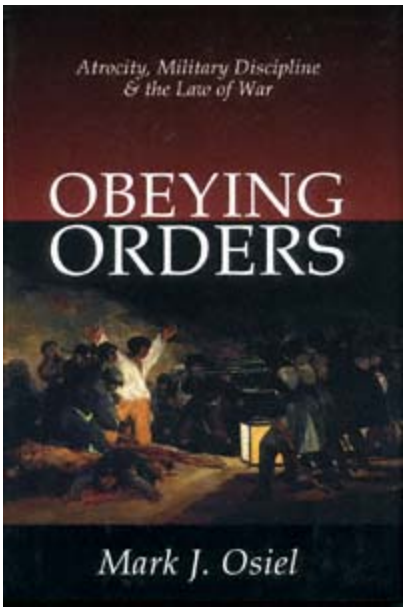

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Obeying Orders

Atrocity, Military Discipline & the Law of War

Mark J. Osiel

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Few civilian lawyers have given as much thought to the limits of soldiers' "due obedience" as Carlos Santiago Nino and Jaime Malamud-Goti. I met them in Buenos Aires as they were prosecuting Argentina's military officers for ordering torture and disappearances during the "dirty war." It was a heady time for human rights lawyers, and we argued this book's issues long into the nights. Unwittingly, perhaps, Carlos and Jaime set me on this course.

The Argentine prosecutions were unique in many ways. But the question they raised about the soldier's dilemma has proven a recurrently vexing one for international and military lawyers, particularly in the last half century. I was therefore able to profit greatly from conversations with several distinguished scholars and practitioners of military law, including Col. Howard Levie, Lt. Col. Mark Martins, John Norton Moore, Maj. Gen. A.P.V. Rogers, Col. Scott Silliman, Robert F. Turner, and Detlev Vagts. Some leading JAG officers and U.S. Defense Department lawyers, whose confidentiality must be preserved here, also offered invaluable suggestions.

Their bemused indulgence of my interminable and often-naive questions far exceeded any call of duty, personal or professional. Our conversations sometimes disclosed a measure of the mutual incomprehension that is, I've learned, common in serious discussions between military leaders and civilians who express skepticism about longstanding military practices. But these

exchanges were always spirited and respectful in ways that, to my mind, were a model of what serious military-civilian dialogue should look like in a constitutional democracy.

In the new field of "applied ethics," analytical rigor is often purchased at the price of excessive remove from the emotions, perceptions and dispositions of those whose conduct it aims to influence. In seeking to overcome these defects, I have found the work of Alasdair MacIntyre extremely suggestive. His cloud looms heavily over this book. Though I have little sympathy with his larger

normative project, I have found myself irretrievably drawn, like many others, to his evocative analysis of the virtues and to his insistence on their appreciation in relation to the social practices and traditions that sustain and reproduce them. MacIntyre himself has only vaguely gestured at what such relations between virtue and social structure might fully involve, apart from lamenting that they were once much stronger and have broken down, in key respects. But even his cryptic hints in this regard effectively lay out the essential tasks for any sociology of professional ethics, in my view.

Students in my annual seminar on military law, several of them veterans of our armed services, contributed enormously to my thinking on the issues examined here. I am also grateful to several members of legal academia who were willing, on condition of anonymity, to share some rather unflattering tales of their own military activities during World War II and the Korean War.

My discussions of military organization and the human experience of combat greatly benefited from comments by Eliot A. Cohen and Sir Michael Howard. I am grateful as well for the thoughtful responses of participants in faculty seminars at the University of Iowa, Stanford Law School, and the University of Tel Aviv. At the last of these venues, two military lawyers who prosecuted Israeli soldiers during the Palestinian Intifada (and requested anonymity here) were especially helpful. A year at Harvard's Program in Ethics and the Professions first encouraged my hope that moral philosophy and social theory might actually have something useful to say to professional ethics, and vice versa.

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Review, and I thank its editors for allowing republication here. The Iowa Law Foundation provided generous financial support. Col. William Eckhardt, Chief Prosecutor of the My Lai massacre trials, offered warm encouragement at a moment of self-doubt. Special thanks, as always, to Eliza Willis, whowith great forbearance, as a fellow child of the early seventiesendured far more of my meandering meditations on military law and affairs than should decently be inflicted on anyone outside the field.

INTRODUCTION

A soldier obeys illegal orders, thinking them lawful. He acts quickly in the midst of combat, a peacekeeping operation, or a humanitarian intervention. When, if ever, does the law excuse his misconduct? When should it? If his error must be not only honest but also reasonable, then which acts, under what circumstances, could a soldier reasonably mistake as lawful?

This book critically examines how military law addresses these questions. They arise only infrequently in actual litigation. But they speak to the moral foundations of the entire enterprise.[1] The duty of obedience, leading soldiers report, is their "cardinal virtue"[2] and "the backbone of the profession."[3] So the possible exceptions to this dutyboth those that soldiers readily acknowledge and those they don'tprove deeply revealing about the very nature of their calling.

In both international law and the military codes of most states, the nutshell answer to the problem of due obedience is that the soldier[4] is excused from criminal liability for obedience to an illegal order, unless its unlawfulness is thoroughly obvious on its face. The litigated cases generally involve traditional atrocities, that is, the intentional killing of P.O.W.s or others who were obviously noncombatants.

1 In this respect, the rules on military obedience resemble the insanity defense. It, too, arises only very occasionally in prosecutions, but presents the most fundamental issues concerning the purposes of punishment and the limits of moral culpability.

2 Field Marshal Wilhelm Keitel, *The Memoirs of Field Marshall Keitel* (1965), in *Warriors' Words* (Peter Tsouras, ed., 1992), at 285.

3 Admiral Sir Charles Napier, in *Leadership: Quotations from the Military Tradition* 203 (Robert Fitton, ed., 1990). Article 90(2) of the U.S. Uniform Code of Military Justice ("U.C.M.J.") prohibits "disobeying a superior commissioned officer." Article 91(c)(4) prohibits "disobeying a warrant, noncommissioned, or petty officer." Article 92 prohibits "failure to obey an order or regulation" not personally directed at the defendant, such as a standing order.

4 I use this word generically to denote all military personnel, not to distinguish Army personnel from that of other armed services or enlisted personnel from officers.

The practice of holding soldiers responsible for manifestly illegal acts is already apparent in the military law[5] of ancient Rome.[6] Canon law maintained it throughout the middle ages.[7] It has endured in various forms to this day. It is currently being employed against several of the Serbian and Croat defendants prosecuted in the Hague.[8] In 1992 it provided the legal basis for convicting several young border guards of killing fellow citizens escaping from the former German Democratic Republic.[9]

More recently, an Italian military tribunal employed the doctrine in acquitting Erich Priebke, a former S.S. captain, prosecuted for shooting Italian partisans and irregulars in 1944. The first Italian court to rule on the case held that though Priebke's conduct was

5 "Military law" is not a technical term of art. As used here, it refers to international and national (or municipal) law, including national rules of engagement, governing the structure and operations of armed services. The more common term today, within the U.S. armed forces, is "operational law," which refers to "the domestic, foreign, and international law associated with the planning and execution of military operations in peacetime or hostilities." Col. Robert L. Bridge, *Operations Law: An Overview*, 37 *Air Force L. Rev*. 1, 3 (1994).

6 The Roman Digest specifically excluded acts of "heinous enormity" from the due obedience defense. *Digest. Law 157. tit. XVII, Lib. L*. The Latin text speaks of acts "*habeant atrocitatem facinoris*." See generally David Daube, "The Defense of Superior Orders in Roman Law," 72 *L.Q. Rev*. 494 (1956); C.E. Brand, *Roman Military Law* 3943 (1968). On Roman military practice, see Mars Westington, *Atrocities in Roman Warfare to 133 B.C*. 123 (1938) (Ph.D. dissertation, U. Chicago) and Doyne Dawson, *The Origins of Western Warfare* 12930 (1996). Justice Enrique Santiago Petracchi of the Argentine Supreme Court suggests the continuing relevance of such ancient sources to contemporary discussion

of these issues. "Argentina: Supreme Court Decision on the Due Obedience Law," in 3 *Transitional Justice* 509, 51214 (1995).

7 James Brundage, "Holy War and the Medieval Lawyers," in Thomas P. Murphy, ed., *The Holy War* 99, 113 (1976). Guillermo J. Fierro, *La Obedencia Debida en el Ámbito Penal y Militar* 9 (1984) (discussing canon law sources).

8 See, e.g., *Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22-T, Int'l Tribunal for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (1996).

9*Border Guards Prosecution Case*, (1996) 5 StR 370/92, [BGH] [Supreme Court] (F.R.G.). For discussion, see Kif Adams, "What is Just? The Rule of Law and Natural Law in the Trials of Former East German Border Guards," 29 *Stan. J. Int'l L.* 271 (1993), and Tina Rosenberg, *A Haunted Land* 261305 (1995). The guards had standing orders to use deadly force where necessary to stop those attempting to escape from East Germany. Though convicted of manslaughter, the defendants received suspended sentences of twenty months' probation.

criminal, it had not been manifestly so, given the "ideological pervasiveness" of the Fuhrer principle.[10]

Both results, Priebke's acquittal and the border guards' conviction, drew considerable criticism at home and abroad.[11] In Priebke's case, most observers thought the result far too lenient; in the young guards' case, too draconian. The manifest illegality rule, as applied, bore substantial responsibility for both results.[12] Its contemporary significance is clear. As forcefully stated by three Yale law professors, the question is "whether or how training in the law of war that gives authoritative voice to the obligation to disobey criminal orders, can be made meaningfully consistent with the overall goal of military training, the molding of reflexively obedient killers."[13] This problem is perennial, perhaps even ineradicable. It cannot be dismissed as pre-Nuremberg atavism.

10 Celestine Bohlen, "Italian Court Throws Out Case in 1944 Rome Massacre," *N.Y. Times*, Aug. 2, 1996, at A3. The court held that though Priebke's acts would normally be classified as manifestly illegal, the fact that he acted pursuant to superior orders and within a pervasive ideological system that wholeheartedly endorsed his acts as necessary and desirable constituted a mitigating circumstance. For sentencing purposes, such mitigation would preclude life imprisonment. Only conduct warranting a sentence of life imprisonment, the court concluded, would be sufficiently grave as to warrant suspending the normal statute of limitations for Priebke's conduct. For critical analysis of this reasoning, see G. Sacerdoti, "A Proposito del Caso *Priebke*: La Responsabilità per L'Esecuzione di Ordini Illegittimi Costituenti Crimini Di Guerra," 80 *Rivisti di Direito Internationale* 130 (1997) and Sarah T. Cornelius, "The Defence of Superior Orders and Erich Priebke," 31 *Patterns of Prejudice* 3 (1997). On retrial, Priebke was convicted. Celestine Bohlen, "Italy

Convicts Ex-SS Officers in '44 Killings," *N.Y. Times*, July 23, 1997, at A4. An appeal is pending. Abigail Levene, "Ex-Nazi Priebke Vows to Take Case to European Court," *N.Y. Times*, Mar. 8, 1998, at A11.

11 A Nazi's Flawed Trial," *N.Y. Times*, Aug. 8, 1996, at A26 (arguing that "the judges misapplied the law about following orders" and that "it is hard to imagine an act more manifestly illegal than murdering 335 innocent civilians.").

12 The rule was invoked in 1997 to defeat the defense of Maurice Papon, Sec. Gen. of the Gironde Prefecture during Vichy, that his transport of foreign Jews to extermination camps in the East had been required by S.S. orders. Craig R. Whitney, "France Amasses Bitter Evidence Five Decades After the Holocaust," *N.Y. Times*, Oct. 6, 1997, at A1. The orders required rounding up Jewish children in the district. French courts rejected his defense, finding the orders manifestly illegal. Papon was also a civilian and therefore not formally subject to military orders. Craig R. Whitney, "Ex-Vichy Aide is Convicted and Reaction Ranges Wide," *N.Y. Times*, Apr. 3, 1998, at A1.

13 Joseph Goldstein et al., *The My Lai Massacre and Its Cover-Up* 8 (1976). My answer to this question will be that the contradiction it asserts largely

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One might suppose that political scientists specializing in the military affairs of constitutional democracies would have given some serious thought to the question. They have not. A leading scholar remarks, for instance, that "Army writers admit that the military were only bound to obey lawful orders, but they held that it was not for them to judge their legality."[14] He accepts this characterization of the issue as establishing a satisfactory *modus vivendi*, for he approvingly adds that "soldiers are soldiers, and not lawyers."[15] But this observation would better be seen as stating the problem, rather than offering a solution, much less a satisfactory one.

From the outside, at least, military ideals and self-understandings seem paradoxical, at best. Officers sometimes present an austere image of sober *gravitas*, befitting the mortal stakes of war, reflected in War Secretary Col. Stimson's remark that "death is an inevitable part of every order that a wartime leader gives."[16] With equal frequency, however, officers adopt a pugnacious swagger, even as they inflict death on thousands of innocent noncombatants. Hence the insouciance of the Enola Gay's pilot and navigator, who brag to this day of never having lost a minute's sleep over bombing Hiroshima.[17]

Officers appear stern and stoic, yet are at once deeply sentimental, sometimes to the point of irrationality,[18] confides General Ridgway.[19] They prize their willingness to subordinate

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> dissolves once we abandon the historical equation of military efficacy with the need for soldiers to be always "reflexively" (i.e., unreflectively) obedient.

14 Samuel Huntington, *The Soldier and the State* 261 (1957).

15*Id*.

16 Henry Stimson, "The Decision to Use the Atomic Bomb," 194 *Harpers Mag*. 99, 106 (Feb. 1947).

17 "Forty Years On: Confronting the Long Shadow of the Bomb," 106 *Newsweek* 40, 44 (July 29, 1985).

18 A.J. Bacevich, "New Rules: Modern War and Military Professionalism," 20 *Parameters: U.S. Army War Col. Q*. 12, 14 (1990) (observing how current Army strategizing is infected by a romantic "Pattonesque" heritage, unrelated to likely force scenarios). This romantic-delusional aspect of the U.S. services' war planning was a central theme in RAND analyst Carl Builder's work, which shows how each of the services tends to seriously strategize only those future threats that will maximize its chances to relive the most heroic moments of its past. Carl Builder, *Masks of War: Military Styles in Strategy and Analysis* (1989).

19 Gen. Matthew Ridgway, "My Battles in War and Peace," *Sat. Even. Post* 17 (Jan. 21, 1956).

personal interest (in life itself) to their country's collective goals. Yet they yearnonce publicly, still in privatefor the chance to win glory through displays of the most heroic individualism. They esteem the "master" virtue, in Nietzsche's sense, of courage to master events by force of will. But they celebrate, no less, a radical self-effacement in obedience to superiors, a virtue primarily in children or "slaves."

Military officers are expected routinely to display the most mature practical judgment in the most life-threatening situations. But in many others they are treated like automatons or irresponsible adolescents, and in fact often behave accordingly. This book is, in part, the sympathetic attempt of a civilian lawyer and sociologist to make sense of these seeming contradictions, through their reflections within military law.

The very idea of a law of war strikes many people as oxymoronic. But this objection proves too much, for the law is *always* generically both a symbol of civilization and an instrument of violence, as Robert Cover famously observed. It is true, moreover, that "the development of a more elaborate legal regime has proceeded apace with the increasing savagery and destructiveness of modern war."[20] Even when it is effective, the law of war reveals "the anomaly of seeking to distinguish degrees of dreadfulness in the context of this most dreadful of human phenomena," as Paul Warnke observes.[21] One of the distinctions it makes, to this end, is that between acts that are so dreadful that their criminal nature are immediately obvious to all and those which are not, including many that are still war crimes.

The law is now generally understood to require that soldiers

resolve all doubts about the legality of a superior's orders in favor of obedience. It therefore excuses compliance with an illegal order unless the illegalityas with flagrant atrocitieswould be immediately obvious to anyone on its face. Such "manifest illegality," as it is called, has been thought to arise from the order's moral gravity, its procedural irregularity, and the clarity of the legal prohibition it violates. These criteria, however, are often in conflict. They are over- and underinclusive in relation to the law's underlying

20 Chris af Jochnick and Roger Normand, "The Legitimation of Violence: A Critical History of the Law of War," 35 *Harv. Int'l L.J.* 49, 55 (1994).

21 Paul Warnke, "Comment," in Peter D. Trooboff, ed., *Law and Responsibility in Warfare* 187 (1975).

policies and principles. And finally, they are vulnerable to frequent changes in how warfare is conducted.

The leniency with which military law has generally answered such queries is no longer justified. New knowledge about the bases of cohesion among troops, the sources of war crimes, and the indispensability of self-discipline suggest that military law should, at key points, abandon its traditional insistence on bright-line disciplinary rules in favor of general standards of circumstantial reasonableness. This approach would encourage the exercise of deliberative judgment where only rote order-following has hitherto been sought. In so doing, it would enhance both the efficacy of military operations, including the multilateral peace-enforcement missions in which Western armed forces are increasingly engaged,22 and the moral accountability of those who execute them.

The first chapter outlines and defends the general approach to military law adopted in this study. That approach stresses the possibilities of "virtue ethics," as contrasted with philosophical ethics, in making military law more effective in averting war crimes. The second chapter offers a nutshell introduction to existing law on the question of "due obedience" to orders. It explains basic terms and background policies regarding military discipline and the prevention of atrocities. Readers who are not lawyers may want to skim quickly through the few technical pages here, as well as those in chapter seven. The rest of Part I explores the myriad puzzles and ambiguities presented by the manifest illegality rule, as it is applied to varying situations.

I contend that the contexts of military conductsocial, political, and

technologicalthat once lent relatively clear meaning to the notion of "manifest illegality" in war, fixing its boundaries with some precision in most soldiers' minds, may have largely dissolved. Courts and commentators today invoke the rule too easily, as if prevalent forms of warfare had not been revolutionized, as if the structure of the societies that engage in it has not been transformed. If the concept

22 Such operations are widely acknowledged to be "the most likely form of military force commitment over the next decade." *Course Catalogue of the Marine Corps Command and Staff College* (1997); "Air Force to Shed Cold War Structure and Reorganize Units," *N.Y. Times*, A16 (Aug. 5, 1998) (quoting U.S. Air Force Chief of Staff Gen. Michael Ryan, "We finally got the message. Some of these contingencies are not going to go away.").

of manifest illegality rests on social foundations that have eroded, then we must ask whether, and in what fashion, these foundations might be reconstructed. In sketching the nature of this erosion and marking its contours, Part I of this book identifies the many serious problems that the traditional rule presents.

International and military law could more effectively prevent combat atrocities by studying how and why they occur. To this end, Part II explores the suppositions of current law about why men commit atrocity in war and assesses the accuracy of these theories. It indicates how the sources of atrocity are far more varied and complex than current law assumes. These variations display recurrent patterns, indicating corresponding legal norms best suited to prevention. I seek to show how the law can better exploit the discernible connections between what makes men willing to fight ethically and what, according to military sociology, makes them willing to fight at all.

Efficacy in combat now depends more on tactical imagination and loyalty to combat buddies than on immediate, unreflective adherence to the letter of superiors' orders, backed by discipline of formal punishment. Practical judgment in the field also entails finding a virtuous "mean" between imprudent risk and excessive caution, a mental process that hard-wires moral reasoning into the soldier's professional identity. Military thinkers increasingly recognize that deliberative judgment of this sort is essential for soldiers, particularly infantry officers, facing battlefield and peace-enforcement situations that are widely varied, rapidly changing, and politically sensitive. These have important implications for

refining the law of war crimes and, more generally, the legal structure of military life.

Part III examines how the law might be brought into closer harmony with current understandings of the human experience of military conflict in the contemporary world. In this regard, military law ought to abandon the long-standing quest for bright-line disciplinary rules that can always be obeyed unthinkingly and automatically. Instead, the law relating to a soldier's compliance with illegal orders ought to work by way of general standards of reasonableness. This type of norm is much better suited to fostering the exercise of practical judgment, both moral and tactical. American military law has already quietly evolved in this direction. But this fact

has not been generally recognized (even within the military), nor its ramifications appreciated.

The upshot of my analysis is that in highly developed societies, at least, officers and noncommissioned officers ("NCOs")and sometimes even enlisted personnelshould face punishment not only for the most obvious atrocities, i.e., acts manifestly illegal on their face, but for any crimes resulting from unreasonably mistaken belief that a superiors' orders were lawful. Narrowing the scope of the due obedience defense in this way would increase incentives for soldiers to learn the law concerning contemplated conduct, and the facts to which it will be applied.

At present, the law gets the incentives wrong, discouraging such effort, even where circumstances easily permit it. The approach favored here aims to "civilianize" military law,23 while nonetheless building upon long-standing, historic virtues internal to the soldier's calling. To this end, I draw evidence from several recent wars and peace enforcement operations. Though examples are offered throughout, the final chapter provides further scenarios designed to show where and how the rule defended here would yield results different from the prevailing approach, that is, the manifest illegality rule.

Civilian critics of military law concentrate their fury almost entirely on the many ways it favors prosecution over defense, as through "command influence," inadequately protecting the individual rights of soldiers. But military law can equally be faulted, in other respects, for excessive leniency. The history of self-regulation by other professions quickly suggests why this might so, and where we should expect to find it.24

23 As the term suggests, civilianization refers to adoption by military law of rules developed within civilian law, particularly those prohibiting cruel or unusual punishment and guaranteeing due process and equal protection. In the U.S., the Court of Military Appeals has contributed greatly to such civilianization since the mid-1970s. On the history of that tribunal in these years, see Jonathan Lurie, *Pursuing Military Justice* (1992).

24 The principal rule of military law criticized in this book finds a close analogue in the ethical rules governing lawyers. Rule 5.2 of the A.B.A. Model Rules of Professional Conduct provides: "A subordinate lawyer does not violate the rules of professional conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." This rule is subject to objections very similar to those raised in the present study. See, e.g., Carol M. Rice, "The Superior Orders Defense in

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Military institutions are remarkably open to social change in some respects, deeply hostile to it in others. Our armed forces insist on obtaining the latest high technology, but also on practicing the most ancient and seemingly anachronistic rituals.25 They have clearly done better than any other American institution in redressing racial wrongs, but probably rank among the worst in overcoming gender inequality.

Yet even the latter failing has its paradoxical side. The community of officers displays an appearance (and partial reality) of crude, sexist machismo, as in the Tailhook affair.26 But it also clearly makes available to its members a measure of genuine camaraderie and a depth of male fraternity for which many civilians yearn. This is a fraternity, moreover, in which people routinely display such behavior as an altruistic concern for other members, the sharing of personal intimacies among comrades (not only in the trenches), and more open affectionemotional and physicalamong fellows than most men can fearlessly disclose in civilian society, certainly among professional colleagues.

In current U.S. debates about the rights and duties of soldiersconcerning homosexuality, gender integration in combat, religious observance, and political expressionneither side draws on the considerable social science examining war's distinctiveness as an activity and the real bases of military discipline.27 This social science helps us answer the perennial, practical questions of how "the leader imposes his will on subordinates instantly in the face of chaotic and primordially intractable forces," and whether "to do so he must resort

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Legal Ethics," 32 *Wake Forest L. Rev.* 887 (1997) (arguing that "rather than totally excusing the subordinate . . . [we] should focus on the relative knowledge of the junior lawyer and whether he considered and attempted to comply with the ethical rules.").

25 Consider, for instance, the requirement that even airplane mechanics regularly perform "close order drill." Maj. Reed Bonadonna, "Above and Beyond: Marines and Virtue Ethics," 78 *Marine Corps Gazette* 18, 20 (1994).

26 Inspector General for Investigations, Dept. of Defense, *Tailhook 91: Events at the 35th Annual Tailhook Symposium* (Feb. 1993).

27 James M. Hirschhorn, "The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights," 62 *N.C. L. Rev.* 177, 179 (1984) (observing this defect).

to measures that in any other context would be judged . . . harshly tyrannical."[28]

In contemporary discussion, including most Supreme Court opinions, there is little careful assessment of the evidence to answering these questions. Rather, from one side we are treated to "bugle blowing"[29] and "platitudes about the special nature and overwhelming importance of military necessity,"[30] as former Justice Brennan put it. From the other side, that is, from liberals and civil libertarians, we encounter hostile "skepticism that implicitly denies the distinctiveness of the military situation," and is not "informed by concrete knowledge of military life."[31]

The present study enlists available knowledge to redress these defects in current discussion, where they limit our understanding of the "due obedience" problem. In its use of contemporary jurisprudence and social theory, moreover, this book shows how the field of military lawcompletely ignored by major legal scholarship todaycan profit from analysis in terms of the same theoretical and methodological tools now standard in more central areas of legal study. With this selective inquiry, I hope to stimulate others to take up that task. We should not assume that the central questions underlying the law of due obedience remain hopelessly obscure and unanswerable as long as so many of them have never been seriously asked.

28 Col. Lloyd Matthews, "The Controlling Leader," 46 *Army* 31, 36 (1996).

29 Hirschhorn, *supra* note 27, at 208.

30 *Brown v. Glines*, 444 U.S. 348, 368 (1980) (Justice Brennan, dissenting).

31 Hirschhorn, *supra* note 27, at 208.

PART I
OBEDIENCE TO SUPERIOR ORDERS

1
Virtues and Vices of Military Obedience

Is military culture better viewed as a source of atrocities or of their prevention? Roughly speaking, there are two schools of thought on the question.1

The first holds that the military caste, left to its own devices, will never give sufficient weight to humanitarian concerns. It follows that civilian society, through its political representatives, must impose its more universal norms, those of international law rooted increasingly in the idea of human rights, upon military officers.

It is no accident, in this regard, that serious thinking about international law literally began, in the work of Grotius, with a critique of Aristotelian "virtue ethics" and an effort to ground duties in war, instead, on natural law2on elementary principles, readily accessible (theoretically) to everyone, regardless of special dispositions of character.

Without civilian imposition of such universal morality, on this view, officers will tend to form a separate society with norms less attentive to such principles. To this end, civil society should integrate officers as much as possible into its schools, churches, and political parties, making them virtually indistinguishable from civilians in moral character, ethical sensibility, and range of political views. Military law must advance this agenda, cracking the culture of

1 Samuel Huntington, *The Soldier and the State* 18992, 26063 (1957).

Huntington is concerned only with alternative means for establishing civilian control. The implications of his alternatives for different approaches to preventing atrocity, presented here, are my own.

2 Hugo Grotius, *On the Law of War and Peace*, trans. Francis Kelsey secs. 4345 (1925). A virtue is generally understood as "a deep and enduring acquired excellence of a person, involving a characteristic motivation to produce a certain desired end and reliable success in bringing that about." Linda T. Zagzebski, *Virtues of the Mind* 137 (1996).

militarist, masculinist folkways. So argues former U.S. Rep. Pat Schroeder, for instance.3

In this view, officers who celebrate martial honor as the basis of military ethics display a discomforting resemblance to lawyers defending aristocratic ideals of "noblesse oblige" as the foundation of legal ethics.4 In both cases, moral duties are explicitly based on unquestioned assumptions about the indispensability of a special, privileged caste and its unique traditionsnotions that understandably arouse skepticism in a modern liberal society. Our moral duties to one another, on the battlefield no less than anywhere else, derive from our status as human beings, not from our occupation of a social role, on this account.5 The soldier thus owes his moral dutieswhatever they may beto enemy troops and noncombatants simply as other persons (regardless of his or their social roles) who are, like himself, free and equal moral agents.

Martial Pride as the Root of Militarism?

Martial honor is a suspect professional 'virtue,' in this account, always threatening to become social vice. Hence the widespread disinclination to acknowledge anything virtuous about it, even when employed bravely in defense of pure aggression. Though no pacifist, Judith Shklar succumbs to this temptation when she asserts, without argument, that "a brave soldier is simply a less repulsive character than a cowardly one."6

After all, to display one's martial honoreven protection of innocentsthe soldier must first engage in a fight. This creates incentives to seek out opportunities for a fight, to misread political

3 Peter J. Boyer, "Admiral Borda's War," *The New Yorker*, Sept. 16,

1996, at 69 (quoting Rep. Schroeder). This is a common theme in much feminist writing on the armed services. See, e.g., Judith Gardam, "Gender and Noncombatant Immunity," 3 *Transnat'l L. & Contemp. Problems* 345, 367 (1993); Madeline Morris, "The 'Rape Differential,'" *Wash. Post*, Nov. 20, 1996, at A19 (arguing that incidents like Tailhook and the Aberdeen scandal "represent the tip of an iceberg and reflect . . . an underlying defect in military culture.").

4 See, e.g., David Luban, "The *Noblesse Oblige* Tradition in the Practice of Law," 41 *Vand. L. Rev*. 717 (1988).

5 Immanuel Kant, *Foundations of the Metaphysics of Morals* (Lewis White Beck trans., 1959).

6 Judith Shklar, *Ordinary Vices* 25 (1984).

situations as requiring one, where the underlying dispute could, with greater patience and imaginative negotiation, be resolved in other ways. "Warrior's honor," writes Ignatieff, "implied an idea of war as a moral theater in which one displayed one's manly virtues in public."[7]

Yet it would clearly be perverse "in analyzing 20th century wars, to say that soldiers are placed on the battlefield for the purpose of exhibiting chivalry," as a philosopher rightly notes.[8] Chivalry may be an "internal good," inherent in excellent soldiering, but war-making itselfthough a precondition for most chivalryis not. Whether war is justified at a given time and place must be determined by whether it is in the common good. Generally, it is not.

Thus, even if martial honor restrains certain kinds of violence, as its defenders emphasize, it assumes that other kinds are inescapable. In some situations, that assumption will be unwarranted, and the incentives generated by martial honorwhen central to professional self-understandingweaken the inclination to question that assumption. This is the germ of truth in the suggestion that *any* conception of martial honor is necessarily "militaristic,"[9] a view that dates at least from the Renaissance.[10]

In contrast, others believe that the danger of militarism can be held in check, in part simply through encouraging awareness of it, by both soldiers and the general public. Professional soldiers harbor a latent pessimism about the possibility of an end to war, apart from their incentives to think this way.[11] But their very disposition in this regard provides an "insurance policy" by which peace-loving

citizens "precommit"[12] themselves against the countervailing dangers of

7 Michael Ignatieff, *The Warrior's Honor* 117 (1998).

8 Douglas P. Lackey, *The Ethics of War and Peace* 65 (1989).

9 In medieval historiography, the issue is somewhat imprecisely cast in terms of whether knightly notions of chivalry did or did not "promote moderation." Johan Huizinga and Matthew Strickland adopt the affirmative view, M.H. Keen and Malcolm Vale, the negative.

10 Albert Hirschman, *The Passions and the Interests* 11 (1977).

11 Lt. Gen. Sir John Winthrop Hackett, *The Profession of Arms* 39 (1962) (observing that "professional officers . . . are more pessimist than optimist in that they see little cause to suppose that man has morally so far advanced as to be able to refrain from violence.")

12 On the psychology and rational defensibility of such precommitment, see Jon Elster, *Ulysses and the Sirens* (1984).

wishful thinking, of exaggerated hopes for a world in which all conflicts can be resolved nonviolently.

Even as we pay our statesmen and diplomats to negotiate and plan for the best, we hire professional soldiers to prepare for the worst. We do this in the understanding that their very preparation makes us less likely ultimately to need their services. In this respect, soldiers resemble lawyers (particularly divorce lawyers, perhaps), who sell us 'insurance' against our frequent, powerful inclinations to behave irrationally in discounting the future (and what we will then need), particularly at times of great emotional turmoil.[13]

An Aristotelian Defense of Martial Honor

Restraint in combat, on this second view, owes its origins and continuing efficacy primarily to virtues internal to the soldier's calling, virtues largely distinct from, even sometimes at odds with, the common morality of civilian society. This view has a long history. According to Aristotle, particular vocations require people of suitable temperament and disposition. This is partly a matter of self-selection. After all, the armed forces tend to attract the sort of people who find congenial a life largely organized around the giving and taking of orders.[14] But the dedicated exercise of a vocation cultivates within its conscientious practitioners, and elicits from them, the virtues peculiar to it.

This process of habituation must not be mindless or uncritical, of course, stresses a Naval Academy professor.[15] Properly understood, such "earnest pretense is the royal road to sincere faith."[16] This applies to human experience of combat, which "involves not merely

13 For a view of attorneys as 'insurers' of client rationality, see David Luban, "Paternalism and the Legal Profession," *Wis. L. Rev*. 454 (1981).

14 For empirical evidence of self-selection in values among men and women entering the Coast Guard Academy, see Gwendolyn Stevens et al., "Military Academies as Instruments of Value Change," 20 *Armed Forces & Soc'y* 473, 48081 (1994) (finding entering cadets higher on conformity and benevolence toward peers than civilian counterparts, but lower on independence).

15 Nancy Sherman, *The Fabric of Character* (1989). Sherman holds the Chair in Ethics and Leadership and the U.S. Naval Academy.

16 Ronald de Sousa, "The Rationality of the Emotions," in A. Rorty, ed., *Explaining Emotions* (1988).

an attempt to defeat an opponent," writes a scholar of ancient Greek warfare, "but an attempt to project a certain image of oneself."[17] The image tends, over time, to become reality insofar as one seeks psychological coherence and, in this sense, personal integrity. This is a goal toward which most people naturally strive, according to psychologists of cognitive dissonance.

The individual is free to choose, of course, whether or not to seek membership in his country's officer corps. But he is not free to decide what it means to be a professional soldier, much less an excellent one. The meaning of meritorious soldiering is determined by the practices and traditions of the professional community he joins. These will gradually change over time, in light of discussion among its leading members (and external pressure, to some degree).

Martial Honor as an Evolving Social Practice

In fact, "a capacity for self-reflection and self-criticism is part of what distinguishes professions from games and other sorts of rule-governed practices."[18] If present practices, then, are sustained by historical traditions, these traditions are living and evolving. And "a living tradition," as MacIntyre puts it, "is an historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition."[19] Members may therefore differ at least as much in the understanding of what the practice *is*, what it currently entails (when properly understood), as over how its practice should be reformed. Such differences of opinion are not a recent aberration, an infection of modernity. Medieval knights, for instance, regularly argued among

themselves over whether a given warrior's conduct had breached their code of honor and was therefore deserving of shame.[20]

17 Hans van Wees, "Heroes, Knights and Nutters: Warrior Mentality in Homer," in *Battle in Antiquity* 1, 34 (Alan Lloyd, ed., 1996).

18 Arthur Applbaum, "Are Lawyers Liars?" 4 *Legal Theory* 62, 87 (1998).

19 Alasdair MacIntyre, *After Virtue* 207 (1981).

20 See, e.g., *Sir Gawain and the Green Knight*, Theodore Silverstein, ed., (1984) and the discussion in Gabriele Taylor, *Pride, Shame and Guilt* 110 (1985). On tensions within the chivalric ideal, spawning such disagreements, see Constance B. Bouchard, *Strong of Body, Brave and Noble* 11117 (1998).

The demands of martial honor that governed ancient Greece were very different from those of contemporary officers anywhere, almost to the point of incomprehensibility.[21] Disagreement of this sort is entirely consistent with the fact that standards of excellence established by professional practices are generally stable in their core at any given moment, and often for long periods. There is widespread agreement in the U.S. Army today, for instance, about what "proportionality" in use of force requires, as applied to troops facing specific factual situations with particular weapons.[22]

Martial honor might be best understood, on more careful analysis, not as a single virtue but a constellation of independent and nonspecific virtues (i.e., generally conducive to human flourishing) insofar as they happen to bear on military conduct. Courage may be the preeminent virtue of the soldier, but it is pertinent to many other activities, after all, such as intellectual life. The soldier's practical wisdom serves to mediate among all such virtues,[23] telling him which of them should primarily govern his action in a particular situation and what it requires of him.

Despite these conceptual qualifications, I shall nevertheless speak of martial honor in the singular, as the coherent amalgam of virtues peculiarly pertinent to the vocation of soldiering. This simplification is partly for reasons of convenience. But it is also noteworthy that the term itselfmartial honoris routinely employed in the ordinary language of officers throughout the world. An approach to professional ethics that casts itself as an interpretation of ordinary moral experience, as an exercise in moral phenomenology, would do well to stay close to the terms of soldiers' self-understanding.

21 Homer, *The Iliad*, trans. Stanley Lombardo, 6.407-11, 43132 (1997) (describing Hector's understanding, before final battle, of his respective duties to family and polis); David Gress, *From Plato to Nato* 7779 (1998) (contrasting Homer's *Iliad* with contemporary understandings of warriors' pride.).

22 Author's interview with Maj. Patrick Reinert, a JAG officer who taught at the Army Command and General Staff College. Aug., 1998.

23 Zagzebski, *supra* note 2, at 22224 (arguing that, for Aristotle, *phronesis* "coordinates the various virtues into a single line of action . . . "). See also John Cooper, "The Unity of Virtue," in Ellen Frankel Paul et al., *Virtue and Vice* 233 (1998).

Martial honor should be distinguished, also in the interests of conceptual precision, from mere "skill" in the arts of warfare. An officer may be instrumentally effective in employing his knowledge to vicious ends, after all. And no amount of courage or bravery will much help him on the battlefield if not joined to adroit facility in deployment of tactical savoir-faire.

In the Aristotelian tradition, virtue and skill are nonetheless closely associated, often to the point of conflation (as common usage of the term "virtuosity" suggests).24 Both skill and virtue are acquired characteristics, usually demanding considerable, sustained effort to attain. Moreover, "many virtues have correlative skills that allow the virtuous person to be effective in action, and thus, we would normally expect a person with a virtue to develop the associated skills," notes a philosopher. For instance, she offers,

> Perceptual acuity skills . . . probably are connected with the virtue of sensitivity to detail and with intellectual care and thoroughness. Verbal and logical skills are very important concomitants of . . . being a good communicator. Spatial reasoning skills, mathematical skills, and mechanical skills are important for effectiveness in many of life's roles.25

All of these skills, one might add, are relevant to professional soldiering. We should therefore expect any discussion of martial honoras the constellation of soldierly virtuesto issue very quickly, almost undetectably, into a discussion of military skillfulness (i.e., of its meaning and requirements). This is very much the case, as Part III of this book seeks to indicate and illustrates.

I have spoken of self-selection to a profession as generally salubrious, as people of certain dispositions are drawn to social

practices for which they are temperamentally suited. But it is true that some forms of self-selection in recruitment foster institutional pathologies. There is some reason to suspect, for instance, that the inessential appearances of military life work to attract precisely the sort of people who do not make good military leaders. The starched uniforms, close-order drill, and rigid hierarchy of military life may be

24 Zagzebski, *supra* note 2, at 10607.

25 *Id*., at 115.

especially appealing to those who lack self-esteem and fear disapproval, those least able to adapt to new information or to cope flexibly with ambiguous, changing situations.[26]

Clausewitz had officers in mind when he wrote that "every special calling in life, if it is to be followed with success, requires peculiar qualifications of understanding and soul."[27] These are often called traits or virtues of character. Unlike general moral principles and the duties they create, virtues are "time- and context-bound excellences of particular communities or lives."[28] They are rooted in local practices and vocational customs, consisting of "an accumulation of ways of solving problems that experience has shown to be better rather than worse . . . "[29] These provide the grounding for notions of warranted behavior and the corresponding capacity to identify unwarranted conduct, and orders to perform it, as such. On this account, the conscientious officer throws herself into her vocation so passionately that it virtually becomes a Wittgensteinian "form of life."[30] Departure from its internal norms thereby becomes very difficult for her even to contemplate seriously.

Avowedly provincial practices internal to a vocation do not derive from universal moral norms, categorically binding upon all.[31]

26 Norman Dixon, *On the Psychology of Military Incompetence* 18995, 30917 (1976); Richard U'Ren, *The Ivory Fortress* (1974) (critical reflections of a West Point psychiatrist, who counseled cadets for several years). For the classic, sociological discussion of this general phenomenon, see Robert Merton, "Bureaucratic Structure and Personality", in *Social Theory and Social Structure* 151 (1949).

27 Carl von Clausewitz, *On War*, 138 (Anatol Rapoport ed. and J.J.

Graham trans., Penguin Books 1968) (1832).

28 Onora O'Neill, *Towards Justice and Virtue* 2 (1996).

29 James D. Wallace, *Ethical Norms, Particular Cases* 78 (1996).

30 Ludwig Wittgenstein, *Philosophical Investigations* part 1, sec. 23 (1953). A form of life consists of shared understandings, manifested in common "routes of interest and feeling, modes of response, senses of humour and of significance and fulfillment, of what is outrageous, of what is similar to what else, what a rebuke, what forgiveness, of when an utterance is an assertion, when an appeal, when an explanation." Stanley Cavell, *Must We Mean What We Say?* 52 (1969).

31 This is, in short, "ultimately the value system of a caste and not of the community as a whole." Sue Mansfield, *The Gestalts of War* 124 (1982). See also Morris Janowitz, *The Professional Soldier* 216 (1960) ("[T]he effectiveness of military honor operates precisely because it does not depend on elaborate moralistic justification . . . The code of honor specifies how an officer ought to behave, but to be "honorable" is an objective to be achieved for its own right.").

Rather, they rest on prevailing understandings of what the practice itself requires, when conscientiously undertaken and properly understood.32

Many readers will surely dismiss this perspective as no more than militaristic nostalgia, of course. Its adherents, however, plausibly contend that it offers us important prospects for restraining war crimes.

War Stories and the Narrative Identity of Soldiers

The officer in training, on this account, builds up a professional identity on the basis of his personal immersion in the ongoing collective narrative of his corps.33 This narrative identity is imparted not by instruction in international law but by stories about the great deeds of honorable soldiers.34 These stories include accounts of how

32 In other words, "the person will develop a cultivated concern with the purposes of the practice, and will accept the guidance of [its] norms . . . The individual, then, is concerned with practicing in accordance with the standards, on the understanding that by so acting, an agent flourishes in the practice and the practice itself flourishes in that performance." Wallace, *supra* note 29, at 99.

In legal theory, Hart introduced the comparable notion of an "internal aspect" or "point of view" to describe the attitude of lawyers and judges toward legal rules they treat, in their professional capacity, as binding. H.L.A. Hart, *The Concept of Law* 55 (1961). Fuller carried the idea further, and in a somewhat different direction, claiming that the very idea of law, harbors certain ideals of processan "inner morality." Lon L. Fuller, *The Morality of Law* 4144, 9297 (1964). Lawyers could also be seen as embracing this internal morality as integral to their professional self-understanding, that is, as inherent in what it means to practice law

(as opposed to, say, engaging in political lobbying or influence peddling). But this reading gives the idea of law's internal morality a more Aristotelian coloration than Fuller, and certainly Hart, would likely have accepted.

33 Richard B. Miller, *Casuistry and Modern Ethics* 241 (1996) (observing that "narrative ethics . . . emphasize the importance of personal identity, the excellences of character (the virtues), and the individual and collective stories in which those excellences find intelligibility.").

34 For examples of such stories, used in ethical training of recruits, see Dept. of the Army, *Values: A Handbook for Soldiers*, sec. 2, Pamphlet 600 (Jan. 1987); Col. Dandridge Malone, *Small Unit Leadership* 118 (1983) (observing that combat teams develop a stock of stories, based on members' experience, and even a private language for rapid communication of signals for action.); Lt. Col. Donald Bradshaw, "Combat Stress Casualties: A Commander's Influence," 75 *Mil. Rev*. 20, 21 (1995) ('A commander builds esprit by . . . using the unit's history

(footnote continued on next page)

good situational judgment enabled their heroes to avoid inflicting unnecessary suffering on innocents. The memoirs of successful officers already display a few such stories.[35] Police officers often take pride recounting incidents in which their good situational judgment made resort to lethal force unnecessary.[36] One would expect similar stories to enter the standard repertoire of military officers, as peace enforcement operations become an increasingly prominent part of their work.[37]

The resilience of the P.O.W., successfully resisting his torturer's attempts to break his will and elicit classified information, was not a part of any canonical story of martial honor. But it became so several years ago, when Admiral Stockdale published his memoirs of his years in North Vietnam,[38] reviving in the process a long-neglected text of Epictetus.[39] The "Stockdale story," as it is now known, is notable as well for its theme of resistance to unlawful acts of (his captors') military authority.

The incorporation of such novel, untraditional narratives into the collective memory of an officer corps is a noteworthy aspect of its evolving identity and the changing self-understanding of its members. "Some of the most brilliant moments in fiction are achieved by those who expand our perception of what can be comprehensible story," writes a philosopher, "and the most brilliant lives may do the same."[40] Learning stories like Stockdale's is therefore integral to the process

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> and traditions. Pride in the unit, built through familiarity with the unit's history, binds the soldier to "those who went before.'").

35 For a memorable story of this sort, which should certainly be part of any such education in martial honor, see James R. McDonough, *Platoon Leader* 11011 (1985) (describing how he would have unwittingly killed several Vietnamese civilians, but for the better situational judgment of a junior platoon member).

36 William K. Muir, *Police: Streetcorner Politicians* 16971 (1977).

37 See, e.g., Lt. Col. Faris Kirkland et al., "The Human Dimension in Force Projection: Discipline Under Fire," 76 *Mil. Rev*. 57, 62 (1996) (observing that American soldiers in Operation Just Cause "accepted the additional danger" of restrictive rules of engagement and "took pride in forbearing to fire.").

38 James Bond Stockdale, *Thoughts of a Philosophical Fighter Pilot* 17785, 22237 (1995).

39 Epictetus, "Enchiridiron" in *The Works of Epictetus*, trans. Thomas W. Higginson (1890).

40 Marya Schechtman, *The Constitution of Selves* 105 (1996).

by which fledgling officers today make the moral history of their nation's armed forces into their own personal history and identity.

The most basic "moral" of virtually all such canonical stories is, as one training officer puts it: "History is the glue that holds this [organization] together. A lot of people have worn the title Marine, and you don't want to let them down."[41] A philosopher states the underlying idea:

> Membership of the group entails living according to the values which are embodied in its honour code. Living accordingly, and only living accordingly, gives the individual status or worth, and his identity is defined in terms of that status . . . Whoever fails to meet the categoric demands engendered by that code ruins his reputation . . . He loses his honour.[42]

From this perspective, the best prospects for minimizing war crimes (not just obvious atrocity) derive from creating a personal identity based upon the virtues of chivalry and martial honor, virtues seen by officers as constitutive of good soldiering. "The soldier, be he friend or foe," wrote Gen. Douglas MacArthur, "is charged with the protection of the weak and unarmed. It is the very essence of his being . . . "[43]

"Marines don't do that"so one officer told a recruit, discovered with his rifle at the head of a Vietnamese woman.[44] This statement is surely a simpler, more effective way of communicating the law of war than threatening prosecution for war crimes, by the enemy, an international tribunal, or an American court-martial.

Faced with a hard case, officers are more likely to do the right thing if they ask themselves: "What is required of honorable

soldiers,

41 Thomas E. Ricks, *Making the Corps* 66 (1998).

42 Taylor, *supra* note 20, at 110, 55 (1985).

43 Quoted in A. J. Barker, *Yamashita* 15758 (1973).

44 W. Hays Parks, Roundtable Remarks, in *Facing My Lai* 129 (David L. Anderson, ed., 1998) (adding "that's all that needs to be said."). See also his "May There Be No More U.S. War Crimes," 123 *U.S. Naval Inst. Proc*. 4, 6 (1997) (observing that war crimes by Marines "reflected adversely on the Marine Corps, on the U.S., and on the many Marines who served honorably in Vietnam.")

here and now?"[45] rather than "What does international law require?", or "What would the theory of justice require of anyone facing such a problem from behind a veil of ignorance?"[46] The appeal is as much to their professional pride as to universalistic ideals.[47] Martial honor "means doing nothing to tarnish that proud heritage" of one's unit, regiment, or branch of service, according to a recent study of Marine basic training.[48]

45 This question may admit of competing answers, of course, no less than the more abstract, theoretical approach with which I contrast it. But such disagreement is not disabling. In fact, as Onora O'Neill notes, "social traditions and personal orientations always include tenets and practices for debating and criticizing, for reflecting on and revising, their own standards, practices and judgments. 'Internal' critique of actual norms and commitments . . . rather than timeless appeals to fixed identities, are then taken as the bottom line in particularist practical reasoning." O'Neill *supra* note 28, at 2122. For one attempt to derive a duty of disobedience from such martial norms, see James H. Toner, "Teaching Military Ethics," *Military Review* 33, 37 (1993). Toner appeals directly to the soldier's sense of shame, exhorting him to ask himself, "Would [my] actions pass muster if . . . evaluated by responsible, respectable soldiers of yesterday and of today?"

On the considerable efficacy of such specifically vocational virtues in restraining battlefield misconduct, see Matthew Strickland, *War and Chivalry* 124, (1996) (arguing that in the early middle ages "the fact that such actions [of self-restraint] brought praise and heightened esteem acted as a powerful incentive for their emulation by others, thereby creating and maintaining a currency of conduct that was deemed honourable and worthy. Conversely, violation of such notions might incur dishonour and stigmatization.").

46 The most influential statements of this latter position are surely

Michael Walzer, *Just and Unjust Wars* 47 (1977) (arguing that "the rules of war . . . are made obligatory by the general consent of mankind . . . They derive immediately and particularly from the consensual process [and] ultimately from principles.") and John Rawls, "The Law of Peoples," in *On Human Rights* 41 (Stephen Shute and Susan Hurley, eds., 1993).

47 Clausewitz defended the view that "at the heart of any army, there would always be a cadre of professionals who would fight, not out of patriotism but . . . from sheer professional pride." Michael Howard, *Clausewitz* 29 (1983). He believed that the professional army "is mindful of all these duties and qualities by virtue of the single powerful idea of the honour of its armssuch an army is imbued with the true military spirit." *Id*. at 187 (quoting Clausewitz). On the means by which diffuse collegial pressure and shame were brought to bear on errant officers in early modern England for dishonorable behavior, see Arthur Gilbert, "Law and Honour Among 18th Century British Army Officers," 19 *Historical Journal* 75, 75 (1976). For a recent philosophical defense of pride, as fostering "the energetic, ambitious application of one's moral code," see Tara Smith, "The Practice of Pride," in Paul, *supra* note 23, at 70, 75.

48 Ricks, *supra* note 41, at 216.

For instance, the German officers who plotted against Hitler justified their disobedience in terms of a "true Prussianism,"[49] a way of "remaining faithful to . . . military tradition,"[50] one in which "obedience ends where knowledge, conscience, and responsibility prohibit execution of an order,"[51] said one of the conspirators. West German soldiers have been schooled in this understanding of that military tradition since the 1960s.[52]

During Operation Desert Storm, Joint Chief of Staff General Colin Powell, in deciding not to pursue retreating Iraqi troops, explained his decision on the grounds that their destruction "would be un-American and unchivalrous."[53] Here, as in many situations, the internal morality of soldiering proved more restrictive and humanitarian than international law. In fact, the "manifest illegality" rule turns out to fail, in many situations, precisely because it relies on unrealistic assumptions about the strength and universality of "humanitarian" moral sentiments.

Courage, also, occupies a central place in the traditional pantheon of martial virtues. Even Clausewitz, though unsympathetic to the law of war, acknowledged that "courage is of two kinds: . . . in the face of personal danger, and courage to accept responsibility, either before the tribunal of some outside power or before the court of one's own conscience."[54] This second aspect of courage potentially

49 Bodo Scheurig, *Henning von Tresckow, ein Preusse gegen Hitler* 16768 (1987).

50 Maj. Ulrich Zwygart, "Integrity and Moral Courage: Beck, Tresckow and Stauffenberg," 74 *Mil. Rev*. 5, 11 (1994).

51 Graf J.A. Kielmansegg, "Widerstand im Dritten ReichEine Erinnerung zur vierzigsten Widerkehr des 20. Juli 1944," *Allgemeine*

Schweizensche Militarzeitung 387 (1984) (quoting conspirator Ludwig Beck).

52 Donald Abenheim, *Reforging the Iron Cross: The Search for Tradition in the West German Armed Forces* 10520, 29098 (1988).

53*Newsweek*, Jan. 20, 1992, at 18. This use of the term is consistent with Dept. of the Army, Field Manual 27-10, *The Law of Land Warfare* 3 (1956). In fact, "principles of chivalry" are still routinely invoked in many training manuals for officers in the law of war. See, e.g., *The Military Commander and the Law of War* (1995). There were, of course, other considerations supporting Powell's decision not to pursue the Republican Guard.

54 Carl von Clausewitz, *On War*, (1832), trans. Howard and Paret, quoted in Tsouras, Peter, ed., *Warriors' Words* 114 (1992).

includes that necessary to disobey a clearly unlawful order.[55] In this way, the officer's normative universe and the exercise of virtues intrinsic to her calling work to restrain acts of atrocity. There is no need for an imposition of common morality from without. Under this approach to military ethics, the norms of civilian society do not constitute a superior moral system that soldiers must be made to share.[56]

Preserving Martial Honor through a "Separate Community"

In fact, integrating soldiers fully into the values and institutions of civilian society would likely weaken distinctive virtues, such as willingness to sacrifice one's life for one's country. As a distinguished commission concludes, "disciplinea state of mind which leads to willingness to obey an order no matter how unpleasant or dangerous . . .is not a characteristic of a civilian community."[57] How the law might better cultivate this necessary "state of mind" in soldiers without unduly compromising other, equally valued objectivesespecially preventing war crimesis the subject of this book.

The virtue of discipline, in this sense, can best be cultivated in some degree of isolation from the secular temptations and material

55 On the courage sometimes entailed in such disobedience, see Sir Compton MacKenzie, "Refusing to Obey in World War," in *Certain Aspects of Moral Courage* 13963 (1962). For a recent official recognition of resistance orders to commit atrocities, see "Medal for Heroes Who Halted My Lai Massacre," *S.F. Chron.*, Mar. 7, 1998, at 1 (describing award of the Soldier's Medal for Gallantry to Hugh Thompson and Lawrence Colburn, Jr.).

56 Indeed, from their virtually crime-free, orderly communities, they

"tend to view the chaotic civilian world with suspicion and sometimes hostility." Huntington, *supra* note 1, at 79. For a somewhat vitriolic recent statement of this view, see Lt. Col Robert Maginnis, "A Chasm of Values," 73 *Mil. Rev*. 2 (1993) (arguing that "the Army must preserve its integrity as an institution by resisting any tendency to accommodate these changed values" within civilian society.). This statement immediately suggests the risks to civilian supremacy of allowing soldiers to constitute themselves as a separate community. The delimited focus of this short book, however, prevents serious examination of the genuine dangers of separation, when it is carried to extremes. I do not purport to offer here a systematic study of civil-military relations. Such a study, to be sure, would have to address this problem.

57 Report to the Secretary of the Army (Powell Report), 1112 (1960), quoted in David Schlueter, *Military Criminal Justice: Practice and Procedure* 5 (1996).

gratifications of contemporary society.[58] For such reasons, the U.S. Supreme Court "has long recognized that the military is, by necessity, a specialized society separate from civilian society."[59] The rationale, as noted by one senior officer, has been that "the values necessary to defend a democratic society are often at odds with the values of the society itself."[60] To serve her country effectively in combat, the professional soldier must live *within* modern democratic society without being entirely *of* it.[61] "We're here to preserve democracy, not to practice it," intones an old-school submarine commanderutterly without irony or self-parodyduring a missile drill in the film *Crimson Tide*.[62]

This is not to imply that the nature of military values and meaning of martial honor are immutable. The precise normative commitments of this separate community have shifted significantly over time and will continue to do so. To defend the utility of some such separate domain is not to suggest that its borders should be

58 For evidence that cadets become socialized into the distinctive value hierarchy of their armed service, see Stevens, *supra* note 14, at 482 (finding especially among female Coast Guard cadets "a movement away from accepting the norms of the outside society . . . [as] the academy/military group becomes the reference group.")

59 *Parker v. Levy*, 417 U.S. 733, 743 (1974). As one military analyst observes, "Contact with outsiders is relatively limited, and members work, play, and often sleep in the same place. The organization defines its members' status, identity, and interactions with others. Military organizations may be the most 'complete' societies of any 'total' organization." Elizabeth Kier, *Imagining War* 29 (1997).

60 Gen. Walter Kerwin, "The Values of Today's Army," *Soldier* 4 (Sept. 1978). See also *Parker v. Levy*, *supra* note 59, at 743 (Justice Rehnquist)

("The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."

61 Richard Gabriel, *To Serve With Honor* 15, 112 (1982).

62 "Crimson Tide" (Hollywood Pictures, 1995). I confess to reluctance about invoking a Hollywood movie as authority for any part of my argument. But during conversations in summer 1996 with two dozen top American military officers, including leading JAGs, several repeatedly mentioned this film as offering a wonderful dramatization of this book's central argument. The conflict that develops between Hunter (Denzel Washington) and Ramsey (Gene Hackman) concerns whether to obey orders requiring launch of nuclear missiles. Later orders, disrupted during transmission, may have rescinded the initial launch order. The two officers differ over whether good judgment requires deferring launch until reconfirmation, in circumstances of extreme international urgency and prior attack of their craft by a Russian submarine.

maintained where they now happen to lie. The requirements of martial honor (and the military law that reinforces it) can be made more demanding in some areaslike preventing war crime. But these requirements can also be made less demanding in other areas, particularly in regulating the private lives (especially the sexual activities) of officers and enlisted personnel.63

Much of civilian society tends to disparage martial honor as antiquarian, just as many professional soldiers disparage civilian society as decadent or morally corrupt.64 Despite their radically different *weltanschauung*,65 each sphere depends upon the other for its existence. The solution, then, is to ensure some measure of formalized insulation of each, so that neither will corrupt the other.66 This should simply be viewed as a form of "institutional differentiation," in Luhmann's terms,67 functional for society at large

63 Recent Pentagon policy, for instance, seeks to downgrade the priority historically given to the offense of adultery, authorizing prosecution only when the defendant's interferes with performance of professional duties.

64 A.J. Bacevich, "Tradition Abandoned: America's Military in a New Era," 48 *Nat'l Interest* 16, 19 (1997). Bacevich observes that "Military 'society' is undemocratic, hierarchical, quasi-socialistic. It prizes order, routine, and predictability. It resists change. America as a whole has none of these qualities." *Id*. at 22. See also Thomas E. Ricks, "Separation Anxiety: 'New' Marines Illustrate Growing Gap Between Military and Society," *Wall Street J*. (July 27, 1995), at A1.

65 Huntington writes of a "military ethic" that stresses "the permanence, irrationality, weakness and evil in human nature . . . the supremacy of society over the individual" and his rights, as well as "the importance of

order, hierarchy, and division of functions." Huntington, *supra* note 1, at 79.

66 Those favoring such separation fear not only excessive "civilianization" of the armed forces, but also militarization of civilian society. For notable expressions of the latter concern among military intellectuals, see Col. Charles J. Dunlap, Jr., "Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military," *29 Wake Forest L. Rev*. 341 (1994); Lt. Gen. Donald H. Horner, Jr., (reviewing James William Gibson, *Warrior Dreams: Violence and Manhood in Post-Vietnam America*, 22 *Armed Forces & Society* 307 (1995-96) (decrying the growth of "paramilitary theme parks," paintball as a combat sport, and other ways in which the repressed memory of military loss and national humiliation in Vietnam returns through "acting out" of such masculinist fantasies.) For similar concerns among postmodernist theorists, see Les Levidow and Kevin Robins, *Cyborg Worlds* (1989) and P. Virilio and S. Lotringer, *Pure War* 3152, 15972 (1983).

67 Niklas Luhmann, *The Differentiation of Society*, trans. Stephen Holmes and Charles Larmore (1982).

no less than for soldiers themselves. Modern Western society no longer allows one to cultivate the virtues of the Homeric hero or samurai warrior, as MacIntyre emphasizes.[68] But historic ideals of martial honor can be reinterpreted in ways that make them practically sustainable within a partially insulated subcommunity of that larger society.

Military law contributes to this end by keeping in check the ubiquitous societal pressures toward ever greater civilianization. The United States military therefore has its own court system, its own trial procedures, its own law as codified in the Uniform Code of Military Justice, its own judges, its own court of appeals, and even its own prisons and police. Despite their convergence with civilian labor markets for certain kinds of technical expertise, the United States armed forces have effectively resisted the most significant normative forms of civilianization.[69]

It might first appear that this separatist approach, with its confidence in virtues internal to the calling, would not work for places like Bosnia or Rwanda. It is also true that many of the most positive reforms that have taken place within the armed forces have been imposed by civilians.[70] When the internal norms of soldiers give out, civilians will need to step in, imposing more universalistic and humanitarian ideals of justice.

I most definitely do not wish to imply that we civilians can trust the internal morality of professional soldiers to solve all problems of

68 MacIntyre, *supra* note 19, at 119 (lamenting that these "virtues require for their exercise . . . a kind of social structure which is now irrevocably lost . . . ").

69 Stephen Peter Rosen, *Societies and Military Power* 268 (1996) (noting that "in the United States the trend is clearly toward a smaller, increasingly professional military, drawn from selected segments of that society, and engaged in technical or overseas activities that keep it separate from the influence of changes in American social structures. The American military is growing more isolated from society and no longer serves as a mass school for nationalism.") See also John Lehman, "An Exchange on Civil-Military Relations," 36 *Nat'l Interest* 23, 24 (1994) (observing that, as a consequence of ending conscription, "we have created a separate military caste."). For a summary of continuing scholarly disputes over the desirability of such isolation, see Bernard Boëne, "How 'Unique' Should the Military Be?" 31 *Eur. J. of Soc'y* 3 (1990).

70 Karen O. Dunivin, "Military Culture: Change and Continuity," 20 *Armed Forces & Soc'y* 531, 539 (1994). This is exemplified by President Truman's executive order requiring racial integration of the United States military. Exec. Order No. 9981, 13 Fed. Reg. 4313 (1948).

military ethics. I categorically reject the view, plausibly ascribed to MacIntyre, that "actions performed by professionals in professional roles can be evaluated only with respect to criteria internal to the professional practice."[71] No one in his right mind, for instance, would trust the traditional aversion of officers to new weapons (i.e., ones threatening their social standing) to serve as a sufficient guarantor against proliferation of such weapons in the contemporary world. And it must be said that the very demanding conceptions of acceptable collateral damage (to enemy civilians and their property) recently adopted by the Pentagon, in contemplating foreign peace operations and other armed interventions, have been largely forced upon itfor better or worse[72]by civilian opinion, from the outside.[73]

The horrific situations in Bosnia and Rwanda are the rare exception, however, and it would be myopic, at best, to construct military law exclusively in anticipation of such problems, however genuine. The worst war crimes in Bosnia, in any event, were committed by civilian police, not by professional military officers, and the greatest share of the Rwandan slaughter has been attributed to civilians.[74] Professional officers were not the major perpetrators in either case. Officers in the Americal Division were admittedly responsible for initially covering up the My Lai massacre. But it was civilians, including several Congressmen, that demanded court-

71 Applbaum, *supra* note 18, at 73.

72 Several leading U.S. military analysts now believe that the increased reluctance of Americans (and citizens of a few other democratic states) to take or inflict human casualties, particularly where national interests are not clearly involved, is constraining the West's political willingness

to undertake military commitments that would have been relatively uncontroversial not long ago. This reluctance may also extend to peace operations, even in the most morally urgent and transparently humanitarian circumstances.

73 Charles Moskos et al., "Casualties and the Will to Win," 26 *Parameters* 136 (1997); Harvey Sapolsky, "War Without Casualties," 31 *Across the Board* 39 (1994). This book does not undertake systematically to assess the relative strengths and weaknesses of martial honor versus formal legal institutions in preventing war crimes. It seeks only to redress the imbalance in current debate by accentuating the enduring significance of the former and the ways in which its contribution can be strengthened.

74 Aryeh Neier, "Rethinking Truth, Justice and Guilt After Bosnia and Rwanda," in *Human Rights in Political Transitions* (Robert C. Post and Carla Hesse, eds., forthcoming 1998).

martialing of the soldiers who had interceded to stop the butchery and who later reported it to the press.[75]

Caste Consciousness and Common Morality

The military sometimes leads the way in social change of the most desirable sort. Truman's integration order may have represented an external imposition upon the military of universalistic moral principle, but civilian society at the time displayed little commitment to racial integration. In fact, the armed forces were the first major American institution to attempt such integration seriously, surely the most major change in social policy of the last half-century. Alas, the military also proved virtually the only such American institution largely to succeed in this endeavor.[76]

The second, internalist approach to military law and ethics also stresses that the international law of war, though influenced at times by civilians, has largely arisen from the evolving conventions of the officer class.[77] Such law has been effective to the extent that it has not deviated much from the normative conventions of this social stratum. Where civilian politicians, however well-intentioned, have sought to push the envelope of legal change, the result has been an ever greater split between the law on the books and the law in action. A revealing

75 Investigation of the My Lai Incident, Hearings of the Armed Services Subcommittee, H.R. April 17, 1976, at 22448 (questioning Hugh Thompson's authority to intercede at My Lai, ordering subordinates to "cover" him against Calley's troops, opposing his effort to save civilians).

76 On the relative success of racial integration in the American armed forces, see Charles C. Moskos and John Sibley Butler, *All That We Can*

Be (1996); Sherie Mershon and Steven Schlossman, *Foxholes and Color Lines* (1998).

77 Geoffrey Best, *Humanity in Warfare* 60 (1980) (noting that "A large part of the modern law of war has developed simply as a codification and universalization of the customs and conventions of the vocational/professional soldiery.") For particularly thoughtful, recent defense of this internalist approach, see Yedidiah Groll-Ya'ari, "Toward a Normative Code for the Military," 20 *Armed Forces & Soc'y* 457 (1994) (arguing for a "stress on professionalism as the ultimate value of soldierya sort of modern substitute for chivalry."); Gabriel, *supra* note 61, at 15, 9199. The classic statement is offered by Carl von Clausewitz, arguing that "for as long as they practise this activity, soldiers will think of themselves as members of a kind of guild, in whose regulations, laws and customs the spirit of war is given pride of place." Howard, *supra* note 47, at 28. See also Gen. Maxwell D. Taylor, "A Professional Ethic for the Military?" 28 *Army* 18 (1978).

example may be found in the widespread disregard for restrictive rules of engagement by American ground troops during the Vietnam War.78 It has since become an article of faith among U.S. officers that these rules placed American forces in undue danger and were therefore tactically imprudent (and morally indefensible).79

This example is somewhat unrepresentative, to be sure, in that martial honor is generally more demanding than legal duty, not less. The law can only impose a minimally acceptable standard, a "floor" beneath which no soldier may descend, at least when it employs bright-line rules. But the most effective soldiering, the sort that wins medals (and battles) is almost always "supererogatory," requiring the acceptance of risk, through the display of courage, "beyond the call of duty."80

The same is true in preventing war crimes. The manifest illegality rule merely sets a floor, and a relatively low one at that: avoid the most obvious war crimes, atrocities. It does not say, as does the internal ideal of martial honor: always cause the least degree of lawful, collateral damage to civilians, consistent with your military objectives. By taking seriously such internal conceptions of martial honor, we may be able to impose higher standards on professional soldiers than the law has traditionally done, in the knowledge that good soldiers already impose these standards upon themselves.

Honorable Emotions

Martial honor can also be more effective in *motivating* compliance with ethical norms than threat of formal legal sanction. It

78 Davida Kellogg, "Guerrilla Warfare: When Taking Care of Your

Men Leads to War Crimes," paper presented at the Joint Services Conference on Professional Ethics 5 (1997); Telford Taylor, *Nuremberg and Vietnam* (1970) (arguing that "no one not utterly blind to the realities can fail to make allowances for the difficulties and uncertainties faced in distinguishing inoffensive noncombatants from hostile partisans.") The very concept of formal "rules of engagement" is quite recent, dating to U.S. air combat in the Korean War.

79 Author's interviews, Washington D.C., June 1996.

80 On this aspect of virtue ethics in the military, see Maj. Reed Bonadonna, "Above and Beyond: Marines and Virtue Ethics," in *Military Leadership* 176, 177 (Taylor et al., eds., 1994) (arguing that "rule-centered military ethics seem to be better at preventing us from acting poorly than they are at encouraging us to act well.")

does so by linking up more directly with the professional soldier's ordinary emotions, those of pride in a job well done and, more ambitiously, of virtuosity in professional judgment. "Emotions enhance moral perception and provide a system of supportive motives," Sherman notes, parsing Aristotle.[81] Such emotions far from being natural or instinctual must be developed. They become ever more effective as one acquires the character dispositions central to the exercise of one's calling.

The upshot of this 'sentimental education' is that "people of good character act not only in accordance with moral virtues but also for the sake of them."[82] Virtue of this sort indeed becomes its own reward. "Practice yields pleasure to the extent to which it exhibits increasingly fine powers of discernment . . . The individual . . . comes to use his perceptual faculties in more and more discriminating ways."[83]

Upholding virtues internal to a practice contributes to the practitioner's success, in the sense of recognition by fellow professionals as someone who honors their craft by preserving its most noble standards. Success within one's chosen profession, in turn, generally leads to personal satisfaction, at least in one's work life. Thus, virtue engenders happiness, on this account. In this way, virtue comes to sustain itself in the face of contrary temptations through the practitioner's own interest and inclinations. (This view of ethics contrasts sharply with that of Kant, who held that action is moral only insofar as motivated by recognition of duty, and that action in accordance with one's inclinations therefore has no intrinsic worth.)

Unlike Kantian or utilitarian ethics, virtue ethicsof which martial

honor is one expression"offers professional soldiers an account of practical reason [that] connects to . . . the 'subjective set' of agents for whom it is intended. It . . . gives reasons that they could recognize as reasons for them from where they are . . . [It] connects to what, in the circumstances in which they find themselves, these people more particularly conceive themselves to be."[84]

81 Sherman, *supra* note 15, at 46.

82 Lackey, *supra* note 8, at 65.

83 Sherman, *supra* note 15, at 160, 187.

84 Geoffrey Hawthorne, *Plausible Worlds* 161 (1991) (parsing Bernard Williams).

From a strictly economic perspective, moreover, self-monitoring by conscientious soldiers in light of their shared internal ideals is cheaper, hence more efficient, than legal sanctions, based on external rules, imposed by civilians. When a practitioner internalizes the ethical virtues of her profession, writes a leading economist, her self-interest is "thickened." Thereafter, when she acts in self-interest, she acts in society's as well. "The best workers express themselves by showing who they are through their work. Their work shows *who they are* by reflecting what they have internalized."[85]

Moreover, the scarcity of comparable work for most officers in the private sector jet pilots are the principal exceptionensures that an individual's costs of exit from the profession, before vesting of retirement rights, are high; this fact, in turn, reduces members' temptation to thumb their nose at the prospect of internal disciplinary sanctions. The power of the professional community to threaten and effectively impose such costs on its members is correspondingly enhanced.

Dishonor as Shame

Virtue ethics work their way in the world at least as much by shame as by guilt. Values and principles may be internalized into the individual's conscience, influencing his behavior in turn. But they also affect conduct through expected relations with peers, by way of anticipation of "how it will be for one's life with others if one acts in one way rather than another," as notes Bernard Williams.[86] The upshot is that "self-respect and public respect stand and fall together."[87]

85 Robert Cooter, "Law and Unified Social Theory," 22 *J. of Law & Soc*. 50, 61 (1995) (observing that "internalizing a role 'thickens' self-interest to include the obligations and goals of an occupation.") (emphasis added). Most economists, however, would share the predominant view of social psychology here, that ethical dispositions are rarely so well-settled and internalized as to allow most people to resist strong, situational incentives to behave differently. This latter conclusion is often drawn from experiments like those of Stanley Milgram, *Obedience to Authority* (1974) and Philip Zimbardo, *Quiet Rage: The Stanford Prison Study* (1990).

86 Bernard Williams, *Shame and Necessity* 102 (1993).

87 Taylor, *supra* note 20, at 55.

The military long employed rituals of public shaming to this end, though they are largely moribund today.[88] These included "the time-honored naval tradition of 'Captain's mast,'" according to which "a seaman who fell asleep on watch . . . could be denounced by the captain in the presence of members of the ship's company assembled on deck for the purpose of shaming him."[89] Rituals of this sort still make sense in many of the situations with which this book is primarily concerned, i.e., where the officer's conduct is not manifestly atrocious but is nonetheless a war crime. Dishonorable discharge and lengthy prison term are unduly severe sanctions for many such cases, as John Norton Moore suggests.[90] This is because military operations are peculiar, virtually unique, in how easily major harm can result from even minor errors, i.e., from suboptimal judgment in decision making.

"Reintegrative shaming," as criminologists now call it, is preferable to more draconian threats where the offender continues to value his membership among the ranks. Expulsion from such ranks remains a possible disciplinary measure, of course, but only in the most extreme cases of egregious, recurrent, and unrepentant misconduct.[91] Forms of "penance," by contrast, send the message that martial honor is something pursued in its own right, for its intrinsic rewards, not merely for fear of prison or discharge.

Reintegrative shaming can work well only in certain collegial contexts, to be sure.[92] These are contexts where the "social

88 In today's U.S. military, however, officers are generally taught the civilian managerial mantra of "praise in public, reprimand in private."

89 John Braithwaite, *Crime, Shame and Reintegration* 58 (1988).

90 Correspondence with the author. Dec. 16, 1997.

91 "While courts-martial of soldiers charged with offenses involving excessive force can frustrate the goal of fielding a land force infused with initiative as well as appropriate restraint, a small fraction of soldiers inevitably will commit crimes that go beyond good faith technical violations . . . The training model [for inculcating the law of war and rules of engagement] would . . . ensure that soldiers learn the facts of criminal cases in a manner that permits them to contrast allegedly criminal conduct with appropriate decisions under the rules of engagement." Lt. Col. Mark Martins, "Rules of Engagement For Land Forces: A Matter of Training, Not Lawyering," 143 *Mil. L. Rev*. 3, 84 (1994). On prior practice, see Robert Stevenson, "The Containment and Expulsion of Wayward Soldiers in the U.S. Military," 25 *Soc. Sci. J*. 195 (1988).

92 James Q. Whitman, "What is Wrong with Inflicting Shame Sanctions?" 107 *Yale L.J*. 1055 (1998).

disapproval is . . . embedded in relationships overwhelmingly characterized by social approval."93 This is decidedly the case of relations among members of a professional officer corps. It is also true within parts of other professions.94 Rituals of reintegrative shaming are clearly most effective when conducted by brethren, rather than outsiders representing the state. More proximate parties can offer an environment that is "neither cold and firm nor warm and permissive, but warm and firm."95 As its principal contemporary proponent argues,

> Shaming is more pregnant with symbolic content than punishment. Punishment is a denial of confidence in the morality of the offender by reducing norm compliance to a crude cost-benefit calculation; shaming can be a reaffirmation of the morality of the offender by expressing personal disappointment that the offender should do something so out of character, and, if the shaming is reintegrative, by expressing personal satisfaction in seeing the character of the offender restored. Punishment erects barriers between the offender and punisher through transforming the relationship into one of power assertion and injury; shaming produces greater interconnectedness between the parties . . . Ceremonies of repentance have even more integrative potential than degradation ceremonies.96

Martial Honor and the Law

Martial honor plays a very different role in situations that are legally "hard" than in the rest. In "easy" cases, the obstacle to compliance is not any difficulty in discerning what the law requires,

93 Braithwaite, *supra* note 89, at 68.

94 E. Friedson & B. Rhea, "Processes of Control in a Company of

Equals," in E. Friedson et al., eds., *Medical Men and Their Work* (1972) (describing formal and informal shaming procedures among physicians within clinics).

95 Braithwaite, *supra* note 89, at 175 (summarizing James Q. Wilson and Richard Hernstein on how family structure influences crime).

96 Braithwaite, *supra* note 89, at 7273, 156.

but in motivating people to respect it, where such respect will put one at greater risk of death. Here, martial honor supplies the needed motive: the desire to be an excellent soldier, to display virtuosity in one's vocation.

By contrast, where the law's requirements are not obvious (as where the illegality of a superior's order is not fully manifest), the principal role of martial honor is to help the soldier identify the proper course of action. It helps him exercise practical judgment in the circumstances, where bright-line rules do not provide clear guidance. His professional character, that is, his cultivated dispositions as a member in good standing of his country's officer corps, helps him quickly apprehend the significant features of his immediate tactical situation and attunes him to the relative weights of competing considerationsincluding competing legal dutiesthat it presents.97

In cases that are legally easy (but otherwise stressful, dangerous, or physically demanding), then, martial honor contributes to having the proper inclinations and emotions, those conducive to skillful performance of one's duties. In legally hard cases, however, professional character reveals itself more in virtuosity of perception, deliberation, and choice. Tactical predicaments can, of course, be at once legally difficult and dangerous or physically demanding. At such times, what rules of engagement and the law of war require are unclear, and it will be difficult to prevailemploying any of the arguably permissible optionswith available human and material resources. In such cases, several aspects of martial honor and associated skills (perceptual,

cognitive/deliberative, and motivational/emotional) will need to be drawn upon, often simultaneously.

The two contrasting positions to professional ethics I have described in this chapterinternalist and externalist, reintegrative vs. exclusionaryare, to some extent, conceptual constructions, ideal types. They lay out end points on the spectrum of views actually held by real people. Each view has strengths and weaknesses. Moreover, they need not always work in opposition. Plato and Hume were surely wrong in thinking that virtue of character is enough and that good

97 This argument is developed in Part III, especially chapter 16.

men need no laws. "A moral atrocity committed by a Pericles or a Lincoln is still a moral atrocity," notes Dana Vila, "regardless of the character of the one who issues the command." Conversely, "accounts of justice, of good laws and institutions, have nearly always been allied with accounts of the virtues, of the characters of good men and women."[98] Thus, the two approaches can, in principle, be complementary, to a large extent.[99] Often, they reach the same conclusions about conduct, albeit from different premises.

Experience suggests, however, that there is a genuine danger that they will work at cross-purposes, each undermining the other. These dangers are greatly exacerbated by the increased "rights consciousness" of civilians.[100] This developmentparticularly the enhanced protections it fosters of individual rights against governmentsits uneasily with martial ideals of subordinating self-interest and of self-sacrifice for the nation as a whole.

One purpose of this book is therefore to show that there is a great deal more potential left in the second, virtue-oriented approach to the prevention of atrocity than most civilians assume, or imagine possible. A powerful international criminal court may be undesirable,[101] and remains unlikely, in any event.[102] Several of the

98 O'Neill, *supra* note 28, at 9.

99 Some who write about military ethics insist on a starker opposition. See, e.g., Capt. Charles A. Pfaff, "Virtue Ethics and Leadership"; Peter Bowen, "Virtue in the Corps: An Analysis of Ethics in the U.S. Marine Corps"; David Lutz, "Rival Traditions of Character Development," papers presented at the Joint Services Conference on Professional Ethics (1998).

100 Lawrence Friedman, *The Republic of Choice* (1990) (showing how, over the past century, Americans have become increasingly attentive to protecting their rights as individuals against large institutions.).

101 Ruth Wedgwood, "The Pitfalls of Global Justice," *N.Y. Times* A23 (June 10, 1998); Barbara Crossette, "World Criminal Court Having a Painful Birth," *N.Y. Times*, Aug. 13, 1997 at 10A. (quoting specialists on likely problems with any such court, particularly frivolous claims). See also Alfred P. Rubin, *Ethics and Authority in International Law* 16869 (1997).

102 Barbara Crossette, "Helms Makes War on U.N. War Crimes Court," *N.Y. Times*, Mar. 27, 1988, at A7. On the limited progress toward the creation of such a court, see Leila Sadat Wexler, "The Proposed Permanent International Criminal Court: An Appraisal," 29 *Cornell Int'l L.J.* 665 (1996). I share the view of Sir Michael Howard. "To transcend this necessity [for statesmen to consider the balance of power] and create a genuine world system of collective security . . . demands a degree of mutual confidence, a homogeneity of values and a coincidence of perceived interests . . . [which] we are a long way from creating in

(footnote continued on next page)

world's major military powers will not ratify, in the foreseeable future at least, the recent treaty establishing such a court.[103] International treaties already in force suffer gaping holes, exempting war crime in internal (i.e., noninternational) conflicts and "genocide" for political or ideological (i.e., non-ethnic) purposes.[104] Key treaties also remain unratified by many states, including major military powers.[105] As long as all this is so, we would do well to focus greater attention on how military law can shape the professional soldier's sense of vocation and his understanding and cultivation of its intrinsic virtues, its "inner morality."[106]

It may seem odd or surprising, at first, that criminal law, even within the armed forces, would take a strong interest in the character of those who come before it. A liberal society strives, after all, not to interfere with its members' "inner life," but rather only to limit their external conduct. Hence the predominant focus of criminal law on the defendant's "intention" to perform a prohibited act, not on his underlying rationale or "motive" for forming that intention.

But in fact, our lawits history, scholarly interpretation, and judicial implementationis infused with a deep and abiding concern with judging, molding and rewarding the moral character of

(footnote continued from previous page)

the culturally heterogeneous world which we inhabit today." Michael Howard, *War and the Liberal Conscience* 132 (1978).

103 Alessandra Stanley, "U.S. Dissents, But Accord is Reached on War-Crime Court," *N.Y. Times* (July 18, 1998) (noting dissenting votes of several major states).

104 Michael P. Scharf, "Book Review: Impunity and Human Rights in International Law and Practice," 90 *Amer. J. Int'l L*. 173, 174 (1996).

105*Id*.

106 The term is Fuller's, who employs it in a different sense. See Fuller, *supra* note 32, at 4144. For one defense of restraint through the internal morality of soldierly virtuosity, see Groll-Ya'ari, *supra* note 77, at 463 (noting that "the nature of any conflict"as just or unjust"is irrelevant to the military, which ought to be a self-contained body, motivated by its inner values, and fit for a world of conflicts."). See also David Zoll, "The Moral Dimension of War and the Military Ethic," 12 *Parameters* 2, 10, 9 (June 1982) ("If a reciprocal trust exists in mutual honor between commander and subordinate, then the subordinate is fully able to express his professional reservations about the prudence and rectitude of a command . . . So long as an omnibus fidelity to . . . personal honor exists, then a notable freedom can proceed: to express unpopular theories, offer criticism, explore alternative methods . . . ")

defendants.[107] A liberal society needs citizens with the liberal virtues, after all.[108] These do not spring up through spontaneous generation, particularly in a highly secularized society. There is no reason why criminal law within the military should not seek to promote martial honor, just as civilian law aims to foster the virtues of liberal citizenship. In both contexts, criminal law offers one common means for cultivating the desired virtues, by punishing and hence discouraging the correlative vices. A military needs professional soldiers of suitable character, officers with a demanding sense of martial honor. So military law should remain attentive to the historic meaning and shifting contours of that ideal.

107 For recent defenses of this understanding of criminal law, see, e.g., Dan Kahan, "Ignorance of the Law is an ExcuseBut Only for the Virtuous," 96 *Mich. L. Rev*. 127 (1997); Michael S. Moore, "Choice, Character, and Excuse," in his *Placing Blame* 54892 (1998); George Vuoso, "Background, Responsibility, and Excuse," 96 *Yale L. J*. 1661 (1987).

108 Stephen Macedo, *Liberal Virtues* (1990); William Galston, *Liberal Purposes* 213 (1991) (characterizing courage, "the willingness to fight and even die on behalf of one's country," as a "general" virtue, in the sense of being one of the "requisites of every political community," liberal or otherwise.)

2
The Law of Military Obedience

History and Sources of Law

Most Western courts and commentators, as well as the recent treaty establishing an International Criminal Court, accept the manifest illegality rule as the best answer to the question of due obedience. That answer is well supported in readily available documentary sources, including the military codes of most Western constitutional democracies.

However, articulating a satisfactory statement of current international law proves quite difficult. One cannot appeal to any canonical authority on the matter, for there is none. The pertinent sources are numerous but offer disparate solutions. Thus, one must conclude that international law on the matter of due obedience is not fully settled. In reaching this conclusion, we must look to treaties, litigated cases, custom, and a number of other sources.

None of the major multilateral treaties squarely addresses the subject, for it has proven impossible for states to reach agreement on it. This is conspicuously true of the Hague and Geneva Conventions, including the 1977 Protocols to the latter.[1] It is also true of the treaties prohibiting genocide, torture, and crimes against humanity.[2] These conventions define the pertinent offenses but say nothing about which

1 Col. Howard S. Levie, "The Rise and Fall of an Internationally Codified Denial of the Defense of Superior Orders," 30 *Mil. L. & L.*

of War Rev. 185 (1991).

2 See, e.g., *Declaration on the Protection of All Persons from Being Subjected to Torture*, G.A. Res. 3452, U.N. GAOR, 13th Sess., Supp. No. 34 at 91, U.N. Doc. A/10034 (1975). But see the Inter-American Convention on the Forced Disappearance of Persons, June 9, 1994, § 5 art. VIII (providing that "The defense of due obedience to superior orders or instructions that stipulate, authorize, or encourage forced disappearances shall not be admitted.").

among long-standing affirmative defenses are or are not available to the accused.

The treaty establishing the International Tribunal at Nuremberg professed to preclude superior orders as a defense, allowing only mitigation of punishment on this basis.3 But the practice of the Tribunal itself, as well as later Nuremberg tribunals administered by the occupying powers, is more equivocal.4 Moreover, the drafters of the Charter appear to have intended that it should only apply to imminent prosecutions for the most serious offenses by the highest-ranking public officials and military officers. It appears their acts were simply assumed, from the outset, to be manifestly illegal.5

As such, there was no need for the Charter to address the potential availability of a superior orders defense to lower-echelon officers accused of lesser charges (that is, of acts not so transparently atrocious). In short, the Nuremberg Charter left the question of due obedience unresolved as it pertains to anything but the most egregious offenses, committed by the highest-ranking officials.

A third source of relevant authority derives from such international organizations as the International Law Commission, the United Nations' General Assembly, and the Security Council, all of which have contributed to defining international criminal offenses.

3 Charter of the International Military Tribunal of August 8, 1945, at art. 8, *annexed to* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544.

4 See, e.g., *In re Von Leeb*, 11 Nuremberg Military Tribunals 511 (1948) (the High Command Trial) (stating that "within certain limitations, [a

soldier] has the right to assume that the orders of his superiors . . . are in conformity to international law."); *In Re List* (the Hostages Case), 11 Nuremberg Military Tribunals 632, 650 (1948) (stating that "if the illegality of the order was not known to the inferior and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the inferior will be protected."). See also Hilaire McCoubrey, *International Humanitarian Law* 221 (1990) (observing that even after Nuremberg, in international law "superior orders will still operate as a defense if the subordinate had no good reason for thinking that the order concerned was unlawful.").

5 The Charter was designed to apply exclusively to offenses, such as crimes against humanity, that were already classified at the legislative stage as manifestly unlawful. This foreclosed any defense of reasonable mistake, as clearly inconsistent with legislative intent. Yoram Dinstein, *The Defense of 'Obedience to Superior Orders' in International Law* 20713 (1965). The same is true of the Israeli statute under which Eichmann was prosecuted. L.C. Green, "Legal Issues in the Eichmann Trial," 37 *Tul. L. Rev*. 641, 673 (1963).

Only the Security Council, however, has sought to shape the military law of due obedience. In chartering the International Tribunals for the former Yugoslavia and for Rwanda, the Council disallowed superior orders as a defense, permitting its use only in mitigation of sanction.6

These Security Council pronouncements suggest that international law offers no excuse of due obedience to the soldier of any rank who performs a criminal act of any sort, even the most minor. But this would almost certainly be mistaken as a general statement of international law; there is virtually no authority for such a proposition. Moreover, it probably does not reflect the intentions of those who drafted the Tribunals' statutes.

