government to members of the military. It is not only that of lawmaker to citizen, but also that of employer to employee. Indeed, unlike the civilian situation, the Government is often employer, landlord, provisioner, and lawyer rolled into one.” Parker v. Levy, 417 U.S. 733, 751 (1974).

\textsuperscript{197} For Congress’s role, see, for example, U.S. Const. art. I, § 8, cl. 11 (establishing the authority of Congress to “declare War”); U.S. Const. art. I, § 8, cl. 12 (establishing the ability to “raise and support Armies”); U.S. Const. art. I, § 8, cl. 13 (establishing the ability to “provide and maintain a Navy”); U.S. Const. art. I, § 8, cl. 14 (establishing the ability to “make Rules for the Government and Regulation of the land and naval Forces”); U.S. Const. art. I, § 8, cl. 15 (establishing the ability to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”); U.S. Const. art. I, § 8, cl. 16 (establishing the ability to “provide for organizing, arming, and disciplining, the Militia”). For the president’s role, see U.S. Const. art. II, § 2, cl. 1 (“The President [is] Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”).

\textsuperscript{198} See generally Pauline Shanks Kaurin, On Obedience: Contrasting Philosophies for the Military, Citizenry, and Community (2020) (discussing a philosophically-grounded distinction between the legal, practical, and moral features of “obedience” (as a military virtue or value that may or may not be similar in some vein to civilian obligations)).

\textsuperscript{199} I agree with Kaurin that there is a meaningful conceptual difference between “moral” and “ethical,” but that difference is probably irrelevant for Proposition 1’s acceptability. Id. at 23.
legitimately chosen civilian government than is expected of a civilian?\textsuperscript{200}

**Proposition 2.** A professional armed force is subject to certain control features. Control features are means and methods through which legal authority over members is exercised in all three relationship modes. These control features are intended to induce, regulate, or restrain both the application of armed force and the personal or professional conduct of members of the Armed Forces whose conduct supports, trains, sustains, employs, or otherwise influences the use of armed force.

Test suite:

- Does the legitimately constituted civilian authority determine, promulgate, revise, and oversee military-specific laws, processes, or systems for regulating the individual servicemember?
- Is the servicemember’s discretion, decision-making, conduct, and exercise of various personal liberties and rights subject to such regulation?\textsuperscript{201}

**Proposition 3.** This legal authority has a dual nature: it is both coercive and agency-based. This authority is evident in all possible control features exercised in all three relationships:

(a) It is coercive in nature, restraining members from acting, or compelling them to act, in prescribed ways or according to prescribed standards, under threat of some adverse consequence imposed by the government; and

(b) It is that of a principal-agent relationship on two levels. In level one, agency is viewed from a macro, institutional, and bureaucratic perspective; it is consistent with the basic structure of democratic civil-military relations theory, in which the professional military-as-agent is

\textsuperscript{200} The Supreme Court thinks so. See Orloff v. Willoughby, 345 U.S. 83, 94 (1953).

\textsuperscript{201} Besides the UCMJ, another example of a military law that determines a servicemember’s discretion (at least it does so without punitive consequences), is National Defense Authorization Act for Fiscal Year 1998, Pub. L. 105-85, § 507, 111 Stat. 1726 (1997) (codified at 10 U.S.C. § 3583) (providing the requirement of exemplary conduct). There are identical requirements elsewhere in Title 10 for members of the Navy and Air Force. An example of a “process” or “system” that regulates a servicemember’s behavior, including the exercise of personal liberties, is the hierarchical rank and promotion system that grants additional and wider responsibilities and authorities to those higher in rank, which in turn is a function of seniority, technical expertise or subject matter qualification, and more qualitative attributes like experience, leadership ability, reputation, and “potential.” Dep’T of Def., Dep’T of Defense Instruction 1310.01, Rank and Seniority of Commissioned Officers (2013) (incorporating Change 1, effective April 29, 2020).
willingly bound to the civilian-as-principal by various duties. The performance of these duties satisfies legitimate expectations of civilian political leadership through the advice, action, and ability of their professional agents. In level two, agency is viewed from a micro, individual, and unit perspective. Senior members of the military profession—depending on rank and position—can simultaneously serve as agents to civilian principals and as principals themselves, relative to subordinate service members. Codes, including penal laws, that proscribe military agents’ conduct serve as mechanisms for exacting both formal retribution and promoting deterrence. They also serve as a step towards rehabilitation, and serve as models of aspirational ideal conduct, reflecting what an exemplary military member ought to be or do as a member of a professional community of agents sharing certain purposes, values, and norms.

Test suite:

- Does the civilian authority rely on the military’s knowledge, experience, and skills for advice and recommendations for designing, as well as the implementation and day-to-day management of, these laws, processes, and regulatory systems?
- Do servicemembers modify their “on duty” and “off duty” choices and conduct to comport with these laws, processes, and regulatory systems?
- If servicemembers do modify their choices and conduct, do they do

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202. M. Janowitz, The Professional Soldier: A Social and Political Portrait 40 (1971); Peter D. Feaver, Civil-Military Relations, 2 Ann. Rev. Pol. Sci. 211, 214 (1999); Huntington, supra note 8, at 2; Peter D. Feaver, Armed Servants: Agency, Oversight, and Civil-Military Relations 1–3, 59–61 (2003). Huntington’s aging “objective control” theory of civil-military relations posits the military acts as a “profession” (analogous to lawyers and doctors) because it exhibits characteristics of expertise, responsibility, and corporateness. Huntington, supra note 8, at 11–12. This framework is not as compelling or realistic a model as those (such as Feaver’s) that followed him in the last half-century. See id.

203. See Daniel Maurer, Crisis, Agency, and Law in US Civil-Military Relations 12, 213 (2017); Kyle & Reiter, supra note 37, at 6 (“The central paradox of civil-military relations is how a society simultaneously can be protected by and from its military. . . . Short of abolishing the military altogether, civilian governments are forced to find ways to subordinate it to their authority.”).

204. William C. Westmoreland, Military Justice—A Commander’s Viewpoint, 10 Am. Crim. L. Rev. 5, 5–6 (1971) (noting that the aims of military justice, in the types of conduct it addresses and in the manner by which it addresses the conduct, include deterrence and rehabilitation, but also protecting “discipline, loyalty, and morale,” and safeguarding the “integrity of the military organization” and “the accomplishment of the military mission”).
so out of a combination of apprehending punitive legal consequences, and adverse employment consequences, and a regard for professional community disapprobation?

- Are certain positions within the military singled out for increased, but conditional, authority over servicemembers, backed by the force of law?
- Do these specialized members, by virtue of rank or duty position, have access to a variety of processes by which to formally or informally—in the name of the sovereign civilian authority and within the professional standards of behavior—adjudicate certain disputes, prospectively deter conduct deemed “wrongful,” and impose consequences for violating or failing to satisfy the demands of the laws, processes, and regulatory systems?
- Do these specialized members have some degree of independent discretion over the use of those laws, processes, and regulatory systems, granted by—and overseen by—the civilian authority?

**Proposition 4.** *The coercive nature of this legal authority takes one of three forms: punishment, discipline, and censure.*

A “punishment” is a government-imposed deprivation of a liberty interest or property interest that is intended to incapacitate the offender or to induce a social and legally enforceable stigma to act as a deterrent, imposed by a judicial deliberative body solely as a consequence for having violated a military criminal statute proscribing harms. Whether martial or non-martial in character, “harms” are avoidable adverse consequences which, in the view of those determining the prohibitions, must be deterred if certain general military goals of the sovereign are to be achieved; if they cannot be deterred, these harmful consequences deserve tangible and symbolic reproach by the military community over whom the prohibitions apply, in the name of the sovereign that enacted the military criminal statute. No act or omission, however, may be punished as a criminal transgression without a culpable mens rea element.\(^{205}\) At

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\(^{205}\) This adopts the Model Penal Code’s approach to criminal liability which requires either purpose, knowledge, recklessness (but not negligence) with respect to the conduct, its consequential harm, or attendant circumstances. *See* Morissette v. United States, 342 U.S. 246, 252 (1952) (“[W]rongdoing must be conscious to be criminal.”); WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW 332–33 (2d ed. 2003). *But see,* e.g., 10 U.S.C. § 912(a) (discussing being drunk on duty). This is one of many UCMJ punitive articles that are defined by act alone with no express mens rea element. *But see* United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994) (noting the Court will “interpret[] criminal statutes to include broadly applicable scienter requirements, even where the statute
a minimum, utilitarian goals of incapacitation and deterrence are permissible justifications for the imposition of punishment. Other goals may additionally justify punishment (either universally or in a specific criminal case), including value inculcation, reform, expressive denunciation, retribution, or rehabilitation, but if and only if in consequence of a military criminal statute violation, and only when those goals are not substitutes for deterrence or incapacitation.

“To punish” means: the act of a lawfully constituted deliberative judicial body, following uniform and nonarbitrary rules (the violation of which is, itself, subject to punishment, discipline, or censure), formally imposing the deprivation of a liberty or property interest on a particular individual as a formal consequence of the individual’s cause (or attempted cause) of a harm, in violation of a criminal statute. 206

Test suite:

- Is the law, administered through various systems and procedures (described in the first three propositions above), capable of depriving a servicemember’s liberty or property interest?

