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Obeying Orders: Atrocity, Military Discipline, and the Law of War

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Obeying Orders: Atrocity, Military Discipline, and the Law of War

Mark J. Osiel

The law now generally excuses soldiers who obey a superior's criminal order unless its illegality would be immediately obvious to anyone on its face. Such illegality is "manifest," on account of its procedural irregularity, its moral gravity, and the clarity of the legal prohibition it violates. These criteria, however, often conflict with one another, are over- and underinclusive, and vulnerable to frequent changes in methods of warfare. Though sources of atrocity are shown to be highly variable, these variations display recurrent patterns, indicating corresponding legal norms best suited to prevention. There are also discernible connections, that the law can better exploit, between what makes men willing to fight ethically and what makes them willing to fight at all. Specifically, obedience to life-threatening orders springs less from habits of automatism than from soldiers' informal loyalties to combat buddies, whose disapproval they fear. Except at the very lowest levels, efficacy in combat similarly depends more on tactical imagination than immediate, letter-perfect adherence to orders.

To foster such practical judgment in the field, military law should rely more on general standards than the bright-line rules it has favored in this area. A stringent duty to disobey all unlawful orders, coupled to a standard-like excuse for reasonable errors, would foster greater disobedience to criminal orders. It would encourage a more fine-grained attentiveness to soldiers' actual situations. It would thereby enable many to identify a superior's order as unlawful, under the circumstances, in situations where unlawfulness may not be immediately and facially obvious to all. This approach aims to prevent atrocity less by increased threat of ex post punishment, than by ex ante revisions in the legal structure of military life. It contributes to "civilianizing" military law while nonetheless building upon virtues already internal to the soldier's calling. In developing these conclusions, the author draws evidence from a wide array of recent wars and peacekeeping missions.

INTRODUCTION

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

This Article critically examines how military law addresses these questions.¹ It argues that changes in the nature of military activity, and in our understanding of its enduring essentials, suggest that the leniency with which military law has generally answered such queries is no longer justified. More specifically, new knowledge about the bases of cohesion among troops and about the sources of war crimes suggests 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 operations in which Western armed forces are increasingly engaged,² and the moral accountability of those who execute them.

The General Background section of this Article includes a nutshell introduction to existing law on the question of "due obedience" to orders. It also explains basic terms and background policies regarding military discipline and the prevention of atrocities. Part I then examines several uncertainties surrounding current law. In particular, four sources of uncertainty are explored: legal, practical, theoretical, and attributional. A wide range of puzzles and ambiguities are thus presented by the "manifest illegality" rule as applied to varying circumstances.

Social, political, and technological contexts that once lent relatively clear meaning to the notion of manifest illegality in war, fixing its boundaries with some precision in most soldiers' minds for long

1. Military law is not a technical term of art. Though the term is widely used, its scope of reference is not uniform. 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 in the U.S. Military today 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 A.F. L. REV. 1, 3 (1994). Operational law extends to such matters as the law governing mobilization of the Reserves, the Soldiers and Sailors Civil Relief Act, the Foreign Claims Act, the Foreign Assistance Act, the Arms Export Control Act, the Posse Comitatus Act, and various legal restrictions on Defense Department acquisitions.

2. Since the Persian Gulf War, American forces have been deployed in over twenty operations, few of which involved traditional combat objectives. On the role of armed force in such operations, see ANTONIA HANDLER CHAYES & GEORGE T. RAACH EDS., *PEACE OPERATIONS* (1995).

periods, may have largely dissolved. I conclude that 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. The doctrine's very terminology, its invocation of atrocious and aberrant acts, of illegality which is manifest to all, rings a strange note in modern ears. If the concept of manifest illegality rests on social foundations that have eroded, then we must ask whether, and in what fashion, these foundations might be reconstructed.³ In sketching the nature of this erosion and marking its contours, this Article identifies the many serious problems that the rule presents.

Part II explores the sociological suppositions of current law about why men commit atrocity in war and assesses the accuracy of these theories. It shows how the sources of atrocity are far more varied and complex than current law assumes. This suggests the need for a finer set of distinctions. To that end, Part III examines how the law might be reformed, through clarification or revision, to bring it 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 its 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. 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.