In fact, in its very first case, the Tribunal for the former Yugoslavia made clear in dicta that it would not even preclude a defense of duress to a charge of war crimes or crimes against humanity, where facts convincingly indicate that the defendant acted in obedience to the orders of a superior who threatened him with summary execution.7 In short, evidence of having received orders from superiors, though not a complete defense, is relevant and admissible to the question of whether the soldier labored under duress when performing the commanded.8

Customary law provides a fourth source from which an answer must be developed. One can discern custom from the general practice of states, as reflected here in their prosecutions of soldiers, both their own and their enemies', for war crimes and crimes against humanity.

6 See "Secretary-General's Report on Aspects of Establishing an

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia," U.N. Doc. s/25704 (1993), art. 6, ¶ 57, art. 7, ¶ 4, 32 *Int'l Legal Materials* 1159 (1993).

7*Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22-T, 9 (1996). See also Col. Anthony Paphiti, "Duress As a Defense to War Crimes Charges," (May, 1997) (paper presented to the XIVth Congress of the International Society for Military Law and the Law of War, Athens). The Tribunal noted "While the complete defense based on moral duress and/or a state of necessity stemming from superior orders is not ruled out absolutely, its conditions of application are particularly strict."

8 This book, however, focuses exclusively on cases where the superior's order bears on the subordinate's claim of mistakelegal, factual, or mixedrather than duress. The latter issue cannot be ignored in any full assessment of the problem, to be sure. But it presents very different questions, one of great complexity, sufficient to require separate study.

Such prosecutions are generally based on domestic military codes that incorporate by reference the relevant international treaties defining such offenses.9

But, as we have seen, the relevant international treaties have no codified "general part," identifying or precluding particular defenses. So even where municipal prosecutions appeal directly to international law (rather than simply to domestic military law), courts generally have to look to municipal law concerning the availability and scope of particular defenses, including that of due obedience.10

Prosecutions by nation-states suggest a variety of approaches to due obedience. Some states, seeking to maximize compliance with official directives, offer the soldier a complete excuse when he obeys unlawful orders, regardless of whether he can establish that he mistakenly believed the order to be lawful or whether it contributed to a situation of duress. This approach was widely favored in the Communist bloc and is still favored throughout much of the Third World.11

Other states will excuse the soldier only if his obedience resulted from an honest belief that the order was lawful.12 Still others, such as the United States and Germany, additionally insist that the soldier's error must have been reasonable (or "unavoidable," in the civil law terminology).13 The majority approach in the industrialized democratic West appears to be the manifest illegality rule. Under this

9 See, e.g., Article 18, U.C.M.J., 10 U.S.C. sec. 818 (1970).

10 Virtually all military codes include some provision on due obedience.

The upshot, in short, is that though international law often tells us what is prohibited and when state prosecution is required, it gives little precise guidance about how to treat particular individuals who violate such prohibitions pursuant to superior orders.

11 Howard S. Levie, *Protection of War Victims* 10, 1516, 19, 22, 31, 3744 (1985) (quoting speeches of representatives to the convention negotiating the Protocol).

12 This approach is also adopted by several states in the United States in statutes governing their militias.

13 In the United States, for instance, "It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful." *Manual for Courts-Martial* 11109 (1995). The legal status of this manual derives from its having been drafted in compliance with an executive order that Congress sought from the President, in Article 36 of the U.C.M.J.

rule, the law presumes that the soldier obeys unlawful orders because he mistakenly believes, honestly and reasonably, in their lawfulness. This presumption is rebutted only when the acts ordered were so egregious as to carry their wrongfulness on their face.[14]

A Genealogy of Terms

Roman military law described the relevant subset of offenses, those legally inexcusable despite having been performed under orders, as "atrocities."[15] This word never became a legal term of art, however, with a settled meaning distinct from ordinary Latin. It no longer occupies any place within the formal language of international military law. It was first supplanted by the term "manifest illegality," then "war crimes," later the subset of war crimes constituting "grave breaches" of the Geneva Conventions,[16] and finally "exceptionally serious war crimes."[17] Though these categories overlap considerably,

14 Many scholars casually describe this approach as adopted by most states. But no one has conducted a systematic empirical survey of military codes throughout the world. Without such an inquiry, it is premature to speak confidently of the manifest illegality approach as the majority rule.

15 *Digest Law 157, tit. XVII, Lib. L.*, Roman law exercised considerable and enduring influence on medieval and early modern Courts of Chivalry, even in England and well into the 17th century. G. D. Squibb, Q.C., *The High Court of Chivalry* 16265 (1959). But recent scholarship suggests that custom or usage was a more important source of constraint in war than Roman law, at least in northern Europe. Matthew Strickland, *War and Chivalry* 3440 (1996).

16 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, T.I.A.S. No. 3365, arts. 14647 (defining what constitutes a grave breach in the context of offenses spelled out in earlier articles). The Convention provides that ratifying states must commit themselves to prosecuting all incidents of grave breaches and that universal jurisdiction exists for such offenses.

17 Report of the International Law Commission on the work of its Forty-Third Session, U.N. GAOR, 46th Sess., Supp. No. 10, at 198, U.N. Doc. A/46/10 (1991) (defined exhaustively, in article 22, as "acts of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons . . . in particular, willful killing, torture, mutilation, biological experiments . . . "). The qualifying adjectives "grave breaches" of the Geneva Conventions, and "exceptionally serious" war crimesseem designed to indicate the international community's "selective emphasis upon major violations." H. McCoubrey, "War Crimes: The Criminal Jurisprudence of Armed Conflict," 31 *Mil. L. & L. of War Rev*. 167, 176 (1992).

their scope is not coterminous. Moreover, the relation between them remains unclarified and infuriatingly obscure.[18]

In the military law of many states, the older terminology persists, in codes which describe the superior orders defense as qualified by an exception covering "atrocious and aberrant acts."[19] Even so, many military codes now speak in terms identical or virtually identical to international law, excluding from the defense all crime the illegality of which is "manifest," "outrageous," "gross," "palpable," "indisputable," "blatant," "unmistakable," "clear and unequivocal," "transparent," "obvious," "without any doubt whatsoever," or "universally known to everybody."[20] In the High Command Case, the International Military Tribunal at Nuremberg referred to acts and orders "in evident contradiction to all human morality and every international usage of warfare."[21] The order must also display its obvious criminality "on its face," according to many authorities.[22]

18 On these terminological obscurities and resulting confusions, see G.I.A.D. Draper, "The Modern Pattern of War Criminality," in *War Crimes in International Law*, 141, 16070 (Yoram Dinstein and Mala Tabory eds., 1996) (noting, for example, that the "division between 'grave' and other breaches does not satisfy. In their anxiety to avoid the term 'crimes', the redactors [of the 1977 Protocol 1] have opened up a vista of uncertainty . . . "). *Id*. at 165.

19 On Argentine law, for instance, see Cód. Just. Mil. art. 514 (1985); Cód. Pen. art. 5 (1985). For discussion, see Guillermo Fierro, *La Obedencia Debida en el Ámbito Penal y Militar* 13941 (1984).

20 Ronald A. Anderson, *Wharton's Criminal Law and Procedure* sec. 118, 25759 (1957). For the countries and commentators adopting these various formulations, see Dinstein, *supra* note 5, at 212, 174, 128, 129,

79, 15, 16; L. C. Green, "Superior Orders and the Reasonable Man," in *Essays On the Modern Law of War*, 43 (1985) (citing these and other formulations employed by military penal codes, field manuals, and courts martial in the United States, Britain, Canada, France, and West Germany).

21 7 *War Crimes Reports* 27, 4142 (1947).

22 See, e.g., "Army and Navy," 6 *Corpus Juris Secundum*, sec. 37 (1937) ("A soldier who executes an illegal order . . . is not criminally liable for the execution [if the order is] one which is fair and lawful on its face; but an order illegal on its face is no justification for the commission of a crime."); *P.M. Riggs v. 41 Tenn*. (1 Cold.) 70 (1866) (holding that "an order given by an officer to his private, which does not expressly and clearly show on its face, or in the body thereof, its own illegality, the soldier should be bound to obey, and such an order would be a protection to him."); Levie, "Rise and Fall," *supra* note 1, at 185; Green, *supra* note 5, at 679; Anderson, *supra* note 20, at 258; Annotation, "Civil and Criminal Liability of Soldiers, Sailors, and Militiamen," 135 *A.L.R.* 10, 37 (1941).

Authorities often suggest, moreover, that the criminality of the order must be such that the recipient "would know as soon as he heard the order read or given that it was illegal . . . "[23] This formulation introduces a temporal element into the analysis of the subordinate's conduct. The criminality of the order must be identifiable immediately because the subordinate, it is assumed, will need to obey the order immediately or nearly so.[24] This assumption proves unwarranted, however, because it overgeneralizes; it is true only in some circumstances.[25]

The older term, atrocity, is still useful and widely used, despite its lack of clear conceptual edges and its uncertain relation to such kindred concepts as war crimes and grave breaches of the Geneva Conventions.[26] The scope of the phenomena at issue in this book can be easily described with relatively nontechnical language: the deliberate harming of known noncombatants (and their property), a

23 Anderson, *supra* note 20, sec. 118; *Riggs v. State, supra* note 22, at 91 (holding that the order's illegality must be apparent to the ordinary soldier "when he heard it read or given."); *McCall v. McDowell* et al., 1 Abb 212 (1887) (holding that the illegality must be apparent "at first blush . . . ").

24 Michael L. Martin, *Warriors to Managers: The French Military Establishment Since 1945* 215 (1981) (describing French military law to this effect).

25 As two defense analysts write, "A theater commander is interested in threats that may take days or weeks to show themselves. A divisional commander concerns himself with hours and days; a battalion commander deals in minutes and hours. For a company and platoon commander, seconds count." George Friedman and Meredith Friedman, *The Future of War* 151 (1996). These distinctions are highly pertinent to

criminal liability, as observes William J. Fenrick, Senior Legal Adviser to the Office of the Prosecutor, International Criminal Tribunal for the Former Yugoslavia. Fenrick, "Attacking the Enemy Civilian as a Punishable Offense," 7 *Duke J. Comp. & Int'l L*. 539, 564 (1997). "The tempo of operations is a relevant factor in determining the legitimacy of particular attacks. If ground forces are engaged in wide-ranging mobile operations in circumstances where decisions to attack must be made frequently and quickly and on the basis of very limited information, good faith errors can be made and no criminal liability should attach. Conversely, when armed forces are engaged in operations in a relatively static situation, such as a siege, or when there is relatively little fighting occurring, it is reasonable to assume that decision-makers are able to devote more time and effort to individual attack decisions.")

26 There is no canonical definition of atrocity in either the military or legal literature. The *O.E.D*. defines it as an act characterized by "savage enormity, horrible or heinous wickedness." *Oxford English Dictionary* 757 (2d. ed., 1989).

category encompassing both civilians and soldiers who have surrendered (or sought to surrender), and the use of prohibited methods of warfare against enemy forces.

Types of Soldiers' Errors

This book offers a general perspective on the problem of due obedience, for readers not only in law but also in the social sciences humanities, as well as the service academies and war colleges. In deference to the nonlawyers, I avoid many complexities of legal doctrine. But a basic introduction is essential to the key choices faced by all legal systems on matters of military obedience.

Even we lawyers often speak loosely of "the defense of following orders." But strictly speaking, there is no such thing. Rather, there are a variety of ways in which legal systems attach exculpatory significance, in differing degrees, to the fact that a military subordinate acted pursuant to orders in committing his offense.

Two approaches stand out as marking the fundamental choice. For the first, that the soldier acted under orders is simply an admissible fact, bearing on his claim to have been mistaken about the legality of his conduct. The soldier claims that having received orders to perform his wrongful actions contributed (along with other things, perhaps) to his mistaken belief.

The military codes of some countries require that the soldier's mistake have been reasonable. For others, it is enough that his mistake was honest. The defendant bears the evidentiary burden of proving this defense,27 i.e., once the prosecution has established

that the defendant performed the prohibited act with the required mental state.[28]

The second general approach to the problem is much more lenient with the defendant-soldier. Having acted pursuant to orders is not merely a fact that is admissible as relevant to a defense of mistake

[27] David Schlueter, *Military Criminal Justice: Practice and Procedure* 71 (1996). The defendant also bears this evidentiary burden if he introduces the superior's orders as a fact relevant to a defense of duress.

[28] Depending on the offense with which he is charged, the defendant must have intended the wrong, known that it would occur, or been recklessly indifferent about this probability.

or duress. Rather, it is a defense in its own right, one which places a much heavier evidentiary burden on the prosecution. If the defendant can show that he acted pursuant to orders, then the law will presumeconclusively in some countries, rebuttably in othersthat he reasonably believed his orders to be lawful. It will excuse him on that account. Where it may rebut this presumption, the prosecution can attempt to show that this defendant actually knew his conduct to be unlawful or was reckless in thinking otherwise.

Some military codes make this showing easier than others. Most make it very difficult. They require prosecutors to establish that the defendant's acts were so flagrantly atrocious that no one would ever mistake them as lawful under any circumstances, even if ordered by superiors in the heat of combat.

In other countries, the prosecutors' task is easier. They need only show that a reasonable soldier, in the defendant's particular circumstances, would not have mistaken his orders as lawful. Some of these circumstances can be highly inculpatory. They are admissible to show that there was no mistake, reasonable or otherwise.

Many military codes, particularly in the Third World, adopt a strong version of the second approach. This effectively prevents prosecutors from rebutting the presumption of reasonable mistake or duress. At the other end-point on the spectrum, a few of the wealthiest constitutional democracies expressly adopt the first approach. It is also strongly favored, as a rule of international law, by most civilian legal commentators. The views of military lawyers

in developed societies are mixed, but incline toward versions of the second approach.

Some military codes adopt a position intermediate between the two archetypal approaches just described. The conclusions of sociology and policy reached in Parts II and III of this study are pertinent to all such resolutions of the question. But my conclusions pose particular problems for the second approach. This approach, after all, puts its thumb firmly on the "obedience to authority" side of the scale and is therefore considerably more generous to the soldier accused of obeying criminal orders.

To say that a soldier mistakenly believes his orders to be legal can mean at least three things. It can mean that he is mistaken about some relevant fact. For instance, let us say that superiors commanded

him to bombard by artillery a cultural shrine which, they inform him, is currently being employed for ammunitions storage. In fact, it is no longer being used for this purpose. It has consequently regained its Hague Convention protections.

The soldier's mistake can take a second form. It may be one of law. Many legal systems, particularly in the common law world, treat mistakes of law less leniently than mistakes of fact. Suppose the soldier faces the question of whether his target, as a particular type of cultural institution, comes within the scope of buildings prohibited by Hague law from direct targeting.

Third, the soldier's mistake may be a "mixed" one of both fact and law. The question he confronts is, let's say, whether a possible human target continues to enjoy the legal status of "noncombatant," despite having apparently performed certain acts that might deprive him of that status. In fact, the targeted person has not actually performed the acts of which he is suspected. And even if he had done so, he would not have lost his noncombatant status in law.[29] Such a mistake is generally treated as one "of law."[30]

The distinction between errors of fact and of law has much greater significance for the first of the two approaches to due obedience than for the second. The critical focus of this study is on the second and more indulgent of the two, as embodied in the manifest illegality rule.[31]

Legal Formalities vs. Social Realities

Some writers on military law go so far as to deny the existence of any "soldier's dilemma," asserting that on close inspection, it

29 On such ambiguities, see Richard Baxter, "So-Called 'Unprivileged Belligerency': Spies, Guerrillas and Saboteurs," 23 *Brit. Y.B. of Int'l L.* 323 (1951).

30 This is because the law in question is penal in nature. Specifically, the definition of "noncombatant" comes from international conventions incorporated by reference into the U.S. Uniform Code of Military Justice. Several other countries treat the matter in a similar fashion.

31 The fact vs. law distinction is therefore irrelevant to most of the ensuing argument and accordingly receives little attention.

vanishes.[32] After all, they rightly note, if the superior's orders are lawful, the subordinate should obey them; if they are not, then he can disobey them with legal impunity, confident that their illegality provides him a complete defense. Q.E.D.

But this 'resolves' the soldier's dilemma only through a formalism completely at odds with the serious practical constraints under which soldiers must often operate. The reader may already have asked herself, for instance, what happens if the subordinate recognizes his superior's order as unlawful and initially resists compliance.

The subaltern can request to be formally relieved of duty, so that he will not have to disobey the illegal order. But his superior is under no obligation to grant that request. Junior officers are bound by the terms of their commissions, which in the U.S. do not allow voluntary resignation before a designated future date.[33]

The superior, let's say, then threatens summary punishment in the field. Back at the base, in a formal court martial proceeding, of course, the subordinate could successfully defend his disobedience by establishing the order's unlawfulness. But he may never get that chance, as a practical matter, if his superior can coerce compliance by effectively threatening to employ the summary punishment procedures that he possesses. Once the subordinate has obeyed the unlawful order, he has little reason to report having received one and, in fact, has considerable incentive to avoid its being reported.

Virtually all military legal systems authorize such informal procedures in the field, to reestablish order in the face of urgent

32 Waldemar Solf, "War Crimes and the Nuremberg Principles," in

John Norton Moore et al., *National Security Law* 359, 391 (1990) (asking "Is there really a soldier's dilemma?").

33 U.S. law is more stringent (or unforgiving) here than that of some other Western democracies, such as France and Canada. Richard Gabriel, "Legitimate Avenues of Military Protest," in Wakin et al., eds., *Military Ethics* 11113 (1987) (contending that "both . . . societies have long recognized the right of the military officer to resign in protest and, indeed, he is expected to resign over questions of honor."). U.S. law has greatly hindered the development of such a tradition here. Lt. Cmdr. Donald Koenig, "Military Ethics as the Basis for the Senior Leader to Ensure that Military Force is Used Responsibly," paper presented at the Joint Services Conference on Professional Ethics 13 (1998) (discussing "the absence of a moral resignation history within the U.S. military.").

threats to discipline. In the most exigent situations, summary process of this sort can even justify the imposition of capital punishment, as in the following example reported by a British officer.

> On one occasion . . . a soldier suddenly started screaming out as a German attack was being launched: 'Get out! Get out! We're all going to be killed.' The rest of the men in his trench started to break. There was only one thing to do, and a Sergeant did it. He picked up a spade and hit out with it as hard as he could, splitting the man's head in half and killing him instantly. The rot was stopped, and the German attack was repulsed.34

This is an "example of how one man nearly caused a disaster and how the day was saved,"35 by imposition of the most severe of summary punishments. But once such sanctions are made available to superiors (and subordinates know of their availability), how are we to prevent their abuse, that is, in securing obedience to criminal orders?

The question raises issues about the subordinate's "duress." These take us beyond the scope of the present study, exclusively concerned with questions of error. But the scenario presents a more general problem, that of how much independence and opportunity for initiative soldiers should receive. How can the law, in turn, help secure whatever measure of such autonomy is appropriate to soldiers performing various tasks at different levels within a military organization? The problem is particularly acute because armies at war all too often become, in Hirschman's terminology, organizations in which "exit is . . . considered as treason and voice as mutiny."36

34 John Baynes, *Morale* 104 (1967) (reporting this story, as told him by a French medical officer in World War I.).

35 *Id*. In less exigent circumstances, of course, the superior could simply relieve the subordinate of duty, place him under arrest, and have him sent to the rear for court martial. In the field, the superior could also apply certain non-judicial sanctions, pursuant to Article 15 of the Uniform Code of Military Justice.

36 Albert Hirschman, *Exit, Voice, and Loyalty* 121 (1970). For further analysis of military obedience in light of this theoretical framework, see *infra* chapter 21.

When to Treat Soldiers Differently from Civilians

The capacity of the human mind to process complex information in situations of extreme adversity, such as those on the battlefield, is quite limited.[37] Criminal law often faces the question of how far to go in the direction of reducing liability in light of such inherent cognitive constraints.[38]

In criminal codes governing civilians, the basic rules are well known: ignorance or mistake of fact or law is a defense only when it negates the existence of a mental state essential to the crime.[39] Some offenses are defined to require awareness that one's act is unlawful.[40] In such cases, any mistake causing one to believe one's act lawful

37 Sustained exposure to combat involves continuous fatigue, filth, hunger, sleep deprivation, cold, heat, anxiety, stress, and fear. These quickly begin to alter the brain's chemistry, causing mental abilities to fall off and leading to "great difficulty comprehending even the simplest instructions." Richard A. Gabriel, *No More Heroes* 142 (1987). He adds, "as the warriors among us improve the technology of killing, the power to drive combatants crazy, to debilitate them through fear and mental collapse, is growing at an even faster rate." *Id*. at 45. The considerable effect of sleep deprivation on military performance is now well-studied. Col. Gregory Belenky, "Sleep, Sleep Deprivation, and Human Performance in Continuous Operations," paper presented at the Joint Services Conference on Professional Ethics (1997) (concluding that "no act of will or ethical passion, no degree of training will preserve the ability to discriminate friend from foe, armed enemy from noncombatant, militarily useful target from distraction, after 96 hours of sleep deprivation.")

38 Cognitive psychology has recently made considerable strides in

identifying certain features of such limitations. See generally Daniel Kahneman et al., *Judgment Under Uncertainty* (1994). Criminal law will stand much to learn from such studies in identifying the relative reasonableness of different kinds of human error.

39 See, e.g., Model Pen. Code, § 2.04(1)(a) (1985). See also Model Pen. Code § 2.02(9) (1985), which provides "neither knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning, or application of the law determining the elements of an offense is an element of such offense, unless the definition of the offense or the Code so provides."

40 Examples include many regulatory offenses, such as shipping a controlled substance to the former Soviet Bloc without a license. See, e.g., 15 C.F.R. § 385.2(c) (1983) (requiring a valid license to ship oil or gas equipment to the Warsaw Pact countries); 15 *C.F.R.* § 385.2(d)(1) (1981) (requiring a license to sell commodities that a person "knows or has reason to know" would be used for the 1980 Summer Olympics in Moscow.).

negates the required intent. Most offenses, however, do not require knowledge that one's conduct is unlawful as a condition of liability. Ignorance of one's legal duties does not excuse such acts.

The rationale for this rule includes the difficulty of assessing the honesty of a defendant's claim of mistake[41] and the incentive for citizens to remain informed of their duties.[42] The principal exception involves the highly unusual situation in which the accused has reasonably relied on authorities to whom such deference is heavily encouraged by public policy.[43]

Even so, the defense of reasonable mistake of law has been significantly enlarged within the American legal system in recent years,[44] bringing it into greater conformity with the German and other continental systems.[45]

The Duty to Presume an Order's Lawfulness

Still, soldiers are treated more leniently than civilians under both international law and the municipal military law of most states.[46] Virtually everywhere, the law requires soldiers to presume the

41 John Austin, *Lectures on Jurisprudence*, 498500 (3d ed. 1869).

42 Oliver Wendell Holmes, *The Common Law* 48 (1963) (org. 1881); Douglas Stroud, *Mens Rea* 52 (1914).

43 Model Pen. Code, § 2.04(3)(b) (1985) (excusing mistakes owing to "reasonable reliance upon an official statement of the law . . . contained in (i) a statute or other enactment; (ii) a judicial decision . . . (iii) an administrative order . . . or (iv) an official interpretation of the public officer or body charged by law with . . . enforcement of the law defining the offense.").

44 See, e.g., *Liparota v. United States*, 471 U.S. 419 (1985) (requiring

knowledge of illegality for conviction of unlawful acquisition and possession of food stamps). Much of this expansion in the scope of the defense extends only to so-called *mala prohibita* offenses. Michael L. Travers, "Mistake of Law in *Mala Prohibita* Crimes," 62 *U. Chi. L. Rev*. 1301 (1995).

45 In German law (like Argentine and that of other legal systems heavily influenced by the German), the error is called "unavoidable." Judgment of Mar. 18, 1952, 2 BGHSt 194; Hans Welzel, *Das Deutsche Strafrecht* 16474 (4th ed., 1971). See generally George P. Fletcher, "The Individualization of Excusing Conditions," 47 *S. Cal. L. Rev*. 1269, 1296 (1974).

46 Barrie Paskins and Michael Dockrill, *The Ethics of War* 273, 27576 (1979) (concluding that the manifest illegality rule "lays a relatively light burden on the individual" and that there are "reasons for demanding of the soldier that he exercise himself about the legality of orders beyond the merely manifest.")

lawfulness of their orders.[47] Military legal systems vary in the ease and manner in which this presumption is rebutted.[48] But most such variations have negligible practical implications for the scope of the defense.

The manifest illegality rule embodies this approach. Only the most transparent forms of illegality can effectively rebut the law's presumption that the soldier was ignorant of the illegality of orders from his superior. But once the presumption of the soldier's legal error is overcome, an opposing presumption arises. It is then conclusively presumed that the soldier could not have been ignorant of the order's illegality or of his corresponding duty to disobey it.[49]

In the interest of discipline, military law thus abandons the civilian fiction that everyone knows all his legal duties. Faced with superior orders, the soldier is presumed to know only the law concerning that subset of crimes immediately recognizable as manifestly criminal by a person of ordinary understanding.[50] To judge from the litigated cases, this subset has virtually always involved clear atrocities.

47 See, e.g., *Unger v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989) and David Schlueter, *supra* note 27, at 71. The current U.S. acceptance of this principle sits somewhat uneasily with the provision of our *Manual for Courts-Martial*, R.C.M. 916(1)(1) (1995) providing that "as a general rule, ignorance of the law . . . is not an excuse for a criminal act." The soldier's duty to presume the legality of superior orders has a long history, and was notably defended by Augustine and Pufendorf. Nico Keijzer, *Military Obedience* 150 (1978). A legal presumption, in this context, should be understood as "a license to act as if a certain fact is the case in the absence of adequate evidence to

support a belief that the fact is the case." Joseph Raz, *The Morality of Freedom* 10 (1986).

48 Keijzer, *supra* note 47, at 21618; L.C. Green, *Superior Orders in National and International Law* 23641 (1976) (general overview), 3334 (South Africa), 46, 50 (Canada), 7071 (Australia), 98 (Israel), 119 (United States), 161 (Belgium), 163 (Denmark). See generally D.H.N. Johnson, "The Defense of Superior Orders," *Australian Y.B. of Int'l L.* 291 (1985); Theo Vogler, "The Defense of "Superior Orders" in International Criminal Law," in 1 *A Treatise on International Criminal Law* 619 (M. Cherif Bassiouni and Ved P. Nanda, eds., 1973).

49 Dinstein, *supra* note 5, at 3137.

50 The Nuremberg Charter and corresponding decisions did not reject this view. The Charter was simply designed to apply exclusively to offenses that were already regarded as manifestly illegal. This foreclosed any defense of reasonable legal error, as a matter of legislative intent. Dinstein, *Id*. at 20713.

Current Law as Compromise

The traditional rule excusing nonatrocious errors by soldiers reflects a compromise between the interests of military discipline and the supremacy of the law.[51] An unqualified concern with military discipline would support a bright-line rule of *respondeat superior*, holding the superior alone liable for unlawful conduct commanded of subordinates, excusing the latter, and thus ensuring blind obedience.[52]

An unqualified concern with the supremacy of law, by contrast, would entail a blanket rule of shared responsibility for all involved, holding subordinates liable for all crimes committed pursuant to superior orders, even when the offense was relatively minor, seemingly lawful under the circumstances, or commanded under threat of court-martial.[53] The drawbacks of either extreme are almost universally recognized by all students of the problem.[54]

51 Albin Eser, "'Defences" in War Crimes Trials,' in Dinstein and Tabory, eds., *supra* note 18, at 251, 255, 259 (describing the manifest illegality rule as one of "a middle of the road approaches.").

52 For codes and commentators favoring this approach, see Nico Keijzer, "A Plea for the Defence of Superior Order," 8 *Israel Y.B. on Hum. Rts*. 78, 8084 (1978). On the British rule to this effect, abandoned in the 1920s, see also Command of the Army Council, *Manual of Military Law* 83 (7th ed. 1939).

It bears emphasis that the doctrine of *respondeat superior* has acquired a radically different meaning in international military law than in the law of agency and employment, where it originated. In the latter context, the doctrine does not excuse the subordinate who does his employer's bidding, but simply adds the employer as a culpable party. In international military law, by contrast, the doctrine is understood to

mean that the superior *alone* responds for the subordinate's illegal conduct.

Shakespeare offered a memorable account of its logic in *Henry V*. One infantryman hails the King's cause as just and honorable. "That's more than we know," replies a second. Adds a third: "Ay, or more than we should seek after, for we know enough if we know we are the King's subjects. If his cause be wrong, our obedience to the King wipes the crime of it out of us." William Shakespeare, *King Henry V*, 26465 (T.W. Craik ed. 1995).

53 This approach was favored by Grotius and Locke. Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres* 368 (Francis Kelsey, ed. (1995)); John Locke, *Two Treatises of Government* ¶ 151, at 386 (2d ed. 1694).

The compromise reached by most national codes of military justice and most sources of international law has been that a soldier may presume the lawfulness of superior orders, and will be excused from punishment if they prove unlawful, unless they require acts so transparently wicked as to foreclose any reasonable mistake concerning their legality. This still leaves the question of whether the mere fact of having followed a superior's order is enough to establish a legal presumption in the defendants' favor, in other words, that the

> In the first United States Supreme Court case raising the issue, Chief Justice John Marshall, though initially inclined to favor a simple rule of respondeat superior, eventually concurred in the Court's holding that "the [President's] instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass." *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177 (1804). The case concerned the scope of the President's powers under the Non-Intercourse Act. Claiming authority under that legislation, President Washington ordered United States military vessels, during the Franco-American War of 1789-1800 to seize foreign ships trading with the French. Pursuant to that command, Capt. George Little of a United States frigate, the *Boston*, seized a Danish ship, the *Flying Fish*. See *Id*. The Court found that since the President's command exceeded what the statute permitted, the captain was liable for civil damages to the owner of the Danish ship. *See Id*.
>
> In another case of civil trespass, Chief Justice Roger Taney would later offer an even stronger statement of the rejection of respondeat superior. "It can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior." *Mitchell v. Harmony*, 13 U.S. (1 How.) 115, 137 (1851).
>
> As these sources indicate, American courts during the 19th century largely rejected the doctrine of respondeat superior in the military

context. William C. De Hart, *Observations on Military Law* 165 (1859) (citing the 9th Article for War for the proposition that "The principle of conduct is, that illegal orders are not obligatory."); Aubrey M. Daniel, III, "The Defense of Superior Orders," 7 *U. Rich. L. Rev*. 477, 483 (1973) (reviewing early American law on superior orders, authored by the military prosecutor of Lt. William Calley).

Though several of these early cases involved civil suits, I do not examine civil cases here. Nor do I address criminal cases in which the defendant alleges that his superior's order, combined with surrounding circumstances, placed him under a state of duress. Such facts present issues sufficiently different to warrant separate treatment. These issues were recently presented in the defense of Drazen Erdemovic before the International Tribunal for the Former Yugoslavia.

54 See, e.g., Dinstein, *supra* note 5, at 235 (noting the substantial consensus among sources of public international law); N.C.H. Dunbar, "Some Aspects of the Problem of Superior Orders in the Law of War," 63 *Jurid. Rev*. 234, 252 (1951) (noting the consensus of several national codes of military justice on this issue).

defendant was ignorant of the illegality of the ordered conduct. That approach has been adopted by many countries.

The doctrine of manifest illegality relies upon the notion of partially shared responsibility. The doctrine demands that the subordinate share responsibility with his superior only for the clearest, most obvious crimes. Courts ascribe legal responsibility to the subordinate only when they are truly certain that he possessed and exercised such responsibility. Courts have that confidence only when the subordinate obeyed an order that any reasonable person would know to be illegal.

The now-disfavored alternative of *respondeat superior*, by contrast, refrained from any apportionment of responsibility between superior and subordinate. It assigned all legal responsibility to the superior, regardless of the facts of the case or the severity of the offense, and offered the subordinate a simple *quid pro quo*, complete impunity for criminal conduct committed pursuant to orders, in exchange for his unqualified obedience.

Logic, Experience and Postwar Legal Change

The rationale for this approach was again pragmatic: the belief that society's interests in protection from external foes demanded a degree of discipline within its armed forces that required a concession of total impunity to its soldiers. The decline of *respondeat superior* in public international law and the military penal codes of most nations has been less a result of logic than of painful experience. It was the historical experience of Nazi war crimes, conducted pursuant to superior orders, that led national and international legislators to reassess the relative dangers to their

societies of obedience to unlawful orders and disobedience to lawful ones.

For instance, one of the century's most influential authors on international law, H. Lauterpacht, confesses that he abandoned his long-standing defense of *respondeat superior*, and his opposition to the exception for manifestly illegal acts, not on account of any new and more persuasive arguments. He changed his view simply in

response to his shock upon disclosure of Nazi atrocities perpetrated in obedience to orders.55

To be more concrete about the currently prevailing approach, let us consider Argentina's military penal code. The pertinent provision states: "When crime was committed in execution of superior orders involving an act of military service, the superior who gave the order will be the sole responsible person, and the subordinate will be considered an accomplice only if he exceeded his orders in the course of fulfilling them."56

An "excess" is defined, following the model of Roman law, to include any "atrocious and aberrant act."57 This provision was employed to hold Argentina's junta members liable for the acts of their subordinates during the "dirty war"58 kidnapping, torture, murder, disappearance, and so forth. Here, having followed a superior's command is not merely a fact relevant to determining presumption that whether the subordinate acted in error. It is presumptively sufficient to establish that ignorance. Argentine law thus creates a rebuttable the subordinate acted under a reasonable mistake of law.

The prosecution may rebut this by evidence that the defendant nevertheless actually knew his conduct was unlawful. If the prosecution can prove the defendant's acts atrocious and aberrant, the presumption reverses conclusively in the prosecution's favor. This general approach is common throughout the world.59

By contrast, some interpretations of international law treat the superior orders defense in a less forgiving fashion. Obedience to a

55 L. Oppenheim, 2 *International Law* 57172 (H. Lauterpacht, ed.,

7th ed. 1952).

56 Cod. Just. Mil. art. 514 (1985).

57 L.N. 23.049; Carlos Nino, "The Duty to Punish Past Abuses of Human Rights Put Into Context: the Case of Argentina," 100 *Yale L.J.* 2619, 2626 (1991) (noting that for such acts "the very nature of the deed constituted evidence which permitted a judge to revoke the presumption that the agent had believed the orders were legitimate.")

58 This term refers to the Argentine government's campaign of terror from 1976 to 1980, during which military officers and para-military forces murdered at least 11,000 citizens. Alison Brysk, *The Politics of Human Rights in Argentina* 3743, 12535 (1994).

59 See, e.g., *P.M. Riggs v. State.; Keighly v. Belle* (U.K.); Green, *supra* note 48, at 97110 (Israel), 17071 (Italy).

superior's order is simply one relevant fact, among others, in determining whether he acted in error of his legal responsibilities.[60] But both this approach and the preceding reject the choice between *respondeat superior* and *ignorantia legis neminem excusat*.

This compromise ensures that some measure of "sociological ambivalence"[61] is built into the internal normative structure of the soldier's social role. That role, after all, is legally defined as requiring "a dynamic alternation of norms and counter-norms," each "calling for potentially contradictory attitudes and behaviors."[62]

To be sure, general attitudes of deference to superiors and obedient behavior are logically compatible with a legal requirement of undeferential disobedience in certain specified and delimited circumstances. But as a practical matter, when any role demands "an oscillation of behaviors: of detachment and compassion, of discipline and permissiveness, of personal and impersonal treatment, "[63] it becomes much more demanding, both intellectually and emotionally, on those who occupy it. These requirements may well be perfectly defensible, but it would be wrong for armchair analysts to minimize their demanding character.

Why *Ever* Excuse Obedience to Illegal Orders?

In most minds, the defense of obedience to superior orders is inextricably linked to the Nazi defendants who invoked it at Nuremberg. This historical association indelibly taints the defense.[64]

60 Dinstein, *supra* note 5 at 253. Dinstein influentially argued that the legal relevance of obedience is merely as a fact relevant to deciding whether the soldier really acted in error regarding his legal duty. In this view, no defense of obedience to superior orders exists, i.e., as an affirmative defense cognizable separately from those of legal error or duress.

61 On this concept, see Robert K. Merton, *Sociological Ambivalence and Other Essays* 1 (1976).

62*Id*. at 18.

63*Id*. at 8.

64 In fact, the very idea of obedience is presumptively suspect among those who pride themselves on their critical faculties. "Obedience . . . has a mechanical, brutish connotation that fits uneasily with our usual conceptions of moral responsibility." Peter L. Stromberg, Malham Wakin, and Daniel Callahan, *The Teaching of Ethics in the Military* 30 (1982).

Its moral defensibility thus initially appears to be something that no right-minded person could seriously entertain.

This view is mistaken. Within limits, the defense is entirely legitimate. These limits have long been established by the exception for atrocities, that is, for manifestly illegal acts. This exception ensured that invocation of the defense at Nuremberg, and by Adolf Eichmann years later, was unsuccessful.

The defense of due obedience makes most sense if we start with the infantryman's primal experience of war. As a Vietnam veteran writes,

> For the common soldier, at least, war has the feel, the spiritual texture, of a great ghostly fog, thick and permanent. There is no clarity. Everything swirls. The old rules are no longer binding, the old truths no longer true. Right spills over into wrong. Order blends into chaos, love into hate, ugliness into beauty, law into anarchy, civility into savagery. The vapor sucks you in. You can't tell where you are, or why you're there, and the only certainty is overwhelming ambiguity . . . You lose your sense of the definite, hence your sense of truth itself . . . 65

Reading such accounts, one can almost feel oneself sinking back into the primeval slime. The measure of cognitive and moral disorientation produced by long periods of ground combat, through fatigue, hunger, and omnipresent filth, ensures that "in many cases a true war story cannot be believed . . . Often the crazy stuff is true and the normal stuff isn't, because the normal stuff is necessary to make you believe the truly incredible craziness."66

Is there any way to make analytical sense, for moral and legal purposes, of such essential incoherence, such primeval devolution?

Some have tried. A literary historian, drawing on a cultural anthropologist, aptly writes,

> War experience is nothing if not a transgression of categories. In providing bridges across the boundaries

65 Tim O'Brien, *The Things They Carried* 88 (1990).

66 *Id*. at 79.

> between the visible and the invisible, the known and the unknown, the human and the inhuman, war offered numerous occasions for the shattering of distinctions that were central to orderly thought, communicable experience, and normal human relations. Much of the bewilderment, stupefaction, or sense of growing strangeness to which combatants testified can be attributed to those realities of war that broke down what Mary Douglas calls "our cherished classifications."67

One such disrupted classification, the distinction between the human and the inhuman, lies at the root of criminal law. In the disorientation of ground warfare, there is good reason to require that subordinates rely upon the greater knowledge and experience of superiors.68 This, in turn, demands that subordinates be given some latitude to obey orders the propriety of which may strike them as questionable, and later prove unlawful.

The famous 19th century English legal scholar, A. V. Dicey, offers a short, lucid statement of the rationale for the superior orders defense in a way that also demarcates the line between it and the exception for manifest illegality. Dicey asks us to compare two situations. In the first,

> An officer orders his soldiers in a time of political excitement then and there to arrest and shoot without trial a popular leader against whom no crime has been proved, but who is suspected of treasonable designs. In such a case there is (it is conceived) no doubt that the soldiers who obey, no less than the officer who gives the command, are guilty of murder, and liable to be hanged for it when convicted in due course of law. In such an extreme

67 Eric J. Leed, *No Man's Land* 21 (1979).

68 H. McCoubrey, *The Concept and Treatment of War Crimes* 121, 133

(1987) ("Not only discipline and efficacy but life itself may depend upon rapid and efficient compliance [with orders] in combat.").

> instance as this the duty of soldiers is, even at the risk of disobeying their superior, to obey the law of the land.69

Dicey then contrasts this situation with a second:

> An officer orders his men to fire on a crowd who he thinks could not be dispersed without the use of firearms. As a matter of fact the amount of force which he wishes to employ is excessive, and order could be kept by the mere threat that force would be used. The order, therefore, to fire is not in itself a lawful order, that is, the colonel, or other officer, who gives it is not legally justified in giving it, and will himself be held criminally responsible for the death of any person killed by the discharge of firearms.70

This second situation leads Dicey to conclude:

> Probably . . . it would be found that the order of a military superior would justify his inferiors in executing any orders for giving which they might fairly suppose their superior officer to have good reasons. Soldiers might reasonably think that their officer had good grounds for ordering them to fire into a disorderly crowd which to them might not appear to be at that moment engaged in acts of dangerous violence, but soldiers could hardly suppose that their officer could have any good grounds for ordering them to fire a volley down a crowded street when no disturbance of any kind was either in progress or apprehended.71

69 A. V. Dicey, *Introduction to the Study of the Law of the Constitution* 304 (10th ed., 1959).

70*Id*.

71*Id*. at 305 (quoting James Fitzjames Stephen, 1 *The History of the Criminal Law of England* 20506 (1883). *Cf*. Report of the Committee appointed to inquire into the circumstances connected with the disturbances at Featherstone on the 7th of September 1893, C. 7234

(1893). Dicey's examples are especially useful in showing the moral defensibility of the superior orders defense since they concern mistakes of fact, rather than of law, or even mixed errors of law and fact. It is admittedly more difficult to justify the defense as applied to pure mistakes of law, where it has nonetheless sometimes been applied.

Even in the civilian context, there are situations implicating a strong societal interest in immediate obedience by ordinary citizens to directives from officials.72 The Model Penal Code provides an excuse for those who obey unlawful directives (usually from police) in civil emergencies.73 In exigent circumstances, civilian legal authorities who demand assistance from laymen will inevitably make occasional mistakes about what the law permits or requires.

Risks of Error

The societal interest in military obedience is not identical to that in the civilian context, but it is at least as weighty. Unjustified disobedience to a superior can be catastrophic for the safety of fellow soldiers in combat. It can also cause mission failure. Foot soldiers in the pitch of battle often cannot accurately assess whether the harm they are ordered to inflict, though unlawful under most circumstances, would be justified to prevent a greater wrong or in reprisal for enemy misconduct elsewhere.

After all, wartime orders from superiors routinely require conduct that would subject its perpetrator to criminal liability during peacetime. To expect the soldier in combat to evaluate whether his superior's order is justified, on pain of severe punishment if mistaken, would often be unfair. Such evaluation will frequently require knowledge of considerations beyond his awareness. If the law requires him to make an independent legal judgment whenever he receives an order, it also risks eliciting his disobedience to orders that appear wrongful from the soldier's restricted perspective but which are actually justified by larger operational circumstances.74

72 See, e.g., *U.S. v. Barker*, 546 F.2d 940, 947 (D.C. Cir. 1976) (concluding that "in certain situations there is an overriding societal interest in having individuals rely on the authoritative pronouncements of officials whose decisions we wish to see respected."); Hyman Gross, *A Theory of Criminal Law* 173 (1979) (observing that "there is a strong social interest in being able at any time to ascertain and then rely on responsible authoritative opinions of the state of the law, free of any risk of criminal prosecution should another view be deemed better at a later time.").

73 Model Pen. Code § 2.04(1)(a) (1985).

74 For a forceful statement of these arguments, see Richard Wasserstrom, "Conduct and Responsibility in War," in *Collective Responsibility* 179 (Larry May and Stacey Hoffman eds., 1991).

The fact that warfare requires them to risk death for their country provides another reason for the law to excuse soldiers' criminal conduct under orders. In becoming a soldier, one signs what is essentially an "unlimited liability clause,[75] committing oneself to the point of death. At the lower echelons, a superior's order will usually be very narrow in scope, bearing little, if any, obvious, direct relation to the war's larger purposes. It may be strategically justified, even indispensable to victory, but nevertheless potentially suicidal for the individuals involved.

When a soldier must face grave and imminent danger, the general purposes of even the most just war can quickly start to look like grandiose abstractions.[76] The only remaining method to motivate the self-sacrificial step into battle would be a deeply ingrained habit of blind obedience to superiors' orders, under virtually all circumstances, without exceptions.

If exceptions were readily allowed, the painfully acquired habit of obedience may be perilously weakened, for the soldier could then always ask himself whether any of the available exceptions, however narrowly drafted, apply to his situation. Much of what will be done in the name of such escape clauses will prove mistaken, given how "nearly everybody's judgment is disturbed by the anticipation of calamity."[77]

Rule consequentialism triumphs here. The consequences of a rule requiring unwavering obedience to superior orders yields better overall results, it is thought, than the effort to assure particularized justice in individual cases. This approach inevitably defines the scope of liability quite underinclusively, for it excuses the soldier who obeys orders, the criminality of which was not apparent on

their face, but could have been discerned within the time the particular circumstances allowed.

The rule is also underinclusive, vis-à-vis the moral concerns it aims to embody, in that it applies only to violations of the *jus in bello*, not the *jus ad bellum*. Soldiers who know that they are fighting an "unjust war"a "war of aggression," in current idiomare

75 Lt. Gen. Sir John Winthrop Hackett, *The Profession of Arms* 40 (1962).

76 This is a common theme in the memoirs of veterans. See, e.g., Paul Fussell, *Doing Battle* 124 (1996).

77 Alan Donagan, *The Theory of Morality* 207 (1977).

immune from liability for this offense, unless they were directly involved in the high-level decision to undertake it. Yet surely, to take a recent example, most Serbian officers, and even many Serbian enlisted personnel, had good reason to know that the war their superiors ordered them to wage was aggressive in nature.

Discretion to Disobey

Some would insist on viewing the problem of excessive obedience by soldiers within the larger context of excessive conformity in modern society at large. In sweeping terms, they contend, for instance, that "the evolution of society in general, and of government in particular, toward the Weberian legal or rational bureaucratic type of authority has permitted actors within the system to become accustomed to following orders and accomplishing their given tasks without question."[78] The problem, from this perspective, is not peculiar to military culture and organization, even if adoption of military models of authority throughout society have made resistance and disobedience ever harder over time.[79]

By implication, to focus on military obedience is to see (and challenge) only the tail, not the much larger animal of which it is a part. Governments are always in danger of doing grave injustice, either by violating the law or by enforcing it. It follows that conscientious disobedience to law must play a central role in keeping state power within legitimate bounds. Legal rules governing the scope

78 Note, "Crime and Punishment," 88 *Mich. L. Rev*. 1474, 1476 (1990) (summarizing the view of Herbert Kelman and V. Lee

Hamilton in *Crimes of Obedience* 13739 (1989)).

79 Les Levidow and Kevin Robins, "Toward a Military Information Society?", in Levidow and Robins, *Cyborg Worlds: the Military Information Society* 161 (1989) (stressing "the role of military models in narrowing political choices throughout all our institutions"). For a classic, early statement of such views, see Lewis Mumford, "Authoritarian and Democratic Technics," 5 *Technology and Culture* 1 (1964).

of a citizen's "discretion to disobey" should accordingly provide a wide berth for such challenges, on this view.80

Proposals for change in military law ought thus to be conceived as part of a larger effort to reform our law to facilitate challenge to questionable exercises of authority by all those subject to it. This is particularly difficult in the military area, to be sure, because its technology is increasingly designed with a conscious view to minimizing opportunities for resistance, disobedience, or shirking.81 But these large questions would again take us beyond the concerns of this book.

Military law has been quite skeptical of fine distinctions, particularly regarding soldiers' mental states. This is not due to the nature of war. In fact, the law generally pays very *close* attention to distinctions between various mental states when it seeks to encourage types of activity that closely resemble activity that it must discourage.82 In war, there is a close resemblance between soldier's acts of legitimate violence and unlawful acts. The two actions are often distinguishable only by the respective mental states of those

80 See, e.g., Harold Laski, *The Dangers of Obedience and Other Essays* 430 (1968); Howard Zinn, *Disobedience and Democracy* (1968); Erich Fromm, *On Disobedience and Other Essays* 2123 (1981). Writing at the height of the nuclear arms race, Fromm trenchantly observed, "Human history began with an act of disobedienceit is likely to end with an act of obedience." *Id*. at 16.

81 Chris H. Gray, "The Cyborg Soldier: the U.S. Military and the Post-Modern Warrior," in Levidow and Robins, *supra* note 79, at 48 (arguing that "Through systems analysis . . . and computer-mediated systems the individual soldier becomes part of a formal weapons system,

bureaucratic and technical, that is very difficult to resist . . . the modern weapons system"that is, its very design, apart from particular orders concerning its use"becomes . . . a new and effective technique of domination."

82 For example, because U.S. law wishes to encourage foreign trade, it required specific knowledge of the law (i.e., the legally restricted nature of transactions in particular products) to punish an exporter who shipped super-computers to the Soviet Union. Criminal law takes a much less discriminating approach to mental states when it wishes to discourage all forms of an activity (such as armed robbery), i.e., when legitimate forms do not need to be carefully distinguished from illegitimate.

performing them.[83] We would thus expect the law governing soldiers to employ relatively fine-grained distinctions between culpable and nonculpable mental states.

But it does not. For instance, it does not demand that officers attempt to make highly nuanced judgments of proportionality or military necessity. It instead prefers that whenever they are in reasonable doubt, they err in favor of obedience,[84] even if this proves to entail greatly excessive harm. To be sure, the law must encourage troops to obey orders under nearly all circumstances. This is why it does not make liability turn on nuanced distinctions of mental state or subtle differences of circumstance. It excuses a wide range of criminality, short of torture and other transparent atrocity.

This long-standing failure of military law to employ a finer set of distinctions concerning mental states is largely due to the simple historical fact that military law originates as an adjunct to military discipline,[85] and has remained tightly tethered to that preoccupation.[86]

83 To offer another example, acts of piracy often appear on their face exactly the same as actslawful even into this centuryof maritime privateering. Janice E. Thomson, *Mercenaries, Pirates, and Sovereigns* 14047 (1994). Privateering involved violent seizure of property on the high seas by private parties, authorized by public commission (as through letters of marque and reprisal), in satisfaction of debts otherwise unrecoverable by the authorizing state. *Id*.

84*U.S. v. Kinder*, 14 C.M.R. 742, 750 (1953) (holding defendant soldier excused from liability for obeying an unlawful order "under circumstances where he might entertain a doubt at to the lawfulness of the order . . . ").

85 Anderson, *supra* note 20, at 25758. For an early reference in U.S. military law to this requirement, see Col. William Winthrop, 1 *Military Law and Precedents* 5354 (1896). ("Courts-martials . . . are in fact simply instrumentalities of the executive power, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the army and navy and enforcing discipline therein."). *O'Callahan v. Parker*, 395 U.S. 258, 265 (1969) ("A court martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved.")

The upshot, then, is that "the history of military justice, fundamentally shaped by the problem of disobedience for other than conscientious reasons, makes it empirically poorly equipped to try cases involving conscientious disobedience to order." James Turner Johnson, *Can Modern War Be Just?* 166 (1984).

86 Brig. Gen. Oded Mudrik, "Military Justice: Goals and Identity," 31 *Mil. L. & L. of War Rev*. 201, 208 (1992) (noting the enduring fact of "command influence" over court-martial proceedings).

It has thus given pride of place to preserving discipline, not only among the rank and file but also at intermediate levels.

This results in considerable cost not merely to individualized justice, as legal scholars have long stressed, but often to institutional effectiveness as well. Many of these costs are unnecessary, given what has been learned in recent years about the sources of military efficacy and ethics.87

87 Because the twin problems of legal over-inclusiveness and under-inclusiveness have a common source, I argue that they also have a common solution. The soldier should be liable for all unreasonable mistakes regarding the legality of superior orders which he obeys, even if these do not entail atrocities. See Part III.

3
The Uncertain Scope of "Manifest" Illegality

Nature of the Defense

There are troubling sources of uncertainty in the scope of "manifest" illegality. As a result, it is unclear which crimes, committed under what circumstances, fall within the subset of manifestly illegal acts and which do not. Collectively, these problems suggest the need for an alternative approach to the problem.

Courts and other authorities concur that not all criminal acts are manifestly so, particularly those committed in the heat of combat. If they were, the exception would completely swallow the rule,[1] which it was never intended to do. The precise scope of this special subset of crimesnot simply illegal, but manifestly sohas been carefully explored in neither judicial opinions nor the scholarly literature built upon them.

The paucity of litigation in this area contributes to this indeterminacy. When a crime is committed pursuant to orders, only the very easiest cases which involve obvious atrocities tend to be prosecuted. The reason for this is clear: most prosecutions for war crimes are conducted by the very state whose soldier stands accused. The fora for such prosecutions are the municipal courts-martial of the defendant's nation state. The collective inclination within any

1 This may happen anyway, notes one distinguished military lawyer.

"There are improper orders of less clear illegality . . . subtle in their wrongfulness, requiring a fine moral discernment to avoid criminality in their execution. They are rare on the battlefield." Gary Solis, *Son Thang: An American War Crime* 271 (1997). But see W. Hays Parks, "Crimes in Hostilities," 60 *Mar. Corps Gaz*. 16, 21 (Aug. 1976) (stressing "the myriad gray areas susceptible to question or misinterpretation."). The majority view is probably that in combat the lawfulness of "the vast majority of orders . . . are not so clear and . . . due to the prevailing circumstances . . . there is no opportunity to clarify." Col. Anthony Paphiti, "Duress as a Defense to War Crimes Charges," paper presented to the International Society for Military Law and the Law of War, Athens, 5 (1997)

military organization to punish one's own comrade in arms, when he has risked his life for the country, is rarely very strong. This is particularly understandable when the defendant's conduct appears to lie in the gray area, close to the line between excusable and inexcusable error.

This gray area can often be quite large. "Between an order plainly legal and one palpably otherwiseparticularly in time of warthere is a wide middle ground, where the ultimate legality and propriety of orders depends or may depend upon circumstances and conditions of which It cannot be expected that the inferior is informed . . . "[2] The predominant view has been, in the words of the United States Nuremberg Tribunal, that it is not "incumbent upon a soldier in a subordinate position to screen the orders of superiors for questionable points of legality."[3]

The same view prevails in international fora as well. For example, to minimize unnecessary controversy, jurisdiction of the current International Tribunal for the Former Yugoslavia has been restricted to that subset of offenses based on "rules of international humanitarian law which are beyond any doubt part of customary law."[4] As a result of such caution, questionable cases are not pursued. The cases actually litigated, given the egregiousness of their facts, do not permit courts to explore and define the boundaries of the exception to the superior orders defense.

The lack of doctrinal clarity also owes in part to the changing content of international criminal law itself, particularly to the expanding number of offenses. Many of the most serious offenses have only recently been identified as such. This is particularly true of many crimes against humanity, such as forced deportation of

2*McCall v. McDowell*, 1 Abb. N. Cas. 212, 218 (1867). "Justice to the subordinate," the court continues, "demands . . . that the order of the superior should protect the inferior." *Id*.

3*In re von Leeb*, 11 Nuremberg Military Tribunals 511, 511 (1948) XI Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 462 (1950).

4 "Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia," U.N. Doc. s/25704 (1993), art. 1, ¶ 57, art. 7, ¶ 33, 32 *Int'l Legal Materials* 1159 (1993).

populations"ethnic cleansing" as it is now often calledand genocide. Enslavement of captured enemy laborers, though eventually outlawed by the Geneva Conventions, was not prohibited by Roman law or many later military codes. The ancients routinely enslaved their vanquished adversaries. In fact, they did so as a matter of right.5

Consider the proliferation of new international crimes such as pollution on the high seas, often caused by military vessels. If these acts are ordered by military superiors, how can prosecutors rebut the presumption that subordinates could not have grasped the criminality of their conduct? Without more prosecution and resulting case law, it is impossible to say. In the *High Command* case at Nuremberg, the International Military Tribunal held that orders relating to prisoner-of-war forced labor, though criminal according to the Tribunal's very Charter, were not manifestly so.6 Field commanders who received such orders had the right to presume their legality and were therefore acquitted on grounds of obedience to orders.7

Today it is much less likely, though still debatable, whether such a commander would be warranted in making the same presumption. The prohibition in international law against prisoner-of-war forced labor is now much more clearly established than in 1945. As international law is enlarged and clarified, the scope of the superior orders excuse contracts and the scope of manifest criminality exception expands. But the paucity of litigation makes it virtually impossible to say, *ex ante*, where the line between the two really lies at any moment.

Where a soldier must exercise situational judgment in order to

ascertain the unlawfulness of a superior's order, that order is not

5 Hugo Grotius, *On the Law of War and Peace, Book Three* 690 (1964) (concluding from ancient sources that "According to the law of nations all persons captured in a war that is public become slaves."); W. Kendrick Pritchett, *Ancient Greek Military Practices*, part 1, 72, 81 (1971). See also Gerhard Conrad, "Combatant and Prisoner of War in Classical Islamic Law,' *Mil. L. & L. of War Rev*. 270, 306 (1981) (noting that Moslem law permitted enslavement of captives).

6 The U.N. War Crimes Commission, XII Law Reports of Trials of War Criminals 8889 (1949); see also A.P.V. Rogers, *Law on the Battlefield* 144 (1996).

7 U.N. War Crimes Commission, *Id*.

manifestly illegal. Situational judgment is often required, for example, when a field officer must choose among weapons systems with differing degrees of destructiveness. Some weapons might cause greater collateral damage to civilians and their property than other weapons capable of achieving the same military objective.

The prevailing view, in both international law and most municipal military codes, is deliberately indulgent. A decision on such a question might prove mistaken, even unreasonably so, given what was known or should have been known about the situation. Though such a mistake could easily produce unlawful consequences, this type of mistake would rarely be classified as manifestly illegal, unless the degree of unnecessary collateral damage was both very great and readily foreseeable. In cases depending on close judgment calls to choose the best course of action, very few mistakes will rise to the level of manifest illegality.

There are many situations where a reasonable soldier, particularly a junior officer, could be expected to recognize his orders as unlawful. To do so, however, he may have to evaluate an order in light of the particular circumstances, including the likely consequences of the commanded action. This is precisely what the manifest illegality rule deliberately discourages him from doing. It does so by defining manifestly illegal actions as those which are clearly criminal under any conditions, regardless of their consequences, however advantageous these may be in the given circumstance. By definition, situational judgment is unnecessary when an order is illegal "on its face."

In this respect, the doctrine is decidedly anti-consequentialist, in the sense that soldiers are not to assess the legal consequences of

their orders; they are to obey them. If the orders require manifest criminality, the soldier must disobey them, however disadvantageous this may prove from the tactical point of view. Again, the rule treats the assessment of consequences as beyond his ken. The upshot, then, is that the law strongly presumes that any mistake a soldier makes in obeying a criminal order is a reasonable one.

National vs. International Law

The current American and German rules are somewhat more demanding, at least "on the books," than the manifest illegality rule. United States law provides that

> the acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful.8

In short, if the subordinate reasonably believed the unlawful order to be legal, he is not culpable for the crime in question.9 Current German military law is virtually identical.10

8*United States v. Calley*, 48 C.M.R. 19, 27 (1973-74). Other sources of United States law appear more indulgent, excusing obedience to orders the criminality of which is unknown to the particular soldier, even if unreasonable. Model Pen. Code § 2.10 (1985) (stating "It is an affirmative defense that the actor, in engaging in conduct charged to constitute an offense, does no more than execute an order of his superior in the armed services that he does not know to be unlawful."). In the prosecution of Calley's immediate superior, Capt. Ernest Medina, the court's instructions to the jury adopted this more lenient standard, requiring actual knowledge that Medina's orders were illegal. C.M. 427162, *Medina* (1971) (case not reported) jury instructions reprinted in Kenneth A. Howard, "Command Responsibility for War Crime," 21 *J. of Public Law* 7, 812 (1982). This interpretation of the soldier's duties is even less demanding than the manifest illegality rule in international law, which is universally interpreted to employ the objective standard of what the defendant should have known. These instructions have been widely criticized by

leading scholars as mistaken. See, e.g., Telford Taylor, "Comments," in *Law and Responsibility in Warfare* 224, 22627 (Peter D. Trooboff ed., 1975).

9 Wayne R. LaFave and Austin W. Scott, Jr., *Handbook on Criminal Law* 441 (1972).

10 German Military Service Act § 11; Mil. Pen. Code ¶ 22; Donald Abenheim,*Reforging the Iron Cross* 10920 (1988) (discussing the introduction of this more demanding approach in the aftermath of the Nuremberg proceedings); Christopher Greenwood, "Historical Development and Legal Basis," in *The Handbook of Humanitarian Law in Armed Conflicts* 1, 37 (Dieter Fleck ed. 1995).

This differs from the manifest illegality rule in that the particular circumstances faced by the soldier now become clearly relevant in determining whether his legal error, and resulting criminal act, are excused. The illegality of the order need not be ascertainable on its face. An order might not be illegal on its face, insofar as obeying it would be perfectly lawful in certain situations. Yet the same order might still be clearly illegal to "a man of ordinary sense and understanding . . . under the circumstances" he faced.

Moreover, what reasonable conduct entails in a given predicament need not be immediately transparent. Discerning what reasonableness requires may demand deliberation among soldiers, or consultation with superiors, where this realistically can be expected.11 Through such deliberation, the illegality of the order may become apparent, even if it was not apparent immediately upon receipt.12

It is therefore fair to characterize the reasonable mistake rule as more stringent than the manifest illegality rule. In applying the latter, the court need never look to complex details of the defendant's circumstances, but only to the face of the order that he obeyed. The American rule's greater stringency has not generally been recognized. This is because in practice the U.S. military, like virtually all others, has not sought to prosecute acts of obedience to criminal orders unless these were also manifestly illegal on their face.

11 For official encouragement of such deliberation, see Dept. of the Army, *Leadership and Command at Senior Levels*, FM 22-103 (1990): "Ethical sensitivity is thus the precondition for clear ethical reasoning. By sharing their reasoning processes and highlighting the

ethical implications of the situation, senior leaders and commander teach and coach their subordinates on the ethics of their profession. Ethical decisions also sometime involve tough choices rather than mechanical applications of principles. Therefore senior leaders take the time to talk through possible solutions with subordinates . . . Unless subordinates learn how to think through ethical issues and have the moral strength to do what they believe is right, they often behave inappropriately. Senior leaders and commanders stand accountable . . . "

12 Gen. Matthew Ridgway writes, in this regard, "It has long seemed to me that the hard decisions are not the ones you make in the heat of battle. Far harder to make are those involved in speaking your mind about some harebrained scheme which proposes to commit troops to action under conditions where failure seems almost certain, and the only results will be the needless sacrifice of priceless lives." Ridgway, "Leadership," in Robert Taylor et al., eds., *Military Leadership* 108, 112 (1996).

What Makes an Order "Manifestly" Illegal?

The trial court that convicted Adolf Eichmann offered a particularly evocative formulation of the rule:

> The distinguishing mark of a "manifestly unlawful order" should fly like a black flag above the order given, as a warning saying "Prohibited." Not formal unlawfulness, hidden or half-hidden, nor unlawfulness discernible only to the eyes of legal experts, is important here, but a flagrant and manifest breach of the law, definite and necessary unlawfulness appearing on the face of the order itself, the clearly criminal character of the acts ordered to be done, unlawfulness piercing the eye and revolting the heart, be the eye not blind nor the heart not stony and corrupt, that is the measure of "manifest unlawfulness" required to release a soldier from the duty of obedience upon him and make him criminally responsible for his acts.13

Legal systems rarely define "manifest" any more precisely than did the Israeli court in this moving but rather purple and overheated passage. The German Military Penal Code is one of the few that even attempts a definition. It offers that illegality is manifest when it is contrary "to what every man's conscience would tell him anyhow."14 An example of such an order would be one requiring the soldier to fire a projectile of glass shards into a school yard of playing children, or to turn his guns on lifeboats containing escaping survivors of a hospital ship that his submarine crew had sunk.15 Similarly, there are

13*Attorney-Gen. of the Gov't. of Isr. v. Eichmann*, 36 I.L.R. 275, 277 (Supreme Ct. of Isr. 1962) (quoting an earlier Israeli case, *Kafr Kassen* case App. 27983, (1958), *Ofer v. Chief Military Prosecutor*, (A) vol. 44: 362.).

14 Hannah Arendt, *Eichmann in Jerusalem* 293 (1962). Even the Third Reich formally retained this view of a soldier's legal duties. N. Kudriavtzev, *The Nuremberg Trial and International Law* 119 (1990); Manfred Messerschmidt, "German Military Law in the Second World War," in *The German Military in the Age of Total War* 323 (Wilhelm Deist ed., 1985).

15 The facts of this latter scenario were those of two important cases in this area, the *Dover Castle* Case, 16 *Am. J. Int'l. L.* 704 (1921), and the Llandovery Castle Case, 16 *Am. J. Int'l. L.* 705 (1921), both decided under German military law. The *Dover Castle* was a British hospital ship torpedoed by defendant

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no circumstances in which it is lawful to make hostages of civilians, to deceptively employ a flag of convenience, or to rape.[16]

The U.S. Army Manual has been comparatively unusual in listing several specific acts that officers are forbidden to order under any circumstances.[17] It has expressly prohibited

> making use of poisoned or otherwise forbidden arms or ammunition, treacherous request for quarter, maltreatment of dead bodies, firing on localities which are undefended and without military significance, abuse of or firing on the flag of truce, misuse of the Red Cross emblem, use of civilian clothing by troops to conceal their military character during battle, improper use of privileged buildings for military purposes, poisoning of wells or streams, pillage or purposeless destruction, compelling prisoners of war to perform prohibited labor, killing without trial spies or other persons who have committed hostile acts, compelling civilians to perform prohibited labor, violation of surrender terms.[18]

Such orders are illegal on their face, not only in particular circumstances. Hence, there is no need to examine the details of such circumstances. The law of armed conflict unequivocally prohibits such acts under all circumstances. The soldier who commits them may not defend himself by asserting that reliance on superior orders

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> Comm. Karl Neumann, under order from German superiors, who told Neumann that the order was justified in reprisal for illegal use of hospital ships by the British. *Dover Castle Case* at 706. Neumann was acquitted on the basis of his belief that he was carrying out legitimate reprisals. *Id*. at 70809.

16 Terry Nardin offers these examples in his book, *Law, Morality, and the Relations of States* 293 (1983).

17 These involve "willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction or appropriation of property, *not justified by military necessity* and carried out *unlawfully* and wantonly." Army Field Manual 27-10, *The Law of Land Warfare*, Chap. 8 sec. I, § 502 (1976) (prohibiting Grave Breaches of the Geneva Conventions of 1949 as War Crimes). See also G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No. 34, at 91, U.N. Doc. A/10034 (1976) (providing that no circumstances, however exceptional, justify torture of any kind).

18*The Law of Land Warfare* FM 27-10, chap. 8, § I, para. 504 (1976).

induced his error. If his conduct falls within the category of manifestly illegal acts, then the court, in determining liability, may not consider evidence bearing on mistake. Thus, when American soldiers were accused of the most flagrant war crimes in Vietnam, juries sometimes did not even receive instructions on the superior orders defense, an exclusion upheld on appeal.19

Obeying superior orders may at most warrant mitigation of sanction for such offenses.20 Only at this point, however, does justice permit the consideration of extenuating circumstances. This conclusion was first enshrined in Article 8 of the Nuremberg Charter and employed by the International Military Tribunal. It was later codified by the International Law Commission for adoption by the U.N. General Assembly. National military codes increasingly follow the lead of international law on this matter. These developments are insufficient, however, to establish the proposition as a binding rule of international law.

Manifestly Illegal to Whom?

Whether an act is manifestly illegal is an objective question: would a reasonable person recognize the wrongfulness of this act? A manifestly illegal act, by definition, is one that no reasonable person could mistake as lawful. It is unlawful as a matter of law.21

The acts at issue are ones that fail "the test of common conscience, of elementary humanity, " the illegality of which "is universally known to everybody."22 These formulations do not take

19 See, e.g., *U.S. v. Griffen*, 39 CMR 586, 588 (1968). In other cases, however, United States courts martial viewed the illegality of defendants' acts as not so transparent to preclude jury instructions on

the existence of the superior orders defense. Most countries treat the question of the illegality's "manifestness" as one of law, decided by the court. L.C. Green, *Superior Orders in National and International Law* 4445, 71 (1976).

20 Philip R. Piccigallo, *The Japanese on Trial* 6872 (1979) (describing mitigation for Japanese soldiers who obeyed superior orders to execute Allied pilots, who were accused of war crimes for bombing Japanese civilian population centers).

21 Israel, for instance, adopts the majority rule on this issue. John Norton Moore et al., *National Security Law* 391 (1990).

22 Yoram Dinstein, *The Defense of 'Obedience to Superior Orders' in International Law* 1516, 79, 128, 129, 174, 212 (quote at 15) (1965).

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into account the strengths and weaknesses of the particular defendant, even when these can be convincingly established. Civilian law often compromises this austere standard by incorporating some of the defendant's characteristics into the legal test applied to his conduct.23

Today, this problem takes a particularly poignant form. A large proportion of soldiers in many recent wars, from El Salvador and Afghanistan to Liberia and the Intifada, have been children, often in their early teens, sometimes younger.24 More than one thousand Hutu children have been detained for their role in the 1995 attacks on Tutsis; many of these children are awaiting trial, for genocide, by the U.N. Rwanda tribunal.25 Child soldiers have no vocational identity as professional soldiers and no corresponding sense of warrior's honor. Much less is manifestly wrongful to a child than to an adult. Children's moral sensibility develops gradually over time.26 Also,

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(discussing the countries and commentators adopting these various formulations); see also Green, *supra* note 19, at 43 (citing these and other formulations employed by military penal codes, field manuals, and courts martial in the United States, Britain, Canada, France, and West Germany); Ronald A. Anderson, 1 *Wharton's Criminal Law and Procedure* 25758 (1957); Lt. Gen. W. R. Peers, *The My Lai Inquiry* 230 (1979) (noting that "there were some things a soldier did not have to be told were wrongsuch as rounding up women and children and then mowing them down, shooting babies out of mothers' arms, and raping.").

23 To a somewhat greater degree, military law in most states has resisted adopting a "subjective" standard. This is especially clear in the manifest

illegality rule itself, with its exclusive focus on orders the criminality of which is immediately apparent on their face to all. Even a reasonable error test of the sort defended in this book, however, faces the question of which of the defendant's characteristics are relevant to assessing the moral culpability of his error. In several Vietnam era courts martial of United States soldiers, for instance, jury instructions did not allow consideration of the defendants' subnormal measured intelligence. Solis, *supra* note 1, at 159, 272, 274.

24 See generally Ilene Cohn and Guy S. Goodwin-Gill, *Child Soldiers* (1994). Child soldiers have been common in over thirty wars within the last ten years. Howard W. French, "When the Gun Play Kills the Kids' Play," *N.Y. Times*, May 12, 1996, at E3. On how such children are recruited, see Carolyn Nordstrom, *A Different Kind of War Story* 14243 (1997) (examining the effects of war in Mozambique on village children).

25 Chen Reis, "Trying the Future, Avenging the Past: The Implications of Prosecuting Children for Participation in Internal Armed Conflict," 28 *Colum. Human Rights L. Rev*. 629, 629 (1997).

26 See generally Lawrence Kohlberg, *Moral Stages* (1983); Jean Piaget, *Judgment and Reasoning in the Child* (1959).

children cannot anticipate the full range of consequences likely to follow their acts. What is reasonably foreseeable to an adult soldier will often not be foreseeable to a child soldier. Hence, if one considers the child's age, the scope of his errors (both of law and fact) found to be reasonable will greatly enlarge.

Moreover, once it is clear to the other side in a war that enemy combatants are very young, it becomes more reasonable to mistake a given child as a combatant, posing a threat to one's own security. At least one American soldier made such a mistake in Somalia, to lethal effect.[27] Though some commentators are content to invoke general formulas about manifest illegality at such times, juries more often feel obliged to assess the defendant's exercise of situational judgment, puzzling through the factual and moral complexities of his situation. This is true even when the applicable legal formulas do not so authorize.[28]

In civilian law, reasonable mistakes of law generally do not excuse crime. But it is also true that even unreasonable errors can sometimes be completely exculpatory. Everything depends on the offense in question. If the offense requires that the defendant knew his actions were unlawful, then even an unreasonable mistake concerning legality is enough to excuse his conduct.[29] Offenses of this nature are felicitously few.

Between these two extremes on the spectrum lies a middle category of offenses and situations which legal error will excuse, but only if the error is reasonable. This category prominently includes situations in which a defendant mistakenly believes that his conduct, though covered by a statutory prohibition, is justified under the circumstances as a lesser evil. A mistaken claim of

justification is one in which the supposedly lesser evil turns out to have been the greater.

27 Diana Jean Schemo, "Boy's Death in Somalia Tests Uneasy U.S. Role," *N.Y. Times*, Feb. 20, 1993, at A1.

28 U.S. law more readily authorizes such particularized inquiry, as I earlier indicated.

29 After Col. Oliver North was convicted of "willfully and unlawfully conceal[ing] certain documents in violation of 18 U.S.C. § 2071 (b), he claimed that his conduct was legally excused, as authorized by military superiors in the National Security Council. The D.C. Circuit rejected this view in a split decision. *U.S. v. North*, 910 F.2d 843, 881 (D.C. Cir. 1990).

Mistakes as to justification function as an excuse.30 They must therefore meet the requirement of any excuse: that the defendant's mistake be faultless or nonculpable.31

Consider, for example, the Argentine officers prosecuted for human rights abuses during the dirty war. Their alleged mistakes were ones of justification.32 They did not doubt that intentionally killing or abducting a human being is unlawful; they believed that the pervasive threat to public order and "national being" presented by leftist guerrillas and by diffuse forces of cultural subversion fostering their growth made "disappearance" a "lesser evil." The courts found the officers mistaken.33

In other instances, soldiers who receive superior orders, the illegality of which is not manifest, appeal to the excusing effect of appearances. They assert that they are entitled to rely upon reasonable appearances, regardless of what the facts ultimately prove to be.34 In the midst of combat, from the subordinate's perspective, the gap between appearance and reality may be very wide indeed.

Evidence about what a reasonable person would know is used in these cases for two purposes. First, it helps satisfy the standard of knowledge appropriate for a finding of criminal negligence on the defendant's part, including negligent homicide. If the defendant's mistake was negligent, then he may be held liable for negligent commission, provided that the offense in question so allows. Second, evidence concerning unreasonableness is used circumstantially to

30 George P. Fletcher, *Rethinking Criminal Law* 69596 (1978).

31 Mistakes of justification do not negate culpability unless they are blameless. *Id*. For most civil law countries, such as Argentina, the inquiry is whether the defendant's mistake was unavoidable, rather than reasonable. But like the common law's inquiry, this entails a normative assessment of whether the defendant could have been expected to be more careful, given the circumstances and his capacities, before taking an action that proved to be unlawful. Gunther Arzt, "Ignorance or Mistake of Law," 24 *Am. J. Comp. L*. 646 (1976).

32 J. L. Austin, *Philosophical Papers* 124 (1961) (describing the difference between justification and excuse as follows: "In the [first] defense, briefly, we accept responsibility but deny that it was bad: in the other, we admit that it was bad but don't accept full, or even any, responsibility.").

33 Mark Osiel, "The Making of Human Rights Policy in Argentina," 18 *J. Lat. Am. Stud*. 135, 16869. (1986).

34 Fletcher, *supra* note 30, at 707.

ascertain the accused's actual knowledge of what he was doing.[35] From what others would have known, an inference is drawn as to what the accused himself knew or intended.

In this way, evidence of unreasonableness supports a mental state of knowing or intentional wrongdoing. It thereby permits conviction for murder, rather than manslaughter. In other words, evidence of what a reasonable person would think can impugn the credibility of the defendant's professed mistake.[36] In cases such as those involving rape, torture, murder, and armed robbery, the unreasonableness of the soldier's mistake has been so egregious as to eliminate any credible claim that he was mistaken at all. Hence, finding the defendant's act manifestly illegal establishes a conclusive presumption of the defendant's awareness of the unlawfulness of his orders.

We must therefore examine how the wrongfulness of such conduct is made manifest to a reasonable person. Several answers suggest themselves. For a superior's order to be manifestly illegal to its recipient, it must command an act (1) the prohibition of which is exceptionally clear, (2) is likely to produce the very gravest human consequences, and/or (3) transgresses established procedures, the customary *modus operandi*. The next few chapters discuss each of these considerations in turn.

Fostering Disobedience to Unjust Wars and Coups

One interpretation of the manifest illegality rule would extend liability to soldiers who voluntarily participate in unjust wars, i.e., wars of aggression. This interpretation has a long history, and was widely accepted in medieval and early modern Europe. Martin

Luther, though wary of encouraging resistance to public authority, exhorted professional soldiers to disobey their lords when the injustice of the latters' military aims was clear. An officer asks him:

35 See, e.g., Morris Greenspan, *The Modern Law of Land Warfare* 490, 495 (1959); August Knieriem, *The Nuremberg Trials* 244 (1959).

36 Sheldon Glueck, *War Criminals, Their Prosecution, and Punishment* 15253 (1944); J.G. Starke, *An Introduction to International Law* 370 (4th ed. 1958).

> Suppose my lord were wrong in going to war. I reply: *If you know for sure that he is wrong*, they you should fear God rather than men. Acts. 4 [5:29], and you should neither fight nor serve, for you cannot have a good conscience before God . . . But if you do not know, or cannot find out whether your lord is wrong, you ought not to weaken certain obedience for the sake of an *uncertain* justice; rather, you should think the best of your lord.37

In short, where wrongfulness is clear, you must disobey, but you must resolve all genuine doubts about wrongfulness in favor of obedience. This is the case, for Luther, regardless of whether the issue is one of the war's ends or means. This broad a reading of the manifest illegality rule did not survive into the modern era, however. Today, it is understandably rejected in democratic societies because it would encourage military leaders to intercede in decisions constitutionally assigned to civilians, thereby threatening civilian supremacy.

This danger, though very real, does not and should not put an end to the argument. There is much to be said for the view, well-stated by Robert Nozick, that "it is the soldier's responsibility to determine if his side's cause is just; if he finds the issue tangled, unclear, or confusing, he may not shift the responsibility to his leaders . . . we reject the morally elitist view that some soldiers cannot be expected to think for themselves. (They are certainly not encouraged to think for themselves by the practice of absolving them from all responsibility for their actions within the rules of war." Libertarians like Nozick understandably hope that such a rule would make citizens more skeptical of their state's illegitimate claims upon them (including the demand that they give up their lives for unjust wars).38

Regular prosecution would not be the primary purpose of adopting such a rule, however. Its central aim would be to induce much closer, critical scrutiny by soldiers of the legitimacy of the wars they are ordered to fight, in the expectation that domestic resistance

37 Martin Luther, "Whether Soldiers, Too, Can Be Saved," in *Luther: Selected Political Writings*, J.M. Porter, ed., 101, 117 (1974) (emphasis supplied).

38 Robert Nozick, *Anarchy, State, and Utopia* 100 (1975).

to unjust wars would thereby be increased. On this view, since most wars are unjust (on at least one side, often both),[39] they should all be prevented or quickly stopped by whatever means the law can muster. It could most effectively do so by threatening to punish anyone who participates in fighting an unjust war, regardless of rank, irrespective of whether he was involved in high-level decision-making. International military law would thus impose a duty of disobedience to any and all commands arising from a state's conduct of aggressive war.

This approach would surely appeal to many American intellectuals, if only because it faintly recalls a familiar slogan of their youth: "suppose they gave a war, and nobody came." This scenario is no leftist fantasy, it should be stressed. Thousands of Americans were criminally prosecuted during the Vietnam War, after all, for refusing conscription on the grounds that the war was immoral and/or illegal. As recently as 1991, a soldier prosecuted for desertion from her unit during Operation Desert Storm sought to argue, in her defense, the illegality of U.S. intervention.[40]

Also appealing to some, no doubt, is the fact that mass disobedience to combat orders have sometimes help spark socialist revolution, as in Russia, Hungary, and elsewhere.[41] Short of this result, mutinies among the ranks sometimes feed upon (and feed into) much larger societal disruptions, as resistance to the Vietnam war amply illustrates.[42] Such resistance could presumably be encouraged (and, to some degree, increased) by subjecting ordinary soldiers to potential international criminal liability for participating in wars of

39 This is not to deny that leaders on both sides generally regard their

cause as just. David A. Welch, *Justice and the Genesis of War* 21718 (1993).

40*U.S. v. Huet-Vaughn*, 43 M.J. 105, 107 (1995). The court rejected the argument as raising a nonjusticiable "political question," holding that 'the duty to disobey an unlawful order applies only to "a positive act that constitutes a crime" that is "so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their lawfulness.'" *Id*. at 114.

41 Marx and Engels clearly foresaw this possibility. For discussion, see W.B. Gallie, *Philosophers of Peace and War* 8486 (1978).

42 Charles Moskos, "The American Combat Soldier in Vietnam," 31 *Journal of Social Issues* 25, 2537 (1975); Geoffrey Perret, *A Country Made By War* 53233 (1980); Lawrence Radine, *The Taming of the Troops* 39 (1977) (discussing the relation between antiwar resistance at home and small scale barracks mutinies in Vietnam.)

aggression. It might well be entirely proper for international law to impose such a duty on *professional* soldiers, especially commissioned officers, who now routinely receive training in international law, including the *jus ad bellum*.

But this approach should not be extended to conscripts, however, for it would place excessive demands upon them.43 In very few societies could soldiers in the ranks realistically be expected to obtain reliable information, independently of their government's claims, to assess the lawfulness of its war-making.

Soldiers would begin deliberating not only about the legality of orders from above, but more generally about their prudence and propriety, if only because the legal criteria they must employ in fact overlap so greatly with those of common prudence and conventional moral proprieties.44 By forcing officers to share legal responsibility with civilian superiors, making them responsible for crimes now attributable only to the latter, the law would thus draw more junior officers into political debate and deliberation over questions beyond their ken.45

43 The U.S. Tribunal at Nuremberg hence concluded, "Obviously, no man may be condemned for fighting in what he believes is the defense of his native land, even though his belief is mistaken. Nor can he be expected to undertake an independent investigation to determine whether or not the cause for which he fights is the result of an aggressive act of his own government." *U.S. v. Ernest Von Wiezaecker*, XIV Trial of War Criminals Before the Nuremberg Military Tribunal Under Control Council Law No. 10 314 (1950), at 337. See also Michael Walzer, *Just and Unjust Wars: A Philosophical Argument with Historical Illustrations* 306 (1977). Walzer concedes, however, that though citizen-soldiers should not be criminally

responsible as soldiers in this context, they are nevertheless morally responsible as citizens, assuming they were old enough to share in their nation's decision to fight. *Id*. at 299300.

44 To some extent, present law already authorizes, even demands, a measure of deliberation about the overall justice of a war, even from officers below the highest levels of decisionmaking. This is because in the limiting case, at least, the legal constraints of "military necessity" and "proportionality" reach beyond the *jus in bello*. They do so whenever the measure of force necessary to achieve a state's overall objectives in a war becomes grossly disproportionate to overall costs (inflicted on everyone concerned) or to the ultimate value of those objectives. An example would be a war whose military objectives were simply not important enough to a state's larger strategic ends to justify the costs (to both sides) necessary to win it. On how conventional military calculations of proportionality systematically underestimate such overall costs, see Michael Cranna, ed., *The True Cost of Conflict* xviiixix (1994).

45 The disposition of military officers to engage in such independent political

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This could easily contribute to fostering military coups in places where civilian supremacy is still precarious and lacking deep roots in local political traditions.[46] For democratic constitutionalists, wary of military intermeddling in foreign policy, there is still much to be said, after all, for "an army that doesn't deliberate, that simply obeys orders," as Field Marshall von Moltke argued.[47] A legal duty of unconditional obedience, entrenched in professional tradition, has often been an effective, often inconspicuous means for attaining and preserving civilian control.

The problem gets more complex if we consider that the very same reluctance to deliberate that keeps generals from challenging civilian presidents also keeps colonels from challenging generals, including generals who have ordered the colonels to march on the presidential palace. We would want the colonels to stop and think, to deliberate before obeying. But we do not want the generals to start thinking about whether they could do a better job of running the country. Can we draft the military law of obedience to foster the first variety of deliberation without also encouraging the latter? Or do we face a starker choice, between encouraging or discouraging deliberation about the defensibility of superior orders of any sort?

The second, more pessimistic view finds abundant support in the historical record. It was widely noted, for instance, that Chilean dictator Augusto Pinochet "drew on the nondeliberative tradition [of

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> deliberation is, of course, affected by many factors, among which the legal rules concerning obedience to superior orders is by no means

the most important. There is a considerable scholarly literature on the causes of military coups. See, e.g., Alfred Stepan, *Rethinking Military Politics* (1988).

46 A qualification should be entered here, to the effect that officers should swear their oath of loyalty to the Constitution, as do U.S. military personnel, rather than exclusively to their superiors in the chain of command. New democracies in Latin America, such as Argentina's, have recently changed their oaths accordingly. By contrast, in 18th and 19th century Prussia, officers successfully resisted the efforts of liberal political forces to require swearing loyalty to the Constitution. In this way, the officers maintained the extra-constitutional position of the army. Manfred Messerschmidt, "Revolution and Political Rights of the Military in Prussia, 1806-1914," *Mil. L. & Law of War Rev*. 359, 36061, no. 17, (1978). In the Third Reich, officers swore their oath of allegiance only to the Fuhrer. A. Dwight Raymond, "Soldiers, Unjust Wars, and Treason," in James C. Gaston and Janis B. Hietala, eds., *Ethics and National Defense* 57, 67 (1993).

47 Quoted in Messerschmidt, *supra* note 46, at 361.

the Chilean armed forces] to label any efforts to check his power as 'political,' and hence 'unprofessional.'"[48] In such situations, we would surely have wanted more deliberation by other senior officers, not less.

After all, once ensconced in power, military rulers can more easily implement the most repressive policies by exploiting the law's requirement of unqualified obedience to superior orders. Ironically, then, the long-standing history of civilian supremacy in Chile ensured that deliberationa precondition for military resistance to Pinochetcut deeply against the grain of professional disposition. In countries where civilian supremacy has not yet been fully established (i.e., much of the Third World), this is a very real and pressing problem for draftsmen of military law today.[49]

We would surely want subordinates to scrutinize the legality of orders requiring them to march on the presidential palace, and to hold them accountable for obeying such manifestly illegal commands. If we had any confidence that the likelihood of disobedience to these orders could be significantly enhanced by requiring such scrutiny, we would surely do so. But in classifying such orders as manifestly illegal, however accurate this classification may be, we can probably do little to strengthen civilian supremacy over the armed forces. If such soldiers have an excuse based on obedience to superior orders,

48 Karen Remmer, *Military Rule in Latin America* 39 (1991). On the constitutional basis of this traditional role, see Mark Ensalaco, "Military Prerogatives and the Stalemate of Chilean Civil-Military Relations," 21 *Armed Forces & Soc'y* 255, 261 (1995) (discussing the

requirement of article 90 of the Chilean Constitution that the armed forces be "obedient and non-deliberative bodies.").