206. This narrowing definition of “punishment,” which includes a definition of “harm” and establishes a necessary justification as a condition for its use, draws primarily from three influences. First, it draws from Husak’s definition of punishment. Douglas Husak, Does the State Have a Monopoly to Punish Crime?, in THE NEW PHILOSOPHY OF CRIMINAL LAW 98–104 (Chad Flanders & Zachary Hoskins eds., 2016) (noting that “a response amounts to a punishment when it deliberately imposes a stigmatizing deprivation or hardship” for conduct that is a “public wrong[,]” that only a state can impose, because the state has a “substantial interest” in proscribing that conduct beforehand). Second, it draws from H.L.A. Hart’s definition. HART, supra note 18, at 2 n.3, 4–5 (discussing “deliberate imposition of suffering,” which is characterized by “pain or other consequences normally considered unpleasant,” “for an offence against legal rules,” applied to an “actual or supposed offender for his offence,” which is intentionally administered by someone other than the offender, who is “an authority constituted by a legal system against which the offence is committed”). Third, it draws from Feinberg’s classic distinctions between punishment and “penalty,” in which he described punishment as an “authoritative deprivation[] for failure” coupled with a symbolic “expressive function” such that punishment is a “conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority himself or of those ‘in whose name’ the punishment is inflicted.” Joel Feinberg, The Expressive Function of Punishment, 49 MONIST 397–400 (1965). Feinberg identifies four “derivative . . . functions” that punishment may have, regardless of whether it primarily serves a retributive, rehabilitative, or deterrent purpose, including a public commitment to disavow and condemn that conduct by formal and regular enforcement. Id. at 404–408.
• Is that deprivation imposed by a deliberative body that is judicial in nature?207
• Is that deprivation a consequence available only for violating a military criminal statute’s defined prohibitions?
• Is each prohibition defined by the adverse consequence or harm the sovereign seeks to prevent and deter?
• Is the adverse consequence or harm an effect that is either directly detrimental to a specific military goal or objective (literally, as in a specific mission or conceptually, like “good order and discipline” and “unit cohesion”), or does the harm—under the circumstances of a particular case—have a predictable, articulable, and non-speculative negative effect on a specific military goal or value?
• Does the definition of each criminal prohibition (that exposes a servicemember to possible “punishment” for violating it) include an element that reflects that wrongful act or omission’s harmful effect on some articulable military goal or value?
• At a minimum, is either deterrence or retribution an acknowledged aim of both the proscriptive list of misconduct and the set of processes, rules, and authorities that administer the system of adjudicating punishment?

“Discipline” is an enforced, non-discretionary pattern of individual (or group) attitudes and behaviors commensurate with a military professional’s knowing, purposeful, and competent performance of duties. It is a species of self-control or self-master in the face of a task to which one would normally object or prefer to avoid (for any number of reasons) but is required by rule, custom, law, or standard in order to achieve some goal one does agree with.208

207. “Judicial in nature” is admittedly a vague phrase belying a complex concept that can deserve its own book length treatments. One way to define it, for the purposes of this test suite and the theory’s propositions, is a standing body independent of the military chain-of-command and not subject to the direct orders or indirect influences of the accused’s chain-of-command with respect to that deprivation of interests; it also means a body which follows non-arbitrary rules of procedure known to the parties in dispute, is neutral with regard to the outcome of fact-finding, is unbiased toward the particular offense or offender, renders judgment according to standards prescribed in law, and generates decisions that are binding and conclusive but may be subject to review by higher authorities for whether prescribed law and procedure were followed in conducting its processes and rendering its judgment. This tracks the rationale the Court used in Ortiz v. United States, 138 S. Ct. 2165, 2173–75 (2018) in conclusively affirming the “judicial character” of courts-martial and comparing its procedure favorably to that of state criminal courts.

208. SHANKS KAURIN, supra note 198, at 98–99.
The performance of such duties means the performing of a tacitly or expressly obligatory military function for a military purpose.

A military function is the specific or implied task to which the specialized knowledge and skills are knowingly, willfully, and competently applied to contribute to the achievement of a military purpose. A military purpose is a lawful objective established or attempted by the military chain-of-command (ultimately responsible and subordinate to lawful civilian authority), for which the specialized knowledge and skills of a servicemember (or capabilities of a military unit) are deemed appropriate. The definition of “military duty” described above can be co-opted and amended slightly here to define “military purpose” easily: “to accomplish a military mission” or to “safeguard or promote the morale, discipline, and usefulness of members of [that] command . . . [provided it is] directly connected [to] the maintenance of good order” and discipline.

“To discipline” means: the act of a legitimate command authority, either directly or through delegation to subordinate authority figures, following uniform and non-arbitrary rules, formally imposing constraints or obligations on a service member (individually or as part of a unit) of a “martial” character. Those constraints or obligations must be intended to induce, sustain, or repair (reform or rehabilitate) a pattern of individual (or group) attitudes and behaviors commensurate with a military professional’s knowing, purposeful, and competent performance of duties for the sake of a commander’s ability to accomplish a military purpose with military functions.

Test suite:

- Is the law, administered through various systems and procedures (described in the first three propositions above) capable of imposing adverse consequences on the servicemember’s employment status (her informal role, her legal rank, her assigned position, or her prescribed duty)?
- Are these adverse consequences imposed solely to remedy that member’s failure to satisfactorily perform a military function for military purpose, according to a standard accepted within the profession?

209. Under this definition of “discipline,” it is not necessary that the servicemember know, understand, or subscribe to what that military purpose is as a prerequisite to comporting with that pattern of attitudes or behaviors.

210. M.C.M, supra note 6, at pt. IV, ¶ 16; supra note 66 and accompanying text.

211. See generally SHANKS KAURIN, supra note 198.
• Are these adverse consequences separate and distinct in procedure from those related to the causes and types of “punishment”?
• Is the primary purpose for these adverse consequences the rehabilitation of the servicemember’s professional competence or to incapacitate the servicemember from performing military functions (either temporarily or permanently)?
• Are these systems and processes for adjudicating professional discipline non-judicial in nature?
• Is the review of fact-finding decisions and of the imposition of discipline beyond the jurisdiction of a court of criminal law?

A “censure” is a government-imposed condemnation or admonition for a purposeful, knowing, reckless, or negligent breach of a non-criminalized martial norm, value, or virtue. Such norms, values, and virtues are consonant with military professionals’ self-adopted identity as a participating member within a unit or organization-defined community of fellow professionals. The primary “casualty” of the breach, whom the government “represents” by imposing condemnation or admonition, is the collective community of fellow professionals within the violator’s unit or organization. The community’s respect for and trust in the violator, and therefore unit cohesion (and possibly morale), is damaged as a proximate result of the violator’s breach of the martial norm, value, or virtue.

“To censure” means: the act of a legitimate command authority, either directly or through delegation to subordinate authority figures, following uniform and non-arbitrary rules, formally registering disapproval in the form of adverse employment constraints or obligations. These constraints or obligations are intended to induce the violator’s rehabilitation and atonement with respect to the martial norm, value, or virtue breached, with a further purpose of repairing unit cohesion and the community’s respect for and trust in the violator.

Test suite:
• Does the military identify (formally or informally), through publication or training of its members, a generally consistent set of norms, values, or virtues that are experientially linked to martial

success (e.g., loyalty, honor, unit-pride, selflessness, courage\textsuperscript{213})?

- Regardless of rank and position, do the members of the profession accept and affirmatively comport themselves to these norms, values, and virtues even if there is no deterrent threat of criminal punishment or professional employment-based discipline?
- Does the military administer systems or processes for regularly and consistently identifying breaches of these norms, values, and virtues, and then imposing a community-recognizable form of condemnation or admonition for violators?
- Are these systems and processes for adjudicating the community’s condemnation and admonition non-judicial in nature?
- Is the review of fact-finding decisions and of the imposition of the community’s forms of censure beyond the jurisdiction of a court of criminal law?

If the definitions of “punishment,” “discipline,” and “censure” in Proposition 4 are reasonably sound, certain consequences for the design of a military justice system might follow. Each of these forms of coercion should, theoretically, have independent reasons, or grounds, for imposition in general and none of those reasons should be shared among the various control features listed above. In other words, if a military justice system were to criminalize child endangerment (e.g., Article 119b, UCMJ), using a check to pay without sufficient funds (e.g., Article 123a, UCMJ), or bribery (e.g., Article 124a, UCMJ), and subject violators to punishment as defined above, it would preclude the system’s use of child endangerment, knowingly bouncing a check, and bribery as a possible reason for exercising discipline or censure.\textsuperscript{214} Neither discipline nor censure can be justified because those offenses do not, themselves, cause or risk the harms sought to be prevented or remedied through discipline and censure. Likewise, if the system permits censure for conduct unbecoming an officer (Article 133, UCMJ), it should not be a listed criminal

\textsuperscript{213} Though tempting, it is admittedly difficult to academically define these martial norms, values, and virtues to the satisfaction of those most likely to find them professionally important. For example, what are the practical limits to “loyalty”? Under certain intense combat conditions, a servicemember’s sense of loyalty is often expressed in terms of protecting one’s peers and subordinates from immediate tangible peril, but not necessarily to the national government that employs the servicemember or to abstract ideals in a written constitution. In other contexts, or in some military cultures, the expectation of loyalty extends to one’s superior officers. But it is unnecessary to define them here for the purpose of validating the proposition; it is only important that the military in question define, adopt, and protect them through internal systems of publication, training, and enforcement.