The upshot of this analysis is that officers should be punished not only for atrocities, i.e., acts manifestly illegal on their face, but for any crimes resulting from unreasonably mistaken belief that a superior's orders were lawful. Broadening the scope of the law's application in this way would increase incentives for soldiers to learn the law concerning contemplated conduct and the facts to which it will be applied. The manifest illegality rule gets the incentives wrong, discouraging such effort, even where circumstances easily permit it.

3. The reconstructive portion of this Article appears in Part III.

GENERAL BACKGROUND

In both international law and the military codes of most states, the nutshell answer to the problem of due obedience is that the soldier⁴ 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 POWs or others who were obviously noncombatants.

The practice of holding soldiers responsible for manifestly illegal acts is already apparent in the military law of ancient Rome.⁵ Canon law maintained it throughout the middle ages.⁶ 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.⁷ In 1992 it provided the legal basis for convicting several young border guards of killing fellow citizens escaping from the former German Democratic Republic.⁸ 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 criminal, it had not

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

5. The Roman Digest specifically excluded acts of "heinous enormity" from the due obedience defense. See IV THE DIGEST OF JUSTINIAN, Law 157, tit. XVII, Lib. L. (Theodore Mommsen & Paul Krueger eds. & Alan Watson trans., Univ. of Penn. Press 1985). On Roman military practice regarding atrocities, see Mars McClelland Westington, *Atrocities in Roman Warfare to 133 B.C.* 123 (1938) (unpublished Ph.D. dissertation, University of Chicago) and DOYNE DAWSON, *THE ORIGINS OF WESTERN WARFARE* 129-30 (1996).

Justice Enrique Santiago Petracchi provides a thoughtful discussion of Roman sources. In his dissent to the Argentine Supreme Court's judgment upholding the due obedience statute of 1987, Petracchi suggests the continuing relevance of such ancient sources to contemporary discussion of these issues. See *Argentina: Supreme Court Decision on the Due Obedience Law*, in 3 TRANSITIONAL JUSTICE 509, 512-14 (1995).

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* 39-43 (1968); GIUSEPPE BETTIOL, *L'ORDINE DELL'AUTORITÀ NEL DIRITTO PENALE* 11-27 (1934).

6. See GUILLERMO J. FIERRO, *LA OBEDECENCIA DEBIDA EN EL ÁMBITO PENAL Y MILITAR* 9 (1984) (discussing sources regarding canon law).

7. 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).

8. See *Border Guards Prosecution Case*, (1996) 5 StR 370/92, [BGH] [Supreme Court] (F.R.G.). For discussion, see Kif A. 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* 261-305 (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.

been manifestly so, given the "ideological pervasiveness" of the Führer principle.⁹

Both results, Priebke's acquittal and the border guards' conviction, drew considerable criticism at home and abroad.¹⁰ 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.¹¹ 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."¹² This problem is perennial, perhaps even ineradicable. It cannot be dismissed as pre-Nuremberg atavism.

Most Western legal commentators accept the aforementioned nutshell answer to questions 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

9. 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 RIVISTA DE DIRITTO INTERNAZIONALE 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. See Celestine Bohlen, *Italy Convicts Ex-SS Officers in '44 Killings*, N.Y. TIMES, July 23, 1997, at A4. An appeal is pending. See Abigail Levene, *Ex-Nazi Priebke Vows to Take Case to European Court* (visited Mar. 8, 1998) <<http://www.infobeat.com>>.

10. See *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 "[i]t is hard to imagine an act more manifestly illegal than murdering 335 innocent civilians").

11. 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. See 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. See Craig R. Whitney, *Ex-Vichy Aide Is Convicted and Reaction Ranges Wide*, N.Y. TIMES, Apr. 3, 1998, at A1, A11.

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

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.¹³ It is also true of the treaties prohibiting genocide, torture, and crimes against humanity.¹⁴ These conventions define the pertinent offenses but say nothing about which among long-standing affirmative defenses are or are not available to the accused.