49 It is a concern by no means peculiar to the Third World, for that matter. The military law of England itself was long preoccupied with the danger of mutinyspecifically, with the need to ensure that subordinates do not comply with the orders of mutinous colonels, while nonetheless complying with all other orders. See, e.g., *Axtell's Case*, 84 Eng. Rep. 1060 (1660) (the soldier who commanded the guard at the execution of Charles I, on trial for murder of the King, defended on the grounds of reliance on orders of his military superiors. Such obedience was held to offer no excuse, since the order was manifestly treasonous.) James Stephens, 1 *History of the Criminal Law* 20406 (1883), (discussing the Mutiny Act of 1688 and amendments, concluding that "a soldier should be protected by orders for which he might reasonably believe his officer to have good grounds.")

that obedience must derive from claims of duress (where these are persuasive on the facts), rather than mistake.

Of course, a war that was obviously motivated by nothing but imperialist aggressionthe Iraqi invasion of Kuwait, perhapsmight today be so "manifestly" unlawful that even existing rules would permit prosecution of all who obeyed orders to participate in it. But the exception to the duty to obey orders has never been interpreted so broadly, at least since the middle ages.50 Whether or not it should is beyond the scope of this study, with its exclusive focus on the *jus in bello*.

The remaining chapters in Part I examine a number of problems with endorsing the manifest illegality rule as the proper answer to the question of when obedience is due.

50 P. Contamine, *La Guerre au Moyen Age* 287 (1984).

4
Sparse and Unsettled Rules

How Legal Uncertainty Erodes the Manifestness of Illegality

For an act to be manifestly wrongful, the law prohibiting it must be very clear, not unsettled or riddled with uncertainty. As Dinstein notes, "manifestly illegal orders and an indistinct law, enveloped in mist, are mutually contradictory."[1] Lauterpacht concurs, "If . . . the obviousness and the indisputability of the crime tend to eliminate one of the possible justifications of the plea of superior orders, then the controversial character of a particular rule of war adds weight to any appeal to superior orders."[2] At Nuremberg, the Tribunal acknowledged that a military commander "cannot be held criminally responsible for a mere error of judgment as to disputable legal questions."[3] Any act the wrongfulness of which can be discerned only by a trip to the library, let us agree, is not manifestly illegal.

1 Yoram Dinstein, *The Defense of 'Obedience to Superior Orders' in International Law* 33 (1965).

2 H. Lauterpacht, "The Law of Nations and the Punishment of War Crimes," in *Brit. Y.B. of Int'l L.* 58, 75 (1944). Writing before the extent of the Nazi Holocaust was known, Kelsen dismissed virtually the entire corpus of the international law of war as too uncertain to permit classification of any violation as manifest, *a priori*, to its perpetrator. Hans Kelsen, *Peace Through Law* 106 (1944). Telford Taylor, *Nuremberg and Vietnam* 3338 (1970) (defending a similar view). See also see Richard Wasserstrom, "Conduct and Responsibility in War," in *Collective Responsibility* 185 (Larry May and Stacey Hoffman eds.,

1991); Richard Wasserstrom, "The Laws of War," 56 *Monist* 1, 89 (1972).

3 7 *War Crimes Reports* 27, 4142 (1947). Oppenheim similarly concluded that obedience to orders excuses members of the armed forces unless "they commit acts which both violate *unchallenged* rules of warfare and outrage the general sentiment of mankind." L. Oppenheim, 2 *International Law*, sec. 253, at 45253 (1st ed. 1906) (emphasis added).

Many key issues in the law of armed conflict remain unclear, as all students of the subject acknowledge.4 A leading military lawyer notes, "The law of war is different [from labor or environmental law] in that there are more gray areas than black and white."5 This lack of clarity often allows considerable latitude for a defendant to establish that the illegality of his superior's order was by no means obvious.

There has been some progress in the clarification and definition of the law of armed conflict, particularly through the 1977 Protocols to the Geneva Conventions. For example, Article 40 provides, plainly and unequivocally, that "it is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis."6 Similarly, reprisals against civilians and prisoners of war are prohibited absolutely.7 But conspicuous gaps remain.

The insistence on clarity presents several problems. First, offenses are often defined imprecisely, providing that specified conduct is criminal only where "not justified by military necessity, "8

4 A.V.P. Rogers, *Law on the Battlefield* 2733, 151 (1996).

5 Maj. Wm. Hays Parks, "The Law of War Adviser," *18 Mil. L. & L. of War Rev*. 357, 385 (1979); see also H. McCoubrey, "The Nature of the Modern Doctrine of Military Necessity, *Mil. L. & L. of War Rev.* 215, 218 (1992) (noting that "the doctrine [of military necessity] remains singularly ill-defined, both as to its foundations and its detailed substance."). To be sure, the law governing airwar is even less clear than that governing land and naval combat. Phillip S. Meilinger, "Winged Defense: Airwar, The Law, and Morality," *20 Armed Forces & Soc'y* 103, 112, 114 (1993) (noting that the "several attempts to codify laws for air warfare since World War II . . . have been largely unsuccessful" and

that "airwar still operates in somewhat of an international legal vacuum."); Julius Stone, *Legal Controls of International Conflict* 609 (1954) ("In no sense but a rhetorical one can there still be said to have emerged a body of intelligible rules of air warfare comparable to the traditional rules of land and sea warfare.").

6 Protocol I to the 1949 Geneva Conventions, Aug. 15, 1977, 16 *Int'l Legal Materials* 1409 (1977); *1977 Convention on the Prohibition of Military and other Hostile Use of Environmental Modification Techniques*, GA Res. 31/72, U.N. GAOR, 31st Sess., Agenda Item 45 (1976), 16 *I.L.M.* 88 (1977).

7 Protocol 1 to the 1949 Geneva Conventions, *supra* note 6, arts. 20 and 50-56.

8 Yehuda Melzer, *Concepts of Just War* 8893 (1975) (quoting *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, Int'l L. Comm'n, July 27, 1950). The Preamble to the 1977 Protocols to the Geneva Conventions maintains this language . A minority of commentators even believe that this wording may override more specific restrictions on force embodied in later provisions. Geoffrey Best, *War and Law Since 1945* 188 (1994).

and is to be avoided "as far as military requirements permit."[9] Few soldiers at the front are in a position to make such assessments. What appears unjustified at the tactical level may prove defensible at the operational or strategic level. As one scholar rightly notes, "this makes it virtually impossible," for all but the most obvious atrocities, "for soldiers to know with any surety whether certain orders they might receive are lawful or not."[10] Destruction of an entire village, with all its civilian residents, will at least occasionally be legally justified, as where immediate capture of its terrain is essential to the success of a much larger campaign.[11]

Second, whatever clarity may exist in the definition and scope of particular offenses, the defendant often may raise affirmative defenses. The scope of these is particularly unsettled. In fact, international criminal law has no codified "general part," defining the scope of available defenses, including that of obedience to superior orders. Neither the Hague nor Geneva Conventions banned the due obedience defense. In the deliberations leading to the 1977 Protocols and the Genocide Conventions, there was considerable debate about how the defense should be defined and delimited.[12] Agreement proved completely impossible. Many states wished to preserve a strong version of the obedience defense.[13]

The upshot, as one leading scholar of international law laments, is that "any defense counsel in a future war crimes trial would be

9 Preamble to the 1907 Hague (IV) Convention, "Respecting the Laws and Customs of War on Land," in *The Hague Conventions and Declarations of 1899 and 1907*, at 101 (James Brown Scott ed. 1918).

10 Paul Christopher, *The Ethics of War and Peace* 167 (1994).

11 Michael Walzer, *Just and Unjust Wars* 31718 (1977) (citing the historical example of the French town of St. Lo, seizure of which was judged essential to Allied breakout from the Normandy beaches) This suggests the more general problem that even when the meaning of a particular legal rule is settled, it may be very difficult for the soldier to discern the facts triggering its applicability to his situation.

12 M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 43334 (1992).

13 Frédéric de Mulinen, "On So-Called Unlawful Orders,' 25 *Mil. L. & L. of War Rev.* 501 (1986) ("Such a provision," establishing the right to disobey unlawful orders, "would lead to misunderstandings," argues one Swiss officer, "inviting the subordinate to discuss the mission given him instead of concentrating all his mental and physical efforts on its prompt and correct execution.").

professionally derelict if he failed to assert to the trial court that the rule denying the availability of the defense of superior orders has been rejected as a rule of international law and that such a defense is available to an individual charged with the commission of a violation of the law of war."[14]

Conflicting Duties under Different Legal Systems

Lack of clarity can take another form: international law and municipal military law may present a soldier with conflicting duties. If municipal law itself acknowledges the supremacy of international legal duties in the event of conflict,[15] then the soldier can clearly chart his proper course of conduct. But if there is genuine dualism, that is, if national law does not grant supremacy to international law, as it rarely does,[16] then the individual soldier, answerable to both legal systems, may find it impossible to act, or refrain from acting, without violating some legal duty.

14 Col. Howard S. Levie, "The Rise and Fall of an Internationally Codified Denial of the Defense of Superior Orders," 30 *Mil. L. & L. of War Rev.* 204 (1991). Levie explains that "in the more than forty [now 50] years which have elapsed since the completion of the war crimes trials after World War II, there has been no successful drafting of such a provision by any international bodyand there is none in sight." *Id*. Levie refers especially to the failure of the 1977 Protocols to the Geneva Conventions to include a provision limiting the defense of obedience to orders. Many share his conclusion regarding the continuing availability of the superior orders defense in international military law. Hilaire McCoubrey, *The Idea of War Crimes and Crimes Against the Peace Since 1945* 25 (1992); Rogers, *supra* note 4, at 146. A recent American casebook includes a section on "superior

orders" under a chapter titled "Viable Defenses." Jordan J. Paust et al., *International Criminal Law* 1361 (1996).

15 Some international treaties require all ratifying states "to secure to everyone within their jurisdiction the rights and freedoms" defined by the convention. 1950 European Convention on Human Rights and Fundamental Freedoms, Article 1, Nov. 4, 1950, E.T.S. 5.

16 Mark W. Janis, *An Introduction to International Law* 8384 (1988) (explaining dualism and monism in international law and the predominantly dualistic position adopted by nation-states); see also Jonathan Turley, "Dualistic Values in the Age of International Legisprudence," 44 *Hastings L.J.* 185 (1993). The United States observes the dualist view. *Restatement (Third) of Foreign Relations Law of the United States*, ch. 2, Introductory note, at 40 (1987). This view understands any national legal system and the international legal system to be separate and discrete entities, each with complete autonomy from the other to settle disputes arising under its rules.

To reject a soldier's defense of obedience to orders, is it really enough to say that the law was clear within the legal system whose agents now prosecute him, though he was equally subject to another system, imposing incompatible duties? Only the most formalistic approach to the relation between legal systems could leave the observer of such a trial completely untroubled by the soldier's predicament.[17] Prosecution of the young East German border guards presented this predicament in especially poignant form.[18] When a state ratifies the Fourth Geneva Convention, with its provisions governing compulsory appropriation of resources from noncombatants by occupying armies, it does not waive its citizens' protection under municipal law of theft and conversion. Conduct that international law may simply restrict and regulate, in short, is conduct that national law will often prohibit outright.

Many assume that such conflicts between national and international law must be rife. After all, the Charter of the Nuremberg Tribunal, and its later verdicts, apparently rejected the superior orders defense altogether, transforming it into grounds merely for mitigation of sanction.[19] Most national codes of military justice, by contrast, preserve the defense in some form, remaining as they do supremely solicitous of the need for discipline among their armed forces.

17 For this reason, an official 1962 United States Army pamphlet argued that ignorance of international law should excuse soldiers from liability, since such law "does not in some cases possess either the exactitude or the degree of publicity which pertains to municipal law." Dept. of the Army Pamphlet 27-161-2, 2 *International Law*, at 246 (1962). See also Hilaire McCoubrey and Nigel D. White, *International Law and Armed Conflict* 342 (1992) ("potentially a

conflict between two systems of law is involved, the detailed resolution of which lies beyond the reasonably expected competence of the average soldier, or indeed junior officer.").

18 Kif Adams, "What is Just? The Rule of Law and Natural Law in the Trials of Former East German Border Guards," 29 *Stan. J. Int'l L*. 271, 28186 (1993) (discussing how the German Democratic Republic officially recognized the international legal duty of States to allow their citizens to emigrate, while nevertheless prohibiting under domestic lawand punishing by deathcitizens from exercising that right.).

19 Charter of the International Military Tribunal of August 8, 1945, art. 8, at 279, *annexed to* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 59 Stat. 1544. The Charter rejected the superior orders defense in the initial trial of major war criminals, but later trials of more junior officials allowed the defense. *Einsatzgruppen Case*, Judgment, N.M.T., vol. 4 58789.

But the actual measure of divergence between international and municipal military law on this issue is not nearly as great as these facts first suggest. In most Western societies, when domestic military law codifies a superior orders defense, it includes some exception for atrocious and aberrant or manifestly illegal acts.[20] Certain nonwestern legal systems, such as the Islamic, have long maintained some version of this exception.[21] Even the Third Reich's military law formally retained the exception on its books.[22]

Moreover, it is by no means clear that the Nuremberg judgments established much new ground regarding the superior orders defense. First of all, virtually all of the acts with which the major war criminal defendants were charged would have fallen within the standard, long-standing exception to that defense. The same is true of the acts charged against Serbian and Croatian defendants in the Hague, arising from war in the former Yugoslavia.[23] In other words, even if courts formally recognized the superior orders defense, the long-standing exception for manifest illegality would surely have encompassed most, if not quite all, of the defendants' wrongs.[24]

20 Bassiouni, *supra* note 12, at 41621; L.C. Green, *Superior Orders in National and International Law* 71 (1976), Nico Keijzer, *Military Obedience* 169, 175, 179, 190, 204, 205, 21018 (1978) (providing a general overview and discussing the United States, United Kingdom, West Germany, Netherlands, and Israel). Concerning early limits on the superior orders defense, as interpreted by United States courts martial, see Sheldon Glueck, *War Criminals, Their Prosecution, and Punishment* 14050 (1944). The United States Army Manual abandoned the exception for manifestly criminal orders in 1914, an exception reinstated in 1940 and retained ever since. In tort suits

against the subordinate based upon the very same acts, obedience to superior orders has never provided a blanket defense in the United States. *Id*. at 147; John Norton Moore et al., *National Security Law* 391 (1990) (parsing *Little v. Barreme* 6 U.S. (2 Cranch) 170 (1804) and *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 137 (1851)).

21 Farhad Malekian, *The Concept of Islamic International Criminal Law* 178 (1994); see also Capt. David C. Rodearmel, "Military Law in Communist China: Development, Structure and Function," 119 *Mil. L. Rev*. (1988) (quoting provisions prohibiting maltreatment of P.O.W.s and other noncombatants).

22 Manfred Messerschmidt, "German Military Law in the Second World War," in *The German Military in the Age of Total War* 323 (Wilhelm Deist ed., 1985).

23 The Tribunal's Charter, like that of Nuremberg's, expressly excludes obedience to superior orders as a cognizable defense, treating it as relevant only to setting punishment.

24 H. McCoubrey, *The Concept and Treatment of War Crimes* 25 ("It would thus be strongly arguable that the defense of superior orders, with the strict 'ought to know' qualification, survived 1945, and remains a feature of modern

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Second, as one leading scholar observes, the evolution of international law since the Nuremberg proceedings has not closely followed their lead in this area.25 The superior orders defense remains very much alive wherever the criminality of the defendant's conduct cannot convincingly be categorized as immediately obvious to anyone on its face.

Failed states in Africa and Asia have been particularly adamant in their unwillingness to let international law dispense with, or even severely restrict, the superior orders defense.26 This unwillingness is perfectly intelligible. In such societies, after all, states are weak precisely because most people owe competing, often stronger loyalties to tribe, clan, or religious faith. Internal conflict between armed factions seeking control of the state further weakens it. In fact, "many African armies [consist of] a coterie of distinct armed camps owing primarily clientelistic allegiance to a handful of mutually competitive officers of different ranks, seething with a variety of corporate, ethnic and personal grievances."27

In these circumstances, loyalty by government troops to formal superiors cannot be casually assumed. It is scarcely surprising, then, that many governments would oppose any strengthening of international norms encouraging soldiers to disobey orders on the basis of competing duties.

This position is obviously self-serving. But it is not altogether indefensible. The central task of politics in such places remains the creation of a state, powerful enough to secure public order. Official support is understandably scant for legal norms authorizing any latitude for soldiers' disobedience to their commanders.28 In fact, the

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law. Nuremberg's novelty lay primarily in its development of the offense of crimes against humanity and its creation of individual liability for crimes previously treated as 'acts of state.'").

25 Levie, *supra* note 14, at 3031.

26 Mohammed Ayoob, "State Making, State Breaking, and State Failure," in *Managing Global Chaos* 3751 (Chester A. Crocker et al. eds. 1996) (explaining how state weakness fosters a very restrictive view of civil and political rights, including discretion to disobey).

27 Samuel Decalo, *Coups and Army Rule in Africa* 1415 (2d ed. 1976). For a recent example, see Howard W. French, "Army Fights Rebel Force to Control Brazzaville," *N.Y. Times*, June 10, 1997 at A 11 (reporting "fighting between the national army and a militia loyal to a former head of state . . . ").

28 Ignatieff observes, in this regard, "As states disintegrate, so do armies and

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state itself is often little more than a legal fiction in such societies, insofar at it fails to monopolize the legitimate use of violence.[29] Historically, for that matter, it was only through military conflict, waged by increasingly strong and disciplined armies, that the modern state came into existence.[30] State-building is necessary for public order, but the process is closely and uncomfortably akin to organized crime.[31]

For this reason, state-building elites do not emphasize the desirability of disobedience to criminal orders. It is no accident that *respondeat superior*, as a solution to the problem of criminal orders, developed in early modern Europe, where it neatly served the interests of modern state-builders. As William James observed, "obedience to command . . . must still remain the rock upon which states are built . . . "[32] For these reasons, then, conflicts between the demands of international and municipal military law have not presented acute practical problems on the issue of obedience to unlawful orders.

Even so, there is a very real danger that such conflict will arise in the future, in situations readily foreseeable today. It is most likely to develop in connection with a U.N. peace enforcement operation.[33] In these operations, American forces now routinely serve under U.N. commanders of other nationalities. These commanders are obligated to apply rules of international law in managing United Nations forces. In such operations, however, American forces remain under the

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> chains of command, and with them, the indigenous warrior codes that sometimes keep war this side of bestiality." Michael Ignatieff, *The*

Warrior's Honor 6 (1998).

29 This was Max Weber's influential definition of the state. By the "legitimate" use of violence, Weber means only that most citizens regard such use as legitimate in most circumstances where it is applied. Max Weber, *Economy and Society* (Guenther Roth, ed., 1968).

30 Charles Tilly, "War Making and State Making as Organized Crime," in *Bringing the State Back In* (Peter B. Evans et al. eds., 1985).

31*Id*. (likening state-building to a protection racket).

32 William James, "The Moral Equivalent of War," in *William James: Writings 1902-1910*, at 1290 (Bruce Kuklick ed. 1987).

33 Such operations are authorized under Chapter VII of the U.N. Charter. On the problem of conflicting interpretations of "shared" rules of engagement by allied armed forces in peace operations, see Sir Roger Palin, *Multinational Military Forces: Problems and Prospects* 34 (1995).

"operational control" of their U.S. superiors.34 American law requires these superiors to hold their subordinates to the terms of the Uniform Code of Military Justice and United States Standing Rules of Engagement. Other states follow similar procedures. The upshot is that "national contingent commanders often seek instructions from their capitals before acting on orders by U.N. force commanders," a practice that "can jeopardize the success of field actions while . . . undermining unity-in-command."35

A situation could easily arise in which a U.N. commander ordered United States forces to perform actions which, though not manifestly atrocious, were contrary to U.S. understanding of international law. If the unlawfulness of these orders were apparent to reasonable U.S. soldiers, they would face liability under U.S. military law for obeying them. This is not a professor's hypothetical. The U.N. command in Bosnia occasionally ordered United States forces to attack civilian targets, sometimes under circumstances where their civilian character was reasonably apparent.36

Similarly, the several national forces under U.N. stewardship in Somalia applied their common rules of engagement very differently. American forces apparently interpreted these rules more stringently than did several others.37 Some of our troops eventually concluded

34 Dept. of the Army, FM 100-5 *Operations*, 4-2, 45; Presidential Decision Directive 25, (May 3, 1994). The directive claims to preserve unity of command but is unclear about how this can be done. Such a division of authority, after all, requires United States forces to disobey orders from U.N. superiors, requiring violations of United

States military law. This potential problem has generated great controversy both among military lawyers and Republican Congresspersons skeptical of U.N. peace enforcement operations. See, e.g., Anthony J. Rice, "Command and Control: The Essence of Coalition Warfare," 27 *Parameters* 152 (1997); J. William Snyder, Jr., "Command" versus "Operational Control": A Critical Review of PDD-25 <http://www.nebonet.com/headhome/dadmisc/liberty/pdd25anl.txt>; John Hillen, "Peacekeeping in Our Time: The U.N. as Professional Military Manager," 26 *Parameters* 17 (1996).

35 John G. Ruggie, *Winning the Peace* 102 (1996).

36 Alex de Waal, "Humanitarian Juggernaut," 17 *London Rev. Books*, June 22, 1995, at 10. The July 1995 fall of Srebrenica to Serbian forces, moreoverwhich resulted in the murder of several thousand civilianshas been partly attributed to differing objectives among the Western states whose troops were supposed to be providing "safe haven" there.

37 A similar dispute arose in Somalia between United States and Pakistani troops when American snipers, obeying United States rules of engagement, fired on individuals protected by U.N. rules for peace forces, according to the

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that, as this greater stringency became apparent to Somali thieves and antagonistic clan forces, the latter tended to concentrate their attacks on U.S. soldiers, rather than other national forces comprising the U.N. presence.[38]

At a minimum, rules of engagement aim to clarify the demands of international law for a given operational theater. But they also have the potentially quite different purpose of reflecting national policy, strategic and even diplomatic, for the region.[39] The several states participating in a given U.N. peace enforcement operation are unlikely to have identical policy objectives in this regard. The rules of engagement and incompatible interpretations of common rules adopted by armies may reflect these differences. The problems of collective action presented by such legal complexity are considerable. But more important for present purposes is the implication of such complexity for what fairly can be considered manifestly illegal to the

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Pakistanis. "U.S. Pulls Somalia snipers in dispute with Pakistan," *Chi. Trib.*, Jan. 13, 1994, § 1, at 4. On coordination of disciplinary procedures within Joint Task Forces, see Dep't. of Defense, Joint Publication 0-2, *United Action Armed Forces*, ch. IV (1995). See also Laura L. Miller and Charles Moskos, "Humanitarians or Warriors?: Race, Gender, and Combat Status in Operation Restore Hope," 21 *Armed Forces & Soc'y* 615, 62627 (1995).

38*Chic. Trib., Id.* Among the national forces representing the U.N., Belgian, Italian, and Canadian forces reportedly beat offending Somalis, while Nigerian and Tunisian forces allegedly fired into unruly crowds. *Id.* American soldiers reported that compared to others, "U.S. forces looked ridiculous and helpless because they seemingly allowed

themselves to be stoned" by not responding with deadly force. Moskos, *Id*. at 626. See also Jennifer Gould, "Military Disgrace: Child Roasted on the Peacekeepers' Pyre," *The Observer*, June 22, 1997, at 6 (describing forthcoming prosecutions of U.N. troops for atrocities); Anthony DePalma, "Canada Assesses Army: Warriors or Watchdogs?" *N.Y. Times*, April 13, 1997, at 16.

39 Lt. Col. John G. Humphries, "Operations Law and the Rules of Engagement in Operations Desert Shield and Desert Storm," 6 *Airpower J*. 25 (1992); Lt. Comm. Guy R. Phillips, "Rules of Engagement: A Primer," *The Army Lawyer* 4, 6, 24 (1993) (noting that such rules can authorize, for the given operation, a subset of the actions already authorized by international law). In the United States, "The highest levels of command specifically describe their rules of engagement to lower headquarters as policy, rather than criminally enforceable orders. However, commanders may purposefully issue particular rules of engagement for the individual soldier as punitive general orders, creating the possibility of courts-martial for violators." Lt. Col. Mark S. Martins, "Rules of Engagement For Land Forces: A Matter of Training, Not Lawyering," 143 *Mil. L. Rev*. 3, 61 (1994); Richard J. Grunawalt, "The JCS Standing Rules of Engagement: A Judge Advocate's Primer," 42 *A.F.L. Rev*. 245 (1997).

soldier of ordinary understanding, working under (and in conjunction with) soldiers who are bound by quite different rules.

When prosecuted under the more demanding U. S. military law, a soldier could argue, with some plausibility, that the wrongfulness of this obedience was not manifest because the conduct it commanded was permissible under the less demanding international law. Again, only the most austere and unforgiving formalism could keep one from sympathizing with such a defendant. Formalism of this sort, in any event, would probably not prove persuasive to a court-martial jury of American soldiers, who would have reason to anticipate facing a similar predicament themselves. If we wish to cultivate greater respect and appreciation for international law within the armed forces of nation states, this is not a very good way to go about doing so.

Conflicting Principles within Military Law

Yet another problem with the insistence on clarity as a condition of manifest illegality arises from the fact that military law enshrines two very different theories of morality. These different moralities often suggest quite disparate answers to legal questions. The law itself does not clearly demarcate the respective domain of each theory.[40]

In some areas the law inclines toward Kantianism, imposing strict side-constraints on violent conduct, applicable regardless of consequences. The 1977 Geneva Protocols provision requiring the giving of quarter to surrendering forces offers an example. In other areas, however, military law inclines toward a rough and ready utilitarianism, aimed at ensuring an overall result consistent with

the general welfare of all concerned.[41] It does so primarily through the principles of proportionality[42] and military necessity.[43]

40 For an early argument to this effect, see Wasserstrom, "The Laws of War," *supra* note 2, at 9.

41 Walzer, *supra* note 11, at 25154 (interpreting the war convention as adopting a qualified version of rights-consequentialism and allowing situations of extreme exigency to override noncombatant immunity); R.B. Brandt, "Utilitarianism and the Rules of War," 1 *Phil. & Pub. Aff.* 1, 145 (1972). (reviewing utilitarian approaches to the law of armed conflict).

42 The principle of proportionality governs the relation between the means employed in combat and the ends desired. The amount of force cannot be

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The Kantian norms take the form of strict side-constraints, direct prohibitions on certain, specified uses of force. The utilitarian norms, in contrast, often take the form of general principles.[44] These principles are expressly stated and enshrined as such, declared as binding across virtually the entire range of military conflict. An officer must generally exercise his "situation sense" to know whether and to what extent in a given predicament a general legal principle trumps the *prima facie* prohibitions imposed by a more specific rule. There is considerable disagreement among legal authorities, moreover, concerning what these principles actually mean and require, even where they are agreed to apply. They "invite endless argument"[45] and their requirements are sometimes counter-intuitive.[46]

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"excessive in relation to the concrete military advantage anticipated." Protocol Additional to the Geneva Convention of 1949, Relating to the Protection of International Armed Conflicts, 1977, 1125 U.N.T.S. at 29. See Morris Greenspan, *The Modern Law of Land Warfare* 31314 (1959). But there is much disagreement concerning what the principle requires of belligerents, a question that invites endless argument. R.R. Baxter, "Modernizing the Law of War," 78 *Mil. L. Rev*. 165, 17879 (1978) ("The rule of proportionality . . . has never been easy to apply in particular cases, and . . . is little more than a cautionary rule, requiring the commander to stop and think before he orders a bombardment.").

43 Military necessity generally authorizes whatever measures are "necessary to compel submission of the enemy with the least possible expenditure of time, life, and money." Capt. Eugene R. Milhizer, "Necessity and the Military Justice System: A Proposed Special Defense," 121 *Mil. L. Rev*. 95, 10205 (1988). A commander accused of

pillage of civilian crops, for instance, can often defend himself on the general grounds of necessity. To this end, Lieber's Code contained provisions like: "the principle has been . . . acknowledged that the unarmed citizen is to be spared in person, property, and honor *as much as the exigencies of war will admit*." Richard Hartigan, *Lieber's Code and the Law of War* 48 (1983) (emphasis added). Key prohibitions of the Hague and Geneva Conventions are littered with qualifications providing that the prohibition applies if "military requirements permit." L.C. Green, *The Contemporary Law of Armed Conflict* 293 (1993) (discussing several provisions embodying these qualifications)

44 These are not the sort of hidden principles that Dworkin has in mind, buried inarticulately within the doctrinal underbrush, latent within more explicit rules, in need of being teased out through argument in litigation. Ronald Dworkin,*Law's Empire* 24748(1986).

45 Paul W. Kahn, "Lessons for International Law from the Gulf War," 45 *Stan. L. Rev*. 425, 435 (1993).

46 For instance, one can use significantly greater force to displace an enemy from a position than needed to establish himself there. Thus, "proportionality here cannot be in relation to any specific prior injuryit has to be in relation to

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What does the field commander's duty to prevent unnecessary suffering and collateral damage to civilians require, for instance, when the adoption of a new artillery method will cut the risk to his forces in half while increasing the risk to civilians by a factor of five? There is virtually no sustained discussion of such questions in the pertinent literature,[47] let alone an answer generally agreed upon. One is first tempted to say that military law concepts like proportionality and unnecessary suffering are, like many key terms in political and moral theory, "essentially contested."[48] But the professional military and academic writing in this area is so undeveloped that the underlying ambiguities are hardly ever brought to the surface or elucidated to the point where the needed contestation could take place.

Let us see more concretely how the two kinds of norms come into open conflict in particular situations. A Geneva provision declares that "fixed establishments and mobile medical units of the Medical Service may *in no circumstances* be attacked."[49] What rule could possibly be clearer than this, one might ask? How could a superior's order to conduct such an attack not be manifestly illegal, given the lucidity of the stated norm? But as in any serious exercise of statutory interpretation, one must read such an isolated rule-fragment in conjunction with the network of related rules surrounding it. As soon as one does this, one immediately discovers that there are

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> the overall legitimate objective, of ending the aggression or reversing the invasion . . . even though it is a more severe use of force than any

single prior incident might have seemed to have warranted." Rosalyn Higgins, *Problems and Process* 232 (1994).

47 The United States' *Law of Land Warfare* manual, for instance, states that for soldiers inquiring whether collateral damage to medical units is proportional to the military objective thereby obtained, "everything depends on the concrete situation." *The Laws of War* 38 (W. Michael Reisman and Chris T. Antoniou, eds., 1994). On the lack of serious analysis of the issue by military commanders and their lawyers, see Rogers, *supra* note 4, at 17. Philosophical analysis of the issue is also undeveloped, as notes Robert Nozick in *Socratic Puzzles* 302 (1997).

48 G.H. Gallie, "Essentially Contested Concepts," *56 Proc. of the Aristotelian Soc'y* 167, 169 (195556) (identifying certain terms, the meaning of which "no amount of argument can possibly dispel.")

49 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 19, 75 U.N.T.S. 31 (1952).

actually several circumstances in which such medical facilities can be lawfully attacked. This is because the surrounding rules prohibit the use of protected nonmilitary facilities such as cultural monuments, hospitals, churches, and so forth, for military purposes. These rules indicate that such facilities lose their immunity when so abused.[50]

What should happen, then, when the enemy has deliberately located a legitimate military target in close proximity to a medical facility such that the latter is virtually certain to be destroyed as collateral damage by successful attack upon the former?[51] This siting practice is quite common in war.[52] In fact, it is increasingly done precisely to make public charges of indiscriminate use of force and of war crimes to the international community through the mass media, thereby influencing the positions taken by other states toward the larger conflict.[53]

The exception, allowing attack of hospitals and cultural monuments, arises naturally from general principles of fair play, reciprocity, and ultimately, military necessity. A fair fight would not be possible if one side could immunize its forces and materiél from attack by locating them within or very close to legally protected objects. To have a fair chance of prevailing against such forces, indeed, to attack them at all, it becomes necessary to direct fire at, or very nearly at, the presumptively protected objects. The legal principle of military necessity thus routinely trumps the seemingly

50 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, TIAS 3365, 75 U.N.T.S. 287

(providing that "the presence of a protected person may not be used to render certain points or areas immune from military operations.").

51 Maj. W. Hays Parks, "Air War and the Law of War," *32 A. F. L. Rev*. 1, 5759 (1990).

52 Meilinger, *supra* note 5, at 103, 111 (noting that during the Persian Gulf War "in several instances the Iraqis placed antiaircraft guns on the roofs of hospitals and hotels and parked aircraft next to ancient archaeological treasures."). Meilinger adds that despite their legal right to do so, the U.N. "coalition elected not to strike these targets, for fear of damaging the adjacent structures." *Id*.

53 Barbara Staff, "Nonlethal Weapon Puzzle for U.S. Army," 4 *Int'l Defense Rev*. 319, 319 (1993); Stephen Young, "Westmoreland v. CBS: The Law of War and the Order of Battle," 21 *Vand. J. of Trans. L*. 219 (1988). For an ethnographic case study of the tremendous tactical difficulties to which this strategy gives rise, see Jeffrey Race, *War Comes to Long An* (1972).

straightforward rules against attacking hospitals, churches, and cultural monuments.

The problem also arises to some extent from the uncertain relation between the Hague and Geneva Conventions. For instance, the Hague Conventions, but not the Geneva ones, authorize reprisals. Whereas the former contain "absolute, nonderogative prohibitions on certain types of conduct," the latter "are vaguely worded, giving commanders wide latitude to plan and implement battle strategies."[54] How then can an order to participate in attacks on hospitals ever be manifestly illegal to subordinates who must often rely entirely on intelligence from superiors regarding the actual use to which the particular facility is being put?[55]

The tension between Kantian and utilitarian moralities is particularly clear in the law of reprisal.[56] That body of law authorizes commanders to order acts otherwise expressly prohibited if taken in retaliation for and with the intention of stopping like acts by the enemy. When taken in reprisal, the consequentialist concern with deterring the enemy's future violations here authorizes a wide variety of otherwise prohibited acts. The rationale has been, as Lauterpacht remarks, that "it is impossible to visualize the conduct of hostilities in which one side would be bound by the rules of warfare without benefiting from them, and the other side would benefit from them without being bound by them."[57] Similar requirements of reciprocity and mutual trust between opponents are central, of course, to prevailing notions of professional ethics in other fields.[58]

Subordinates must generally trust superiors that a given order, expressly prohibited by the *jus in bello*, is permitted under the

54 Roger Normand and Chris af Jochnick, "The Legitimization of Violence," 35 *Harv. Int'l L.J.* 49 (1994).

55 The mistake in question, in any event, involves a reasonable mistake of fact rather than of law and as such would more readily be excused.

56 Christopher, *supra* note 10, at 189200.

57 C. J. Greenwood, "Reprisal and Reciprocity in the New Law of Armed Conflict," in *Armed Conflict and the New Law* 230 (Michael A. Meyer, ed., 1990).

58 J. Gregory Dees and Peter C. Cramton, "Shrewd Bargaining on the Moral Frontier," 1 *Bus. Ethics Q.* 135, 135 (1991) (arguing that in business and in legal practice, "moral obligations are grounded in a sense of trust that others will abide by the same rules. When grounds for trust are absent, the obligation is weakened.").

circumstances as a reprisal. After all, the enemy's violations often occur elsewhere in the strategic theater beyond the view of the subordinates ordered to conduct the retaliation. This is an acutely practical problem. Defense counsel have raised it in several war crimes prosecutions, beginning with those stemming from submarine warfare during the First World War.[59] An order to fire on lifeboats, leaving a troop vessel that one has just sunk, might seem manifestly illegal on its face, but not necessarily in circumstances where the commander explains that the order is in retaliation for like conduct by the enemy many miles away.

The reason that the law of armed conflict has been so indeterminate on such matters is not only the paucity of litigation. Another obstacle to making the law clearer, and thereby enlarging the scope of manifest illegality as an exception to the superior orders defense, is that in any given combat situation, some peoples' moral intuitions will be Kantian and others' utilitarian.

This explains, for instance, the widely differing reactions of equally thoughtful people to the nuclear destruction of Hiroshima. When in a Kantian mood, we are shocked that a weapon of such magnitude would be targeted at a population center, consisting almost entirely of noncombatants. To kill so many innocents in this way is to use them merely as means, however laudable the end their deaths are made to serve.

But most of us also have utilitarian moments during which we are inclined to excuse even so clear a violation of a presumptive legal prohibition on the grounds that it will produce a lesser evil from the perspective of the general welfare. Using the atom bomb shortened, even ended, the War.[60] According to some scholars, it made

unnecessary a land invasion of Japan, thereby saving the lives of over one million Americans and Japanese, far more than killed by the nuclear weapons.[61] Leading Air Force generals during the Vietnam

[59] See generally James Willis, *Prologue to Nuremberg* (1982).

[60] George Feifer, *Tennozan* 57984 (1992).

[61] See, e.g., William O'Neill, *A Democracy at War* 42026 (1993); Ronald Schaffer, *Wings of Judgment* 13138 (1985). Even the Japanese government accepted this conclusion, in litigation against it by victims of the bombing. *Shimoda v. Japan*, 8 *Jap. Ann. Int'l L.* 212, 240 (1964). But see Gar Alperowitz, *Atomic Diplomacy* 1927, 28487 (1985); Michael Sherry, *The Rise of American Air Power* 33536 (1987).

War made virtually identical arguments in favor of much more aggressive bombing of the North's electric, transportation, and water supply systems than was actually done.62 In many areas of military law, the tension between Kantian and utilitarian intuitions about the nature of morality has not been clearly resolved.63 The upshot is to leave much of the law still too unsettled to activate the manifest illegality rule at all.

Only some professional philosophers think it necessary to choose one moral theory over the other as universally true and applicable everywhere. This is precisely what makes their advice in practical matters often seem so bizarre, extreme, and lacking in situational judgment. Some of the best current work in moral philosophy, however, accepts moral pluralism,64 according to which both Kantian and utilitarian principles are true and must be accorded variable weights depending on the particular circumstance of their application.65 Wise application of such principles relies more on situational judgment, even traditional casuistry, by people of virtuous

62 Schaffer, *supra* note 61, at 21013.

63 U.S. military law resolves the tension much more clearly than international law or the military codes of most other countries. Army Field Manuals, rewritten in both 1940 and 1956, state that the rules of war may not be disregarded on grounds of military necessity because the drafting of the prohibitory rules already accounted for these considerations. See, e.g., Dept. of the Army, Field Man. 27-10, *The Law of Land Warfare* 4 (1956). Telford Taylor did not share this view. He observes that the practice of states establishes customary law, and states at war do not behave as if the doctrine of military necessity has been restricted to this degree. Taylor, *Nuremberg and Vietnam* 3239 (1970).

See also Parks, *supra* note 51, at 52 (proclaiming "the fundamental failure of the law of war to acknowledge that the traditional distinction between the combatant and the noncombatant was obsolete, and had been for the century preceding World War II.").

It is unsettled whether the principle of military necessity limits only top commanders deciding strategic issues or also limits the lowest echelon officers to deciding tactical matters in individual operations. Robert L. Holmes, *On War and Morality* 103 (1989).

64 Current defenders of this view include Thomas Nagel, *Mortal Questions* 12841 (1979); Joseph Raz, *The Morality of Freedom* 32166 (1986); Amaryta Sen, "Plural Goods," in *Proceedings of the Aristotelian Society* (1981).

65 James D. Wallace, *Ethical Norms, Particular Cases* 21 (1996). ("In some particular situations where these considerations conflict, it is clear as can be that one is more important than the other. This suggests . . . that we are able to discern, on a case-by-case basis, how conflicts are properly resolved, even though we have no general principles to guide us . . . ").

character than on any formal decision procedure, easily and equally applied by anyone.66 Much of the war convention acknowledges the fact of moral plurality.67

The manifest illegality doctrine sits somewhat uneasily with this insight, however. It assumes, after all, that the law should punish soldiers' crimes of obedience only when immediately and transparently wrongful under all circumstances to everyone. Can the law of military obedience be revised to attend more closely to the reality of moral pluralism, to foster the practical judgment necessary to give it effect? Part III of this book defends an affirmative answer to that question.

Perverse Incentives for Legal Stagnation

The demand for legal clarity as a condition for a finding of manifest illegality creates unfortunate incentives to leave the special part of international criminal law undeveloped. If officers could be criminally liable for any unreasonable legal error in combat, they would surely push for greater clarity in the rules governing it. Like most people subject to serious threat of legal sanction, they would want to know exactly what the law requires of them in the various sorts of situations they can expect to face. Pilots would demand answers to questions like: When, exactly, is it permissible to bomb "dual-use" targets, e.g., electrical power plants used simultaneously for both military and civilian purposes? Computer scientists in the Pentagon would insist on a formal legal opinion, at least, on 'What constitutes "aggression" in cyberspace?'

The manifest illegality rule sets the incentives of soldiers quite differently, however. When subordinates inquire about their legal

duties in a complex situation, the response from superiors is likely, "Not to worry, the complexities are beyond your ken; just obey the order, unless it clearly calls for atrocities." This kind of reassurance is all too comforting for most people, not only soldiers. However, the

66 See generally *Virtue Ethics* (Roger Crisp and Michael Slote, eds., 1997). The inegalitarian implication of this view of virtuous judgment cannot be gainsaid. Clausewitz often described it, in fact, as "genius." But by this he meant only "a very highly developed mental aptitude for a particular occupation." Carl von Clausewitz, *On War*, 138 (Anatol Rapoport ed. and J.J. Graham trans., 1968).

67 Michael Walzer, "A Response," 11 *Ethics & Int'l Aff*. 99, 104 (1997).

manifest illegality rules gives such reassurance to soldiers much more generously than to anyone else by excusing them even from unreasonable errors as long as the resulting crimes do not constitute atrocities.

If military law only punishes acts that are obviously illegal on their face, then courts cannot easily help to evolve and advance the law into new areas. Any uncertainty about whether the defendant's conduct was manifestly illegal must be resolved in his favor. After all, criminal statutes are strictly construed. A commanding officer might be initially unclear, for instance, about the legal propriety of using a new weapon such as nonlethal sticky foam.[68] This use of sticky foam might be unlawful, and the officer's decision to use it unreasonable under the circumstances. It is highly unlikely that using the sticky foam would be manifestly criminal, however, until a body of settled law fully regulates its use. The law almost always lags behind, often far behind, the development of new weapons systems.[69]

But the results of many modern military conflicts often turn on one side's use of novel technologies, such as smart bombs, information warfare,[70] blinding lasers, and other nonlethal weapons.[71]

68 Sticky foam is one of a large class of nonlethal weapons now deployed or under development. Nonlethal weapons are "designed to fill the gap between verbal warnings and deadly force." F. M. Lorenz, "Nonlethal Force: The Slippery Slope to War?," 26 *Parameters* 52, 52 (1996). They are considered particularly suitable for peace enforcement operations, where minimum use of force is essential to preserving local support for continued presence of foreign soldiers. On the problems presented by such new weapons, see Martin N. Stanton, "What Price Sticky Foam?," 26 *Parameters* 63 (1996).

69 According to "realists," the international community bans weapon systems only after discovering them to be largely ineffective or obsolete and supplanted by yet more destructive weapons. Chemical weapons offer an apt example. Though used extensively in the First World War, the weapon was not effectively covered by an international treaty prohibiting its use until 1997, by which point nuclear weapons had been developed, deployed, and even used. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and Their Destruction, Jan. 13, 1993, 32 *Int'l Legal Materials* 800 (1993).

70 Information warfare "consists of any action to deny, exploit, corrupt, or destroy the enemy's information and information functions; protecting ourselves against those actions; and exploiting our own military information functions." Dep't. of the Air Force, *Information Warfare* D 301.2: W 23, at 5. See generally Col. Richard Szafranski, "A Theory of Information Warfare: Preparing for 2020," 9 *Airpower J*. 56 (1995).

The upshot, then, is that the manifest illegality rule, as the last dike left standing against a successful defense of superior orders, is unlikely to be remotely relevant to modern military commanders as they face many of the most significant decisions concerning questionable use of new, semi-regulated technologies.

Some advocates of reform in military law actually relish the continued unsettledness of the rules prohibiting various methods of warfare. They believe that legal indeterminacy is likely to have a chilling effect on officers contemplating conduct close to the line of impermissibility. Introducing complexity into the law is one means to this end because it creates uncertainty in the officers' minds as to what is and is not permitted. "If we cannot outlaw war, we will make it too complex for the commander to fight!" acknowledged Jean S. Pictet, senior representative for the International Committee of the Red Cross, during drafting of the 1977 Geneva Protocols.72

The more probable consequence of excess complexity, however, is to give comfort to officers already inclined to reject rules restricting the use of force as legalistic intermeddling. Where the law is hopelessly complex, it is also likely to be unclear and difficult to apply correctly in exigent circumstances. By this route, the door opens further for defendants to claim that their conduct was not manifestly illegal on its face. The rule provides, after all, that legitimate doubts about the legality of an order may be resolved in favor of its obedience.

71 See generally Nick Lewer and Steven Schofield, *Nonlethal Weapons* (1997); Lorenz, *supra* note 68, at 52 (noting that some United States military strategists are "concerned that the proliferation

of less-lethal technologies would inadvertently bridge the gap between peace and war, leading us down the 'slippery slope' to deadly force (and war) with little foresight and no debate"); Douglas Pasternak, "Weapons," *U.S. News & World Rep*., July 7, 1997, at 38 (describing such new technologies, some of them already deployed, as light-beam lasers, sleep-inducing spray, bean bag projectiles, sticky foam, acoustic disorientation devices, and vortex shock guns); Stanton, *supra* note 68, at 63 (explaining problems presented by such new weapons).

72 Parks, *supra* note 51, at 75 (comment attributed to Pictet by Waldemar A. Solf). As is true of most treaties and contracts, however, many of the ambiguities in the 1977 Protocols to the Geneva Conventions result simply from the parties' inability to agree on more precise language. A recent study argues that the organization is indeed committed to this objective. Nicholas O. Berry, *War and the Red Cross* 5 (1997).

Unfortunately, in many areas, the law of armed conflict has become more complex without becoming more clear. To make the law a more effective deterrent to wrongdoing it is necessary to ensure that its rules are as clear as they can be. They should also comport closely, wherever possible, with basic notions of fairness, i.e., of a "fair fight" exclusively between belligerents. In these ways, we can increase the odds that the ordinary commander or soldier can readily grasp the legal restrictions bearing on a given combat situation.73

And only by creating incentives for the people subject to such restrictions to get their meaning clarified can we ever hope to overcome the doubts of "realists," on both the right and left, that the law of war offers only the illusion of constraint, that it is really no more than a convenient rhetorical mantra by which leaders can more soothingly justify virtually any violence serving apparent military purposes.74

73 This was the position adopted by the United States in negotiations over the 1977 Protocols. For a defense of this view, see Parks, *supra* note 51, at 75.

74 For a recent, "left" version of this longstanding realist view, see Roger Normand and Chris af Jochnick, "The Legitimation of Violence: A Critical Analysis of the Gulf War," 35 *Harv. Int'l L. J.* 387, 40913 (1994).

5
The Weightlessness of Moral Gravity

A law's clarity is a necessary condition for a finding of manifest illegality, but not a sufficient one. The gravity of the wrong must also be very great.[1] This requirement is readily satisfied whenever the defendant's act clearly constitutes a "grave breach," as specifically enumerated in the Geneva Conventions and the first 1977 Protocol. The requirement might at first appear relatively unproblematic. After all, a large proportion of criminal acts committed in war have grave consequences for their victims.

But if gravity were enough to establish manifest illegality, the exception for manifestly illegal acts would almost entirely swallow the general rule which requires subordinates to presume the legality of superior orders. In short, gravity proves too much. During wartime, even lawful acts such as killing enemy soldiers in combat have very grave consequences. Learning to be a soldier requires learning to suppress one's initial moral revulsion at killing other human beings.

The memoirs of former soldiers, such as *All Quiet on the Western Front*, are full of ambivalence about success in this endeavor.[2] Just as people in other jobs learn to suppress the

1 Yoram Dinstein, *The Defense of 'Obedience to Superior Orders' in International Law* 15 (1965); H. McCoubrey, *The Concept and Treatment of War Crimes*, 121, 131 ("The real criterion of identification [of "grave breaches" under the Geneva Conventions], which is implicit in all the major listings to which reference is made,

is perhaps the gravity of the *actus reus* and its consequences.") Some think the distinction between felony and misdemeanor sufficient to mark certain offenses as grave enough to count as manifestly illegal. Adolphe Chaveau and Helie Faustin, *Théorie du Code Penal* 57779 (4th ed. 1861) (arguing that "if they commit a felony the order is not cause for justification," but that "low ranking military officers are less likely to recognize the illegality of an order pointing to the perpetration of a misdemeanor since its immorality is less piercing.").

2 Erich Maria Remarque, *All Quiet on the Western Front* 113, 19596, 21929 (1929). Such memoirs often speak of the anguish of seeing so many civilian casualties. See, e.g., Eric M. Bergerud, *Red Thunder, Tropic Lightning* 21025

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expression of negative feelings, such as those toward customers,[3] soldiers must learn to suppress their positive ones, such as sympathy toward enemy conscripts. Hence, soldiers cannot rely upon their feelings about the moral gravity of an act as a reliable indicator of its illegality, as they generally may do during peacetime.

Warfare is a social practice the very nature of which places its practitioners momentarily beyond good and evil, making them partially exempt from normative regulation that exists in all other contexts. War, especially a just war, morally authorizes people to engage in acts that would obviously be criminal under any other circumstances. The normal moral intuitions of peacetime about right and wrong offer little purchase on practical deliberation in combat. The law would be wrong to conclusively presume to the contrary.

To be sure, superior orders calling for manifestly illegal acts can often be distinguished from other combat orders on the basis of the unique revulsion they are likely to awaken in recipients. As one court has put it, an order of this nature "is so palpably atrocious as well as illegal that one ought *instinctively feel* that it ought not to be obeyed . . . "[4] Orders to shoot a line-up of unarmed children provide a paradigmatic case. A complete description would more graphically capture its full ghastliness, the sheer horror that its contemplation would elicit from anyone receiving such an order and facing the beseeching cries of imminent victims. Fiction and film capture this horror more truthfully than the law's case reports.[5]

Revulsion, then, seems to offer an initial clue to what makes the criminality of certain wrongs more manifest than others. In this

regard, prohibition of certain acts, such as use of poison or biological weapons, resonate deeply with long-standing cultural beliefs. These

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(1993) (quoting infantrymen of the U.S. 25th Division, recalling their frontal attack on enemy-controlled villages during the 1968 Tet Offensive).

3 Arlie Russell Hochschild, *The Managed Heart* 67 (1983).

4*McCall v. McDowell*, 1 Abb. N. Cas. 212 (1887) (emphasis added).

5 One resists the inclination to offer a fully accurate verbal account of such events for fear of allowing one's prose to descend into a kind of pornography. Not all resist the temptation. Iris Chang, *The Rape of Nanking* 81142 (1997) (offering a gruesome, detailed account). For a literary account, see Stendhal, *The Charterhouse of Parma* 4849, 7677 (1997). The most powerful and unsparing cinematic treatment of war crime is surely the Russian film *Come and See* (1985), directed by Elem Klimov.

habits of revulsion extend easily into civilian contexts and thus are commensurable with ordinary peacetime experience.6 The acts thus reproached evoke a particular repugnance, moral opprobrium, and sense of abhorrence toward their perpetrators.7 The soldier's anticipation of such stigma readily enables him to discern the unlawfulness of such an order, it might be argued. His practical maxim may remain "mine is not to reason why." But the whole point of the rule is that no 'reasoning why' is necessary to discern the wrongfulness of an order immediately displaying its criminality on its face. Its illegality is apparent in a way that is pre-reflective, gut-level, *un*reasoning.

The way in which certain kinds of killing acquire such historical stigmata is "ultimately mysterious,"8 however, making this a poor basis for rational reconstruction of the modern law of manifest illegality. "Taking an 'objective' point of view," notes a distinguished military historian, "it is not clear why the use of high explosive for tearing men apart should be regarded as more humane than burning or asphyxiating them to death."9 At various points in history, new weapons such as the pike, the crossbow, firearms, and the machine gun10 have been stigmatized for a time as especially dishonorable, their use seen as unfair.11 But these ethical sentiments arose only because the new weapons undermined an aristocratic officer class

6 On the ancient and medieval prohibitions against poison and poisoned weapons in war, see Hugo Grotius, *On the Law of War and Peace, Book Three* 65153 (1964). Cole discusses the stigma associated with biological and, to a lesser extent, chemical weapons. Leonard A. Cole, *The Eleventh Plague* 21326 (1997) (noting the historical association with the use of poison in war); Michael

Mandelbaum, *The Nuclear Revolution* 3233, 3738 (1981) (noting that "the poison taboo recurs through time and across cultures."). *Id.* at 38. But see Richard Price, "A Genealogy of the Chemical Weapons Taboo," 49 *Int'l Org.* 73 (1995) (questioning such claims of a near-universal taboo).

7 Cole, *supra* note 6, at 1214, 21325 (using these terms to describe prevailing attitudes toward biological weapons).

8 John E.V.C. Moon, "Controlling Chemical and Biological Weapons Through World War II," in *Encyclopedia of Arms Control and Disarmament* 673 (Richard D. Burns ed., 1993).

9 Martin van Creveld, *Technology and War* 72 (1989).

10 John Ellis, *The Social History of the Machine Gun* 4775 (Arno Press 1981) (1975).

11 See generally Stephen Peter Rosen, *Winning the Next War* (1991) (detailing the history of resistance to new weapons).

whose power rested on its monopoly over older and suddenly ineffective methods of violence.12 All these new weapons ultimately gained acceptance due to their greater efficacy, overcoming the initial revulsion and corresponding stigmatization they inspired among hereditary military elites.13

Ancient and medieval stigmata no longer correspond very closely with the moral intuitions of modern citizen-soldiers about what is and is not permissible in war. For instance, death by poison, long prohibited by the law of war14, strikes few contemporaries as much more terrible than death by any number of other weapons, many of them lawful. The law has always allowed deceiving an enemy by "ruse," but not by "perfidy," though both tactics equally involve active misrepresentation.15 Most important, the scope of historically stigmatized acts is profoundly underinclusive with respect to contemporary wartime criminality, even the subset identifiable as such by reasonable soldiers. For these reasons, it would be wrong to seek a litmus test of manifest criminality in the moral revulsion allegedly felt by soldiers in response to particular orders. Such a test would be radically underinclusive of the universe of misconduct for which soldiers should be held responsible.

The test would be radically overinclusive as well. Many actions in combat, including many that are entirely lawful, often evoke in soldiers intense feelings of revulsion or closely related emotions, such as anticipation of remorse, disgust, or horror. This is true, for

12 Maj. Ralph Peters, "A Revolution in Military Ethics?," 26 *Parameters* 10203 (1996) ("When English [plebian] longbowmen struck down masses of French knights with early stand-off precision

weapons, chivalry reacted with a horror that we can no longer grasp."); Matthew Strickland, *War and Chivalry* 18081 (1996).

13 That such revulsion was generally rooted in concerns of social status is apparent, for instance, in the reaction of Gen. George Patton, when informed that the Germans were developing "wonder weapons," i.e., long-range rockets. "I don't see the wonder in them," he replied. "Killing without heroics, nothing is glorified, nothing is reaffirmed. No heroes, no cowards, no troops, no generals."

14 Alberico Gentili, 2 *De Iure Belli Libri Tres* 15561 (John C. Rolfe trans., 1993) (marshaling ancient and medieval sources in support of this conclusion).

15 Article 37(1) of the 1977 Additional Protocol 1 defines perfidy as "acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law . . . with intent to betray that confidence." See generally L.C. Green, *The Contemporary Law of Armed Conflict* 16970 (1993).

instance, of the experience of ambushing unsuspecting enemy soldiers at rest, while they are unarmed, out of uniform, and at play. Such an order is perfectly legal, however unsettling the experience of executing it.16

Despite considerable pressure from Gen. Leslie Groves, Director of the Manhattan Project, Secretary of War Henry Stimson rejected Kyoto as the target for the first atomic bomb because of its unique artistic and architectural treasures, the potential destruction of which filled Stimson with revulsion.17 Yet Kyoto was no more nor less lawful a target than Hiroshima. Lt. Calley's orders to kill unarmed women and children at My Lai would evoke revulsion in any conscientious soldier. But the Geneva Conventions did not extend to such victims; these treaties do not technically protect nationals of a co-belligerent state from the depredations of an ally.18

The law of war employs distinctions that often sit uneasily with our ordinary moral intuitions. For instance, it long permitted laying siege to cities but not their firebombing.19 As Walzer notes, "more civilians died in the siege of Leningrad than in the modernist infernos of Hamburg, Dresden, Tokyo, and Nagasaki, taken together."20 Blockades of cities are lawful acts of war even though they are "inherently indiscriminate . . . most affecting those least able to resist: women, children, and the aged."21 Thus, there is no clear manifest

16 2 *The Collected Essays, Journalism, and Letters of George Orwell* 254 (Sonia Orwell and Ian Angus eds., 1968).

17 Barton J. Bernstein, *Hiroshima and Nagasaki Reconsidered* 15 (1975); Dan Kurzman, *Day of the Bomb* 36365 (1986).

18 James E. Bond, "Protection of Noncombatants in Guerrilla Wars," 12 *Will. & Mary L. Rev.* 787, 788 (1971). Hence the need to prosecute Calley for murder, under U.S. military law.

19 W.J. Fenrick, "Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the Former Yugoslavia," *6 Duke J. Comp. & Int'l L.* 103, 109 (1995). Protocol 1 of the Geneva Conventions, article 51, paragraphs 2 and 7, has greatly limited the legal defensibility of siege warfare, however, unless civilians and the wounded are permitted to leave the area. Aryeh Neier, *War Crimes: Brutality, Genocide & Justice* 15863 (1998).

20 Michael Walzer, *Just and Unjust Wars* 160 (1977). The siege of Leningrad resulted in more than 1.3 million civilian deaths, most of which were due to starvation and artillery fire. Phillip S. Meilinger, "Winged Defense: Airwar, The Law, and Morality," *20 Armed Forces & Soc'y* 103, 112 (1993).

21 Meilinger, *supra* note 20, at 112. Meilinger, an Air Force colonel, adds that 'the "productive" elements of a war societythe military forces and industrial

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relation between the degree of harm that methods of war impose on noncombatants and the lawfulness of their use.

Until accustomed to legal norms of combat, most people feel utter revulsion at the prospect of shooting another human being. (The only major exception, of course, arises when the other is shooting back, evoking the stronger, Hobbesian fear of violent death.) Intense feelings of moral revulsion, then, do not always signal the unlawfulness of the order evoking them. In sum, whether a reasonable soldier feels revulsion upon receipt or execution of a superior's order is a very poor guide to whether its illegality should have been manifest to him. Obedience even to lawful orders in combat often evokes revulsion.

Moreover, many unlawful orders do not evoke revulsion. Some of these orders involve merely procedural illegalities, *mala prohibita* violations. But not all. The more candid memoirs of modern soldiers often report reacting to witnessing atrocity "more with fascination than disgust."[22] Technology often enhances this aesthetic dimension of combat. Modern weaponry offers those using it a sensory cornucopia of sight and sound.[23] A hand-held machine can throw a beam of fire for fifty yards. A helicopter's release of napalm can turn an entire hillside into a kaleidoscope of vivid colors in a second. In air combat, brightly colored tracers light the sky with a pageantry that resembles a circus or carnival.[24]

Such technologies, in short, not only dispel any sense of revulsion in those using them, but also can stimulate the sensory experience of soldiers in highly seductive ways, even when the violence they inflict is unlawful, often murderously so. Soldiers may

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workersare usually the last to suffer, since they will receive what food and medicine are available." *Id.* See also Maj. Ralph Peters, "A Revolution in Military Ethics?," 26 *Parameters* 106 (1996) (arguing that military law is morally indefensible insofar as it permits "attacking foreign masses to punish by proxy protected-status murderers," in other words, civilian chiefs of state who launch wars of aggression).

22 Samuel Hynes, *The Soldiers' Tale* 20 (1997).

23 Chris Hables Gray, *Postmodern War* 87 (1997).

24 For a pilot's memoir stressing the aesthetic allures of the job, see Samuel Hynes, *Flights of Passage: Reflections of a World War II Aviator* 24041 (1988). Addressing recruits, Marine drill instructors sometimes describe the visual effects of certain, powerful weapons on human targets as "beautiful." Thomas E. Ricks, *Making the Corps* 150 (1998).

not always feel revulsion when unleashing such aesthetically stimulating weapons upon noncombatants. But they may come to feel extreme remorse upon later appreciating the consequences of their actions. There are many documented cases of Vietnam veterans who report psychiatric problems associated with their confessed participation in atrocities.25

In sum, the expectation that one would feel revulsion before a commanded atrocity does not necessarily inculpate. Likewise, the absence or weakness of such feelings does not necessarily correspond with battlefield circumstances that the law regards are exculpatory. Combat atrocities often result despite the very real revulsion the perpetrator himself would normally feel toward such acts. His revulsion is often suppressed in two ways.

First, sustained exposure to physical danger can induce "post-traumatic stress." It did so in approximately 25% of Vietnam veterans, for instance.26 This syndrome has gone by other names in the past, such as "shell shock." And it has only very recently been recognized as a frequent concomitant of ground combat throughout modern history.27 Medical specialists believe that the numbing of emotion is a common symptom of post-traumatic stress, including emotions of moral revulsion and indignation.28

Second, when sympathetic emotions are not repressed in this way, competing emotions can simply overpower that of revulsion. Soldiers often feel intense resentment and indignation, for instance, at

25 Peter Watson, *War on the Mind* 244 (1978). New methods of "information warfare" off the drawing boards apparently enable an officer to disable a country's entire banking system with a single

computer keystroke, probably violating an aerospace satellite treaty in the process. Whether it would be "natural" for the officer to feel moral disgust when so doing is highly questionable, to say the least. When the harmful consequences of one's contemplated act are so spatially remoteand the process of inflicting them so removed from one's ordinary experienceit is anyone's guess what the natural human reaction to such an order might be.

26 Abigail Zuger, "Many Prostitutes Suffer Combat Disorder, Study Finds," *N.Y. Times* (Aug. 18, 1998), at B12 (citing data on Vietnam veterans).

27 Eric T. Dean, Jr., *Shook Over Hell: Post-Traumatic Stress, Vietnam, and the Civil War* (1997).

28 Amer. Psychiatric Assoc., *Diagnostic and Statistical Manual* 7 (1980, 3rd ed.); Dennis Grant, "Psychological Damage of Combat," 148 *Amer. J. of Psychiatry* 271 (1991); David Grady et al., "Dimensions of War Zone Stress: An Empirical Analysis," 177 *J. of Nervous and Mental Disease* 347 (1989).

the enemy's killing of close comrades, especially when this has been done "perfidiously."[29] Military history is full of incidents in which a platoon or squad, having taken heavy casualties at the enemy's hands, finally prevails. The law requires it to accept the surrender of the very soldiers who had, until seconds before, been its mortal enemies, seeking its destruction. "Too late, chum," has too often been the actual response, however.[30]

In some cases it would be conceivable to excuse such atrocities under the rules concerning "temporary insanity."[31] Military law does not do so, however. Soldiers are expected to suppress or channel the violent impulses their emotions arouse, on pain of prosecution for war crimes. That the defendant might feel the deepest loathing for those who had just killed his closest buddies does not legally excuse his decision to murder surrendering forces.

The criminal law treats these emotions, however intense and intelligible, as "educable" by reason and justice.[32] What justice requires is quite clear: from behind a veil of ignorance, unaware whether one will find oneself surrendering or accepting surrender, every self-interested soldier would surely choose the current legal rule, however difficult the "strains of commitment" sometimes required in following it.[33]

29 Perfidy consists of "acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable to armed conflict, with intent to betray that confidence . . . " Protocol 1 Additional to the Geneva Conventions of 12 Aug. 1949, Article 37, at 28 (1977).

30 John Keegan, *The Face of Battle* 5051 (1976).

31 Lt. Col. David Grossman, *On Killing* 179 (1995).

32 For recent arguments in defense of the law's approach in this regard, see Dan M. Kahan and Martha Nussbaum, "Two Concepts of Emotion in Criminal Law," 96 *Colum. L. Rev.* 269 (1996).

33 The "strains of commitment" problem refers to Rawl's concession that when choosing social arrangements from behind a veil of ignorance, people "will avoid agreements they can adhere to only with great difficulty." John Rawls, *A Theory of Justice* 176 (1971). Within moral theory, this view is by no means unique to Rawls. For Hobbes, too, "it is a condition of morality that individuals . . . be generally capable of complying with its demands," as one interpreter observes. David Mappel, "Realism, War, and Peace," in Terry Nardin ed., *The Ethics of War and Peace: Religious and Secular Perspectives* 70 (1996).

6
Irregularity Amidst Procedural Formality

Lack of legal clarity and grave consequences are not the only indicia of manifest illegality. Due partly to the problems just described, some conclude that illegal orders become manifestly so not because their content shocks the conscience but because of formal or procedural irregularities. This means, in practice, that the orders either exceed the scope of authority enjoyed by the person issuing them or have been otherwise issued in a manner that breaches standard operating procedures.[1] Procedural irregularities serve as a surprisingly effective indicator of substantive criminality because formal procedures govern so much of military life, including the format in which orders may be issued.[2]

The regular, settled practices of a legal system, as Hannah Arendt observed, establish "the relationship of exception and rule" between what is generally permitted and what is permitted only under the most special and unusual circumstances.[3] The exceptional, extraordinary quality of Eichmann's acts, she noted, "is of prime importance for recognizing the criminality of an order executed by a subordinate."[4] From this perspective, the doctrine of manifest

1 On how certain civil law systems adopt this approach, see Guillermo J. Fierro, *La Obedencia Debida en el Ámbito Penal y Militar* 3840, 6076 (1984); on American law, see *U.S. v. Keenan*, 39 C.M.R. 108 (1969) (concluding that subordinates' wrongful acts committed in compliance with a superior's orders are excused "unless such acts are manifestly beyond the scope of his authority").

2 Gwynne Dyer, *War* 136 (1985); Col. Dandridge Malone, *Small Unit Leadership* 46 (1983) (describing the organization of the standard "five-paragraph field order."). For recent discussion, see John Woloski and Randy Korich, "The Automated Operation Order: The Next Step," 73 *Mil. Rev.* 76, 76 (1993) (observing how the "controlled, structured format" of "today's five-paragraph operation order" has "enhanced logical decision making and brought order where chaos and vague directives once reigned.")

3 Hannah Arendt, *Eichmann in Jerusalem* 292 (1962).

4*Id*.

illegality does not require the soldier to consult his conscience but merely his understanding of routine and settled practice.5

This approach to identifying manifest illegality has the advantage of not requiring everyone to possess the intuitions enabling him immediately to recognize the wrongfulness of certain acts under all conditions.6 No one needs refined moral sensitivities to know that his superiors would be exceeding their legal authority if they ordered him, for example, to marry his own cousin, purchase the superior's groceries, to immigrate to outer Mongolia, or, as one American court puts it, "to commit rape, to steal . . . or for the subordinate to cut off his own head."7

Counsel for Second Lt. Kelly Flynn initially planned to use such an argument to defend his client's disobedience of orders to cease adulterous behavior. The argument would have been that such an order could have no valid military purpose because Flynn's private behavior had not affected her professional performance in any way.8 The Uniform Code of Military Justice does not explicitly prohibit adultery, and the lack of such prohibition could allow the inference that a superior's order barring adultery exceeded the scope of his lawful authority, entitling Flynn to disobey it. On this view, the order was *ultra vires* (i.e., beyond his lawful powers).9

The proceduralist approach to manifest illegality closely resembles America's collateral bar rule. Under the rule, one wishing to challenge the constitutionality of a court's order must first obey it or exhaust all procedural means for challenging it unless the court clearly lacks jurisdiction. Only the lack of jurisdiction, a relatively technical issue in most such cases, authorizes one to disobey a

5 This foundation for the doctrine is sometimes eroded in a criminal state, one that straightforwardly authorizes and routinizes its most repressive policies. *Id*. at 29395.

6 Even the proverbial "bad man" (of Holmes' devise) can easily know his legal duties, after all, without need for recourse to his consciencenonexistent, *ex hypothesi*. Oliver Wendell Holmes, "The Path of the Law," 10 *Harv. L. Rev.* 457 (1897).

7*U.S. v. Kinder*, 14 C.M.R. 742, 747, 775 (1953).

8 Elaine Sciolino, "From a Love Affair to a Court-Martial," *N.Y. Times*, (May 11, 1997), at A1.

9 For several early English and U.S. cases holding military subordinates liable for acts pursuant to superiors' *ultra vires* orders, see William Winthrop, *Military Law and Precedents*, 2nd ed., 29697, 575, 887.

judicial order.[10] Under this rule, even the court's flagrant misreading of substantive law, for example, the court's denial of Martin Luther King, Jr.'s constitutional right to march, does not exempt one from the duty to obey its order.

But as has been widely criticized,[11] exclusive attention to procedural issues at times can produce results that are very odd, even perverse. The result of this approach is to treat as manifestly illegal many acts that are merely *mala prohibita*, while leaving other acts, though clearly *mala in se*, outside its scope and immune from liability. An order to bag groceries might prove manifestly illegal, but not necessarily one to kill a child in a conflict involving child soldiers.

Sometimes, a morally serious violation of substantive law is accompanied by a violation of procedural duties, often a reporting requirement. This was the case, for instance, of the bombing missions into North Vietnamcontrary to written rules of engagementordered by Gen. John Lavelle. Pilots were ordered, upon return to base, not to report features of their missions that they could normally expect to report.[12] The order to breach normal reporting procedures put them on clear notice that something serious was likely amiss, and should have prompted further inquiry on their part, at the very least. But generally the more "manifest" procedural violation will be much less serious than the underlying substantive one, so that resulting punishment would have to be relatively minor, if not *de minimus*. Still more often, the "nonmanifest" substantive violation will occur without any associated procedural breach at all.

Any effort to define manifest illegality in terms of *ultra vires*

activities, moreover, faces the same problem that the *ultra vires* idea faces in its traditional home within corporate law: it proves surprisingly difficult to identify, with any precision, the "essential core" of an organization's or profession's activities in a world where corporations increasingly merge, subdivide, and enter new

10 *United States v. United Mine Workers*, 330 U.S. 258 (1947).

11 *Walker v. Birmingham*, 388 U.S. 307 (1967).

12 On this aspect of the incident, see Malham Wakin, "The Ethics of Leadership," 19 *Amer. Behav. Scientist* 567, 67879 (1976). In an important case from the Korean War, an American military guard killed a detainee on orders from a superior officer, who then filed a false report on the incident. *U.S. v. Kinder*, ACM 7321 742, 747 (1953).

industries,[13] and where warriors increasingly become peace keepers, state builders, election supervisors, and distributors of humanitarian aid.

A proceduralist approach to the manifest illegality rule would also have the unfortunate effect of classifying as blameworthy most efforts to halt attempts at military coups d'état. Successful coups generally entail obedience by combat soldiers to unlawful orders their immediate superiors issued, such as to march on and seize the presidential palace. Only intervention in the chain of command by civilian or higher military personnel can stop such wrongful obedience.

President Charles de Gaulle, for instance, issued a broadcast on national radio to urge French troops in Algeria to disobey the orders of his mutinous generals, resisting his decision to withdraw and concede defeat to the indigenous insurrection.[14]

King Juan Carlos of Spain did much the same in 1982 to block a coup attempt by junior officers claiming to act on his personal authority.[15] In 1991, with the benefit of more recent technology, Russian President Boris Yeltsin was able to reach (via cell phone) the individual commander of the particular tank brigadeordered by his immediate superiors to seize the Russian Parliamenthalting a coup attempt in its tracks. These intercessions by de Gaulle, Yeltsin, and Juan Carlos, though surely necessary and desirable, violated formal procedures establishing the chain of command. As violations of standard operating procedure, the officers' orders had to be easily recognizable as manifestly illegal under this approach to the rule.

13 This is why any good corporation lawyer today will draft a company's articles of incorporation to permit it to engage in any lawful business. This move effectively eliminates the historical problem.

14 De Gaulle announced "I forbid every Frenchman, and above all every soldier, to execute any of their orders . . . " Alistair Horne, *A Savage War of Peace* 455 (1978). See generally Orville D. Menard, *The Army and the Fifth Republic* 209 (1967).

15 Carolyn P. Boyd and James M. Boyden, "The Armed Forces and the Transition to Democracy in Spain," in *Politics and Change in Spain* 94, 10912 (Thomas D. Lancaster and Gary Prevost eds., 1985); Pilar Urbano, *Con la Venia . . . Yo Indague El 23-F* 28991 (1982).

7
Atrocities "Vanish" by Verbal Artistry

One way in which environing circumstances have often been accorded legal weight, sometimes surreptitiously, has been to incorporate them into the factual description of an accused's conduct. In this way, his acts are framed in a way that permits background considerations to be brought to the foreground of legal analysis.[1] The defendant's acts cannot describe themselves, and even his atrocious ones do not so self-characterize.

Some descriptions of the defendant's act will readily allow its classification as manifestly illegal on its face. But other descriptions, equally accurate, will not. The law has no fixed criteria for determining which of a range of true descriptions to adopt.

The consequences of adopting one description rather than another can be enormous. Recent work in cognitive psychology[2] as well as long-standing experience in public opinion surveys[3] suggest that how a question is formulated and the issues framed often make an enormous difference in the response it receives.

1 Lawrence Alexander, "Reassessing the Relationship Among Voluntary Acts, Strict Liability, and Negligence in the Criminal Law," in *Crime, Culpability, and Remedy* 160 (Ellen Frankel Paul et al. eds., 1990) (observing that extending the temporal frame may have inculpatory or exculpatory implications, depending on the circumstances); Mark Kelman, "Interpretive Construction in Substantive Criminal Law," 33 *Stan. L. Rev.* 591 (1985) (arguing that

legal doctrine authorizes both broad and narrow narrative framing of the defendant's conduct, allowing considerable arbitrariness in result).

2 Paul Slovic et al., "Response Mode, Framing, and Information-Processing Effects in Risk Assessment," in *Decision Making* 152, 15256, 163 (David E. Bell et al. eds., 1988) (concluding that "even when all factors are known and made explicit, subtle aspects of problem formulation, acting in combination with our intellectual predispositions and limitations, affect the balance that we strike among them"). See generally Amos Twersky and Daniel Kahneman, "Rational Choice and the Framing of Decisions," in *Decision Making*, *Id*., at 167.

3 Herbert Asher, *Polling and the Public* 4256 (1988).

Defense counsel for a soldier accused of manifestly illegal acts constructs her client's defense in light of this fact. She describes the defendant's acts to encompass any circumstances that might vitiate the manifestness of his unlawful conduct. This was the approach defense counsel for Lt. William Calley took. If Calley's acts were described as "intentionally shooting civilian women and children," he was guilty of murder. The court-martial so found. But if his acts were described as "following superior orders unreasonably believed to be lawful," then he was guilty only of negligent manslaughter, as his attorney contended. The second description mitigates or exculpates while the first does not.

Both accounts of events can be accurate in the sense of "consistent with known facts." They might even be "extensionally equivalent," in terms of analytical language philosophy, in that they refer to the identical set of facts.[4] After all, "intentionally shooting women and children" does not logically preclude the possibility of unreasonably believing such orders to be lawful, given active support by local noncombatants for the Vietcong, Calley's subnormal intelligence, well-demonstrated flaws of character, and inadequate training in the law of war, however unlikely this possibility.

But each account focuses the descriptive frame very differently, highlighting certain facts while relegating others to legal irrelevance. Nature cannot be carved up at the joints. So legal categories necessarily impose a classificatory scheme, one that does not reflect the nature of human action as such, but rather law's purposes in seeking to regulate it.[5]

In the Calley judgment, there was nothing arbitrary in the fact

finder's choice between such descriptions, despite Kelman's claim to that effect. The court adopted the inculpatory account of events

4 W.V.O. Quine, "Reference and Modality," in *Reference and Modality* 15 (Leonard Linsky ed., 1971). See also Joel Feinberg, *Doing and Deserving* 134 (1970).

5 For classic statements of the problem, particularly as it arises in negligence law, see Clarence Morris and C. Robert Morris, Jr., *Morris on Torts* 165 (2d ed. 1980) ("Since there is no authoritative guide to the proper amount of specificity in describing the facts, the process of holding that a [plaintiff's] loss isor is notforeseeable is fluid and often embarrasses attempts at accurate prediction."). See also H.L.A. Hart and Tony Honoré, *Causation and the Law* 44953, 48182 (2d ed. 1985).

because this better served the law's purposes. In the aftermath of the Second World War, the purpose of deterring the slaughter of innocents has acquired enhanced moral weight vis-à-vis competing objectives.

The choice between descriptions thus pragmatically reflects the law's ranking, in such circumstances, regarding the comparative importance of: 1) preserving military discipline through order-following vs. 2) preventing war crimes. Many of the duties that the law assigns to people within a given occupation are based on its understanding, often tacit, about the proper nature of their social role.[6] Our current understandings of the soldier's proper role strongly favor one of the two accounts (i.e., intentionally shooting women and children). The court's choice of this description over its alternative is thus anything but arbitrary.[7]

But it is this choice that allows Calley's conduct to be described as involving a manifestly illegal act. One might also observe that this choice tacitly reflects the court's understanding of soldiering itself as a social practice. There is simply no narrative of soldiering, accepted by professional officers, according to which Calley's acts, on any credible description, would fall within the boundaries of honorable conduct by a fellow officer.

One might be tempted to resolve the question summarily by saying that the law, in deciding how the defendant's conduct should be described, ought simply to adopt the formulation embodied in his superior's order (i.e., whatever conduct was described in his directive). Such an approach would also enable us to make some sense of the occasional statements to the effect that the order must carry its criminality "on its face."[8]

6 Meir Dan-Cohen, "Responsibility and the Boundaries of the Self," 105*Harv. L. Rev*. 959, 9991001 (1992).

7 Richard H. Pildes, "Conceptions of Value in Legal Thought," 90 *Mich. L. Rev*. 1520, 153942 (1992).

8 See, e.g., "Army and Navy," 6 *Corpus Juris Secundum*, sec. 37 (1937) ("A soldier who executes an illegal order . . . is not criminally liable for the execution [if the order is] one which is fair and lawful on its face; but an order illegal on its face is no justification for the commission of a crime."). *Riggs v. State*, 3 Cold. 85, 85 (Tenn. 1866) (holding that "an order given by an officer to his private, which does not expressly and clearly show on its face, or in the body thereof, its own illegality, the soldier would be bound to obey, and such order would be a protection to him."); Col. Howard S. Levie, "The Rise and Fall of an

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This resolution of the matter proves unpersuasive, however. First, to judge from jury instructions in actual cases, this element of the manifest illegality rule is often disregarded. Fact finders are sometimes expressly permitted to consider a host of environing circumstances in determining whether the defendant should have known that the orders he received would require criminal acts.9 This

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> Internationally Codified Denial of the Defense of Superior Orders," 30 *Mil. L. & L. of War Rev*. 185, 185 (1991). This interpretation of the facial wrongfulness requirement, wherever it actually exists in the practice of courts martial, seems more plausible, at least, than the very different meaning the term possesses in constitutional law. In the latter context, a statute is said to be unlawful on its face if it would be unconstitutional in application to all or virtually all imaginable cases. Michael C. Dorf, "Facial Challenges to State and Federal Statutes," 46 *Stan. L. Rev*. 235 (1994). This doctrine arises from the fact that statutes are designed to apply to large numbers and often a wide variety of factual situations. But this is not true of military orders, even many standing orders, to anything like the same degree.
>
> Even more important, the distinction between superiors' directives unlawful in all situations and those unlawful only in the situation actually faced by the specific soldier-defendant is completely irrelevant to determining his culpability for criminal acts. It is enough for culpability that the illegality should have been apparent under the circumstances he actually faced.
>
> 9 In prosecutions arising from the Vietnam war, the issue was treated quite differently by different courts martial. Compare *U.S. v. Calley*, 48 C.M.R. 19 with *U.S. v. Griffin*, 39 C.M.R. 586 (1968). In *Griffin*, the jury was simply instructed that if an order to kill helpless civilians had

been given, it was manifestly illegal as a matter of law. But in *Calley*, the jury was also instructed that they could consider, in determining whether an ordinary soldier in Calley's situation could have reasonably mistaken his conduct as lawful, that he understood himself to be acting pursuant to superior orders.

The *Calley* jury instructions left for the jury to decide whether the defendant's acts were manifestly illegal. The jury was instructed to "consider all relevant facts and circumstances, including Lt. Calley's rank; educational background; OCS [Officer Candidate] schooling; other training while in the Army . . . his experience on prior operations involving contact with hostile and friendly Vietnamese; his age; and any other evidence tending to prove or disprove that . . . he knew the order was unlawful." *Calley* Jury Instructions, p. 27. For discussion, see Aubrey Daniel, "The Defense of Superior Orders," 7 *U. Rich. L. Rev*. 477, 50003 (1976).

Referring to indictments of members of Argentina's death squads, one of the country's leading human rights lawyers observes in this regard, that "under Argentine law it would be irrelevant to decide whether the actual factual setting for the following-orders defense could be admitted into evidence. The mere allegation of the defense would compel their trier of fact and law to scrutinize whether or not the rank of the executioner, the nature of the alleged crime, and the subjective and objective circumstances of the case made the error of law

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is particularly true for charges of crimes against humanity as opposed to traditional war crimes.10

Second, there is good reason for this practice, since the superior's directive itself, when intended to induce atrocities, will virtually never display its true intent expressly. Everything is said with a wink and a nod. Such euphemism is designed to permit the superior later to claim that no criminal orders were ever given. The only sort of criminal conduct likely to be described explicitly is the most minor. Minor offenses are not grave enough to be manifestly illegal, and so they come within the scope of the superior orders defense.

Alternatively, the question might be posed in terms of whether the defendant's conduct can be described in terms consistent with accepted internal understandings of his professional role and the social practice of which it is part. Surely, no description of Lt. Calley's conduct at My Lai would fall within any acceptable account of the practice of soldiering, even in counterinsurgency warfare. This is the approach to the problem most consistent with the "virtue ethics" perspective adopted by this study, but it is an approach that remains to be developed and defended.

In summary, the three traditional indicia of manifest illegalitymoral gravity, legal certainty, and procedural irregularitybear no necessary relation to one another and so, not surprisingly, are regularly at odds in concrete cases. Thus, a superior's order may involve an act of great moral gravity, though the law it violates is unclear and unsettled in important respects. The order's illegality may be very clear despite being issued in a procedurally impeccable manner. And the order can be procedurally defective in

transparent ways without requiring an act of moral gravity or one that violates any well-settled rule of substantive criminal law.

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excusable." Author's correspondence with Juan Méndez, attorney (July 20, 1996).

In only a few jurisdictions, however, does the applicable statute expressly authorize examination of all surrounding circumstances found to be relevant. See, e.g., *Ind. Stat. Ann*. § 10-2-4-4 (1973) (providing that a military subordinate who obeys criminal orders if "he reasonably believed [them] to be legal . . . under all of the attendant facts and circumstances on such occasion.").

10 See, e.g., *Her Majesty The Queen v. Finta* (1994) S.C.R. 701, 816 (concluding that the crime itself must be considered in context).

If all three indicia were required to establish manifest illegality, the set of manifestly illegal orders would be virtually null. The upshot of the preceding analysis, then, is that these criteria for overriding the defense of superior orders prove, in isolation and in combination, to be highly over-inclusive or underinclusive vis-à-vis the law's essential concerns.

Can War Crimes Ever Be "Acts of Service"?

Apart from the manifest illegality rule, another route to the same result, convicting the subordinate, avoids the entire question of whether his act came within the scope of the particular orders he received. Certain kinds of conduct can plausibly be described as not even involving an "act of military service," in the language of many legal systems.[11]

An act of military service is one that can be performed lawfully under at least some set of circumstances, however limited, and must relate to the actor's specifically military duties. Conduct that fails this test need not constitute a war crime. It need not even be otherwise illegal. A superior officer who orders a soldier to purchase groceries for the officer's family, for instance, would have issued a command that, though not a criminal offense, failed the act of service test. The command simply does not involve the exercise of a soldier's military duties within the legal meaning of the term.[12]

11 Guillermo Fierro, *La Obedencia Debida en el Ámbito Penal y Militar* 12539 (1984); see also "Argentina: Supreme Court Decision on the Due Obedience Law," in 3 *Transitional Justice* 509, 51011 (1995) (defining an act of service as one "related to the specific activities of military authority, that is, whether the order is necessarily connected with the specific functions pertaining to the armed

forces"). The law generally further provides that "an order requiring the performance of a military duty may be inferred to be legal." See, e.g., the U. S. *Manual for Courts-Martial*, (1969 rev. ed.), ¶ 216d. Until 1987, the notion of a "military service act" was necessary to establish court-martial jurisdiction in the U.S.

12 David Schlueter, *Military Criminal Justice: Practice and Procedure* 72 (1996) (summarizing U.S. case law). The cases conclude that for an act to be one "of military service" it must be "reasonably necessary to safeguard or promote the morale, discipline, and usefulness of the members of any particular command and . . . directly connected with the maintenance of good order." *U.S. v. Smith*, 25 M.J. 545, 548 (1987). For criminal offenses that do not involve genuine acts of service, environing circumstances are legally irrelevant to a finding of liability.

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Consider an illustration. A soldier who committed rape pursuant to superior authorization could not invoke the authorization to establish a defense of legal error. This explains the rejection, for instance, by the Sarajevo military tribunal in 1993 of the superior orders defense by Borislav Herak. Herak was a soldier who claimed that his Serbian commanders had ordered the rape of Muslim women. Since such acts professedly had the military purpose of improving the troops' morale, they were argued to be acts of military service.13 This argument was rejected. The defendant's conduct, like that of a torturer, was simply not an act of service, and the court so held.14

Analysis becomes more difficult where the soldier's crime at least arguably involves an act of service. Shooting a person is an act of service because there are certain circumstances in which a soldier may lawfully do so, for example, shooting the enemy. But the particular act of shooting a person might also be described as shooting a noncombatant in the back, one whose hands and legs are shackled and whose eyes are blindfolded.

The act portrayed in the first rendering is very much an act of service. As described, it also fails to rise to the level of manifest illegality. By contrast, the act described in the second account is without a doubt manifestly illegal. How are we to decide which is the better description of the defendant's conduct? For the law, at least, the ultimate answer is the usual one: why do you want to know? Here,

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> In this respect, the rule works much like the manifest illegality rule. There is no reason for any court to consider evidence concerning the

details of the particular situation because unless the defendant's act was one of service, it simply cannot, *ex hypothesi*, be lawfully performed under any circumstances.

The act of service concept is decreasingly useful, however, as the activities of soldiers, in operating sophisticated dual-use technologies, come to resemble closely those of civilian counterparts. Such essentially civilian work occupies an increasing proportion of military personnel, including many whose jobs are designated as combat positions. This development is what is described in military literature as the decline of "teeth-to-tail."

Whether the defendant's crime was an "act of service" should not be confused with whether it was taken "in the line of duty." 28 U.S.C. sec. 2671. No criminal act can, by definition, be taken in line of duty.