\textsuperscript{214} See 10 U.S.C. §§ 919(b), 923(a), 924(a).
offense that justifies punishment or discipline. Punishment, discipline, and censure are independent and non-overlapping forms of coercive authority. A military justice system—if it recognizes a formal distinction between punishment, discipline, and censure as defined above—is rationally structured and justified not merely by the conduct itself, but rather by (1) the effect or type of harm caused, but (2) only in terms of one of three types of relationship modes in which the servicemember participates.

First, the modern UCMJ grants criminal jurisdiction over the servicemember based on employment status, applies worldwide, and its court-martial processes, the range of commander authorities, the scale of punishment, and availability of non-judicial punishment is solely conduct-centric.215 Certain acts or omissions are subject to criminal prosecution and criminal punishment; the more harm caused or made possible by the conduct, the more severe the potential punishment to be meted out in the name of the sovereign. And as the Court in Ortiz recognized, this system is analogous to other criminal justice systems—they all exist to regulate conduct of members in a specified geographic community with violators subject to a range of adverse deprivations of their liberty or property interests. If that sovereign (represented by a public official like a prosecutor or judge) chooses not to prosecute, or even to downgrade the charges or seek a less severe sentence, that choice is really just a deviation from a default setting aimed at deterring and punishing crimes (and possibly aimed also at rehabilitating or incapacitating criminal offenders), and not for the sake of reinforcing a professional standard of competence or a universally shared set of community norms, values, and virtues. If the use of a civilian criminal justice system, either generally or in a specific case, results in positive contribution to either of these other relationship modes, it is incidental and probably unintentional.

Second, if the government can justify making some act a crime and can justify “punishing” it, then surely it can also opt—for the benefit of that servicemember or of the government—to make it a “lesser-included” violation that imposes less stigma, and fewer and less debilitating consequences. In specific cases, the facts may warrant, and the government might prefer to argue, that the servicemember’s conduct has produced a set of harms which implicate the interests of the government in its employment or community relationship modes in addition to its sovereignty mode. It may be reasonable for the

government, in a specific case of misconduct or wrongdoing to seek to punish a service member for some act or omission, to discipline for others, and to censure for still others. In some cases, a single wrongful act may implicate all three relationship modes and thus all three forms of coercive legal authority.\footnote{216. Absence without leave (“going AWOL”) or desertion may be examples of such martial offenses. In these cases, the act is wrongful because it (1) degrades the ability of the unit or command to execute a mission according to plan (a challenge to the government as “sovereign”); (2) fractures the confidence that the military principal (i.e., the commander) has in the loyalty and activity of the agent (the perpetrator subordinate)—a challenge to the government as “employer”; and (3) risks damaging unit cohesion, group morale, and mutual trust expected within a military organization consisting of a voluntary community of professionals aligned by customs, norms, and shared purpose (a challenge to the government as “community”). See 10 U.S.C. § 885 (desertion); id. § 886 (absence without leave).}

Furthermore, it might have been apparent in the definition of punishment in Proposition 4 that certain obviously wrongful acts that are universally condemned as “criminal” would slip outside the jurisdiction of a military justice system’s schema. If a sergeant on active-duty rapes and kills a child in the local community outside a domestic army installation, that conduct would not be considered—by itself—“punishable.” That interpretation is sound given the parameters outlined above; in order to trigger military criminal jurisdiction capable of justifying and imposing punishment on a servicemember, the course of criminal conduct would necessarily have to involve a harm to the sovereign’s interest in some identifiable and non-speculative military goal—for example, undermining an articulable military mission; disabling unit morale and cohesion; discouraging trust in the chain of command’s lawful decisions; or interrupting or incapacitating mission readiness.

This is reasonably close to the concept of prejudicial to “good order and discipline,” which serves as a justification for the so-called “terminal element” of Article 134 of the UCMJ to criminalize certain otherwise non-criminal behavior that—in many instances—would be constitutionally protected, like certain speech or interpersonal relationship conduct.\footnote{217. 10 U.S.C. § 934.} The definition of “prejudicial to good order and discipline” under the U.S. Manual for Courts-Martial is not completely helpful, for it only defines “prejudicial”: conduct that has a “direct and palpable” effect on good order and discipline; it cannot be “indirect or remote.”\footnote{218. M.C.M., supra note 6, at pt. IV, ¶ 91(c)(2)(a).} However, a more complete description might be found in the explanation of why “extramarital [sexual] conduct” could—under certain
circumstances—be so prejudicial: “conduct that has an obvious, and measurably divisive effect on unit or organization discipline, morale, or cohesion, or is clearly detrimental to the authority or stature of or respect toward a Servicemember, or both.” Therefore, this proposition—in how it defines punishment and the nature of the sovereignty relationship mode—suggests a substantial modification to the current UCMJ: \textit{all} current UCMJ offenses, not just the Article 134 offenses, would require proof of an explicit terminal element akin to the prejudicial to good order and discipline justification.

\textbf{Proposition 5.} The “control features” (the means and methods that induce, regulate, or restrain both the application of armed force and the personal or professional conduct of members of the Armed Forces in all three relationship modes) meet customary expected standards: their design, implementation, and review are non-arbitrary and rule-governed, relatively stable (but able to be amended or applied with some degree of discretion), formal, and publicized.

Test Suite (an affirmative answer to each is suggestive of a “control feature” as defined above):

- Are servicemembers at least generally aware of the relevant and lawful reasons for imposing punishment, discipline, or censure on its members, both in general and applicable to specific cases?
- Are servicemembers at least generally aware of the proscribed behaviors and their consequences?
- Are servicemembers at least generally aware of the permissible types of punishment, discipline, or censure?
- Are there non-arbitrary, rule-governed, publicized processes for investigating, accusing, defending, and judging the kind of conduct for which punishment, discipline, or censure may be available and appropriate?
- Are there non-arbitrary, rule-governed, publicized processes for establishing who may participate in the process of deciding whether and how to punish, discipline, or censure?
- Are there non-arbitrary, rule-governed, publicized factors for weighing whether and how to punish, discipline, or censure, and making the factors mandatory or discretionary?
- Are there non-arbitrary, rule-governed, publicized processes for establishing who is held accountable for their conduct and thus exposed to potential punishment, discipline, or censure?
- Are there non-arbitrary, rule-governed, publicized processes for

\footnote{219. \textit{Id.} at pt. IV, \S 99(c)(1).}
developing, promulgating, managing, revising, or amending control features listed above?

**Proposition 6.** Each of the three relationship modes (sovereignty, employment, and community) has a distinctive account of, or answer for, this common set of control features.

With knowledge of the control features, a servicemember should be able to expect that certain conduct triggers the government’s adverse response, as a body’s immune system reacts to invasive pathogens or cancer cells. Like antibodies specifically adapted to combat known pathogens, the government’s adverse response will reflect which of the three relationship perspectives from which it chooses to counter or deter specific conduct or induce certain behaviors. The servicemember, with knowledge of the control features of the military justice system, should be able to know *which* proscribed conduct will trigger *which* kind of government relationship mode. When, for example, the government is contemplating adverse action against a servicemember from an employment relationship perspective, certain *reasons* for disciplining that person (in contrast to punishing or penalizing), and rules for *who* may participate in the process, *what* the process will consist of, and *whether or how* to employ that discipline are sensible and permissible, while other reasons, processes, and mechanisms are ill-suited or unavailable, unless the government takes action meant to reflect its ends and interests from a different relationship perspective, like that of sovereign. Because it is reasonable for the government, in a specific case of “misconduct,” to seek to *punish* a service member for some act or omission, to *discipline* for others, and to *censure* for still others, potentially different mechanisms, actors, and consequences will be tapped and functional.

One possible criticism of this framework is that it is apparently indifferent to concerns for judicial economy of resources; even the modern U.S. military justice system is for, among other things, the promotion of “efficiency and effectiveness” in the Armed Forces. But that is a hasty assumption, and not unlike some of the unsupported premises forming the predicate logic of military justice. It is because they imply different mechanisms, actors, and consequences that no single authority or decision-maker (e.g., a judge or a commander) is unreasonably taxed. Rather, their lane has become narrower and more distinctive, allowing that authority—and only that authority—to exercise

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220. *Id.* at pt. I, ¶ 3.
Proposition 7. Considering military justice as a system (whose available “control features” are a function of which relationship mode best reflects the interests and intent of the government via one of three relationships) reveals it is composed of principles roughly analogous to the fundamental natures of criminal law, contract and agency law, and tort law. Consequently, the control features adopted by the government to regulate or deter conduct in each of the three relationship modes can be explained (descriptively), or should be influenced, at least in part (prescriptively), by the rich store of fundamentally core legal concepts in criminal, contract and agency, and tort law that justify and structure particular demands upon certain interpersonal relations.