The treaty establishing the International Military Tribunal at Nuremberg professed to preclude superior orders as a defense, allowing only mitigation of punishment on this basis.¹⁵ But the practice of the Tribunal itself, as well as later Nuremberg tribunals administered by the occupying powers, is more equivocal.¹⁶ 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 tacitly

13. See Col. Howard S. Levie JAGC. (Ret.), *The Rise and Fall of an Internationally Codified Denial of the Defense of Superior Orders*, 30 MIL. L. & L. OF WAR REV. 185 (1991) [hereinafter Levie, *Rise and Fall*]; Howard S. Levie, *Some Comments on Professor D'Amato's "Paradox,"* 80 AM. J. INT'L. L. 608 (1986).

14. 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 Inter-American Convention on the Forced Disappearance of Persons, June 9, 1994, § 5 art. VIII (providing that "[t]he defense of due obedience to superior orders or instructions that stipulate, authorize, or encourage forced disappearances shall not be admitted"); see also Inter-American Juridical Committee Draft Convention Defining Torture as an International Crime, Feb. 6, 1980, art. 3, 19 INT'L. LEGAL MATERIALS 618, 630; General Assembly Resolution on the Code of Conduct for Law Enforcement Officials, G.A. Res. 34/169, U.N. GAOR, 34th Sess., Agenda Item 88 (1980), Dec. 17, 1979, art. 5, 19 INT'L. LEGAL MATERIALS 526, 529; Memorandum of Understanding Concerning Cooperation in the Fight against Illicit Trafficking of Narcotic Drugs through the Use of Equipment and Personnel Based at Great Inagua and Such Other Bases as May Be Established in the Turks and Caicos Islands, with Annexes, July 12, 1990, U.S.-Bah.-U.K., §5(iv), D.O.S. 92-182.

15. See 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*, [hereinafter Charter of the International Military Tribunal], Aug. 8, 1945, 59 Stat. 1544.

16. See, e.g., In re Von Leeb, 11 Nuernberg Military Tribunals 511 (1948) (the High Command Trial) (stating that "[w]ithin 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 Nuernberg 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").

stipulated *ab initio* to be manifestly illegal.¹⁷ 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.

A third source of relevant authority derives from such international organizations as the International Law Commission, the United Nations (hereinafter U.N.) General Assembly, and the Security Council, all of which have contributed to defining international criminal offenses. 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.¹⁸ 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.¹⁹ In short, evidence of having received orders from superiors, though not a

17. 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. See YORAM DINSTEIN, *THE DEFENSE OF 'OBEDIENCE TO SUPERIOR ORDERS' IN INTERNATIONAL LAW* 207-13 (1965). The same is apparently 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).

18. 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) [hereinafter *U.N. Yugoslavia Report*].

19. See *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."

complete defense, is relevant and admissible to the question of whether the soldier labored under duress when performing the command.²⁰

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. Such prosecutions are generally based on domestic military codes that incorporate by reference the relevant international treaties defining such offenses. 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.²¹

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.²² Other states will excuse the soldier only if his obedience resulted from an honest belief that the order was lawful.²³ 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).²⁴

The majority approach in the industrialized democratic West appears to be the manifest illegality rule. Under this rule, the law presumes that the soldier obeys unlawful orders because he mistakenly believes, honestly and reasonably, in their lawfulness. This presumption is

20. This Article, however, focuses exclusively on cases where the superior's order bears on the subordinate's claim of mistake, legal or factual, rather than duress.

21. 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.

22. See HOWARD S. LEVIE, *PROTECTION OF WAR VICTIMS* 10, 15-16, 19, 22, 31, 37-44 (1985) (quoting speeches of representatives to the convention negotiating the Protocol).