13 John F. Burns, "Two Serbs to be Shot for Killing and Rapes," *N.Y. Times*. March 31, 1993, at A6.

14 Whether the defendant's conduct constitutes an act of service is what lawyers call a threshold question. If the answer is no, the court does not even reach the question of whether superiors actually authorized the conduct.

we want to know not in order to resolve some metaphysical puzzle about which description is more true or accurate. Rather, we want to know which description, should the law adopt it, will better serve the law's purposes, that is, *our* purposes in addressing such situations.15

How we answer the question, in short, turns on how we formulate it, which depends on our reasons for asking it. If our primary purpose is to ensure military obedience to orders, we will have the law describe the defendant's act as shooting a person. But if our primary purpose is to deter war crimes, we will describe his act as something closer to shooting a noncombatant in the back.

The redescription problem, as it is generally called, sometimes takes more subtle forms.16 An act described as killing enemy soldiers who are seeking to surrender would be manifestly illegal and hence would come within the exception to the superior orders defense. But as Telford Taylor famously argued, military necessity might permit a small platoon, operating at great vulnerability behind enemy lines, to kill surrendering soldiers it encountered if it could not take prisoners of war without abandoning an important mission or disclosing its location to the enemy.17

15 Those of nonpragmatist inclination, of course, will reject the notion that the question can be solved, even for the law's limited purposes, without tacitly making some commitment to one or another position in the philosophy of logic and language. Since any such commitment is controversial, they might add, it should be identified as such and explicitly defended against the alternatives. From this perspective, it is unsatisfactory to announce summarily that the law will adopt description X rather than Y because the first helps the court hand down a decision that we would prefer as a policy matter.

Leading legal theorists observe that "the problems are perplexing" and that there is no agreement among their serious students. Hart and Honoré, *supra* note 5, at 484. It deserves mention, nevertheless, that there have been several interesting attempts and advances toward resolving the problem. Alonzo Church, *An Introduction to Mathematical Logic* 19, 2327 (1956); W. V. Quine, *Ways of Paradox* 15877 (1976); W. V. Quine, *Word and Object* 13856, 19132 (1960); Michael Moore, "Foreseeing Harm Opaquely," in *Action and Value in Criminal Law* 125 (Stephen Shute et al. eds., 1993); W. V. Quine, "On Sense and Reference," in *Translations from the Philosophical Writings of Gottlob Frege* 56 (Peter Geach and Max Black, eds., 1966).

16 Arthur Applbaum, "Are Lawyers Liars? The Argument of Redescription," 4 *Legal Theory* 63 (1998).

17 Telford Taylor, *Nuremberg and Vietnam* 132 (1970); William O'Brien, *The Conduct of Just and Limited War* 123 (1981); Paul Ramsey, *The Just War* 437 (1968). But see Geneva Convention III, art. 85 (forbidding the killing of surrendering troops even "on grounds of self-preservation" or because "it

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On Taylor's account, killing enemy soldiers seeking to surrender does not merely fail to qualify as manifestly illegal. Military necessity legally justifies it. It is therefore not even wrongful. As such, its perpetrators do not need to establish the excuse that they were acting in obedience to superior orders.

This dispute could easily turn on which facts one chooses to incorporate or exclude from the act to be assessed. Would circumstances have permitted, say, the platoon to bind the surrendering prisoners to trees, gagging their mouths but permitting them to breathe through their noses? The answer would depend on how many prisoners there were, how close and numerous enemy forces were thought to be, in short, on how risky it would be for the platoon to spare the lives of enemy soldiers who could be expected, upon discovery by comrades, immediately to disclose the capturing platoon's size, resources, and direction of movement.

In other words, it might still be criminal after all to kill the surrendering prisoners. Despite Taylor's claim, if an alternative existed that would not greatly increase the platoon's risks while allowing it to respect the legal rights of surrendering forces, then killing the prisoners might still be criminal. In all but the easiest cases, such a decision by the infantry officer would require a close judgment call. And when situational judgment is essential, all but the grossest evil or stupidity cannot be categorized as manifest illegality.

To say that the law's purposes determine its descriptions still leaves a great deal unresolved. Prosecutors and defense counsel will interpret the law's mix of competing purposes very differently. They therefore reach very different conclusions about how the

defendant's act should be described for resolving whether it constitutes an act of military service and one whose illegality was manifest on its face.

This kind of dispute thus occupied a prominent place in the early stages of the prosecution of Argentine military officers for human rights abuse occurring during the dirty war. Argentine prosecutors, lawyers for families of the disappeared, supported by several members of Congress and two dissenting Justices of the Supreme Court argued for the more precise and inculpatory description.[18] They insisted that the defendants' acts be described as

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appears certain that they will regain their liberty").

18 J.M. Rodriquez Devesa, *La Obedencia Debida en el Derecho Penal Militar*

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killing and torturing people during peacetime, in which case these were not acts of military service.

The Argentine courts, however, adopted the alternative approach, classifying any act of shooting as an act of military service.[19] One reason for adopting this description, persuasive to some Court members,[20] is that the law probably cannot significantly augment its deterrent effect by simply manipulating the way it describes a defendant's conduct. On this view, it is unduly optimistic to expect the possibility of any such *ex post* description significantly to affect behavior *ex ante*. A pragmatic approach to resolving doctrinal and descriptive problems, after all, requires sensitivity not only to the law's purposes, but also to its likely limitations as a method of social control.

Of course, if military law does no more than track operational considerations jot for jot, mirroring commanders' calculations of military necessity, it becomes largely superfluous.[21] But if it departs too greatly from these considerations, it quickly comes to be ignored

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245 (1957); Eugenio Zaffaroni, *Sistemas Penales y Derechos Humanos en America Latina* 272 (1986) (arguing that "an 'act of service' excludes by definition any order designed to produce any cruel or inhuman acts that would fit the dictionary definition of 'atrocity'"); Guillermo A.C. Ledesma, "La Responsabilidad de los Comandantes," in *El Legado Autoritario en La Argentina* (Leonardo Senkman and Mario Sznajder eds., 1995), at 129.

19 Causa No. 547 incoada en virtud del Decreto No. 280/84 del Poder Ejecutivo Nacional, in *El Libro del Diario del Juicio*, "La Sentencia,"

519 (1985) (author's translation). For a later defense of the Court's holding by one of its members, see Guillermo A.C. Ledesma, "La Responsabilidad de los Comandantes," in *El Legado Autoritario*; *supra* note 18, at 12829 (defining an act of service as one "unequivocally linked to the fulfillment of functions that [soldiers] are charged with performing on account of express legal dispositions").

20 Interview in Buenos Aires, Argentina (June 1987), confidential S.Ct. source.

21 One indicator of its apparent superfluousness in this regard may be the fact that many military lawyers regularly tout their subject to fellow officers by observing how the law of war, in key concepts like proportionality and necessity, already neatly dovetails with such strictly military concerns as the "economy of force." See, e.g., Maj. Wm. Hays Parks, "The Law of War Adviser," *18 Mil. L. & L. of War Rev*. 357, 374 (1979) (arguing that "in teaching the law of war the instructor must be prepared to show the consistency of the law of war with the principles of war, other tactical concepts, and good leadership"). This view greatly underestimates the degree of actual discrepancy between legal and strictly military considerations, particularly with regard to weighing of collateral civilian damage.

and, to the extent it rests on custom and state practice, thereby ceases even to be formally binding.22

Most people, especially those knowledgeable about the Argentine officer corps, doubted that purely verbal stratagems could enhance the law's deterrent effect.23 In episodes of large-scale administrative massacre, such as Argentina's dirty war, the law's enforcement agencies become the primary vehicles of its violation. In such situations, few soldiers make short-term decisions about order-following on the basis of their long-term calculations about the possibility of a radical change in regime.

But there is yet another reason why the law might choose the more exculpatory description of the soldier's conduct. It may be unreasonable, as Arendt contended, for a court to expect such soldiers to detect the unlawfulness of their orders under the circumstances, even when these orders require atrocious and aberrant acts.24 If the reasonable soldier cannot identify his orders as manifestly illegal, then the threat of punishment for obeying them cannot deter him. When the state invests its repressive policies with the appearance and even the reality to some extent of lawfulness, it becomes difficult to conclude that superior orders implementing such policies carry their criminality on their face.

The central point here is simply that whether a soldier's criminal conduct is manifestly illegal depends on how it is described. The description determines whether the conduct entails an act of military service, and an act of service can be manifestly illegal only if it is

22 This is Taylor's view. See *supra* note 17, at 3338. He suggests that

state practice remains governed almost entirely by considerations of military necessity, as officers understand these, and that the law's attempts to limit the latitude accorded to such considerations are ineffectual and therefore invalid. This reading of Taylor is shared by Robert L. Holmes, *On War and Morality* 104 (1989) (contending that, for Taylor, "there cannot be a longstanding conflict" between military necessity and international law "since law that is regularly violated by all is ineffectual and eventually ceases to be law in any meaningful sense").

For a recent effort to test whether state practice conforms to authoritative statements of customary law on resort to force, see generally Mark Weisburd, *The Use of Force* (1997).

23 Author's interviews in Buenos Aires (June 1985 and June 1987)

24 Hannah Arendt, *Eichmann in Jerusalem* 27279, 28894 (1962).

described in a way encompassing inculpatory circumstances.[25] In Part III of this book, I propose a way to cut the Gordian knot created by such tangled doctrinal complexities.

The solution is to simplify the analysis, reducing the presently structured tier of questions[26] to a single one of whether the defendant's professed error about the legality of his orders was reasonable, all things considered.[27] Any facts relevant to that issue and consistent with other rules of evidence would be admissible. This approach obviates the need for any authoritative description of the defendant's conduct as a necessary predicate to determining whether it is manifestly illegal. In eliminating that step, a reasonableness test also would dispense with disagreements between prosecutors and defense counsel over how much of the background of defendant's conduct should be incorporated into that description.

Disagreements would still arise, of course, concerning the relevance of particular facts to a soldier's claim of reasonable error and the weight to be accorded such facts in assessing the reasonableness of his mistake. But these would be questions for the fact finder. Testimony concerning such surrounding facts, both inculpatory and exculpatory, would be admitted more readily. The current need to exclude it would disappear since that need rests on the view that circumstances surrounding a manifestly illegal act are *ex hypothesi* irrelevant to liability. The jury would not need to agree on any particular description of the defendant's act before assessing its reasonableness. So the question of how it should be described disappears.

25 As a logical matter, it is neither necessary nor sufficient that the

conduct at issue entail an act of service in order to be manifestly illegal. But in practice, it is much easier to establish that the illegality of a defendant's conduct was manifest to him if his conduct is described in a way that fails the act of service test. Such Byzantine complexities only ensure that, in a given case, there will often be considerable room for argument.

26 On how common law systems are generally adverse to such complex structuring of decision rules, see George Fletcher, "The Right and the Reasonable," 98 *Harv. L. Rev*. 949 (1985).

27 There would, of course, remain the question of whether the defendant is telling the truth regarding his professed belief in the legality of the orders he received from his superiors.

8
Views of Atrocity in Legal Theory: Positivist, Naturalist and Postmodernist

Adherents of natural law have attributed the capacity to tell manifest illegality from other misconduct to an innate moral sense given by God or nature and possessed by every human being.[1] Grotius thus wrote of "an infallible rule of action, which is written in the hearts of all men," requiring them to disobey orders entailing "atrocious cruelty."[2] This moral law binds all rational creatures who know it by virtue of their rationality.[3]

Early judicial opinions often reflected this conviction. In 1875, an American judge could accept, for instance, that "an ordinary comprehension of natural right, the faintest desire to act on principles of common justice" could have permitted the defendant, a Confederate soldier charged with atrocities against Union prisoners, to discern the illegality of his orders.[4] In the same era, an English judge wrote that for a defense of superior orders to be excluded, the defendant's act must be "so palpably atrocious as well as illegal that one can instinctively feel that it ought not to be obeyed, by whomever given . . . "[5] On this view, a soldier cannot claim that he lacked fair notice of his duties, for everyone is on notice, by their very nature as human beings, of the unlawfulness of such conduct.

1 For natural law perspectives on the manifest illegality rule see Yoram Dinstein, *The Defense of 'Obedience to Superior Orders' in*

International Law 16, 24 (1965); Guillermo J. Fierro, *La Obedencia Debida en el Ámbito Penal y Militar* 152 (1984).

2 Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres* (Francis Kelsey, ed. 138, 150 (1995).

3 Alan Donagan, *The Theory of Morality* 2632 (1977).

4 L.C. Green, *Superior Orders in National and International Law* 54 (1976) (discussing the Wirz trial).

5*McCall v. McDowell*, 1 Abb. 212, 218 (1867).

Many soldiers agree. "The conditioned obedience expected in battle is compatible with the refusal to do what is immoral," insists one officer.6 "Military training may attempt to make obedience totally automatic, but it cannot, simply because of human nature."7 This moral sense, enabling us to sympathize with victims of unnecessary suffering, does not operate primarily by impelling valiant attempts at rescue but more simply by restraining us from inflicting harm, even when superiors authorize us to do so.8

Legal positivists would take a very different tack in justifying soldiers' liability for manifest illegality. Skeptical of metaphysical speculations about human nature,9 they would stress instead the attentiveness by society's members to its fundamental mores, or positive morality.10 This attentiveness is indispensable to the ability to function routinely within any society. The force of this positive morality, which repudiates atrocious and aberrant acts, in turn puts the soldier on notice as to the illegality of conduct inconsistent with it. Because the positive morality of all "civilized" states deplores atrocity, Justice Jackson could employ the concept of civilization, at Nuremberg, as a legal basis for finding the defendants to have been culpable, to have known the wrongfulness of their conduct. Training material issued to U.S. forces today adopts a similar view of positive morality, reminding soldiers that "crime such as murder, rape, pillage or torture" is "*clearly* criminal because it violates common-sense rules of decency [and] social conduct . . . "11

Thus, both naturalists and positivists agree that the law correctly presumes that the person of ordinary understanding can readily identify an order requiring atrocities as one for which no excuse of

reasonable mistake is possible. Though they differ over the rationale for the rule, both perspectives reach the same conclusion regarding how to treat the paradigm cases involving atrocities.[12]

6 Richard De George, "Defining Moral Obligations," 34 *Army* 22, 29 (1984).

7*Id*.

8 James Q. Wilson, *The Moral Sense* 39 (1993).

9 The moral sense need not rest on metaphysics, of course. It may rest alternatively on a biologically based feeling that the given conduct is wrong.

10 H.L.A. Hart, *The Concept of Law* 17576 (1961).

11 U.S. TRADOC, *Your Conduct in Combat Under the Law of War*, Field Manual 272, 26 (1984) (emphasis added).

12 This is an example of what has been called an "incompletely theorized

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The transparent immorality of atrocities ensures that their illegality is manifest. The wrongs in questiontorture, murder, violent abductionunequivocally violate the moral principles (respect for human life and physical liberty) that the criminal law treats as axiomatic. As Arendt observes, this view "rests on the assumption that the law expresses only what every man's conscience would tell him anyhow."[13] Manifestly illegal acts are those which most clearly violate the moral intuitions and settled judgments underlying the core of the criminal code.

An important corollary is that an officer does not need a legal adviser to identify a contemplated action as manifestly illegal.[14] Professional legal advice becomes essential only when officers can be held liable, as this book advocates, for nonatrocious errors for actions the unlawfulness of which is not immediately obvious.

For instance, during Argentina's dirty war, officers routinely performed acts that the law has always considered manifestly illegal, such as rape, torture, robbery, and killing of noncombatants in custody.[15] Therefore, the defendants could not successfully raise the superior orders defense.[16] When Buenos Aires police officials asserted it to charges of torture, the court rejected it outright, concluding that "any person, be he civilian or military, knows that if he kills, tortures or robs a defenseless person, he is committing a crime."[17]

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agreement." Cass Sunstein, *Legal Reasoning and Political Conflict* 3561 (defined at 35) (1996).

13 Hannah Arendt, *Eichmann in Jerusalem* 293 (1962). A leading

German legal scholar expressly defends this assumption, stating, "the rationale underlying the ancient . . . doctrine is basically sound: we *do know* the prohibitions which are at the core of our criminal law." Gunther Arzt, "Ignorance or Mistake of Law," 24 *Am. J. Comp. L.* 646, 666 (1976) (emphasis added). On most understandings of the doctrine, manifestly illegal acts entail, not merely *malum in se* offenses, but the subset in which the *malum* is most unequivocal.

14 Hence the conclusion of the United States Military Tribunal at Nuremberg, in the *Case of the German High Command* (1948): "The expert opinion of legal advisers was unnecessary to determine the illegality of such orders," because those "given to the *Wehrmacht* and the German Army [that] were obviously criminal." *Id*.

15 Ronald Dworkin, "Introduction" to *Nunca Más*, 2653, 28292 (1986)

16 Carlos S. Nino, "The Duty to Punish Past Abuses of Human Rights Put Into Context: the Case of Argentina," 100 *Yale L.J.* 2619, 262627 (1991).

17 Jeffery L. Sheler, "Jail Time for Argentine Jailer," 101 *U.S. News & World*

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Postmodernist Challenges

Both the positivist and naturalist arguments for the manifest illegality rule would today face serious rejoinder from postmodernists. In response to naturalist claims about a moral law recognizable by all rational creatures, postmodernists rightly point out the extreme historical contingency of this idea. It reflects, after all, the peculiar "humanistic" assumptions of Enlightenment liberalism about the moral constitution of our species.[18] These assumptions were largely the creation of France and England in the 18th century. From the perspective of other cultures, they appear exceptional if not outright bizarre.

The classical Islamic law of war, for instance, does not distinguish combatants from noncombatants, a distinction at the core of the Western *jus in bello*.[19] Even in Western Europe, until the 16th century, most people of all social classes took unabashed pleasure in inflicting severe pain and suffering on both animals and fellow humans in ways that today strike almost all of us as odious and appalling.[20] The law's expectation of humanitarian behavior from soldiers, postmodernists would thus suggest, is only as strong as its humanist assumptions about the nature of man. And "most peopleespecially people relatively untouched by the European Enlightenmentsimply do not think of themselves as, first and foremost, a human being."[21] writes Rorty.

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> *Report*, Dec. 15, 1986, at 10 (quoting Argentine judges); "Matter of Suárez Mason, Carlos Guillermo, and Others," *Fallos de la Corte Suprema de Justicia de la Nación* 311, 1043 (1988).

18 Luther Martin, "Truth, Power, Self: An Interview with Michel Foucault," in *Technologies of the Self* 9, 15 (Luther H. Martin et al. eds., 1988) ("This idea of man has become normative, self-evident, and is supposed to be universal. Humanism may not be universal but may be quite relative to a certain situation . . . Humanism . . . presents a certain form of our ethics as a universal model for any kind of freedom.").

19 John Kelsay, "Islam and the Distinction Between Combatants and Noncombatants," in *Cross, Crescent, and Sword* (James Turner Johnson and John Kelsay, eds., 1990).

20 Norbert Elias, 1 *The Civilizing Process* 193204 (Edmund Jephcott trans., 1982) (1939) (arguing, at 15359, that such knights as de Cazenac took unabashed delight in torturing and "mutilating the innocent," and that such conduct was "a socially permitted pleasure.")

21 Richard Rorty, "Human Rights, Rationality, and Sentimentality," in *The*

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The soldier's seemingly innate ability to identify manifestly wrongful acts follows only from the historical fortuity of his having happened to acquire the dispositions of a modern Western self. That self is not merely a contingent construction, but a surprisingly recent one. It is also likely to prove evanescent, like all earlier conceptions of human nature, on this account.

Postmodernists would question the positivist defense of present law no less vigorously than the naturalist. The positivist confidence in the moral conventions of contemporary society is unfounded, and complacent. These conventions do not offer much support for a strong duty of resistance to officially mandated criminality. Even in the modern West, the life experience of the ordinary worker-soldier does not much buttress his periodic, errant impulse to disobey directives he finds morally distasteful. Modern industrial capitalism, in some postmodern views, so alienates the worker-soldier from the possibility of humane social relations that his ability to exercise meaningful moral autonomy is greatly weakened, if not eliminated.22

In other words, the severe hierarchy and regimentation experienced by subordinates in contemporary civilian and military workplaces belie the very conception of selfas free and rational, autonomously choosing its course of actionon which the modern law of manifest illegality has come to rest. Warfare is no longer "a game of skill [in which] all the players were skillful."23 It thus no longer allows much space for individual heroism,24 particularly that entailed in resistance to imprudent or atrocious orders, having become instead "a matter of grinding mass against mass."25

On this account, there is little point in the soldier's attempting to

discern the possible injustice of orders he can do little to resist. As a result, his capacities for moral discernment tend to atrophy. The

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Human Rights Reader 263, 264 (Micheline Eshay, ed., 1998).

22 On the displacement of the heroic subject by industrialized methods of warfare, see, e.g., William Chaloupka, *Knowing Nukes* 2733, 37 (1992); Les Levidow and Kevin Robins, *Cyborg Worlds* 169 (1989); Peter Sloterkijk, *Critique of Cynical Reason* 10002 (1987).

23 Samuel Hynes, *The Soldier's Tale* 143 (1997).

24 Chaloupka, *supra* note 22, at 2637; Paul Edwards, "The Army and the Microworld," 16 *Signs* 102, 116 (1991); Sloterkijk, *supra* note 22, at 10002; Eric Leed, *No Man's Land* 3031 (19); P. Virilio, *Speed and Politics* (1986).

25 Hynes, *supra* note 23, at 140.

dominant conventions of his larger society, which demand very little in the way of disobedience to unjust authority, only exacerbate this tendency. In contrast to this picture of the modern soldier as dehumanized cog, the manifest illegality rule implicitly portrays him as a spirited, free-thinking conscience, quick to perceive evil in his superiors and to intercede against it. This fiction departs too radically from the reality of industrialized mass slaughter for it to remain coherent, intelligible, or morally defensible.

The postmodernist analysis thus suggests that positive morality offers much less sustenance to the soldier contemplating disobedience than legal positivists assume. By requiring resistance to superiors, current law rests on social foundations that have been greatly eroded by the growth of modern organizational discipline and alienated work relations. It exaggerates the freedom available to subalterns to think and act independently of workplace constraints and consequently imposes on them unreasonable expectations of moral assertiveness. If the present rule is to be preserved at all, it follows that new conceptual foundations must be found for it.

It is likely that this entire analysis is greatly exaggerated, of course.[26] Its view of humanitarianism as the ephemeral prejudice of modern Europe utterly ignores the deep roots of this ideal in Western intellectual and religious history,[27] as well as its submerged but resurgent presence within certain non-Western cultural traditions.[28] Its depiction of the modern workplace is little more than a Chaplinesque parody of "modern times," deeply at

odds with the more complex, empirical findings of industrial sociology.[29]

[26] Many memoirs of soldiers continue to speak of the sense of freedom they feel in combat. Hynes, *supra* note 23, at 4849, 9091, 13945.

The postmodern insistence on the alienated and unheroic character of modern combat experience is also at odds with the increasing emphasis in military training on display of independent judgment and initiative by lower echelon officers, and even enlisted personnel at times, a development examined in Parts II and III.

[27] See, e.g., Col. Guy Roberts, "Judaic Sources of and Views on The Law of War," 37 *Naval. L. Rev*. 221, 221, 232 (1988).

[28] See, e.g., Amaryta Sen, "Human Rights and Asian Values," 217 *New Republic* 33 (1997); Michele M. Moody-Adams, *Fieldwork in Familiar Places: Morality, Culture and Philosophy* (1997).

[29] See, e.g., Robert Blauner, *Alienation and Freedom* (1964) (showing how various production technologies differ greatly in the degree of autonomy they

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But the rhetorical allure, at least, of the postmodern critique is not insignificant. It is also influential enough in contemporary discourse to warrant more serious inquiry into the defensibility of current law.

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allow workers); see generally, Curt Tausky, *Work and Society: An Introduction to Industrial Sociology* (1996); Kai Erikson et al., *The Nature of Work: Sociological Perspectives* (1990).

9
Individual Responsibility for Systemic Horrors?

There is yet another source of uncertainty about the scope of "manifest" illegality, and the exception it creates for any defense of due obedience. This involves the attribution of individual responsibility. Sometimes it proves difficult to ascribe an admittedly wrongful act to a culpable individual, the defendant. The problem takes many forms, two of which are examined here.

How Totalitarianism Erodes the Manifest Illegality of Atrocity

Many of the largest scale massacres committed in obedience to orders took place under totalitarian and authoritarian regimes. In her influential reflections on Eichmann's trial,[1] Hannah Arendt observed that the wrongfulness of even the most horrific official commands has been by no means transparent to many ordinary men. Lower and middle echelon functionaries called upon to implement such orders often display no such awareness.

She contended the criminal law is therefore wrong in conclusively presuming the contrary. If it is to punish such men nonetheless, it must do so in the teeth of its long-standing assumptions, to which Eichmann's judges complacently and mistakenly adhered, about the nature of evil.[2]

1 Hannah Arendt, *Eichmann in Jerusalem* (1962).

2 Arendt's controversial book has been attacked on many grounds, but it was virtually ignored by legal scholars. They did not realize the extent to which she was directing her substantial theoretical firepower at what she

saw as the central assumptions of Western criminal law. The only efforts by legal scholars to grapple with elements of Arendt's critique of the manifest illegality doctrine are very recent. James Friedman, "Arendt in Jerusalem," 28 *Israel L. Rev*. 601 (1994); Pnina Lahav, "The Eichmann Trial, The Jewish Question, and the American-Jewish Intelligentsia," 72 *B.U.L. Rev*. 555 (1993).

The central problem with the law of superior orders, particularly the exception for orders encompassing acts that are manifestly illegal, can be identified in the tension between two equally incisive observations:

> When orders are manifestly illegal, there can be no room for mistake of law . . .
> H. Lauterpacht3

> From the standpoint of our legal institutions . . . [Eichmann's] normality was much more terrifying than all the atrocities put together, for it implied . . . that this new type of criminal commits his crimes *under circumstances that make it well-nigh impossible for him to know or to feel that he is doing wrong*.
> Hannah Arendt4

When it is impossible for a normal person to know he is doing wrong, he is likely to make mistakes of law. This is the source of the tension between current law, as stated by Lauterpacht, and the circumstances of bureaucratic mass murder, to which Arendt alludes. If it is unrealistic to expect inferiors to discern the wrongfulness of their orders at such times, then the law cannot conclusively presume that such wrongfulness is manifest to them. It would seem to follow that when judging the agents of such wrongs, the law must make room for mistakes concerning superior orders to commit acts that have always been regarded as manifestly illegal.

Observing Eichmann on the witness stand, Arendt was surprised that he showed no ideological fanaticism and no particular animosity against the Jews, whose extermination it had been his job as chief administrator of deportation to the death camps.5 "The

trouble with Eichmann was precisely that so many were like him, and that many

3 Yoram Dinstein, *The Defense of 'Obedience to Superior Orders' in International Law* 105 (1965).

4 Arendt, *supra* note 1, at 253 (emphasis added).

5*Id*. at 146-49.

were neither perverted nor sadistic, that they were, and still are, terribly and terrifyingly normal."[6]

How was it possible, she asked, that "an average 'normal' person, neither feeble-minded nor indoctrinated nor cynical, could be perfectly incapable of telling right from wrong"?[7] She was persuaded, moreover, that "whatever he did he did, as far as he could see, as a law-abiding citizen. He did his *duty*, as he told the police and the court over and over again; he had not only obeyed *orders*, he also obeyed the *law*."[8] Eichmann was "a law-abiding citizen of a criminal state."[9]

A totalitarian regime, in Arendt's view, conducts administrative mass murder "within the frame of a legal order."[10] It thereby vitiates the manifestness of its evil by cloaking its policies in "legal paraphernalia."[11] By eroding common sense and destroying our sense of reality, such a sociopolitical order makes very easy the kind of legal mistakes that the law regards as virtually impossible. A totalitarian regime is a criminal state, Arendt suggests, because it sanctifies the most wrongful of conduct in its enacted law. The average citizen of a totalitarian society therefore lacks the indicia by which a wicked command normally makes itself manifest, the fact that it "runs counter to his ordinary experience of lawfulness."[12] Under normal circumstances, a radically evil order from one's superior, such as killing unarmed Jewish children, would be readily identifiable as contrary to law.

But once wicked principles become legally codified, evil conduct can become the standard operating procedure of civil servants. Such principles are normalized and the indicia of

6*Id*. at 253.

7*Id*. at 23.

8*Id*. at 135 (emphasis in original).

9*Id*. See also Jeffrey Isaac, *Arendt, Camus, and Modern Rebellion* 48 (1995). Eichmann viewed the Jews entirely through the lens of the law. For them, from the Nuremberg laws down, "a condition of complete rightlessness was created before the right to live was challenged." Hannah Arendt, *Origins of Totalitarianism* 296 (1958).

10 Hannah Arendt, "Personal Responsibility Under Dictatorship," *The Listener*, Aug. 6, 1964, at 185.

11 Arendt, *supra* note 1, at 149.

12*Id*. at 148.

wrongfulness thereby vitiated. Eichmann's acts, after all, had been at least arguably consistent with the positive law of the Third Reich.[13]

Hitler's word had been law, not merely in the realist sense that his orders were followed as if they were law, but in that the Fuhrer principle made his word the formal foundation of all legal authority.[14] The Fuhrer's commands, lawful by their pedigree, became the basis of detailed regulations for thousands of civil servants. Such regulations, "far from being a mere symptom of German pedantry or thoroughness, served most effectively to give the whole business its outward appearance of legality."[15] It may or may not have ultimately been "reasonable" for citizens to rely on these appearances. The question is arguable. But such appearances of legality surely make it impossible to say that the illegality of these official regulations was manifest to all.

Moreover, the Fuhrer principle masked the unlawfulness of superior orders even when orders were not issued pursuant to official regulations and edicts. After all, there was nothing distinctive about Hitler's assumption of the legislative power through rule by decree.[16] Many autocrats have commonly assumed that authority. This was true, for instance, of the Argentine juntas.[17]

13 Of course it is true, as Deák writes, that even "Nazi law did not [expressly] authorize the murder of Jews just for being Jews, or of Polish intellectuals simply because they happened to be Polish priests, professors, journalists and lawyers." István Deák, "Misjudgment at Nuremberg," *N.Y. Rev. of Books* XL 46, 51 (1993).

14 On the use of this argument by Eichmann's attorney, see Dinstein,

supra note 3, at 188-89, 206-13. To be sure, statutes prohibiting murder, assault, and other serious offense were not formally repealed during the Third Reich, but Nazi leaders were never prosecuted for violating such domestic legislation. If they had been prosecuted, they could easily has pointed out that the Fuhrer doctrine established a kind of supremacy principle, overriding all contrary sources of domestic law. *Id*. at 141-42.

15 Arendt, *supra* note 1, at 149-50. In Nazi Germany "it was not an order but [national] law which had turned them all into [international] criminals," Arendt observed. *Id*.

16 The German legislature expressly relinquished its law-making powers to Hitler through an enabling act, which in effect superseded the Weimar Constitution. This allowed Hitler to rule by decree. Dinstein, *supra* note 3, at 141-42.

17 Patricia Weiss Fagen, "Repression and State Security," in *Fear at the Edge* 39, 52 (Juan E. Corradi et al. eds., 1992).

What is distinctive about the Fuhrer principle is that Hitler's word alone, unaccompanied by formal decree, was law. When a significant portion of public law thus remains unpublished and is communicated only by "private" channels, there is no sure way for a subordinate official to learn whether the order of his immediate superior is consistent with the Fuhrer's word. The superior cannot point to a public decree authorizing his morally dubious order. But neither can the soldier or bureaucrat any longer assume the validity of published law, which may have been superseded by Hitler's word, conveyed orally down the chain of command to one's superior.

Totalitarian rule, specifically the Fuhrer principle, thus make a mockery of the manifest illegality rule in ways to which Arendt only vaguely alluded. Once the Fuhrer Principle had been adopted, even the most reliable indicia of legality, published statutes and regulations, ceased to offer the conscientious subordinate any sure guidance in assessing the lawfulness of his orders.[18]

These facts suggested to Arendt that the wrongfulness of Eichmann's conduct, however extreme it would later be judged, was by no means manifest to him at the time. To disallow as a matter of law any defense of mistake deriving from superior orders was therefore indefensible.[19] The criminal law had not anticipated an offender with Eichmann's mental state, Arendt contended, and so did not possess the conceptual framework necessary to judge him.[20]

There would normally be no methodological warrant, of course, for attacking the law's conceptual framework on the basis of its

18 I am not ultimately persuaded by Arendt's argument here. But its plausibility is sufficient to warrant inclusion in a discussion of problems with the manifest illegality rule. My critique of Arendt in this regard may be found in *Lawful Atrocity, Tortured Legality* (forthcoming 1999).

19 Certain aspects of her book generated enormous controversy. This centered on her remarks concerning the alleged contribution of Jewish councils in occupied Europe to the Holocaust. Shiraz Dossa, "Hannah Arendt on Eichmann: The Public, the Private and Evil," 46 *Rev. of Pol*. 163 (1984). But legal scholars, like others, ignored Arendt's critique of the doctrine of manifest illegality. Her critique of the rule has never been systematically refuted and hence continues to reappear whenever prosecutions of subordinates for state-sponsored massacres is proposed.

20 Arendt, *supra* note 1, at 276. Arendt hence saw herself as demonstrating "the misunderstanding of the prosecution and the judges" who had not "understood the novelty of this kind of criminal." Stephen Whitfield, *Into the Dark* 208, 230 (1982).

weaknesses in grappling with a single case against a particular defendant. But Arendt viewed Eichmann as a representative specimen of the bureaucratic mass murderer.[21] She claimed that her thesis about his mental state largely explained the behavior of other members of this class[22] and so required a complete repudiation of the law's long-standing rule on manifest illegality.

She contended, in short, that in cases of large-scale state brutality there are distinctive circumstances that make it wrong to presume and doubly wrong to presume conclusively that any acts truly carry their illegality on their face, however transparently heinous they may seem to us in retrospect.[23] Honest mistakes are possible. Even reasonable mistakes are possible in the sense that only extraordinary individuals will prove themselves able to avoid such errors. It would seem to follow that it is profoundly unfair to the soldier to foreclose any excuse of legal error.

The criminal law, she rightly argued, presupposes the prevalence among the population of a certain pattern of moral thinking and of certain social conditions supportive of this manner of thinking. These moral and social presuppositions are reflected in the law's preconditions for a finding of culpability. When these suppositions prove inapplicable to an isolated defendant, the law is prepared to make isolated and interstitial allowances, as through the insanity defense.

But, she argued, when law's suppositions fail with respect to an entire society and to enormous numbers of the most horrendous

21 Her conclusion in this regard is consistent with those reached by trial observers of other Nazi officials. Tania Long, for instance, described the courtroom *persona* of Otto Ohlendorf, commander of a

mobile execution squad, as that of "a somewhat humorless shoe salesman." Whitfield, *supra* note 20, at 213. See also Richard Breitman, *The Architect of Genocide* 250 (1991) (observing that "the death camp was the creation of bureaucrats. Himmler was the ultimate bureaucrat.").

22 In fact, Arendt viewed Eichmann as representative of modern man in his preoccupation with his career at the expense of the common good. Here she linked her view of Eichmann and the law to her critique of liberal privatism and market society, which she saw as undermining civic virtue. Hannah Arendt, *The Human Condition* 53-64, 95-119 (1958). In this respect, her arguments closely resemble those of civic republicans and sectors of the Critical Legal Studies movement.

23 Arendt, *supra* note 1, at 292-95.

offenses, it is preposterous to conduct a criminal proceeding according to traditional juridical concepts.[24] The category structure of the law had collapsed. In other words, the normal operation of the criminal law makes certain assumptions about what social and political institutions are like (i.e., that most of the time they enforce moral obligations) and about what moral thinking is like (i.e., that it derives from prevalent norms and social conventions.) In the circumstances where administrative massacre is most likely to occur, these assumptions prove mistaken.[25] The law of manifest illegality rests on these assumptions and follows their fate.

An alternative approach, preferable to the manifest illegality rule, would simply excuse subordinates for reasonable mistakes about the legality of superior orders. Many mistakes would count as reasonable, given the pervasively legalized criminality, by international standards, within authoritarian and totalitarian regimes. Most minor forms of low-level complicity in large-scale, nationwide, regime-based evil are virtually never prosecuted by successor regimes, in any event, because their perpetrators are always far too numerous to bring to justice in this way.[26]

The approach proposed in this book would better accommodate Arendt's widely shared intuitions that many minor subordinates in the institutional machinery of administrative massacre are not fully culpable and should suffer sanctions other than criminal prosecution.

How "Many Hands" Weaken Manifest Illegality

When examined in isolation, many wrongful acts, like intelligence gathering for the purpose of identifying kidnap victims, could not

justify a criminal sanction sufficient to deter anyone from such conduct. This is even true when the intelligence agents are perfectly aware that the arch-criminals themselves control the state's

24 I owe this formulation to Jeremy Waldron.

25 The circumstances that Arendt had in mind involved her conception of totalitarianism, which she viewed as a natural outgrowth of mass society, technology, and modernity.

26 On the failure of denazification efforts in postwar West Germany, see Jeffrey Herf, *Divided Memory* 72-74 (1997). On the paltry efforts at lustration in post-communist Eastern Europe, see generally John Borneman, *Settling Accounts* (1997).

penal institutions. To punish the intelligence agent for what other operatives do with the information he gathers, however, is to hold him responsible for harm well beyond his control, given the enormous discretion enjoyed by other operatives concerning the fate of those abducted.27

The punishment of this agent is not likely to trouble many of us. Even if the agent cannot be said to have intended the particular harm the kidnapped suffered, he was certainly reckless in providing their names to others, knowing that he was putting them at considerable risk. Pragmatic concerns with deterrence rather than rules of causation tend to govern our legal practices on such matters, even if only *sub rosa*.28 The central question must therefore be: can the wrongfulness of conduct integral to administrative mass murder be made more clearly manifest to participants by either of the available options: by apportioning responsibility or by imposing shared responsibility?

Shared responsibility is preferable to apportionment when deterrent concerns are particularly acute.29 They are particularly acute when parties to crime know that state authorities will do everything they can to ensure the impunity of all involved.30 Usually, the prospect of prosecution by a successor regime or a victorious enemy appears insubstantial when weighed against the more immediate incentives to suppress one's doubts about the lawfulness of current conduct.31 But when a person knows that he can be held responsible

27*La Sentencia, El Libro del Diario del Juicio* 517, 522 (1986).

28 Marion Smiley, *The Boundaries of Responsibility* 12, 110-17, 179-248 (1992).

29 Justice Frankfurter famously expressed the deterrent rationale for

shared and enhanced responsibility, observing that "partnership in crime . . . presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association . . . makes possible the attainment of ends more complex than those which one criminal could accomplish." *Callahan v. United States*, 364 U.S. 587, 593 (1961).

30 The Argentine court that convicted the military juntas laid special emphasis on these assurances of impunity. *La Sentencia*, *supra* note 27, at 517, 521, 523.

31 Conceding this point, Jaime Malamud-Goti, a principal architect of the Argentine military prosecutions, thus contends that only some form of retributive rationale can justify prosecution of such acts. Jaime Malamud-Goti, "Punishment and Human Dignity," 2 *S'Vara* 69 (1991).

for the conduct of his chosen associates, he is more likely to monitor their conduct closely, scrutinizing it for possible unlawfulness. Conversely, when a person knows that he can be held responsible only for his own acts, he is less attentive to the lawfulness of associates' conduct.

If the law adheres strictly to a requirement of individual culpability, it would create perverse incentives for institutional design. Criminal organizations can divide the labor of participants so that each act would be removed from its institutional context and would be a minor misdemeanor when described in isolation from the rest. This is not hypothetical; architects of each new episode of administrative massacre are very attentive to how the law has treated perpetrators of preceding ones.32 David Luban eloquently summarizes the net result:

> Those with the authority don't know, they often tell us, what their operatives and functionaries are doing, nor are they themselves the ones who pull the triggers. And those who pull the triggers are just following orders. So it goes, up and down the line, for even those who give the orders are relying on information gotten from their subordinates. They walk like angels through the moral world, surrounded by the radiant halos of their deniability. At the extremes of the hierarchy, we are left with an ignorant God who foolishly trusted his lieutenants, and innocent devils who had no authority to spare their victims. A day does not pass in which we do not read these stories in the newspapers.33

Luban is rightly concerned here with how the division of labor in large organizations can be invoked, even designed, to shield everyone within them from legal responsibility for his acts, even

when the aggregate harm is considerable, recurrent, and altogether foreseeable. At least by the omniscient outsider.

32 Minutes of one meeting of the first Argentine *junta* explicitly refer to the need to avoid an Argentine Nuremberg. Interview with Luis Moreno Ocampo, Assistant Prosecutor in Junta Trial, in Buenos Aires (Aug. 1987).

33 David Luban, *Lawyers and Justice* 123 (1988).

But it would be wrong to imply that, within a complex industrial society, the division of labor primarily serves such heinous ends. It primarily contributes, after all, to a spectacular increase in human productivity over all other known forms of organization and production.34 It would surely be indefensible, moreover, to hold all members of an organization legally accountable for all its collective wrongs, as Luban acknowledges. The whiff of "conspiracy against the laity" nevertheless hovers over his account of the division of labor and its social consequences. An effective way to dispel it is to look a little deeper into one of those newspaper stories to which he refers us.

In 1994 American fighter planes shot down two U.S. Army helicopters over Iraq, killing all 26 people aboard. The fighter pilots had relied on information transmitted by an AWAC radar plane. The question was who, if anyone, should be court-martialed. Traditionally, as Eliot Cohen writes, "the fundamental assumption of combat [is] that a warrior is responsible for the injury his weapons inflict."35 But the pilots apparently acted in reasonable reliance on information relayed to them from the nearby plane. The person on that plane who misidentified the U.S. helicopters as Iraqi fighters was an Air Force captain. Increasingly, the task might even be "outsourced" to a civilian data analyst.36 His "crime" consisted of the negligent "interpretation of symbols appearing on a computer screen."37 For this offense, heand not the fighter pilotswas court-martialed.

Most would say that the catastrophic consequences of the captain's error was simply multiplied, many times over, by the complexity of the organizations involved (Army and Air Force) and the nature of

the technology at their disposal. Few would really want the captain's misreading of computer data penalized in a way commensurate with the measure of harm it caused, once ramified through the system.

34 Adam Smith, *The Wealth of Nations* 5 (Mod. Lib. Ed., 1937) (1776).

35 Eliot A. Cohen, "Come the Revolution," XL VII *National Rev*. 26, 27 (1995).

36 On the increasing reliance on civilian outsourcing for such highly technical, noncombat work, see Col. Charles Dunlap, "Organizational Change and the New Technologies of War," paper presented at the Joint Services Conference on Professional Ethics (1998).

37 Cohen, *supra* note 35, at 27.

So the problem of "many hands" in organizational wrongdoing is not primarily that to which Luban alludes: the conspiratorial evasion of responsibility, the disingenuous passing of bucks. The inevitable division of responsibilities in rationally organized operations simply ensures that it is often genuinely difficult, if not impossible, to identify parties whose degree of wrongdoing (and culpability) even roughly corresponds with the degree of harm ultimately produced. For every newspaper story of the sort Luban mentions, this reader detects far more of the latter variety.

Moreover, the problem of perverse incentives to remain ignorant and hence inculpable does not suggest that the law ought to impose shared responsibility among all people involved, even in episodes of administrative massacre. When the law imposes shared responsibility, there may be perverse incentives of a very different kind. Intellectual architects might ensure that so many people are involved that few are clean enough to assist any effort at prosecution. When the law imposes collective responsibility on all who are party to a common enterprise, it ensures that each individual will feel implicated in the acts of his peers. At a certain point, he will conclude that they have implicated him so deeply in their acts that he no longer has any stake in distancing himself from them. The law has linked their fate too closely to his own.

This has proven true in cases of state-sponsored mass murder. German soldiers in World War II on the Eastern front remained loyal to superiors largely because of shared responsibility for atrocities against civilians and POWs. The soldiers had come to believe that their treatment at the hands of the enemy, after defeat, would be worse than the risks of death in battle.[38] Their superiors

self-consciously employed this barbarization effect to their own ends, successfully securing a spectacular measure of discipline and cohesion under the most adverse of combat circumstances.[39]

Carlos Nino notes a similar source of cohesion among junior officers involved, even peripherally, in the Argentine dirty war:

> The commanders . . . deliberately involved as many officers as possible in the crimes. The few who resisted

[38] Omer Bartov, *Hitler's Army* 71, 101, 126, 169-70 (1991).

[39] *Id*.

> participating . . . were immediately fired. In reality, the degree of participation among officers differed greatly. However, through internal campaigning by those involved, the vast majority of the military were convinced that they too would fall prey to the trials. The fact that during all of Alfonsín's years no upper-echelon officer who knew how the operations were conducted revealed his knowledge to . . . the courts, or the press (when more than one sensationalist magazine would have compensated dearly for the story) is highly illustrative of the military's cohesiveness.40

In short, perverse incentives can result as much from the law's imposition of shared responsibility as from its insistence on apportioned responsibility. The devil is in the details of a given case. Military law has been unable to reach any consistent answer to the question of how the presence of many hands affects attributions of manifest illegality to the acts of a particular defendant, particularly one at the margins of a large and long-standing conspiracy.

To a great extent, the problems with the traditional rule on manifest illegality stem from an exaggerated quest for certainty and simplicity, and for a bright-line rule that would eliminate the gray area between clear legality and clear illegality. In this uncomfortable territory, one cannot trust to habit or instinct, but must stop and think. The failure to do so is a major source of atrocity, according to Arendt.41 The law's intolerance of ambiguity in this area, widely accepted elsewhere in the law, causes most of the difficulties described throughout this book. Such intolerance makes it impossible simply to acknowledge uncertainty, and assess the reasonableness of the soldier's conduct on its face.

Sometimes, however, the moral and legal uncertainties of the

soldier's situation become inescapable. Despite the law's heavy-handed efforts to suppress them, such uncertainties rise to the surface of judicial awareness. The manifest illegality rule then completely excuses the soldier from liability because ambiguity about the nature

40 Carlos Santiago Nino, *Radical Evil on Trial* 109 (1996).

41 Hannah Arendt, "Thinking and Moral Considerations," 38 *Soc. Res*. 416 (1971).

of his duties undermines the obviousness of the proper course of action.

The reason for the law's singular intolerance of ambiguity here is not hard to see. It is designed entirely in anticipation of a single, worst-case situation which has become increasingly rare due to changes in the nature of modern war. In this situation, an ill-informed subordinate must instantly obey his superior's order to use deadly force without a moment's reflection, or else all (i.e. the decisive battle) will be lost. But a closer look at the nature of military conflict in the modern world suggests that it is wrong to focus the law's attention exclusively upon this situation. Though admittedly evocative, that situation is only one, and by no means the paradigmatic or quintessential one, among several trying ones with which the law must cope.42 Many illegal orders, after all, are issued far from any front-line combat hostilities.43 Many atrocities are not committed, for that matter, in the genuine "heat of battle." The law thus needs a more fine-grained understanding of how atrocities and other war crimes of various types tend to occur.

The upshot of Part I is that the manifest illegality rule presents us with several unresolved and perhaps unresolvable problems. These imperil efforts to convict war criminals in ways that are conceptually

42 The excessive significance that the law of armed conflict has historically placed upon this worst-case situation arises in large part from the fact that, until the First World War, the result of most wars turned on the results of a single, decisive battle. The fate of nations could thus turn on whether a few soldiers obeyed their disagreeable orders, since wars have come to rely more on attrition, and have thus become much longer in duration. This is no longer true to nearly the

same extent. Russell F. Weigley, *The Age of Battles*, x-xiii, 536-39 (1991). The heavy emphasis of military thinkers (such as Rommel, Guderian, Von Manstein, and Von Mellenthin) on "the decisive battle" endured until the end of the Second World War. In more tacit form, it continues to hover quietly over most discussions of military law.

43 Richard T. DeGeorge, "A Code of Ethics for Officers," in *Military Ethics*, Col. Malham Wakin, Col. Kenneth Wenker, and Cap. James Kempf, eds., 13, 26 (1987) (noting that "not all orders require automatic response.") The misfocus of legal attention in this regard reflects a more general tendency, in attempts at foresight and rational planning, for "people [to] give unlikely events more weight than they deserve," i.e., in relation to ones that, though less evocative, are far more likely to occur and hence pose a more serious, practical threat to people's welfare. David E. Bell et al., "Descriptive, Normative, and Prescriptive Interactions in Decision-Making," in *Decision Making* 9, 24 (David E. Bell et al. eds., 1988).

coherent, empirically accurate, and morally defensible. I have hinted at how an alternative approach, aimed at assessing the reasonableness of the soldier's professed legal error, would work better.

But before proposing and developing that approach in greater depth, it is necessary to take a closer look at changes in the nature of military operations, such as the recent increase in multilateral peace enforcement operations, and in prevailing understandings of traditional forms of combat. We can devise better legal responses to the problem of atrocities only after we have learned something more about their sources.

PART II
AVERTING ATROCITY

10
Legal Norms and Social Practices in Military Life

Recent work in military history, informed by sociology, has significant implications for the legal redesign of armies in ways that can help reduce atrocities. The law's effort to prevent war crimes stands much to gain from these inquiries into how the soldier, in the face of battlefield adversity, can be induced to remain concerned with others' fate.

The management of armed forces also has much to learn from legal theory. Particularly instructive is the experience of designing and regulating other kinds of formal organization, with a view to enhancing the efficacy and morality of their members. Part III develops and defends this latter conclusion.

There are two prevailing perspectives on legal efforts to prevent atrocities. Neither has taken this tack. The first, favored by international lawyers and legal scholars, champions the need for military law to prohibit such acts unequivocally, in all circumstances and without exceptions.[1] This is the "legalist" approach.[2] It calls for courts, military and civilian, national and international, to punish perpetrators severely. If the law has failed to banish atrocity effectively from the modern battlefield, it is because the law has failed both to articulate its norms with sufficient clarity and to threaten their violators with enough deterrent.

The second perspective, pervasive among political scientists, is deeply skeptical of law's ability to impede combat atrocities,

however

1 Many have noted and lamented the alleged failure of the international law of warfare to achieve such clarity. See, e.g., Hans Kelsen, *Peace Through Law* 106 (1944); Telford Taylor, *Nuremberg and Vietnam* 2838, 4356 (1970) (identifying ambiguities in the international law regarding military necessity and the rules authorizing reprisals for an enemy's legal violations); Richard Wasserstrom, "The Responsibility of the Individual for War Crimes," in Virginia Held et al., *Philosophy, Morality, and International Affairs* 185 (1974).

2 The scholarly flagship for this point of view is undoubtedly *The American Journal of International Law*.

clear its prohibitions and draconian its threats.3 This is the "realist" view. Its proponents remind us that throughout the history of warfare, atrocious misconduct has been, if not a virtual constant, then at least persistent and perennial, eluding the best efforts of the most conscientious commanders and statesmen. On this view, the frenzy of combat elicits primordial passions that are nearly impossible to restrain by appeal to the soldier's rationality.4

Consider, for instance, a soldier's sudden impulse to avenge a close comrade who was killed, perhaps through an enemy's act of deception. These situations have driven soldiers berserk,5 inducing acts of unspeakable horror against prisoners of war. The intractable force of these instincts, and the seeming inevitability of the battle conditions that evoke them, ensure that the law stands relatively powerless before one of history's most recurrent tragedies. Let the lawyers in their innocence fiddle with their military codes and international conventions. It will be to little avail.6

I suggest a third approach, distinct from the preceding two. Regarding law's promise, this approach is neither as trusting as the legalists' nor as dismissive as the realists'. Realists are right to insist that law's promise to prevent atrocity becomes chimerical if it refuses to confront the psychological reality and the moral disorientation of

3 For such skepticism about international criminal law, see George F. Kennan, *American Diplomacy* 95101 (1951); Hans J. Morgenthau, *Politics Among Nations* 279314 (5th ed. 1978); Kenneth Waltz, *Man, the State, and War* 15964, 209 (1959).

4 Tim O'Brien, who was stationed in My Lai several months after the massacre there, describes these passions in a recent fictionalized account

of his combat experience in Vietnam. Tim O'Brien, *In the Lake of the Woods* (1994). "'There's a fine line between rage and homicide that we didn't cross in our unit, thank God,'" he recounts. "'But there's a line in the book about the boil in your blood that precedes butchery, and I know that feeling.'" Jon Elsen, "Doing the Popular Thing." *N.Y. Times Book Rev*., Oct. 9, 1994, at 33 (quoting Tim O'Brien).

5 A psychiatrist has recently written perceptively on the phenomenon of "berserking" by combat soldiers. Jonathan Shay, *Achilles in Vietnam* 77102 (1994).

6 These approaches offer ideal types, useful for conceptual and heuristic purposes. But they necessarily simplify the more nuanced views of actual scholars and military officers. Attorneys who have represented the United States Armed Forces and the State Department assure me that these two approaches represent the end points on a spectrum, with the modal position which is favored by most military lawyers lying somewhere in between.

the battlefield. But realists generally misconstrue and oversimplify these realities, viewing combat as asocial liminality[7] and atrocity as emotional efflux, both recalcitrant, by their nature, to constraint through social norms.

Conversely, legalists are right to insist that law can and does influence battlefield behavior in important ways. But they are wrong to focus exclusively on threats of punishment *ex post*. Far more important in averting atrocity are the more mundane legal norms structuring the day-to-day operation of combat forces. These rules achieve their effect *ex ante*, long before the soldier faces any opportunity to engage in atrocious conduct. After all, "frequently, ethical dilemmas are a result of bad institutional arrangements."[8] Prominent among these are the legal rules that shape the structure and culture of the organization imposing such dilemmas upon its members.

Military law inevitably rests on certain assumptions about what holds armies together and makes them effective. These concern both the kind and extent of social solidarity that such organizations require and how it is produced. Law is only one among several kinds of norms that govern social life. In striving to influence a given societal sphere, law ignores these other norms, assuming its supremacy over them, at its peril.[9]

The internal life of military organizations is one area where such other norms and the social practices they help cement are especially powerful and perennially in tension with legal ones. Law's efforts to avoid atrocity inevitably intersect with and rely upon the continuing efficacy of these other norms and mechanisms, which have historically played a much greater role toward this end.

7 For accounts of war's liminality, see Eric Leed, *No Man's Land* 1225 (1979).

8 Daniel Callahan, "How Shall We Incorporate Ethics Instruction at All Levels?," in *Ethics and National Defense* 135, 142 (James C. Gaston and Janis Bren Hietala eds., 1993). See also Com. Patrick Kelley and Dr. John Gibson, "We Hold These Truths: The Development and Assessment of Character," paper presented at the Joint Services Conference on Professional Ethics, Jan. 25, 1996, at 9 (concluding that "It is unwise to create and perpetuate work environments that make ethically responsible behavior into acts of moral courage.")

9 On how extant social norms often limit law's impact, and on how law and norms often influence each other, see Richard H. Adams, "The Origin, Development, and Regulation of Norms," 96 *Mich. L. Rev*. 338, 342, 347 (1997).

Law's promise and its limits must be examined in this light. Neither realists nor legalists have done so. The lawyerly drafters and judicial interpreters of military codes have done considerably better, but in light of their jurisprudential and sociological assumptions, they could profit from a more explicit assessment of the available choices. Atrocity in war is by no means infrequent, to judge from statistical surveys of veterans.[10] This frequency suggests the magnitude of what is at stake.

The U.S. Supreme Court, like the courts of most countries, has displayed extraordinary deference toward the armed forces as a community possessed of its own *nomos*, or norm-creating and norm-sustaining mechanisms.[11] This deference understandably dismays civil libertarians. They are deeply skeptical of this normative autonomy and wish to import and infuse the civilian law more thoroughly into the workings of military institutions.[12]

10 See generally H.B. Jacobini, "Data on the Laws of War: A Limited Survey of Veteran Recollections and Experiences," 15 *Mil. L. & L. of War Rev*. 459 (1976). In 1975, civilian social scientists asked several hundred U.S. veterans whether, in the course of their service, they knew of or had heard of under credible circumstances an incident such as the My Lai massacre. Of those who had served in World War II or the Korean conflict, twenty percent answered in the affirmative. But nearly thirty percent of Vietnam veterans offered that answer. These numbers refer to atrocities committed by either U.S. or enemy forces. In my view, the formulation of the questions in this survey is too ambiguous to allow confident generalization about the frequency of atrocities. But it is of some value, however imprecise.

11 See, e.g., *Brown v. Glines*, 444 U.S. 348, 350 (1980) (holding that a base commander may suppress written materials posing "a clear danger to the loyalty, discipline or morale of members of the armed forces");

Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (holding constitutional the prohibition of visible religious accouterments inconsistent with the Air Force's dress code, on the basis of the military's need for "instinctive obedience, unity, commitment, and esprit de corps"); *Greer v. Spock*, 424 U.S. 828 (1976) (finding no constitutional right to make political speeches or distribute leaflets on a military base); *Middendorf v. Henry*, 425 U.S. 25 (1976) (concluding that legal counsel at summary court-martial is not constitutionally compelled); *Rostker v. Goldberg*, 453 U.S. 57, 65 (1981) ("It is difficult to conceive of an area in which courts have less competence. The complex, subtle and professional decisions as to the composition, training, equipping, and control of the military force are essentially military judgments.").

12 Edward F. Sherman, "The Civilianization of Military Law," 22 *Me. L. Rev*. 3, 3 (1970); James B. Jacobs, *Socio-Legal Foundations of Civil-Military Relations* 22, 25 (1986).

The approach taken here is more respectful of the armed forces as a nomic community. It examines the possibility of reform from within the armed forces' normative universe and corresponding social practices. Within that universe, concerns with efficacy in combat are paramount. But they are constrained by other norms also regarded as intrinsic to good soldiering. The present analysis aims only to help rearticulate the evolving conventions of soldiering as a social practice,[13] not to subordinate these to more universalistic norms.

As a civilian, I must rely, of course, on soldiers' own accounts of their normative universe. The legal modification here proposed is defended as consistent with, even required by, values already taken as central and internal to that universe. No major transformation of military culture is necessary to effect needed change, just greater clarity concerning the implications of existing commitments and self-understandings. This approach is more pragmatic than that favored by professors of international law, few of whom show much interest in the moral universe of professional soldiers. Yet, as one scholar rightly concedes,

> Despite persistent criticism of military justice [from civilian scholars], reforms have come about on the military's own terms . . . This means that the evolution of military law lies largely, but not completely, in the hands of military leaders themselves. Therefore, students of military law must concentrate on the forces within the . . . armed services that facilitate and inhibit the evolution of military law.[14]

Such forces, for change or stasis, have to be identified and interpreted. There may exist little consensus about their direction within the officer corps itself. Even when the general direction of

13 For the leading defense of this method of moral and social theorizing, see Alasdair MacIntyre, *After Virtue* 2 (1981). Informed, critical reflection upon existing practices and their relation to internal virtues has been a long-standing and recurrent activity among professional soldiers and sympathetic commentators, since at least the later middle ages. Maurice Keen, *Nobles, Knights, and Men-At-Arms in the Middle Ages* 15 (1996) (describing the treatises of Bonet and Mézières on the law of arms).

14 Jacobs, *supra* note 12, at 25.

needed change is clear, there are usually differences of opinion concerning its contours. Civilian opinion has a modest but important place in this conversation.

This book aims to reinforce certain aspects of the "professional military ethos,"[15] setting these against other aspects that have become less important. The objective is not to crack the culture of the military community. Rather, it is to contribute to what one leading military analyst calls the necessary "reformulation of the warrior's calling, adapting and updating its externals in order to preserve its essentials."[16]

Like other institutionalized social practices, the professions, particularly those (like medicine, engineering, and the officer corps) that are dependent on current technology, routinely undergo such a process of refinement.

> If we study the development of a certain area of practical knowledge, it is sometimes apparent that as technique for the activity improves, the notion of the point or purpose of the activity becomes more complex and refined. The purpose of the activity thus changes, but often in ways that seem a natural development of potentialities present in earlier forms of the activity. Paralleling such a development will be a development of the standards by which performances of the activity are judged to be better or worse.[17]

Consider how this process now plays itself out within the U.S. military. The technology for war fighting has improved not only in sheer destructiveness. It has also improved in its capacity to discriminate between combatant and noncombatant, and to disable enemy forces without killing them. Moreover, improved

technology for reporting the experience of war to civilians, the so-called CNN

15 This is the standard term in the military literature for the virtues seen as integral to competent soldiering. See, e.g., Paul Christopher, *The Ethics of War and Peace* 125 (1994).

16 A.J. Bacevich, "Tradition Abandoned: America's Military in a New Era," 48 *Nat'l Interest* 16, 23 (1997).

17 James D. Wallace, *Ethical Norms, Particular Cases* 10 (1996).

factor,18 has necessitated legal reform. Such media coverage enhances military self-restraint by increasing public awareness of the causal connection between what elected leaders authorize our soldiers to do and the human consequences of their doing it. It is in the military's own interests to write its rules of engagement so as to preserve both national and international support for its operations.

The use of more discriminating and nonlethal weapons, in turn, begins to alter our assessments of proportionality and necessity in relation to specific uses of military force. Nonlethal weapons will often enable the same military objective to be attained with a much lesser degree of deadly force. Technologies assist in developing the more fine-grained purposes now imposed upon the military, such as peace making through restoring order and building confidence among former adversaries. This social practice is very different from simply destroying an enemy's forces and occupying its territory.19 The increasingly routine integration of JAG officers into operational and even tactical decisionmaking reinforces these developments.

Potentialities inherent in existing forms of military practice can thus be drawn out and developed in ways that also raise "the standards by which performances of the activity are judged to be better or worse."20 Developments internal to soldierly practice suggest the need for a reinterpretation of military law. As soldiering itself becomes more discriminating in its use of force, the law governing soldiers can and should also become more discriminatingmore ethically and conceptually refined. To this end, the reasonable error rule would authorize soldiers engaged in practical deliberation (on the battlefield and off) to consider

disobedience to a superior's orders for reasons other than manifest illegality.

18 This term refers to the fact that military operations no longer exist independently of their coverage, insofar as anticipation of how they will be covered now influences how they are undertaken. Frank J. Stetch, "Winning CNN Wars," 24 *Parameters* 37 (1994); Warren P. Strobel, *Late-Breaking Foreign Policy* (1994).

19 Dept. of the Army, *Joint Task Force Commander's Handbook for Peace Operations*, IV-1 (June 16, 1997) (observing that "the major objective of a peace operation is a settlement, not a victory."); *Joint Doctrine for Military Operations Other Than War*, Joint Pub. 307, II5 (June 16, 1995) (noting that rules of engagement in such operations "are generally more restrictive . . . and sensitive to political concerns than in war.").

20 Wallace, *supra* note 17, at 10.

Rival Views On the Legal Structure of Armed Forces

Until well into this century, the conventional wisdom of military commanders could be neatly summarized in three propositions: (1) military effectiveness does not demand from troops much ground-level initiative, so they should be trained in ways that would today be described as operant conditioning;[21] (2) the optimal organizational structure for the military is therefore strictly hierarchical and highly centralized; and (3) atrocity results from free-lance self-seeking behavior by troops, ignoring the exhortations of their superiors.

Clearly, these propositions are closely connected, both logically and empirically. In combination, they yield two conclusions: (1) orders to subordinates should be cast as bright-line rules, allowing minimal scope for discretion; and (2) military law should authorize subordinates to question or disobey the orders of superiors only in the very narrowest of circumstances, if at all.[22] The affinity between these two conclusions is explicit in the reflections of leading officers. "The mind of the soldier, who commands and obeys without question," writes Field Marshall Earl Wavell, "is apt to be fixed, drilled, and attached to definite rules."[23]

These conclusions account for why the military law of most nations, like most sources of international law, has limited the subordinate's duty of disobedience to situations in which his superior's command was manifestly illegal, that is, unequivocally atrocious and aberrant.

21 On the predominance of such behaviorist Skinnerian or Pavlovian approaches, see Gwynne Dyer, *War* 65 (1985). She describes military

training as long focused entirely on soldiers' ability "to perform extremely complicated maneuvers in large formations . . . completely automatically even under the stress of combat. This was accomplished by literally thousands of hours of repetitive drilling, accompanied by the ever-present incentive of physical violence as the penalty for failure to perform correctly." *Id*.

22 This statement of the conventional wisdom necessarily oversimplifies to some degree the actual range of military opinion and practice during the nineteenth and early twentieth centuries. Armies have always varied considerably in their approach to discipline. In fact, some of the best, like the Australian Imperial force of World War I, were quite unlike the ideal-type just described. C.E.W. Bean, *The Story of Anzac* 4748 (1921).

23 Field Marshall Earl Wavell, *Generals and Generalship* 34 (1941).

Leading social-historical analyses of combat, however, require considerable revision of the first three propositions in ways that demand reconsideration of their derivative conclusions.24 Military commanders throughout the world have themselves reassessed the first two propositions. The new learning is that: (1) military effectiveness depends greatly on ground-level ingenuity and improvisation by field officers and combat groups;25 due to the tactical importance of surprising the enemy and the dangers of leadership "decapitation,"26 and (2) the army's organizational structure should therefore be informal enough within combat groups and sufficiently egalitarian among the ranks to foster strong personal loyalties, both vertically and horizontally.27

Effective leadership depends more on personal charisma and positive incentives than on coercion. Scholars and some military elites are increasingly acknowledging that atrocity has often occurred at the direction of officers. It follows from these revisions that the law governing soldiers ought to enlarge the range of circumstances in which they are required to question and to disobey unlawful orders.

24 See generally Geoffrey Best, *War and Society in Revolutionary Europe*, 17701870 (1982); Brian Bond, *War and Society in Europe, 18701970* (1983); Derek McKay, *War and Society in the Age of Absolutism* (1982).

25 On increasing recognition by military authorities of the need for greater reliance on soldierly self-discipline rather than on organizational discipline, see Anthony Kellett, *Combat Motivation* 9293 (1982). In this regard, military thought corresponds to broader developments in applied cognitive psychology. See, e.g., Ellen Langer, *Mindfulness* 63 (1989) (examining mindfulness in connection with an illustration from strategy

during the Napoleonic Wars). On the importance of tactical improvisation to battlefield success, see Michael D. Doubler, *Closing With the Enemy* 107, 264, 27298 (1994).

26 On the difficult coordination problems posed by such loss of leadership, see Paul Bracken, *The Command and Control of Nuclear Forces* 226, 23235 (1983).

27 These developments in military thinking were first described for civilians by Morris Janowitz, *The Professional Soldier* 89 (1960). A leading military historian concludes, "The fact that, historically speaking, those armies have been most successful which did not turn their troops into automatons, and did not attempt to control everything from the top, and allowed subordinate commanders considerable latitude has been abundantly demonstrated." Martin van Creveld, *Command in War* 270 (1985).

Morality vs. Efficacy:
A False Dichotomy

Since the ancient Greeks, practical judgment has been understood to combine both tactical and moral components.[28] In military affairs, however, tactical and moral concerns with avoiding war crimes are sometimes thought to be at odds.[29] If they are not, this is only because there can be no crime by definition unless there is no military necessity for the act in question.[30]

Nonetheless, studies of U.S. officers conducted by the military itself conclude that ethical behavior and technical competence are highly correlated, sometimes even inextricable.[31] This view has a long vintage. "The military virtues are not in a class apart, " argued General Sir John Hackett.[32] Courage, fortitude, and loyalty "are virtues which are virtues in every walk of life."[33]

Even empathy is an essential martial virtue, for the successful combatant will spy out the soul of his adversary," writes Maj. Gen. J.F.C. Fuller.[34] Effective soldiers never deny the humanity of their adversary. Recognizing key aspects of this humanity is necessary to

28 Nussbaum offers a recent defense of this view. Martha C. Nussbaum, "The Discernment of Perception," in *Love's Knowledge* 54 (Martha C. Nussbaum ed., 1990).

29 Since Clausewitz, this has been the avowed view of so-called realists in the study of international relations. Carl von Clausewitz, *On War*, Michael Howard and Peter Paret, eds. and trans., 7576, 81, 581 (1976).

30 Although this approach to defining war crimes has some support in the doctrine of proportionality, which is essentially consequentialist in its moral premises, much of the rest of humanitarian law (such as prohibitions on use of particular weapons) is more deontological in

nature, since it establishes side-constraints that cannot be violated in order to secure gains in the general welfare, regardless of apparent "necessity" in particular circumstances.

31 Samuel Stouffer et al., *Study on Military Professionalism* 13 (1970) (noting how decisions can be effective at high levels only if subordinates honor their legal duties to report accurately on ground-level performance and readiness, however embarrassing). But see Eliot A. Cohen, *Commandos and Politicians* 7577 (1979) (noting that elite American and French commando units, though often highly effective, have sometimes been particularly inclined toward use of unlawful methods).

32 Lt. Gen. Sir John Winthrop Hackett, *The Profession of Arms* (1962), quoted in Col. Anthony Hartle, "Do Good People Make Better Warriors?," 42 *Army* 20, 20 (Aug. 1992).

33 Hackett, *Id*.

34 Major General J.F.C. Fuller, quoted in Robert Fitton, ed., *Leadership: Quotations From the Military Tradition* 69 (1990).

anticipate the enemy's likely actions and reactions. This process requires "a sort of empathy."[35] To dehumanize the enemy in one's mind may reduce one's moral qualms about killing him. But it also greatly impedes one's ability to outwit him and so to prevail against him.[36]

The American involvement in Vietnam provides a painful but powerful example.[37] The U.S. relied excessively on abstract game-theory models, positing hypothetical and indistinguishable rational actors on all sides.[38] This allowed far too little room for the exercise of judgment in the face of uncertainty.[39] Judgment informed by a deeper understanding of the political and cultural context often plays a powerful role in shaping strategic calculations.[40]

Moreover, the recent revisions in military thinking suggest that concerns of ethics and efficacy are increasingly congruent. Because combat effectiveness depends less on draconian threats of formal discipline than on informal organization and spontaneous initiative, military law can afford to expand the exceptions to the soldier's duty to obey unlawful orders that have hitherto been strictly construed.

In essence, the very changes in the legal structure of armies, increasingly recognized as necessary to make such organizations more effective in the field, would make it easier for troops to identify

35 John Keegan, *The Face of Battle* 314 (1976).

36 Martin van Creveld, *The Transformation of War* 195 (1991); James B. Stockdale, *A Vietnam Experience* 18, 22 (1984).

37 According to one JAG officer, dehumanization of enemy troops encouraged the soldier "to think of them as less than human and thus unworthy of the protection of the law of war." He adds, "this dehumanization is especially dangerous when allied or neutral noncombatants are of the same race . . . or ethnic group as the enemy." Lt. Col. Jonathan Tomes, "Indirect Responsibility for War Crimes," *Mil. Rev*. 37, 43 (Nov. 1986).

38 It is only a slight exaggeration to say, as do two military analysts, that 'since the early 1960s, computer simulation, which is part of a larger intellectual and bureaucratic process called "systems analysis," has largely replaced "command judgment" as the basis for most major decisions in the U.S. military." Paul Seabury and Angello Codevilla, *War: Ends and Means* 73 (1989).

39 Williamson Murray, "Clausewitz Out, Computer In," 48 *Nat'l Interest* 57, 63 (1997) (arguing that "what matters most in war is what is in the mind of one's adversary, from command post to battlefield point-of-contact" and that computerized methods of war planning are "wholly disconnected from what others think, want, and can do").

40 Alastair Iain Johnston, "Cultural Realism and Strategy in Maoist China," in *The Culture of National Security* 216 (Peter J. Katzenstein ed., 1996).

and evade a wider range of unlawful orders from superiors. Military law should acknowledge and capitalize upon these felicitous compatibilities between the demands of ethics and efficacy. At issue, in short, is the nature of the soldier's practical deliberation. As Aristotle saw, "being good at deliberating about the conduct of life . . . is both a virtue of character and a virtue of thought."[41]

41 Wallace, *supra* note 17, at 39.

11
Cold Hearts and the Heat of Battle: Atrocity from above or from Below?

How the law ought best to deter atrocities surely depends on what causes them. The evidence examined here suggests that effective prohibitions against atrocity depend much less on the foreseeability to soldiers of criminal prosecution after the fact than on the way soldiers are organized before and during combat. Hence the law can best restrain illicit methods of warfare not so much by its threat of subsequent sanction as by its effect on how armies are organized and how responsibility is distributed within them. The law thus remains vitally important, but not the law of war crimes as such.

This chapter and the next suggest that military law has evolved a structure of norms designed to address differing sources of atrocity. At some points, these norms threaten to run afoul of one another, for they are based on very different assumptions about how war crimes arise. This chapter seeks to identify and clarify some of the tacit tensions and resulting trade-offs that military law must make. These choices, I contend, should be based on the relative strength of different sources of atrocity in different societies and various kinds of military organization engaged in disparate types of conflicts. There is no single, legal cure-all, but rather a menu of legal options, each most suited to a particular kind of problem.

The social organization of military life and the experience of combat have fostered atrocities in several ways: (1) by stimulating violent passions among the troops ("from below"); (2) through

organized, directed campaigns of terror ("from above"); (3) by tacit connivance between higher and lower echelons, each with its own motives; and (4) by brutalization of subordinates to foster their aggressiveness in combat. I shall discuss each of these in turn.

Conversely, military culture and social organization have hindered atrocities in several corresponding ways: by class honor, by

bureaucratic discipline, by individual self-discipline, by small group cohesion, and by more civilized (and civilianized) treatment of soldiers. These ways of impeding atrocity can be viewed chronologically, for to some extent they represent stages in the social history of the military. They also reflect stages in the history of thought about military organization. Or they can be seen more conceptually, as representing different types of social mechanisms affecting the propensity for atrocity, which vary in strength and prominence over time and space but are all potentially present and at work at any given moment. They may be seen, in other words, as ideal-types.1

Finally, they can be seen as competing causal accounts of how atrocities have been prevented and as rival explanations of how an army's social organization buffers the propensity of its members to engage in atrocity. This last formulation would be especially perspicacious if any of these atrocity-impeding mechanisms works in ways that undermine the efficacy of the others. But for the present purpose, assessing the law's best strategies of regulation, there is no need to choose among these alternative conceptions. I shall therefore move between them with relative abandon.

Our concern here is with the local, proximate causes of atrocity, not the larger, global causes that admittedly lie beyond. The macro-level sources of war crimes include such things as racial hatred, nationalist ideologies, genocidal policy, the nature of counter-insurgency warfare, and the tendency of reprisalsintended merely as tit-for-tatto escalate out of control.2

The imminence of battlefield failure can sometimes increase pressure to order war crimes, in a final, desperate effort to forestall

1 Max Weber, *The Methodology of the Social Sciences* 4146 (Edward A. Shils and Henry A. Finch eds. trans. 1949).

2 For a game-theoretic perspective on such tit-for-tat escalation, see James Morrow, "The Institutional Features of the Prisoners of War Treaties," paper presented at the Amer. Polit. Sci. Assoc. meetings, Sept. 1998. On how guerrilla insurgents attempt to elicit atrocities from conventional enemy forces, as a means of turning the civilian population decisively against such forces (toward whom civilians initially are often merely indifferent or ambivalent), see Maj. James Linder, "A Case for Employing Nonlethal Weapons," 76 *Mil. Rev.* 25, 28 (1996); Davida Kellogg, "Guerrilla Warfare: When Taking Care of Your Men Leads to War Crimes," paper presented at the Joint Services Conference on Professional Ethics 6 (1997).

defeat. But imminent victory can also increase incentives to commit such crimes. After all, the looming prospect of complete and spectacular successjust around the corner, within one's reachcan weaken inhibitions that have been respected until that point. The increasing probabilities of a favorable result, guaranteeing impunity for one's contemplated crimes, further disposes soldiers to accept the risks involved. Perceptions of likely triumph or defeat can thus cut both ways. Why they apparently have cut one way in a given case but the other in a different has not been discovered, or seriously investigated.

Some claim to find the source of recent atrocity in the breakdown of the state, the collapse of Clausewitz's "trinity," and the attendant increase in nonprofessionalized warfare.3 But others rightly note that the very process of state-building is itself often a form of "organized crime," that is, an expanding 'protection racket' which generates much violent activity itselfalbeit in furtherance of a more stable (and centralized) public order.4 In one extravagant version of this view, neo-classical economists profess to find the origin of modern war crime in the suppression of mercenaries, of private markets for ransom of prisoners, and the state's effort to acquire a monopoly over such markets.5 But others correctly observe that the privatized acquisition of booty led knights to seek foolish pretexts for war, to fight one another (while ostensibly on the same side) for control of rich enemy prisoners, and to abandon battles prematurely (i.e., before the enemy was vanquished) to plunder the dead.6

These complex imponderables can be left to the relevant specialists. To do effective harm, however all such macro-sources of war must ultimately exert their influence at the level of micro-

interactions, especially those between military superiors and subalterns in the field. So this is where, for present purposes, we shall

3 Martin van Creveld, *The Transformation of War* 192222 (1991); Michael Ignatieff, *The Warrior's Honor* 132, 158 (1998).

4 Charles Tilley, "War Making and State Making as Organized Crime," in *Bringing the State Back In* (Peter B. Evans et al., eds., 1985).

5 Bruno Frey and Heinz Buhofer, "Prisoners and Property Rights," 31 *J. of Law & Econ.* 19 (1988). For a defense of "mercenary" forces, as recently revived in several African conflicts, see David Shearer, "Outsourcing War," *Foreign Policy* 68 (Fall 1998).

6 Malcolm Vale, *War and Chivalry* 2627, 55, 15155 (1981).

look. Criminal law has most experience there, and is generally most effective, intelligible, and morally defensible at this level.

Atrocity as Primordial Passion

The most influential understanding of how atrocities occur has been that they reflect a breakdown of discipline and bureaucracy, an inability of those at the top of the organization to exercise sufficient control over those at the bottom. Ambrose writes, in this regard, "When you put young people, eighteen, nineteen, or twenty years old, in a foreign country with weapons in their hands, sometimes terrible things happen . . . This is a reality that stretches across time and continents. It is a universal aspect of war . . . "[7] On this account, the commission of atrocities appears almost a force of nature.

In short, atrocities happen when individual soldiers, as creatures of desire, are able to indulge their passions: for women, alcohol, food, revenge of lost comrades, or simple blood lust. Such passions lurk everywhere within us, simply awaiting an opportune moment for release. Young men simply release them more readily than their elders. The central question becomes, then, not why atrocities occur, but why they don't occur much more often. A social scientist would say that Ambrose's theory, as here amended, greatly overpredicts the frequency with which atrocity actually occurs.

This understanding of atrocity dominates all the great artistic depictions of it, such as Jacques Callot's *Large Miseries of War* and Rubens' *The Consequences of War*.[8] On this view, atrocity is inherently free-lance and self-seeking. "If discipline is relaxed when it has not been replaced by a high morale," Lord Moran

warned, on the basis of his experience in the First World War, "you get a mob who will obey their own primitive instincts like animals."[9] Let us call this traditional atrocity. The superior orders defense has no bearing on such conduct, for no one has ordered it.

The ancient Roman siege of the Spanish city of Locha in 203 B.C. exemplifies traditional atrocity. When the city's leaders finally surrendered, the Roman commander Scipio Aemilianus ordered his

7 Stephen E. Ambrose, *Americans at War* 152 (1997)

8 Peter Paret, *Imagined Battles: Reflections of War in European Art* 89 (1997).

9 Lord Moran, *The Anatomy of Courage* 166 (1966).

troops to halt their attack and give quarter. They ignored him and sacked the city. When the commander regained control, he punished the chief malefactors among his men, restored the property they had stolen, and publicly apologized for their deeds.[10]

Military leadership has conventionally sought to prevent such looting and pillaging, not only because these acts were thought to be immoral but also because they entail a collapse of oversight and organization.[11] Such acts by soldiers make it difficult for leaders to consolidate the recent gains of organized combat and to refocus collective energies quickly in pursuit of further goals.[12]

Thus, atrocities are anti-social, not merely in their effect on innocent victims but also in detracting from the larger purposes behind any coordinated military campaign. In addition, atrocities are asocial. They reflect a return by individuals to the state of nature in its raw brutality. Atrocities are an efflux of animal instinct, to be restrained where they cannot be entirely suppressed. Hundreds of rapes by its soldiers led the Japanese government to establish enforced prostitution in China in 1932.[13] Organized criminality, sponsored by the authorities, was seen to pose much less danger to discipline and public order than the more disorganized variety.

Like the desire for sex, hunger is also a powerful human instinct. Often, mass armies have been chronically malnourished. In addition, armies have generally been composed of involuntary conscripts, men who had no personal stake in their rulers' political aims. In early modern Europe, mass armies were substantially composed of "penniless adventurers . . . drunks, chronic ne'er-do-

wells, and outright criminals, for whom the army was the last refuge from

10 Peter Karsten, *Law, Soldiers and Combat* xii (1978).

11 John A. Lynn, *The Bayonets of the Republic* 114 (1984); Gunther Rothenberg, "The Age of Napoleon," in *The Laws of War*, 86, 95 (Michael Howard et al. eds., 1995) (noting several eighteenth and nineteenth century British and French commanders who held this view).

12 Maj. Wm. Hays Parks, "The Law of War Adviser," *18 Mil. L. & L. of War Rev.* 357, 367 (1979). This problem is longstanding. See, e.g., Vale, *supra* note 6, 164 (1981) (noting "the unnerving ease with which armiesparticularly bands of infantrycould dissolve into packs of brigands and pillagers.").

13 George Hicks, *The Comfort Women* 45 (1995).

starvation or from justice."[14] Not surprisingly, these men thus often deserted at first opportunity.

Response:
Discipline through Bureaucracy

If the source of the problem was insufficient organization, it followed that the solution was more and better bureaucracy. Toward this end, bright-line rules were clearly preferable to general, discretionary standards, particularly rules requiring strict obedience to all superior orders. Any act beyond the scope of orders would be strongly discouraged, and any act inconsistent with them would be strictly forbidden. What was not required was prohibited, and the need for discretionary judgment all but eliminated.

Formal sanctions for desertion and disobedience, particularly to orders imperiling the conscript's life, had to be draconian, for otherwise troops would find these sanctions preferable to combat.[15] "The avenue to the rear is completely closed up in the mind," a Civil War private observed in his diary. "Such equanimity is produced by discipline. Stern discipline can manufacture collective heroism."[16] This had not much changed since ancient Rome, where "the generals had a right to punish with death; and it was an inflexible maxim of Roman discipline that a good soldier should dread his officers far more than the enemy."[17]

It also followed that commands issued to subordinates had to be as precise and specific as possible, leaving minimal latitude for interpretation. This conception of how armies should be designed displayed great affinity for formalist conceptions of law.

Conversely, more recent conceptions of military organization stress informal

14 Gwynne Dyer, *War* 64 (1985).

15 Discipline "could only be maintained by liberal use of the lash, the hangman's noose, and the firing squad." Dyer, *supra* note 14, at 64.

16 John Baynes, *Morale* 180 (1967) (quoting Stephen Graham, *A Private in the Guards* 2 (1919). Even today, officers are encouragedsomewhat euphemisticallyto "put a skilled, trusted veteran in the rear of formation to keep men and small units moving forward." Col. Dandridge Malone, *Small Unit Leadership* 150 (1983).

17 Baynes, *Id*. at 182. Soviet officers on the Eastern front adopted the same maxim during the Second World War. Antony Brewer, *Stalingrad* xiv (1998) (reporting that some 13,500 Soviet soldiers were executed for attempted desertion during and immediately following that single battle).

mechanisms of command, and thus have affinities with nonformalist conceptions of law, particularly legal realism and sociological jurisprudence.

Formally rational methods greatly stifled initiative by subordinates, not much was sought from them. According to pre-modern theories of war, soldiers were to march together lockstep into combat, forming close-knit, phalanx-like formations, producing a massive onslaught. Sparta's warriors were to go "shoulder to shoulder . . . into the melee . . . setting foot beside foot, resting shield against shield, crest beside crest, helm beside helm."[18] Grotius reports that in Roman law "one who had fought an enemy outside the ranks and without the command of the general was understood to have disobeyed orders," and was punished by death, "even if what he had done turned out successfully."[19]

Not incidentally, this strategy minimized opportunities for desertion. The virtues of soldiers were those of a well-oiled machine: to respond quickly to command without tactical or moral reflection. No special courage was sought, for none could be expected. Few duties could be imposed as few rights were accorded. Efforts by foot soldiers to employ intelligence and imagination were widely thought to hinder effective performance of the very simple tasks and skills demanded of them.[20] Given the importance of uniform conduct to combat effectiveness, displays of "individual valor and initiative might have positively catastrophic consequences," notes a military historian.[21]

18 1 *Elegy and Iambus* 7375 (J.M. Edmonds ed. and trans., 4th ed. 1961) (quoting Tyrtaeus).

19 2 Hugo Grotius, *De Jure Belli Ac Pacis, Libri Tres* 788 (Francis

Kelsey, ed. (1995). He explains that "if such disobedience were rashly permitted, either the outposts might be abandoned or, with the increase of lawlessness, the army or part of it might even become involved in ill-considered battles, a condition which ought absolutely to be avoided." *Id*. at 78889.

20 This view was common among the British officer corps, for instance, well into the late nineteenth century. It no doubt partly reflected the acute socioeconomic disparities in Britain between officers and enlisted men, disparities significantly greater than elsewhere in Europe. Alan Skelley, *The Victorian Army at Home* 29092 (1977). Similarly, in France the ideal of the Second Empire army was "a man of boundless courage and audacity but no reflection." Dallas D. Irvine, "The French Discovery of Clausewitz and Napoleon," 4 *J. Am. Mil. Inst.* 143 (1940).

21 Omer Bartov, *Murder in Our Midst: The Holocaust, Industrial Killing, and*

(footnote continued on next page)

If the inferiors were the problem, then strict subordination to their superiors was the most plausible solution. The officer class, socialized from early age to stringent ethics of honor, could be trusted to issue only such orders as were consistent with time-honored restraints.

Atrocity by Bureaucracy

The second understanding of how atrocities occur views them as acutely social in nature. Atrocity derives precisely from the nature of social organization, especially military organization, not from its collapse. It reflects the workings of such organization in strength, rather than in dissolution.

Let us call this modern atrocity. Cases of modern atrocity would include the crimes committed in World War II against prisoners of war and noncombatants, both by Japanese soldiers in China and by German soldiers on the Eastern front. Perpetrated under orders from superiors on pain of discipline for disobedience, these acts were the antithesis of free-lance self-seeking.[22] Such "atrocities are the last resource *of strategy* in its efforts to force an enemy to his knees," as an American officer once acknowledged.[23]

In the 1950s and 1960s, American modernization theorists celebrated the rise of strong armies throughout the Third World, viewing their formal structures as the standard bearers of bureaucratic rationalization.[24] But in many places these armies quickly proved themselves much more effective in suppressing domestic dissent, often through torture and rape, than in prevailing against less

(footnote continued from previous page)

Representation 17 (1996).

22 Omer Bartov, *Hitler's Army* 6970, 8290 (1991); Christopher Browning,*Ordinary Men: Reserve Battalion 101 and the Final Solution in Poland* 16061 (1992); see also Yuki Tanaka, *Hidden Horrors: Japanese War Crimes in World War II* 20711 (1996) (describing "the corruption of Bushido," or the ethic of loyalty to the Emperor).