Though the definitions offered above for both “discipline and punishment” involve violations of only martial duties, expectations, norms, or values, there is a substantial difference between these two forms of coercive authority. Each offers a perspective from which we can evaluate the conduct and gauge the injury or harm. It is that perspective for whom the discipline or punishment is intended to protect or act as a remedy. Discipline’s perspective is that of the commander. It is the commander’s expectation of the competent professional performance of her subordinates, and the expectation on the commander that she will accomplish the assigned military objectives, that justifies the imposition of discipline.\textsuperscript{223} It is fundamentally an employer-employee perspective, and this implicates fundamental core concepts of contract and agency law.

An employment relationship between self-policing professional agents working for a principal who sets the terms of that employment is one consistent with principles of contract and agency law. Contract law defines the rights and duties governing the relationship between parties to an agreement, backed by court enforcement through ordering of certain remedies (e.g., damages or

\textsuperscript{222} Ultimately, the theory composed of these nine propositions is about rationalizing the necessary and sufficient features of military justice—articulating appropriate ends (and justifying them), and then identifying and fitting the means and methods to those ends. “Efficiency” of process is a separate goal, and one that should not be equated to, or have an opportunity to veto, goals of a justice system that presumes the volunteer subject servicemember is “innocent until proven guilty/culpable/responsible/at fault.” Efficiency was not one of the four principles derived from the Rawlsian thought experiment. \textit{See supra} Section IV.C.

\textsuperscript{223} \textit{See}, \textit{e.g.}, 10 U.S.C. § 3583 (discussing the “[r]equirement for exemplary conduct” imposed by Congress on leaders in the military).
performance). Under Anglo-American common law, a contract is manifested through offer and acceptance (the so-called “meeting of the minds”), consideration (a promise of something of value given by the promisor in exchange for something of value given by the promisee), and mutual intent to be bound. Contracts are made, and legally enforced, for several well-established reasons: they yield an economic benefit by enforcing stable and consistent bargains; the moral importance of promises should be signaled and prescribed; and they deter self-dealing that leaves the other party without the benefit intended by their agreement. For some scholars, a contract is not just an instrument for a transaction but rather it also reflects a larger social context of a mutually created comprehensive relationship in which the parties’ interests are aligned for a time.\(^{224}\)

Generally speaking, an “agency” (specifically, a principal-agent) relationship is formed when one party (the agent) assents to use its expertise, skills, knowledge, access, or other attribute or resource to accomplish some task, goal, or function for the benefit of another party (the principal), under that other party’s direction and to some extent autonomously within the scope of authority or license granted by that party. As with a doctor-patient relationship, or a lawyer-client relationship, the parties are bound to each other (through legally enforceable mechanisms) for a time guided by certain “fiduciary” duties of care, competence, good faith, loyalty (no self-dealing), candor, diligence, and confidentiality in ways that benefit the agent and enable the principal to augment his or her native capacity and capability.\(^{225}\)

\(^{224}\) This is a surprising foundational affinity between a military’s criminal law and other branches of civil law, but this can only be short introduction to it. My overly simplified description of the basics of contract law is drawn from the following sources: CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (2d ed. 2015); RESTATEMENT (SECOND) OF CONTRACTS (AM. L. INST. 1981); Daniel Markovits & Emad Atiq, Philosophy of Contract Law, STAN. ENCYC. PHIL. (Nov. 23, 2021), https://plato.stanford.edu/entries/contract-law/ [https://perma.cc/JMV6-3W98]; Ian R. Macneil, Whither Contracts?, 21 J. LEGAL ED. 403 (1969); Ian R. Macneil, Contracting Worlds and Essential Contract Theory, 9 SOC. & LEGAL STUD. 431 (2000); Richard Austen-Baker, Comprehensive Contract Theory: A Four-Norm Model of Contract Relations, 25 J. CONT. L. 216 (2009) (arguing that Macneil’s ten norms, while influential, analytically sound, and practically useful, are overly numerous and overly focused).

This is not to say that the complex relationship between soldier or sailor and her commander is structured as if it were a contract whose terms are construed by contract interpretation standards and drafting methodologies. Nor does it mean that a commander’s breach of her obligations to a subordinate ought to necessarily trigger a court-enforceable order for specific performance. Nor does it mean that we should formalize the conduct constraints imposed on Marines or Airmen in terms of what an expert professional agent can or should do for the benefit of his commander as principal, as if they were state-enforceable duties. But it does suggest that basic contract and agency law concepts like trust and promise, capacity and competence, duress, reliance, unconscionability, “unclean hands,” due diligence, specific performance, scope of authority, candor, and an agent’s authority (actual, apparent, and implied) might explain the relevance and justification for certain administrative procedural methods already available to—or binding on—American military commanders; they may also be profitably mined for adaptation and the design of remedies in military contexts in which a discipline is thought to be relevant.

For example, a military commander has a menu of optional non-punitive administrative corrective measures to address minor forms of indiscipline when harsher measures (e.g., a potential court-martial conviction and imprisonment) is unwarranted by the facts and circumstances. They may admonish, rebuke, or reprimand the servicemember, or reassign the servicemember to a different unit, or reclassify the servicemember into a different occupational specialty; or assign extra duty, instruction, and training requirements; or may withhold certain privileges (like a four-day pass for a long holiday weekend), or even “separate” the servicemember (employment termination). Consider the rules that provide servicemembers with means for seeking redress from their chain-of-command for allegations of being wronged by their commanders’ acts or omissions, suggesting that some form of duty obliges the commander with respect to those under his command. As the U.S. Army’s regulation on command authority states it:

The commander is responsible for all aspects of unit readiness. Training is the cornerstone of unit readiness and must be the commander’s top peacetime priority. Establishing a positive leadership climate within the unit and developing disciplined and cohesive units contributes to combat readiness and sets the tone for social and duty relationships and responsibilities

226. M.C.M., supra note 6, at pt. V, ¶ 1(g).
within the command. As the primary unit trainers, commanders must develop their leaders to extract the greatest training value from every opportunity in every activity in order to build combat readiness and prepare their units and Soldiers to rapidly deploy and accomplish their decisive action missions. Commanders remain responsible for the professional development of their Soldiers at all ranks. Commanders and other leaders will treat their subordinates with dignity and respect at all times and establish a command and organizational climate that emphasizes the duty of others to act in a similar manner toward their subordinates in accomplishing the unit mission. . . . Commanders and other leaders committed to the professional Army Ethic promote a positive environment. If leaders show loyalty to their Soldiers, the Army, and the nation, they earn the loyalty of their Soldiers. If leaders consider their Soldiers’ . . . needs and care for their well-being, and if they demonstrate genuine concern, these leaders build a positive command climate.227

All commanding officers and others in authority in the Army are required . . . to take all necessary and proper measures, under the laws, regulations, and customs of the Army, to promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under their command or charge.228

Censure’s perspective, in contrast to that of punishment and discipline, is that of the unit or organization in which the member serves. This community of fellow professionals has a shared expectation that each member of the community is willing and able to abide by certain martial-oriented values and professional norms, and the expectation of the community is that a member will serve larger military interests than their own individual interests in self-preservation and self-advancement. Breaches of these expectations are what justify and explain the imposition of censure.

Enforceable duties like these owed by one person to another within a community—where that community is largely defined by the bonds of loyalty, trust, mutual respect, candor, commitment, and shared sacrifice—essentially reflect a relationship consistent with principles of the common law of tort. A tort is generically defined as a socially undesirable breach of some obligation

228. This directive has a statutory basis. See 10 U.S.C. § 7233 (emphasis added).
(to do or not do something) that a public or private party owes to another, established by statute or court, not because of contractual agreement but because of their status as members of a common social and political community. That joint membership implies a relationship of mutual regard strong enough that a legal authority may assign liability and order the tortfeasor to compensate the injured party. The remedy for the harm or invasion of a personal right is based in part on the moral wrongness of the tortious act and what would adequately return the injured party to whole. This shifts the burden of loss from the injured party back to the injurer at fault, either because it is “efficient resource allocation” or “optimally deterrent,” or because it is thought normatively “fair.” Though tort law serves deterrence and punitive functions like criminal law, the emphasis in tort unlike in criminal law is not the moral culpability for which public condemnation and hardship is deserved but simply redress for “fault.” It is, as noted criminal and tort law scholar George Fletcher says, a “unique repository of intuitions of corrective justice.”

This is not to say that any act or omission in common law that would constitute a form of (intentional, economic, or dignitary) tort, or negligence, like intentional infliction of emotional distress, inherently dangerous activity, trespass, conversion, defamation, or battery should be prohibited within military justice’s jurisdiction, whether through penal prohibitions or adverse administrative actions. Nor is it to say that a civil court-imposed remedy for such actions arising from military operations or by military personnel would be an efficient reallocation of risk and resources or would be normatively fair.


230. See, e.g., RESTATEMENT (SECOND) OF TORTS § 146 (AM. L. INST. 1965) (“A member of the armed forces of the United States or any of the several States is privileged to inflict a harmful
But it does suggest that general tort law concepts of negligence, assumption of risk, transaction costs, malpractice, standards of care, foreseeability, class action, and proximate causation might be profitably mined for adaptation and the design of remedies in military contexts in which a censure is thought to be relevant.