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

24. In the United States, for instance, "[i]t 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 COURTMARTIAL* 11-109 (1995).

rebutted only when the acts ordered were so egregious as to carry their wrongfulness on their face.²⁵

A. *Genealogy of Terms*

Roman military law described the relevant subset of offenses, those legally inexcusable despite having been performed under orders, as "atrocities."²⁶ 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,²⁷ and finally "exceptionally serious war crimes."²⁸ Though these categories overlap considerably, their scope is not coterminous. Moreover, the relation between them remains unclarified and infuriatingly obscure.²⁹

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."³⁰ Even so, many

25. Many scholars casually describe this approach as adopted by most states. But none has actually conducted a systematic empirical survey of military codes throughout the world. Without such an empirical inquiry, it is premature to speak confidently of the manifest illegality approach as the majority rule. Whether its adoption is sufficiently widespread to describe it as reflecting "the general practice of states" should therefore be treated, strictly speaking, as an open question.

26. See DIGEST OF JUSTINIAN, Law 157, tit. XVII, Lib. L., *supra* note 5. Roman law exercised considerable and enduring influence on medieval and early modern Courts of Chivalry, even in England and well into the 17th century. See G. D. SQUIBB, Q.C., *THE HIGH COURT OF CHIVALRY* 162-65 (1959). But recent scholarship suggests that custom or usage was a more important source of normative constraint in war than Roman law, at least in northern Europe. See MATTHEW STRICKLAND, *WAR AND CHIVALRY* 34-40 (1996).

27. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, T.I.A.S. No. 3365, arts. 146-147 (defining what constitutes a grave breach in the context of offenses spelled out in earlier articles); see also *id.*, arts. 50 and 51. The Convention provides that ratifying states must commit themselves to prosecuting all incidents of grave breaches and that universal jurisdiction exists for such offenses.

28. 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) (giving an exhaustive definition, 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 crimes—seem 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).

29. 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, 160-70, 165 (Yoram Dinstein & 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 I] have opened up a vista of uncertainty . . .").

30. On Argentine law, for instance, see Cód. JUST. MIL. art. 514 (1985); Cód. PEN. art. 5 (1985). For discussion, see FIERRO, *supra* note 6, at 139-41.

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," "clear and unequivocal," "transparent," "obvious," "without any doubt whatsoever," or "universally known to everybody."³¹ 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."³² The order must also display its obvious criminality "on its face," according to many authorities.³³

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"³⁴ 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. This assumption proves unwarranted, however, because it overgeneralizes; it is true only in some circumstances.³⁵

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.³⁶ The scope of the phenomena at issue in this Article can be easily described with relatively nontechnical language: the deliberate harming of known noncombatants (and their property), a category encompassing

31. RONALD A. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 118 (1957). For the countries and commentators adopting these various formulations, see DINSTEIN, *supra* note 17, 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); Green, *supra* note 17, at 674 (quoting a South African case describing the defendant's conduct as "grossly illegal").

32. 7 WAR CRIMES REPORTS (1947), 27, 41-42.

33. See, e.g., 6 C.J.S. *Army and Navy* § 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*, 43 Tenn. (3 Cold.) 85, 85 (1866) ("[A]n 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 13, at 185; Green, *supra* note 17, at 679; ANDERSON, *supra* note 31, at 258; Annotation, *Civil and Criminal Liability of Soldiers, Sailors, and Militiamen*, 135 A.L.R. 10, 37 (1941).

34. ANDERSON, *supra* note 31, § 118, at 258.

35. 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 & MEREDITH FRIEDMAN, *THE FUTURE OF WAR* 151 (1996).

36. There is no canonical definition of atrocity in either the military or legal literature. The *Oxford English Dictionary* defines it as an act characterized by "[s]avage enormity, horrible or heinous wickedness." OXFORD ENGLISH DICTIONARY 757 (2d ed. 1989).

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

B. "Cracking the Culture" of the "Separate Community"

Roughly speaking, there are two schools of thought on whether the so-called separate sphere of military culture is the source of atrocities or of their prevention.³⁷ The first of these 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.

Without such imposition, 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, political parties, etc., 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 militarist, masculinist folkways.³⁸ So argues former United States Representative Pat Schroeder, for instance.

In contrast, others believe that restraint in combat owes its origins and continuing efficacy primarily to virtues internal to the soldier's calling, virtues largely distinct from, even 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.³⁹ But the dedicated exercise of a vocation cultivates within its conscientious practitioners, and elicits from them, the virtues peculiar to it.