23 James D. Morrow, "Strategy, Victory, and the Laws of War," paper presented at the American Political Science Association, Washington, D.C., Aug. 29, 1997, at 1 (quoting United States Army Captain Charles Roess).

24 See, e.g., Marion Levy, "Armed Forces Organizations," in *The Military and Modernization* 41 (Henry Bienen ed., 1971). Morris Janowitz, *The Military in the Political Development of New Nations* (1964).

hierarchically organized military rivals, such as partisan irregulars and guerrilla bands.25

An army has both a formal and an informal organization. The formal consists of the official structure, the informal of uncodified patterns of social interaction among and between soldiers and their commanders.26 In modern atrocities, formal procedures of military bureaucracy, order giving and order following, down a chain of command,27 are employed to induce soldiers to commit crimes. In such cases, atrocity clearly results not from bureaucracy in disarray, but from bureaucracy run amok. Because the superiors are the primary source of the problem, their subordinates should be enlisted as part of a solution.

Response:
Discipline through Democracy

To that end, the law obviously cannot hope to reduce atrocities by structuring armies to resemble more closely a "top-down" Weberian bureaucracy.28 In fact, the primary legal means toward reducing atrocity by bureaucracy would surely be to codify generous

25 See, e.g., Larry Rohter, "4 Salvadorans Say They Killed U.S. Nuns on Orders of Military," *N.Y. Times*, April 3, 1998, at A1. "'Don't be worried,' one of the guardsman said his superior had told the four. 'This is an order that comes from higher levels, and nothing is going to happen to us.'" *Id*.

26 Both the formal and informal organization can contribute to atrocities in combat, on the atrocity by bureaucracy account. I emphasize the informal in the following pages. The pathbreaking early studies of informal organization within armies include Samuel Stouffer et al., *The*

American Soldier (1949); Morris Janowitz and Edward Shils, "Cohesion and Disintegration in the German Army in World War II," 12 *Pub. Opinion* Q. 281 (1948). For surveys of more recent research, see Wm. Darryl Henderson, *Cohesion: The Human Element in Combat* (1985) and Gregory Belenky, ed., *Contemporary Studies in Combat Psychiatry* (1987).

27 A logician observes that a true chain of command should be conceived as involving iterated order-giving, in which each intermediary lends the weight of her own authority, rather than merely transmitting or carrying messages from above. Nicholas Rescher, *The Logic of Command* 1415 (1966).

28 Weber's view of bureaucratic discipline was stark and uncompromising. "The content of discipline is nothing but the consistently rationalized, methodically trained and exact execution of the received order, in which all personal criticism is unconditionally suspended and the actor is unswervingly and exclusively set for carrying out the command." Hans H. Gerth and C. Wright Mills, eds., *From Max Weber* 253 (1958).

qualifications and exceptions to the duty of obedience to superior orders. Such an approach would require obedience to any unlawful orders, even those not manifestly illegal on their face. This approach might even go so far as to confer a legal excuse for disobedience wherever the superior's order reasonably appeared unlawful under the circumstances, even though the order ultimately proved legal.

Where troops are committed to the war effort and are loyal to national leadership, they can more often be trusted with the discretion to disobey unlawful orders. Such was the case, for instance, with the New Model Army in the English Civil War, at least where influenced by the Levellers.29 It was also true during the early French Revolutionary wars, when soldiers were more loyal to spreading the Revolutionary cause across Europe than to their professional commanders, many of whom retained ties to the aristocracy.30 The troops were therefore encouraged to question and even disobey superior orders appearing to contravene the Revolution's new legality.31

Since the troops were animated by patriotism, new and more effective methods of warfare became available.32 Open formations replaced closed. Wide distribution of more complex weapons requiring greater concentration, such as the breach-loading rifle, became possible. Superiors could authorize unregulated fire where opportunity might present itself, rather than only on command. That such innovations weakened direct control over the lower ranks and raised the influence of noncommissioned officers was no longer perceived as a threat to social order.33 France's early military

29 Christopher Hill, *God's Englishman: Oliver Cromwell and the English Revolution* 7981 (1970); Christopher Hill, *The Century of Revolution, 1613-1714* 12839 (1961).

30 Lynn, *supra* note 11, at 10001; Theda Skocpol, *Social Revolutions in the Modern World* 279, 27998 (1994).

31 Lynn, *supra* note 11, at 10001.

32 Barry R. Posen, "Nationalism, the Mass Army, and Military Power," 18 *Int'l Security* 80, 89109 (1993) (showing how nationalist and revolutionary enthusiasm suppresses the divisive impact of civilian social structures within mass armies, thereby enhancing their power vis-á-vis military adversaries); see also Stephen Peter Rosen, *Societies and Military Power* 267 (1996).

33 On the relation between these innovations, both technological and organizational, and the advent of modern state and society, see Maury D. Feld, *The Structure of Violence* 13, 22 (1977).

successes were attributable in part to its adversaries, like Prussia, being more hierarchical societies whose officers were reluctant to adopt such decentralized organizational forms.34

The historical experience of French Revolutionary armies, though extreme in some respects, is not entirely anomalous. During the American Revolution, colonists widely expressed contempt for the coercive discipline that the British imposed on their troops, because it was "alien to the republican society of freemen they were fighting to achieve."35 The famously informal procedures of the Israel Defense Forces are similarly attributable to the unusual degree of confidence among superiors in subordinates' commitment to the organizational mission.36 In fact, in the Israel Defense Forces' early years, "orders were commonly formulated after open debate in which rank often carried less weight than sound arguments, and could rarely be imposed by the sheer authority of superior rank."37 Modern theorists of counterinsurgency warfare advocate similarly decentralized organization as essential to combating guerrilla armies, which are the type that largely determined the shape of military conflict since the Second World War.38

As larger (and lower socioeconomic) sectors of society were required to carry arms abroad in national defense, they often acquired correspondingly greater rights of citizenship at home, first civil and

34 Peter Paret, *Understanding War* 79 (1992) ("Skirmishing demanded a degree of independence and initiative on the part of the soldier that could not easily be accommodated by the discipline and

tactics of such services as the Russian, British, or Prussian."); Peter Paret, *Clausewitz and the State* 2429 (1976).

35 James M. McPherson, *For Cause and Comrades* 49 (1997).

36 Troops do not salute their superiors, who are commonly addressed by first names. On the this aspect of the Israel Defense forces, see Yigal Allon, *The Making of Israel's Army* 4445 (1970); Stuart A. Cohen, 'The Israel Defense Forces (IDF): From a "People's Army" to a "Professional Military"Causes and Implications,' 21 *Armed Forces & Soc'y* 237, 248 (1995). See generally Amos Perlmutter, *Politics and the Military in Israel* 19671977 (1978).

37 Edward Luttwak and Daniel Horowitz, *The Israeli Army* 54 (1975).

38 See, e.g., Andrew F. Krepinevich, Jr., *The Army and Vietnam* 717, 165, 25875 (1986). Writing in the immediate aftermath of the Vietnam War, one expert observes that "These days the basic fighting unitthe infantry Battliongoes into action not as a closely controlled body, but as a loose conglomeration of combat sub-groups. A spin-off from this is that nowadays humble corporals and others have to take decisions that only commissioned officers would have taken years ago." Peter Watson, *War on the Mind* 230 (1978).

political, then social and economic.[39] The modern welfare state was, in many ways, the ultimate, unintended result of mass military mobilization.[40] But the causal relation ran both ways: the citizen's enhanced sense of entitlement in turn fostered a greater sense of obligation to protect the fellow citizens who recognized and honored those entitlements. Such obligation laid the motivational basis for self-discipline. This increasingly supplemented the legal enforcement of punitive discipline, without supplanting it, of course. The decline of conscript armies in the contemporary West contributed further in this regard, ensuring that soldiers need not serve and fight against their will.

Prior to 1945, military law concerning the proper limits of obedience focused almost entirely on traditional atrocity, that is, atrocity through disobedience and organizational demise.[41] Since the Nuremberg trials, however, the focus has understandably been on modern atrocity, which is atrocity through obedience to bureaucracy. It is modern atrocity which has captured the imagination of legal theorists, moral philosophers, novelists, and other intellectuals.

Western industrial societies can now afford to supply their troops with adequate food and clothing; hence the need for soldiers to forage and pillage in order to ensure their survival has been all but eliminated.[42] The need to satisfy material necessities, however, has

39 Feld, *supra* note 33, at 2425; see also Eric Foner, *Reconstruction* 910 (1988). The imposition of new duties, particularly impressment into a war effort, has often led those so affected to demand greater rights. Of course, there is nothing automatic in this relationship between the creation of rights and duties. In fact, authoritarian states

regularly exempt dominant ethnic groups from military conscription, imposing this duty exclusively upon disadvantaged minorities. Alon Peled, *A Question of Loyalty: Military Manpower Policy in Multiethnic States* 16 (1998). Moreover, only very rarely, if ever, has the extension of new rights enhancd the desire of their recipients to assume new legal burdens and social duties. See generally James Burk, "Citizenship Status and Military Service: The Quest for Inclusion by Minorities and Conscientious Objectors," 21 *Armed Forces & Soc'y* 503, 504 (1995); Morris Janowitz, *On Social Organization and Social Control*, 22627 (James Burk ed., 1991).

40 See, e.g., Theda Skocpol, *Protecting Soldiers and Mothers* (1992); Linda K. Kerber, "'A Constitutional Right to Be Treated Like . . . Ladies": Women, Civic Obligation, and Military Service,' 1 *U. Chicago L. Sch. Roundtable* 95, 98 (1993); Kenneth Karst, "The Pursuit of Manhood and the Desegregation of the Armed Forces," 38 *UCLA L. Rev*. 499, 528 (1991).

41 James Turner Johnson, *Can Modern War Be Just*? 166 (1984).

42 Geoffrey Parker, "Early Modern Europe," in Howard et al., *Laws of War*, at

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never been the only impulse behind traditional atrocity, merely the most readily intelligible and, perhaps, excusable. Military legal codes, as well as their draftsmen and judicial interpreters, must continue to confront the possibilities of both traditional and modern atrocity.

Indeed, either type of atrocity may occur, and it is precisely their simultaneous possibility that makes legal draftsmanship so difficult. The tension in trying to avert both traditional and modern atrocity simultaneously is apparent. Laws that aim to increase tactical effectiveness by encouraging independence and initiative in subordinates can be employed only at the risk that such independence may be turned to atrocious ends. The challenge is to regulate in a way that will elicit and unleash some very explosive violence from soldiers, but only in ways consistent with the organization's lawful purposes.43

It would be wrong, however, to suggest a simple zero-sum relation between law's various objectives here. The two types of soldierly misconduct generally occur in very different situations. Hence, rules directed at one situation are unlikely to undermine those directed at the other. Traditional atrocities take place despite express orders not to commit them or the absence of orders to commit them. They thus bear, by definition, no relation to illegal orders from superiors, or to situations in which such orders must be obeyed or disobeyed. Efforts to avert atrocity by bureaucracy would therefore seem unlikely to affect, or be much affected by, efforts to impede the free-lance variety. But this conclusion confuses the conceptual tidiness of the ideal-types with messy empirical realities.

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40, 41 (contending that this development "noticeably reduced military mistreatment of the civilian population by removing one of its underlying causes"). Regular provision to soldiers of pay, food, and shelter, however, remains problematic in many underdeveloped countries, whose legal draftsmen thus cannot afford the luxury of minimizing the resulting dangers to civilians.

43 This challenge also arises at the point of recruitment, especially for elite cadres. A recent study of Green Berets thus concludes, "Special Operations psychologists admit they are looking for a potentially volatile mix. They want soldiers who will take on dangerous assignments. At the very same time, Special Forces cannot afford individuals who voluntarily engage in risky behaviors. This presents a very fine line, with an incredibly costly margin of error." Anna Simons, *The Company They Keep: Life Inside the U.S. Army Special Forces* 58 (1997).

12
Permutations On Perversity: Atrocity by Connivance and Brutalization

The clarity of the ideal-types sketched in the last chapter is muddied by an important complexity with which the law of military obedience must cope.

This complexity is exemplified by the Argentine dirty war, in which authority for illegal operations was deliberately decentralized with a conscious view toward impeding subsequent legal efforts to ascribe the acts of subordinates to superiors.[1] It is also illustrated by the experience of German draftees on the Eastern Front during World War II. Aberrant acts were not only ordered by superiors as integral to the government's "military objectives." Troops were also given, in compensation, a license to vent their anger and frustration on the enemy's soldiers and civilians."[2]

Atrocity by connivance, the third general category of atrocities, is really a hybrid of the first two. These acts are neither ordered from above, nor undertaken spontaneously from below. Where there are no formal orders, of course, the relevance of the superior orders defense is open to dispute, for the link between the conduct of superiors and

1 Mark Osiel, "The Making of Human Rights Policy in Argentina," 18 *J. Lat. Am. Stud*. 135, 14041. (1986).

2 Omer Bartov, *Hitler's Army* 28 (1991). Allied forces sometimes engaged in similar methods. The Free French enlisted many Moroccan men by offering them a general license to rape and plunder. Michael

Walzer, *Just and Unjust Wars* 20809 (1977). Such methods provided the French with an army when otherwise they would have had none. Again, there is nothing entirely new here. Napoleon and his senior marshalls, for instance, regarded looting by troops as one of the compensations of war, even if legal developments did not yet require such officers to engage in the hermeneutic subtleties of post-Nuremberg atrocities. Gunther Rothenberg, "The Age of Napoleon," in Howard et al., *Laws of War*, at 86, 96.

their subordinates is difficult to establish by way of admissible evidence.3

Atrocity by connivance often occurs by means of what the official Report on the My Lai massacre referred to "a permissive attitude" on the part of commanders "toward the treatment and safeguarding of noncombatants."4 For instance, Vietnamese strikers who accompanied Special Forces units were often allowed "to catch the chickens and pigs that were running loose" during destruction of a village, "since plunder was accepted as part of their payment for fighting."5 C.I.A. advisers to South Vietnamese intelligence sometimes simply "turned their backs," on local military interrogators, leaving the room to avoid activating duties to report incidents of torture to superiors.6

In atrocity by connivance, troops are simply given to understand, through winks and nods of acquiescence, that spontaneously-initiated atrocities will not be penalized. Soldiers understand, As Gen. S.L.A. Marshall puts it, that "when an officer winks at any depredation by his men, it is no different than if he had committed the act."7 Such acts will often implicitly be regarded as a form of payment, where other forms are insufficient, for enduring outrageously brutal conditions and obeying orders requiring soldiers to risk their lives.

The only hard evidence of connivance is often the record of *post facto* efforts by superiors to conceal more direct evidence of events

3 To compromise rules of evidence here, allowing easy inferences about what was "really" being intimated, quickly begins to threaten defendants' rights of due process and not only as these are understood in the U.S. See Andres J. D'Allessio, "La Violación Masiva de los

Derechos Humanos Durante el Gobierno Militar," in *El Legado Autoritario en La Argentina* (Leonardo Senkman and Mario Sznajder eds., 1995), at 97.

4 Joseph Goldstein et al., *The My Lai Massacre and Its Cover-Up* 314 (1976). The prosecution alleged that Captain Ernest Medina, "once learning that he had lost control of his unit . . . declined to regain control for a substantial period of time during which the deaths of unidentified Vietnamese civilians occurred." Col. Kenneth Howard, Charge to the Jury in *U.S. v. Medina*, Sept. 1971, reprinted in Goldstein et al., *Id*., at 46566.

5 Peter G. Bourne, *Men, Stress, and Vietnam* 107 (1970).

6 Mark Moyar, *Phoenix and the Birds of Prey* 99 (1997).

7 Gen. S.L.A. Marshall, *The Officer As Leader* 274 (1966).

from discovery.[8] But connivance can sometimes be proven by indirect or circumstantial means, as when commanders clearly prevent or punish certain kinds of war crimes, but not others. That Gen. William Tecumseh Sherman could effectively prevent virtually rape and murder by his troops, while they inflicted enormous property damage across Georgia, strongly suggests his connivance in their criminality.[9]

Though it is very old, this kind of atrocity has become increasingly prominent in comparison to other types, particularly since the Nuremberg trials. The intended result of such connivance is that the subordinate can claim to have acted pursuant to what he believed to be orders, while the superior can claim never to have issued them. To produce this result, orders must be willfully ambiguous. This is the indispensable *modus operandi* of atrocity by connivance.

But courts have considerable experience coping with verbal ambiguity, particularly with the obstacles it creates in ascribing responsibility to an actor whose speech is designed to conceal his true intentions. The law has always evolved in response to criminal ingenuity.

But so too has criminal ingenuity mutated to evade new legal developments. This is very much the case with atrocity by connivance. Early postwar efforts (beginning at Nuremberg) to punish commanding officers for the conduct of their troops have led to political learning of a perverse sort; that is, a superior's order to commit atrocities can no longer be worded explicitly, but must be veiled in euphemism. This was not always so. As late as 1915, at least, European officers seeking atrocities could explicitly order their troops, "Kill everyone and burn everything."[10]

8 See, e.g., Seymour M. Hersh, *Cover-Up: The Army's Secret Investigation of the Massacre at My Lai 4* 99160 (1972).

9 Mark Grimsley, *The Hard Hand of War: Union Military Policy Toward Southern Civilians, 18611865* 171225 (1995) (describing the carefully circumscribed scope of such seemingly "random" pillaging.). For another instance of such selective attention to certain war crimes, indicating connivance in others, see John Reed, "External Discipline during Counterinsurgency: A Phillipine War Case Study, 1900-1901," 4 *J. of Amer.-East Asian Relations* 29, 3035 (1995).

10 Gustave Le Bon, *The Psychology of the Great War* 386 (1916) (recounting orders of a German officer preceding the sack of Louvain in 1915). Consider also in this connection the order written by United States Army Brig. Gen. Jacob H.

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Significantly, the minutes from an early meeting of the first Argentine junta in 1976 refer to the need to take steps to ensure against the possibility of "an Argentine Nuremberg."[11] As a result, Alfonsín's lawyers, in prosecuting Argentina's military juntas, could not produce any written evidence or oral testimony explicitly authorizing unlawful acts by subordinates.[12] Orders to murder a detainee, for instance, were always couched as orders for a transfer.[13] Similarly, in the Bosnian conflict, Croatian leaders often ordered militiamen "to clean up" their prisoners, with the expectation that such prisoners would be murdered.[14]

To repress anti-apartheid revolt in South Africa, the Cabinet approved plans calling for political enemies to be "'permanently removed from society,' 'neutralized,' and 'eliminated.'"[15]

Scholars often like to explain such euphemisms as an effort to foster moral distancing and psychological desensitizing among those

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Smith to a patrol leader, during the Spanish-American War: "I want no prisoners. I wish you to burn and kill; the more you burn and kill, the better it will please me." Gary D. Solis, *Son Thang* 95 (1997).

11 Luis Moreno Ocampo, "The Nuremberg Parallel in Argentina," 11 *N.Y.L. Sch. J. Int'l & Comp. L.* 357, 357 (1991). The Argentine junta also learned from the embarrassing experience of Chile's criticism by the U.N. Human Rights Commission to avoid at all costs the appointment of a U.N. special reporter. Alison Brysk, *The Politics of Human Rights in Argentina* 46, 5155 (1994). Argentina's military rulers achieved this objective through skillful alliances with their Soviet allies. Iain Guest, *Behind the Disappearances* 68, 11819 (1990).

12 There was testimony that records, including written orders to arrest suspected subversives, were destroyed in October 1983, immediately prior to the transition to constitutional rule. Brysk, *supra* note 11, at 39.

13 Interview with Argentine prosecutors, Buenos Aires (Aug. 1987).

14 Chris Hedges, "Croatian's Confession Describes Torture and Killing on Vast Scale," *N.Y. Times*, Sept. 5, 1997, at A1.

15 Suzanne Daley, "Apartheid Figure Denies His Intent Was Murder," *N.Y. Times*, Oct. 19, 1997, at A4 (quoting testimony of Adriaan Vlok, former Minister of Law and Order, to the Truth and Reconciliation Commission). In Vietnam, more verbally adept officers sometimes employed subtler euphemism. Col. Jack Crouchet, *Vietnam Stories: A Judge's Memoir* 133 (1997) (describing court-martial of an officer who ordered subordinates holding prisoners "to pursue the situation."). A Canadian general in World War II achieved similar results by instructing his subordinates that they "must tell the men that we are not particularly interested in prisoners." Patrick Brode, *Casual Slaughters and Accidental Judgments: Canadian War Crimes Prosecutions*, 1944-1948 223 (1997).

ordered to participate in organizational criminality.[16] But we should not minimize a more obvious and straightforward reason: the legal usefulness to potential defendants of verbal ambiguity in establishing defenses.[17]

In any event, what began as euphemistic dissimulation quickly turned to irony, since junior officers understood perfectly well what their superiors actually intended of them.[18] Junior officers in Argentina thus began to employ the euphemistic terminology as parody, to mock not only the cruel fate of their victims, but also the verbal evasiveness and political caution of their superiors.[19] Later, at their trial, the junta members would indeed disavow responsibility for the crimes of their subordinates.[20] As one young officer later observed, "in the 'War Against Subversion,' we were left in the hands of our own fate, something that frequently obliged us to act outside the law, due to lack of precise orders and the absence of operational control from the generals."[21]

In South Africa, lower echelons of the security forces received similarly vague directives, with the predictable result that their superiors, when later accused of ordering murder and disappearance, would claim, "'with shock and dismay,'" to have been misunderstood.[22]

16 See generally Robert Jay Lifton and Eric Markusen, *The Genocidal Mentality* (1990).

17 A new term has even been recently coined for this phenomenon: the "semantic defense." "Ambiguity's Path to Murder," *The Economist*, Oct. 18, 1997, at 47.

18 Several students of torture and the language of its perpetrators have observed this denotative shift from euphemism to irony. See, e.g.,

Herbert Kelman, "The Social Context of Torture: Policy Process and Authority Structure," in *The Politics of Pain: Torturers and Their Masters* 35 (Roland Crelinsten and Alex Schmid eds., 1993).

19 Interviews with Argentine military officers, Buenos Aires (Aug. 1997).

20 Osiel, *supra* note 1, at 16869.

21 Silvio Waisbord, "Politics and Identity in the Argentine Army," 26 *Latin Am. Res. Rev*. 157, 165 (1991) (quoting an Argentine major).

22 Daley, *supra* note 15, at A4. (quoting Adriaan Vlok, former Minister of Law and Order). Mr. Vlok recently testified to the Truth and Reconciliation Commission that "now, with the benefit of hindsight, we can see that there wasn't enough consideration given about the use of these words. We only now realize with shock and dismay that they gave rise to certain actions;" that is, torture and murder. *Id*.

Response:
Command Responsibility

The incidence of atrocity by connivance suggests that the law, in aiming for a proper measure of formal rationality in military procedure, can no longer assume that it faces a relatively simple trade-off between averting atrocity from above and averting it from below. But atrocity by connivance, like traditional and modern atrocities, immediately calls to mind a particular legal response, a correlative type of norm for structuring military organizations.

This is the rule on command responsibility. According to this doctrine, a superior officer is criminally liable for his subordinates' atrocious acts if he "knew or had reason to know that [they] were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress [these crimes] . . . or to punish those who had committed them."23 The rule thus casts its net very widely, imposing criminal liability for conduct attributable to serious negligence in the supervision of subordinates. Such breadth is necessary to prevent superiors from slipping between the cracks of criminal liability by insulating themselves from detailed knowledge of their subordinates' criminal activities.

But command responsibility poses myriad problemsmoral, conceptual, and practicalthat have not been satisfactorily addressed.24 Not the least of the practical problems is that the very breadth of liability it casts discourages commanders at intermediate levels from initiating prosecution of more subordinate commanders.

23*Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, ¶ 56, Article 7(3), U.N. SCOR, 48th Sess., U.N. Doc.S/25704, Annex (1993). This formulation of the doctrine draws heavily upon that employed by the Nuremberg tribunals. For analysis of the doctrine, see Col. William G. Eckhardt, "Command Criminal Responsibility: A Plea for a Workable Standard," 97 *Mil. L. Rev.* 1 (1982); Maj. William H. Parks, "Command Responsibility for War Crimes," 62 *Mil. L. Rev.* 1 (1973).

24 For analysis of these problems and some suggestions for their solution, see "Command Responsibility for War Crimes," 82 *Yale L. J.* 1274 (1973) (student note). Luban's critique of the willful blindness rule in criminal law directly applies to command responsibility. David Luban, "Contrived Ignorance," *Geo. L. J.* (forthcoming, 1998).

After all, such prosecution "would invite attention to his own behavior regarding the underlying subordinate crimes."[25]

A serious moral problem is that imposing liability for willful blindness illegitimately transforms offenses requiring knowledge, even willfulness, into crimes of simple negligence. Still, some version of command responsibility is probably essential, for it is especially well-suited for dealing with commanders who practice contrived ignorance toward their subordinates' misconduct. The peculiar breadth of liability imposed by this doctrine can only be understood and justified, I would suggest, by the possibility (and considerable historical experience) of atrocity by connivance.

The hope is that threat of serious criminal liability for 'mere' negligence will lead even the most reluctant commander (in order to protect himself) to take all reasonable measures to prevent war crimes by subordinates. Tilting the scales in the prosecution's favor here is defensible to compensate for its difficult evidentiary burden in proving connivance, which involves a form of knowing (not merely reckless) misconduct. The scope of liability is formally overinclusive here, but only in order to make up for severe practical dangers of underinclusiveness. These latter dangers are particularly acute when the law confronts connivance, which frequently characterizes the contribution of commanders to war crimes today.

Atrocity by Brutalization

Another kind of atrocity is caused by the difficult conditions soldiers are sometimes required to withstand. Numerous memoirs attest that ground combat in modern war is inherently brutalizing to

the soldiers compelled to endure it.[26] The human experience of the average infantryman is nasty and brutish. No one has really found a way to make it anything else, notwithstanding periodic fantasies of a technocratic battlefield without soldiers.[27] The problem is that brutalization of soldiers tends to breed brutalization by soldiers.

25 *Yale L. J.*, *Id*. at 1291.

26 See, e.g., Paul Fussell, *Doing Battle* (1996).

27 For a recent specimen, see Col. José Carlos Albano do Amarante, "The Automated Battle: A Feasible Dream?" 74 *Mil. Rev.* 58, 61 (1994) (arguing that in the foreseeable future 'technology could offer robotic "humanoids" to replace

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"One of the particular cruelties of modern warfare," Keegan observes, "is by inducing even in the fit and willing soldier a sense of his own unimportance; it encouraged his treating the lives of disarmed or demoralized opponents as equally unimportant."[28] The soldier's "sense of his own unimportance" inevitably follows from the scale and brutality of the forces that constrain his options (including his freedom to act humanely), and to which his fate is subject.[29]

The problem has proven especially acute when conventional organizational forms are employed to fight a guerrilla army which refuses to confront its adversary in set-piece battles. This was the experience of the U.S. Army in Vietnam. As an historian of that episode observes, "soldiers sufficiently angry and vengeful, who are frustrated in their efforts to retaliate against the enemy itself, sometimes vent their aggressions on whoever is available."[30] He suggests that atrocities such as the My Lai massacre almost inevitably result.[31]

These are relatively generous perspectives, however, on the relation between the brutalization of soldiers and their perpetration of war crimes. A less charitable view would posit that commanders, aware of this relationship, consciously brutalize their troops in the interests of fomenting hostility to be turned against the enemy (since it cannot be turned against the superiors themselves).[32] A psychiatric study of Vietnam veterans concludes that

> the purpose of training is to get the soldier to "pattern himself after his persecutors (his officers)"; if

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infantrymen.'). On the long history of such dangerous fantasies, see generally Manuel De Landa, *War in the Age of Intelligent Machines* 12779 (1991); Chris Cables Gray, *Postmodern War* 43 (1997).

28 John Keegan, *The Face of War* 322 (1976). See also Christopher Browning, *Ordinary Men: Reserve Battlion 101 and the Final Solution in Poland* 161 (1992) ("War, especially race war, leads to brutalization, which leads to atrocity.").

29 Browning, *Id*.

30 Peter Karsten, *Law, Soldiers and Combat* 69 (1978).

31*Id*.

32 Anger can be a potent inhibitor of fear, according to empirical psychological studies. S. J. Rachman, *Fear and Courage*, 2nd. ed., 5657 (1990).

> successful, this will cause the trainee to undergo a "psychological regression during which his character is restructured into a combat personality." Behavior in war is patterned on the drill field. There, the training officer treats the trainee in the same way that he wants the soldier to treat the enemy in battle. To escape the low and painful status of victim and target of aggression, the mantle of the aggressor is assumed with more or less guilt. In so far as this identification with the aggressor is successfully maintained . . . the soldier's activity in war, all the shooting, maiming, and killingis perceived as moral, legitimate, and meaningful.33

Japanese military training in World War II carried this approach to extremes. Officers were explicitly instructed that "enlisted men should hate their officers."34 In the words of one high-ranking official, the thought was that "[the soldiers'] resentment is often converted into fighting strength. The repressed anger of the drill field and camp life explodes in wartime as a blood-thirsty desire to slaughter the enemy."35 The "skillful" commander could "by treating his men with calculated brutality mold them into a fierce fighting unit against the enemy . . . "36 A leading Japanese historian thus concludes,

> The inevitable side effects of training to "breed vicious fighters" was a penchant for brutality against enemy prisoners and civilian noncombatants. Men under constant pressure would explode in irrational,

33 Eric Leed, *No Man's Land* 10506 (1979) (quoting Chaim F. Shatan, M.D., "Through the Membrane of Reality: 'Impacted Grief' and Perceptual Dissonance in Vietnam Combat Veterans," 11 *Psychiatric Opinion* 6, 10 (1974)); see also Gwynne Dyer, *War* 10203 (1985) ("To make soldiers of them, I give them hell from morning to sunset. They begin to curse me, curse the army, curse the state. Then

they begin to cure together, and become a truly cohesive group, a unit, a fighting unit.'" (quoting an Israeli officer)).

34 Saburo Ienaga, *Japan's Last War* 53 (1968); see also Robert B. Edgerton, *Warriors of the Rising Sun* 30814 (1997) (describing Japanese methods to this end).

35 Ienaga, *Id*. at 53.

36*Id*.

> destructive behavior. Individuals whose own dignity and manhood had been so cruelly violated would hardly refrain from doing the same to defenseless persons under their control. After all, they were just applying what they had learned in basic training.37

The Germans developed similar practices, albeit more slowly and less deliberately, based on a similar rationale. Toward the end of World War II, the *Wehrmacht* began to take enormous losses on the Eastern front.38 Cohesion could no longer be maintained by soldiers' loyalty to their primary group; the death toll was too high and replacements too rapid to allow reformation of group solidarities.39 Soldiers could be kept at their stations only by draconian discipline.40 The idea was to ensure that soldiers were too afraid of disobeying their superiors to be afraid of engaging the enemy.41

Overzealous discipline generated enormous resentment among soldiers toward their superiors. But a *modus vivendi* developed. German soldiers "were given an outlet for their accumulated fear and anger . . . As long as they fought well, the soldiers were allowed to 'let off steam by transgressing accepted civilian norms of behavior and by acting illegally even according to the far from normal standards of the front."42

The development of this *modus vivendi* equilibrium resembles, to some extent, what I have called atrocity by connivance. It therefore poses the same question of whether the superior orders defense is applicable. But despite its deliberate ambiguity in the formulation of unlawful orders, atrocity by connivance involves relatively clear communication, once the code words and conventions are deciphered,

37*Id*.

38 Omer Bartov, "The Conduct of War: Soldiers and the Barbarization of Warfare," 64 *J. Mod. Hist.* 32 (1992).

39*Id*.

40 At least 15,000 German soldiers were executed by the Wehrmacht for desertion, panic, or failing to carry out dangerous orders on the battlefield. *Id*.

41 Bartov, *supra* note 2, at 6. This approach to discipline has been adopted even in some initially popular wars (such as the United States Civil War), which relied heavily upon voluntary enlistment. See, e.g., James McPherson, *For Cause and Comrades* 4953 (1997).

42 Bartov, *Id*. at 61.

from superiors to subordinates. The message is that certain kinds of war crimes will be tolerated. Atrocity by brutalization lacks even this measure of clarity. Hence it becomes more difficult, as a legal matter, to ascribe the resulting misconduct by troops to any unlawful exercise of authority by superiors.

After all, the troops cannot be allowed to understand that, in abusing noncombatants and prisoners of war, they are acting consistently with their superiors' intentions. The superiors' brutal methods of operation ensure that they are despised by ordinary soldiers, who do not realize that this loathing is being consciously cultivated. If subordinates knew their superiors' true intentions, they might be less inclined to do their officers' unstated bidding.

Unlike atrocity by connivance, then, the entire process occurs without the knowledge of the subordinates who perpetrate the atrocities. By displacing a hatred of his own superiors, willfully instilled by the superiors' cruel and arbitrary abuses of power, the average soldier becomes violently aggressive toward the enemy and supportive civilians.43

Response:
Civilianize Military Law

The law can best prevent atrocities of this provenance by strengthening the due process protections owed to troops by officers. This has long been a key plank in the platform of those favoring the civilianization of military law.44 The U.C.M.J. now includes, for instance, the criminal offense of "cruelty or maltreatment," prohibiting such treatment of "any person subject to [the defendant's] orders."45

It might first appear that civilianizing criminal law within the military would necessarily reinstate a degree of formality and legalism at odds with the greater efficacy now seen to flow from

43 For a fictional evocation of this process, loosely based on the author's WWII experience, see Norman Mailer, *The Naked and the Dead* 13241 (1948).

44 On this trend, and its vicissitudes in the American context, see, e.g., James B. Jacobs, *Socio-Legal Foundations of Civil-Military Relations* 530 (1986) (parsing several pertinent cases); Eugene R. Fidell, "The Culture of Change in Military Law," 126 *Mil. L. Rev.* 125 (1989); Edward F. Sherman, "The Civilianization of Military Law," 22 *Me. L. Rev.* 3, 3 (1970).

45 U.C.M.J., Sec. 893, Art. 93.

more informal, personalistic, and even inspirational modes of military leadership. But this concern trades upon a false dichotomy. Treating subordinates more like the law treats civilians does not necessarily mean treating them with a cold impersonality. "He who feels the respect which is due to others cannot fail to inspire in them regard for himself, while he who feels, and hence manifests, disrespect toward others, especially his inferiors, cannot fail to inspire hatred against himself."[46] These words are studied by all West Pointers to this day.[47]

One legal rule pertinent here has gone unnoticed. According to the "divestiture" doctrine, an officer's order is completely invalid if, in issuing it, he employs language or engages in conduct so inappropriate as to "abandon" his military office, if only momentarily. The litigated cases generally involve superiors who physically and verbally brutalized a subordinate while ordering him to perform certain (lawful) acts.[48] If the superior's "order" is not an official directive, it may seem to follow that the subordinate who obeys it cannot formally claim to have been following orders. The subordinate should therefore be convicted, regardless of having acted pursuant to his superior's command.

But this misunderstands the legal significance of a superior's directive under most modern military codes. That significance consists not in the fact of having received an order *per se*, but in how the superior's statement (and attendant conduct) contributed to the subordinate's reasonably mistaken *belief* that he was receiving a lawful order. The fact that the superior's brutalization formally divested him of office will often prove irrelevant to whether the

subordinate nevertheless had reason to think the resulting order lawful, though issued in a fit of rage.

The superior will not necessarily escape conviction in cases where he "orders" atrocities while formally divesting himself of

46*Leadership: Quotations From the Military Tradition* 85 (Robert A. Fitton ed., 1990) (quoting Maj. Gen. John Schofield, Address to corps of cadets (Aug. 11, 1879)).

47 Mark S. Martins, personal correspondence with author, March 1997.

48*U.S. v. King*, 29 M.J. 885, 886 (1989); *U.S. v. Collier*, 27 M.J. 806, 809 (1988) (holding that "the superior must affirmatively abandon the office by taking action or using language that is outside the accepted norm . . . such as a challenge to a fight or use of racially sensitive language.") See also Eugene Milhizer, "The Divestiture Defense and U.S. v. Collier," *Army Lawyer* 3 (1990).

office by brutalization. Even though, by abandoning his official position, he never formally issues a "order" (unlawful or otherwise), he nonetheless instigates the subordinate's conduct, and so is liable as an accessory. This line of analysis has not been pursued in any litigated cases, though it is entirely foreseeable.

As to civilianization of military law, in the sense of greater due process protections for soldiers as a check against brutalization, one serious question is whether this may undermine the sense of martial honor, with its special virtues. Certain officers (particularly in the Marines) consider rites of passage, some of them rather brutal, indispensable to acceptance into their fraternity. Whether these rituals bear any rational relation to the physical or even emotional demands of the job, however, is debatable, at best.

In dealing with legal aspects of institutional design, military and international lawyers must thus ask themselves: which perils pose the greatest threat to human rights during military conflicts? How can we draft the law of military obedience to reduce any of these dangers without at once exacerbating the rest? This is a grisly business, but one that military lawyers inevitably face in seeking to strike a prudent balance between opposing dangers, none of which can safely be dismissed as the residue of history. Despite the considerable reflection since 1945 on the nature and sources of war crimes, legal scholarship has had almost nothing to say to these urgent questions of practical military ethics.

This chapter and the preceding have indicated the close relation between each of atrocity's proximate sources and a legal devices suited to addressing it. The implication for legal drafting and institutional design is that, in a given time and place, the kind of

legal norms we should focus on buttressing will depend on the particular direction from which atrocity is most likely to come at us.

13
Why Do Men Fight?

The last two chapters sought to show the close relation between each source of atrocity and the legal device best suited to preventing it. However, any persuasive account of what makes men willing to fight ethically must be compatible with a more general account of what makes them willing to fight at all. There have been major changes in this regard due to changes both in soldiers' social units and in the norms governing their conduct in combat.

For Class Honor

Feudal codes of manly honor, as de Tocqueville observed, "sanctioned violence but invariably reprobated cunning and treachery as contemptible."[1] During the medieval and early modern period, moral restraint in war consisted of chivalric customs shared by knightly classes and their spiritual descendants throughout Europe. The widespread loyalty to chivalric norms was based on common membership in this social estate whose members often intermarried.[2] Chivalric principles were not binding upon all, but were a reflection of social position.

Chivalric restraints on atrocity thus did not extend much beyond the knightly stratum, for "honor is a direct expression of status, a source of solidarity among social equals and a demarcation line against social inferiors."[3] Men in arms thus owed more to those

1 Alexis de Tocqueville, *Democracy in America* 618 (J.P. Mayer ed. and George Lawrence trans., 1969). Treachery entails deceit, such as

abuse of the white flag of surrender to lure enemy soldiers from places of safety. It is barred by Article 23(b) of the 1907 Hague IV Convention.

2 Hans Speier, *Social Order and the Risks of War* 27374 (1952) ("This social homogeneity made for some degree of moral restraint in the conduct of war.").

3 Peter L. Berger et al., *The Homeless Mind: Modernization and Consciousness* 86 (1973); see also Paul Kennedy and George Andreopoulos,

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across the battle lines than to others in whose name they nominally fought. The result, in fact, was that "noncombatants were a good deal more at risk in medieval warfare than soldiers ever were."[4] Atrocities generally occurred when warriors encountered people of social classes to whom chivalric duties did not extend. When a commander wished to order atrocities against those protected by the chivalric code, he could rely upon nonknightly warriors. Hence at Agincourt, Henry V had to employ his two hundred archers, all yeomen, to murder the French knights his forces had captured.[5]

As an ethical ideal, honor was not merely a side-constraint on conduct,[6] limiting what the warrior could do in pursuit of his objectives. It was also an affirmative ideal, defining to some degree those objectives themselves. At a minimum, knights fought in order to fulfill their feudal contract, serving their lords in regional conflicts.[7] But they also fought partly to win glory, which required the display of martial virtue.[8] Heroic virtue had historically been regarded as indispensable, not merely to military triumph (the immediate, instrumental objective) but also, no less important, to the personal glory,[9] even salvation,[10] of its carriers and adherents.

According to medieval theology and canon law, the knight had a duty not to engage in a war, or perform any act therein, which would endanger his soul.[11] Committing an atrocity against a military peer

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"The Laws of War: Some Concluding Reflections," in Michael Howard et al., *The Laws of War* 214 (1994).

4 Maurice Keen, *Nobles, Knights, and Men-At-Arms in the Middle Ages*

220 (1996).

5 Theodor Meron, *Henry's Wars and Shakespeare's Laws* 159 (1993).

6 A side-constraint is a rule that establishes duties which are absolute. When such a rule applies, it overrides all competing considerations. Such a rule is not essential to the basic activities of a social role, but rather imposes a limit on what can be done in the name of any such role

7 On the contractual element within these obligations, see Frederick Russell, *The Just War in the Middle Ages* 14754 (1975).

8 Morris Janowitz, *The Professional Soldier* 216 (1960). This attitude proved so powerful and enduring that, even well into the eighteenth century, European officers often displayed great reluctance to adopt new military technologies that, though more effective than those of adversaries, had the effect of depersonalizing combat, thus reducing the element of personal heroism.

9 Johan Huizinga, *The Waning of the Middle Ages* 7071 (1954).

10 Richard W. Kaeuper, *War, Justice, and Public Order* 187 (1988).

11 Russell, *supra* note 7, at 149, 229.

was thought to have this effect.[12] But it is likely that restraints on atrocity depended less on theological commitments than on a less lofty motive: the desire for honor, in the more modern, pedestrian sense of distinction among peers.[13] Knightly peers valued restraint in combat primarily because it gave public witness to personal traits regarded as constitutive of the knightly self.[14]

It would be "unjust to regard as factitious or superficial the religious elements of chivalry, such as compassion, fidelity, [and] justice," notes Huizinga. "They are essential to it."[15] But the chivalric ethos was essentially one of personal virtues, not of impersonal principles. And martial virtue was understood to encompass not only courage or bravery, but also a measure of graciousness toward other gentlemen of one's station, including those vanquished in battle.[16] The benefits bestowed to other warriors in this fashion were not at all a matter of respecting their human rights, a notion that would have been unintelligible. What men-at-arms recognized in their adversary was not any common humanity, but fellow membership in "the international military brotherhood," a term invoked by officers even today.[17]

12 *Id.*

13 As a distinguished medieval historian observes of this mentality, "a person's honourable qualities must be manifest to all and, if their recognition is endangered, must be asserted and vindicated by agonistic action in public," such as the duel. Johan Huizinga, *Homo Ludens* 94 (1949).

14 *Supra* note 9, at 105 ("If a little clemency was slowly introduced into political and military practice, this was due rather to the sentiment of honour than to convictions based on legal and moral principles. Military duty was conceived in the first place as the honour of a knight.").

15*Id*. at 78.

16 The military stratum of non-western societies has often upheld similar ideals and self-conceptions. In medieval Chinese warfare, for instance, there could "be no talk of victory unless the prince's honour emerges with enhanced splendour from the field of battle. This is not procured by gaining the advantage, still less by using it to the utmost, but by showing moderation. Moderation alone proves the victor's heroic virtue." Huizinga, *Homo Ludens* 97 (1939) (parsing Marcel Granet, *Chinese Civilization* 27273 (1930).

17 Maj. Ralph Peters, "A Revolution in Military Ethics?," 26 *Parameters* 105 (1996). On the origins of these sentiments in medieval contractual bonds between knightly orders, see Keen, *supra* note 4, at 5159 (1996). The roots of restraint in caste convention explain why it comes under greatest pressure, and most easily breaks down, when professional soldiers face other, very different, types of combatants, such as partisans or citizen militias. Military intellectuals

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The resulting restraints on combat appear to have been no less effective on that account.[18] To dishonor oneself by committing atrocity, and so to besmirch one's escutcheon, was to display, in a stratum prizing honor as its cardinal virtue, a vice of corresponding magnitude. Restraints against atrocity thus grew from and rested upon social foundations of a very particular sort, the historical contingency of which is readily apparent.

Still, it partly endures, in more modern form, as the so-called "professional military ethos" that provides a common moral currency among officers of different nation-states. This largely unwritten code resembles, in key respects, that of other professions, whose members likewise share certain self-understandings and resulting restrictions on what they will do, though they work for very different (and sometimes competing) employers.[19]

For God and Country

As these feudal foundations eroded in the early modern era, legal scholars sought to reconstruct them on new footings. The principal achievement of early theorists of natural law was precisely this.[20] Seeking to buttress long-standing traditions perceived as in decline, they inevitably transformed these in the process, grounding

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> are today very much aware of this problem. Ralph Peters, "The New Warrior Class," 24 *Parameters* 16, 16 (Summer 1994) (noting that unlike soldiers, warriors are "erratic primitives of shifting allegiance, habituated to violence, with no stake in civil order," and that they "do not play by our rules, do not respect treaties, and do not obey orders they do not like").

18 This is not to deny that these norms were as much an authorization for certain kinds of violence as a prohibition on others. "The knightly ethos, however much it civilized behaviour in certain categories of life, glorified direct and violent responses to any challenge to honour." Kaeuper, *supra* note 10, at 392; see also *id*. at 7, 188.

19 The way "professionals in organizations" manage competing claims of employer and professional has been well-studied by sociologists. See, e.g., W. Richard Scott, "Professionals in Bureaucracies: Areas of Conflict," and William Kornhauser, "The Interdependence of Professions and Organizations," in *Professionalization* 265, 291 (Howard Vollmer and Donald Mills, eds., 1966).

20 See, e.g., J.B. Scott, *The Catholic Conception of International Law* (1934); James Brown Scott, *The Spanish Origin of International Law* 163242 (1934); Theodor Meron, "Common Rights of Mankind in Gentili, Grotius, and Suárez," 85 *Am. J. Int'l. L*. 110 (1991).

ancient and chivalric restraints on more universal ideas of human nature and morality. Thus, the plausibility of restraint in combat no longer depended upon the persistence of feudalism.21 These natural law ideas in turn became the intellectual foundations for modern international law of armed conflict as we know it.

However, such transformation at the level of high legal culture was effective in influencing conduct only because of considerable continuity at the level of social structure. Restraints against atrocity endured as "the supranational memory of feudal courtesy" through self-perpetuation of the martial stratum.22 Well into the twentieth century, the officer corps of many major European countries continued to be staffed by the scions of earlier generations of officers.23 This source of continuity came to seem highly anachronistic, as its incongruity with meritocratic principles became increasingly transparent.

But despite its vestigial nature, this source of continuity grew even more important, ironically, as the root of moral restraint in war. The rise of the state system in the sixteenth century, and of nationalist enthusiasm in the nineteenth century, greatly weakened even the new foundations of restraint. In defending such restraints, the early modern theorists of international law had made theological arguments about the moral intuitions shared by all created in God's image. In so doing, they presupposed a pan-European unity based upon the moral hegemony of the Roman Church. It followed that where Western forces confronted military antagonists who were not fellow Catholics, such as Muslims in the Levant or Indians in the New World, such

21 The rhetoric of chivalry continues to inform and infuse the

military law of many states. For example, a United States Army publication requires that belligerents "conduct hostilities with regard for the principles of humanity and chivalry." Dept. of the Army, Field Manual 2710, *The Law of Land Warfare* 3 (1956).

22 Alfred Vagts, *A History of Militarism* 113 (1937); see also Keen, *supra* note 4, at 240 ("The ideal of the knight errant began to blend into that of the officer and gentleman; what had been a cavaliers' code developed into the code of an officer class.").

23 Arno Mayer, *The Persistence of The Old Regime* 17677 (1981). On how the aristocratic component of the Prussian officer corps waxed and waned significantly during the 19th century, see Samuel Huntington, *The Soldier and the State* 40 (1957).

theological qualms and corresponding legal restrictions simply did not apply.24

After the Reformation, the unity of Christendom was no more. During the Wars of Religion, religious leaders on all sides even offered soldiers explicit theological justifications for unprecedented levels of atrocity.25 It had become routine to seek to deprive an enemy of supplies by destroying his cities, countryside, crops, and urban crafts on which his armies succored.26 Yet the older rhetoric never completely disappeared: the first Geneva Conventions sprang from discussions overtly invoking the common "responsibilities of Christian gentlemen."

Legal rules originating in feudalism have sometimes been revitalized into effective instruments of modern society.27 But the medieval law of war proved less flexible in this regard than property law. To be sure, underlying principles of chivalry were recast in more universalistic terms by the Catholic natural lawyers. And these principles, in turn, were secularized and thereby preserved by later theorists of international law. In the nineteenth and early twentieth centuries, moreover, these ethical principles were codified into the Hague and Geneva Conventions on the law of warfare.28

But growing imperialist rivalries and crises in the interstate balance of power made short shrift of such commitments. These commitments proved frightfully ineffective in both the First and

24 On the unrestrained military practices of Imperial conquistadors in America, see Harold Selesky, "Colonial America," in Howard et al., *supra* note 3, at 5985; Rolena Adorno, "The Warrior and the Warrior Community: Constructions of the Civil Order in Mexican Conquest

History," 14 *Dispositio* 225 (1989). On similar practices toward Muslims during the Crusades, see Stacey, in Howard et al., *supra* note 3, at 33.

25 Geoffrey Parker, "Dynastic War," in *The Cambridge Illustrated History of Warfare* 146, 151 (Geoffrey Parker, ed., 1995) (observing that during the Thirty Years War, "military chaplains acted almost as political commissars, maintaining ideological fervour and repressing any sense of pity among their troops, [ensuring] that few of the defeated . . . received quarter").

26 Frank Tallett, *War and Society in Early-Modern Europe, 1495-1715*, at 5865 (1992).

27 Karl Renner, *The Institutions of Private Law and Their Social Functions* 10508, 11422 (O. Kahn-Freund ed. and Agnes Schwarzschild trans., 1949) (showing how this happened to the law of real property).

28 On this history, see generally Geoffrey Best, *Humanity in Warfare* 128215 (1980).

Second World Wars as a counter-weight to the fervor engendered by nationalist and racialist ideologies of total war. These ideologies promoted a view of enemy soldiers and their civilian supporters as subhuman entities not fully protected by international treaties.[29] When war was supported by theological authority and understood to pit an entire nation against its opponents, restraints rooted in class honor or religious affinity could have little influence on battlefield behavior.

Moreover, the martial virtues of the officer stratum, with its built-in ethical checks, depended on its continuing aloofness from the passions of mass politics. That aloofness became deeply suspect among a mobilized population, newly taught to view war as a conflict between whole nations, unrestrained by cross-national sympathies of class honor. The resilience of martial virtue as a check against atrocity also depended on the corporate autonomy of the officer stratum from the encroachment of popular dictators who, like Adolph Hitler, saw nothing but anachronistic feudal residues, if not outright treason, in such self-imposed restraints.[30]

Once the officer corps was subordinated to such a totalitarian ruler, its members could be induced to issue illegal orders deploying their entire organizational apparatus, perfected, in part, precisely to prevent atrocity by undisciplined subordinates. Atrocities could no longer be identified as violent acts committed without authorization from superiors, breaching procedures of legal command.

In sum, for much of Western military history, men in arms had been easily able to identify certain acts, known since Roman law as atrocities, as manifestly wrongful, on account of their flagrant inconsistency either with one's professional character as an

honorable officer, with Catholic theology, or with disciplinary rules. This is certainly not to suggest that there was ever a genuine golden age of ethical warfare.[31] To recount the history of modern war as an

29 John Dower, *War Without Mercy* (1986); Michael Howard, "Constraints on Warfare," in Howard et al., *supra* note 3, at 8.

30 Speier, *supra* note 2, at 278 (discussing Hitler's distrust of the Prussian officer corps for these reasons). The military leaders of revolutionary regimes have shared this aversion to aristocratic notions of moral restraint. For discussion of Napoleon's armies in this regard, see Rothenberg, in Howard et al., *supra* note 3, at 86, 88.

31 On the frequency of deviation from these ideals, even at their apogee, see Strickland, *War and Chivalry* 19 (1996) ("Tensions between ideals of conduct

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elementary tale about "the decline and fall of moderation" would greatly oversimplify.[32]

Modern war has witnessed frequent episodes of extraordinary (and little-noted) self-restraint in the face of extensive illegal practices;[33] such situations surely evoked strong impulses toward retaliation in kind. Over the long haul, at least, the particular modes of restraint on atrocity that prevailed at various times tended to co-evolve with its sources. Problems recurrently arose, however, since legal and other normative restraints were constantly lagging behind the advent of new sources of atrocity. By the dawn of the twentieth century these precarious pillars of moral guidance and self-restraint in combat had greatly weakened.[34]

To Prove One's Self: Discipline in a Postmodernist Key

The experience of modern ground combat itself disciplines the soldier in ways that do not rely heavily on strict obedience to superiors' orders. Keegan ably conveys this in terms eerily suggestive of Foucault:

> It is a function of the impersonality of modern war that the soldier is coerced, certainly at times by people he can identify, but more frequently, more continuously and more harshly by *vast, unlocalized forces against which he may rail, but at which he*

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> and actual behaviour in war itself were present *ab initio* in the Anglo-Norman period, if not indeed existing as a universal paradox within the culture of any warrior aristocracy."). The period of greatest compliance with the *jus in bello* came much later, between the

Westphalia treaty of 1648 and the Hague Conferences, on the eve of the First World War. Michael Howard, "*Temperamenta Belli*: Can War be Controlled?" in Jean Bethke Elshtain, ed., *Just War Theory* 27 (1992).

32 The quoted wording is from the subtitle to Michael Glover, *The Velvet Glove: The Decline and Fall of Moderation in War* 14153 (1982).

33 Robert Edgerton, *Warriors of the Rising Sun* 31819 (1997) (noting several incidents of such refusal to retaliate in kind for enemy brutality on and off the battlefield).

34 For an extended account of their demise, see Michael Glover, *The Velvet Glove: The Decline and Fall of Moderation in War* 14153 (1982).

> *cannot strike back* and to which he must ultimately submit: the fire which nails him to the ground or drives him beneath it, the great distance which yawns between him and safety, the progression of a vehicular advance or retreat which carries him with it willy-nilly. *The dynamic of modern battle impels more effectively than any system of discipline* of which Frederick the Great could have dreamt.35

What precisely are these "vast, unlocalized forces" that hold the soldier within their grip so effectively? Would they permit a relaxation of the formal legal mechanisms traditionally thought necessary to keep him from free-lance mayhem? If so, might such additional freedom be employed to encourage evasion of superior orders requiring war crimes? In speaking of "the dynamic of modern battle," Keegan has partly in mind the psychological pressure of the primary group, as described by military sociology. But he also metaphorically alludes to the inertial momentum of diffuse forces that, once set in motion, suck the infantryman into their vortex, and carry him along in their wake.

The surveillance of the soldier's movements by superiors, now provided by command helicopters and sensory tracking,36 is becoming increasingly part of this dynamic. His extreme vulnerability to enemy forces, once isolated from his unit, deters desertion, for enemy forces can more readily find and kill him before he can hope to surprise or surrender to them. Moreover, the soldier's great dependence on his comrades for protective cover, as well as food, drink, and shelter, carry him along almost willy-nilly, without much recourse to formal mechanisms of hierarchical order-giving. This is not to suggest that the state and its legal machinery become irrelevant to combat

35 John Keegan, *The Face of Battle* 324 (1976) (emphasis added). The sort of combat that Keegan describes is, to be sure, really one of the most intense kinds of ground fighting in the two World Wars. Other forms of modern warfare, such as air combat, do not subject soldiers to such diffuse disciplinary pressures, independent of formal command through an organizational hierarchy. Author's correspondence with Eliot A. Cohen.

36 On helicopters as instruments of command surveillance in modern combat, see Martin van Creveld, *Command in War* 255 (1989). The use of helicopters for this purpose was introduced during the Vietnam War. J.D. Coleman, *The Dawn of Helicopter Warfare in Vietnam* (1988).

discipline. But their relevance takes forms other than the threat to punish disobedience to orders.

Any talk of decentralization will quickly lead followers of Foucault to respond that repressive forms of top-down control could be reduced in modern society only because discipline had been internalized in ways that are no less constraining, albeit less conspicuous. The modern citizen is a deeply disciplined creature, one who restrains his own errant impulses in subconscious deference to the more diffuse demands of his new masters. After all, self-discipline is still a form of discipline by which more antinomian and Dionysian impulses are squelched.

Self-disciplined soldiers, the sort that modern training methods seek to produce, are much more disconcerting to the postmodernist left than their lackadaisical forebears, for they comply with orders so readily and naturally that they dispense with much need for close supervisory monitoring.37 Well before Foucault, a British officer could openly acknowledge that the newly self-monitored soldier was, in a sense, less free than his more rigidly governed predecessor: "As long as he went through the motions correctly [his predecessor] could think his own thoughts; his daily round was ruled by military law, but his soul was his own."38

Foucault correctly observes that discipline in a modern army depends far less on the state's formal exercise of sovereign legal authority than on other, more subtle "microphysics of power."39 The constant surveillance of troops, for instance, ensures the virtual elimination of privacy and the deviance that privacy permits. Equally important are the practices designed to inculcate self-discipline in the

37 Les Levidow and Kevin Robins, *Cyborg Worlds: The Military-Information Society* 89, 17071. (1989). *Cf.* Richard Sennett, *Authority* 108 (1980) (characterizing this "work ethic" as the "idea that people want to work hard, no matter how oppressed they are in the process, because the self-discipline gives them a sense of moral worth").

38 John Baynes, *Morale* 186 (1967). See also Norbert Elias, *The Civilizing Process* 153 (Edmund Jepcott trans., (1982) (arguing that since the modern "individual is curbed by self-control," he can enjoy "a relaxation which remains within the framework of a particular civilized standard of behavior, involving a very high degree of automatic constraint . . . "). Foucault's view of self-discipline as necessarily engendering "docility" is deeply at odds with modern military conceptions of the idea.

39 Thomas Dumm, *Michel Foucault and the Politics of Freedom* 104 (1996).

soldier, such as drills, physical training, organized group recreation, mental testing, medical measurement, examination, and classification.40 To the considerable chagrin of postmodernists, "many [young men and women] actively want the discipline and the closely structured environment that the armed forces will provide."41 Witness the burgeoning applications to military schools and academies.42

The extensive disciplinary practices that these institutions employ are but a sample of more pervasive ones that have sprung up since the eighteenth century which, according to postmodernists,43 gave birth to the modern citizen and fashioned his soul by acting upon his body. Such practices rarely rely on penal law. No identifiable class or elite of "oppressors" established them, Foucault observes.44 Their net effect is nonetheless to configure, even constitute on some accounts, the modern self. It was only our acceptance of such new impositions that made it possible for us to exercise ever more extravagant forms of liberal freedom, without pitching our personality, economy, and society into chaos and dissolution.45

Modern disciplinary practices began in the military, but quickly spread outward to prisons, factories, and schools.46 In becoming a

40 Michel Foucault, *Discipline and Punish* 13558, 468 (1977). See also Lt. Col. Kenneth Estes, *The Marine Officer's Guide*, 6th ed., 315 (1996) ("The best discipline is self-discipline. To be really well-disciplined, a unit must be made up of individuals who are self-disciplined.")

41 Gwynne Dyer, *War* 108 (1985).

42 "Citadel Applicants at Five-Year High," *The Herald*, Rock Hill, S.C.,

Sept. 26, 1996, at 8A. Applications from women have risen dramatically, despite the harassment encountered by the first female students. "Citadel Dismisses Cadet for Hazing," *Chi. Trib.*, Mar. 11, 1997, at N8.

43 William G. Staples, *The Culture of Surveillance: Discipline and Social Control in the United States* 30 (1997).

44 Foucault, *supra* note 40, at 8790. For analysis, see J.G. Merquior, *Foucault* 11012 (1985).

45 Dumm, *supra* note 39, at 11618.

46*Id*. at 116; Foucault, *supra* note 40, at 13595 (arguing that modern society has been built on "the military model as a fundamental means of preventing civil disorder. Politics . . . sought to implement the mechanism of the perfect army, of the disciplined mass, of the docile, useful troop." *Id*. at 16869); Daniel Pick, *War Machine* 173 (1995). Weber offered an early statement of this view. Max Weber, "The Meaning of Discipline," in *From Max Weber* 253, 261 (H.H. Gerth and C. Wright Mills eds., 1948) ("The discipline of the army gives birth to all discipline."). Foucault himself went so far as to refer to the "military dream of

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soldier, then, one does not experience so radical an increase in discipline as many would suppose. The diffuse dissemination of modern disciplinary practices, Foucault implies, permitted the maintenance of combat discipline without much need to threaten legal punishment for disobedience to orders. In fact, an army composed of modern subjects could profit handsomely from the "tactical dispersal involved in the creation of the self-contained soldier, possess[ing] . . . the necessary discipline that allowed small groups of men to fight on their own or to coalesce into larger battle groups according to the circumstances."[47] To this extent, military law can relax its grip on the modern soldier, confident that he will not use his new freedom to initiate atrocities, hopeful that he might even use them to subvert unlawful orders.

For Comrades in Arms

In our century, the prevailing answer to "what makes men fight?" is dramatically different from the preceding ones. Any answer to the question of what makes them fight ethically must take this understanding into account. If men once fought for honor and glory, now they fight for the respect of their immediate comrades, and from a sense of intimate, fraternal camaraderie. According to this widely-accepted account, the scope of soldiers' concern does not extend beyond the primary group of fellow soldiers on whose trust and esteem their fates depend. "[Men] will stand and fight for one very simple reason: fear that their peers will hold them contempt. There is no place to hide from such ostracism."[48]

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society." Foucault, *supra* note 40, at 169. As such emulation of

military models proliferated, it eventually became impossible, according to this view, to speak coherently of a possible civilianization of the military. Civilian society itself had been largely militarized.

47 Manuel De Landa, *War in the Age of Intelligent Machines* 72 (1991) (parsing Foucault, *supra* note 40, at 16263). On the inevitability of such dispersal, see Dyer, *supra* note 41, at 142 (noting that "[m]odern ground forces fight in circumstances of extreme dispersion in which it is impossible for the officer to exercise direct supervision and control over his men's actions.")

48 Richard A. Gabriel, "Modernism vs. Pre-Modernism: The Need to Rethink the Basis of Military Organizational Forms," in *Military Ethics and Professionalism* 55, 71 (James Brown and Michael J. Collins eds., 1981); see also Samuel Stouffer et al., *The American Soldier* 13031 (1949) (concluding

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This view initially developed from studies of the battlefield persistence of German draftees during the Second World War.[49] It was discovered that the recruits had little commitment to Nazi ideology or the expansionist objectives of the Third Reich.[50] Their high morale was instead maintained by keeping those from particular villages and towns together in the same units, both in training and in combat.[51] Wounded soldiers, once recovered, could expect to rejoin their old comrades. To escape combat on account of nondisabling wounds, even to linger in an army field hospital rather than returning promptly to battle, was regarded as letting one's comrades down, imposing unfair burdens upon men whose fate had become inextricable from one's own.

By fostering solidarity in this way, courageous acts of self-sacrifice could be elicited from recruits who were initially quite reluctant to serve at all. Powerful instincts of self-preservation could be overcome by strengthening personal loyalties, unrelated to larger national objectives. The defense of immediate comrades restored the possibility of personal heroism, despite the seeming reality of anonymous mass slaughter. Submerging his individual identity into the small group paradoxically allowed the soldier to find a measure of

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that the informal or primary group "set and enforced group standards of behavior, and it supported and sustained the individual in stresses [the soldier] would otherwise not have been able to withstand").

49 Morris Janowitz and Edward Shils, "Cohesion and Disintegration in the German Army in World War II," 12 *Pub. Opinion Q*. 281, *passim* (1948). This study was based on interviews with German prisoners of

war during the last year of the War. On the history of this influential research, sponsored by Office of Strategic Services, see Peter Buck, "Adjusting to Military Life: The Social Sciences Go to War, 1941-1950," in *Military Enterprise and Technological Change* 203 (Merritt Roe Smith, ed., 1985).

50 Janowitz and Shils, *supra* note 49. It is true that junior officers were recruited disproportionately from the Hitler Youth, and that their ideological commitment thus cannot be doubted. Also, the study's sample necessarily examined only soldiers who had been willing to surrender, not those who had been willing to fight to their deaths. It is quite possible, as Eliot A. Cohen puts it, that the "tougher nuts," more deeply dedicated to the cause, simply died first. Correspondence from Eliot A. Cohen.

51 Janowitz and Shils, *supra* note 49. Recent research admittedly casts some doubt on this facet of the Shils/Janowitz study. German cohesion remained quite strong on the entire Eastern Front, even where solid, small groups did not have time to form because of extremely high casualties. Omer Bartov, *Hitler's Army* 3158 (1991).

individual meaning and even fulfillment in an era of industrial killing.[52]

The exercise of such individuality within, and on behalf of, one's platoon displayed an egalitarian dimension, lacking in older, Homeric heroism.[53] This is probably why modern military experience has consistently been found to reduce authoritarian personality inclinations.[54]

These bonds of camaraderie are sometimes described in terms that would warm the hearts of contemporary communitarians if the context were less lethal. One former soldier reflects, for instance, that "this confraternity of danger and exposure is unequaled in forging links among people of unlike desire and temperament."[55] Some soldiers confess to feelings of love and even of immortality, arising from their sense that integral belonging to a group with shared purposes is more meaningful than civilian life, with its frequent

52 The predominant view among liberal intellectuals and humanitarians is more pessimistic, holding that in modern war the infantryman's "bravery . . . involves rather a blind trust in luck than a rational trust in personal fortitude." James A. Farrer, *Military Manners and Customs* 225 (1885).

53 On the elements of individualistic self-display in ancient Greek ideals of heroism, see Hans van Wees, "Heroes, Knights and Nutters: Warrior Mentality in Homer," in *Battle in Antiquity* 1, 1 (Alan B. Lloyd, ed. 1996).

54 See, e.g., Donald T. Campbell and Thelma H. McCormick, "Military Experience and Attitudes Toward Authority," 52 *Am. J. Soc*. 482 (1957); Elizabeth G. French and Raymond R. Ernest, "The Relation Between Authoritarianism and Acceptance of Military Ideology," 24 *J.*

Personality 181, 18191 (1955); Klaus Roghmann and Wolfgang Sodeur, "The Impact of Military Service on Authoritarian Attitudes," 78 *Amer. J. Sociol*. 418 (1972); E. M. Schreiber, "Authoritarian Attitudes in the United States Army," 6 *Armed Forces and Soc'y* 122 (1979). This finding is, of course, deeply contrary to prevailing intellectual prejudices.

55 J. Glenn Gray, *The Warriors* 27 (1959). Gray also refers to other communitarian aspects of the primary group in combat. See *id*. at 4346, 90. Fussell famously argued that the horrors of trench warfare during World War I banished such weepy celebrations of war's ennobling and humanizing aspects from its literary representation, displacing them with irony. Paul Fussell, *The Great War and Modern Memory* 318, 139 (1975). But recent scholarship finds continued belief in the meaningfulness of the fraternity, courage, and self-sacrifice evoked by military service. Jay Winter, *Sites of Memory, Sites of Mourning* (1995); Samuel Hynes, *The Soldier's Tale* 22, 47, 214 (1997); Eric Leed, *No Man's Land* 11 (1979); Rosa Maria Bracco, British Middlebrow Writers and the First World War, 1919-1939 (1989) (unpublished Ph.D. dissertation, Cambridge University).

malaise, indecision, and aimlessness.[56] Camaraderie of this sort establishes an essential core of courage, even in the most reluctant warriors and in the most unpopular wars. The memoirs of Vietnam veterans, often bitter and war hating, nevertheless brim with stories of bravery. But such stories tend to be less about killing the enemy, which often receives little or no positive moral weighting, and more about "the protective actsrecovering one's own wounded, or the dead, or covering a withdrawal."[57]

Whatever the ultimate source of its cohesiveness, the primary group (generally the platoon or squad) was crucial because higher commanders could exert scarcely any control over those in the field once battle had commenced. If soldiers on the battlefield could not coordinate their actions spontaneously, without centralized direction, then the battle would soon be lost. Hence, a central feature of military organization became increasingly clear.

Formal command and official authority had long been considered the *sine qua non* of combat effectiveness, "the glue that holds armies together."[58] But "they began to break down in the very situation for which they were created, combat."[59] As troops approached the front, their immediate commanders generally relied less and less on formal legal authority, and more and more on such personal rapport as they could establish with their men. This required a more informal approach to leadership.[60]

56 This view of the contrast between civilian life in liberal society and military life, particularly that of the combat group, have been a staple theme in English literature. See e.g., Robert Graves, *Good Bye to All That* (1929); T.E. Lawrence, *Letters of T.E. Lawrence* (1939).

57 Hynes, *supra* note 55, at 214.

58 Janowitz, *supra* note 8, at 136.

59*Id*. Janowitz thus found it possible to defend the formally-rational procedures of military bureaucracy not for their operational efficacy, but for their "ritualistic" functions in cementing social unity. He went so far as to describe the still-prevalent preoccupation with hierarchical formality as "fetishistic." See also Baynes, *supra* note 38, at 183 ("Although the antithesis of self-discipline, which I will call imposed discipline, still exists, it is enforced almost entirely for the preservation of good order, and has little influence on a man's courage in battle.").

60 Gray, *supra* note 55, at 13536; Janowitz, *supra* note 8, at xix; Stouffer,*supra* note 48, at 11724. This conclusion is shared by the distinguished British veteran and military historian Sir Michael Howard. Personal communication with Howard, (March 1997). It is still widely resisted by many officers, however.

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Superiors could not assume, as a matter of course, that highly dangerous orders would be obeyed without cavil. Inferiors had to be reasoned with and persuaded concerning the merits of a risky course of action. In fact, they had to be treated as parties in a negotiation.[61] To be an effective negotiator requires interpersonal skills and verbal facility that had not hitherto been highly prized in commanders, many of whom have been famously laconic characters.

The modern view is that strict discipline, rigid hierarchy, and impersonal authority during peacetime are "justified only because of [their] importance during hostilities."[62] According to most who have experienced it, however, modern ground combat more closely resembles indescribable chaos,[63] a situation of in which bureaucratic rigor is unobtainable.[64] A leading military historian describes the result:

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> They may be partially correct, at least insofar as technological innovations, such as the helicopter, now permit greater surveillance and command control than was possible before the 1970s.
>
> 61 That such negotiations indeed occurred, from World War I to Vietnam, has been well-established by military historians and sociologists. On World War I, see, e.g., Leonard V. Smith, *Between Mutiny and Obedience* 1119, 93 (1994). On Vietnam, see Janowitz, *supra* note 8, at xxi.
>
> 62 Janowitz, *supra* note 8, at 39; see also Model Pen. Code § 2.10 cmt. 1 (1985) (quoting *Neu v. McCarthy*, 33 N.E.2d 570, 573 (1941)) ("Even in time of peace obedience is the first duty of the soldier."); Dyer, *supra* note 41, at 136 ("Armies in peacetime look preposterously overorganized, but peace is not their real working environment. . . . All

[such formalities] find their justification by bringing some predictability and order to an essentially chaotic situation.").

63 This is a recurrent theme in most memoirs of infantrymen. See, e.g., Hynes, *supra* note 55, at 2021, 15255; Leed, *supra* note 55, at 104 ("In description after description of the major battles . . . one perception always emerges: Modern battle is the fragmentation of spatial and temporal unities. It is the creation of a system with no center and no periphery in which men, both attackers and defenders, are lost."). See also Roger Beaumont, *War, Chaos and History* 36 (1994) (noting that "a leitmotif of combat-as-chaos runs through military history, theory, and literature."). The key question for military strategists and scholars, however, is "how much the chaos of war is *per se*, or the product of perceptual or mechanistic inadequacies to be overcome." *Id*. at 3.

64 Beaumont, *id*. at 7596; Christopher Bassford, *The Spit-Shine Syndrome* 121 (1988). As Clayton Newell notes, "It is simply unrealistic to expect too much order in an activity where the whole point is for armed opponents to destroy one another." *The Framework of Operational Warfare* 297 (1991).

> In circumstances of extreme personal danger . . . the wishes of the commander, which the individual soldier apprehends only in the most abbreviated sense, "Forward!" or . . . "Fire at will!" . . . will influence his behavior to only a marginal extent; and the commander's win/lose conceptions will have no relevance to his personal predicament. Battle, for the ordinary soldier, is a very small scale situation which will throw up its own leaders and will be fought by its own rules, alas, often by its own ethics.65

If battle is really "an orgy of chaos," as Gen. Patton insists, then why do armies pursue "the folly of schooling to precision and obedience where only fierceness and habituated disorder are useful."66 From all credible accounts, what really happens in most ground combat is that a small number of true fighters lead the way into combat, drawing others in after them, as much to protect these more risk-prone buddies (and permit their recovery, if wounded) as to press the fight.67 Getting one's subordinates to stand, or more precisely, not to disintegrate before the enemy does so, is thus largely a matter of maintaining morale under extremely demoralizing circumstances. This is surely what Keegan means when he writes that "battle, therefore . . . is essentially a moral conflict."68

This recognition must affect our view of military discipline. The importance of having the latest, most sophisticated weaponry, for instance, comes to lie as much in its contribution to morale as in its strictly technical contribution to battlefield superiority against a foe. Tanks, for instance,

65 Keegan, *supra* note 35.

66 General George S. Patton, "Why Men Fight," in 1 *The Patton Papers* (1972), quoted in Peter Tsouras, *Warriors' Words* 44 (1992). By

"habituated disorder," Patton presumably means "habituation to disorder."

67 Rachman, S. J., *Fear and Courage*, 2nd. ed. 299 (1990) (describing the "contagion of courage" in combat); Dandridge Malone, *Small Unit Leadership* 85 (1983) (same). The earliest discussion of this phenomenon is by Gustave Le Bon, *The Psychology of the Great War* 32526 (1916).

68 Keegan, *supra* note 35, at 296.

> should be thought of not so much as weapons but as theatrical devices . . . by the maneuvering of which a general is enabled to manipulate the emotions, so to stimulate the responses of his army that its resistance to movement is overcome, its tendency to self-protection transcended and its normal rhythm of campaigning shattered by the imposition of a higher object than that of holding one's ground . . . 69

Inducing soldiers to comply with dangerous orders, in short, is mostly an emotional game with mirrors, requiring psychological sleight of hand. At the decisive moments, effective leadership consists in persuasively redefining the situation, reconstructing the soldiers' sense of reality, so that what initially seems a foolhardy or even suicidal course of action comes to seem possible, even indispensable.70

To prevent mass desertion and free-lance atrocity, however, modern armies have generally been legally constructed as Weberian bureaucracies, supplemented only at the margins with elite cadres of special forces, organized more informally. This had clear implications for the rules governing obedience to superior orders. Typical in this regard were the 1871 British army regulations. They provided: "Every order given by a superior must be obeyed at once, and without hesitation. Its propriety must not be disputed, or questioned at the moment."71

Weber himself viewed disciplinary rigor as essential to military success throughout virtually all of history, whether "in a slave army of the ancient Orient, on galleys manned by slaves or by prisoners in Antiquity and the Middle Ages."

> In these cases the only effective element is indeed the mechanized

drill and the individual's integration into

69*Id*., at 294.

70 "Though the structure of command, supervision, and punishment for poor performance remains in place, the officer must now rely much more on persuasion and manipulation of his men." Dyer, *supra* note 41, at 142.

71 Quoted in A.R. Skelley, *The Victorian Army at Home: The Recruitment and Terms and Conditions of the British Regular, 1859-1899* 91 (1977).

> an inescapable, inexorable mechanism, which forces the team member to go along . . . This form of compulsory integration remains a strong element of all discipline, especially in a systematically conducted war, and it emerges as an irreducible residue in all situations in which the ethical qualities of duty and conscientiousness have failed.72

Weber's views here largely reflect the dominant thinking of his time and place. A German nationalist, Weber greatly admired the Prussian model of military organization, with all its hierarchical excesses. The roots of that model lay in the parochialism of the German Counter-Enlightenment.73 Yet it came to be widely adopted by armies throughout the world,74 including Argentina.75

There is reason to think that its adoption had less to do with its inherent superiority than with the homogenizing tendencies common within many organizational fields.76 These tendencies often make existing practices immune to competitive cross-testing of available alternatives.77 In fact, early German successes in the Second World

72 Max Weber, "The Meaning of Discipline," in 3 *Economy and Society* (Guenther Roth and Claus Wittich, eds., Fischeff et al. trans., 1978).

73 Azar Gat, *The Origins of Military Thought: From the Enlightenment to Clausewitz* (1991), 17187 (1991); Gerhard Ritter, 1 *The Sword and the Scepter: The Problem of Militarism in Germany* 10911 (1969).

74 See generally David B. Ralston, *Importing the European Army: The Introduction of European Military Techniques and Institutions into the Extra-European World, 1600-1914* (1990). An unfortunate side effect of adopting the Prussian model was also to reinforce the most antidemocratic aspects of military institutions in their relations with their

surrounding society. See, e.g., Luigi Manzetti, *Institutions, Parties, and Coalitions in Argentine Politics* 165 (1993).

75 George P. Atkins and Larry V. Thompson, "German Military Influence in Argentina, 1921-1940," 4 *J. of Lat. Amer. Studies* 257 (1972); Warren Schiff, "The Influence of German Armed Forces and War Industry on Argentina, 1880-1915," 52 *Hisp. Amer. Hist. Rev*. 437 (1972).

76 Paul DiMaggio and Walter Powell, "The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields," 48 *Amer. Soc. Rev*. 147 (1983).

77 Fred Halliday, *Rethinking International Relations* 50 (1994) (noting that "international rivalry . . . acts as a homogenizing force, so that the growth of governmental structures . . . has, over a period of decades, a convergent character.")

War are frequently attributed to reforms that had greatly *de*centralized decision-making.[78]

The Prussian model of inflexible hierarchy, codified by legal-rational norms, only made sense to the extent that there would be no major surprises requiring improvisation by subalterns. Rigid hierarchy was defensible only if by imposing formalized routine superior officers could banish the necessity for practical judgment by men in the field, judgment dependent upon changing factual configurations that are case-specific and almost infinitely unique.

Advances in military technology, moreover, require highly skilled and highly motivated soldiers.[79] Modern guerrilla warfare demands frequent maneuvers behind enemy lines; such operations must be highly decentralized.[80] Both developments enhance the need for local initiative of the sort that only the soldier of high morale, motivated by his primary group and relatively unrestrained by complex rules and bureaucratic procedures, can provide.[81] Among

78 John T. Nelsen II, "*Auftragstaktik*: A Case for Decentralized Combat Leadership," in Lloyd Matthews and Dale Brown, eds., *The Challenge of Military Leadership* 26, 2737 (1989); Paul B. Stares, *Command Performance: The Neglected Dimension of European Security* 6970 (1990) (describing German use of "mission-oriented" tactics, employing brief and simple commands, giving junior commanders "latitude and discretion" on how "to achieve generally stated objectives." This approach "made for greater responsiveness at the tactical level.")

79 George Friedman and Meredith Friedman, *The Future of War* 383, 39293 (1996); Janowitz, *supra* note 8, at 41 ("The infantry squad, the aircrew, or the submarine complement, all have wide latitude in making

decisions requiring energy and initiative. The increased fire power of modern weapons causes the increased dispersion of military forces . . . in order to reduce exposure to danger."). This is not to deny that use of sophisticated weaponry is governed by complex rules of procedure, accompanied by intense training in their application. Further technological innovation, however, can easily be constrained by bureaucratic formalism. Huntington, *supra* note 23, at 75 ("Rigid and inflexible obedience may well stifle new ideas and become slave to an unprogressive routine.").

80 Edward N. Luttwak, 2 *Strategy and History* 170 (1985) ("Maneuver . . . depends much more on intelligence and intellect than attrition warfare . . . "); see also Richard D. Hooker, Jr., "The Mythology Surrounding Maneuver Warfare," 23 *Parameters: U.S. Army War C. Q.* 27, 30, 34, 36 (1993) and Robert R. Leonard, *The Art of Maneuver* (1991).

81 Describing how excessive bureaucratic formalism limited the tactical responsiveness of United States ground forces in Vietnam, Luttwak observes that "no organization so complex on the inside could possibly be responsive to the quite varied and often exotic phenomena on the outside." Luttwak *supra* note 80,

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military managers, the widely accepted answer to why men willingly risk death in combat is the small group theory.82

This compels us to examine the theory's implications for legal restraint of atrocity. One could reasonably infer that if subordinates can be trusted with discretion for tactical judgment in combat, they might also be trusted at such times with greater discretion in moral judgment. Thus, they might be required to disobey unlawful orders of any consequence, not merely the small subset of these that can be characterized as manifestly so on their face.

If combat effectiveness actually turns out to depend much more on the strength of personal ties and informal loyalties than on draconian discipline, then the duty of obedience to virtually all superior orders, the legal corollary of strict bureaucratic hierarchy, might legitimately be qualified to enlarge the scope of subordinates' duty to disobey unlawful ones.

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at 200.

82 Dyer, *supra* note 41, at 106 ("The more sophisticated forms of infantry basic training . . . now place far greater stress on 'small-group dynamics': building the solidarity of the 'primary group' of five to ten men who will be the individual's only source of succor and the only audience of his actions in combat.").

14
Morale and Morality: An Uneasy Relationship

The theory of combat cohesion through primary groups tells us about the sources of military morale. But what is the relation between morale and morality, between fighting effectively and fighting ethically? Many would suppose that there is none. In fact, many would suspect that the sanguinary enthusiasms stirred in the soldier by his primary group almost necessarily work at cross-purposes with any effort to restrain such enthusiasms within strict, moral-legal limits.1

However, the relation between the morale of the informal group and the morality of its members' conduct is more complex, and can often cut both ways. It warrants mention that the issue has not even been addressed by military sociologists. They have focused on how to enlist the passionate loyalties of the primary group in maximizing compliance with *all* superior orders, not just lawful ones.2

1 This view has a long history. Freud, like Gustave Le Bon, argued that membership in the group tends inherently to undermine an individual's capacity for moral reflection and his propensity for moral action. See Sigmund Freud, *Group Psychology and the Analysis of the Ego* 27 (James Strachey ed. and trans., 1959) (1922); see also Irving L. Janis, "Group Identification Under Conditions of External Danger," 36 *Brit. J. Med. Psychol*. 227, 236 (1963) ("The military group . . . provides powerful incentives for releasing forbidden impulses, inducing the soldier to try out formerly inhibited acts which

he originally regarded as morally repugnant."); Gary Solis, *Son Thang* 273 (1997) ("In combat, a group dynamic sometimes overtakes individual judgment and one's normal behavior may become submerged in the behavioral community of the unit, sometimes the lowest common behavioral denominator."). A psychoanalyst finds support for this Freudian account in his study of Nazi S.S. members. Henry V. Dicks, *Licensed Mass Murder* 256 (1972).

2 Jacques van Doorn, *The Soldier and Social Change* 133 (1975) ("Serious and systematic analysis [of war atrocities] from the side of the social sciences is lacking."). The junior Argentine officers who mutinied explicitly invoked the findings of military sociology, on the importance of primary groups and informal loyalties to charismatic leaders, in justifying their resistance to superiors who

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The *Wehrmacht* example of persistence is commonly cited as proving that small group loyalties can induce soldiers to continue obeying orders requiring Herculean exertions in the face of nearly insurmountable obstacles. But there is considerable evidence that such loyalties have also been very effective in animating disobedience to orders, particularly those that are clearly imprudent and sometimes unlawful.

During World War II, for example, numerous Japanese officers and soldiers "refused orders to bayonet prisoners and yet survived the war to talk about it."[3] The July 20, 1944 attempt on Hitler's life similarly involved considerable cooperative effort by a substantial number of German officers who were opposed to the Fuhrer's imprudent and unlawful commands.[4] The more recent resistance of Israeli soldiers to active duty in Lebanon illustrates the social and interactive nature of such conduct. Most of these soldiers were already members of groups opposed to Israeli intervention, such as Peace Now or Yesh Gvul.[5]

Sometimes even the act of a single individual, though initially isolated, would induce like-minded comrades to respond in kind. A former Israeli conscript reports, for instance, that he selectively resisted orders to deport the families of suspected Palestinian militants when there was no reason to suspect family members of terrorism.[6] To his surprise, his commander chose to support his refusal. The commander, who was also a legal adviser to the military governor, even convinced the Defense Minister to defer or cancel certain deportations. The conscript's motives were ethical, but he was also aware that there were doubts about the legality of

such deportations,[7] doubts that the legal adviser could draw upon in persuading military superiors to reconsider.

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allowed prosecution of subordinates for human rights abuse. Pablo Hernandez, *Conversaciones con el Teniente Colonel Aldo Rico* 38 (1989).

3 Robert Edgerton, *Warriors of the Rising Sun* 314 (1997).

4 Peter Hoffmann, *Stauffenberg* 132 (1995).

5 See, e.g., Ruth Linn, *Conscience at War* 89 (1996).

6 Author's interview, Tel Aviv, June 1998.

7 The doubts arose from the prohibition against civilian deportation, codified in the Fourth Geneva Convention. Whether the Convention formally applies to the occupation in question is a widely disputed matter. See generally, Lex Takkenberg, *The Status of Palestinian Refugees in International Law* 205, 216,

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Discussions of civil disobedience, including disobedience to wrongful orders, tend to assume a situation in which an individual of particular scrupulousness is called by conscience to act against the expectations of his fellows. To be sure, the state will seek to isolate its disobedient denizens in just this way. When it succeeds, they are likely to experience the most anguished loneliness. "This is what is most difficult," observed a young French officer jailed for refusing service in Algeria, "being cut off from the fraternity, being locked up in a monologue, being incomprehensible."[8]

But such isolation need not result. Like obedience,[9] disobedience often has a sociological dimension.[10] "Commitments to principles," as Walzer writes, "are usually also commitments to other men, from whom or with whom the principles have been learned and by whom they are enforced."[11]

Consider an example. Small-scale mutinies occurred with some frequency among combat units in French trenches during the First World War. These mutinies arose in response to orders requiring troops to risk near-certain death when, in the soldiers' view, the objective of the assault either had become clearly unobtainable or had lost its strategic value.[12] When officers sought to push soldiers further

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288 (1998).

8 Michael Walzer, *Just and Unjust Wars* 223 (1977) (quoting Jean Le Meur).

9 The extensive literature on the sociology of obedience is summarized in Herbert C. Kelman and V. Lee Hamilton, *Crimes of Obedience:*

Toward a Social Psychology of Authority and Responsibility (1989).

10 Milgram found considerable resistance to a scientific experimenter (who demanded infliction of electrical shock on a mock victim) when a second participant-subject was present and offered resistance. Stanley Milgram, *Obedience to Authority* 118 (1974). On the social bases of military obedience, see Peter S. Bearman, "Desertion as Localism: Army Unit Solidarity and Group Norms in the U.S. Civil War," 70 *Social Forces* 321, 321 (1991) (finding that deserters shared local origins, so that "company solidarity thus bred rather than reduced desertion rates").

11 Michael Walzer, *Obligations* 5 (1970). For example, European "Resistance" movements during World War II were often based in pre-existing attachments to church, party, or locality. See, e.g., Philip Hallie, *Lest Innocent Blood Be Shed* 2526 (1979). For experimental evidence, see generally, William Gamson, et al., *Encounters With Unjust Authority* 1319 (1982).