The significant distinction between discipline and censure on one hand and that of the apparently more severe punishment as defined above is clear. Punishment’s perspective is not that of the violator’s commander or the violator’s community, but that of the broader government (within which the military functions as agent to civilian political principals) in its role as lawful sovereign. That sovereign is responsible to an electorate for ensuring broad collective security and public safety from that which wrongfully causes (or could cause) harm. It is the sovereign’s perspective that animates a system of punishment specifically and only applicable to the military for two material reasons. First, it is in the sovereign’s interest to formally and regularly deter conduct that would undermine its ability to reliably and lawfully use its armed forces for certain general military purposes. Second, it is in the sovereign’s interest to signal deserving tangible and symbolic unpleasant blame in the name of the larger military community over whom the prohibitions apply and in the name of the larger civilian community the military protects and from which the military is drawn.  

contact or otherwise invade another’s interests of personality if such invasion is reasonably necessary for the execution of a command issued by a superior, if the command is (a) lawful, or (b) is believed by the actor to be lawful and is not so obviously unlawful that any reasonable man would recognize its illegality.”).  

231. KYLE & REITER, supra note 37, at 9–10. In accord with FEAVER, supra note 202, at 93, the authors rightly describe military justice as a mechanism for maintaining effective civilian control over the military; they relate the degree of military subordination to the extent to which military courts are relied upon for various disciplinary and punishment functions. Where I depart from the authors is that they describe this “military legal subordination” on a spectrum with only three phases (“full subordination,” “jurisdictional contestation,” and “military overreach”) and based on only two variables: who can be prosecuted in military courts (civilians or just military members?) and for what conduct (civilian offenses or just military offenses?). Id. at 54 tbl. 3.2; see also id. at 230–35. As outlined in Section III.A, supra, consideration of the military justice system in a civil-military relations framework must include at least a few more questions: what role (investigative, administrative, judicial, punishing) for commanders? What due process protections provide checks on those authorities? To what extent are military courts and the disciplinary decisions of commanders subject to review by civilian judicial authorities? What role does the civilian legislature play in formulating rules of procedure and determining what conduct is criminalized? The answers to these questions will
Proposition 8. Though exercising distinct forms of coercive authority, using different control measures and rules, these three relationships ultimately share a common purpose: to create a self-regulating Armed Force (subject to the demands of civilian principals) of self-regulating individuals (subject to rules, norms, and customs enforced by military principals) presenting the most favorable conditions possible for the use of reliable armed force by the chain-of-command.

Proposition 9. Military justice can be thought of as a military strategy, not unlike other military strategies, but aimed at resolving the command-and-control paradox in a manner that satisfies the principles of non-repulsion, retention, mission risk-reduction, and compliance. At its most generic, military justice as a strategy is the political use of legal structures to set desirable military conditions for achieving national security objectives.

To claim that military justice serves as a strategy is to claim that it is a kind of advanced, long-term, interlocking set of plans of varying complexity for distributing and using limited resources rationally in an effort resolve disputes, prevent harms, assign duties, constrain power, and express a community’s objectives according to commonly accepted principles or rules. In simplest terms, a strategy posits an organization-wide or community-wide effect (or multitude of effects) for which to reach, and for which various tools and methods for using those tools are employed deliberately. This borrows in necessarily yield a system that functions in some ways more directly accountable to civilian control and in some ways almost entirely free of oversight; it may yield a complex jurisdictional scheme of certain actors being punished for certain offenses but only under certain exogenous conditions, like whether the alleged misconduct occurred in wartime. The authors do acknowledge that the “establishment and change” of military justice systems (looking to examples from around the world) is a function of the “interactions among three principal actors—the [civilian] government, the military, and [civilian] high courts” and several domestic and international influences. Id. at 62–78.

232. See supra Section III.C.

233. The U.S. military defines “strategy” as a “prudent idea or set of ideas for employing the instruments of national power in a synchronized and integrated fashion to achieve theater, national, and/or multinational objectives.” DEP’T OF DEF., DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 227 (2016). More simply, it is the reasonable connection between an organization’s “ends, ways, and means.” Arthur F. Lykke, Jr., Toward an Understanding of Military Strategy, in U.S. ARMY WAR COLLEGE GUIDE TO STRATEGY (Joseph R. Cerami & James F. Holcomb, Jr., eds., 2001), https://press.armywarcollege.edu/cgi/viewcontent.cgi?article=1118&context=monographs [https://perma.cc/98V7-AV2S]. There are many usable formulations. One noted twentieth century military author defined it as the “art of distributing and applying military means to fulfill the ends of
spirit from Professor Scott Shapiro’s “Planning Theory of Law.”

Shapiro does not view law (at its most general and fundamental of levels, not speaking of a criminal law specifically, or the law on self-incrimination) as a set of rules or commands backed by the force of the state with an intent to fix “bad character” within a community or to eradicate moral vices (e.g., coercion, deception, greed, aggression, violence, certain social deviances, etc.). Instead, he suggests that law is best understood as a sophisticated form of social planning—the legal system made up of processes, actors, and institutions—serving to coordinate and organize a community’s resolve to address these problems in the most efficient, least dangerous, and most cost-effective way.

[L]egal activity is a form of social planning. Legal institutions plan for the communities over which they claim authority, both by telling members what they may or may not do, and by identifying those who are entitled to affect what others may or may not do . . . [so] legal rules are themselves generalized plans, or planlike norms, issued by those who are authorized to plan for others. And adjudication involves the application of these plans, or planlike norms, to those to whom they apply. In this way, the law organizes individual and collective behavior so that members of the community can bring about moral goods that could not have been achieved, or achieved as well, otherwise.

Rather than an attempt to solve a particular “moral quandary,” law is “an answer to a higher-order problem, namely, the problem of how to solve moral quandaries in general.” A military justice system defined by the first eight propositions above reflects this sort of sophisticated, multi-layer planning effort managed by and for a specialized community possessing idiosyncratic professional standards, cultural norms and expectations, and an organization-wide telos.

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235. Id. at 175.
236. Id. at 155.
237. Id. at 173.
What I have referred to elsewhere as the “command-and-control paradox” may illustrate this.238 In hierarchical organizations like military units, the position an actor sits in generally determines that actor’s resources, knowledge, scope of responsibility, ability to orchestrate or coordinate among others, and the opportunity or authority to act independently or with personal discretion.239 The executive, according to James Q. Wilson’s famous study of bureaucratic organizations, is often concerned more with “external constituencies” and other similar-situated organizations than with internal organizational management.240 The “operator,” in contrast to the executive, is the “person who does the work that justifies the existence of the organization.”241 Therefore, it seems reasonable to suggest that a generic graphic representation of information awareness and event control is opposite that of the standard line-and-block organizational tree in which a singular head, director, or commander at the apex branches out below with an ever-increasing number of subordinates as one descends layers of the hierarchy and chain-of-command. Figure 1 depicts this inversion. It dismisses the common joinder of “command and control”242 by representing the counter-intuitive notion that the more (people, material, process, physical space) a person “commands,” the less that person actually “controls,” absent some form of procedural or personal intervention—the kind developed and systematically employed as a result of planning.

240. Id. at 31–32.
241. Id. at 33–34.
242. DEP’T OF DEF., DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES 1–18 (2013) (incorporating Change 1, 2017) (defining “[c]ommand and control” as “the exercise of authority, responsibility, and direction by a commander over assigned and attached forces to accomplish the mission. Command at all levels is the art of motivating and directing people and organizations into action to accomplish missions. Control is inherent in command. To control is to manage and direct forces and functions consistent with a commander’s command authority. Control of forces and functions helps commanders and staffs compute requirements, allocate means, and integrate efforts”) [hereinafter Joint Publication].
Figure 1: The Generic Organizational Command-and-Control Paradox

At the nadir of the inverted triangle is the generic “action officer” (or “operator,” to use Wilson’s term). This actor is representative of the unit or organization that most directly engages with a particular event, issue, incident, or case. In a military unit in combat, imagine this person to be the soldier directly engaged in a firefight with an enemy combatant. In terms of military justice, we can imagine this actor to be a generic captain in command of a company, the most junior position at which an officer possesses legal authority and the ability to dispose of certain criminal offenses in the U.S. Army. At this lowest level, the soldier experiences and benefits from the deepest well of situational awareness about that particular engagement he or she experiences first-hand. In military justice terms, the first commander in the chain-of-command likely knows about the accused’s personal and professional life more intimately than the accused’s battalion, brigade, or division commanders farther up the chain-of-command.

The actor’s ability to control or influence that engagement, or determine a prosecutorial disposition, by a single person at this point is at its maximum. However, as one moves farther away from the engagement, either geographically or by rank, the situational awareness and opportunity to directly influence that particular engagement or address that misconduct will, realistically, decrease. A squad leader must remain cognizant of six other
soldiers and their engagements, activities, decisions; a platoon leader orchestrates three such squads and must communicate with, and receive direction from, the company commander; the company commander in turn must orchestrate three or four of these platoons while under the supervision of the battalion commander, who is likely one of three or four similarly situated commanders reporting to a brigade commander, and so on.

As the actor’s range of command responsibility widens, straining effects on management—control—become noticeable. Moving higher up the chain-of-command to the battalion, brigade, or division headquarters, the breadth of command or responsibility naturally expands (represented by increasing horizontally), but their depth of awareness shrinks in comparison to those below.243 Only in rare exceptions would a battalion or brigade commander experience the same situational and contextual depth of understanding about a particular soldier’s alleged misconduct that the first-line commander has. The same can be said of the difference between civilian political authority and the military chain-of-command’s persistent concern with its ability to ensure troops are ready and capable of performing military duties or accomplishing a military mission.

The horizontal lines stretching across the diagram in Figure 1 can also be thought of as horizon lines dividing the various echelons of command. Unless affirmative and overt steps are taken to communicate between and among these various strata, the information and situational awareness each actor at each layer experiences become largely inaccessible, hidden from the view of the others much like seeing beyond an actual horizon line is impossible if one remains still. Consequently, the action officer (operator) would not necessarily observe (let alone influence) the concerns that affect or motivate decision-making and judgment at each higher layer of command. This is part one of the paradox: the person most able to directly address the particular event, issue, incident, or criminal case does so blind to how the event is situated within the hierarchical chain-of-command’s overall atmosphere of discipline and justice. Unless active measures are instituted to grant that commander visibility over those issues or grant authorities to inquire into questionable acts, that commander is at risk of missing the larger forest for the trees directly ahead.

243. The size differences in these strata are relative, not absolute measures. In other words, the operator’s or action officer’s situational awareness may in fact be objectively quite shallow because the incident or event is just then beginning, but it remains—relatively—much deeper than that possessed by ascending levels of command and control above him.
The second part of the paradox is that the person at the top floor of the hierarchy is most responsible for ultimately creating, sustaining, and improving the atmosphere or culture of conduct among the members of that command, but is least able to directly understand the context or circumstances of a servicemember’s particular episode of misconduct and its effect on that unit. This commander (or, even more broadly, civilian political authority), then, is at risk of missing the trees for the forest, rendering a prosecutorial or judicial-like decision over behavior that may not—in any real way—actually undermine the ability to command and control others for the sake of preparing for or accomplishing a given military mission. Whether one stands at the “tip of the spear” closest to the action, or one stands at the apex of command overseeing entire subordinate organizations, the risk that each will make uninformed, biased, arbitrary, reactionary, or short-term-only decisions is high.

A military justice system, however, may modify this inversion, or at least offer an account for addressing its implications. At one level, a commander relies on the advice, expertise, judgment, and action of her subordinate staff officers—including military lawyers—to not only partake in the planning of missions, but as a strategy for effectively and efficiently managing resources, assigning duties, and aligning with higher headquarters’ missions, all according to commonly-accepted principles or rules. The lower-ranking staff officers possess subject-matter expertise, specified roles, and designated opportunities to address narrow aspects of wider problems that the commander cannot—themselves—see or address in a timely or effective way. This decentralizes the control mechanisms relied upon by the commander. This includes the exercise of their quasi-investigative, prosecutorial, and judicial authorities granted by the UCMJ and the Manual for Courts-Martial. It is the intervention, so-to-speak, of the military prosecutor or judge on behalf of the commander (really, representing the military as a client, not the commander per se) that exposes the decision-making commander to detailed knowledge of relevant facts and circumstances surrounding an alleged offense in ways that permit informed decision-making.

244. This problem is particularly acute for the chain-of-command’s role in the legal disposition of “civilian”-type crimes that have no apparent bearing on good order and discipline of a unit. See DAN MAURER, AN OPEN, BUT DIFFICULT, CHALLENGE: FINDING THE RATIONALE FOR A COMMANDER’S GCMCA FOR ALL OFFENSES 1–5 (2020), https://www.caaflog.org/home/maurer-an-open-but-difficult-challenge-finding-the-rationale-for-a-commanders-gcmca-for-all-offenses [https://perma.cc/Y9UB-DEES], revised and expanded in Lieutenant Colonel Daniel Maurer, Cross-Examining Convention: A Hypothetical Test of Pro-Convening Authority Discretion, ARMY LAW., Issue 4 2021, at 67.
decision-making. To conclude otherwise is to envisage a military justice system in which the commander of an accused is the sole law enforcer, factfinder, investigator, prosecutor, defense counsel, and judge in that servicemember’s case—a description of “justice” that has not existed in fact since the Roman legions of antiquity.\textsuperscript{245}

At another level, Congress relies on the President (who in turn relies on the military chain-of-command) to manage the day-to-day application of the UCMJ it constructs. Though not “in command,” Congress nevertheless has singular constitutional authority over the military justice system, able to “make Rules for the Government and Regulation of the Land and naval Forces.”\textsuperscript{246} As Commander in Chief, it is reasonably presumed that the President (and the subordinate chain-of-command) is closer to the facts of individual cases and can best (at least better than legislators) survey systemic challenges to good order and discipline across the Armed Forces, and best ascertain what rules, norms, and standards would permit the military to efficiently and effectively provide for “justice” while—and in service of—accomplishing its national security missions. Of course, this is not universally true: recent legislative reform of the UCMJ in response to perceived inability by the chain-of-command to appropriately prosecute sexual offenders, to sufficiently deter sexual assault, or to adequately protect victims of sexual assault demonstrates a “command” decision by consensus to alter the manner in which actors within the system wield their prosecutorial authorities—that is, an exercise of control. But, generally outside the recent reform packages, Congress has long authorized the President to make administrative rules for courts-martial (including the investigation and in-court adjudication of allegations),\textsuperscript{247} provide guidance to prosecutors and commanders on what contextual factors to consider before deciding how to dispose of an allegation,\textsuperscript{248} nominate the generals and admirals to command positions in which they exercise UCMJ authorities,\textsuperscript{249} and to even act as a court-martial convening authority herself.\textsuperscript{250}


\textsuperscript{246} U.S. CONST. art. I, § 8, cl. 14.

\textsuperscript{247} 10 U.S.C. § 836.

\textsuperscript{248} 10 U.S.C. § 833.

\textsuperscript{249} U.S. CONST. art. II, § 2, cl. 2.

\textsuperscript{250} 10 U.S.C. § 822.
At either level, the rules that specify, organize, arrange, authorize, and allocate the resources tied to military justice practice for the idiosyncratic military community and its missions reflect a concerted planning effort (in Shapiro’s terms) in advance of a strategy. That strategy, which begins with the political branches’ exercise of their constitutional powers, aims to overcome the command-and-control challenges inherent to large hierarchical organizations like the military through legal actors, legal institutions, legal processes, and legal standards. It ends with the effective accomplishment of the political and civil-directed national security goals by that disciplined armed force—which, ultimately, is the reason for the existence of the Armed Forces.

VI. OPERATIONALIZING THE PROPOSITIONS

A. Implications of the Theory

This theory’s practical value depends on how well it aids in formulating, conceiving, debating, justifying, or critiquing the actual components, or proposed components, of a real military justice system. In this light, there is ample room for questioning and critiquing the current UCMJ (within Congress’s scope of responsibility) or the Manual for Courts-Martial (the President’s responsibility). Several subjects are worthy of reconsideration:

- Rules for court-martial panel member voting (should guilt be determined by unanimous vote, as the Court recently determined was a constitutional requirement for all other criminal courts);
- Rules for court-martial panel member selection criteria and rules for who has authority to select the members;
- A commander’s discretionary authority to investigate certain kinds of alleged misconduct (including the ability to issue search authorizations) and to dispose of them with “non-judicial” measures;

251. Shapiro, supra note 234, at 204.

252. Joint Publication, supra note 241, at i (“The US Armed Forces fulfill unique and crucial roles, defending the US against all adversaries while serving the Nation as a bulwark and the guarantor of its security and independence. The US Armed Forces function within the American system of civil-military relations and serve under the civilian control of the President, the Commander in Chief. The US Armed Forces embody the highest values and standards of American society and the profession of arms.”).

253. See id.

254. Ramos v. Louisiana, 140 S. Ct. 1390, 1395 (2020) (“A jury must reach a unanimous verdict in order to convict.”).
• Conditions under which a commander’s discretionary authority to place suspects in pre-trial confinement;
• Whether the “non-judicial punishments” available to commanders outside of a courtroom and beyond appellate review are commensurate with the kind of disciplinary penalties and censures appropriate for violations of employment standards and community values and norms;
• Whether a military justice code should prohibit martial offenses alone or, instead, prohibit a combination of these military crimes and civilian-type crimes that have no discernible (let alone “direct and palpable”) effect on good order and discipline and do not “discredit” the military in any non-speculative way (this is a different question entirely than whether certain commanders—rather than lawyers—should be able to make prosecutorial decisions about those martial and civilian-type crimes);
• Whether a military justice code should consider two new terminal elements when criminalizing behavior that is ostensibly non-harmful and non-criminalized in civilian codes, or even constitutionally protected: “prejudicial to professional competence” and “prejudicial to mission accomplishment.” These elements more accurately describe the harm caused by acts or omissions that render a soldier less ready to perform his duty (e.g., absence without leave, excessive consumption of alcohol, self-injury, reckless conduct) and acts or omissions that interfere with or degrade the command’s ability to execute its mission (e.g., desertion, disobedience to lawful commands, disrespecting non-commissioned officers);\(^\text{255}\)
• Whether the long arm of personal jurisdiction extends to retired servicemembers;
• The degree of deference Congress gives toward military advice about the structure, purpose, function, and consequences of military justice;
• The degree of deference the Court gives to Congress or to the President about these questions;
• Whether battlefield misconduct that violates the rights of persons protected under the laws of war should be charged as “war crimes” or—as currently practiced by the United States—merely for the

\(^{255}\) See \textit{supra} notes 75 and 78 and accompanying text.
underlying bad act (e.g., murder).256 Such misconduct warrants this special stigma because it implicates the interests and values of all three “relationship modes”—the only category of criminal offense that arguably does so.