12 Leonard Smith, *Between Mutiny and Obedience* 17 (1994) ("For soldiers, the issue [was] under what circumstances they considered the . . . offensive violence expected of them relevant to the goal they shared with their commanders . . . ").

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than they were willing to go, the structure of command broke down, and the military organization had to be reconstructed. The restructuring took place through informal negotiation between troops and commanders, rather than through the use of the draconian discipline that military law permitted. Commanders came to acknowledge that their troops were loyal to the shared objective of victory. Hence, disagreements between superiors and subordinates could plausibly be interpreted as concerning only means, and not ends.[13]

The law of military obedience, however, acknowledges no such distinction: either motive for disobedience, rejection of means or ends, is equally unlawful. Yet the social practice that evolved made this distinction crucial to how battlefield commanders responded to disobedience. They appear even to have realized that field troops sometimes had keener awareness concerning whether their obedience to particular orders was likely to spell calamity, not only for themselves, but for the common cause. For example, soldiers realized the danger of following an order requiring them to march head-on into a highly entrenched machine gun nest, without directing heavy artillery toward the emplacement.

Due to strong solidarity among small groups in the field, soldiers determined how they would and would not fight, and hence altered the parameters of command authority.[14] In turn, decisionmaking at the operational level began to be influenced by anticipation of potential resistance from below. After all, "wise leaders know that nothing is so destructive of cooperation as the giving of orders that cannot or will not be obeyed."[15]

This sort of practical judgment by French troops had both a tactical

and an ethical component. The tactical component lies in the

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they shared with their commanders of winning . . . ") Confrontations between troops and superiors arose whenever these two parties reached very different conclusions in this regard. *Id*.

13 That was precisely how the most politically sophisticated commanding officers, particularly Marshal Philippe Pétain, chose to interpret these mutinies. *Id*. at 17677, 21530.

14*Id*., at 17; see also *id*. at 14 ("A gray area existed between command expectations and what soldiers in the trenches determined was possible. Like No-Man's Land itself, that gray area was contested for the duration.").

15 Richard Holmes, *Acts of War* 334 (1985) (quoting George C. Homans).

gauging of costs and benefits associated with the particular military objective. The ethical component resides in the attachment of relative moral weights to various risks and opportunities.16 The soldiers' moral mathematics in this regard relied upon a general standard of reasonableness.

Significantly, their calculations did not only include their immediate self-interest in skirting death. The troops also took into account the more disinterested aim of national success in the larger war effort. Small groups in the field, then, can successfully foster resistance to imprudent combat orders, in ways that display some moral disinterestedness. Good officers remain ever-attentive to this possibility in order to ensure that they give only those orders that will be obeyed.17

In summary, what makes men risk death in combat is not bureaucratic discipline, but small group loyalties. Soldiers can also be most effective by exercising courageous ingenuity under rapidly changing circumstances, within the scope of rules authorizing and orders encouraging this.

Bases of Resistance to Unlawful Orders

These findings compel the following question: if loyalties to his group stimulate the soldier's capacity for deliberation with his fellows, and if such deliberation can often lead to group action at odds with superior orders (judged to be ill-advised), then might not the small group also foster resistance to unlawful orders, manifest and otherwise?

The theory of primary group loyalty is entirely indeterminate here. Of course, a platoon leader who has established a close personal

16 Of course, it remains true that in many combat situations field soldiers will be in no position to assess accurately the strategic significance of most commands from their superiors, and the applicable rules must take this fact into account.

17 An officer describes this process: "The more people you have . . . who would question a wrong decision that you make, the less likely you can get away with a wrong decision. If you know that the way you're going to do something isn't going to cause the men to be solidly behind you, even though you can override them . . . it's going to affect the way you do it." Quoted in Lawrence B. Radine, *The Taming of the Troops* 6869 (1977).

tie with his men can presumably employ his charismatic authority to induce them to disobey superior orders requiring atrocities, just as he induces them to restrain their primordial passions. The best platoon leaders understand their job in just this way. Hence, one writes,

> I had to do more than keep them alive. I had to preserve their dignity. I was making them kill, forcing them to commit the most uncivilized of acts, but at the same time I had to keep them civilized. That was my duty as their leader . . . A leader has to help them understand that there are lines they must not cross. He is their link to normalcy, to order, to humanity . . . A bottle of soda stolen from an old peasant woman leads gradually but directly to the rape of her daughter if the line is not drawn in the beginning.18

If all platoon leaders had this understanding, military rules and regulations would be drafted to give them greater authority than they now enjoy. But a dynamic platoon leader could just as easily employ his personal authority to induce his men to disobey superior orders *not* to commit atrocious acts. When his *de facto* authority is charismatic rather than formal, his men will not ask or care whether their acts are lawful, but whether he will be pleased. When the formal organization is the source of unlawful expectations, as it was in the Third Reich and authoritarian Argentina, then an informal organization that is vibrantly autonomous could play a major role in helping soldiers to resist such expectations.

For example, several German generals effectively resisted Hitler's Barbarossa Decree, which expressly ordered them to disregard the legal protections enjoyed by Russian prisoners of war and Commissar noncombatants under the Geneva Conventions.19 In

this resistance, German officers employed a variety of ingenious stratagems, none of which required expressly challenging the order's legality.[20]

18 See, e.g., see James R. McDonough, *Platoon Leader* 61 (1985).

19 Alfred M. de Zayas, *The Wehrmacht War Crimes Bureau, 1939-1945* 20 (1979).

20 *Id*.

But when the informal organization is itself the source of unlawful expectations, the loyalties it engenders can easily facilitate resistance to orders that are perfectly lawful and, indeed, morally irreproachable.21 This was the case in Argentina during both the dirty war and the democratic transition. Within the death squads, as one of Alfonsín's legal advisers later conceded, "immediate and certain approval from comrades overrode any reason for complying with legal standards or any fear of the consequences of engaging in criminal behavior."22

In short, unlawful conduct, including atrocity, may result from the culture of the primary group,23 and from the more extended ties of camaraderie that assemble these small groups into the larger organization.24 In the Vietnam War, American "soldiers' primary groups probably contributed as much to subverting as to supporting the formal goals of the military organization," writes a leading military sociologist.25

It might first appear that to accept the theory of primary groups is to acknowledge the law's irrelevance. After all, when the culture of the primary group endorses atrocity, even the threat of draconian discipline is likely to fail to prevent it. Moreover, when the primary group repudiates atrocity, the threat of legal discipline is unnecessary.

21 Some analysts characterize this problem in terms of the difference between cohesion and esprit. See, e.g., Anthony Kellett, *Combat Motivation* 4647 (1982). ("Cohesion denotes feelings of belonging and solidarity that occur mostly at the primary group level . . . Esprit denotes feelings of pride, unity of purpose, and adherence to an ideal represented by the unit, and it generally applies to larger units with more formal boundaries . . . ").

22 Jaime Malamud-Goti, "Transitional Governments in the Breach: Why Punish State Criminals?," 12 *Hum. Rts. Q.* 1, 9 (1990).

23 One could thus consider pressure from the primary group as a fifth source of atrocity and add it to my list. But the norms established within primary groups more often serve to restrain atrocities arising both from above and from below.

24 According to one study, this was often the case among American forces in Vietnam. Stephen D. Wesbrook, "The Potential for Military Disintegration," in *Combat Effectiveness: Cohesion, Stress, and the Volunteer Military* 244, 257 (Samuel Sarkesian, ed., 1980).

25 Charles C. Moskos, "The All-Volunteer Force," in *The Political Education of Soldiers* 307, 309 (Morris Janowitz and Stephen Wesbrook, eds., 1983) (summarizing empirical research). The same has even been said, with some truthfulness, of Canadian soldiers during the U.N. peace operation in Somalia. Martin Friedland, *Controlling Misconduct in the Military* 46 (1996) (quoting Lt. Col. Charles Cotton).

Thus, if the internal norms of combat groups have any strength, the prospect of formal punishment for atrocity is likely to be either ineffective or superfluous. In either event, the law is largely irrelevant.

But this conclusion takes primary groups to be the exclusive source of atrocity, when in fact, they constitute only one among several. As emphasized above, atrocity can also result from orders from above, anomic discipline from below, connivance, or brutalization. The law must deal with all of these sources at once. So the central question becomes: given what historical sociology teaches us about the sources both of atrocity and of its restraint, how might military law most effectively prevent such misconduct?

PART III
FREEDOM AND CONSTRAINT IN MILITARY LIFE AND LAW

15
Rules vs. Standards in Military Law

A soldier or airman is not an automaton but a "reasoning agent" who is under a duty to exercise judgment in obeying orders of a superior officer.
U.S. v. Kinder1

It is a mistake to treat soldiers as if they were automatons who make no judgments at all. Instead, we must look closely at the particular features of their situation and try to understand what it might mean, in these circumstances, at this moment, to accept or defy a military command.
Michael Walzer2

At first glance, it might seem that military superiors always have a strong interest in maximizing control over their subordinates' conduct. It may also appear to be in subordinates' self-interest to minimize such control. After all, subordinates are most likely to do the bidding of their superior, for good or ill, when under his thumb, while they enjoy greater liberty to do whatever they please when free of his domination.

But these seeming truisms prove surprisingly inaccurate in many situations. Hegel famously observed that the "slave" cannot give the master what the latter wantsrecognition as a superior beingwithout the master's recognizing the slave's capacity to accord that recognition, thereby acknowledging the slave's humanity.3 Within an army, in similar fashion, a superior needs to

1*U.S. v. Kinder*, 14 C.M.R. 742, 776 (1953).

2 Michael Walzer, *Just and Unjust Wars* 31112 (1977) (emphasis in original).

3 F. Hegel, *The Phenomenology of Mind*, trans. J.B. Baillie 220, 272273 (1931).

give his subordinates enough responsibility credibly to hold them (rather than himself) accountable for certain kinds of failure. But once endowed with this measure of responsibility, they may do with it what they will. Sometimes, at least, they will choose to subvert their master's intention that they commit atrocities and other war crimes.

The incentives created by military law play into this dynamic at key points. As we have seen, efficacy in combat and peace operations often depends on ground-level initiative in creating and capitalizing upon fleeting opportunities. This initiative inherently escapes complete control from above. The successful commander thus decentralizes much tactical decisionmaking to the level of infantry officers in the field.4 He rewards them for independent virtuosity in practical judgment, penalizing both excessive risk-taking and excessive caution. This has the felicitous side-effect of allowing superiors to sound credible in blaming subordinates when things go awry, as they so often do in difficult field operations.

The problem here is that good decentralization, necessary for tactical efficacy, almost inevitably creates a smoke screen behind which bad decentralization, designed to permit war crimes, can take place. When the superior wants his troops to engage in atrocities, he has a strong interest in letting them get or appear to get out of his control, for their conduct can then no longer be easily attributable to him. He can accomplish this in many ways, such as by brutalizing them shortly before contact with the enemy, then letting their hostile emotions carry them away in what will appear to be the heat of combat.

Because perfect monitoring of proactive behavior in the field is

undesirable, holding the commander responsible for the excesses of his subordinates threatens to become impossible under the accepted notions of legal agency. A subordinate who exceeds his superior's

4 U.S. officers are today taught that "ideally, the initial plan for an operation will establish the commander's intent and concept of operations and the responsibilities of subordinate units. It will, however, leave the greatest possible operational and tactical freedom to subordinate leaders. . . . [commanders should also] encourage subordinates to focus their operations on the overall mission, and give them the freedom and responsibility to develop opportunities which the force as a whole can exploit to accomplish the mission more effectively." FM 100-5, *Operations*, Dept. of the Army, Wash., D.C., May 5, 1996, at 21, 15.

seemingly lawful command, i.e., one not obviously atrocious on its face, becomes the perpetrator of the resulting crime. The subalterns thus may be ultimately induced to do the superior's evil bidding, albeit not through any orders legally attributable to him. To hold the superior responsible for the results of a situation over which he had "lost control" (whether due to enemy efforts or simply to deliberate decentralization) verges on strict liability.5 Strict liability is morally indefensible, all agree, for any of the serious offenses with which he could be charged.6

Correspondingly, military subordinates often do not desire maximum autonomy from superiors, first appearances notwithstanding. Junior officers quickly learn that though they may sometimes be rewarded for successful displays of initiative, i.e., those for which superiors will not find a way to claim credit, they will virtually always be punished for failures, i.e., unfavorable developments plausibly ascribed to their arguably sub-optimal actions. Under the decentralized structures now favored by sophisticated managers, junior officers in fact can expect to bear responsibility for many kinds of foul-ups from which a more formal, hierarchical system would excuse them, on grounds of due obedience. This is also true for war crimes.

In short, the self-interest of military subalterns is often better served, all things considered, by a legal structure that lets them escape liability for all serious failures by ascribing virtually all of their acts to their superiors, even if this prevents them from taking full credit for well-deserved successes. Such an incentive system will appeal especially to soldiers viewing combat's free-lance indulgences, such as rape and pillage, as among its principal

compensations. Those engaged in the legal design of armies need to become more sensitive to considerations of this sort, and to the ambiguities in principal-agent relations that give rise to them.

5 Current formulations of the "command responsibility" rule, as in Article 7 of the Charter for the International Criminal Tribunal for the Former Yugoslavia, therefore restrict liability to situations where the commander "failed to take necessary and reasonable measures to prevent" his subordinates' criminal acts.

6 Richard Wasserstrom, "Strict Liability in Criminal Law," *12 Stan. L. Rev*. 731 (1960).

Part II showed how the law's contribution to combat cannot consist in compelling soldiers to obey orders immediately and unreflectively. Law's role is more important in structuring armies so that members at all levels have sufficient authority and inclination to press the fight, as circumstances arise. The best military history and sociology suggests that effectiveness is based not on lockstep uniformity, with large numbers of soldiers marching and firing on command, but on the initiative of a small minority of highly motivated soldiers whose personalistic authority over comrades, combined with greater tolerance for risk, enables them to lead others into danger.

These conclusions have significant implications for the form that legal norms ought to take when seeking to govern military activity and to establish the structure of military organizations. Part III examines these implications.

A captain in Mario Vargas Llosa's first novel ruefully explains to a fellow officer,

> "We all believe in the [military] regulations . . . But you have to know how to interpret them. Above all, we soldiers have to be realists, we have to act according to the situation at hand. You can't make the facts fit the rules, Gamboa. It's the other way around. The rules have to be adapted to the facts." The captain's hands made circles in the air; he clearly felt inspired. "Otherwise, life would be impossible."7

This captain's remarks reflect his rule-skepticism. This is skepticism about the possibility and desirability of guiding social conduct or resolving complex disputes through the straightforward application of preexisting rules. His remarks also highlight the need for what Karl Llewellyn called "situation sense," a fine-grained

sensitivity on the decision-maker's part to the full range of pertinent factual configurations before him.[8] Yet Vargas Llosa's tone here is ironic, for

[7] Mario Vargas Llosa, *The Time of the Hero*, 350 (Lysander Kemp trans., Farrar, Straus and Giroux 1986) (1966).

[8] Karl N. Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed," 3 *Vand. L. Rev*. 395

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the captain clearly wishes to condone some variety of shady conduct, some species of chicanery, that the military regulations prevent. The captain's words thus evoke our skepticism about rule-skepticism.

Even so, this Part will argue that the officer has it basically right, and that the risks of abuse entailed in his desired approach to military law, to which Vargas Llosa's irony alludes, can be kept within tolerable limits. I contend that the legal norms of which military organizations are constituted, especially the norms establishing combat procedures, should rely less on bright-line rules and more on general standards.9

"A paradigmatic rule is 'drive at 55 m.p.h. or under.' A paradigmatic standard is 'drive safely.'"10 To oversimplify a bit, rules are categorical; a rule either applies or does not apply. Where it applies, it seeks to specify precisely what can and cannot be done by those whose conduct it governs. To apply a rule, one need not look directly to the values it is designed to serve. Rules can often be applied in a relatively straightforward way, as by syllogistic subsumption.

In contrast, applying legal standards requires sensitivity to context, in light of the law's underlying purposes. Standards require a greater degree of interpretation, regarding both where they apply and what actions they require or permit when they do apply. Standards generally require balancing the law's underlying purposes in light of the factual nuances of the case at hand.11 In so doing, "standards make

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(1950).

9 This view continues the qualification that formal rules remain essential in failed states, where the fundamental minimum of public order has not been secured and where military personnel suffer low motivation, education, and loyalty to the state.

10 Larry Alexander and Ken Kress, "Against Legal Principles," in *Law and Interpretation* 279, 280 (Andrei Marmor ed., 1995).

11 See, e.g., Frederick Schauer, *Playing by the Rules* 158162, 222228 (1991); Frederick Schauer, "Authority and Indeterminacy," in *Authority Revisited* (NOMOS: XXIX), (J. Roland Pennock and John W. Chapman, eds., 1987); H.L.A. Hart, *The Concept of Law* 12631 (1961); Colin S. Diver, "The Optimal Precision of Administrative Rules," 93 *Yale L.J*. 65 (1983); Isaac Ehrlich and Richard Posner, "An Economic Analysis of Legal Rulemaking," 3 *J. Legal Stud*. 257 (1974); Louis Kaplow, "Rules versus Standards: An Economic Analysis," 42 *Duke L.J*. 557 (1992).

visible and accountable the inevitable weighing process that rules obscure."[12]

Standards themselves vary in the range of considerations that they make legally relevant. Like rules, standards are often exclusionary to some degree, in that they preclude the decision-maker from considering certain factors that she might otherwise be inclined to take into account.[13] So-called multi-factor tests, which now abound in American judge-made law,[14] offer a good example of this middle point between bright-line rules and all-things-considered assessments of reasonableness. These tests specify a limited range of relevant considerations to which the legal actor should attend, without fixing their relative weights *ex ante* or offering a completely open-ended invitation to do whatever seems appropriate under the circumstances.[15]

The best current thinking among JAG officers favors precisely this multi-factor approach to drafting American and multilateral rules of engagement.[16] Standards need not invite the sort of all-things-considered deliberation displayed by Vargas Llosas's officer.

12 Kathleen M. Sullivan, "The Supreme Court, 1991 TermForward: The Justices of Rules and Standards," 106 *Harv. L. Rev*. 22, 67 (1992).

13 Steven J. Burton, *Judging in Good Faith* 3848 (1992); Joseph Raz, *The Morality of Freedom* 3869 (1986).

14 For a recent, and rather elaborate typology of such tests, see Richard Fallon, "The Supreme Court, 1996 TermForward: Implementing the Constitution," 111 *Harv. L. Rev*. 54, 6774 (1997).

15 In military law, the requirement of proportionality in the use of force is best understood as a general standard, to which the following, and

only the following, factors are legally relevant: the military importance of the target or objective, the density of the civilian population in the target area, the likely incidental effects of the attack, including the possible release of hazardous substances, the types of weapon available to attack the target and their accuracy, whether the defenders are deliberately exposing civilians or civilian objects to risk. A.P.V. Rogers, *Law on the Battlefield* 19 (1996); William Fenrick, "Attacking the Enemy Civilian as a Punishable Offense," 7 *Duke J. Comp. & Int'l L.* 539, 565 (1997) (describing how a field commander quickly integrates these factors into his deliberations).

16 Lt. Col. Mark S. Martins, "Rules of Engagement For Land Forces: A Matter of Training, Not Lawyering," 143 *Mil. L. Rev*. 3, 91 (1994) (proposing a structured standard, governing gradual escalation of force, designed to give greater guidance to soldiers "than to those who merely respond, 'it all depends."). To be sure, the movement from rules to standards in other areas of the law has been roundly condemned by several leading thinkers. See, e.g., Antonin Scalia, "The Rule of Law as the Law of Rules," 56 *U. Chi. L. Rev*. 1175 (1989); Friedrich A. Hayek, *Law, Legislation and Liberty*, in 2 *The Mirage of*

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When they do, the danger of arbitrariness greatly increases. This danger largely disappears, however, where a professional community establishes well-understood conventionsoften informalabout the meaning of competent practice. These conventions define the range of acceptable options when facing a given situation and guide the practitioner in deliberating over choosing among them. She can then exercise her judgment in particular cases within the confines of these conventions.

Conversely, we rely on clear rules in situations where such settled conventions do not exist and where the danger of arbitrariness is therefore most severe: where we distrust the decision-maker's wisdom or impartiality and where the array of situations she will face is highly predictable *ex ante*.17

Legal scholarship could perform a considerable public service by mapping out all the areas of military law now generally covered by rules and by standards, then investigating whether the soldierly activities governed in these respective ways actually require the degree of situational discretion (or its absence) that legal theory would lead us to predict. How well, in other words, does the relative reliance of military law on rules and standards in regulating the disparate activities of soldiers actually track the counsel that jurisprudents would offer. And what explains the divergences between legal theory and practice, in this regard?

The more immediate question, however, is whether in regard to illegal orders military law should continue (by the bright-line rule on manifest illegality) to exclude most considerations from the practical deliberation of soldiers, or whether it should instead authorize attention to such considerations even when the illegality

of the superiors' orders is not immediately obvious to all. By encouraging soldiers to attend to these considerations, military law can and should foster more disobedience to unlawful orders.

This can be achieved without significantly increasing the danger of disobedience to lawful orders. Unjustified disobedience would remain subject to severe punishment. The considerable practical

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Social Justice 1117, 12628, 14344 (1976). Such authors argue that standards fail to provide sufficiently clear guidance to those who wish to avoid potential liability.

17 Schauer, *Playing by the Rules*, *supra* note 11, at 152.

difficulties of establishing a defense to disobedience, including the defendant's exposure to cross-examination, ensure that the deterrent effect of criminal sanctions will not be seriously weakened. The two types of error are depicted in Table 15.1

		Soldier	
		Obeys	Disobeys
Order is	Legal	OK	Type 1 Error
	Illegal	Type 2 Error	OK

Table 15.1

The left axis distinguishes legal orders from illegal ones. The top axis distinguishes orders obeyed from those that are disobeyed.

Some will respond that an organization's central purpose should determine which of these two kinds of error should have greater priority for institutional designers.[18] The central purpose of an army is to prevail in armed conflict. The prospect of frequent disobedience to lawful orders surely imperils that objective far more than periodic obedience to unlawful ones. It follows that the legal rules by which armies are constructed should not risk excessive indulgence of the former error in order to minimize the latter.

But this is too crude a mode of analysis, for it seeks to impose zero-sum trade-offs that we do not face. There is nothing in the historical experience examined here suggesting that we could not tinker with the rules in ways that would increase disobedience to

unlawful orders without also significantly increasing disobedience to lawful ones.

Those unpersuaded by this response should focus closely on the fact that the proposed approach does not excuse Type 1 errors, i.e., where the soldier disobeys lawful orders because he thinks they are unlawful. This is true even if the soldier's belief is reasonable. In

18 Thanks to Prof. Abner Green for making this point to me.

other words, no excuse is available,[19] for disobedience to lawful orders. An excuse would exist only for obedience to unlawful orders if such obedience is attributable to a reasonable belief in their lawfulness. This excuse would be available whether or not the orders' unlawfulness was immediately manifest on their face.

In short, legal orders must be obeyed. The soldier is routinely punished when they are not.[20] In principle, illegal orders must not be obeyed.[21] But the law permits some excuses for obeying illegal orders. The question here is the scope of this excuse.

Disobedience of Type 1 was exemplified in *Parker v. Levy*, in which an American physician-draftee refused to train Special Forces airmen during the Vietnam war.[22] Levy defended his disobedience on the grounds that Special Forces units were allegedly engaged in atrocities, so his assistance in their training would make him an accessory to those crimes. As he correctly argued, atrocities are manifestly illegal. Thus, there is no legal excuse for soldiers who obey orders to commit, or to aid and abet the commission of atrocities.

Levy was unable to produce any significant evidence, however, to support his factual claims. The court therefore found that he was mistaken in his understanding of his duties. Even if his error was reasonable, as many would conclude, such disobedience is no less punishable under the suggested approach than under present U.S. law.[23] The reasonable error rule merely enlarges the class of Type 2 errors that are punishable. Under the rule, a soldier should be punished for obeying orders he unreasonably and mistakenly believes are lawful, whether or not these orders obviously involve atrocities.

19 For U.S. law, the proposal requires only clarification, for that of most other states, revision.

20 For U.S. law, see U.C.M.J., Arts. 89 through 92.

21 Unfortunately, as a practical matter, it is likely that most illegal orders will be obeyed, given the overwhelming influence of the military's hierarchical structure, particularly on the lowest echelons. The question is therefore simply which instances of such obedience should be excused. The fact that most unlawful orders will probably be obeyed, particularly in combat, makes it especially important that the law reach the right answer to this question.

22 417 U.S. 733 (1974).

23 The U.S. Uniform Code of Military Justice, for instance, makes it unlawful to violate or refuse to obey a lawful order which the accused had a duty to obey. 10 U.S.C.A. § 892 Art. 92 (1) (1997).

Several Northern European states excuse the soldier who disobeys lawful orders he reasonably believes to be illegal.[24] Levy did not defend himself in this way, to be sure. It is unlikely, moreover, that U.S. military courts would have accepted this interpretation of the reasonable error rule. But that interpretation should not be summarily rejected as preposterous. It would entail a much greater challenge to prevailing notions of due obedience, however, than the view defended here.

This latter approach would not abandon the strict liability now applied to such situations; it would therefore continue to hold the soldier accountable even where his mistaken belief in the order's illegality was entirely reasonable. In short, I favor a middle position between excusing all reasonable errors and excusing none. Current U.S. military law is best understood as already adopting this middle view, at least formally and "on the books."

Legal theorists suggest that standards are preferable to rules when it is desirable to encourage the exercise of practical judgment below the top layers of an organization.[25] Whenever "getting it right" requires considerable sensitivity to facts specific to a given situation, bright-line rules are inferior to more general standards for governing the activity in question.

It is easy to imagine a lawful, authoritative directive that is not yet even a rule, let alone a standard. Imagine, for instance, the Marine sergeant shouting, "Attention!" directly into the ear of a single recruit.

> There is no judgment required on the recruit's part to determine if a specific action fits some general characterization of an action type put forth in a rule . . . He is required to perform an action token and he

does not even have to judge *ex ante* whether it is an adequate instance of its type. For the sergeant is there to supervise its performance and he can be counted on to judge it accordingly . . . Second, the command is highly personal.

24 Denmark, Norway, and Germany, for instance, excuse the soldier's disobedience in such circumstances. On German military law in this regard, see Nico Keijzer, *Military Obedience* 79 (1978).

25 See, e.g., Schauer, "Authority and Indeterminacy," *supra* note 11, at 3135.

> The sergeant shouts in the recruit's ear. There are no other recruits around. The context makes it clear that the command goes from one authority to one and only one subject. There is no room for the recruit to wonder, "Does he mean me?" . . . Third, the time and place at which the order is to be carried out is clearly set out by the sergeant . . . Implicit in the command is, "Here, now!" . . . Fourth, there is no choice or judgment exercised by the recruit as to how he carried out the command.26

Orders of this sort are most common during basic training of recruits, where "every word they hear will carry a tacit insistence that it be executed immediately."27 But orders of this variety become decreasingly frequent as more complicated tasks get assigned to more experienced soldiers.

Moreover, since a spectrum is unidimensional, it is an oversimplification to speak of rules and standards as if they were two points on a spectrum. In fact, the four factors just mentioned suggest a multi-dimensional grid. The sergeant's command can be opened up along all of these dimensions: "from action tokens to types [embodied in rules]; from personal address to general mandate; from time specific to standing order; from action performance to state realization commands." Each of these modifications in the directive "trades on a progressively higher notion of autonomy" in the recipient.28 It follows that the proper way to formulate a given directive depends on how much autonomy is appropriately accorded a given type of subordinate facing a particular kind of situation.

Informed by military sociology, sophisticated military managers increasingly prefer the initiative of the self-starter to the blind

obedience of the automaton.[29] Suspicious of excessive bureaucratic

[26] James W. Child, "Specific Commands, General Rules, and Degrees of Autonomy," 8 *Canadian J. of L. & Jurisprudence* 245, 254 (1995) (emphasis omitted). See also Nicholas Rescher, *The Logic of Commands* 1425 (1966) (offering similar distinctions).

[27] Thomas E. Ricks, *Making the Corps* 27 (1998).

[28] Child, *supra* note 26, at 258.

[29] On recent European developments in this regard, see Michael L. Martin, *Warriors to Managers: The French Military Establishment Since 1945* 217 (1981).

rigidity, they seek to cultivate in professional soldiers the disposition to act in conformity with the spirit of a command, rather than formalistically with its letter.30 A felicitous way to do this is to formulate orders to junior officers (and where possible, to the troops themselves) in terms of mission objectives. Soldiers cannot succumb to excessive reliance on the letter of the law if it is no longer drafted in ways that allow such an escape into formalism. General standards, like reasonableness under the circumstances, all but do away with any notion of law's "letter."

The good faith of an officer's efforts to comply with "mission-type" orders can, indeed, only be properly assessed by reference to general standards of reasonableness.31 After all, a junior officer who receives an order to "take that hill" may fail to do so despite all reasonable efforts on his part to accomplish this objective, even supererogatory heroics. His failure to do so would technically constitute 'disobedience' were the order not interpretedregardless of its facial wordingreally to mean "make all reasonable efforts to take that hill." Hence the deep affinity between the increasing reliance by Western militaries on mission orders and the increasing need, defended here, to evaluate officers' compliance by a reasonableness standard rather than bright-line rules.

Such standards are best calculated to encourage soldiers to exercise practical judgment, in light of the full range of relevant circumstances. Hence rules of engagement now routinely describe certain types of "actions that can be taken at the discretion of a commander under certain specified circumstances *unless* explicitly negated by new orders from higher authorities."32 Bright-line rules

30 'Any military unit that merely fulfills the letter of its orders will

fail even more surely than a company whose unionized employees "work to rule.'" Paul Seabury and Angello Codevilla, *War: Ends and Means* 93 (1989).

31 "Clearly, an order specifying only ends leaves the means up to those commanded. It is expected that they will think about the best and most appropriate way to secure the objective. In such instances, automata would be useless." Richard DeGeorge, "A Code of Ethics for Officers," in *Military Ethics*, Col. Malham Wakin et al., eds., 13, 26 (1987).

32 Scott D. Sagan, "Rules of Engagement," 1 *Security Stud*. 78, 80 (1991). These are called "command by negation" provisions. Most rules of engagement also include what are called "positive commands," i.e., ones that spell out military activities which can be taken by a commander only if expressly authorized by superiors at some later point. *Id*.

only hamper the exercise of such all-things-considered judgment where it is most needed.

Contemporary military managers throughout the world have sought to put onto practice sociological findings about why men fight.33 It might seem oxymoronic to think that law, the quintessential tool of formal bureaucracy, could play any significant role in fomenting the tactical, case-specific improvisation now sought from troops in the field. Military sociologists think that this sort of initiative can come only from the morale that results from face-to-face bonding within the combat group.

But sociologists themselves are quick to observe that the relation between formal organization (the rule book and organizational chart) and informal organization (the primary group and its extensions of camaraderie) can often be more complex.34 The task for institutional design is to structure the formal organization in the manner best calculated to fortify small combat groups and to rally their energies in service of the larger organization.35 To that end, there have proven to be no simple recipes.

Military sociologists, no less than the realists and legalists of the preceding Part, often seriously underestimate the law's ability to foster flexibility through alternative approaches to institutional design. By favoring general standards over bright-line rules, the legal norms establishing a military organization and its internal procedures can promote *phronesis*36 (that is, wise, all-things-considered judgment under rapidly changing circumstances) and discourage rote rule-following.37

33 Gwynne Dyer, *War* 106 (1985).

34 See generally Charles Perrow, *Complex Organizations* 79118 (1986).

35 For examples of cases in which such design has apparently been achieved, see Wm. Darryl Henderson, *Cohesion: The Human Element in Combat* 152 (1985).

36 This is the Greek term for practical judgment. For discussion of Aristotle's view that there are no rules or formal methods for practical deliberation, even if the reasoning employed could be formalized thereafter, see Aristotle, *The Nichomachean Ethics* Book III, 151162 (Martin Ostwald, trans. 1962); John M. Cooper, *Reason and Human Good in Aristotle* 958 (1975).

37 On how law's use of standards fosters deliberation and discourages rote, unreflective rule-following, see Schauer, "Authority and Indeterminacy," *supra* note 11, at 3135; Sullivan, *supra* note 12, at 8689.

After all, in regulating other areas of social life, general standards are consistently favored over precise rules whenever we seek to foster practical deliberation, rather than unthinking obedience, among those facing touch choices. This is especially true when we doubt that we can anticipate most such predicaments, prejudge their precise contours, and draft specific rules to guide people through them wisely.

These doubts about the value of precise rules are particularly acute where, as in many types of combat and peace operations, soldiers must exercise nuanced situational judgment to discern the measure of force "proportionate" for their objectives, i.e., without causing excessive collateral damage. Too many circumstantial factors are pertinent to most such decisions for bright-line rules to offer precise guidance, i.e., without serious dangers of lethal over- and underinclusiveness.

But military lawyers who teach the law of war to American officers report that when experienced officers are presented with a given scenarioin all its factual densitythey reach remarkably similar conclusions about what should be done.38 There exist, in short, settled conventions within the professional community defining the meaning of competent and excellent soldiering over a wide area. This in turn suggests that a multi-factor test, or even general standards of reasonableness, could safely be employed on many issues to provide a meaningful touchstone for evaluating an individual's performance in the field. The law could thus effectively identify and constrain criminally incompetent soldiering without need for recourse to bright-line rules, drafted *ex ante*.

38 Author's interview with Maj. Patrick Reinert, who has taught

Army officers for several years. Aug. 1998.

16
Martial Courage as Moral Judgment

Initiative and imagination are important to effectiveness in combat and peace operations primarily because of how they influence manifestations of courage. Courage, the quintessential martial virtue, is best understood not as a sudden and unthinking outburst of will, but as a form of practical judgment under especially exigent circumstances. A recent study of this virtue concludes that "the most courageous acts are deliberated through a period of . . . reflection and are quiet acts of high principle."[1] This view is shared by military leaders: "courage comes of cool thought and knowledge, never of hot-headedness or lack of knowledge . . . It is serious and purposeful, not rash or adventurous."[2]

To characterize an act as courageous thus requires an inquiry into "how the action was carried out, which entails studying the practical reasoning behind the actionthe way the agent carried out his intentions in the specific circumstances of the action."[3] Courage in battle, then, can never be simply a matter of following orders unreflectively. Instead, it entails a process of interpreting orders wisely, in light of current conditions, which may alter rapidly and radically as a particular confrontation develops.

According to studies of combat pilots, courage does not involve desensitization to fear, i.e., "fearlessness," but rather the self-disciplined control of one's fears, in ways that enhance one's capacity

1 Douglas N. Walton, *Courage: A Philosophical Investigation* 9

(1986). Tocqueville observed this long ago. Alexis de Tocqueville, *Democracy in America* 223 (J.P. Mayer ed. and George Lawrence trans., 1969) ("Even in what is called instinctive courage there is more of calculation than is usually supposed.") For a more traditional view, see Robert Nye, *Masculinity and Male Codes of Honor in Modern France* 228 (1993).

2 General Yigal Allon, *The Making of Israel's Army* 25152 (1960).

3 Walton, *supra* note 1, at 13.

to manage the very dangers that give rise to them.4 This suggests how genuine courage entails the mental element of "resolution," a character trait (according to Aristotle) involving a "mean" between indecision and obstinacy.5

To behave courageously, one must first recognize a situation as one to which a display of courage is fitting and appropriate. Before one can deliberate about what courage requires in such a situation, one must first accurately identify it as one calling for courage at all. A tactical combat predicament in which the odds stand heavily against one's forces, for instance, is often one in which a hasty retreat is clearly warranted. This is a course of action in which courage generally plays little if any role.

Thus, there is a perceptual element in the exercise of courage. Courage resembles the other virtues in this respect.6 "Discerning the morally salient features of a situation is part of expressing virtue and part of the morally appropriate response," writes a philosopher at the Naval Academy. "In this sense, character is expressed in what one *sees* as much as in what one *does* . . . Accordingly, much of the work of virtue will rest in knowing how to construe a case, how to describe and classify what is before one."7

Situational perception of this sort has a physiological foundation, of course. But on this foundation the practitioner must build upover time, through trial and errora "conscientious discernment," one which "will entail adjusting perception to correct for biases and pleasures toward which one naturally tends, but which are likely to distort."8 These include, for the professional soldier, the pleasures and rewards associated with virtuoso displays of courage itself.

In addition to these perceptual and deliberative elements, courage is also widely recognized as a *moral* virtue. Its exercise thus involves not merely judgment *tout court*, but judgment of a

4 S. J. Rachman, *Fear and Courage*, 2nd. ed. 234, 248 (1990).

5 Aristotle, *Nichomachean Ethics* 14243, 150151 (Martin Ostwald, trans. 1959).

6 On the centrality of perceptual discernment to the virtues, see Nancy Sherman, *On the Fabric of Character* (1989) and Martha Nussbaum, *Love's Knowledge* (1990).

7 Sherman, *id*. at 34, 29

8*Id*. at 35.

specifically moral variety. Charles Larmore, parsing Aristotle, suggests why this is so. He defines courage as

> the duty to defend or pursue what is important to us in the face of obstacles that make this difficult or dangerous, although neither futile nor suicidal. But such a general rule cannot tell us by itself whether a particular situation is one that requires us to defend and pursue our commitments, or one whose challenge to our commitments is relatively insignificant. Courage is a duty when the situation itself is important enough to call for it. This too is a clause belonging to the rule defining courage. But it is a clause that can be satisfied only by the exercise of *moral* judgment . . . There are no general rules that will prove very helpful in our need to weigh the importance to us of our commitments against what we perceive the situation to require. Here *moral* judgment must steer us between the twin dangers of timidity and overzealousness, of doing too little to uphold our commitments and of rushing headlong into extravagance . . . The particular task that duties like courage present to *moral* judgment arises from the schematic character of the rules associated with these duties . . . Their schematic character seems to lie rather in their stipulating that the situation must be "significant" or "important" enough and that our action must be a "fitting" way of carrying out our duty.9

Courage thus entails the exercise of practical judgment, and practical judgment involves a specifically moral element. To say that soldiers must exercise judgment, that superior orders and background rules cannot fully guide them in combat, is to say that soldiers must exercise moral judgment. This is to acknowledge that moral considerations are never alien to tactical deliberations of the most seemingly pragmatic, instrumental sort. Requiring soldiers to

consider the morality of superiors' orders is, then, not altogether alien

9 Charles Larmore, *Patterns of Moral Complexity* 67 (1987) (emphasis added). See also Homer, *The Iliad* 2845 (observing that the brave man is one not wholly fearless, but one who "does not fear too much.").

or hostile to the nature of their expertise. It often takes courage to disobey an order, given the threat of a court-martial or more informal sanctions.

But in stressing the importance of practical judgment in the military context, it is best not to put too fine a point on its Aristotelian conception. After all, what we are grappling with here can be very elemental. As even an Oxford philosopher appreciates, military decision making calls primarily "for what is vulgarly called horse sense, or all-round awareness of one's situation, in the most distracting and unnerving of circumstances. Now it is a simple fact of life that some otherwise very ordinary men have a capacity for such decisionmaking in a very high degree . . . "[10] But to acknowledge this 'vulgar' side to practical judgment is not to deny its simultaneously moral component.

The moral element in the closely-related virtue of bravery is even more transparent. Bravery generally involves a measure of altruism, a willingness to subordinate the instinct of self-preservation to the interests of others, in service of a larger cause. But it remains a virtue only when practiced in moderation, the 'mean' that Aristotle saw as central to all moral virtue.[11] In Herman Melville's *Billy Budd*, Captain Vere is praised as a man "intrepid to the verge of temerity, though never injudiciously so."[12] Contemporary military writing similarly stresses that in combat a balance must be struck between control and latitude, safety and audacity. A soldier's decision to engage his enemy, at a particular place, in a given manner, or even at all, depends on his assessment of the relative lethality and vulnerability of their respective forces.

The following example sheds light on how considerations of ethics

and efficacy are inextricably linked in displays of martial courage: A lightly-armed platoon is operating behind enemy lines at dusk on a reconnaissance mission. The sergeant detects movement in the distance, and then identifies a larger group of enemy soldiers eating dinner around a small field stove. Should he initiate an

10 W.B. Gallie, *Philosophers of Peace and War* 111 (1978).

11 Aristotle, *supra* note 5, at 7071; see also Sarah Brodie, *Ethics with Aristotle*, 95103 (1991).

12 Herman Melville, "Billy Budd, Foretopman," in *Six Great Short Modern Novels* 57, 79 (1954).

engagement? Would this be courageous or foolhardy and suicidal? Would he be displaying martial virtue, or the vice of "overzealous extravagance," in Larmore's terms?

The answer depends on a range of situational factors that the sergeant must quickly apprise. Will the advantage of taking the enemy by surprise quickly be outweighed by his greater numbers? Are his own men adequately armed to prevail in such an engagement, given how the enemy appears to be armed? Will any casualties his platoon incurs be acceptable given the much greater damage its members may be able to inflict? How easily will either side be able to call in for reinforcement, on ground or by air? How does his topographical situation help or hinder the prospects of his platoon's prevailing in a firefight? How competent are the enemy soldiers likely to be as fighters, given how their comrades have recently performed in the area?

To answer these questions in seriously mistaken ways, and hence to engage or evade engagement without due basis, is to display poor judgment.[13] In so doing, the sergeant not merely behaves sub-optimally in terms of technical competence, he also commits a moral error of the first order, either by putting his men at undue risk, or by missing a ripe opportunity to advance his country's military aims, consistent with his duty to do so. This connection between ethics and efficacy helps us understand Major Bunting's point that "in battle the boundary between stupidity and immorality is itself most difficult to set."[14]

Notice that, in the above example, the thought processes that determine the sergeant's effectiveness, in strictly pragmatic terms,

involve weighing the appropriateness to the particular situation of his conflicting duties: to press the fight, a duty based in rules of

13 The same is true of decisions to employ force during peace enforcement operations where uncertain indicia of hostile intent may warrant actions in self-defense. Richard J. Grunawalt, "The JCS Standing Rules of Engagement: A Judge Advocate's Primer," 42 *A.F.L. Rev.* 245, 252 (1997) ("To be overly cautious may result in destruction of the unit. Conversely, to be too fast to respond may risk death or injury to persons innocent of hostile intentions. Therefore, the guidance in the Standing Rules of Engagement recognizes that the determination of hostile intent is necessarily a matter of military judgment.").

14 Maj. Josiah Bunting, "The Conscience of a Soldier," 16 *Worldview* 6, 10 (1973).

engagement and other standing orders, and to protect his men from undue risk. What characterizes the sergeant's decision to engage the enemy as courageous, rather than extravagant, or his decision to evade the enemy as prudent, rather than timid, is as much a moral as a tactical matter. The nature of practical judgment makes the two virtually indistinguishable.

Napoleon and Clausewitz believed that effective soldiers display good judgment above all else.[15] Because judgment centrally involves moral discrimination, good soldiering entails the exercise of moral deliberation. This conclusion undercuts the suggestion that the law must treat the effective soldier as a kind of "idiot savant," shrewdly adept and ingeniously perceptive in many respects, while completely ignorant and uneducable in others. In situations like the one described above, it would be professionally irresponsible to make decisions based exclusively on the rules of engagement provided by superiors, regardless of the ultimate result. Such rules could never capture enough of the pertinent facts and their relative weights *ex ante*.

Tactical judgment entails "conceiving in a moment," wrote Frederick the Great, "all the advantages of the terrain and the use that [one] can make of it."[16] As this observation reveals, such judgment has both temporal and spatial dimensions. Clausewitz described the latter as the "sense of locality."[17] More concretely, this means for example, according to Frederick the Great:

> habit teaches you the ground that you can occupy with a certain number of troops . . . Within a single square mile a hundred different orders of battle can be formed. The clever general perceives the advantages of the terrain

15 Napolean sought to contrast judgment with brilliance in this regard. Jay Luvaas, "Napoleon on the Art of Command," in Lloyd Matthews and Dale Brown, eds., *The Challenge of Military Leadership* 20 (1989). Clausewitz insisted that search for the lessons of military history should not "degenerate into a mechanical application of theory . . . A critic should never use the result of theory as laws . . . but onlyas the soldier doesas aids to judgment." Carl von Clausewitz, *On War*, 157158 (trans. Peter Paret and Michael Howard) (1832).

16 Frederick the Great, *Instructions to His Generals*, (1747), as quoted in Peter Tsouras, *Warriors' Words* 111 (1992).

17 Clausewitz, *supra* note 15, at 109. For discussion, see Thomas Killon, "Clausewitz and Military Genius," 75 *Mil. Rev.* 97, 97 (1997).

> instantly; he gains advantage from the slightest hillock, from a tiny marsh; he advances or withdraws a wing to gain superiority; he strengthens either his right or his left, moves ahead or to the rear, profits from the merest bagatelles.18

As this suggests, success or failure in exercising tactical judgment can often depend on the seemingly smallest details, that is, on perceiving these accurately and exploiting such perceptions promptly.19 In peace operations, this can be true at even the lowest levels, where "the activities of relatively small units can have operationaleven strategicimpact," according to current U.S. military thinking.20

The temporal aspect of tactical judgment is no less important than the spatial. It often involves knowing when not to decide, e.g., when to defer a decision that does not yet need to be made. Military law already accommodates this fact, providing that "reasonable delay in complying with an order that states no specific time for compliance" does not constitute disobedience.21 The recipient of a questionable order may therefore often choose to defer its execution, anticipating that the situation it presupposes will soon change in ways that make easier any decision about what to do. It is a virtue of a good soldier, no less than of a good lawyer,22 to know when the decision one faces is readily deferrable (and when it is not). This virtue is often described as patience.

Most theoretical approaches to applied ethics, however, focus on the most difficult "dilemmas," situations where events have played out in such a way as to make this virtue irrelevant. The point is not

18 Frederick the Great, *supra* note 16, at 112. Though he refers to "generals," much the same could be said, *mutatis mutandis*, for

officers of lesser rank.

19 This fact explains the increasing appeal in certain military quarters of so-called "chaos theory," with its emphasis on the cumulative, often decisive effect of the most minute, idiosyncratic features of a situation. Siegfried Grossman and Gottfried Mayer-Kress, "Chaos in the International Arms Race," *Nature* 337:8, 701 (Feb. 23, 1889); Elizabeth Corcoran, "The Edge of Chaos," *Scientific Amer*. 267:4, 17 (Oct. 1992).

20 U.S. Army Field Manuel 100-5, *Operations* 131 (1996).

21 See, e.g., *U.S. v. Dellarosa*, 27 M.J. 860, (1989); David Schleuter, *Military Criminal Justice: Practice and Procedure* 74 (1996).

22 James C. Freund, *Lawyering* 263269 (1982).

that such dilemmas never arise, but simply that professional virtue often consists precisely in knowing when and how they can be headed off, circumnavigated, rather than confronting them directly, with all their dilemmatic force. The element of imagination within practical judgment is particularly salient here, as the actor must be able to conceive alternative "angles" on the problemones in light of which it is no longer zero-sumand to imagine how these might be made more readily available, perhaps at a later time.23

Concretely, the squad leader in the preceding hypothetical might decide that engagement with the enemy should be delayed until reinforcement can be called in, to improve his odds of success in the firefight that will ultimately occur. When decision cannot be delayed in this way, tactical judgment often consists in split-second "judgment calls." An American soldier vividly describes this feature of ground combat experience:

> You couldn't go by the book in Vietnam. Maybe in previous wars you could say, "We hide behind this," or "We move over here . . . " But when you got a good commander, he used his own discretion in certain situations. Lotta times the shit hit the fan so fast, the book didn't help. It was constantly up to you to react in a certain way. If you reacted wrong, you were dead.24

Military thinkers since Napoleon have referred to thisless graphically, but no less metaphoricallyas the *coup d' oeil*. This is the ability to 'size up' a situation very quickly (and to act accordingly).25 It entails "the quick recognition of a truth that the mind would ordinarily miss or would perceive only after long study and reflection."26

Optimal responses to even the most urgent decisions, however,

virtually never rely exclusively on even the most discerning perception of immediate circumstances. After all, the very ability to discern subtly (and appreciate the precise significance of) immediate

23 Max Bazerman, *Judgment in Managerial Decision Making* 109117 (1986).

24 Dandridge Malone, *Small Unit Leadership* 7 (198).

25 Quoted in Tsouras, *supra* note 16, at 110.

26 Clausewitz, *supra* note 15, at 102.

circumstances generally results from prior training and field experience. As a leading JAG puts it, "When the shooting starts, soldiers follow those principles that repetitive or potent experiences have etched in their minds." Hence, "those principles [must] conform to both tactical wisdom and to relevant legal constraints on the use of force."27 Another U.S. major adds,

> There may be no time even to ask this question . . . What kind of person do I want to be, and what would such a person do? . . . The answer will have been determined in advance by the personal traits that the individual has acquired up to the moment of crisis.28

These traits are cultivated today primarily by exercises involving scenarios and simulations of readily foreseeable predicaments. The theoretical foundations for this approach lie, again, in Aristotle. He observed, Nancy Sherman notes, that for "many acts of courage . . . there is no time for deliberative preparation. Instead, the act flows spontaneously from character (and vision)." What is at work here, in short, is not untutored intuition, but professional character, and a highly sophisticated one at that, developed over a long period of time.

The past is important in still other ways. Contemporary computer scenarios are often based not only on hypothetical future events, but on actual historical ones. Military history is viewed as an almost infinite repository of useful knowledge about "what works."29 Virtually the whole of military history, back to the Romans, at least, is viewed as potentially relevant to manyalbeit not allcurrently

> 27 Lt Col. Mark S. Martins, "Rules of Engagement For Land Forces: A Matter of Training, Not Lawyering," 143 *Mil. L. Rev.* 3, 5 (1994).

28 Maj. Reed Bonadonna, "Above and Beyond: Marines and Virtue Ethics," 178 in Military Leadership.

29 In this respect, professional soldiers adopt a conception of history, and the value of knowledge about it, largely abandoned in the West since the 18th century. Reinhart Kosselleck, *Futures Past: On the Semantics of Historical Time* 267288 (1985). Today, in virtually all other fields, familiarity with problems encountered in the distant past and with how they were handled is viewed as almost completely irrelevant to solving present predicaments.

foreseeable situations.30 This affects any full appreciation of tactical judgment. Such judgment must encompasses not merely nuanced perception of immediate circumstances, but also awareness of historical analogies that can properly be brought to bear in interpreting these circumstances. Poor judgment, officers know, can therefore take the form of "wrong lessons being learned and [historical] experiences proving to be irrelevant as false confidence blunted sensitivity to crucial differences" between past and present situations.31

A familiar response to recognizing the centrality of judgment is to dispense with the search for rules altogether, even presumptive rules of thumb. In this spirit, a U.S. Army major recently argued, for instance,

> The art of war has no traffic with rules, for the infinitely varied circumstances and conditions of combat never produce exactly the same situation twice. Mission, terrain, weather, dispositions, armament, morale, supply, and comparative strength are variables whose mutations always combine to form new patterns of physical encounter. Thus, in battle, each situation is unique and must be approached on its own merits.32

This view all but banishes the possibility of accumulated knowledge, even rough, empirical generalizations about what works and does not in warfare. It excludes that possibility even in highly predictable situations, the general features of which can be identified in advance. It resembles certain forms of legal realism and feminist legal thought. All three essentially seek to eliminate the professional's reliance on *ex ante* norms, even on general standards, in favor of an extreme version of Khadi-like, case-by-case particularism. Here, it goes too far.

30 Capt. F. Freeman Marvin, "Using History in Military Decision Making," 68 *Mil. Rev.* 23 (1988).

31 Roger Beaumont, *War, Chaos and History* 86 (1994).

32 Maj. Richard D. Hooker, Jr., "The Mythology Surrounding Maneuver Warfare," 23 *Parameters: U.S. Army War C.Q.* 27, 30 (1993).

Such a stark opposition between strict application of rules and the exercise of situational judgment virtually ensures, as a practical matter, substantial noncompliance with legal norms governing the use of force. It leads officers to view all normative restraints, other than those internal to the calling, as legalistic intermeddling in their legitimate sphere of tactical judgment. It thereby increases the likelihood that legal norms will be ignored whenever they prove inconvenient,33 and that these will be blamed for battlefield failure, even when they played no role in it.34

This is not to deny that rules of engagement can indeed be drafted too restrictively, putting soldiers at unwarranted risk. Recent history offers several, well-documented instances of this problem.35 It is very real, but it has arisen largely from demonstrable defects in draftsmanship by top military commanders and their JAG advisers. These defects in turn have often been quickly cured by revision, in response to complaints by officers in the field. For instance, during the Somali peace enforcement mission, rules of engagement initially called for a three-step graduated escalation of force: from verbal

33 See, e.g., the remarks of Admiral Grant Sharp, in Congressional testimony concerning 1968 North Korean seizure of the U.S.S. *Pueblo*. Hearings Before the Special Subcommittee on the USS Pueblo of the Committee on Armed Services, H.R. 91st Congress, 1st sess., March 17, 1969, p. 795.

34 Vietnam memoirs of American soldiers often blame overly restrictive rules of engagement for U.S. loss of that conflict. See, e.g., Nicholas Warr, *Phase Line Green: Hue 1968* 124 (1997) ("These damnable rules of engagement . . . prevented American fighting men from using the only tactical assets that gave us an advantage during firefights . . . ");

Gary D. Solis, *Son Thang* 97 (1997) (describing combat rules of engagement as "an exercise in politics, micromanagement, and preemptive ass covering, a script for fighting a war without pissing anybody off."); W. Hays Parks, "Rules of Engagement: No More Vietnams," 117 *U.S. Naval Inst. Proc.* 27 (March 1991).

35 During Operation Restore Hope in Somalia, for instance, U.S. rules of engagement prevented American soldiers from using armed force to stop massive looting and theft. F.M. Lorenz, "Law and Anarchy in Somalia," *23 Parameters* 27, 39 (1993-94). After six soldiers were court-martialed for violating these rules, "soldiers . . . perceived that prosecution would follow every decision to fire." Martins, *supra* note 27, at 64; An Army colonel serving there observed, "'soldiers in some cases were reluctant to fire even when fired upon for fear of legal action.'" *Id*. at 66. See also Ruth Linn, *Conscience at War* 115 (1996) (describing this problem during the Palestinian Intifadah). It is noteworthy that in both the Somali and Israeli cases, one of the major reasons that rules of engagement proved impracticable is that the restrictions they imposed on soldiers' use of force came to be widely known by their adversaries.

warning, to pepper spray, to riot stick (first against limbs, not organs). But recurrent attacks on U.N. truck convoys by looters, who were demonstrably undeterred by the mild spray (from which they rapidly recovered), quickly revealed that the order of the last two steps should be reversed.36

The most serious expressions of the problem, then, should not be viewed as inherent in the very idea of using rules to restrain the tactical judgment of soldiers. But it must be said that this is precisely how rules of engagement are often viewed by military officers jealous of professional prerogative.37

They insist that effective soldiering consists of judgment "all the way down." They view law exclusively in terms of bright-line rules, thenunderstandablyproclaim the inadequecy of such rules for many of their tasks. They rail against bureaucracy and defend the indispensibility of its tactical subversion. But their resulting loathing of the law arises from a corrigible mistake about its inevitable rigidity. They become prisoners of their own jurisprudential assumptions.

The better view, defended by the JAG corps' leading thinkers,38 rejects so simple an opposition between untrammeled situational judgment and obedient rule-following. It instead stresses the need for good judgment in the application of legal (and other) norms, particularly rules of engagement.39 This approach introduces two crucial changes in the preceding picture, with a view to attenuating the acknowledged tension between the two desiderata.

36 See generally Lorenz, *supra* note 35.

37 See, e.g., Brad Hayes, *Naval Rules of Engagement: Management*

Tools for Crisis 9 (1989); Maj. W. Hays Parks, "Righting the Rules of Engagement," *U.S. Naval Inst. Proc.* 83, 86 (May 1989); Captain J. Ashley Roach, "Rules of Engagement," 36 *Naval War C. Rev.* 46, 46 (1983).

38 To judge from published materials and the author's conversations with JAG officers, the leading legal thinker at present on such matters within the U.S. armed forces is Lt. Col. Martins. *Supra* note 27.

39 See, e.g., Scott Sagan, "Rules of Engagement," 1 *Security Studies* 78, 88 (1991). Rules of engagement are meant to guide commanders' judgment about the appropriate uses of force, and not to determine precisely when and how to respond to threats. ROE therefore can only encourage certain kinds of responses, but a myriad of other factors can, and often should, influence military commanders' judgments in this area. *Id*.

First, rules restricting the use of deadly force must always be supplemented by explicit authorization of its use wherever reasonably necessary for individual or collective self-defense.[40] Of course, restrictive engagement criteria are deliberately designed to sacrifice some measure of mission effectiveness and safety in order to minimize collateral damage and attendant international opprobrium.[41] But such rules must always authorize soldiers to defend themselves when an immediate threat to their lives is clearly present. Soldiers can be ordered to incur higher risks than international law requires. But they should not be precluded from defending themselves when high risk of imminent death genuinely materializes.

Conversely, soldiers must be trained to exercise restraint in many situations where both international law and national rules of engagement fully authorize the use of deadly force.[42] Such extra-legal restraint is particularly essential where civilians are likely to be harmed,[43] or where escalation of the larger political conflict is likely to ensue from any use of force, however lawful.[44] In peace

40 The current U.S. Standing Rules of Engagement adopt this approach. Chairman of the Joint Chiefs of Staff Instruction, *Standing Rules of Engagement for U.S. Forces*, CJCSI 3121.01, 1-2 and 1-8 of enclosure A (1994); See also U.S. Navy Regulations ¶ 0915 (1973) ("The right to self-defense may arise in order to counter either the use of force or an immediate threat of the use of force.").

41 Casper Weinberger, *Fighting for Peace: Seven Critical Years in the Pentagon* 190, 198 (1990).

42 Such training in restraint can be buttressed, of course, by rules of engagement requiring that a warning shot, or even repeated warning shots, are necessary before firing with intent to harm; they can also

require that several indicia of hostile intent be present rather than merely one. Sagan, *supra* note 39, at 82.

43 As one JAG officer cautions, "It is easy to provide a legal opinion that women and children willingly participating in hostilities are not protected, but this does not eliminate the natural reluctance of troops to fire on women and children, nor does it prevent the events from inflaming local public opinion and becoming the subject of international media attention. Dealing with this problem will require the utmost in training, skill and measured judgment at every level. Lorenz, *supra* note 35, at 39. But cf. Martin N. Stanton, "What Price Sticky Foam?," 26 *Parameters* 63, 65 (1996) ("Many of our potential opponents understand only too well our squeamishness about injuring women and children . . . and they will capitalize on this. Factions in Somalia used large groups of their women and children (active rioters all) to screen the movements of their gunmen and grenade throwers with their bodies.").

44 Parks, *supra* note 37, at 88, (describing incidents in which U.S. aircraft,

(footnote continued on next page)

enforcement operations in particular, over-reaction (as opposed to under-reaction) by U.N. forces will often pose more severe political costs, endangering the entire mission. Field officers must be taught to exercise their judgment and interpret rules of engagement accordingly, despite the added risks of harm this will sometimes impose on them.

The upshot of these departures from the first view is that soldiers should come to understand that their cultivated judgment must often compensate for inevitable defects of over- and underinclusiveness in rules of engagement without altogether displacing them. Judgment is thus recognized and honored as an essential supplement to norm-obedience.45 The tension between the two becomes much more manageable once training methods are modified to acknowledge (and capitalize upon) the centrality of both to the self-understanding of professional soldiers.

JAG officers advocating this latter view have significantly reshaped American officer training in recent years. The prior focus on mastery of abstract rules,46 such as those of the Geneva and Hague Conventions, has been largely abandoned. Training programs now employ case studies immersing soldiers in realistic scenarios designed to cultivate practical judgment in the field, particularly in morally "hard cases."47 Military training, like other social practices,

(footnote continued from previous page)

> legally authorized to use deadly force against Libyan jet fighters, "prudently held their fire" in order to avoid escalation of an international political conflict.).

45 Situations where soldiers exercise suboptimal judgment often do not rise to the level of criminality, so nonpenal sanctions will generally be more appropriate. This is one implication of Martin's case for a "nonlegislative" approach to compliance with rules of engagement. Martins, *supra* note 27. In this respect, the law governing soldiers should be modeled more closely on the law regulating other professionals, which gives them considerable latitude from liability wherever "judgment calls" are considered necessary.

46 W. Hays Parks, "Crimes in Hostilities," 60 *Marine Corps Gazette* 16, 22 (1976) (describing in these terms the law of war training U.S. officers received a generation ago).

47 Martins, *supra* note 27, at 3. This point is also stressed by Richard J. Grunawalt, Professor of International Law at the U.S. Naval War College, who helped draft the current U.S. Standing Rules of Engagement and who trains U.S. military personnel throughout the world in their implementation. Richard J. Grunawalt, Lecture at University of Virginia (June 14, 1996). Until after the Vietnam War, training of soldiers by JAG officers "was generally abstract and theoretical." Guenter Lewy, *America in Vietnam* 367 (1978). For examples of current training exercises, see Center for Army Lessons Learned, *Peace*

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increasingly takes place in the shadow of the law.[48] This is an enormously salubrious development, about which civilians, including civilian attorneys, know very little.

American military aid to other countries is also beginning to include training in the exercise of legal judgment. For example, since 1992, the U.S. Southern Command, aided by the Inter-American Institute of Human Rights, has trained thousands of Latin American military and police officials in international human rights norms, including those of the Geneva Conventions. This training "involves role-playing and simulation exercises where the military participants are asked to apply general human rights rules in specific and often tense combat scenarios."[49]

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Operations Training Vignettes, with Possible Solutions, No. 95-2 (March 1995), Dept. of the Army; Maj. Michael Robel, "Simulating OOTW [Operations Other Than War]," 75 *Mil. Rev*. 53 (1995); Cap. George Stone III, "Military Simulations for Noncombat Operations," 69 *Mil. Rev*. 52 (1989).

48 On how law indirectly influences, in this way, the relations between people who never go to court (but anticipate the possibility), see Lewis Kornhauser and Robert Mnookin, "Bargaining in the Shadow of the Law: the Case of Divorce," 88 *Yale L.J*. 950 (1979).

49 Kathryn Sikkink, "The Influence of International Human Rights Law on Human Rights Practices in Latin America," manuscript at 10 (Sept. 1, 1996) (paper presented at the American Political Science Association Conference). See also Instituto Interamericano de Derechos Humanos, *Programa Fuerzas de Seguridad, Derechos Humanos, y Democracia* (1995).

17
Promoting Practical Judgment

As legal norms governing subordinates, standards work better than rules at achieving decentralization. Decentralization is increasingly recognized as desirable within military organizations because it contributes to effective fulfillment of lawful orders that require ground-level improvisation. Such decentralization, and relying on standards helpful in effecting it, can also be very helpful in discouraging fulfillment of unlawful orders. If decentralization fosters the independent judgment necessary for effective obedience, then once brought into being, it is available to foster disobedience when the law requires.

Military law already displays no scarcity of general standards. Surrender to the enemy, for instance, is legally permissible when soldiers "no longer have the resources to resist."[1] As late as the end of World War II, official American naval publications openly asserted that customs and tradition were as fully legal and binding on all soldiers as written provisions.[2] Such facts come as a surprise to laymen, since we tend to associate strict hierarchy and formal styles of interpersonal relations in an organization with bright-line rules.

Even in the United States, with its strong constitutional due process doctrine, a professional soldier can suffer severe punishment both for any "conduct unbecoming an officer,"[3] and for conduct prejudicial to "good order and discipline."[4] The Supreme Court has

1 Dept. of Defense, *Code of the U.S. Fighting Force*, "Code of

Conduct," sec. 2 (1988). For discussion, see James H. Toner, *The American Military Ethic* 246 (1992) (observing that this legal standard "is and must be vague at best.")

2 James E. Valle, *Rocks and Shoals* 50 (1980).

3 U.S. Code of Mil. Just. 10 U.S.C. § 933, Art. 133 (1994). See also Art. 88, "Contempt toward officials," and Art. 89, "Disrespect toward superior commissioned officer."

4*Id*., Art. 134. To be sure, the Executive Order/Manual for Courts Martial now also lists several specific examples of such conduct, and this listing is

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upheld the military's use of general standards against "void for vagueness" constitutional challenges.5 The Court held the customs and conventions of military life give the offenses sufficient clarity such that an officer has fair notice when contemplating conduct that will breach them.

Civil libertarians predictably decry this conclusion.6 It is entirely congruent, however, with much in current communitarian thought which embraces social practices, including those distinctive to particular professions, as indispensable to social and moral order.7 Practices of this sort are prized for the ways in which they bind members to communities whose shared understandings, though largely unarticulated, define the meaning of excellence and virtuous performance within them.8 Legal concepts like "conduct unbecoming an officer," understood as acts "dishonoring [one's] . . . character as a gentleman, "9 may be all that we have left of "the memory of feudal courtesy" for the purposes of self-regulation of professional soldiers.10

But using such concepts is no longer so easy where the profession lacks the social homogeneity of a traditional martial stratum. Its members then would not have the dense web of connecting conventions enabling them to respond immediately in unison to superior orders calling for particular acts, with cries of "No.

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> treated as if it were intended to be exclusive. This degree of specificity, however, is relatively recent and clearly a response to the socioeconomic democratization of officer recruitment during this century.). For history of these provisions, see Cap. James Hagan, "The General Article: Elemental Confusion," 10 *Mil. Rev*. 63 (1960)

and Com. D. B. Nichols, "The Devil's Article," 22 *Mil. Law Rev*. 111 (1963).

5*Parker v. Levy*, 417 U.S. 733, 737 (1974).

6 For such arguments, see *id*. at 744 (Stewart, J. dissenting).

7 See, e.g., Alasdair MacIntyre, *After Virtue* 169210 (1981). For an incisive critique of this aspect of communitarianism, see Stephen Turner, *The Social Theory of Practices* (1994).

8 See, e.g., MacIntyre, *supra* note 7, at 169210.

9 Richard Dahl and John Whelan, *The Military Law Dictionary* 43 (1960). Recent codifications, such as the Model Rules of Professional Conduct, have abandoned this norm because the social composition of the bar has become too diverse for it to possess any determinate, shared meaning among most members. Geoffrey C. Hazard, Jr., "The Future of Legal Ethics," 100 *Yale L.J*. 1239, 124851 (1991).

10 Alfred Vagts, *A History of Militarism* 113 (1937).

That's unchivalrous!" Without bright-line rules, there is serious danger of wildly disparate judgments on whether particular instances of soldierly conduct should count as cowardly or "unbecoming." These standards resemble the prohibition in legal ethics of conduct creating "an appearance of impropriety,"[11] in that their facial vagueness is overcome by the tacit conventions and normative understandings that most competent members share.

A related problem is that the life cycle of a modern weapons system is often very short; it can become obsolete in several years, often without ever being employed in actual combat. There is simply not enough time for any settled customs to congeal around its use, conventions that would help soldiers know which uses were and were not generally considered acceptable.[12]

This lack of shared moral sensibility among professional soldiers inevitably leads some conscientious commanders to favor greater specificity in the draftsmanship of rules and particular commands. Such officers believe that specificity, through bright-line rules, remains the only means of ensuring that certain acts can be readily identifiable by most soldiers, even in the pitch of the battle, as clearly impermissible.[13]

Rules of engagement offer a helpful means toward this end. They seek to solidify the general injunctions of international law and national military codes into more particular guidelines on the use of force in light of the particular terrain, enemy capabilities, and other context-specific features of a given conflict.[14] But the preceding analysis suggests that resorting simply to bright-line rules risks sacrificing the purposive initiative so essential to success in the field, particularly in politically sensitive peace operations.[15]

11 Model Code of Professional Responsibility DR 9-101 (1997).

12 On this problem, see Philip Meilinger, "Winged Defense: Airwar, The Law, and Morality," *20 Armed Forces & Soc'y* 103, 104 (1993).

13 U.S. military law has long been more precise in this regard than that of most states. Dept. of the Army, Field Manual 27-10, *The Law of Land Warfare* ¶ 502, 504 (1956). (listing particular acts that are forbidden under all circumstances). Canada's military code is also relatively specific in this regard, offeringas an example of a manifestly illegal orderone requiring the recipient to shoot a fellow soldier "for only having used disrespectful words or . . . to shoot an unarmed child." Martin Friedland, *Controlling Misconduct in the Military* 19 (1997).

14 Dept. of the Army, *Operational Law Handbook*, JA 422, 8-1 to 8-3 (1996).

15 Defense Secretary William Cohen observed in this regard, "a zero-defect

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On the other hand, in some aspects of peace operations bright-line rules are essential, particularly to "avoid inadvertently slipping from one type of . . . operation"i.e., simple peacekeeping"to another"i.e., more conflictive peace enforcement"without the requisite political and force compositions."[16] At the tactical level, at least, this form of "mission creep" can be largely redressed by limiting, via engagement rules, the discretion of low-level officers over matters where inadvertent slippage is most likely and most problematic. Prominent among these matters would be the authority to designate a force "hostile," on the basis of its locally observable acts.

When legal theorists have strayed into the area of military law and organization, they have tended to become too quickly intoxicated by the 'romantic' aspects and appeal of decentralized methods of warfare. Roberto Unger, for instance, waxes lyrical about the "social plasticity" of "the vanguardist style of warfare" (roughly, guerrilla warfare), with its "capacity to surprise and to survive surprise . . . to preserve order and momentum in conditions of intense variety and violence . . . "[17] He argues that such decentralized methods "weaken the distinctions between . . . taskmasters and executors."[18] They thereby disrupt the "ready-made script" imposed by "social roles and hierarchies" on "people's practical or passionate dealings."[19]

Yet even the unsurpassed master of irregular military methods, T.E. Lawrence, deplored their unpredictability, which he attributed to their inability to impose constant discipline upon soldiers of

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attitude can make commanders very cautious and timid, jeopardizing success in battle." Eric Schmitt, "Cohen Details Faults of General in Bombing," *N.Y. Times*, Aug. 1, 1997, at A20. Gen. Dennis Reimer, "Leadership for the 21st Century," *Mil. Rev*. (Jan.-Feb. 1996); S. L. Arnold and David Stahl, "A Power Projection Army in Operations Other Than War," 23 *Parameters* 4, 22 (1994).

16 Brig. Gen. Morris Boyd, "Peace Operations: A Capstone Doctrine," 76 *Mil. Rev*. 20, 25 (1995).

17 Roberto Mangabeira Unger, *Plasticity into Power: Comparative-Historical Studies on the Institutional Conditions of Economic and Military Success* 206, 186, 157 (1988). Unger's fondness for such aspects of war derives from his deep debt to Hegel, who viewed it as the principal way by which the state comes into being, establishing the collective identity of the nation that engages in it. Fredreich Hegel, *Philosophy of Right* 20910 (T.M. Knox trans., 1942)(1821).

18 Unger, *supra* note 17, at 207.

19*Id*. at 207.

inconstant mood and commitment.[20] Mao Tse-Tung, the greatest 20th century theorist and practitioner of guerrilla warfare, said much the same.[21] The informality of the State of Israel's Defense Forces has resulted in numerous accidents and even occasional atrocities, such as beatings at internment camps during the Intifada.[22] "A good dose of traditional discipline might not have hurt them at all in this regard," notes Eliot A. Cohen.[23]

Moreover, getting soldiers with the right kind of training and the right kind and amount of matériel into the right place at the right time demands meticulous planning and long-range foresight, not wild-eyed improvisation.[24] To get soldiers and resources to the front requires a formally organized system of logistics,[25] even if the value of such bureaucratic formality often gives out at the point of combat.[26]

Effectiveness thus often depends on both formal organization and informal improvisation. The legal norms governing military activity and organization need to reflect this fact at every point. Strict, precisely defined rules have an important and legitimate place in military organizations. Complex weapons, such as tanks and aircraft, necessarily involve a measure of standard operating procedure, which soldiers must be trained and disciplined to follow. These invariant procedures can and should be codified as rules.

20 T.E. Lawrence, *The Seven Pillars of Wisdom* (1942), quoted in J.C.T. Downey, *Management in the Armed Forces* 8788 (1977). One leading scholar, Martin van Creveld, concludes from a survey of military history that "those belligerents gained the upper hand whose administrators, scientists, and managers developed the means by

which to set up gigantic technological systems and run them as efficiently as possible." Creveld, *Technology and War* 161 (1989).

21 Mao Tse-Tung, *Selected Military Writings of Mao Tse-Tung* 61, 9596, 15152, 16365, 17880 (1963).

22 On such beatings, see Ruth Linn, *Conscience at War* 6269, 11416 (1996).

23 Letter from Eliot A. Cohen, Professor of Strategic Studies, Paul Nitze School of International Affairs, John Hopkins University.

24 See, e.g., M. D. Feld, "Information and Authority: The Structure of Military Organization," 24 *Am. Soc. Rev*. 15 (1959).

25 See generally Martin van Creveld, *Supplying War* (1977).

26 Even modern Western armies routinely experience logistical breakdown during intense combat. During World War II, for instance, armies "managed to live off the land as long as they kept moving." Manuel De Landa, *War in the Age of Intelligent Machines* 113 (1991).

Unger himself rightly acknowledges, albeit rather cryptically, that military "solutions that diminish the practical influence of rigid roles and hierarchies are likely to be more explicit if not more elaborate than the institutions they replace."[27] An important example of this has been a general staff, the task of whose members is partly to intermediate between "line" officers. The staff has also served, in many of the most effective armies, as a kind of "institutional brain,"[28] solving coordination problems arising from the autonomy of line officers at the middle and lower echelons. Another example of the explicitness to which Unger refers would be a rule requiring subordinates to question and seek clarification of a superior's order where there is good reason to suspect that it is extremely improper, whether tactically or legally. Training manuals in the U.S. Army now encourage this.[29]

Legal theory offers us a sophisticated range of choices amongst various combinations of rules and standards.[30] For instance, the current Standing Rules of Engagement offer several indicia of hostile intent.[31] Together, these indicia establish a general standard concerning when the use of force, in what measure, is justified. But

27 Unger, *supra* note 17, at 208.

28 The term is De Landa's, *supra* note 26, at 5. On the function of the German general staff, see Walter Goerlitz, *The German General Staff, 1657-1945*, trans. Brian Battershaw (1953); Eliot A. Cohen and John Gooch, *Military Misfortunes* 24041 (1990).

29 One training manual exhorts, for instance, "Rather than presume that an unclear order directs you to commit a crime, ask your superior for clarification of the order."

30 See, e.g., Sullivan, Kathleen M., "The Supreme Court, 1991 TermForward: The Justices of Rules and Standards," 106 *Harv. L. Rev*.

22, 61 (1992) ("All kinds of hybrid combinations are possible. A strict rule may have a standard-like exception, and a standard's application may be confined to areas demarcated by a rule.").

31 Chairman of the Joint Chiefs of Staff, *Standing Rules of Engagement for U.S. Forces*, CJCSI 3121.01, 1-2 and 1-8 of enclosure A (1994). These indicia include failure to respond to U.S. warnings; maneuvering into a position from which an attack would be effective; and aiming weapons at, or "locking on" to a target with fire control radar. Such indicia must be present during a specific incident or immediate encounter, until civilian superiors declare the other nation's forces are hostile, at which point field officers are no longer required to wait for signs of hostile intent, much less for hostile acts, before employing their weapons. For discussion, see Scott Sagan, "Rules of Engagement," 1 *Security Studies* 78, 8283 (1991).

these indicia are expressly supplemented with a rule requiring engagement whenever necessary for self-defense of an individual or unit.[32]

The proper mix of rules and standards depends on many factors. These include, in particular, the degree of situational judgment required by soldiers assigned to various tasks and the level of education or motivation the soldiers possess.[33] Such factors vary greatly from one branch of service to another.[34] They also vary within a given society at various points in time. British warships, for instance, are no longer manned, as in Melville's day, by "hands . . . eked out by draughts culled direct from the jails."[35]

In several contemporary societies, however, Melville's description remains uncomfortably accurate. Hence, lawyers for armies in non-Western states would probably do well to hold their soldiers to bright-line rules that minimize opportunities to present disobedience to orders as the exercise of situational judgment.[36] Where loyalties to the state are weak, public order insecure, and soldiers are poorly educated and unmotivated, strict, bright-line rules, backed by threat of severe sanction, remain essential.

Much will also depend on the popularity of the particular military conflict and the measure of egalitarianism in the conscription system. Differences in the terrain of conflict will further affect the ease with which formal supply systems break down, necessitating

32 *Standing Rules of Engagement*, *supra* note 31, at A-3.

33 On the importance of these factors in accounting for military successes and failures, see Stephen Peter Rosen, "Military Effectiveness: Why Society Matters," 19 *Int'l Security* 5, 2122, 28 (1995); Kenneth M. Pollack, The Influence of Arab Culture on Arab Military Effectiveness

(1996) (unpublished Ph.D. dissertation Massachusetts Institute of Technology).

34 There is a continuum of (degrees of) discretionary judgment necessary for different kinds of work. Whereas fighter pilots occupy one end-point on this spectrum, submarine technicians occupy the other.

35 Melville, Herman "Billy Budd, Foretopman," in *Six Great Short Modern Novels* 85 (1954).

36 The general practice has historically been that where states have sought "recourse to impressed troopsthe dregs of towns shanghaied out of taverns, impoverished laborers dragged from their hamlets," military operations "and the means of their execution were defined from the top in their minutest details." Michael L. Martin, *Warriors to Managers: The French Military Establishment Since 1945* 212 (1981).

recourse to "organized plunder"[37] if troops are not to die of starvation or exposure.

Rules of engagement must reflect the likelihood that such situations will arise. Such rules should therefore be drafted and redrafted with a view to shifting geographic and demographic conditions. The best contemporary scholarship in military affairs places great weight on the importance of such "sociological" factors in influencing how, and how successfully, armies fight one another.[38] Military law can and should do the same.

Since international law governs all states, rich and poor alike, it necessarily sets a "floor" for fundamental rules, beneath which no state may sink. The manifest illegality rule, for all its problems, would serve this task particularly well. National armies should then codify higher standards in their respective military codes, regulations, and rules of engagement, when so doing is warranted by the higher quality and commitment of their troops.

The higher the level of education and motivation possessed by soldiers at a given level in the hierarchy, the more that military law should regulate their activities by way of standards, rather than rigid rules, *ceteris paribus*. This book proposes a general standard of reasonable error in determining whether to excuse a soldier who obeys unlawful orders. In the United States, we can reasonably expect a great deal from officers. Many receive degrees from civilian educational institutions.[39] In addition, high rates of reenlistment facilitate the cultivation of professional character over individual careers and the transmission of tacit norms and professional conventions from senior to junior officers.

Situational judgment is essential to efficacy at the strategic, operational, and tactical levels of a military campaign. But the meaning and nature of judgment will surely be quite different at these

37 During both World Wars in Europe, such logistical problems were recurrent. One scholar thus concludes that, "a nomadic logistic system of plunder has remained at the core of sedentary [i.e., nonnomadic] armies whenever their own supply lines have broken down due to friction." De Landa, *supra* note 26, at 113.

38 See generally Stephen Peter Rosen, *Societies and Military Power* 830 (1996).

39 Michael Satchell, "The New U.S. Military: Pride, Brains, and Brawn," *S.F Chron*., Apr. 20, 1988, at A2 (noting twenty-five percent of the officers in the Army and nearly sixty percent in the Air Force graduate from civilian colleges).

three levels.[40] Each level thus requires a different mix of precise rules and more general standards. Mistakes at one of these levels can often be identified and corrected at other levels.[41] But, to this end, there must be flexibility in the structure of rules and regulations.

Developing the right mix of rules and standards for the various areas of military life and law would take us far beyond the scope of this book. Modern U.S. armed services increasingly tailor rules of engagement to units with particular kinds of operational responsibility that deploy particular weapons systems in specific kinds of operations.[42] Officers at every level of command are authorized and encouraged to suggest changes to such rules if doing so facilitates mission accomplishment or unit defense.[43] The classified status of many such nonstanding rules prevents further jurisprudential analysis of where their various provisions fall on the rules-standards

40 The tactical level of war concerns particular battles and engagements, while the operational level addresses the conduct of whole campaigns and major operations. The level of strategy focuses on world-wide and long-range perspectives and national concerns, or coalition objectives. To be maximally effective, military operations, including peace operations, involve coordination and consistency between the three levels of decision-making. The operational level is not always treated independently. Hence one authority writes, "while tactics seeks to integrate men and weapons in order to win single battles, strategy seeks to integrate battles together to win entire wars . . . As Clausewitz said, how a battle is fought is a matter of tactics, but where (in which topographical conditions), when (in which meteorological conditions) and why (with what political purpose in mind) is a matter for strategy to decide." De Landa, *supra*

note 26, at 83. On the formal definition of the three levels, see Allan R. Millet et al., "The Effectiveness of Military Organizations," in *Military Effectiveness* 1, 1024 (Allan R. Millett and Williamson Murray eds., 1988) and James R. McDonough, "Building the New FM 100-5 Process and Product," 71 *Mil. Rev*. 2 (1991).

41 For instance, tactical obstacleswhen they become clearly insurmountablecan necessitate reassessment of larger operational and strategic commitments. The frustrations and failures of trench warfare offer the quintessential example. Timothy K. Nenninger, "American Military Effectiveness in the First World War," in Millet and Murray, *supra* note 40, at 15253. On how new information technologies are eroding the traditional tripartite distinction, in any event, see Lt. Col. Douglas A. MacGregor, "Future Battle: The Merging Levels of War," 22 *Parameters* 33, 42 (1992-1993).

42 Maj. Mark Warren, "Land Forces Rules of Engagement Symposium," *Army Lawyer* 48, 52 (Dec., 1996).

43*Id*.; Richard J. Grunawalt, "The JCS Standing Rules of Engagement: A Judge Advocate's Primer," 42 *A.F.L. Rev*. 245, 255 (1997) ("By their nature, ROE are designed to be questioned and when necessary, changed.").

continuum. The respective merits of each type of legal norm (and the possibilities for their complex combination) ought to have a more prominent focus in the continuing education of elite JAG officers.

The considerable technical literature on the proper use of particular weapons in particular types of military operations suggests enough agreement for theoretically-informed JAG lawyers to provide valuable guidance on the proper mix of rules and standards. It is clear, for instance, that certain aspects of peace enforcement operations often require much more complex situational judgment at the tactical level than bright-line type rules of engagement can fully capture.

In such operations, troops are often whipsawed between police-like, constabulary functions,44 where they must calm heated tempers of civilians, and full-fledged combat engagement, where they must "break things and kill people."45 One military thinker observes that in such operations

> the decisionmaking cycle is short and stressful, and action in the force continuum can move in both directions. Warning shots could be followed by a decision to employ a sniper to respond to a hostile act, and this might be quickly followed by the return to nonlethal means in response to unarmed hostile elements. This approach is consistent with concepts of the nonlinear battlefield and the commander's responsibility to make sense of chaos.46

44 On the resemblance of soldiers' duties in peace operations to those of street-beat police officers, see William Rosenau, "Peace Operations, Emergency Law Enforcement, and Constabulary Forces," in Antonia Handler Chayes and George T. Raach, eds., *Peace Operations: Developing an American Strategy* 115, 128 (1995). On

the declining resistance of American officers to this new role, see George T. Raach, "Military Perspectives on Peace Operations," in *Id*., at 83, 84. On the considerable receptivity of U.S. enlisted personnel to such missions, see Mike O'Conner, "G.I. Disinterest Is a Casualty in Bosnia," *N.Y. Times*, (Jan. 4 1998), at A6.

45 Warren, *supra* note 42, at 48. For discussion of this phenomenon during "Operation Just Cause" in Panama, see Clarence E. Biggs, III, *Operation Just Cause, Panama, December 1989: A Soldier's Eyewitness Account* 4 (1990).

46 Col. Frederick M. Lorenz, "Nonlethal Force: The Slippery Slope to War?,"

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Troops in such operations often occupy a nebulous middle ground where it is unclear "who is friend and who is foe."[47] Allies and enemies may switch places very quickly with new developments. Soldiers must thus be equipped and skilled at shifting between lethal and nonlethal weapons as conditions require. Field officers must be able to make judgment calls regarding subtle evidence of a party's possible "hostile intent," which may fall well short of any traditional "hostile act."[48]

Rules of engagement will be modified on a regular basis.[49] But "there is ultimately no substitute for judgment,"[50] as virtually all writers in this area remind. Current training therefore focuses on getting rules of engagement, "assimilated into a soldier's judgment,"[51] helping him "unpack the self-defense boilerplate into meaningful components."[52]

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26 *Parameters* 52, 60 (1996) and his "Standing Rules of Engagement: Rules to Live By," *Marine Corps Gazette* 20 (Feb. 1996). The military's traditional "approach [of immediate recourse to deadly force, whenever any force is authorized] is not consistent with the practice in the civilian law enforcement field, where the use of force is viewed as a continuum of action rather than a black or white alternative. By viewing the application of force on a sliding scale . . . a more realistic approach can be found." *Id*.

47 Warren, *supra* note 42, at 33.

48 Both are terms of art in military law. The crucial difference is that a hostile act can be identified as such in isolation, whereas a display of hostile intent often cannot. *Standing Rules of Engagement*, *supra* note 31, at A-5. The latter must be assessed in light of military evidence (tactical and operational), background intelligence from indicational

warnings, and political evidence regarding the general state of tension or truce between parties to potential engagement.

49 Warren, *supra* note 42, at 56 ("Standing rules . . . may be supplemented or modified inand often duringan actual operation. Soldiers must be alert and responsive to, and trained to anticipate, changes in ROE [rules of engagement]. Changes in the application of ROE may occur because of changes in mission or threat.").

50 Grunawalt, *supra* note 43, at 255. See also Maj. W. Hays Parks, "Righting the Rules of Engagement," 115 *U.S. Navy Inst. Proceedings* 83, 93 (May 1989) ("No amount of rules can substitute for the judgment of [the] individual, and ROE are not intended to do so.").

51 Lt. Col. Mark Martins, "Rules of Engagement For Land Forces: A Matter of Training, Not Lawyering," 143 *Mil. L. Rev*. 3, 20 (1994).

52*Id*. at 78. The need to emphasize the development of situational judgment also counsels against "rule overpopulation," since soldiers will be tempted to rely on a seemingly applicable rule even where situation sense might counsel a different course. *Id*. at 56.

Those writing about the armed forces recommend decentralization to varying degrees for operations other than peace enforcement.[53] Some blandly call for balancing the imperatives of central coordination and situational judgment:

> The military has difficult problems in balancing between obedience to authority and independent moral judgment; between protecting the morale and camaraderie of the group and the need to train soldiers who can disobey an unlawful order with good judgment and courage, and will pass important information on conditions and activities back up the hierarchy so that they can have an impact on the policymakers and on the opinion of the citizens . . . in whose name the violence is being perpetrated . . . [54]

This statement is unusual for its lucidity and moral acuity. But vague calls for balancing abound in the military organization literature.[55] One suspects that "there is still a deeply rooted belief that

> 53 Compare Kurt Lang, "Military Organizations," in *Handbook of Organizations* 85253 (James March ed., 1965) (arguing that for the tactical commander and ordinary soldier, "his judgments concern only how to overcome the external difficulties he encounters in the execution of his orders") and Feld, *supra* note 24, at 15 ("The initiative undertaken by individuals must conform to the objectives of the group."), with Edward Luttwak and Daniel Horowitz, *The Israeli Army* 5455 (1975) (lamenting the "bureaucratic attitudes" of "front-line commanders [who] fail to act promptly because they want to be 'covered' by orders from above"), Barry R. Posen, *The Sources of Military Doctrine: France, Britain, and Germany Between the World Wars* 48 (1984) ("Victory goes to the most flexible command structure."), Deborah D. Avant, *Political Institutions and Military Change* 4 (1994) ("Military organizations are likely to be concerned

with . . . resources and prestige . . . and to be mired in standard operating procedures . . . which often prevent military organizations from responding adequately to their country's security goals.") and Charles Hables Gray, *Postmodern War* 63 (1997) (attributing several fiascos in postwar U.S. military history, including the *U.S.S. Mayaguez* rescue attempt and aspects of the Grenada invasion, to excessive command centralization). For a shrewd characterizations of the United States Army's appreciation of these tensions, see John Keegan, *The Face of Battle* 53 (1976).

54 Hillel Levine, "Between Social Legitimation and Moral Legitimacy in Military Commitment," in *Legitimacy and Commitment in the Military* 9, 18 (Thomas Wyatt and Reuven Gal eds., 1990).

55 See, e.g., U.S. TRADOC, *Force XXI Operations: A Concept for the*

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habituation to obedience in the training camp," as well as the formal hierarchy and rule-governed procedures that this entails, "is the prerequisite to discipline under fire on the battlefield."[56]

No one doubts, of course, that *certain* acts, such as reloading rifles or artillery, can and should be routinized to the point of automatism. With such acts, deeply formed habit is essential to free up the time and energy for independent initiative needed on other matters, particularly during a genuine emergency.[57] The dispute arises over the extent to which *other* types of acts, particularly firing of lethal weapons, should be equally habitual and unreflective in response to superior orders.

Many students of military organization clearly believe that such habituation to obedience has not only been a frequent source of war crimes, but also the primary obstacle to greater initiative and ingenuity in combat and peace operations.[58] Above I have sketched an admittedly stark opposition between defenders of relatively

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> *Evolution of Full-Dimensional Operations for the Strategic Army of the Early Twenty-First Century*, Pamphlet 525-5, ch. 1, § 1-2(e)(2), U.S. Army Training and Doctrine Command (Aug. 1, 1994) (contending that future "military operations will involve the coexistence of both hierarchical and internetted, nonhierarchical processes" and that "combinations of centralized and decentralized means will result in military units being able to decide and act at a tempo enemies simply cannot equal") See also George Friedman and Meredith Friedman, *The Future of War* 152 (1995) ("Too little information and the commander will be caught by surprise. Too

much . . . and he will be overwhelmed and unable to understand, let alone act on it.")

56 Lt. Col. William L. Hauser, *America's Army in Crisis: A Study in Civil-Military Relations* 111 (1973); Douglas A. MacGregor, *Breaking the Phalanx: A New Design for Landpower in the 21st Century* 158, 163 (1997) (noting persistence of this attitude in U.S. military circles). On how these proclivities explain many Soviet military failures, see Chris Donnelly, "The Soviet Soldier: Behaviour, Performance, Effectiveness," in *Soviet Military Power and Performance* 101, 115 (John Erickson and E.J. Feuchtwanger eds., 1979).

57 Dept. of the Army, *An Infantryman's Guide to Combat in Built-Up Areas*, Field Manual 90-10-1, at 17 (1993) ("Well-trained soldiers accomplish routine tasks instinctively or automatically. This allows them to focus on what is happening in the battlefield."); Elaine Scarry, "Thinking in an Emergency," Lecture to the Program in Ethics and the Professions, Harvard University (Nov. 13, 1997).

58 See, e.g., Gen. Omar N. Bradley, "On Leadership," in Lloyd Matthews and Dale Brown, eds., *The Challenge of Military Leadership* 3, 4 (1989); Lt. Col. Charles G. Sutton, Jr., "Command and Control at the Operational Level," in Matthews and Brown, *id*. at 74, 7781.

unreflective obedience to precise orders, judged by bright-line rules, and mission orders demanding situational judgment (assessed *post facto* by its reasonableness). These polar views will be modulated by more nuanced positions, as top JAG officers gain experience in drafting rules of engagement for different forces that employ varying weapons, face disparate foes, and engage in alternative kinds of operations.

One step in this direction, advancing our appreciation of the respective place of rules and standards in military law, would be to seek better understanding of what is really involved in the process of habituation. Those who stress the continuing centrality of unthinking habit in military life, it must be said, often invoke Aristotle and his theory of learning no less than do modern celebrants of situational judgment. This is illustrated by the Marine drill sergeant, quoted in my second epigraph, who enjoins his recruits to model their actions on his own, on the grounds that "we are what we repeatedly do. Excellence . . . is a habit."[59]

In this way, rote habituation is often contrasted, by both its defenders and critics among contemporary officers, with critical reflection by the soldier concerning the immediate demands of his tactical predicament. But this is a false dichotomy. What Aristotle actually meant by learning as habituation is more complex than the drill sergeant's highly abbreviated account could hope to adequately suggest.

As a recent interpreter stresses, "We misconstrue Aristotle's notion of action producing character if we isolate the exterior moment of action from the interior cognitive and affective moments which characterize even the beginner's . . . behavior."[60] When learning a

new skill, uncritical repetition of rote steps would never allow one to learn from one's errors, to improve upon prior attempts. Rather, every conscientious student is always monitoring himself and his performance. This process, as any beginner will report, is often quite *mentally* demanding. "In each successive attempt, constant awareness

59 Quoted in Thomas Ricks, *Making the Corps* 197 (1997) (observing Marine drill training at Parris Island).

60 Nancy Sherman, *The Fabric of Character* 178 (1989).

of the goal is crucial, just as measuring how nearly one has reached it or by how much one has fallen short is important for the next trial."[61]

In the military context, there is often considerable danger that the new skill will cause great harm if improperly exercised. This is particularly true of the skills required to operate sophisticated weapons systems, of course. The need for critical reflection in the process of acquiring such a skill, including discrimination about the situations properly calling for its use, is correspondingly even greater here.

Information Warfare and the Legal Structure of Armies

New information technologies promise to radically alter certain kinds of military conflicts, perhaps even to "dissipate the 'fog of war,'"[62] some contend. Such technologies have major implications for the design of military organizations.[63] Specifically, it will be necessary to reassess the proper mix of rules and standards governing various activities. Advances such as imaging sensors on the ground and under the sea, and expedited satellite photography will make it possible for American, U.N., or NATO forces to surveil better their enemies' movements, capacities, troop concentrations, logistical logjams, and other strengths and weaknesses and plan their operations accordingly.[64]

61 *Id*. at 179.

62 Admiral William A. Owens, "System-of-Systems," *Armed Forces J. Int'l* 47 (Jan. 1996). These technologies are generally referred to as the "revolution in military affairs." *Id*. For theorists of "postmodern" war, "the chief objective . . . is no longer the killing of human beings, but the

blinding and disabling of the computer command and control system of the enemy." Michael Ignatieff, "The Gods of War," *N.Y. Rev. of Books*, Oct. 9, 1997, at 10, 13. For recent discussions by U.S. officers, see Lt. Cmdr. Randall G. Bowdish, "The Revolution in Military Affairs: The Sixth Generation," 75 *Mil. Rev*. 26 (Nov.-Dec. 1995); Lt. Cmdr. Randall G. Bowdish, "Manprint: Battle Command and Digitization," 75 *Mil. Rev*. 48 (May-June 1995).

63 For a trenchant analysis, see Col. Charles Dunlap, Jr., "Organizational Change and the New Technologies of War," paper presented at the Joint Services Conference on Professional Ethics (1998).

64*U.S. Air Force, New World Vistas: Air and Space Power in the 21st Century* (1995) ("The power of the new information systems will lie in their ability to correlate data automatically and rapidly from many sources to form a complete picture of the operational area.").

Oversimplifying a bit, there are two schools of thought concerning the implications of this "revolution" for institutional design. On one view, the proliferation of pertinent information about battlefield developments enhances the need for, and practicability of centralization.65 Such information, gathered from far-flung sources, must be integrated and analyzed by staff at the top of the organization. According to this view, even if line officers at lower levels are provided with access to intelligence technologies they would be unable to discern the optimum course of tactical action. Their conduct should therefore be closely directed from above with precise orders, and rules governing their execution, that do not take advantage of even the most refined local knowledge and situation sense.66

The second and better view maintains that the revolution in military affairs will be much more indeterminate in its ramifications for the ideal design of armies. The influx of new information about the enemy will create as many problems as it will solve, adding new sources of "friction" through the increased demand for the data's coordination, integration, and interpretation.67 The high proportion of "friendly fire" casualties during Desert Storm,68 despite (and in part because) of its heavy reliance on such advanced technologies, offers abundant, painful evidence for this view. Soldiers will need not merely "training," but "education" in "problem formulation, information gathering, pattern recognition, and information synthesis."69 The upshot will be a need for more centralization in

65 Friedman and Friedman, *supra* note 55, at 390; Eliot A. Cohen, "A Revolution in Warfare," 75 *Foreign Affairs* 37, 4850 (Spring 1996).

66 Friedman and Friedman, *Id*. (describing the rationale for this view).

67 W.B. Cunningham and M.M. Taylor, "Information for Battle Command," 74 *Mil. Rev*. 81, 83 (1994); De Landa, *supra* note 26, at 7879. Earlier efforts to rely heavily on statistical data fed into computer models for war-planning proved quite unsuccessful during the Vietnam War. Martin van Creveld, *Command in War* 253 (1985). An influential, early defense of such methods was offered by Herman Kahn, *On Thermonuclear War* viiiix, 41 (1960).

68 Caleb Parker, "War Friendly Fire Prompts U.S. Call for Doctrine Shift," *Defense News*, Dec. 9, 1991, at 4 (citing official Defense Department data); "Not So Friendly Fire," 72 *Mil. Rev*. 39 (1992) (noting the surprising amount of fratricide resulting from mistaken identifications during Desert Storm).

69 Maj. E. Casey Wardynski, "The Labor Economics of Information Warfare," 75 *Mil. Rev*. 56, 57 (1995). The U.S. Army War College now offers courses with

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some matters, and less in others,[70] in ways that cannot be readily foreseen and that will continually evolve.

Some military analysts go so far as to claim that it is simply impossible to generalize, from one situation to the next, about what level of a military organization in war will likely possess the information most pertinent to many types of decision. The answer to the questionwho should decide what?is often indeterminate *ex ante* (perhaps even *ex post*), on this view. Beaumont argues, for instance, that

> postmortems of such events [as] Pearl Harbor . . . have shown how, in intelligence nets as in any complex organization, no one at any level can perceive more than a fraction of the entire organization's state at any moment, nor can that ever be fully sensed or depicted, even in hindsight. The angle of view and general sense of detail of the aggregate tend to be greater toward the top, but what happens throughout the organization is sensed only approximately. Details may seem clearer at "the cutting edge," but only across a limited range . . . [71]

To accommodate such uncertainty, armies must be legally structured for considerable flexibility. Such structuring will foster the exercise of good situational judgment by officers at all levels, acting on the information available to them, much of it provided by new technologies operated by peers and underlings.[72] "If warriors understand their commander's intent and share the same situational awareness," writes one military analyst, "they can exploit new

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such titles as "Creative Thinking."

70 Long before the current "revolution," in fact, as early as the mid-

1960s, leading scholars of the U.S. military were arguing that "the technology of warfare is so complex that the coordination of a group of specialists" of the sort involved in any modern weapons system "cannot be guaranteed simply by authoritarian discipline." Morris Janowitz and David Little, *Sociology and the Military Establishment* 41 (1974).

71 Roger Beaumont, *War, Chaos and History* 148 (1994).

72 New technologies will increase the useful information available even to infantrymen. Friedman and Friedman, *supra* note 55, at 383 (describing how technologies like the wireless head-mounted display will do this).

developments, confident that their decisions are consistent with command objectives."[73] This approach is surely preferable to one that would encourage field officers to assume that superiors' orders necessarily and invariably rely on perfect information, or even a more complete picture always just beyond one's horizon.

73 James McCarthy, "Managing Battlespace Information," in *War in the Information Age* 83, 96 (Robert Pfaltzgraff, Jr. and Richard Shultz, Jr., eds., 1997). See also Field Manual 100-5, *Operations* 15 (1993) (defining initiative as the "willingness and ability to act independently within the framework of the higher commander's intent."); U.S. Army Field Manuel 22-102, *Soldier Team Development* (1987) (stressing "the ability and readiness of junior officers to use initiative and act correctly in the absence of orders or supervision" and the need for "decentralized operations based on trust and respect between leader and follower and mutual confidence . . . ").

18
What Soldiers Know

The two approaches to regulating soldiers outlined in the last chapter trade upon very different conceptions of what knowledge about effective war making entails. On the first view, this knowledge is a form of applied science, reducible to laws that can be codified and mastered as such.1 On the second view, famously associated with Clausewitz,

> We cannot formulate principles, rules, or methods: history does not provide a basis for them. On the contrary, at almost every turn one finds peculiar features that are often incomprehensible and sometimes astonishingly odd . . . While there may be no system, no mechanical way of recognizing truth, truth does still exist. To recognize it one generally needs seasoned judgment and an instinct born of long experience.2

Clausewitz criticized his contemporary strategists, like Antoine-Henri Jomini, who believed that the centuries of war offered up lessons that could be inductively derived from its history, formulated as binding rules, and refined into more general theory.3 Clausewitz argued that "no prescriptive formulation universal enough to deserve the name of law can be applied to the constant change and diversity

> 1 The origins of this view are usually traced to Antoine-Henri Jomini. For the more recent history of his epigones, see Manuel De Landa, *War in the Age of Intelligent Machines* 9697, 102103, 206 (1991). For a noteworthy contribution to this tradition, see Col. T.N. Dupuy, *Understanding War: History and Theory of Combat* (1987).

2 Carl von Clausewitz, *On War* 75 (trans. Peter Paret and Michael Howard) (1976).

3 In this respect, Clausewitz's argument resembled the challenge posed by legal realism to Landellian formalism.

of the phenomena of war."[4] This meant that "as in all practical arts, the function of theory is to educate the practical man, to train his judgment, rather than to assist him directly in the performance of his duties."[5]

This dispute rests on a still deeper, long-standing disagreement about the nature of professional identity within the officer corps of a modern state. The first approach views officers as essentially highly-skilled technicians: military engineers who exercise legitimate authority to the extent that they can banish uncertainty, through their harnessing of modern science and their masterful application of its technological cornucopia.[6]

The second approach views officers more as professionals, even craftsmen, whose power arises precisely from their somewhat mysterious virtuosity in the management of uncertainty. Under this view, officers derive their authority from their good judgment in plotting an artful, sleuthful course through "the fog of war," rather than in presuming to know how to lift it.[7]

Officers drawn to the first approach tend to favor bright-line rules and bureaucratic styles of military management through which superiors can systematically apply the lessons of military science. Those sympathetic to the second perspective tend to prefer general standards and more informal modes of organization.[8] This is because the more one can codify the proper course of action in likely future scenarios, the more one can also require this codified course of action in the form of a bright-line rule. Where situation X clearly requires response Y, it can be negligent to do Z instead, and such duties can be formulated into rules that are often quite detailed.

4 Clausewitz, *supra* note 2, at 20405.

5*Id*., at 361.

6 On this view, see Lt. Gen. Sir John Winthrop Hackett, *The Profession of Arms* 40 (1962) (observing that the soldier "can be regarded as no more than a military mechanic: a military operation can be considered just another engineering project."). Hackett himself does not share this view.

7 Gabriel offers a defense of this view. Richard Gabriel, *To Serve With Honor* 3941, 73, 99 (1982).

8 A similar tension runs through the self-understanding of practitioners in many fields, including the law. See generally Jack Dowie and Arthur Elstein eds., *Professional Judgment: A Reader in Clinical Decision Making* (1988).

A profession's practical know-how may remain uncodified not because it is inherently ineffable, but simply because no one has yet found time to write it down. Its uncodifiable aspects are thus remediable, in principle. In some fields, it is a major function of university professors to perform this task, so that what cutting-edge practitioners are doing can be more quickly and easily transmitted to a new generation (thereby abbreviating much of apprenticeship upon entry). Architecture traditionally offered perhaps the closest approximation to this pattern.9

In other professions, by contrast, new knowledge is more often generated in universities themselves (rather than merely codified there), and transmitted to practitioners by way of formal training and periodic recertification programs. Medicine most closely fits this model, even though "clinical" know-how retains an important place in all but the most scientifically-driven specialties.10 At any given time, much more of a physician's knowledge-in-use will have been codified, available in a university library, than an architect's or litigator's. The law of medical malpractice treats physicians accordingly. Legal norms in this area have become increasingly bright-line in form. This facilitates the ability of juries to detect significant departures from standard procedure.

Despite efforts to turn it completely into an applied science, professional soldiering remains decidedly closer to the litigator/architect end of the spectrum than to the modern physician. The law should govern it accordingly. Clausewitz did seek to promulgate such "rules" as "cavalry should not be used against unbroken infantry."11 But he acknowledged that few such

rules were absolute, that all had significant exceptions not fully specifiable *ex ante*.

In fact, he sometimes went so far to say that "what genius does is the best rule, and theory can do no better than show how and why

9 It is also characteristic of many nonelite law schools. See generally Donald Schön, *The Reflective Practitioner: How Professionals Think in Action* 77104 (1983).

10 H. Tristam Englehardt Jr. et al., eds., *Clinical Judgment* (1979).

11 Antulio Echevarria II, "Clausewitz: Toward a Theory of Applied Strategy," paper presented at the Joint Services Conference on Professional Ethics, 2 (1995) (parsing Clausewitz).

this should be the case."[12] From this perspective, whatever rules exist in a given field are really "no more than summaries of the judgments which morally sensitive people make of individual cases."[13] To the extent that they do no more than "crudely map the decisions of the virtuous person,"[14] such rules are valuable primarily for training the novice.

Where an occupation's knowledge-in-use is formally codified, specifying the proper course of action in most circumstances, the rules of ethics governing its members can build upon this foundation of relative certainty, and can themselves be more precisely codified in turn. But to the extent that knowledgeable practice of a profession continues to require a great deal of nuanced, uncodified, situation-specific know-how, the ethics of its practitioners will remain inextricable from traits of character.[15]

For instance, in threatening punishment for "cowardice,"[16] we may require professional soldiers to display a certain measure of courage in combat. But "we cannot adequately specify what courage . . . may require of those who practice it only in terms of rules . . . ," as MacIntyre observes. This is because, he continues, "every virtue . . . enables those who possess it to go beyond the rules in specific situations in ways not provided for and not providable for in advance."[17] There is thus a correspondence between the moral and cognitive dimensions of professional character, i.e., between ethical and effective practice, a correspondence that the law can wisely exploit. The law can best foster the exercise of professional virtues by recourse to general standards, not bright-line rules.

Some defenders of "virtue ethics" would go still further, claiming

that even general legal standards, founded on the settled and

12 Clausewitz, *supra* note 2, at 136; see also Thomas Killion, "Clausewitz and Military Genius," 75 *Mil. Rev.* 97 (1995).

13 J. B. Schneewind, "The Misfortunes of Virtue," in Crisp, Roger and Slote, Michael, eds., *Virtue Ethics* 178, 192 (1997).

14*Id*. at 179.

15 Here, "no antecedently statable rules or laws can substitute for virtuous character in leading people to act properly." Schneewind, *supra* note 13, at, 182.

16 Article 99, U.C.M.J., "Misbehavior Before the Enemy," prohibiting "cowardly conduct."

17 Alasdair MacIntyre, "The Return to Virtue Ethics," in *The Twenty-Fifth Anniversary of Vatican II*, Russell Smith, ed., 239, 247 (1990).

evolving conventions of competent practitioners, cannot fully capture the nature of true professional virtuosity. And it is surely true that no legal norm can impose so high a standard that only the most distinguished of a vocation's practitioners could hope to meet it. Criminal law, in particular, aims to set a minimum, to establish a 'floor' above which virtually everyone can rise, not to articulate our highest ideals and noblest aspirations, at least not directly. The law of professional ethics, even when guided by "virtue ethics," must set its sights accordingly.

The highly chaotic nature of war, despite all efforts to rationalize and routinize it, ensures that professional warriors will always best be governed by some form of "virtue ethics." The law should take this into account, governing soldiers by way of general standards that build upon virtues internal to the calling, allowing professionals themselves to play the primary part in defining these. To be sure, this will sometimes require taking sides on debates within the profession, where these arise, over the meaning of martial honor.

Two Ways to Prohibit War Crimes

For present purposes, I want only to explore the relevance of the rules versus standards debate in legal theory to how military law should handle the problem of obedience to criminal orders. There are, roughly speaking, two ways to mark the conceptual borders between war crimes and admissible defenses. The first sets the limits of acceptable behavior very indulgently, in deference to the practical demands of war. However, it then insists that any conduct exceeding these restrictions is forbidden absolutely.

Its "philosophic approach is lenient in terms of the content of the rules themselves but strict in terms of its demand for their observance."[18] There is little room for argument once the rules are established because they mark off only a very narrow band of misconduct as punishable. Within this band, everything is unambiguously criminal. "That which is not absolutely prohibited is absolutely permitted: an act is either permissible or not."[19]

[18] Ian Clark, *Waging War* 75 (1988).

[19] *Id*.

The second approach, on the other hand, sets the boundaries of acceptable conduct in a much more demanding way. It prohibits a greater range of conduct. But this approach also makes it much easier to argue it is excusable to go beyond them in special circumstances.

> While [the second approach] is strict on the rules themselves, it is relatively more lenient in allowing exceptions to them . . . [It] allows a small area at either extremity, that which is absolutely permissible and that which is absolutely impermissible, but concentrates its energies upon the middle ground where the debate takes place. Transgressing the boundaries becomes something which requires justification in the special circumstances . . . [This approach] allows for a more subtle differentiation. In addition to the realms of [clear] permission and prohibition is the area of debate where what is normally prohibited can be argued for if the circumstances are sufficiently compelling. This . . . has the benefit of allowing for a category of actions which are illegal in normal circumstances but possibly justifiable in the exception.20

It also allows for a category of actions that are unpunishable in normal circumstances (e.g., nonatrocious crimes), but punishable on compelling facts (e.g., when their unlawfulness is reasonably clear in the situation at hand). While the first approach offers a generous concession to anyone whose questionable conduct falls within the gray area, the second approach makes the gray area "an area of philosophic debate where the onus is upon the actor who would go beyond the pale to demonstrate what the justification is for doing so."21 The second approach also requires such debate where special circumstances are inculpatory, because the criminality of the defendant's conduct might be reasonably apparent in those he actually faced.

The distinction between these two approaches itself suggests nothing about the conditions under which either might be preferable to the other. This question should be central for military criminal law.

20*Id*. at 7576

21*Id*. at 76.

Legal efforts to avert atrocities now heavily favor the first approach, as they have generally done in the past. But the second offers unrecognized advantages towards averting atrocities. International law and the domestic military law of most Western states excuse soldiers who obey unlawful orders, unless their unlawfulness is immediately obvious on their face. Since even lawful orders in wartime often require acts of great violence, the exception for manifestly illegal acts can turn out to cover a rather narrow subset of illegality.

The manifest illegality rule thus imposes a broad duty to obey superior orders that is qualified by an equally bright-line duty to disobey orders to commit atrocities. The general rule's extreme leniency is redressed, in part, by the exception's extreme stringency. The rule demands that soldiers honor the exception invariably, regardless of circumstantial variation. The objective is to eliminate any possibility of doubt about what one should do in any given situation. This approach to military law contributes significantly to what is probably the central human experience of soldiering (at lower echelons), as it is depicted in the memoirs of recruits: "The young man who goes to war enters a strange world governed by strange rules, where everything that is not required is forbidden . . . "[22]

The manifest illegality rule is intended to cover only the easiest cases. The very easiest case might involve killing a noncombatant under one's custody, whose eyes are blindfolded, and whose hands are tied behind his back.[23] As one legal scholar explains, "in the doubtful or uncertain cases, the order ought to be obeyed, precisely because its illegality is not manifest or transparent."[24]

Clark's second approach would, however, be more consistent with the situational judgment commanders now seek from troops in every other area of combat behavior. This approach would begin with

22 Samuel Hynes, *The Soldiers' Tale* 19 (1997).

23 Argentine Admiral Rubén Oscar Franco conceded in his trial testimony that this was done. Jorge Camarasa, Rubén Felice, and D. González, *El Juicio: Proceso al Horror* 12324 (1986).

24 Guillermo J. Fierro, *La Obedencia Debida en el Ámbito Penal y Militar* 79 (1984) ("Los casos dudosos deben ser ejecutados, pues, precisamente, no son manifiesta u ostensiblemente anti-jurídicos."). A clear act of treason, such as offering arms or food to a declared enemy (without surrendering), is also classified as manifestly illegal. *Id*. at 13133.

a more stringent version of the general rule: obey only lawful orders, on pain of punishment for criminal acts. That bright-line rule would then be qualified by an exception cast in the form of a general standard; reasonable mistakes concerning the lawfulness of superiors' orders would constitute an affirmative defense. Its plausibility would depend on details of the factual configuration confronted by the errant soldier, as recounted by witnesses.

In litigated cases there would be more room to debate whether the soldier who obeyed his superior's unlawful order exercised reasonable judgment in the circumstance. The soldier would no longer be expected to resolve any and all doubts about the legality of superior orders in favor of obeying them. The distinction between lawful and unlawful obedience would therefore no longer be marked by a bright-line. The very absence of such a line is well-calculated to stimulate deliberation, both within the mind of the individual soldier and between members of the combat group. Clark's "gray area" would no longer receive blanket endorsement.

Many suspect that the most serious and extensive modern war crimes and crimes against humanity are directed by superiors, not the product of traditional free-lance foraging. If this view is correct, we will want to encourage soldiers to hesitate at least briefly, and to deliberate with fellow soldiers about the legality of orders falling within this gray area. The approach just described is better directed at that objective than the manifest illegality rule.[25] This is because standards are more effective than bright-line rules in promoting dialogue and deliberation among those whose conduct they govern.[26]

25 A civilian employee in the private sector, after all, is expected to

read any directive from his employer against the background established by the legal system as a whole. The military subordinate can likewise be expected to read a superior's order against the background of military lawspecifically, that established by the law of war crimes.

26 Kathleen M. Sullivan, "The Supreme Court, 1991 TermForward: The Justices of Rules and Standards," 106 *Harv. L. Rev.* 22, 69 (1992) ("Rules block the dialogue that standards promote."). Her point is something of an exaggeration, however. People often have to discuss whether a rule (or which among several related rules) applies to their present situation, as well as what the applicable rule or rules require of them, precisely. Cognitive psycholol gists are beginning to study these issues experimentally. Gwen M. Wittenbaum and Garold Stasser, "The Role of Prior Expectancy and Group Discussion in the Attribution of Attitudes," 31 *J. of Experimental Soc. Psychol.* 82, 102 (1995) (concluding that in applying clear rules, groups deliberate and perform better

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No one should confuse the present proposal as inviting soldiers to engage in Socratic dialogue during a firefight. Prompt, immediate action is often required. The law's long-standing standard for assessing a person's conduct on the basis of its reasonableness under the circumstances accommodates this reality.

But virtually all veterans report that soldiering is mostly an experience of waiting and watching, punctuated only intermittently by fierce, brief engagement with the enemy.[27] Thus, there is plenty of time for soldiers to consider and discuss the implications of what they have recently done and are again likely to be ordered to do. As the Nuremberg Tribunal put it, "The sailor who voluntarily ships on a pirate craft may not be heard to answer that he was ignorant of the probability he would be called upon to help in the robbing and sinking of other vessels."[28]

However, time to deliberate is not accompanied by wholesale access to information. For instance, a soldier who pushed the button firing a missile at what turned out to be a civilian population center could plausibly argue, in most circumstances, that his knowledge of the target's nature was necessarily limited. The divided labor force that operates such sophisticated weaponry is shielded from the precise nature of the target, and hence, from knowledge of its unlawfulness. Security considerations generally warrant the traditional "need to know" rule, according to which no one knows more about an operation than is necessary to accomplish his or her part in it.[29]

But an organization committed to fostering situational judgment at lower levels for tactical efficacy will be one whose subordinates do, in fact, need to know more than those in a highly centralized

system.[30] Many an order simply cannot properly be followed, officers

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than individuals, whereas in applying more diffuse standards, individuals do better than groups).

[27] Hence the perennial complaint of soldiers, that they are often ordered to "hurry up and wait." Col. Dandridge Malone, *Small Unit Leadership* 60 (1983).

[28] IV *Trials of the Major War Criminals* 473 (The *Einsatzgrupen* Case).

[29] Malone, *supra* note 27, at 143. (distinguishing "need to know" information from "good to know" and "nice to know.")

[30] De Landa, *supra* note 1, at 61, 7880; A.J. Bacevich, "Tradition Abandoned: America's Military in a New Era," 48 *Nat'l Interest* 16, 19 (1997). Marine officers are therefore counseled, for instance, "if time and the situation permit,

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report, unless one knows a good deal about how it is intended to contribute to a larger mission, at the operational level. Current U.S. regulations encourage commanders to disseminate information accordingly.[31]

It is no longer true that "those who know the least obey the best," as one distinguished officer put it long ago.[32] Some of the traditional restrictions on information dissemination were rooted in attitudes that had less to do with rational considerations of institutional design than with simple class prejudice. Hence, "the archetypal old sergeant used to tell the recruits that if the Army had wanted them to think, it would have given them brains."[33]

The soldier in our above scenario knows too little to effectuate his bright-line duty to disobey an obviously illegal order, such as one requiring that he fire upon a known population center. If he did push the button, he could defeat a prosecution by invoking the reasonable error defense. Since reasonable mistakes are excused case-by-case, depending on the circumstances, he would have the legal burden to establish these exculpatory conditions.[34] On the facts described in our scenario, the reasonableness of his conduct would be easy to establish. He had no reason to believe the target was unlawful because he knew nothing of its nature and was expected to trust his superiors in that regard.

The legal result proves no different under the manifest illegality rule. The soldier would be found not guilty for a different reason. He would be acquitted because firing on a city is not *per se* manifestly illegal. There are some circumstances (albeit not necessarily those he actually faced) when it can be done legally, such as when the

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you should make known to your subordinates the reasons for a given order because this knowledge will increase the desire of your people to do the job and will enable them to do it intelligently." Lt. Col. Kenneth Estes, *The Marine Officer's Guide*, 6th ed., 315 (1996).

31 Joint Chiefs of Staff, "Principles Governing Unified Direction of Forces," 5.12/2:0-2, JCS Pub. 2, at 3-3.

32 Sir George Rodney, "Letter from Gibraltar to the Admiralty" (Jan. 28, 1780) (quoted in Robert Heinl, Jr., *Dictionary of Military and Naval Quotations* 217 (1966)).

33 George Friedman and Meredith Friedman, *The Future of War* 392 (1997).

34 Since such an excuse is an affirmative defense, the prosecution does not bear the burden of production, i.e., of producing evidence inconsistent with it, in order to prove its case in chief.

immediate target is a military installation located within the city, so that civilian casualties constitute collateral damage.

Figure 18.1 provides a visual rendering of the rule defended here, suggesting how a larger subset of criminal conduct would be made punishable than under the manifest illegality rule.

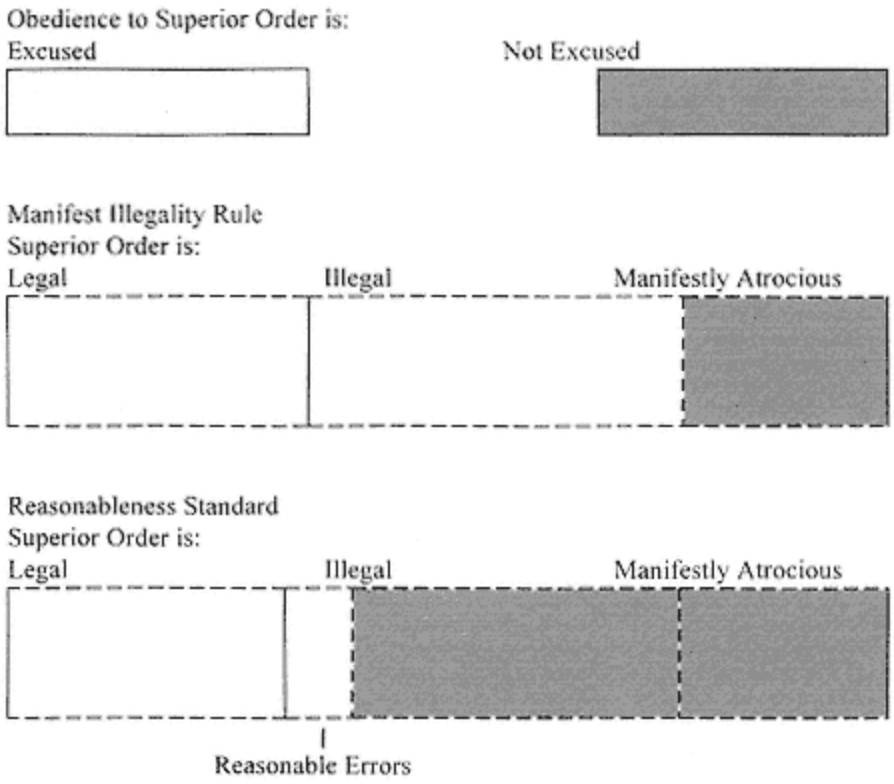

Figure 18.1

The burdens of proof (i.e., production) would shift as well. Under the manifest illegality rule, unless the defendant's orders obviously required him to commit an atrocity, the prosecution has to prove beyond a reasonable doubt that the defendant knew, or should have known,35 that his orders were illegal. The law is designed to make this showing all but impossible. Accordingly, it is a disfavored strategy. Where there is no atrocity, ignorance of illegality is heavily presumed.

In contrast, the approach defended here presumes the defendant knows the law. If he obeys illegal orders, he thus bears the burden of establishing that his error was honest and reasonable. The law's presumption no longer tilts the scales heavily in his favor. In other words, he must produce sufficient evidence to establish a reasonable doubt about the culpability of his error. To do this, as a practical matter, he must take the stand in his own defense. This is surely the most significant practical ramification of the reasonable error rule.

Training, Conduct Rules, and Decision Rules

Training and access to information play a crucial role in this approach. So do the types of rules we ask soldiers to follow. Consider the confusing process of practical deliberation that the manifest illegality rule forces soldiers to engage in when faced with an order they suspect is illegal: Does the order require an atrocity? If not, I must obey. If so, I cannot obey without risking later prosecution. If I have other doubts about the order apart from its nonatrociousness, I should obey it, for I will not be punished, whether or not it proves illegal.

The reasonable error rule, by contrast, requires the soldier to engage in a more structured process of deliberation. This process could generally be conducted very quickly. Often, the decision will take no more than a couple of seconds. Sometimes it will take longer, should the situation warrant. In either event, the decision will be influenced by hours of training and frequent simulations and games involving similar scenarios.[36] Realistic simulations duplicate actual

35 This is pertinent only where the particular offense allows for the possibility of negligent commission.

36 On the advent and dissemination of such techniques, see Gen. William R.

(footnote continued on next page)

field experience to the point, for instance, of showing precisely where a given round of fire would have hit. The performance of each individual officer is critically examined, by retracing his decision process and allowing him to explain why he responded at each point as he did. This training process increases the effective degree of compliance with superiors' orders.37

Once properly trained according to the rule I propose, the soldier who faces a situation will first ask himself: Is this order lawful? If so, I must obey. If not, I cannot obey without facing liability. If I suspect that the order is illegal, my proper course depends on how much time is available for deliberation. If there is no time to deliberate, then I must obey the order immediately. I can be confident the very exigency of my circumstances will protect me against liability if the order ultimately proves unlawful, for my conduct has been reasonable. To the extent that time permits, however, I must seek guidance from fellow soldiers or request clarification and explanation from my superior. If I fail to do so, I will share liability with my superior should the order prove unlawful.38

It may also be possible to induce disobedience to a still wider range of unlawful orders by not informing the soldier that reasonable belief in their legality will excuse his compliance. Training material

(footnote continued from previous page)

> Richardson, "The 'Training Revolution' That Built Today's Army," 46 *Army* 8 (Sept. 1996); Col. J. Michael Hardesty and Jason Ellis, *Training for Peace Operations* (1997).

37 This is precisely what most troubles current post-modern critics about such methods of training. Chris Hables Gray, *Postmodern War* 57 (1997). Orders from superiors will generally demand the use of force and these critics assume that virtually all uses of interstate force in the contemporary world are ultimately unnecessary and therefore illegitimate. Under this view, the use of force reflects a simple failure of the social imagination to devise effective, nonviolent methods for resolving underlying conflicts. For present purposes, I will simply assumewithout argumentthat such thinking is unduly optimistic.

38 The proverbial "bad man," unconcerned with either what is morally right or with obeying the law apart from the consequences of getting caught, would ask a further question: If I obey the order despite doubts about its legality, will I later be seen to have acted under circumstances allowing me to know better? If I conclude that my legal error would be considered unreasonable, I must ask my superior to reassess it, in light of the negative consequences we will both face. For a famous argument that the law should assume that it is largely dealing with such "bad" men, see Oliver Wendell Holmes, "The Path of the Law," 10 *Harv. L. Rev*. 457, 459 (1897).

issued to American soldiers during Operation Desert Storm did just this, describing their legal duties as more demanding than they actually were. The superior orders defense went unmentioned, as if it did not exist; and soldiers were expressly instructed: "Orders Are Not a Defense."[39]

In other words, training material made no distinction between legally inexcusable conduct (i.e., conduct that is unlawful on its face) and excusable conduct. Rather, troops were simply instructed, "although you are responsible for promptly obeying all legal orders . . . you are obligated to disobey an order to commit a crime,"[40] that is, any criminal order. In essence, then, American soldiers are being taught that there is no excuse for "obedience to illegal orders," even where their error was reasonable or the order's criminal nature not manifest. They are being taught that they must disobey all unlawful orders, even if their unlawfulness cannot reasonably be discerned in the circumstances.[41]

The highly simplified version of applicable law that soldiers now learn reveals that they are currently taught a *conduct rule* considerably less forgiving of possible errors than the actual *decision rule* by which their conduct would later be judged at trial.[42] In one special respect, at least, this fact is highly telling. Our willingness to instruct our soldiers in this fashion persuasively rebuts the claim, long made by traditionalists,[43] that restricting the legal duty of obedience would necessarily lead to a breakdown of good order and discipline,

39 Dept. of the Army, U.S. TRADOC, *Your Conduct in Combat Under the Law of War*, Field Manual 27-2, 26 (1984). On the other hand, it appears that basic training of enlisted personnel does not

generally include this caveat, and that they are often instructed to "obey all orders without question." Thomas Ricks, *Making the Corps* 56 (1998) (quoting a Marine drill instructor addressing new recruits at Parris Island).

40 *Id*.

41 In fact, international law is less demanding, i.e., to the extent that there is any settled law on the matter.

42 On the difference between conduct rules and decision rules, see Meir DanCohen, "Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law," 97 *Harv. L. Rev*. 625 (1984).

43 See generally Lt. Col. Gary Solis, *Son Thang: An American War Crime* 95 (1997) (quoting Brig. Gen. Edwin H. Simmons: "In many cases, the better the Marine, the less apt he would be to challenge an illegal order.")

and a resulting parade of horrors. The fact that this has not happened seriously weakens the traditionalist's claim.

Now contrast the role of practical judgment under the reasonable error rule with its role under the manifest illegality rule. The latter rule all but excludes judgment from the soldier's decision whether to obey a superior's order. The rule's basic norm, *obey all orders*, and its exception, *unless they entail atrocities*, are cast as bright-lines rules. The exception makes contextual circumstances irrelevant to deliberation, since atrocities are virtually defined as acts manifestly illegal under all circumstances.

The reasonable error rule, by contrast, encourages the exercise of practical judgment, both in applying both the basic norm and its exception. The basic norm, *obey lawful orders only*, may require the soldier to apply a bright-line rule or general standard. This depends on which legal norm is pertinent to evaluate the order he receives. Applying a general standard requires attention to factual details of the situation at hand, and some perceptive discernment regarding their relative significance. This is the essence of practical judgment.44

The exception to the basic rule encourages similar perceptiveness about the actual situation confronted: it requires the soldier to ask whether his contemplated conduct, if it proves to have been based upon an error, will appear reasonable. The decision rule, by which his conduct will later be judged, might therefore inevitably enter into his deliberation over conduct. This influence need not be entirely harmful. The soldier will surely appreciate the danger that a reasonableness standard poses: the hindsight vision of his judges may be twenty-twenty.

The two approaches also differ in how they handle asymmetries of information between superior and subordinate. Under manifest illegality's bright-line rule, the law must choose *ex ante* whether the superior or the subordinate is most likely to apprise correctly the legality of a particular directive. Understandably, the law opts for the superior, in the reasonable expectation that he will more often be able to see the bigger picture, strategically speaking, more accurately. This picture is often essential to legal judgments about proportionality and military necessity. The "context" for judgments by the front-line

44 Charles Larmore, *Patterns of Moral Complexity* 821 (1987); Martha Nussbaum, *Love's Knowledge* 6675 (1990).

infantryman, after all, often consists only of the few dozen yards ahead of him and the hundred yards behind him.

But the choice between absolute supremacy for superior or subordinate (and the rule-consequentialism it implicitly accepts) is unnecessary if the law shifts to greater reliance on a general standard of reasonableness. There are some situations, after all, when the subordinates in the field have greater information than their superiors back at camp, and this information cannot be communicated to superiors before action must be taken.[45] Officers are taught to expect the unexpected, because "no battle plan survives contact with the enemy."[46]

Sometimes this will merely require acting beyond the scope of orders, because the situation confronted is unlike that contemplated by superiors. In fewer cases, it will even demand conduct directly contrary to the express terms of orders. Military thinkers have long recognized the occasional necessity for disobedience of this sort, as the next two chapters reveal.

45 Moreover, as two military analysts shrewdly observe, "In war, as in other human activities, the more competent an individual, the less information he will require in order to act as he should. That is often because excellent people impose their agenda on others by taking the initiative. Weak decision makers, for their part, never seem to have enough informationperhaps because they want the situation to dictate their decisions. They often get their wish." Paul Seabury and Angello Codevilla, *War: Ends and Means* 11 (1989).

46 De Landa, *supra* note 1, at 82.

19
Misreading Orders Morally

Remember, gentlemen, an order that can be misunderstood will be misunderstood.1

This seemingly sensible remonstrance confronts a major problem. Superiors often have good reason to leave their orders ambiguous in key respects. Virtually any such ambiguity can, in turn, become the basis of a subordinate's unwitting or sometimes willful misinterpretation. There "are ways of responding to an order short of obeying it," as Walzer observes.2 These include "postponement, evasion, deliberate misunderstanding, loose construction, and overly literal construction."3

Walzer could have added psychiatric collapse, both real and feigned, for this has been a particularly frequent (and apparently increasing) source of noncompliance with difficult or disagreeable orders.4 Even overt disobedience can itself take many forms, from the polite recusal to "fragging" the order-giver.5 A careful exploration of Walzer's taxonomy and useful additions to it would employ diverse

1 Robert Heinl, Jr., *Dictionary of Military and Naval Quotations* 226 (1966) (quoting Helmuth Von Moltke, the Elder).

2 Michael Walzer, *Just and Unjust Wars* 314 (1977).

3*Id*.

4 Chris Hables Gray, *Postmodern War* 59 (1997). Freud himself observed this relationship. "The war neuroses which ravaged the German Army [in the First World War] have been recognized as being a

protest of the individual against the part he was expected to play . . . the hard treatment of the men by their superiors may be considered as foremost among the motive forces of the disease." Sigmund Freud, *Group Psychology and the Analysis of the Ego* 27 (James Strachey ed. and trans., 1959) (1922).

5 "Fragging" refers to the murder of NCOs and junior officers by enlisted personnel. Several dozen such incidents occurred during the Vietnam War, particularly "after inexperienced officers had given what the men considered to be impossible orders." Peter Watson, *War on the Mind* 246 (1978).

examples from military history to show where and why each form of noncompliance proves most effective, in the face of unlawful or imprudent orders. Since such a detailed study does not exist, we must approach the subject in a more *ad hoc* fashion.

Like rules and regulations, orders themselves vary greatly in their intended degree of specificity, depending on the breadth of their goals and the desired degree of decentralization. Discrete goals of limited complexity can be formulated into orders that are verbally precise. More capacious goals require language that is more diffuse.[6] In the middle and upper reaches of an army, as in any large organization, many of the most important directives received from the top are inevitably cast in very general terms. It is only through such generality that delegation of authority is possible.[7]

Generality entails ambiguity, however. There will often be several alternative means to achieve the director's aims. Those who accept responsible positions in large organizations necessarily accept responsibility for determining, within the scope of their lawful discretion, the most suitable means for attaining their superiors' objectives. They also accept responsibility for failing to achieve these objectives, despite the directive's not having specified steps that could have led to greater success. One Army major captures these vicissitudes with poignant modesty:

> The last job I really understood was being tank platoon leader in combat. As I progressed upward, the ethical environment became more murky . . . less subject to specific rules and simple solutions. However, an officer's usefulness to the nation and overall credibility is fundamentally affected by his ability to enter an environment where absolutes are

6 Fred Schauer, "Authority and Indeterminacy," in *Authority Revisited* (NOMOS: XXIX), (J. Roland Pennock and John W. Chapman, eds., 1987).

7*Id*. Policy decisions to curtail such delegation thus often take the form of replacing general standards with more precise rules. The law of medical malpractice has moved increasingly in this direction in recent years, as physicians often must now show that they have followed more standardized procedures, often mandated by insurers, in order to establish their compliance with the duty of reasonable care.

hard to find, and still make wise and ethical decisions.[8]

Certain kinds of military operations, such as maneuver warfare, simply cannot be scripted in detail from above in advance of execution. For such operations, orders will necessarily be cast in general terms. When quick action is necessary, "in issuing orders brevity is the rule," as General Creighton Abrams observes.[9] This is especially true at higher levels of the organization. "The higher the commander," a famous German officer notes, "the shorter and simpler the orders must be."[10] Thus, the combination of urgency and a chain of command conspire to ensure that many orders will not be highly detailed. And such generality inevitably means, from the subordinate's perspective, "indeterminate orders lacking specific instructions."[11]

Even when superior orders are precise, letter-perfect compliance with their terms is precisely what is not expected, *ex post*. At the higher ranks, especially, "the letter of an instruction does not relieve him who receives it from the obligation to exercise common sense," reports Gen. S.L.A. Marshall.[12] One must also grasp "the spirit of the order"[13] to achieve the commander's intent.

Ambiguous Orders and the Common Soldier

Deliberate ambiguity in the wording of orders often leads atrocity by bureaucracy to blur into atrocity by connivance. How such

8 Maj. Gen. Clay T. Buckingham, "Ethics and the Senior Officer," in Lloyd Matthews and Dale Brown, eds., *The Challenge of Military Leadership* 135, 138 (1989).

9 John Sorley, *Thunderbolt: General Creighton Abrams and the Army of His Times* 56 (1992). See also Maj. James Morningstar, "Creating the

Conditions for Maneuver Warfare," 75 *Mil. Rev*. 36, 39 (1995).

10 Field Marshall Helmuth Graf von Moltke, 2 *Militaerische Werke* (1892), quoted in *Warrior Words* 306 (Peter Tsouras, ed., 199).

11 Dept. of the Army, *Small Wars Manual* (1940), in Thomas Ricks, *Making the Corps* 184 (1998).

12 Gen. S.L.A. Marshall, *The Officer as Leader* (1966), in Peter Tsouras, *Warriors' Words* 307 (1992).

13*Id*.

ambiguity affects liability is also a decisive practical concern for both superior and subordinate.

For a common soldier to be liable for disobeying a superior's order, the order must attain a reasonable degree of specificity, according to the military law of most Western nations. Such an order, as one military lawyer writes, "is a specific mandate to do or refrain from doing a particular task . . . It must particularize the conduct expected, or there cannot be any offense against it: an order to . . . perform one's duties [for instance] does not meet this requirement."14

Legal ambiguity thus has very different effects on the potential liability of superiors and subordinates. For subordinates, it is exculpatory; for superiors with decision-making capacity, it is not. This is of considerable practical importance, because any order calling for atrocities is likely to be willfully opaque.

From a jurisprudential standpoint, the relation between the letter and the spirit of an order calling for atrocities is therefore quite complex. When superiors wish to order atrocities, they have a strong self-interest in communicating their commands indirectly, and in conveying their intention without providing the subordinate, if later prosecuted by enemy forces, with a defense inculpating those issuing them.

To take a relatively recent example, in 1989 at Tiananmen Square, "troops were simply instructed to empty [the] Square of demonstrators as quickly as possible."15 Their orders stated that soldiers and policemen "had the right to use all means to forcefully dispose of those who defy martial law regulations."16 Such "vague

language was probably deliberate," notes one scholar of Chinese politics, "since no one wanted to assume direct responsibility for the decision and any resulting bloodshed."[17]

14 Edward M. Byrne, *Military Law* 143 (3d ed. 1981); see also *United States v. Bratcher*, 39 C.M.R 125, 18 C.M.A. 125 (1969).

15 Andrew Scobell, "Why the People's Army Fired on the People: The Chinese Military and Tiananmen," 18 *Armed Forces & Soc'y* 193, 200 (1992) (citing Melanie Manion, "Introduction," in *Beijing Spring, 1989: Confrontation and Conflict* xxxix (Michael Oksenberg et al., eds., 1990).

16 Xinhua, "Martial Law Troops are Ordered to Firmly 'Restore Order,'" *China Daily*, (June 5, 1989), at 1.

17 Scobell, *supra* note 15, at 200.

Thus, a key problem with requiring that an order be manifestly criminal on its face, in order to hold subordinates liable for obeying it, is that this approach easily permits the superior officer who desires atrocity to formulate his orders in ways that ensure that soldiers obeying them are excused from criminal liability. It takes no great measure of verbal artistry to do this, for the slightest vagueness in his orders will generally introduce enough doubt about their unlawfulness in the mind of the average soldier to excuse his obedience to them. This is because the manifest illegality rule authorizes soldiers to resolve all legitimate doubts about legality in favor of obedience.[18]

By couching his order imprecisely, the criminal superior can deliberately foster such doubts, where a clearer order would not. In this way, the superior greatly increases the likelihood that inferiors will be immunized from punishment.[19] This is true even when surrounding circumstances make clear that the orders call for atrocities or other war crimes, as long as these orders do not do so immediately on their face. Surely the law should permit fact finders to pierce the veil of an order's deliberate and superficial vagueness in

[18] Civilian criminal law handles very differently doubts about the legality of an act that may cause serious harm to persons. Hence, if a hunter has some doubt that the animal he is stalking in the forest really is a deer, for instance, and he fires on it without first clarifying such doubt, then he is culpable for negligent manslaughter if the animal turns out to be a man. His doubts are inculpatory, not exculpatory, because (unlike a soldier who has received superior orders to fire) he has no prima facie duty to shoot. Guillermo J. Fierro, *La Obedencia Debida en el Ámbito Penal y Militar* 98 (1984).

19 This aspect of the manifest illegality rule does not apply when the military subordinate receives his authorizations from civilian superiors, i.e., those not above him in the military chain of command. Thus, Oliver North defended his conduct on the basis of a Model Penal Code provision applicable to civilians who reasonably rely on statements of their legal duties by official authorities. In this context, the law rightly expects much greater specificity in the formulation of orders calling for unlawful acts and expects doubts about legality to be resolved in favor of disobedience. Hence one of the jury instructions the trial court gave in the Oliver North case stated: "Authorization requires clear, direct instructions to act at a given time in a given way. It must be specific, not simply a general admonition or vague expression of preference . . . A person's general impression that a type of conduct was expected, that it was proper because others were doing the same, or that the challenged act would help someone or avoid political consequences, does not satisfy the defense of authorization." *U.S: v. North*, 910 F.2d 843, 885 (D.C. Cir. 1990).

search of what the superior is really saying to his subordinate. The requirement of manifest illegality, if taken seriously, makes this extremely difficult to do.

This inclination toward vagueness in formulating commands may reflect a more general tendency of superiors when contemplating how responsibility may be ascribed *post facto*. "It has been a habit of generals," writes Vagts, "to word their orders in such an oracular fashion that victory, if it comes, can be traced to them, while failure, if it befalls, can be excused as a misreading by those lower in command."[20] We must ask: Exactly how is this done, as a matter of verbal draftsmanship? And how can military law effectively minimize the latitude for such efforts to misallocate responsibility, especially for atrocities?

During the American Civil War, General William Sherman ordered his troops, who carried few edible supplies, to "forage liberally" when in need of food or fuel.[21] It quickly became clear that Sherman would not punish arson or indiscriminate pillage by his troops. The meaning of "liberally" came to be understood accordingly. One soldier, ransacking a civilian storeroom, was even heard to shout "forage liberally," to the general laughter of his comrades.[22] What we see here is simply the downward extension, to the lowest reaches of the armed forces, of methods for evasion of accountability long practiced at the highest levels of executive policymaking.

Testimony before South Africa's Truth and Reconciliation Commission laid bare the necessarily elusive path by which the Army adopted its criminal methods of suppressing anti-apartheid resistance. General Joep Joubert, in applying for amnesty for his

role in planning several assassinations, testifies that he had sought approval for his plan from another general, the head of defense forces, at a cocktail party. Later the same day, his superior, retired Gen. Janie Geldenhuis, said that he would never have approved General Joubert's plan. But

20 Alfred Vagts, *A History of Militarism* 22 (1937).

21 Peter Karsten, *Law, Soldiers and Combat* 83 (1978) (quoting Special Field Order No. 120). Gen. Sherman was himself a lawyer, and had a judge advocate on his staff. Maj. Wm. Hays Parks, "The Law of War Adviser," *18 Mil. L. & L. of War Rev*. 357, 397 (1979).

22 Karsten, *supra* note 21, at 83.

he agreed that General Joubert had spoken to him about a "very vague" plan. He said the other general might have been under the impression that he had been given approval.23

This example shows how the conceptual niceties of my typology, in identifying distinct sources of atrocity with which the law must correspondingly cope, quickly begin to dissolve in analyzing actual cases. Thus, one might reasonably ask of the situation described by General Joubert: Is this a case of atrocity by bureaucracy or by connivance? His account surely suggests elements of both. Of course, the heuristic value of ideal-types never lies in pigeonholing the infinite variety of human experience into a neat set of water-tight cubby holes.24

Consider, in more detail, another relatively recent example of willfully ambiguous orders suggesting connivance between superior and subordinate. The decision to employ covert operations in American foreign policy was long conducted under the legal authority of National Security Council directives codifying the doctrine of "plausible deniability."25 According to the initial version of that doctrine, covert operations should be "so planned and executed that any U.S. Government responsibility for them is not evident to unauthorized persons and that if uncovered the U.S. Government can plausibly disclaim any responsibility for them."26

But the doctrine came to be more broadly construed to allow the National Security Council and the Central Intelligence Agency officials to keep vital information from the President, so that his later

23 Suzanne Daley, "Apartheid Figure Denies His Intent Was Murder,"

N. Y. Times, (Oct. 19, 1997), at A4. For an explicit judicial finding of atrocity by connivance, see the recent finding against Dusko Tadic by the International Tribunal for the former Yugoslavia. Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia Since 1991 (*Prosecutor v. Dusko Tadic*), 1997 Int'l Tribunal (IT-94-1-T) at 147 (May 7) (concluding that Tadic's actions "clearly occurred with the connivance or permission of the authorities running these camps and indicate that such acts were part of an accepted policy toward prisoners").

24 On the purpose and value of this method within social science, see Thomas Burger, *Max Weber's Theory of Concept Formation: History, Laws and Ideal-Types* 13540, 17579 (1987).

25 In 1948, NSC-4/A, expanded by NSC-10/2, provided the President's first formal authority for covert operations in the postwar period.

26 John Prados, *The Presidents' Secret Wars* 29 (1986) (internal quotation omitted).

denials of their activities would appear more plausible. Presidents sometimes found this interpretation of plausible deniability all too convenient as a mechanism for shifting blame when covert policies failed and the U.S. government's involvement was publicly revealed. A doctrine initially conceived as a way of keeping the targets of covert operations unaware of any American role was thereby reconceived as a way of keeping the Commander-in-Chief himself from acquiring knowledge that would give him the requisite mental state. As the Church Committee rightly described it, the doctrine so conceived "is the antithesis of accountability."[27]

The doctrine not only undermined the accountability of the President both to Congress and to the American public. It also undermined the accountability of the President's subordinates in the national security apparatus. The committee concluded,

> Permitting specific acts to be taken on the basis of general approvals of broad strategies . . . blurs responsibility and accountability. Worse still, it increases the danger that subordinates may take steps which would have been disapproved if the policymakers had been informed. *A further danger is that policymakers might intentionally use loose general instructions to evade responsibility for embarrassing activities*.[28]

This danger in turn "generated confusion regarding the exact nature of the order given" in at least two major covert operations.[29] In refusing to insist upon clarification of the orders they received or to report the precise nature of their activities in compliance therewith, subordinates thought they were fulfilling their duty to ensure that the policy embodied in those orders could remain plausibly deniable.

27 Alleged Assassination Plots Involving Foreign Leaders, An Interim Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, S. Rep. No. 465, at 27778 (1975).

28*Id*. at 278. (emphasis added).

29 Boyd M. Johnson, III, "Executive Order 12,333: The Permissibility of an American Assassination of a Foreign Leader," 25 *Cornell Int'l L.J*. 401, 405 (1992).

They were to some extent correct in thinking that this was precisely what their superiors hoped of them.30

The doctrine of "command responsibility" can effectively minimize the latitude for such efforts to misallocate responsibility, especially for atrocities. It allows courts to deem that a commanding officer, by accepting a position in the chain of command, assumes legal responsibility for preventing atrocities by his subordinates and for protecting them from unreasonable risk.31 If he negligently fails to do so, he is liable.

Recent technological innovations, when working effectively, greatly increase the commanding officer's ability to monitor the movement of his troops.32 In turn, these technical advances enable the law to expect a high level of awareness concerning the conduct of his subordinates at the front. The officer's knowledge that the doctrine of command responsibility will be applied to him for atrocities by his troops ensures that he will not indulge the hope of escaping liability for such misconduct on account of any ambiguity in the orders he gives them.

Giving Orders by Hints, Intimation, and Suggestions

For communicating among members, all effective organizations rely on their informal methods no less than on their formal structure. What orders are to the latter, "suggestions" often are to the former. Suggestions can also be inexplicit. They are no less significant for

30 The doctrine of plausible deniability, at least in relations between the President and Congress, was formally abandoned in 1974, through the Hughes-Ryan Act. But neither that Act nor its successors, such as

the Intelligence Oversight Act of 1980, proved a panacea, as the Iran-Contra affair revealed soon thereafter.

31 For a recent example of punishment for the latter, see Eric Schmitt, "Defense Chief Details Faults of General in Saudi Bombing," *N. Y. Times*, Aug. 1, 1997, at A1 (describing denial of promotion to Brig. Gen. Terryl Schwalier for exposing his subordinates to undue risk, resulting in the death of 19 soldiers). There was considerable disagreement within informed Air Force circles over whether such harm could have been avoided by Gen. Schwalier, given recurrent resistance by Saudi authorities to prior United States proposed expansions of the security area surrounding the compound, which was destroyed by terrorists in June 1996. *Id*. at 13.

32 George Friedman and Meredith Friedman, *The Future of War* 38485 (1997).

being so. This lack of explicitness, though integral to informal social life, creates problems for allocation of legal responsibility.

Sometimes the manifestly illegal nature of an order will be clear enough, but its status as an order will not. A subordinate who disobeys his superior's instructions cannot be convicted of disobedience if they "lack content,"[33] that is, if they "fail to provide a clear enough mandate."[34] In other words, he is immune from legal liability if the superior's directive is couched as "mere advice," rather than a "positive command."[35] The recipient wishing to disobey such instructions can profit from this fact because there are many situations where superiors will prefer to couch their directives indirectly.

During the Vietnam War, for instance, "the diffusion and frequent uncertainty of lines of authority led to a tendency . . . to couch even straightforward military orders in terms of 'requests.'"[36] The need to preserve good diplomatic relations among allies required such tactfulness, and therefore verbal indirection. A United States commander could not issue orders to Australian, Thai, South Korean, or Nationalist Chinese troops, despite the frequent need for coordinating their activities with American forces. Often, the American commander would also need approval from one or more South Vietnamese province chiefs for a particular artillery mission; he had no formal authority to demand it.[37]

This uncertainty about a statement's legal authority has subtle, but important, implications for the scope of the superior orders defense.[38] On one hand, such a directive can be more easily

33 David Schlueter, *Military Criminal Justice: Practice and*

Procedure 78 (1996).

34*U.S. v. Beattie*, 17 M.J. 537 (A.C.M.R. 1983). See also *U.S. v. Couser*, 3 M.J. 561 (A.C.M.R. 1977); *U.S. v. Oldaker*, 41 C.M.R. 497 (A.C.M.R. 1969).

35*U.S. v. Mitchell*, 6 C.M.A. 579, 20 C.M.R. 295 (1955).

36 Martin van Creveld, *Command in War* 24344 (1985).

37*Id*. One experienced officer, Robert F. Turner, notes, "It was often wiser to express 'wishes.'" Correspondence with author, 1997. On the inevitability of "command by negotiation" during multilateral peace operations, see Hilaire McCoubrey and Nigel White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* 132 (1997).

38 For a leading case examining this question in a peacetime context, see *United States v. Cherry*, 22 M.J. 284 (C.M.A. 1986). An Army private, operating a truck with periodic but apparent brake problems, complied with his superior's

(footnote continued on next page)

circumvented, since the subordinate can later claim that it was never really a legally authoritative order at all. He can also insist on clarification, moreover, asking his cryptic superior, "Is that an order?" Soldiers in such circumstances have sometimes done so, according to reported cases.39

On the other hand, the status of a superior's directive as something less than a formal order deprives the subordinate who obeys it of presumed ignorance about its unlawfulness. He is excused from nonatrocious crimes committed in obedience to orders, but not in conformity with requests or suggestions. Both of these facts should work to reduce the deference shown by subalterns to superior's calls for manifestly illegal actions.

At first glance, a hint seems the very "opposite of an order," as a prominent psychoanalyst writes.40 Orders "can only be submitted to or rejected."41 But a hint "invites interpretation"42 and, in this way, can "be easily used" or "made something of" for a wide variety of purposes.43 Like innuendoes and insinuations, moreover, hints are deliberately conveyed covertly. Young adults undergoing professional socialization areas any law professor can readily attestparticularly susceptible to even the most indirect "suggestion," in the psychiatric sense of the term.44

"Not everything may be intended as a hint," Phillips writes, "but anything might be experienced as one."45 When a military subordinate wishes not to follow a wrongful order, he can claimif later accused of disobediencethat he took his superior's utterance to be merely a

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"directive" to continue driving, resulting in the death of two other people. The private was convicted of involuntary manslaughter and aggravated assault. His superior's statement was found not to constitute an order within the legal meaning of the term. Had it been so classified, the private's obedience to it would certainly have been legally excused, since both the order itself and the act of compliance with it were merely negligent, not manifestly criminal on their face.

39*U.S. v. Kinder*, A.C.M. 7321, 742, 747 (1953).

40 Adam Phillips, *The Beast in the Nursery* 96 (1998).

41*Id*. at 111.

42*Id*. at 96, 107, 111.

43*Id*. at 107, 111,.

44 John Schumaker, ed., *Human Suggestibility: Advances in Theory, Research, and Application* (1991).

45 Phillips, *supra* note 40, at 90.

suggestion or hint. This will often be entirely plausible, since the superior's self-interest lies in concealing his actual intent to order, that is, his intention that the subordinate treat the statement as if it were a command. A "real" command, after all, would make the superior into the "principal," in the law's eye, and therefore clearly liable as perpetrator of the resulting crime.

The converse proposition is also true, however. A hintthat is, a genuine hintcan sometimes be sincerely mistaken for an order, one that is merely conveyed indirectly. The subaltern might simply attribute the verbal indirection to his superior's haste or inarticulateness.46 Courts cannot casually ascribe the superior's indirection to willful euphemism and a desire to evade responsibility.

Even where the court sides with the superior on this issue, interpreting his statement as something less than a command, however, he isn't necessarily off the hook. He may still be liable as an accessory, that is, insofar as his hinting became so assertive as to constitute "instigation."47 Still, most hinting would not rise to this level. (Only "general staff" officers would often be liable here, for they greatly influence what the "line" commander does, without ever issuing orders.48)

In the face of such verbal stratagems and counter-stratagems, it is often extremely difficult for a fact-finder to discern what messages, if any, were actually passed from the mind of superior to subordinateand which were the latter's concoction, sincere or otherwise. For this reason, the law generally takes refuge in "objective" standards, asking the juror how a reasonable person in

the subordinate's place would have interpreted the superior's words and true intent.

46 To treat an order, or any kind of rule or instruction, as merely suggestive," Phillips observes, "to turn it into something a little more to one's tasteis to radically alter the nature of authority," i.e., the authority its author claims. *Id*. at 112.

47 To be liable as an instigator, one must "incite, arouse, stir up, encourage, goad, or persuade" the perpetrator to commit his crime. *Black's Law Dictionary* 799 (1990, 6th ed.). None of these words suggest anything close to an authoritative command. An accessory receives a lesser sentence in many legal systems within the "civil law" world.

48 Capt. Russell Fontenot, "Development of the Staff Legal Officer's Responsibility Under the Law of War," 14 *Mil. L. & L. of War Rev*. 69, 8185 (1975).

These verbal nuances are by no means the hair-splitting of classroom hypotheticals. Ambiguities about the formally binding status of superiors' statements proved quite problematic in the prosecution of Argentine military officers for human rights abuse during the dirty war. Junta members claimed to have formally ordered only the lawful aspects of the "war against subversion."[49] This left their subordinates, particularly members of the death squads, without the essential predicate for raising a defense of superior orders. Even if orders calling for atrocities are manifestly illegal (and so outside the scope of the superior orders defense), the juntas claimed they had never formally issued any such orders in the first place.

There was also no "paper trail" to prove them wrong. What almost certainly happened is that the formal orders, ambiguously worded, were accompanied by more informal intimations of what the juntas actually intended.[50] But it was by no means easy to establish with admissible evidence that these true intentions fell within the terms of what had been formally ordered. The illicit intentions certainly were not legible from the face of such orders.

Particular orders always have to be read in the more general light of standing orders, such as rules of engagement and other military rules and regulations. This creates the likelihood of conflict between the demands of various duties. To be sure, these supplementary authorities will sometimes insist, as did Soviet regulations for a time, that orders "can never be treated in 'too formal a manner'" and must "be carried out just as written down, without any deviations."[51]

49 Mark Osiel, "The Making of Human Rights Policy in Argentina,"

18 *J. Lat. Am. Stud*. 135, 16869 (1986).

50 Author's interviews with Argentine prosecutors, August 1987, Buenos Aires.

51 Herbert Goldhamer, *The Soviet Soldier* 14344, 173 (1975) (quoting Soviet military regulations). This approach was abandoned only in the final years of the Soviet Union, when Mikhail Gorbachev introduced reforms calling for greater decentralization in military decision-making. Yang Zhong, "The Transformation of the Soviet Military and the August Coup," 19 *Armed Forces & Soc'y* 47, 52 (1992). Even when more stringent notions of formal hierarchy prevailed within military law, many forms of disobedience, including physical assaults on officers, were not uncommon. Richard A. Gabriel, *The Mind of the Soviet Fighting Man* 2528, 6971, 11114 (1984). Moreover, Soviet military law

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But such seeming rigor only makes it easier to circumvent the purpose of an order that euphemistically seeks atrocities without explicitly describing them. After all, punctilious adherence to the letter of bright-line work rules is often one of the most effective ways of subverting their drafters' purpose. Striking employees have long used this tactic of ingenuous scrupulosity to their considerable advantage in conflicts with management.52

Consider in this light, for instance, the statement of Russian Maj. General Ivan Babichev in stopping his advance, after unarmed Chechen civilians blocked its tanks. He announced to a Reuters TV crew, citing chapter and verse of the legal authority for his division's march on Grozny, "Article 5 of the President's decree says that we shouldn't shoot at civilians or send our tanks against civilians."53 In other words, the order to retake the city of Grozny had been ambiguous with respect to an unanticipated eventuality: massive, nonviolent civilian resistance. President Yeltsin had deliberately introduced such ambiguity into the orders he issued to the army, according to political analysts, to be able to dissociate himself from their more aggressive actions, particularly if these harmed civilians.54

According to the manifest illegality rule, reasonable doubts about the legality of an order are be resolved in favor of obeying it. But this is not true of doubts about the meaning of the order, that is, about whether the issuer intended to order a war crime. Where his wording permits two readings of his intentone lawful, one notthe subordinate's duty is to adopt the interpretation that will allow the order to be obeyed lawfully.55 This means that if the recipient desires not to commit a war crime, he has every incentive to

redescribe doubts about the order's legality into doubts about its meaning. This

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adhered to the manifest illegality rule, for it provided that the soldier "incurs no responsibility for the crime, which is that of the officer, except where clearly criminal, in which case the soldier is responsible with the officer who issued the order." V. M. Chkhikvadze, *Sovetskoe Voenno-Ugolov-moe Prava* (1948), quoted in Morris Greenspan, *The Modern Law of Land Warfare* 491 (1959).

52 Reinhard Bendix, *Work and Authority in Industry* 445 (1956).

53 Alessandra Stanley, "Russian General Halts His Tanks As Qualms Over Rebellion Grow," *N. Y. Times* (Dec. 17, 1994), p. A1.

54 Dimitri Simes, lecture at the University of Virginia, July 12, 1996.

55 The logic and structure of this obligation closely resemble that of judges' obligations to adopt the reading of a statute that is consistent with the Constitution and other background law.

is often very easy, given the deliberate ambiguity with which such orders are now increasingly couched.

The Duty to Seek Clarification and Written Reiteration

Training manuals encourage future officers to repeat back any oral order they receive to its sender, where circumstances permit, to ensure that they have heard it correctly. Often, they will inevitably paraphrase it, i.e., reformulate it in their own words. This process can often make it more difficult for superiors to communicate unlawful purposes by intimation and innuendo.

Moreover, when subordinates receive directives appearing to order atrocities, they may also insist upon clarification of the directive. The military codes of some societies specifically encourage this inquiry.[56] The request will often fail to elicit the required specificity. For instance, Captain Ernest Medina is unlikely to have responded, had he been asked, that "By 'waste them' I mean that you should kill every man, women and child, even if obviously a noncombatant."[57]

Failure to elicit the desired specificity should make the recipients of an order more cautious. Instructional manuals for the junior officer place the burden on him "to assure himself that he understands the orders issued to him."[58] To this end, he may have to seek clarification of ambiguous wording, or at least reiteration, as some military codes provide.[59]

56 U.S. Army Regulation 35030; Army Subject Schedule 271, at 1112. See also the Chilean Military Code, Art. 335 discussed in Rafael Mackay Barriga, *El Delito de Desobediencia en el Código de Justicia Militar de Chile* 57 (1965).

57 One witness claims, however, that when asked: "Do you mean women and children, too?" Medina actually responded, "I mean everything." Lt. Col. Dave Grossman, *On Killing* 190 (1995). Lt. Calley first told his subordinates, after they had lined up the village's women and children: "You know what to do with them." Ten minutes later he returned and asked, "Haven't you got rid of them yet? I want them dead. Waste them." Maj. Jeffrey F. Addicott, "The Lessons of My Lai," 30-31 *Mil. L. & L. of War Rev*. 73, 86 (1991-92).

58 U.S. Marine Corps, *Small Wars Manual* 69 (1940).

59 This is true of the Greek code, for instance. Sahir Erman, "Compliance with Superior Orders Under Domestic Criminal Law and Under the Law of War," 10 *Mil. L & L. of War Rev*. 371, 375 (1971).

To similar effect, other codes require that certain orders be in written form if the subordinate is to be excused from liability for the resulting crime. By basing exculpation on the subordinate's possession of written instructions, this rule creates powerful incentives to request instructions in that form, whenever the lawfulness of the order is in serious question. Superiors will often be reluctant to leave any such paper trail. Their rejection of the request also sends a clear signal to subordinates about what their commander himself thinks of the order's legality.

Some will object that it is unrealistic to expect soldiers, even officers, to insist upon written reiteration of such an order. Requests for oral clarification or written reiteration, however, need not be couched as an explicit challenge to authority. They are more prudently (and thus most likely to be) pitched with a certain ingenuousness. In this way, the soldier's feigned naïveté about his superiors' intentions cannot credibly be treated as a threat of insubordination.

The soldier's posture of ignorance, whether genuine or affected, also sends a clear signal up the chain of command that not all soldiers understand the "rules of the game" as their superiors wish it played. The troops' rejection of illegal orders can be effectively communicated via a simple request for clarification. This delivers the message that the troops cannot be trusted to keep their silence under all foreseeable scenarios. After all, both the post-war German trials of military subordinates and the more recent Argentine and Bosnian ones show that those occupying even rather lowly echelons have reason to anticipate the possibility of later sanction.

One need not dig very deeply into military history to find periodic instances of the conduct the law should encourage here. In the Second World War, for instance, a Japanese colonel who was a hero of the Bataan campaign insisted upon written reiteration of oral orders from superiors demanding that he "kill all prisoners and those offering to surrender."[60] While waiting for the superiors' reply, he ordered his men to release their prisoners, allowing them to escape into the jungle.[61] In the First World War, a French battery commander refused, without written order, to fire on French troops who had

60 Karsten, *supra* note 21, at 114.

61 *Id*.

disobeyed orders to leave their trenches for combat.[62] General von Schlieben disobeyed Hitler's order to destroy Paris,[63] just as in the American Civil War, Colonel William Peters disobeyed an order to burn the city of Chambersburg.[64] There is reason to suspect that officially recorded history has captured only a very small subset of all such incidents.

To be sure, many episodes throughout the contemporary world suggest that a number of officers, particularly but not exclusively in the Third World, continue to believe in the inevitability of atrocities, perhaps even in their desirability, at least in the most exigent circumstances.[65] This necessity may even be part of a tacit understanding shared by many professional men in arms. But the hostile public reaction to evidence of atrocities has also led officers to realize that this tacit commitment is something civilians could never understand. Hence the troops, conscripted civilians or short-term enlistees, are also suspect: they are scarcely more likely to comprehend the periodic need for such third-degree measures than members of the general public.

The practical result is that in an international climate of enhanced ethical sensibility, the call for atrocities must remain unspoken or spoken only in euphemisms, and certainly unwritten. Writings that expressly order atrocities result in considerable legal risks for superior and subordinate alike. American soldiers are today expressly instructed to be wary of superiors' euphemisms in this connection. They are told, "Soldiers who kill captives or detainees

62 This incident is described in a fictionalized account by Humphrey Cobb, *Paths of Glory* (1935), and in Stanley Kubrick's memorable film of the same title (Metro-Goldwyn-Mayer 1957).

63 Gen. Dietrich von Choltitz, the Wehrmacht commander in chief, similarly refused to obey Hitler's order. Martin van Creveld, *The Transformation of War* 89 (1995).

64 Karsten, *supra* note 21, at 44.

65 Perhaps because they do not face such choices themselves, leading military scholars are prepared to acknowledge that "morality may not go nearly as harmoniously with military effectiveness as we would wish. In dirty wars like Algeria, Vietnam, or the Intifada, torture and selective murder may help fulfill the mission." Letter from Eliot A. Cohen. Cohen adds that "we should in almost all cases choose morality . . . but should not delude ourselves about the price." *Id*. Telford Taylor's example is the situation most often mentioned in this connection. Reports of such situations are not uncommon.

cannot excuse themselves from the acts by claiming that an order 'to take care of' a captive or detainee was understood to mean 'execution.'"[66]

The Kantian publicity principle has some real-world impact here, even in highly undemocratic regimes.[67] Orders that cannot be stated explicitly and recorded in written form are less likely, in other words, to be issued at all. If they are issued, they are then less likely to be obeyed in spirit. There is nothing new in formalistic compliance with the letter of commands that are intended to induce recipients to be more assertive in fulfilling a superior's objectives than they wish to be. "Work-to-rule" has been a frequent method of labor resistance to management for generations.

66 Dept. of the Army, U.S. TRADOC, *Your Conduct in Combat Under the Law of War*, Field Manual 27-2, 26 (1984). Officers are similarly taught to avoid such ambiguous language when issuing orders. A JAG officer thus advises, for instance, "An example of an ambiguous order could be as simple as saying, "Take care of the prisoner." Do you mean for your subordinate to take him to a prisoner of war collection point or to kill him? If you want your subordinate to take him to a POW collection point, say so!" Lt. Col. Jonathan P. Thomas, "Indirect Responsibility for War Crimes," 66 *Mil. Rev*. 36, 42 (Nov. 1986).

67 Immanuel Kant, "Eternal Peace," in *The Philosophy of Kant* 425, 51825 (Carl J. Friedrich ed. and Theodore M. Greene et al. trans., 1949) (1795); see also John Rawls, *A Theory of Justice* 133, 17782 (1971).

20
Disobedience as Creative "Compliance"

The line between obedience and disobedience to orders at first appears unproblematic. But it often proves surprisingly difficult to locate in actual cases, because the successful initiative in military operations often requires going beyond the express terms of superiors' directives. A leading British general goes so far as to say, "though thousands of moralists have solemnly repeated . . . that only he can command who has learned to obey, it would be nearer the truth to say that only he can command who has the courage and initiative to *dis*obey."

This curious possibility, in turn, allows conscientious soldiers to behave both more effectively and more ethically than illegal orders at first would seem to permit. Competent subordinates will sometimes accept an order's objectives as legitimate, but reject its formulation and methods as grievously ill-considered. This situation arises particularly where developments at the front are evolving too quickly to permit adequate communication with superiors at the rear. Such situations exemplify a classic problem in principal-agent theory, one arising in quite disparate contexts.[1] In the military context, subordinates may choose (and are often wise) to read their orders in light of their "spirit," diminishing the importance of their "letter."

In this regard, subordinates behave as good lawyers and judges routinely do in applying the law to situations not contemplated by its drafters. In fact, many distinguished soldiers love to tell stories

of their having saved the day by this sort of reinterpreting of a superior's

1 John W. Pratt and Richard J. Zeckhauser, "Principals and Agents: an Overview," in *Principals and Agents: The Structure of Business* 1, 3 (John W. Pratt and Richard J. Zeckhauser eds., 1985). For a military application, see Geoffrey Brennan and Gordon Tullock, "An Economic Theory of Military Tactics: Methodological Individualism at War," 3 *J. of Econ. Behav. & Org*. 225 (1982). On the British officer quoted above, see Cathy Downes, *Special Trust and Confidence: The Making of an Officer* 107 (1991).

orders, orders which, if obeyed mechanically and uncritically, would have had catastrophic consequences.2

A leading military analyst thus writes:

> self-confident commanders have on occasion seen fit to ignore, often ingeniously, the orders of superiors in what they presumed to be the interests of victory. The most celebrated case, perhaps, is that of Admiral [Horatio] Nelson's convenient inability [professedly due to his blindness in one eye] to see a flag signal that would have prevented his destruction of the Danish fleet in Copenhagen. [Ulysses S.] Grant, during his campaigns in the West, was known to have cut his own communications so as to prevent his receipt of recalls from his superior, Halleck.

The line between "initiative" and "disobedience," Zoll continues, is often an indistinct one in practice . . . there is a long-standing tradition that commanders, despite formal orders, always retained the option of "marching to the sound of the guns."3

This "option" can even be fairly characterized as an expectation, allowing officers to be later reproached for failure to exercise it. As Zoll adds,

> The failure of Grouchy at Waterloo to do precisely that, thus ignoring Napoleon's somewhat garbled field order, has been widely criticized by military analysts since . . . A general tradition of bellicose initiative has long been part of military custom, often even in the face of a more studied prudence . . . Martial

2 See, e.g., Lewis Sorley, "On Knowing When to Disobey Orders: Creighton Abrams and the Relief of Bastogne," 101 *Armor* 6, 8 (1992) (describing Abrams' surprise maneuver, in breach of superior orders, to exploit an unexpected opportunity, where "the combat

commander hadn't been anywhere near the action all day long, and Abrams was in a far better position to assess what should and shouldn't be done."). See also Farley Mowat, *And No Birds Sang* 174175 (1979).

3 Donald Atwell Zoll, "The Moral Dimension of War and the Military Ethic," 12 *Parameters* 2, 14 (1982).

> spirit frequently is seen as more commendable than a strict interpretation of . . . formal orders.4

Sometimes this will merely require acting beyond the scope of orders, because the situation confronted is unlike that contemplated by superiors. In fewer cases, it will even demand conduct directly contrary to the express terms of orders. Military thinkers have long recognized the occasional necessity for disobedience of this sort. "If commands of the ruler are contrary to these . . . [battlefield] contingencies," counseled Chinese strategist Sun-Tzu, "do not obey them . . . "5

Sometimes, superior orders can be interpreted in ways that authorize actions beyond their express scope, but are consistent with their background purpose. Lord Nelson justified such behavior as follows:

> What would my superiors direct, did they know what is passing under my nose? To serve my King and to destroy the French I consider as the great order of all, from which little ones spring, and if one of these little ones militate against it, I go back to obey the great order.6

Lord Nelson here claims merely to be interpreting one recent order *pari passu* with other, equally binding ones. He asserts, in

4*Id*.

5 Sun-Tzu, *The Art of Warfare* 180 (Roger T. Ames trans., 1993); see also *id*. at 8889. Gen. Lyman Lemnitzer similarly counseled, "Military history provides innumerable examples of commanders, who, confronted with unforeseen circumstances, have adhered slavishly to instructions and, at best, have lost an opportunity; at worst they have brought on defeat." Quoted in Robert Fitton, ed., *Leadership: Quotations From the Military Tradition* 127 (1990).

6 A. T. Mahon, 1 *The Life of Nelson* 5663, 189191, 445451 (1897). The common law of agency has long authorized such autonomy. W. Seavey, *Agency* 40 (1964) ("If a situation arises which the agent reasonably believes was unforeseen by the principal, the agent may have the authority to do acts . . . contrary to his specific instructions, if necessary to protect the principal's interests. If he can communicate with the principal by reasonable means, he should do so. But if he cannot, and the matter appears to call for action in order to prevent the principal from suffering a loss, he has the authority to do what appears to be necessary.").

essence, that his superior has both a specific intention, reflected in the most recent order, and a general ("great") intention, that of victory, which the recent orderlike earlier oneswas intended to implement. Nelson reads the most recent command in what Ronald Dworkin might call "its best possible light,"[7] i.e., in a way that tries to harmonize it with his superior's most central military objectives, embodied in earlier orders (some of them more generally stated), in light of the tactical circumstances he then faced.

He realizes that he will not be punished for so doing if his "reinterpretation" proves tactically successful, no matter how strained and implausible its hermeneutics. The main point here, however, is simply that military commanders sometimes face interpretative questions quite similar to those faced by lawyers interpreting the state's "commands," i.e., its statutes and constitutional provisions. Methods of interpretation developed by lawyers should therefore have something to say to soldiers in grappling with these problems.

In a spirit similar to Nelson's (if more prosaically), commanders today enjoin junior officers: "This acting without orders, in anticipation of orders, or without waiting for approval, yet always within the over-all intention, must become second nature . . . "[8] To this end, a more radical proposal than the reasonable error rule would excuse disobedience to orders which, though lawful, are radically misconceived and hence highly imprudent. Under this view, if the subordinates act reasonably in light of their more intimate familiarity with immediate circumstances, they would not risk sanction.

This rule would greatly increase the incentives to act on fleeting

opportunities in the field, not foreseen by or readily communicable to commanders back at camp. Freeing junior officers from fear of liability when their errors of judgment prove reasonable is often necessary to embolden them to take the initiative.[9] From experience to date, this appears to be no less true of peace enforcement

7 Ronald Dworkin, *A Matter of Principle* 149 (1985).

8 Field Marshal Sir William Slim, *Defeat into Victory* 451 (1961).

9 Maj. Christopher M. Schnaufelt, "Lessons in Command and Control from the Los Angeles Riots," 27 *Parameters* 88, 105 (1997) ("Units required to wait for explicit instructions could be frozen in time and space; an adversary astute enough to sense or discover this situation will close gaps in his defense or abruptly attack to exploit local opportunities.").

operations, where quick action is often necessary to prevent eruption or escalation of conflict, than of traditional combat missions.

General Erwin Rommel's memoirs report, for instance: "We had continually to circumvent orders from the Fuhrer or Duce in order to save the army from destruction."[10] In such circumstances, the line between creative compliance and outright disobedience will be thin. In fact, the line is likely to be drawn, as legal realists will rightly insist, entirely on the basis of whether the subordinate's creativity proved effective in accomplishing goals shared by his superior.[11] Initiative of this sort has a long history.[12] The challenge today essential to encouraging useful tactical innovation is for superiors to take the time and trouble to "distinguish between failures that are inevitable in the course of reasonable experimentation and failures that result from plain incompetence," as Fukuyama and Shulsky insist.

For all the memorable instances of success, "free interpretation" by subordinates of ambiguous orders has also contributed to some of the greatest errors and crises in military history. These prominently include Gen. Douglas MacArthur's effort to carry the Korean War to the North and Gen. Curtis LeMay's effort to do much the same during the Vietnam conflict.

10 Gen. Erwin Rommel, *The Rommel Papers* 321 (B.H. Liddell Hart, ed. and Paul Findlay trans., 1953).

11 For an example, see Keith Douglas, *Alamein to Zem Zem* 17 (1966). In contrast, Roman military law, consistent with its uncompromising commitment to formal hierarchy, required punishment of soldiers whose disobedient initiatives proved tactically effective.

12 See, e.g., B.H. Liddell Hart, *T.E. Lawrence: In Arabia and After* 182, 225 361 (1934) (describing Lawrence's successful efforts to overcome obstacles imposed by British superiors on his assistance to Arab resistance to Ottoman rule).

When they realized that local conditions made orders from home illconsidered, Spanish colonial administrators in the New World often skirted them, with the maxim "se obedece, pero no se cumple." Charles Gibson, *Spain in America* 94 (1966) (providing the history of this maxim). Literally, "one obeys, but does not comply." *Id*. The meaning of the phrase is as follows: "I do not challenge your authority to issue such orders, but will exercise discretion in determining how to implement them, including the extent to which any implementation is possible and appropriate, given your larger objectives in the colony, all things considered."

The memoir literature is understandably reticent regarding incidents where unfortunate consequences ensued from letter-perfect compliance with superior orders.[13] But military history reveals no paucity of such incidents. For instance, the sinking of the H.M.S. *Victoria* in 1893 resulted from "blind obedience to an ambiguous order,"[14] and caused the deaths of several hundred people.