The theory of *jus in disciplina militaris* described above clearly has practical implications for the design or reform of a military justice code. It may reveal that American military justice should consciously strive for what Professors Kyle and Reiter describe as “full subordination” in which (assuming military courts exist) only a narrow band of cases implicating “good order and discipline” can be addressed by court-martial prosecution.257 Though they do not term this as such, this narrowing is consistent with Huntington’s classic view of “objective control”: the military accepts dominant civilian oversight precluding interference in political matters in exchange for a significant autonomy in a “separate”—focused entirely and narrowly on maximizing military professionalism and military effectiveness.258

But it also raises a more abstract question whose answer might not meet the public’s expectations (if it has any) for what military justice is supposed to do. Is military justice, understood as a series of propositions explicated above, even a species of “criminal law,” at least as understood by legal theorists? I think it is beyond contention that it would meet Holmes’s curt definition of criminal law’s purpose: “to induce external conformity to rule” in order to avoid a “harm.”259 We can also, probably, explain the various prohibited conduct, the authorities granted to commanders and the courts, and the due process-related protections in Hart’s terms of “primary rules” and “secondary rules.”260 It may also be fair to conclude that a military justice system described by the nine propositions is—as George Fletcher puts it—a “species of political and moral philosophy” in which “[i]ts central question is justifying the use of the state’s coercive power against free and autonomous persons.”261 And surely the harms

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257. *Kyle & Reiter*, supra note 37, at 9–10. The authors also contend that “full subordination” is, normatively, best: “the goal to which democratic states should strive.” *Id.*
258. See *Huntington*, supra note 8, at 7–18, 83–85.
261. *Fletcher*, supra note 118, at xix.
military justice seek to prevent include “loss of life, bodily injury, loss of autonomy, and harm to or loss of property.”

But in light of the three relationship modes and variety of coercive means and available control measures, it may not be so easy to dismiss possible ancillary—if not co-equal—goals of compensation, rehabilitation, or the inculcation of virtue. It may be worth further consideration whether a system that is identifiable under this theory satisfies the five fundamental characteristics of a criminal law described by Henry Hart, or whether its components can be identified with R.A. Duff’s two “central ingredients” and two “key aspects” of criminal law. It may be worth further study to know whether the essential features forming the genetic code of any legitimate criminal law are discoverable within this theory.

Classification as criminal law matters because a proper criminal law theory both describes and prescribes certain elements that do, or ought to, characterize a particular system and is understood to do so by the parties that are subject to it, create it, and adjudicate it. Three potential classifications seem plausible. First, if military justice is fundamentally something different than a traditional criminal law, for instance, it explains and justifies a great deal of the history of the practice and the roles played by non-legal actors. But that conception does not explain the structures and values that have surfaced as a result of its gradual civilianization. The current American system grants power to a unit commander to authorize searches and seizures of personal property; to charge or dismiss a long list of offenses; to pick the type of court-martial (and therefore the range of possible punishments available if convicted); or to choose among various administrative, non-judicial measures. Moreover, neither the logic nor the motivating purpose for those prosecutorial judgments are currently subject


263. Id.


265. R.A. Duff, Towards a Theory of Criminal Law?, 84 PROC. ARISTOTELIAN SOC’Y 1, 1, 7, 10–15 (2010). More generally, Duff believes that a “complete normative theory of criminal law” covers the following: (a) substantive crimes—their “scope, content, and structure”; (b) the (usually) legislative processes by which these acts or omissions are defined as crimes; (c) “the activities of those who enforce the criminal law”; (d) how acts or omissions are investigated and adjudicated; and (e) punishments for those convicted. Id. at 1–3.

266. See generally Bray, supra note 11; Schluter, supra note 11.
to being cross-examined or interrogated by any court.\(^{267}\) However, commanders’ authority to impose pre-trial confinement is limited and can be checked by neutral detached officers engaging in a review process for that decision;\(^{268}\) commanders must demonstrate a degree of neutral and detached independence from the investigation they trigger in order to authorize a probable cause-based search;\(^{269}\) and commanders cannot do or say anything that would, or appear to, unlawfully influence the way in which an accused is investigated, tried, or punished.\(^{270}\) Commanders are not free to consider the accused’s “character of military service” up to the point of the alleged murder when deciding whether to charge or refer, even when that character reveals his instrumental role in maintaining good order and discipline among junior soldiers and in accomplishing dangerous military missions at the risk of his own life.\(^{271}\)

On the other hand, there is a second plausible point of view. If military justice is fundamentally nothing more than a criminal law, Congress should either rationalize and amend, or discard outright, structures and that do not reflect core principles of what we tend to think are criminal law’s values, roles, and goals.\(^{272}\) For just one example, in the U.S. military, engaging in an act thought to be so professionally repugnant that other professionals are concerned that it may tend to “bring discredit upon the armed forces” if known by the

\(^{267}\) They are subject only to a de facto veto when a court-martial convening authority higher in the chain-of-command withholds disposition over the offense and takes a contrary action. See M.C.M., supra note 6, at pt. III, ¶ 18.

\(^{268}\) Id. at pt. III, ¶ 6.

\(^{269}\) Id. at pt. III, ¶ 14.

\(^{270}\) 10 U.S.C. § 837(a); United States v. Barry, 78 M.J. 70, 76–78 (C.A.A.F. 2018) (quoting in part United States v. Boyce, 76 M.J. 242, 247 (C.A.A.F. 2017)) (holding that Article 37’s bar on “unlawful influence” applies to anyone subject to the UCMJ, not just commanders. In this case, the Deputy Judge Advocate of the Navy, a Rear Admiral, acting “without the mantle of command authority” committed this “improper manipulation of the criminal justice process” unintentionally. The absence of intent does not prevent the court from providing a remedy to the accused, such as dismissal with prejudice).

\(^{271}\) In the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1708, 127 Stat. 672, 961 (2013), Congress directed the president to remove from Rule for Court-Martial 306 (initial disposition guidance) any mention of the character of the accused’s military service as one of the valid considerations that commanders and prosecutors should think about when deciding whether or how to prosecute the accused service member. The subsequent Executive Order, Exec. Order No. 13,669, 79 Fed. Reg. 35000 (June 13, 2014), did just that.

\(^{272}\) Of course, there is no agreement on what criminal law’s universal values, roles, and goals are, or ought to be, or even if they are universal rather than local and contingent.
public exposes the actor to the stigma not only of professional contempt and opprobrium, but a federal conviction and possibly a term of confinement in a federal penitentiary. But damage to a governmental organ’s reputation, or an affront to the person’s or the institutions’ “honor,” is hardly the kind of harm thought fundamental to a society’s right to punish. Nor is it facially consistent with the commonly understood meaning of “justice,” the first cardinal objective of military law identified in the Manual for Courts-Martial, and considered by some scholars (themselves former military lawyers) to be the primary or first among equals. In other words, its chosen ways and means are not aligned with its self-declared ends. It is, in the military’s own terms, a flawed strategy.

If, however, military justice is something of a hybrid then we need to sufficiently describe where criminal law begins and ends. In this third plausible view, a coherent account is needed to distinguish the values, principles, norms, processes, rights, prohibitions, and authorities explicitly justified by criminal law principles and theory from those explicitly justified by some other body of principles and theory like contract, agency, and tort. But this third view requires something extra. It implies that there is some meta-reason that justifies and explains why the overall system can and should have this hybrid nature at all.

273. See, e.g., 10 U.S.C. §§ 933–934; see also United States v. Meakin, 78 M.J. 396, 403–04 (C.A.A.F. 2019) (holding that an Air Force officer’s private, unofficial, and anonymous transmission of sexually indecent and obscene materials involving fantasies of sex with children falls within the ambit of “conduct unbecoming an officer and gentleman”; that an act need not violate some other provision of the UCMJ or even be otherwise “criminal” in order to be within the ambit of Article 133, and that the gravamen of the Article 133 offense is “that the officer’s conduct disgraces him personally or brings dishonor to the military profession such as to affect his fitness to command the obedience of his subordinates so as to successfully complete the military mission”).