More recently, the 1983 attack against the United States Marines' installation in Beirut, which killed 241 soldiers, is widely attributed to excessively literal compliance by sentries with restrictive rules of engagement, authorizing them to use deadly force only if "instructed to do so by a commissioned officer" or "unless you must act in immediate self-defense."[15] Sentries should have shot the truck driver when he crashed through the front gate, which was some distance from the compound, even though self-defense did not require the sentries to do so. Because the rules of engagement were under-inclusive vis-àvis their essential purpose, the sentries believed they would have had to violate these rules in order to accomplish that purpose. A standard-like excuse of reasonable error for disobedience to such standing orders, accompanied by good training in dealing with hypothetical scenarios, could have obviated the problem and perhaps saved many lives.[16]

Military historians report that throughout "modern warfare soldiers have found ways of reducing the risks implicit in their orders without inviting retribution. That is, they may comply with the letter of their instructions, but not necessarily with their spirit."[17] The subordinate's motive for reinterpreting unlawful orders as if they

13 For several examples of catastrophic mistakes arising from unthinking compliance with the letter of superior orders, see the discussion in Dixon, Norman, *On the Psychology of Military Incompetence* 40 (1976).

14*Id*. at 267.

15 Lt. Col. Mark Martins, "Rules of Engagement For Land Forces: A Matter of Training, Not Lawyering," 143 *Mil. L. Rev*. 3, 11 (1994). See also Scott Sagan, "Rules of Engagement," 1 *Security Studies* 78, 82 (1991); Col. Frederick M. Lorenz, "Standing Rules of Engagement: Rules to Live By," *Marine Corps Gazette* 20 (Feb. 1996).

16 This is the conclusion of the Defense Department investigation of the incident. *Report of the Commission on Beirut International Terrorist Act, Oct. 23, 1983*, at 51 (Dec. 20, 1983). See also Martins, *supra* note 15, at 4.

17 Anthony Kellet, *Combat Motivation* 147 (1982) (summarizing historical research on levels of soldierly compliance with combat orders).

were intended as lawful ones need not stem from disinterested conscience. It may more often arise from the soldier's legitimate fear of personal liability and of enemy reprisals in kind, if he or comrades are captured.

Atrocity from above, Resistance from Below

Deliberate ambiguity in a superior's orders thus has a positive side. Ambiguity enables inferiors to circumvent unlawful directives without risking accusation of having disobeyed them. When an order is willfully opaque, subordinates can subvert its true intent by choosing to interpret it in a manner consistent with background law. Indeed, it is their duty to do so.

On the battlefield and in difficult peace operations, commanders at the rear often have difficulty monitoring compliance with directives to soldiers at the front. Economists call this the "agency problem."[18] It may be a problem from the superior's perspective. But it is also sometimes a solution from the law's perspective. It leaves agents with considerable latitude from their principals,[19] latitude which they may employ for good, no less than ill. One former soldier writes in this regard, that "the man of conscience can survive morally only by following the letter of such [unconscionable] orders and disobeying their intention."[20]

Employing this latitude for the good is possible precisely because the relevant orders are very likely to have been drafted to permit lawful fulfillment of their letter, while allowing circumvention of their atrocious intent. If they were drafted in any other way, they would provide the proverbial "smoking gun" by which superiors could readily be held accountable. "It is the great boon of front-line

positions," one soldier says, "that this disobedience is frequently possible, since supervision is not very exact where danger of death is

18 Pratt and Zeckhauser, *supra* note 1, at 124.

19 *Id*. (discussing how agents often act in ways contrary to their principals' interests and intentions, due to information asymmetries, obstacles to effective monitoring, and differing time-horizons and incentives).

20 J. Glenn Gray, *The Warriors* 189 (1949).

present. Many a conscientious soldier has discovered he could reinterpret military orders in his own spirit before obeying them."[21]

In other words, the inevitable failures of bureaucratic oversight at such times can facilitate ethical conduct. Disobeying the spirit of unlawful commands becomes a realistic possibility that the law itself can support by demanding disobedience of all unlawful commands. Just as the nation must rely on the tactical judgment of its ground forces in such circumstances because formal mechanisms of organizational discipline have collapsed, it must also rely on their moral judgment because superiors will likely couch an illegal order ambiguously, requiring its interpretation by inferiors in light of immediate circumstances at the battlefront.

Such reliance would not be misplaced. Even the clearest orders often cannot remove all opportunity for their evasion, if conscientious soldiers so desire. At My Lai, for instance, two soldiers

> disobeyed direct orders from Calley to shoot civilians. When Michael Bernhardt did this, Calley threatened him; thereafter, Bernhardt chose to "fire and miss on purpose." Herbert Carter appears to have preferred a self-inflicted wound to further service that morning at the scene of the carnage. Warrant Officer Thompson had caused the guns of his helicopter to be trained on Calley to prevent further bloodshed.[22]

None of Calley's soldiers who refused to fire ever suffered for their refusal; apparently none of them even expected to be punished.[23]

Atrocity from Below

The preceding analysis of how ambiguity in the wording of orders reduces the likelihood of atrocities assumes that it is the superior who desires the atrocities, and the subordinate who does not.

21*Id*.

22 Peter Karsten, *Law, Soldiers and Combat* 38 (1978).

23*Id*. Nearly 20% of the German policemen studied by Browning similarly evaded or resisted orders to kill Jewish women and children. Browning, Christopher, *Ordinary Men: Reserve Battlion 101 and the Final Solution in Poland* 168, 184186 (1992).

As stressed in Part II, however, this is only one of several possible scenarios that the law must simultaneously address.

In the reverse scenario, ambiguity in orders has quite the opposite effect. When it is the troops who crave the gratuitous mayhem, ambiguous orders make it much easier for them to indulge their impulses. Unless their orders unequivocally prohibit such conduct and superiors rigorously punish disobedience, any command that could plausibly be interpreted as authorizing atrocities would be likely to produce them.

This danger is admittedly exacerbated when orders are cast in the form of general standards, not bright-line rules. Soldiers will no longer expect a high level of specificity in directives issued by superiors. The nonspecific character of orders appearing to call for atrocities will then no longer stand out nor facilitate identifying their probable intent as unlawful. In stressing the need for greater reliance on general standards in order to elicit greater practical judgment (moral and tactical) from the troops, I do not mean to deny the reality of this danger.[24]

But the manifest illegality rule provides a safeguard against it, at least in the most extreme cases. The facial ambiguity of an order intended to produce atrocities would at first seem to allow the soldier to claim in his defense that his interpretation of it, though apparently mistaken, was a reasonable one.[25] That excuse is foreclosed, however, by the long-standing rule concerning manifestly illegal acts.

The principal appeal of that rule, and of the exception it creates to the superior orders defense, is precisely that it bars the excuse of

reasonable mistake in such circumstances, on the grounds that no reasonable person could ever mistake aberrant acts as lawful. For the troops, this rule forecloses a defense based on the legal ambiguity of

24 The quotation from Mario Vargas Llosa on page 236 suggests the reasoning process by which this risk is likely to materialize.

25 The most lethal scenario, of course, arises where both superiors and subordinates seek unrestrained carnage and pillage. At such times, ambiguity serves the different aims of each group. It enables superiors to disclaim liability, dissociating themselves from the misconduct of their troops, and it permits subordinates to disavow responsibility as well, on the grounds that their interpretation of superior orders was reasonable, albeit mistaken.

superiors' orders, just as the rule regarding "decision making capacity" does the same for senior officers.[26]

How might the law preserve this virtue of the manifest illegality rule while overcoming its many problems discussed above? One possible way would be to employ general legal standards, but to enforce them vigorously, so that a common law develops which clarifies their meaning.[27] U.S. military publications offer impressive evidence of how in-house reflection on recent experience in peace operations can help generate such standards of reasonableness, i.e., emerging conventions about what responses are appropriate to a wide variety of situations. Such situations initially appear, to the untutored soldier, to vary only slightly, but often actually differ in morally and legally significant ways.[28]

One could object that general standards like "proportionality," "military necessity," or "incidental loss of civilian life" have generally failed to restrain indefensible wartime behavior by military forces. But this is only because such standards have virtually never been taken very seriously by military courts.[29] Commanders have thus been able to interpret these legal norms as they wish, which has sometimes meant very self-indulgently. If military prosecutors invoked these norms more often, a common law would develop that lends some precision to these admittedly general terms.[30] The law

26 It is true, of course, that the manifest illegality rule applies to senior officers, no less than to the lowliest private.

27 Such legal development would be facilitated by the increasing proportion of courts martial conducted without juries, that is, tried by military judge alone. Lt. Col. William Hagan, "The Officer Corps:

Unduly Distant From Military Justice?" 71 *Mil. Rev*. 51, 53 (1991). The written opinions of military judges would leave a better recordon which soldiers could thereafter relyof how and why certain conduct was found reasonable or unreasonable.

28 For stellar examples of such reflection, see, e.g., Lt. Col. John Abizaid, "Lessons for Peacekeepers," 73 *Mil. Rev*. 11 (1993) and Lt. Col Douglas Scalard, "People of Whom We Know Nothing: When Doctrine Isn't Enough," 77 *Mil. Rev*. 4 (1997).

29 For a rare finding of disproportionate use of force, see *U.S. v. List* 11 Trials and War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, (Hostage Case) 1246, 12961297 (1948) (finding German Gen. Lothar Rendulic liable for disproportionate use of force in his "scorched earth" treatment of occupied Norway).

30 Military commissions have recently faced similar issues in developing a nonarbitrary standard by which to identify a "propensity" to engage in

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would still develop from within the military's normative universe, since it would be military rather than civilian judges who would do the developing.

Commanders could then no longer adopt the most lenient possible interpretation of these legal standards in good faith when faced with a battlefield situation governed by them. As things stand, however, the proportionality principle, if invoked in prosecution of an alleged violator, would almost surely be found "fundamentally flawed and . . . constitutionally void for vagueness in its present form."[31]

As a practical matter, this may be too much to expect of courtsmartial, or even promotion boards. The better view is to conceive of the problem of law-abidingness in what are currently gray areas as less of a problem of criminal law enforcement, and more of one of training professional judgment and cultivating virtuous character. Toward this end, American officer training has rightly moved away in recent years from the abstractions of international treaties toward requiring junior officers to cope with concrete, factually complex situations.[32] This approach seeks to develop habits of deliberation and skills of discernment that lead officers to do the right thing, not from fear of prosecution but from their disposition to behave honorably, i.e., to display the virtues valued by their profession, virtues immanent in its conscientious practice.

By no means would it be wise to replace bright-line rules with general standards throughout the law of armed conflict, in a wholesale fashion. In fact, the present argument criticizes a general rule, *obey all orders*, currently qualified by a bright-line exception,

except manifestly illegal ones. I instead recommend a bright-line rule, *disobey illegal orders*, qualified by a general standard-like exception, *unless reasonably convinced of their legality*.

No less important than these concerns with the substance of legal doctrine are my methodological ones. I am suggesting that our approach to this body of law become more informed by jurisprudential analysis of the respective strengths and weaknesses of

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homosexual acts. Janet E. Halley, "The Status/Conduct Distinction in the 1993 Revisions to Military Anti-Gay Policy," 3 *GLQ* 207, 209213 (1996).

31 Maj. W. Hays Parks, "Teaching the Law of War," in Gaston and Heitala, eds., *Ethics and National Defense* 145, 162 (1993).

32 Martins, *supra* note 15, at 50.

both kinds of legal norms, and by current sociological analysis of what causes atrocities in the first place. My method suggests a way of analyzing these problems that, more than "realist" or "legalist" approaches, would both be attentive to the insights of sociological analysis and self-conscious about its jurisprudential premises.

Insofar as a formalist conception of law, with its deep-seated longing for bright-line rules as opposed to general standards, has deterred such an examination, it is very much a part of the problem. So too are antiquated and overly simplistic ideas that battlefield effectiveness can be maximized, and atrocities minimized, only by the most authoritarian forms of institutional design.

So many factors influence soldiers' propensity to commit atrocities that it would be naive to suppose military law could be drafted to anticipate and preclude all of these with equal effectiveness. Even so, the emphasis here has been not where social scientists invariably place it: on law's inherent limitations in the face of force, social pressure, and unregenerate wickedness. Rather, my central concern throughout has been to show how military law, through an intelligent sensitivity to combat's social circumstances, can foster practical judgment and, in so doing, more effectively deliver on its promise, often unfulfilled, to restrain atrocity.

In sum, the chronic temptation of the military subordinate to follow orders unthinkingly, with insufficient reflection about either their underlying purpose or its optimal means of attainment, is the source of two perennial problems often thought to be unrelated. These problems have a common legal solution. A partial solution to plodding torpor among ground forces turns out, upon

examination, to be a partial solution to the problem of war crimes as well.

Of course, the solution proposed here would by no means constitute a cure-all for either problem. But it would have several positive effects. First, it would widen the scope of liability for the soldier who obeys illegal orders to cover not only the most obvious atrocities, but also any crime, including all war crimes and crimes against humanity, that a reasonable soldier in his situation would have recognized as unlawful. In relation to the manifest illegality rule, the reasonable error rule enlarges the gray area of situations where the law does not immediately provide the soldier with a clear-cut decision-rule. This rule requires him to exercise judgment in light

of the circumstances he faces, on pain of punishment if he unreasonably misapprehends them.

My primary purpose, however, is not to prosecute and convict more soldiers of war crimes, but to enhance the law's *ex ante* influence on their behavior in the field. The present proposal, then, aims primarily to increase compliance with existing law by increasing soldiers' disobedience to illegal orders, especially where not obviously atrocious on their face.

Second, by increasing the law's reliance on general standards, the reasonable error rule fosters deliberation by soldiers, rather than unreflective reliance on orders. It encourages greater attentiveness to their immediate circumstances, if the circumstances are pertinent to assessing the legality of a superior's order (or the reasonableness of a possible mistake about its legality). This rule is supported by, and supportive of, the general tendency of military thinking about what makes for effective combat performance. Such new learning suggests that situational deliberation, not rote automatism, produces more effective and more ethical decisions in many of the predicaments faced by professional soldiers which require hard choices and quick judgment calls in the field.

Finally, the reasonable error rule returns military morality to its historical origins in virtue ethics, although the relevant virtues would no longer be the virtues of an exclusive, in-grown social stratum. It would bring about this return by cultivating in professional soldiers a disposition to be "finely aware" of the actual situation in which a questionable order is received, and to be "richly responsible" for how they respond to it, during war as well as during peacetime.[33]

This in turn would surely affect, in significant measure, the character of the people who become and remain professional soldiers.[34] It would strengthen in them the tragic sense that comes

33 I borrow these terms from Nussbaum, who borrows them from Henry James. Martha Nussbaum, *Love's Knowledge* 148 (1990).

34 Moral education in the U.S. service academies is still very much couched in the traditional language of "character development," rather than of applied ethical philosophy. An elective course is often offered in the latter subject. Letter from Lt. Col. Terence Moore, Chief, Character Development and Ethics Division, 34th Training Wing, U.S. Air Force, ("We are trying to reshape the notion of honor and glory to be consistent with moral principle and have the respect of one's immediate comrades depend on how one measures up to this.");

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from routinely acting in the face of "moral conflict," that is, situations "where [one] must harm to help, kill innocents to save other innocents, violate one unqualified moral duty to fulfill another."[35]

This view of military ethics, as inhering in the excellencies of good soldiering *tout court*, is distinct from that favored by most civilian scholarship in this area. The prevailing view has been that military ethics should be based directly upon general principles of common morality imposed upon the profession of arms by civilian society, national and international, at large.[36]

There are situations where some degree of moral wrong will certainly result from honoring one's legal duties.[37] This moral remainder is often quite considerable, especially in war. It includes, most saliently, the killing of people simply because they happen to be in the uniform of one's formal adversary. Professional soldiers should not quickly dismiss this remainder of wrongdoing after deciding how to act, even when their decisions rightly give greater weight to competing considerations.

In other words, they may continue to feel ambivalently about acts that are unambiguously justified or excused. To brush aside this residue of harm, once the optimal course of action has been selected, is to deeply underestimate the full awfulness of the world, the presence within it of "extreme, undeserved, and uncompensated suffering,"[38] much of it caused by war. To preserve their humanity, military officers, even more than the rest of us, need to retain an awareness of this enduring awfulness and how their professional

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See also the curriculum of the Center for Character Development, U.S. Air Force Academy (Dec. 1994), including such publications as the "Character Development Manual" and "Making Character Central to Tomorrow's Military Leaders"; James H. Toner, *True Faith and Allegiance: The Burden of Military Ethics* 3973 (1995). Toner teaches ethics at the U.S. Air War College.

35 Nancy Sherman, *Making a Necessity of Virtue*, abridged in Donovan, Aine et al., eds., 1 *Ethics for Military Leaders* 468 (1997).

36 Defenders of this view have included Thomas Nagel, Michael Walzer, Paul Christopher, and Terry Nardin. See, e.g., Terry Nardin, *Law, Morality, and the Relations of States* 287304 (1983).

37 This advantage of general standards over bright-line rules is implicit in Nussbaum's analysis. Nussbaum, *supra* note 33, at 3740, 7173, 155161. See also Stuart Hampshire, *Morality and Conflict* 123 (1983).

38 Bernard Williams, "*The Women of Trachis*: Fictions, Pessimism, Ethics," in Robert Loudon et al., eds., *The Greeks and Us* 51 (1997).

actions contribute to it. Those who fail to do so succumb to a *déformation professionelle* that is perfectly intelligible and all too common, but by no means inevitable, to judge from the reflections of sensitive soldiers.

We generally want people to take pleasure in their work and we generally prize a society that lets them do so. We desire them to enjoy "peace of mind" upon finishing a day's work. This is integral to virtually all conceptions of human flourishing. Yet surely we are appalled by the thought of soldiers who take pleasure in war and in the killing it entails. Even lawful acts in a just war, as medieval theologians stressed, cannot be conducted "without an admixture of evil."[39] This rightly influences our view of what it should mean for a professional soldier to have a "healthy attitude" toward his work.

The present position departs from two prevailing views in this regard. The first is associated with a functionalist sociology of the professions.[40] It holds that professionalswhen acting "in role"need to strip themselves of virtually all the emotional baggage they would normally carry, i.e., as ordinary, well-adjusted human beings. Physicians, for instance, should no feel no revulsion at cutting bodies open for surgery, nor even disgust at performing intrusive physical examination of bodies they find extremely unattractive.

The requirements of occupational roles, on this view, reflect a division of labor without which the benefits of modern society would simply be impossible. This entails a differentiation of professional roles whose occupants must desensitize themselves to the feelings that virtually everyone else would have in performing similar acts, i.e., in order to properly perform essential social

functions. The adaptive capacities of the human mind here appear truly wonderful, deserving of deep appreciation.

The second view of desensitization and emotional numbing, by contrast, stresses their downside, their unfortunate side-effects. The mind's adaptive capacities here disclose a more sinister dimension. The psychology of professionalism enables practitioners to don blinders when performing their vocational dutiessuch as litigators

39 As quoted in Bernard Verkamp, *The Moral Treatment of Returning Warriors in Early Medieval and Modern Times* 36 (1993).

40 See, e.g., Talcott Parsons, *The Social System* 428479 (1951) (discussing physicians).

zealously arguing a position they know to be mistakenthat impair their ability to think critically about the implications of their actions for people who will be harmed. "That's not my job," is the convenient response, after all, of the many people who would simply prefer not to consider very carefully the second-order consequences of performing highly lucrative tasks, however questionable these may be from a moral point of view.

Notice how both views regarding the desensitizing effect of professional roles are concerned exclusively with what practitioners should *do*, with their immediate acts, not with the moral constitution of the people who perform them. From the second of these paired perspectives, the impact of professional roles on moral sensibility is undesirable because it induces practitioners, like the Nazi physicians and medical experimenters,41 to engage in morally indefensible conduct. From the opposing view, the narrowing of human vision to which professionalism contributes is desirable because it facilitates performance of professional duties, such as life-saving surgery and judicial resolution of disputes, that greatly advance the general welfare.

There are important truths and insights in both of these analyses, when not exaggerated and overdrawn (as they often are). But it is noteworthy that neither analysis is particularly interested in, or concerned about, the character of the people whose conduct is in question. Character, in this context, refers to the moral sentiments that practitioners will typically feel when performing professional duties, particularly those at odds (at least *prima facie*) with requirements of common morality. The contribution of "virtue

ethics" to the sociology of the professions consists precisely in its scrupulous attention to this relation: that between the performance of specific vocational practices and the corresponding dispositions of the

41 Robert J. Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide* (1986) (describing the self-division, or "doubling," by which physicians became preoccupied with skillful use of their professional talents, losing all awareness of responsibility for the ends in service of which these skills were devoted). On the wider pertinence of Lifton's analysis to other professions under less extreme political conditions, see Paul Starr's review of Lifton's book in *The New Republic*, (Nov. 24, 1986), at 34.

practitioner, or more plainly, between what the practictioner has to do and how she should feel when doing it (or soon thereafter).[42]

Focusing on this relation enables us to pose morally significant questions that are completely ignored by the other two perspectives. Consider a military example.

How would we want a British fighter pilot, for instance, to feel and react upon shooting down an Iraqi fighter in a future conflict with Iraq? With exaltation at his stunning and difficult achievement? With immediate sorrow at having killed another human being?

We would surely allow the British pilot momentary celebration in a dangerous job skillfully performed. But we would also expect him to feel some measure of sorrow, not too long thereafter, befitting the moral gravity of his actions and their human consequences (for the Iraqi's family, for instance).

How much sorrow? Surely not so much as to disable him emotionally from performing his professional tasks in the future, that is, all morally justifiable aspects of his vocation. But a pilot who never displayed any appreciation for the tragic dimension of his successful exploit would strike us as deficient in the appropriate sentiments. He would possess, in a word, a dreadfully deficient character.

Ted Van Kirk, navigator of the Enola Gay, professes never to have lost a moment's sleep over his bombing of Hiroshima, even in its immediate aftermath.[43] But it is difficult to maintain such complete equanimity if one has seen the photographs of the result, that is, the several square miles of incinerated urban center or the skin condition of civilian survivors. Van Kirk's tone or posture of

insouciance surely strikes most people (even those who justify the Hiroshima bombing), including most pilots, as extravagant to the point of inhumanity.

Returning to our British fighter pilot, how soon after his triumph in the skies would we want some traces of regret to begin to enter his mind? Not merely on his deathbed years later, of course. But only the

42 As Bernard Williams more precisely puts it, "There is more to the ethical dispositions than their giving psychological effect to the results of casuistry," i.e., more to them than fostering conduct proper in the circumstances. Bernard Williams, "Professional Morality and its Disposition," in *The Good Lawyer* 267 (David Luban, ed., 1983).

43 *Newsweek*, July 1985, p. 44.

most virulent pacifists would deny him at least a few moments of giddy exhilaration. The question of timing is not trivial, but it is ultimately a secondary one, on which reasonable people may disagree.

In short, then, we want officers to feel a measure of regret (as distinguished from remorse)[44] at a world that sometimes makes their role and its corresponding cruelty necessary and unavoidable. Some would say the same of lawyers.[45]

From this perspective, it is not enough to ensure that soldiers make the right choices in combat, that they deliberate wisely on matters of tactics and strategy, avoid committing manifestly atrocious acts. A good society will also care about the character of its members, as evidenced by their awareness of the morally problematic nature of aspects of their work, even when their actions are ultimately justified or excused. They should recognize the inevitability of "dirty hands," a term that apparently originates in medieval Christian efforts to purify returning warriors.[46]

Great military commanders have often disclosed surprisingly tragic sensibilities, at least in their memoirs. General Omar Bradley, despite dedicating his professional life to the preparation and fighting of war, could describe it as "a wretched debasement of all the thin pretensions of civilization."[47] William Tecumseh Sherman is often quoted for his remark that "War is hell," as if he wished simply to denounce the possibility of its amelioration. But immediately preceding these words Sherman announces that he is "sick and tired of war . . . It is only those who have neither fired a shot nor heard the shrieks and groans of wounded who cry aloud

for blood, more vengeance, more desolation."[48] And this to a proud and hopeful audience of graduating cadets.

[44] Verkamp, *supra* note 39, at 92. Unlike remorse, regret has "as its object a contemplated disvalue, not a contemplated wrongness." Maurice Mandelbaum, *The Phenomenology of Moral Experience* 80 (1969).

[45] Heidi Feldman, "Codes and Virtues: Lawyers as Ethical Deliberators," 69 *S. Cal. L. Rev*. 885, 911 (1996); Williams, *supra* note 42, at 259.

[46] Verkamp, *supra* note 39, at 124.

[47] Omar Bradley, *A Soldier's Story* 311 (1951).

[48] William T. Sherman, Graduation Speech, Michigan Military Academy, June 19, 1879.

Even the immediate experience of victory is not one of unalloyed celebration for honorable military commanders. As the Duke of Wellington observed, "Nothing except a battle lost can be half so melancholy as a battle won."[49] "To rejoice in conquest is to rejoice in murder," Lao Tze similarly concludes.[50] For those of us who have not known combat, literature and film best capture the tragic sensibility of the virtuous soldier. One thinks, for instance, of the final scene in Kubrick's *Paths of Glory*, as battle-weary French troops first mercilessly jeer a young German girl (when told of her nationality), then almost immediately, upon hearing her begin to sing, join her in mournful chorus.

Our conclusions about the British pilot do not lay all matters to rest, and in fact raise questions that are much more difficult. For instance, how can it be that each of these very different attitudescelebration and regrettoward the pilot's act are both correct, given their very different ethical stance, simply in virtue of the passage of a few minutes or hours? What does it say about individual identity over time and the possibility of personal integrity throughout a life, that we would expect the pilot to display both such (seemingly

49 Ken Booth, *Strategy and Ethnocentrism* 32 (1979) (quoting the Duke of Wellington). To similar effect, see Douglas MacArthur, *Duty, Honor, Country* 17, 30 (1962) ("I know war as few other men now living know it, and nothing to me is more revolting . . . The soldier, above all other people, prays for peace, for he must suffer and bear the deepest wounds and scars of war."). Dwight D. Eisenhower eloquently formulated a still deeper element of tragedy when he wrote, "Every gun that is made, every warship launched, every rocket fired, signifies in the final sense a theft from those who hunger and

are not fed, those who are cold and are not clothed. The world of arms is not spending money alone. It is spending the sweat of its laborers, the genius of its scientists, and the hopes of its children."

50 Robert Heinl, Jr., *Dictionary of Military and Naval Quotations* 44 (1966). Another early Chinese officer remarked, "Such a thing was fitting in ancient times, when famous kings resplendent in every virtue warred with the enemies of heaven and made an example of the wicked. But in our day there are no guilty, only vassals proving their fidelity to the death. Is that just cause for a monument?" Quoted in Johan Huizinga, *Homo Ludens* 97 (1949). A recognition of the tragic element in even the most defensible resort to armed force for settling intergroup conflict is also common among enlisted personnel, of course. See, e.g., Ruth Linn, *Conscience at War* 14849 (1996) (recording the reflections of Israeli reservists ordered to suppress the Intifada).

contradictory) attitudes in such short succession?[51] These broad questions would take us far beyond the scope of this selective study of military law and its social setting.

But it is worth observing that much of the law governing the professional activity of officers tacitly disparages tragic sentiments as mere octogenarian sentimentality. The training of soldiers is no better, in this respect, with its view of moral grief (for justified killing) as mere squeamishness and its convenient invitation of military psychoanalysts blithely to "forgive oneself."[52] A recent study of U.S. Air Force fighter pilots concludes, for instance, that "most aviators didn't want to discuss it [the morality of war]. Being too introspective could be misread as vulnerability. Sensitivity was ridiculed in this business. A jet pilot never revealed that side of his personality, if he had it."[53]

One would hope that military law could play a modest role, at least, in ensuring that a measure of tragic sensitivity about war is not confined to our final moments on earth, to Church confessional, the "padre's hour."[54] The approach defended here, in fact, aims in part to build such ethical sensitivity into the very nature of effective soldiering, making it an inseparable component of the soldier's practical reasoning.

51 As Taylor writes, "The person who capriciously and irresponsibly identifies with different desires behaves as if what he says and does were isolated events with no implications for the future, and equally with no roots in the past." Gabriele Taylor, *Pride, Shame, and Guilt: Emotions of Self-Assessment* 114 (1985).

52 On the moral defects of military psychiatry in this regard, see Chaim Shatan, "The Grief of Soldiers: Vietnam Combat Veterans' Self-Help

Movement," 43 *Amer. Orthopsychiatric Assoc*. 640 (1973) (describing the military's official "dehumanized attitude of anti-grief."); Peter Marin, "Modern Therapies Cannot Deal with Guilt and Conscience," *Center Mag*. 21 (Aug. 1981); Peter Marin, "Living in Moral Pain," 15 *Pych. Today* 68, 68 (1981) (discussing dissatisfactions of Vietnam veterans with counseling received from military psychiatrists, particularly its deficiencies in coping with "moral distress, arising from the realization that one has committed acts with . . . terrible consequences."); Philip Caputo, as cited in Myra MacPherson, *Long Time Passing: Vietnam and the Haunted Generation* 55 (1984) (describing "the guilt all soldiers feel at having broken the taboo against killing.").

53 Douglas C. Waller, *Air Warriors* 249 (1998).

54 Bernard Williams is author of the latter phrase. Williams, *supra* note 42, at 266.

This approach seeks to hard-wire such ethical awareness into the professional soldier's understanding of his very role, rather than treating it as a qualification imposed from outside by the common morality of civilians. The character of professional soldiers whose lifelong mantra remains "obey all orders, unless clearly atrocious" will very likely prove to be quite different, in the long run, from those trained instead to regard their first principle as "obey lawful orders only."

In short, military law ought to encourage the kind of practical deliberation that self-consciously fuses the tactical and moral aspects of decision-making. In so doing, it cultivates the disposition to engage in such deliberation, as a virtue internal to the calling. The reasonable error approach to due obedience, in particular, sensitizes soldiers to a wider range of moral considerations, many of these codified by the law of war, than the manifest illegaliy rule. The byproduct of this approach will, simply put, be better soldiers who are also better human beings: the kind of people about whom a democratic society should have fewer qualms when bestowing control over weapons of great destructive power.

One might object that a tragic sense of one's job and its moral complexities, widely shared among lower-echelon officers, would undermine the passionate commitment necessary for their success on the battlefield.55 This would be true even in peace enforcement operations, which often require tough resilience in the face of armed, local resistance. Kantians, and many others, would prefer professional soldiers to kill only from a sober recognition of duty, *sine ira et studio*without passion, and certainly without pleasure.

Even apart from the moral dilemmas it presents, there is much in the nature of military experience to encourage a tragic view of the world among those who dedicate their lives to this vocation.[56]

55 Roy Sorensen, "Rewarding Regret," 108 *Ethics* 528, 533 (1998) (observing that in the strictly professional context of naval decision making, an admiral might be expected to discourage regrets among his sailors on the grounds that such regrets "erode the martial virtue of decisiveness.").

56 Gwynne Dyer, *War* 146 (1985) (noting that an "essentially tragic view of human nature is reinforced and broadened by what [professional soldiers] know about the nature of battle itself: that it is an environment where nothing works reliably, and no plan or stratagem succeeds for very long").

But knowledge of one's duties is not always sufficient to motivate compliance with them, even when one knows one's cause to be just, notwithstanding Socrates' famous counterargument.57 It would be comforting to believe that even the most courageous and daring acts of soldiering are motivated only by "simple obedience to duty," in the words of the Arlington inscription.58 But it remains to be seen whether "nobility of spirit," as one officer puts it,59 can be expected to provide enough officers with enough motivation to risk their lives in pro-active ways. Indeed, recent studies of what motivates people to join and remain in the U.S. armed services suggest much skepticism about the realistic probability of motivating many modern soldiers in this way.60

The opposing view, defended by some thoughtful students of the problem,61 is more disconcerting: that successful combat requires more than mere stern, sober resolution in devotion to duty. Churchill's insistence on continued strategic bombing of German population centers, for instance, displayed a "passionate single-mindedness" that was "admirable . . . despite its countermoral tendencies," admits one moral theorist.62 This confronts us with the possibility, he argues, of "admirable immorality," of virtues indissolubly linked to correlative vices.

At the lower echelons of an army, success often requires vigorous initiative of at least a small cadre of officers distinguished by their ruthlessness and "bloody-mindedness." To win battles, and ultimately wars, these officers must maintain the passionate intensity

57 Plato, *Protagoras* 4852: 354e3357e8 (C.C.W. Taylor trans., 1991); Terence Irwin, *Plato's Moral Theory* 7577 (1982).

58 Quoted in Fitton, *supra* note 5, at 202.

59 John Baynes, *Morale* 9798 (1967).

60 Such studies find an overwhelming tendency, among both officers and enlisted personnel, for today's soldiers to view their service in much the same way that others view their civilian jobs. This has entailed a declining commitment to the view that the military must uphold values distinct from civilian society and that those who serve it must be motivated primarily by patriotism or a pride in martial valor, rather than by the material benefits and later educational or employment opportunities military service may offer. Charles Moskos, correspondence with author, Aug. 1998.

61 John A. Ballard and Aliecia J. McDowell, "Hate and Combat Behavior," *Armed Forces & Soc'y* 229 (Winter 1991).

62 Michael Slote, *Goods and Virtues* 95 (1983).

in the act of breaking our civilized prohibitions against hurting people and breaking things. Perhaps even the obvious thrill some derive from such flagrant transgressions of society's most deeply entrenched conventions is ultimately necessary.63 Release of such passion may well be no less a source of combat effectiveness than of free-lance atrocity. Again, moral vices may be inextricable from professional virtues. Willfully transgressive Dionysians may make surprisingly effective soldiers.

Historical accounts of battlefield success since the *Iliad*, after all, are full of seemingly ordinary men who suddenly enter "a state of exaltation" or "furor," becoming utterly "beside themselves."64 In short, the Foucauldian post-modernists might be right after all, albeit not in ways they expect or desire. We would then have to acknowledge that virtues of restraint, prompting conscientious protection of noncombatants, are not ultimately "internal to the calling" at all. We would have to acknowledge that the most effective soldiers display a creative spirit akin to that of artists, abandoning themselves (and all social convention) to their inner demons.

Military law must afford them the artistic license to do so, on this view, or deny the very essence of what makes for success in warfare. Even Aristotle himself acknowledges that "a spirited temper

63 For discussion of this Nietschean element in the motivation of successful combat leaders, see Baynes, *supra* note 59, at 9798. The apparent pleasure that some people take in inflicting great pain in war is closely related, in some cases, to a hatred of the enemy. This raises the inescapable question of whether such hatred is functional for

combat motivation and, if so, whether it should be cultivated among those who do not already posses it, in the expectation that it will increase their aggressiveness in combat. Most readers of this book will likely dismiss this possibility as too unsavory to contemplate. But military psychologists take it very seriously indeed. See Ballard and McDowell, *supra* note 61, at 22935. We would therefore do better to try to refute it than to ignore it. However unsavory it may be, this hypothesis is best viewed as genuinely open to empirical inquiry. The evidence to date is simply inconclusive. *Id.*

64 Hans van Wees, "Heroes, Knights and Nutters: Warrior Mentality in Homer," in *Battle in Antiquity* 1, 1 (Alan Lloyd, ed. 1996) (quoting Marcel Detienne). See also Georges Dumezil, *The Destiny of the Warrior* 10 (1970) (describing the emphasis of ancient Celtic, German, and Greek mythology on the successful soldier's "physical and spontaneous exaltation of the entire being in the course of the exploit," his submission to "mystical forces" and "passions of the soul.").

gives support" to the soldier, and "has something that closely resembles courage."[65]

But if all this is so, it would also mean that the long-proclaimed opposition between military efficacy and common morality is just as inherent and inescapable as the worst militarists have always believed. This conflict would then be far too severe to be more than superficially papered over by old-fashioned, warmed-over notions of virtues internal to the calling.

This is not a happy conclusion, nor one that should be reached too quickly on the basis of insufficient evidence. But the memoirs of many thoughtful soldiers attest to its plausibility. Anyone seriously concerned with cultivating the character of successful soldiers, and with how military law contributes to that end, should thus not reject this possibility too easily. A reasonable error rule, whatever its considerable advantages in other regards, should not be applied in a way that would unduly hamper such forceful personalities, for they are the natural leaders of all combat operations.

They are most decidedly not, however, the natural leaders of infantry's contribution to traditional peace-keeping operations, nor even to some (more assertive) forms of peace enforcement. This fact suggests that, as they enlarge the range of skills associated with excellent soldiering, officers will initially experience some strain and internal tension, insofar as martial honor will now require (and come to mean) quite different things in different kinds of military operations.[66] But such tensions are common to many professional

65 Aristotle, *Nichomachean Ethics* 756 Martin Ostwald trans (1959).

He seeks to emphasize, however, that "the kind of courage that comes from a spirited temper . . . becomes true courage when choice and purpose are added to it. Moreover, anger gives men pain and revenge pleasure; and although those who fight for these motives are good fighters, they are not courageous, for it is not the incentive of what is noble that makes them fight, and they are not guided by reason but by emotion."

66 This problem might be partly redressed by increased division of labor within the armed forces, e.g., by training a single Army division in the special skills necessary for peace operations. Proposals of this sort have recently been seriously discussed among professionals in military affairs. They have also found their way into the official presidential platform of former Tennessee Governor Lamar Alexander. The German army now has such a special force. Ronald Asmus, *Germany's Contribution to Peacekeeping* 3235 (1995).

roles,[67] and simply reflect the moral complexity of the diverse tasks that modern society assigns to them.

The best contemporary reflection on professional ethics, moreover, concludes that "professional consciousness" should "sustain a certain degree of uneasiness," reflected in recurrent "qualms."[68] The goal is not to make conscientious practitioners "unhappy," which would be pointless and self-defeating, but simply, at least periodically, to

> encourage [them] to . . . ask whether certain practices that cause suffering . . . are necessary. It will help them to ask how in detail the justifying arguments for the profession as a whole apply to this or that practice. It will provide some psychological antibodies against absorbing into the bloodstream a mystifying conception of the dignity of the profession and neutralize some of the mechanisms of self-deception . . . [69]

The ethical dispositions will then not be wholly disconnected from those of their fellow citizens. As a result, professional soldiers will be more appealing human beings. In the end, there may yet still be a practical pay-off, for society at large, in cultivating professional characters of this sort. The soldier who preserves a sense of moral uneasiness about his tasks, after all, is also the soldier whose "felt ethical dissatisfactions with some things that are necessary to how things are keeps alive the search for how things might be otherwise."[70] The law can help soldiers take a few steps in this direction, in the ways here suggested. The downside dangers of unintended consequences are very minor. Most officers harbor deep skepticism about the possibility of eliminating war. There is little risk that that law's small promptings here will instill a utopianism

that cripples their ability to prepare effectively for the conflicts it is their task to anticipate.

67 Robert K. Merton, *Sociological Ambivalence and Other Essays* 1 (1976).

68 Williams, *supra* note 42, at 266.

69 *Id*., at 266.

70 *Id*., at 269.

21
Living with Lawyers

The law can help soldiers reinterpret their internal ideal of martial honor, I have argued, to require not merely atrocity avoidance but full adherence to the law of war. For officers seriously to concern themselves with legal issues beyond the most manifest atrocity, however, legal counsel must become part of military decision making at many points, in ways that have been uncommon, until quite recently.

No one likes lawyers, and professional soldiers have been no exception.[1] Yet for the law of war to become an effective restraint on any but the most immediately obvious atrocity, professional soldiers must learn to trust and respect their legal advisers. To win this respect, however, such advisers must demonstrate an intimate familiarity with the practical problems faced by military decision makers. Until recent years, there were major deficiencies among U.S. forces on both sides of this equation. And most other states lag far behind the U.S. in this area.[2]

One aspect of the problem involves the reluctance of military commanders to seek legal advice when they clearly should do so. During the Vietnam War, for instance, the U.S. Joint Chiefs of Staff reversed an initial decision (made secretly) to resign *en masse*, in protest against President Johnson's consistent rejection of their counsel, on the grounds that such protest would constitute "mutiny."[3]

1 This has been true even of professional soldiers who were trained as

lawyers, such as William Tecumseh Sherman. L. Lewis, *Sherman* 103112 (1932).

2 For comparative analysis of how legal advice is delivered to military commanders, see volume 35 (1996) of the *Mil. L. & L. of War Review*, devoted entirely to this matter.

3 For an account of this incident by a Navy JAG, see Lt. Cmdr. Donald Koenig, "Military Ethics as the Basis for the Senior Leader to Ensure that Military Force is Used Responsibly," paper presented at the Joint Services Conference on Professional Ethics 89 (1998); See generally Andrew Buzzanco,

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It would not, and any competent JAG adviser could have told them so.4 There is little excuse for high-ranking officers to make gross errors of this sort, then or now.

But I want to focus here on the other side of the problem: the fact that military lawyers generally have not even *thought* of themselves as advisers on the law of war, insofar as this role would require integral participation in military decision making. Historically, they have had surprisingly little experience of this sort. They also lack a tradition of independence from their "client" that would be necessary to perform this function satisfactorily.

There has been considerable recent progress here, to be sure. But it has not yet stabilized into anything that could plausibly be called a settled practice. To be sure, there are numerous stories in the narrative stock of American JAGs concerning incidents in which a military lawyer "fell on his sword," i.e., interceded successfully to prevent a commander from violating the law of war. But there are more numerous, telling accounts of how this or that JAG adviser capitulated to justifying an illegal course of action strongly desired by his commander, as in the invasion of Gen. Manuel Noriega's compound during Operation Just Cause.5 Thus, some nontrivial change must occur in the self-understanding and professional identity of military lawyers if the internalist, virtue-oriented approach to war crime prevention defended here is to realize its potential.

Experienced legal advisers today are present and active participants in military decision-making at upper and middle echelons of the American armed forces.6 During Operation Desert Storm, for instance, General Powell claims that, for the first time, "decisions

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Masters of War: Military Dissent and Politics in the Vietnam Era (1996).

4 Mutiny consists of refusing to obey lawful orders with intent to usurp or override lawful military authority. U.C.M.J., Art. 94. For analysis and application to these facts, see Koenig, *id*., at 89.

5 Author's interviews with JAG officers.

6 At the higher echelons, many JAG attorneys under age 50 today have advanced degrees in international law, including virtually all of those detailed to the Joint Chiefs of Staff. For a discussion of such developments, see Steven Keeva, "Lawyers in the War Room," 77 *A.B.A.J*. 52 (Dec. 1991). See also Matthew E. Winter, "Finding the Law"The Values, Identity, and Function of the International Law Adviser, 128 *Mil. L. Rev*. 1 (1990); Diane Guillamette, "Legal Advisers in Armed Forces," in *Implementation of International Humanitarian Law* 132 (Frits Kalshoven and Yves Sandoz eds., 1989).

were impacted by legal considerations at every level . . . Lawyers proved invaluable to the decision-making process."[7] Lawyers in the U.S. military today "jump out of airplanes" and pride themselves on "being out there and getting as dirty as anybody else."[8]

More routinely, American naval ships at sea currently carry a legal adviser on board at all times, with an ever-ready lap-top computer and a CD-Rom which put at her fingertips all cases ever decided under the Uniform Code of Military Justice, as well as many sources of international law.[9] Such an adviser can be extremely useful. For example, advisers help a ship's commander exercise the judgment necessary to respect the distinction between impermissible retaliation for an adversary's unlawful act of provocation, on one hand, and permissible, defensive use of force in hot pursuit, on the other.

Competent legal advice is thus available on very short notice.

> The Navy captain with a judge advocate on the bridge can arrive at a prudent interpretation of the ROE [rules of engagement], even when one rule counsels restraint and another commands him to use necessary preemptive force . . . Similarly, the commander of an Army corps can select targets from a list recommended by a staff cell, the

7 Keeva, *supra* note 6, at 52; see also Lt. Col. Harry L. Heintzelman and Lt. Col. Edmund S. Bloom, "A Planning Primer: How to Provide Effective Legal Input into the Planning and Combat Execution Process," 37 *Air Force L. Rev*. 5 (1994). It is difficult to evaluate or even determine the precise meaning of such claims, however, due to national security (and attorney-client privilege) restrictions on disclosure of the relevant information. On the logistics of lawyer

deployment during the war, see Col. Scott L. Silliman, "JAG Goes to War: The Desert Shield Deployment," 37 *Air Force L. Rev*. 85 (1994).

8 W. Hays Parks, in *Facing My Lai* 163 (David L. Anderson, ed., 1998).

9 Maj. Mark Warren, "Land Forces Rules of Engagement Symposium," *Army Lawyer* 69 (Dec., 1996). All United States combat forces, in fact, have an "operational law" attorney assigned at the division level, advising operational commanders on decision-making and basic legal training for lower ranks. For discussion of the recently increased role of such advisers, see Maj. Jeffrey F. Addicot and Maj. William A. Hudson, Jr., "The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons," 139 *Mil. L. Rev*. 153, 183 (1993); Lt. Col. Robert L. Swann et al., "The Role of the Judge Advocate Under the New Field Manual 100-5, Operations," *Army Law*. 25 (Dec. 1994); Lt. Col. David E. Graham, "Operational LawA Concept Comes of Age," *Army Lawyer* 9 (July 1987).

judge advocate for which has identified the potential targets that violate no ROE.10

Lawyers in all United States services are encouraged to be proactive, offering legal counsel *sua sponte*, because commanders, no more than most other clients, cannot be expected to spot all legal issues on their own.11 JAG officers familiarize themselves with the capabilities of alternative weapons systems, so as to be able to offer competent counsel on questions such as whether contemplated uses of particular weapons will cause "unnecessary suffering," within the meaning of the Hague Conventions.12 The ready availability of legal advice, now encouraged by Protocol 1 to the Geneva Conventions,13

10 Lt. Col. Mark Martins, "Rules of Engagement For Land Forces: A Matter of Training, Not Lawyering," 143 *Mil. L. Rev*. 3, 59 (1994). Most other countries lag behind the United States. in this regard. Winter, *supra* note 6, at 20. Article 82 of the 1977 Protocol to the Geneva Conventions ultimately rejected a requirement that legal advisers be made available to military commanders, and instead requires only that states adopt some procedure whereby commanders acquire familiarity with the law of war. *Id*. at 17.

11 Maj. Wm. Hays Parks, "The Law of War Adviser," *18 Mil. L. & L. of War Rev*. 357, 376 (1979). Parks is surely right that "it is folly to plan for the interjection of a law of war adviser . . . upon commencement of hostilities, expecting that his advice will be sought for the first time in the heat of battle, or that his advice will have any impact on previously-coordinated plans. If it is to have any effect, law of war advice must be provided in peacetime planning at all levels at which operations plans . . . are promulgated. Moreover, it must be proffered as well as sought." *Id*.

Col. Coupe adds that "a well-intentioned commander should not hesitate

to discuss any command option, power, or duty with the Staff Judge Advocate. Providing advice on such matters is the SJA's primary job." Dennis Coupe, "Commanders, Staff Judge Advocates, and the Army Client," *Army Law*. 4, 8 (1989). See also A.P.V. Rogers, *Law on the Battlefield* 154 (1996).

12*Convention with Respect to the Laws and Customs of War on Land*, July 29, 1899, 32 Stat. 1803 Annex at 18111825, 187 Consol. T.S. 429 Annex at 43642, 1 *A.J.I.L*. Supp. 129 Annex at 13453, Art. XXIII [1899 Hague Regulations]. For discussion, see Captain Paul A. Robblee, Jr., "The Legitimacy of Modern Conventional Weaponry," 15-16 *Mil. L. & L. of War Rev*. 403, 41619 (1976-77). Martins offers another useful example. To be competent to advise soldiers on whether the aiming of a rifle at them during a peace operation constitutes "hostile intent" sufficient to justify armed response, a JAG must know the rifle's maximum effective range and rate of fire. Martins, *supra* note 10, at 109.

13 The Protocol provides that parties to armed conflict "shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol."

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has considerable effect on the availability of the superior orders defense.

It is not difficult to imagine a situation in which a field commander receives an order from his superior to execute an operation that his JAG adviser, present at his side, insists is unlawful under the circumstances, which are unknown to the superior from afar. The unlawfulness, I shall assume, is not so great as to be transparent on the order's face to any reasonable soldier, lacking legal counsel. Current U.S. officer-training scenarios anticipate this type of situation.14

The presence of legal counsel inevitably raises the standard of care required of commanders, in assessing the reasonableness of their errors after the fact.15 Where time permits, it is now objectively unreasonable for a American commander to refrain from consulting such a legal adviser whenever there is any ground for doubting the legality of a contemplated use of force. The fact that its illegality is not manifest on its face will no longer automatically exempt the commander from liability, for his lawyer will be there to apprise him of his legal duties, including many of which may not be immediately obvious to him.

The legal adviser, unlike the commander, can be expected to know or quickly learn which pertinent countries have ratified or acceded to which Conventions and with what reservations, whether or not an armed conflict exists and whether it is international in nature, what import recent U.N. Security Council resolutions have on the situation, what bilateral or multilateral agreements the disputing states have signed, and so forth. If no legal consultation is sought, where it would have clarified the unlawfulness of certain orders (as

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Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, U.N. Doc. A/32/144 / Annex I/(1997), reprinted in 16 I.L.M. 1391 (1997).

14 Coupe, *supra* note 10, at 8 (advising JAG officers that "If subordinate commanders insist upon illegal action and cannot otherwise be deterred, the situation should be brought to the attention of the higher commander or supervising command lawyer.")

15 L. C. Green, "Superior Orders and the Reasonable Man," in *Essays On the Modern Law of War*, 42 (1985) ("we would see the dawn of an era in which it was true of the man in the field during combat, as it is for the civilian charged with a criminal offense, that *ignorantia juris non excusat*").

the commander interpreted them, even if not on their face), then his obedience would be unreasonable. And he would be liable.

If the commander has reasonably relied on the advice of counsel, he will find it easier to win acquittal on grounds of error.[16] But this prospect is not to be feared, for it creates powerful incentives for commanders both to seek and rely upon legal advice, particularly in the law's gray areas, where they might not otherwise do so, and be powerfully tempted to err on the side of obedience. "It is difficult to accuse a commander of lack of concern about the law of war," writes one military attorney, "if he has a Staff Judge Advocate approval of a plan."[17]

This lesson has not been lost upon military officers. After a recent training exercise, one commander reports, in this regard:

> When I saw the force list, I wondered why we were even taking the SJA. After these past three weeks, I know that if I ever go to war again, the first person I'm taking is my lawyer."[18]

The JAG officer herself faces incentives to exercise independence in the preventive role of counselor, rather than serving merely as a partisan advocate for whatever legal interpretation might serve the commander's immediate objectives. First, she risks serious criminal liability if her interpretation of international law proves more indulgent than that of the enemy state into whose hands she falls, and by whom she and her commander can expect to be prosecuted.[19]

16 Winter, *supra* note 6, at 29.

17 Lt. Col. Jonathan Tomes, "Indirect Responsibility for War Crimes," *Mil. Rev*. 37, 43 (Nov. 1986). Such approval is now required by

regulation.

18 Col. Patrick Finnegan, "Operational Law: Plan and Execute," 76 *Mil. Rev*. 29, 32 (1996).

19*Id*. at 24; Because officers above a certain rank possess decision-making capacity of this sort, military law in many societies denies them the superior orders defense. See, e.g., Alison Brysk, *The Politics of Human Rights in Argentina* 83 (1994) (describing Argentine law). Officers of this rank are said to possess "decision-making capacity." They occupy positions bestowing upon them the discretion, when obeying superior orders, to choose among alternative courses of actionmost important, to choose lawful over unlawful means to given ends sought by their superiors. The responsibility to interpret orders

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Second, the ethics rules for military lawyers clearly identify the JAG's client as her branch of the armed forces, not the individual superior to whom she offers legal counsel.[20] Third, these rules provide that the JAG officer must refer a matter to a higher military authority when an immediate superior fails to follow her advice and so doing will result in serious illegal action.[21]

Thus, a military lawyer who does not assert the requisite degree of professional independence from her immediate superiors, when they issue or obey orders involving war crimes, now faces disciplinary sanction in her professional capacity, apart from possible criminal prosecution as an accessory. Displays of such independence by legal counsel make it harder for commanders to find legal support for criminal orders they might wish to give or obey, whether or not their criminality was manifest on their face prior to receiving legal counsel.

Still, everything learned from research on organizational dynamics gives grounds for suspicion here. Studies of lawyers, accountants and physicians strongly suggest that within large organizations it is extremely difficult to protect the exercise of independent professional judgment from subtle but powerful pressures toward "going along" with questionable policies.[22] This

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> properly, so that they may be fulfilled lawfully, inheres in such "decision-making capacity," as a matter of law. One whose position endows him with this capacity cannot claim that he lacked sufficient authority to devise some way of following his orders lawfully.
>
> Thus, by implication, "decision-making capacity"which is here clearly a legal term of artentails the right to disobey an order when it allows of no

lawful interpretation. The order should be classified as clearly illegal, not because it expressly calls for atrocious conduct, but becausehowever vague and imprecise its formulationany of its interpretations would, in application, entail atrocious conduct.

20 Model Rules of Professional Conduct Rule 1.13 (1998). Dept. of the Army, DA, *Legal Services: Rules of Professional Conduct*, Pamphlet 27-26, Dec. 31, 1987; U.S. Army Regulation 27-10, Military Justice, March 18, 1988. This rule follows Model Rules of Professional Conduct Rule 1.13 (1998).

21 Model Rules of Professional Conduct Rule 1.13 (b)(1)-(4) (1998). For discussion, see Col. Dennis F. Coupe, "Commanders, Staff Judge Advocates, and the Army Client," in James Gaston and Janis Hietala, eds., *Ethics and National Defense* 77 (1993).

22 Diane Vaughan, *The Challenger Launch Decision* (1997); William Kornhauser, *Scientists in Industry: Conflict and Accommodation* (1965); Andrew Abbott, *The System of Professions* 15057 (1988); W. Richard Scott,

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problem is greatly exacerbated when the professionals in question, like military officers, cannot credibly threaten to leave for comparable employment by a competitor.

Their capacity to exercise "voice," as in questioning the legality of superiors' orders, is thus undermined by their high costs of "exit," in Hirschman's terminology.[23] The voice of legal advisers is supposed to provide a "mechanism of recuperation,"[24] an institutional device by which the organization can be set "back on track" when its leaders are about to derail it from a lawful path. It is important to ensure the efficacy of "voice" precisely because armies are organizations in which "exit" is all but precluded, that is, at the moment when one must decide whether to obey (or counsel disobedience of) a legally questionable order. But armies at war are also organizations in which often "exit is considered as treason and voice as mutiny."[25]

The threat to professional independence is further compounded by the fact that even the highest ranking JAGs hold positions generally at least two full ranks below the commanders they must advise. A colonel, for instance, may have to tell a four-star general that the latter's contemplated course of action is unlawful.

Experienced JAGs report, however, that their greatest influence in decision making virtually never derives from threatening formal legal sanction (for ignoring their counsel). Successful influence comes instead from their integration into the officer corpslong prior to moments of crucial military decisionas respected fellow officers "who happen to be lawyers." This perception of shared membership in a common brotherhood is essential if JAGs are to help officers reinterpret prevailing understandings of martial honor

so that the *jus in bello* occupies a more central place within it. The "voice" of critical scrutiny is often most effective, after all, when accompanied by clear display of "loyalty," as Hirschman puts it.[26] In short, military lawyers have to be perceived as loyal members of a decision-making

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"Professionals in Bureaucracies: Areas of Conflict," in *Professionalization* 265 (Howard Vollmer and Donald Mills, eds., 1966).

[23] Albert Hirschman, *Exit, Voice, and Loyalty* 9697 (1970).

[24] *Id*., at 3.

[25] *Id*., at 121.

[26] *Id*., at 7697.

team if their counsel is to given the weight it deserves. This is the unanimous view of the American JAGs I have interviewed.

How to integrate oneself in this way into military decisionmaking, without unduly compromising one's independent professional judgment, is surely the central question here. The challenges it poses for institutional design and the formulation of legal norms are more vexing than one would gather from published discussions in the professional journals of military lawyers. An approach to military law and martial ethics (like the present) placing great weight on internal traditions and professional character, moreover, clearly cannot ignore this problem.

But the JAGs whom I have interviewed in recent years emphasize the wide range of devices by which they handle it. These can win trust, they report, in such seemingly trivial ways as demonstrating familiarity, at key moments of deliberation, with military history, terminology, and traditions. "We try to throw in a reference here and there to the von Schlieffen plan, for instance, or a 'double envelopment.' They like that," jokes one JAG Major.27 "And we keep our uniforms and appearance as crisp and neat as anyone's." Civilians may be inclined casually to dismiss such signaling of vocational commonality as superficial. That would be a mistake, for if lawyers are effectively to contribute to the reinterpretation of martial honor, they have to be perceived as sharing the professional identity and collective fate of those they advise. Most importantly, good military attorneys find ways to portray legal norms as "facilitative," i.e., aimed at helping commanders do their jobs well, rather than as simply punitive or disciplinary constraints extrinsic to soldiering virtuosity.

The more general problem here is by no means unique to military lawyers and it is not necessarily any more severe in the military context. After all, lawyers who advise business clients routinely report that they must win the trust of such clients over time by showing their deepening understanding of the clients' business and

27 Interviews with author. A double envelopment is a simultaneous attack on both enemy flanks. The von Schlieffen plan was the strategy by which the German General Staff aimed to win a two front war in Europe during WWII. On the role of traditions in military life, see Col. Raymod Bluhm, Jr. et al., *The Soldier's Guidebook* 105110 (1995).

their sympathy for the ethical dilemmas he faces.[28] "Business judgment" is ultimately for the businessperson herself, corporate law makes clear.[29] This authority includes the right to ignore the counsel of one's lawyer and accept the consequences of so doing, including personal criminal liability. Likewise, the exercise of military judgment is ultimately for the military commander, not her staff JAG adviser. Professional counselors in many fields have cause to worry over the powerful client who uses their professional opinions only to justify publicly a course of action chosen for completely different reasons.[30] After all, the language of expertise often provides a discursive patina of legitimacy for dubious policies of all sorts. The law of war is a particularly malleable instrument to such ends.[31]

But the line between legal and extra-legal advice often blurs as the lawyer becomes a trusted counselor, one whose judgment and characteras much as her formal knowledge of the laware relied upon and recognized to be in play. In short, the problem is a classic old chestnut, a perennial dilemma, as long as liberal societies continue to rely on professionals to monitor legal compliance by citizens. This problem can be managed and ameliorated in various ways, but it would be naive to hope that it could ever be completely banished. Its enduring presence therefore does not condemn to futility the approach defended here.

There is always room for improvement. But recent U.S. experience suggests that conscientious officers and their JAG advisers are finding ever better ways of integrating legal counsel into military decision making. This conclusion lends support to the argument for

continued reliance on internal traditions and evolving professional practices as potentially effective means of preventing war crime.

28 See generally Robert Nelson, *Partners with Power: The Social Transformation of the Large Law Firm* (1988).

29*Pollitz v. Wabash R. Co.*, 207 N.Y. 113, 124 (1912) (holding that "questions of policy of management . . . may not be [legally] challenged" if taken "for the common and general interest of the corporation," even if resulting decisions are "unwise and inexpedient.").

30 Harold Wilensky, *Intellectuals in Labor Unions: Organizational Pressures on Professional Roles* (1956); Nico Stehr, *Knowledge Societies* 197 (1994).

31 Chris Jochnick and Roger Normand, "The Legitimization of Violence: A Critical History of the Law of War," 35 *Harv. Int'l L.J.* 49 (1994).

22
Applying Applied Ethics, or Where the Rubber Hits the Road

One might ask what differences would the reasonable error rule make in the treatment of actual cases, compared to the manifest illegality rule? Consider four brief scenarios. These are derived from actual incidents, but have been modified in important ways to better illustrate my argument.

Scenario One

The commander of an air force bomber group orders his pilots to attack anti-aircraft artillery and missile installations, located on top of earthen dikes in enemy territory. These orders specify use of a conventional type of high-explosive ordnance, with which the bombers are routinely equipped. Consistent with standard "need to know" limits on data disclosure, the pilots are given only spatial coordinates of their targets, which are described simply as anti-aircraft and missile installations.

Such orders, whatever their ultimate legality, are not manifestly illegal to the ordinary pilot. Pilots who were later prosecuted could thus rightly claim that the fact they acted pursuant to superior orders legally excuses their conduct. After all, the targets as described in the orders are legitimate "military objectives" within the legal meaning of the term.[1] Moreover, there are many circumstances in which use of high-explosive ordnance against

such targets would be perfectly justified and consistent with general military law.

In the hypothetical, however, the dikes surround population centers. Conventional, high-explosive ordnance would likely destroy

1 Protocol I to the 1949 Geneva Conventions, Aug. 15, 1977, 16 *Int'l Legal Materials* 1409 (1977).

not only the artillery and missile emplacements, but also the irrigation installations on which they are constructed. This would cause massive flooding and the probable death of several hundred thousand civilians.

Anti-personnel weapons, however, could neutralize the artillery and missile installations without substantial damage to the dikes, and without significant decrease in accuracy or effectiveness. Use of conventional bombs, likely to destroy the dikes, would be disproportionate to the military advantage anticipated in this case. All competent JAG officers, if consulted, would advise accordingly.

The result of criminal prosecution would thus be different under the proposed approach. If time permitted, as it generally would, reasonable inquiry by the commander would include consultation with legal counsel, now available for this purpose. Competent briefing of the pilots would have to include, under the reasonable error rule, a brief explanation of the legal defensibility of the weapon system selected for the mission under the circumstances.

This would require disclosing to the pilots the factual circumstances sufficient to justify such selection. If the commander did not volunteer such explanation and corresponding information, the pilots would be expected to ask for it. If they did not, or the commander's answer was clearly inadequate, then error concerning the legality of these orders would not pass the test of reasonableness. A pilot would therefore be liable, despite having acted pursuant to superior orders requiring war crimes other than manifest atrocity.

Scenario Two

A field commander is ordered to clear a series of enemy soldiers' trenches. To this end, he is supplied with riot-control gas. He obeys the order, but is eventually prosecuted for violating the Geneva Gas Protocol.[2] He claims that the convention does not cover riot-control agents. Legal authorities are split on the question.[3]

[2] *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare*, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65.

[3] *Id*. The Chemical Weapons Convention, which recently entered into force (and which the U.S. has ratified), clearly prohibits use of riot control agents, however. Convention on the Prohibition of the Development, Production, and

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Acknowledging this fact, the tribunal nonetheless concludes that the Protocol does indeed prohibit the officer's conduct.

The illegality of the officer's conduct was not immediately apparent on its face. The substantive legal issue was not yet completely settled at the time he acted. This creates legitimate doubts about the order's illegality. All such doubts are to be resolved in favor of obedience, under the manifest illegality approach. The officer who obeyed the order must, therefore, be acquitted under this rule, despite the tribunal's ultimate finding that his conduct violated the Protocol.

The result would be different under the proposed approach if the officer had received now-standard instruction in the applicable conventions. Such instruction would have apprised him that the question was unsettled. As would any officer or civilian, he would act at his own peril in areas of legal unsettledness. He would risk that his conduct might later be found to constitute a war crime. He would not be expected automatically to resolve any doubts about the order's legality in favor of compliance.

His liability under my approach would depend on the ultimate legality of his conduct and the reasonableness of his error in that regard. The latter question would turn on the nature and the extent of the information available and attributable to him at the time of his conduct. This would include basic familiarity with the law of armed conflict, derived from all requisite prior instruction in such law. If he were unaware of the state of applicable law and there was time to ask for a legal opinion, however brief and perfunctory, he would be expected to make such a request.

In this case, competent counsel's response would be that there was conflicting authority on the issue and, if he obeys, he runs a serious risk that a tribunal will find his conduct criminal. Under these circumstances, it would be unreasonable for him to assume that his orders were legal and that he could confidently act on such a belief. He could, therefore, be convicted of violating the Protocol, despite the prior uncertainty of its scope and his consequent doubts about its prohibition of contemplated conduct.

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Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 *Int'l Leg. Mat*. 800 (1993).

Scenario Three

A middle-echelon officer is ordered to transmit commands from headquarters to his subordinates requiring them to assemble prisoners of war for rail departure at a particular time and place.

The order is not manifestly illegal on its face, so the recipient officer need not fear liability should it turn out to be unlawful. It would be unlawful if the prisoners of war were being shipped to a factory where they would be required to manufacture armaments for their captors. The officer's actionsparticipating in prisoner-of-war transportation intended for this purposecould make him an accessory to the crime of forced labor.

Under traditional manifest illegality analysis, however, his ignorance of the ultimate destination and purpose of the transport would be presumed and would excuse him. A court would find he lacked the requisite mental state of intending to contribute, or knowingly contributing, to the offense. The easy availability of this mistake-of-fact defense creates powerful incentives for him to ask no questions and turn a blind eye.

Under the reasonable error rule, by contrast, he would have to establish the honesty and reasonableness of his professed error. His officer training in pertinent law and general knowledge among such officers regarding similar shipments in the recent past would help determine the reasonableness of his action, as would the availability of legal counsel and time available to seek advice.

Assuming it was generally known where prisoners were transported and for what purpose, and that he was familiar with the relevant rules, my approach mandates that his asserted defense of

reasonable error will fail. The division of labor among many hands might vitiate the order's manifest illegality, but would not prevent the reasonable officer from recognizing such illegality under the circumstances described.

Scenario Four

During a future war in the Persian Gulf, two Apache attack helicopters are traveling en route to their targets near Baghdad. While still over the desert, the pilots spot a lone, Iraqi tank squadron. With the approval of the commanding pilot, they divert course to initiate an attack, intending to resume their mission immediately thereafter. Just as the choppers are about to attack, however, the tanks' hatches open and soldiers within begin to wave white flags.

The helicopters cannot stop to accept the Iraqis' surrender without abandoning their original mission. Abandoning the mission would compromise the larger operational initiative to which their efforts are designed to contribute. If the tanks are not destroyed, they will regain their liberty and their occupants could be expected to transmit to enemy headquarters information about the choppers' location and direction of movement. There is no practical way for the Apache pilots to tell Iraqi soldiers to abandon their vehicles and communications equipment before destroying these items from the air. The lead pilot therefore orders commencement of firing upon the still-occupied tanks.

The Hague Convention requires that surrender be accepted whenever offered.4 It specifically prohibits "without qualification, the killing of surrendering enemy soldiers even if taking prisoners impedes an advancing army's progress."5 The Third Geneva Convention further forbids such killing even "on grounds of self-preservation" or because "it appears certain that the [enemy soldiers] will regain their liberty."6 An order to attack enemy

troops who obviously are attempting to surrender thus comes about as close as one can get to the core of the manifest illegality rule.

Here, however, the redescription problem, as I have called it, presents an obstacle to that seemingly simple result. The superior's order can be alternatively redescribed, quite plausibly by defense counsel, as one requiring attack of enemy troops who cannot be taken

4 Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2227, 1 Bevins 631, Art. 23.

5*Id*.

6*Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6 U.S.T. 33316, 75 U.N.T.S. 135, Art. 85.

prisoner without seriously compromising the overall mission. Though the Hague and Geneva prohibitions on point are clear and well-settled, they are not the only source of pertinent law.

The general practice of states suggests that customary law continues to authorize recourse to considerations of genuine military necessity, not merely a matter of inconvenience or minor tactical disadvantage. On these facts, the Apaches' need to rejoin and complete the original mission is real and substantial. The threat to that mission posed by not destroying the tanks' communication capabilities is equally genuine.

Under the prevailing approach, the question of liability could thus easily get mired in a dispute over how the defendant's conduct ought to be described. Courtroom argument would focus on what jury instructions should say about whether "background" facts and which such facts concerning the defendants' larger mission should be included when describing their conduct in firing on surrendering soldiers.

Under the reasonable error approach, the final result would probably be the same, but the analysis would focus much more simply on whether the defendant's error about the order's legality was reasonable under the totality of the circumstances. Liability would thus turn on the essential issue of moral culpability, rather than on the arcane and logically irresolvable conceptual question of how their conduct should be described.

CONCLUSION

The ideal of martial honor finds eloquent expression in the words from Aristotle that serve as my epigraph. This entire study can be taken as a sustained gloss on his views, from a socio-legal perspective.[1] It seeks to rehabilitate (for civilians) and partly reinterpret (for soldiers) this ancient ideal.

The rehabilitation aims at enhancing civilian appreciation of the continuing importance of this internal virtue, when properly understood, in preventing war crime, at a time when virtually all civilian efforts are directed at strengthening more formal, external sanctions. Today these efforts concentrate on creating an international criminal court with broad jurisdiction.

The reinterpretation consists in applying the law of due obedience so soldiers themselves more clearly understand that the courage required of them involves risking one's life not only for one's country and one's combat "buddies,"[2] but also, at times, for the noncombatants who increasingly find themselves in harm's way during modern war. The approach defended here aims, in short, at reinforcing the law's concerns with minimizing harm to innocents, even where this harm does not manifestly involve a "grave breach" of the Geneva Conventions (in current international parlance) or an

1 Philosophers and social theorists might be surprised to learn how regularly Aristotle is invoked by professional military authors in discussing ethical questions. The author encountered at least a dozen references to Aristotle during the last decade's issues of the *Military Review*, published by the U.S. Army. See, e.g., Capt. Christopher

Kolenda, "Navigating the Fog of Technological Change," 76 *Mil. Rev.* 31, 40 (1996).

Contemporary officers are not, of course, the first soldiers to profit from his teachings. Aristotle's own pupil, Alexander the Great, brought along on his military campaigns a copy of Homer's *Iliad*, annotated by his former tutor. Alexander "always kept [it] under his pillow, with his dagger." Plutarch, "Life of Alexander," in *The Age of Alexander*, trans. Ian Scott-Kilvert 259 (1973). Among the lessons Alexander claimed to have learned from Aristotle was to "treat each situation as unique." John Maxwell O'Brien, *Alexander the Great* 20 (1992).

2 Article 99, U.C.M.J., "Misbehavior Before the Enemy," prohibiting "cowardly conduct," such as "running away."

"atrocious and aberrant act" (the older term in national military codes).

To this end, I propose to "nudge" one legal doctrine a small step down a road on which military law, as a whole, has long been traveling. That road is generally called "civilianization," and the step involves adopting (and taking seriously) a presumption routinely applied to civilians: that people know their legal duties, including the nonobvious ones.3

The operational and tactical circumstances of modern combat and peace operations are very different from Aristotle's day, to be sure. But a reasonable error rule would, I have shown, harmonize well with the circumstances of contemporary soldiers; it would strengthen incentives to develop the fine-grained situational awareness now already expected of them for other reasons. The central objective, then, is to ensure that recent advances in military "judgment training" are made to work in tandem, not at odds, with the law of war.

In this way, lawyers can contribute in a modest but significant way to the reinterpretation of soldiering as a social practice and the readjustment of its internal ethical gyroscope that are already well underway in the post-Cold War world. Professional judgments of "proportionality" in the use of force have, of course, *always* required that competent officers "balance" considerations of military necessity against "principles of humanity" protecting noncombatants.

But the new international environment and the new kinds of noncombat missions in which military organizations are now

routinely engaged have decisively changed the ways these judgments need to be made, these balances struck. Virtuosity in the graduated show of force, in particular, has not been central to traditional understandings of martial honor. Today, it is not enough to avert obvious atrocity; soldiers also "may have to put themselves in

3 The view defended here remains more lenient than civilian law in that all reasonable errors of obedience by soldiers would be excused. Civilian criminal law does not grant such general or blanket immunity. Rather, its general rulethat ignorance of one's legal duties is no defenseis qualified by a number of very particular, delimited exceptions.

increased danger to avoid accidental civilian casualties,"[4] as conclude two RAND analysts.

In principle, this goal might be achieved by better training alone, and there has been considerable improvement in that area. But good training takes place "in the shadow of the law." So we should be sure that military law casts its shadow where we want it to. General standards tend to cast very different shadows than bright-line rules. The former are conducive to a wide field of vision, the latter to a delimited one. Deliberately so. These contrasting norm-types imply two very different approaches to institutional design and to military law, specifically in preventing war crime.

The first type of norm uses highly specific rules to limit the autonomy that soldiers have too often abused to pillage and plunder. It assumes that superiors always have more complete knowledge than subordinates of crucial operational considerations, invisible at the front. It therefore concludes that the law should maximize rote obedience by subordinates to the terms of precisely-formulated directives. Opportunities for even virtuoso displays of tactical judgment are minimized, for fear that they will be viciously abused.

The second approach does not assume that atrocity springs exclusively from low-level soldiers and that superiors always possess (and have properly interpreted) greater knowledge than those on the scene. This approach therefore regulates subordinates by way of general standards that encourage them to exercise situational judgment on the basis of local knowledge, assessed in light of prior experience. General standards encourage situational judgment because they make legally relevant, and hence require

attentiveness to, a wider range of the circumstances faced by the decision maker whose choices they govern. Attention to such considerations is essential to the effective initiative now widely sought from lower-echelon officers and NCOs by military leaders and thinkers in advanced industrial societies.

The practical judgment cultivated in this way has a moral dimension, I have argued. The result is to "hard-wire" important aspects of moral reasoning into the very core of effective soldiering. In widening their field of vision, general standards make soldiers

4 Jennifer M. Taw and John Peters, *Operations Other Than War: Implications for the U.S. Army* 18 (1995).

more attentive to moral aspects of a tactical situation, no less than to strictly prudential ones. Many of these moral considerations are already embodied in military law, particularly the substantive law of war crimes. As soldiers become more attentive to these considerations, the law can reasonably expect them to weigh these considerations properlyi.e., not only in the very easiest cases. One way to do this is to limit the due obedience excuse to reasonable errors, not only to situations of the most manifest criminality.

Some officers, fearful of a solution worse than the problem, no doubt fear that an abandonment of bright, simple lines in military law for multi-factor tests will inevitably lead the subordinate down a slippery slope. He will casually act on open-ended, all-things-considered "hunches" about what "feels right." And he will therefore often get things very wrong.

This fear is not irrational. But the law can go a long way in guarding against the dangers it identifies. Multi-factor tests can specify a limited set of relevant considerations and their relative priority, such as those pertinent to finding "hostile intent" in the absence of obviously "hostile acts."[5] Training in the application of such tests can and must include instruction in how our decisional processes are frequently distorted by cognitive "heuristics."[6] Increased awareness of these sources of bias can significantly reduce their influence. Hence, Army training in implementing standing rules of engagement is increasingly influenced by psychological studies of the limits on human information processing and rule-application in exigent circumstances.[7]

Current rules of engagement in peace operations are designed to induce soldiers to employ violent force in more discriminating

ways

5 A good example of this type of "exclusionary" standard is the R.A.M.P. test proposed by Lt. Col. Mark Martins, and recently adopted by much of the U.S. Army. Lt. Col. Mark, "Rules of Engagement For Land Forces: A Matter of Training, Not Lawyering," 143 *Mil. L. Rev*. 3 (1994). Multi-factor tests may even specify such things as the considerations relevant to responding to such differing nonlethal threats as rock throwing, banditry, unarmed assaults, and minor harassment. Maj. James Linder, "A Case for Employing Nonlethal Weapons," 76 *Mil. Rev*. 25, 27 (1996). These several challenges to lower-echelon officers and enlisted personnel were posed by several major peace operations in recent years.

6 Max Bazerman, *Judgment in Managerial Decision Making* 1443 (1986).

7 Martins, *supra* note 4, at 7486 (showing the relevance of such studies to training in military law).

without denying the right to defend themselves, where circumstances require. In fact, restrictive rules on use of force are increasingly understood as simply part of the evolving social practice of soldiering in the post-Cold War world. Measured responses to nonlethal threats, however, require not only more restrictive rules, but also more patience from soldiers than the law has traditionally expected.8 Patience is largely a trait of character, of course. We must therefore be more self-conscious in drafting legal norms to cultivate this disposition in those who must practice it, often in the most trying circumstances. Military law has not generally been approached with this objective foremost in mind. Quite the contrary.

The dangers admittedly posed by granting junior officers significant autonomy can be substantially held in check by rigorously training them in practical judgment, in how to use their discretion wisely. This means rewarding them accordingly when they do, no less than threatening punishment when they do not. When punishment must be employed, it ought to rely more on reintegrative "shaming" than on draconian threats of expulsion and destruction of one's career. This is more consistent with the historic roots of noncombatant protection in martial honor, in virtues inherent to practice of the profession.

Greater situational attentiveness to the moral aspects of decision will also help professional soldiers become better, more appealing human beings. The officer who appreciates the competing moral considerations at stake in a difficult tactical choice is simply a person of better character than one who confines himself to making the right decision, and then forgets all about the ethical/legal

considerations that counseled differently. His character is superior because he shows greater appreciation of the dilemmas with which his job confronts him and greater awareness of their ultimately tragic nature. His situational discernment in such matters is also inextricable from what makes him effective in implementing the mission-type orders he now increasingly receives.

The manifest illegality rule draws a bright-line around atrocities, excusing other war crimes. But for all its indulgence in this regard, it is less demanding than the blind obedience preferred by the military

8 Linder, *supra* note 4, at 29 (citing U.S. Army Field Manuel 110-5, *Operations*, June 1993).

leaders of many Third World states. That preference is painfully clear in their positions concerning the first 1977 Geneva Protocol. But the manifest illegality approach provides a useful "floor" for international law, in that it is a norm to which most states can realistically aspire.9 More developed societies, with more highly educated and better trained militaries, can afford to strive for more, however. The reasonable error rule, embodied in U.S. and German military law, offers a good means to this end.

But even these rich democracies have yet to appreciate the full repercussions of this approach to war crime, for they do not seriously investigate, much less prosecute, unlawful obedience where its criminal nature would not be immediately manifest to all.10 The result, practically speaking, is to confine courts-martial (and lesser sanctions) to a small subset of the law's formal jurisdictional domain. After all, often an order will not carry its criminality on its face, but can be identified as unlawful by a particular officer in the circumstances, including his training in implementing applicable rules of engagement and the availability of JAG advisers.

Once we correct our assumptions about the bases of efficacy and initiative in combat, we can better tailor the law to secure ethical conduct from soldiers without compromising their effective performance. This is because the demands of both ethics and efficacy increasingly point not toward unthinking obedience, but to deliberative discernment and individual ingenuity. The law does not effectively foster such practical judgment by rigid, bright-line rules like "obey all orders, except those clearly calling for atrocities." It more effectively encourages moral judgment by

holding soldiers responsible for all unreasonable mistakes resulting in war crime, regardless of whether these involve manifest atrocities.[11] This

9 Admittedly, much of contemporary warfare occurs in precisely those societies where it may be unrealistic to expect widespread adherence even to this seemingly indulgent requirement.

10 This is also true of the Israel Defense Forces, according to a military lawyer who prosecuted soldiers accused of excessive force against Palestinian protesters during the Intifada. Author's interview with confidential source, Tel Aviv, June 1998. On such trials, see Yaron Ezrahi, *Rubber Bullets* 210223 (1997).

11 Soldiers can be held responsible not only by criminal prosecution, but also by milder forms of administrative sanction. See R.C.M. 306(c); U.C.M.J., Art 15. In many cases, criminal prosecution offers too blunt an instrument for encouraging the sort of initiative and practical judgment now widely sought from

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approach would not offer a cure-all for the several problems here discussed. But it is unlikely to do much harm,12 and would likely do considerable good. It is therefore, at least, a step in the right direction.

Just as important as the refocusing of military law that I defend is the way in which I propose to justify and implement it. It is justified as intrinsic to the kind of practical judgment that soldiers already aspire to, simply in virtue of being good soldiers. No one wants to think of herself as a murderer, after all, and it is the law of war, particularly the *jus in bello*, by which professional soldiers distinguish what they do from murder. These norms are therefore central to their identity, to their vocational self-understanding, even for soldiers avowedly skeptical of legal "formalism" and the "airy" claims of international society. Military law can take better advantage of this fact.

The "internalist" approach I defend can be implemented accordingly: less by enhanced threat of prosecution than by increased reflective habituation, through realistic training simulations in which soldiers apply rules of engagement to different kinds of military operations. The experienceincluding the frustrationthat particular rules of engagement provide soldiers in such training (and actual missions, of course) will continue to help JAG attorneys improve these rules over time, in a process of reciprocal learning between soldiers and their legal advisers.

This will become yet another aspect of the increasing integration of JAG officers into military decision making now occurring in the U.S. It will help soldiers appreciate the law, including the law of war crimes, as less threatening than many still suppose. Finally,

this enlarged internal role for JAGs can help the law play a more effective and less obtrusive part in preventing war crime than the conspicuous spectacles of *post facto* criminal prosecution (international or

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junior officers. "Nonpunitive" sanctions include transfer in assignment, reduction in rank, written reprimand, withdrawal of privileges, and remedial training, among other things.

12 Those who imagine a parade of horribles following from explicit adoption of such an approach ought to consider that exaggerated concerns about weakening of authority have preceded most other successful reforms in disciplinary procedures, including abolition of flogging. Vice Admiral James Calvert, *The Naval Professions*, 2nd. ed., 153 (1971).

domestic),[13] for all its admitted value. In the field, the practical effect of the new focus on legal training and habituated experience in practical judgment is considerably enhanced by the changing force-structure of Western militaries, which rely increasingly on long-term professional cadres rather than mass conscription of those who quickly come and go.[14]

New training methods, especially simulated application of engagement rules, should be closely assessed by empirically-oriented social scientists studying military organization. This should be their top research priority, in fact, if this book's analysis is substantially correct. Until we have reliable data in this regard, we outsiders cannot be fully confident that those who now clearly "talk the talk" are also prepared to "walk the walk."[15]

Clemenceau famously observed that "military justice is to justice what military music is to music."[16] His judgment has been shared by many since. Sousa's marches are vigorous and rousing, but he was no Mozart. Both martial music and military law are blunt instruments, limited in their range and nuance on account of serving strictly limited purposes. Martial music lacks aesthetic or emotional subtlety because it is designed to bolster the patriotic sentiments of soldiers, emboldening them to risk their lives in battle. It aims to "strengthen the wavering man," as Homer put it.[17] So too with military law.

Still, Charles Ives successfully disassembled the simple motifs of Sousa's traditional oompah-marches, recombining them into

13 On the elements of deliberate public spectacle in such trials, see Mark Osiel, *Mass Atrocity, Collective Memory and the Law* 209292 (1997).

14 James Burk, "National Attachments and the Decline of Mass Armed Forces," 17 *J. of Polit. & Mil. Sociol*. 65 (1989).

15 There are some indications of a disparity between the two. See, e.g., Lt. Col. Tim Challans, "Autonomy and Leadership," 76 *Mil. Rev*. 29, 30 (1996) ("Many soldiers and leaders, including many students at our service colleges, do not understand that not only do they have a right to disobey illegal orders, but they also have a duty to disobey illegal orders.")

16 Clemenceau apparently offered the comment orally, but it is universally attributed to him by secondary sources.

17 Robert Heinl, Jr., *Dictionary of Military and Naval Quotations* 185 (1966) (quoting Homer, *The Iliad*). Nietzsche observed, more trenchantly, "how good bad music and bad reasons sound when we march against an enemy." *Id*.

richer, more complex patterns.[18] The resulting swirl of disharmony, with their conflicting rhythms, tunes, and keys, disrupt the audience's settled expectations concerning the predictable structure of military music, without mocking those on whose work he relies. In hopes that readers will indulge the conceit, I confess that I have written this book in much the same spirit.

One may find, of course, that the musical analogy comes to mind in less flattering ways. Ives's innovative use of military marches may have been very clever, and they have entered the modern orchestral canon. But one shudders to think what would happen if a real soldier were to try to march to them.[19] Fine distinctionsboth musical and legalhave always been the first casualty of war.[20]

The approach defended here will, to some extent, make soldiering even harder than it is. And it is already a difficult vocation. But the proportion of all casualties suffered by noncombatants in war has increased in every major military conflict over the last century.[21]

18 Denise von Glahn Cooney, 'A Sense of Place: Charles Ives and "Putnam's Camp, Redding, Connecticut,"' 14 *Am. Music* 276 (1996).

19 For instance, Ives's spectacular composition, "Putnam's Camp," was inspired by hearing two marching bands on Memorial Day enter the main square of his hometown from opposite directionsplaying different pieces of music simultaneously. Von Glahn Cooney, *supra* note 16, at 299 (noting how "opposing groups of instruments symbolize the discord in the ranks . . . between weary soldiers prepared to desert the colonial cause and Gen. Israel Putnam, who convinced them to reverse their course").

20*Reid v. Covert*, 354 U.S. 1, 3536 (1957) (Black, J.) (observing, in connection with courts-martial, that "a rough form of justice emphasizes summary procedures, speedy convictions, and stern penalties"). Justice

Douglas, writing for the majority, went so far as to refer to "so-called military justice" and to describe "court-martials as singularly inept in dealing with the subtleties of constitutional law." *O'Callahan v. Parker*, 395 U.S. 258, 266 (1969).

Consider also the drumhead court-martial of Melville's *Billy Budd*. Herman Melville, "Billy Budd, Foretopman," in *Six Great Short Modern Novels* 124138 (1954). In that tale, the abbreviated procedures of a sea-going vessel, followed scrupulously, prevent the deepest moral questions and psychological complexities from influencing the course of legal events. The reader's central preoccupations seem to lie beyond (or beneath) the law's concern. For recent debate over the accuracy of Melville's depiction of such legal procedures, see Richard H. Weisberg, *The Failure of the Word* 13376 (1984) and Richard Posner, *Law and Literature: A Misunderstood Relation* 15565 (1988).

21 The percentages rise from each conflict to the next: from the First to the Second World War, from the latter to the Korean conflict, and from Korea to the Vietnam War. Kurt T. Gaubatz, "Changing Interests and Persistent Rules: The

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Given the pointless suffering that soldiering thus inflicts, it cannot be the law's central and over-riding purpose to make the soldier's job a great deal easier.22

Max Weber thought that meaning in modern society could only be found by recapturing within other vocations the sense of calling that remained undisturbed, unproblematic, only for the warrior.23 For the law of due obedience, however, the challenge is to help the professional soldier acquire a deeper appreciation of the morally problematic features of his calling, features so apparent to the rest of us. This is desirable because of its likely effects on both his character and conduct, for the two interact in ways that ultimately make them all but inseparable.

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Protection of Non-Combatants in War," paper presented at the 1997 Amer. Polit. Sci. Assoc. Convention, Washington, D.C. See generally Michael Cranna, ed., *The True Costs of Conflict* xv (1994).

22 This must be our response to those complaining of "ethicists [who] remain fussy academics unconnected to the demands of postmodern warfare." Lt. Col. Peter R. Faber, "The Ethical-Legal Dimensions of Strategic Bombing During WWII: An Admonition to Current Ethicists," paper presented at the Joint Services Conference on Professional Ethics 4 (1996). On how any defensible view of military ethics would necessarily be demanding on the conscientious soldier, see Michael Walzer, "Two Kinds of Military Responsibility," in Lloyd Matthews and Dale Brown, eds., *The Parameters of Military Ethics* 67, 72, (1989).

23 Harvey Goldman, *Politics, Death, and the Devil: Self and Power in Max Weber and Thomas Mann* 6669 (1992) (parsing the 1920 revised version of Weber's "Intermediate Reflection: Theory of the Stages and Directions of Religious Rejection of the World.").

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