274. Parker v. Levy, 417 U.S. 733, 765 (1974) (Blackmun, J., concurring) (quoting Fletcher v. United States, 26 Ct. Cl. 541, 562–63 (1891)) (“[T]here are things which are malum in se and . . . things which are merely malum prohibitum. . . . In military life there is a higher code termed honor, which holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code.”); MODEL PENAL CODE § 1.02 (AM. L. INST. 2017) (reflecting the “Harm Principle,” and stating that the penal code intends to forbid and prevent conduct that “unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests”); see also STUART MILL, supra note 189, 21–22 (“[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”); Hamish Stewar, The Limits of the Harm Principle, 4 CRIM. L. & PHILO. 17 (2010).

275. M.C.M., supra note 6, at pt. I, ¶ 3; GILLIGAN & LEDERER, supra note 98, at 1–2.

276. See SHAPIRO, supra note 234.
B. (New) Grounds for Criticizing Military Justice Systems

All three relationship modes can and do make valid claims to fall within the legitimate scope of “military justice” as the term is presently understood by those in the profession. The U.S. military justice system seems to strive to be all things to all parties: utility-maximizing, deontologically-grounded, and virtue-reflective. This is a large task fraught with risk that these aims may clash or, if not clash, are independently inconsistent in their application. As a consequence, grounds for criticizing military justice arise from two types of problems, one of construction and one of conception, now made clearer through the theory’s nine propositions.

The first ground for criticizing military justice is when its designers construct system rules that misalign a “control feature” to one or more of the three relationship modes. This accords loosely with Robert Nozick’s distinction between taking action against a person because that person violated another’s rights (a type of wrongdoing we could call a crime, deserving punishment277) and taking action against a person because that person has “flout[ed]” a set of “correct values,” customs, norms, or expectations but without violating another’s rights (a type of wrongdoing that we do not typically criminalize and punish, but seek to prevent, correct, or compensate in some other way).278 For example, an account of punishment as a method of coercive authority within the community relationship is misaligned because punishment (its reasons, its types, who may decide to punish and how, and who is subject to it) best fits

277. In his formulation, this is “retributive punishment,” whose contours are a function of the wrongdoer’s criminal responsibility (r, with a value of zero equating to no responsibility, up to one equating to full responsibility) multiplied by the magnitude of harm caused or magnitude of the wrongdoing (H). Robert Nozick, Philosophical Explanations 720 (1981). The “message” tacitly sent to the wrongdoer, through the mechanism of punishment, states “this is how wrong what you did was.” See id. Distinguished from revenge, retribution is an act of general applicability meted with no conflict of interest by those imposing it and based on general principles influencing responses in similar cases; retributive punishment is justified because of two fundamental conditions: (1) because the wrong act occurred and (2) “in virtue of the wrongfulness of the act.” Id. at 369–70; see also id. at 363–97. If we follow Bentham’s utilitarian perspective on crime and punishment, the extent to which society will define a harm and punish various acts or omissions depends on the effect of that act or omission on a person’s pain or pleasure, as determined by a host of circumstances influencing [the person’s] sensibility to that act (including the person’s health, hardiness, intellect, moral biases, sympathies and antipathies, “pecuniary circumstances” age, sex, and social status). Jeremy Bentham, An Introduction to the Principles of Morals and Legislation 44–67 (J.H. Burns & H.L.A. Hart eds., 1970) (1780).

278. Nozick, supra note 277, at 719 n.84.
within the purposes of the Armed Forces as sovereign. Likewise, an account of discipline as a method of coercive authority within the sovereignty relationship is misaligned because it fits better within the employment relationship. An account of censure as a method of coercive authority within the employment relationship is misaligned when it ought to be accounted for in the social community relationship.

The second ground is one of conception: when system rules are criticized or defended without understanding their fit within one of the three relationship modes, or without articulating how they relate to punishment, discipline, or censure. For example, when the Ortiz Court compared modern American military justice and civilian systems, it heralded their similarities in both the types of wrongdoing that these systems seek to deter and in the types of punishments available to judicial authorities.\(^\text{279}\) The Court failed to mention the myriad acts and omissions punishable under the UCMJ that have no civilian analogue whatsoever (e.g., disrespecting a superior commissioned officer or absence without leave), nor did it mention that the UCMJ’s range of punishments include a “bad conduct discharge” and “dishonorable discharge,” which are better understood as stigmatizing employment decisions. Moreover, the Court’s decision to describe the “good order and discipline” effect of military justice as largely incidental to its primary purpose of “justice” underscores the fact that civilian courts do not make analytical distinctions between reasons why martial conduct is punished (and how) and reasons why civilian-type misconduct is punished (and how).

When the military’s senior leadership explains to Congress its position on keeping an element of prosecutorial discretion with certain high-ranking commanders rather than attorneys, they risk making this conceptual mistake. Military leaders making this argument rely on a claim that such authority is critical to maintain servicemembers’ trust in the chain-of-command and critical for mission accomplishment.\(^\text{280}\) This argument speaks to the employer-employee and community relationship modes and their related justifications for professional discipline and community censure, yet is routinely conflated with a description of the sovereignty relationship mode, personified by the role of the commanding officer, and with justifications for control measures (ultimately resulting in courts-martial) related to punishment. Under this theory and its nine propositions, however, it is now much clearer why the military’s


\(^{280}\) For recent examples, see Maurer, supra note 13, at 928–31.
leadership struggles to defend claims that conventional court-martial convening authority, and other traditional commander quasi-prosecutorial roles, is tantamount to a military necessity for a disciplined, cohesive, and competent armed forces.

VII. CONCLUSION

This Article culminates a line of argument and analysis from three earlier articles beginning with a thought experiment that exposed four foundational principles that ought to guide a rational design of any military justice system and continuing with an attempt to expose the strengths and weaknesses of the myriad maxim-like premises often deployed to explain or justify the American model of military justice. Given the principles, the lack of foundation for many of those premises, increasing public and Congressional skepticism, and the Court’s inconsistent (or evolving?) understanding of the nature of military justice, this Article provides a theory to serve as a groundwork for understanding the why of a military justice system en route to prescribing the what and how. To borrow from theorists R.A. Duff and Stuart Green, this project engaged in both analytical “[e]xpository jurisprudence” (articulating the “structures that inform the content and underpin [the] operations” of the law) and normative “[c]ensorial jurisprudence” (being attentive to “the aims, values, and principles that should structure a system of criminal law”). To recap, this theory of jus in disciplina militaris states: any military justice system is justified and defensible when it functions strategically as the political use of legal structures to set desirable military conditions for achieving national security objectives. By relating to military members in alternating but often overlapping roles as “sovereign,” “employer,” and “community,” civil government attempts to achieve various distinguishable objectives. These objectives include: (1) consistency with legal requirements for, and norms of, due process and fundamental fairness to the accused and victims; (2) a sustainable state of positive morale, effective teamwork, an impartial and

281. R.A. Duff & Stuart P. Green, Introduction: Searching for Foundations, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 3 (R.A. Duff & Stuart P. Green eds., 2011) (emphasis omitted). For a similar caveat, in the context of writing about a rationale that justifies punishment, see NOZICK, supra note 277, at 365 (“A[n] explanation of why a moral principle holds, of why a moral notion has application, also provide[s] an . . . explanation of how such a (correct) principle or (correct) application is possible . . . [while that] explanation of how something is possible will appeal to principles [and] structures not themselves known (or obviously seeming) to be false or inapplicable . . . [and an] explanation will utilize apparatus that at least is a candidate for acceptability.”).
respectful and respected chain-of-command; (3) efficient accomplishment of duties and the mission at both the individual level and within a given military unit; (4) the appropriate use of coercive power (whether legal or administrative authority) that promotes, or at least does not violate, the first three objectives. Ultimately, the animating motive, in all three relationship roles, behind these objectives is to create a self-regulating armed force of self-regulating individuals presenting the most favorable conditions possible for the use of reliable armed force by the chain-of-command, on behalf of legitimate civilian political authority for whom the military serves as an agent. In setting these desirable military conditions, military justice provides an answer to a “command and control paradox.”

In graphical form, see Figure 2 below.

**Figure 2: Diagram and Outline of a Theory of Military Justice**

Even if the nine propositions are incomplete, there are certainly two things beyond dispute: (1) no theory currently exists but (2) a theory is warranted. It is hoped that this account of military justice will make headway in defining the system’s purpose (why it exists at all when some other alternative system of regulation and coercion could be in its place), describing the broad contours of its structure, and explaining why actors in the system make certain choices—the construction and use of various rules—and providing a framework for
judging existing or proposed military justice systems and reforms. It should provide a rubric, not answers, for evaluating possible solutions to the five fundamental questions appropriate to this sort of theory. It should provide a basis for determining when and where this application of sovereign governance, as opposed to other criminal law regimes, applies; for determining what conduct should be prohibited and subject to various types of consequences; for determining who plays which roles in this kind of governance; for determining the outer limits of, conditional constraints on, and scope of discretion of those actors, and for determining the who, what, when, where, and how to review decisions by those exercising these authorities; and for determining the limits or constraints on individual servicemember liberties and how much due process (however that is defined) will protect that servicemember from unjust, erroneous, or arbitrary applications of this form of governance.

282. See supra Figure 2.
283. See supra Section III.A.