Some forms of self-selection foster institutional pathologies, however. For instance, there is some reason to suspect, according to the

37. See SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE* 189-92, 260-63 (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.

38. Peter J. Boyer, *Admiral Boorda'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 Non-Combatant 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").

39. 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, 480-81 (1994) (finding entering cadets higher on conformity and benevolence toward peers than civilian counterparts, but lower on independence).

work of one general-turned-psychologist, that the external, 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 are appealing to those who lack self-esteem and fear disapproval, those inflexible and unable to adapt to new information or to cope well with ambiguous, changing situations.⁴⁰

Clausewitz had officers in mind when he wrote that "[e]very special calling in life, if it is to be followed with success, requires peculiar qualifications of understanding and soul."⁴¹ These peculiar properties are often called virtues of character. Unlike general moral principles and the duties they create, virtues are "time- and context-bound excellences of particular communities or lives."⁴² 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"⁴³ 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"; departure from its internal norms thereby becomes very difficult for her even to contemplate seriously.

Many readers will surely dismiss this perspective as no more than militaristic nostalgia. Its adherents, however, plausibly contend that it offers us the best prospects for restraining war crimes. Avowedly provincial practices internal to a vocation do not derive from universal moral norms, categorically binding upon all.⁴⁴ Rather, they rest on prevailing understandings of what the practice itself requires, when conscientiously undertaken and properly understood.⁴⁵

40. See NORMAN DIXON, *ON THE PSYCHOLOGY OF MILITARY INCOMPETENCE* 189-95, 309-17 (1976). For the classic, sociological discussion of this general phenomenon, see Robert Merton, *Bureaucratic Structure and Personality*, in *SOCIAL THEORY AND SOCIAL STRUCTURE* 151 (1949).

41. CARL VON CLAUSEWITZ, *ON WAR* 138 (Anatol Rapoport ed. & J.J. Graham trans., Penguin Books 1968) (1832).

42. ONORA O'NEILL, *TOWARDS JUSTICE AND VIRTUE* 2 (1996).

43. JAMES D. WALLACE, *ETHICAL NORMS, PARTICULAR CASES* 7-8 (1996).

44. 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.").

45. 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 43, at 99.

The officer in training builds up a professional identity on the basis of his personal immersion in the ongoing, collective narrative of his corps.⁴⁶ This narrative identity is imparted not by instruction in international law but by stories about the great deeds of honorable soldiers. These stories include accounts of how good situational judgment enabled their heroes to avoid inflicting unnecessary suffering on innocents. The memoirs of successful officers display no shortage of such stories.⁴⁷

From this perspective, the best prospects for minimizing 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. Faced with a hard case, officers are more likely to do the right thing if they ask themselves: "What is required of honorable soldiers, here and now?"⁴⁸ 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?"⁴⁹ The appeal is as

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 process—an "inner morality." LON L. FULLER, *THE MORALITY OF LAW* 41-44, 92-97 (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.

46. See 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").

47. For a memorable story of this sort, which should certainly be part of any such education in martial virtue, see JAMES R. McDONOUGH, *PLATOON LEADER* 110-11 (1985) (describing how he would have unwittingly killed several Vietnamese civilians, but for the better situational judgment of a junior platoon member).

48. 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 judgements. "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 42, at 21-22.

On the considerable efficacy of such specifically vocational virtues in restraining battlefield misconduct, see STRICKLAND, *supra* note 26, at 124, 1066-1217 (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").

49. The most influential statement of this latter position is surely Walzer's. See Michael Walzer, *Two Kinds of Military Responsibility*, in *THE PARAMETERS OF MILITARY ETHICS* 67, 72 (Lloyd J. Matthews & Dale E. Brown eds. 1989) [hereinafter Walzer, *Two Kinds*]. See, e.g., MICHAEL WALZER, *JUST AND UNJUST WARS* 47 (1977) (arguing that "the rules of war . . . are made

much to their professional pride as to universalistic ideals.⁵⁰ For instance, 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."⁵¹ Here, as in many situations, the internal morality of soldiering proved more restrictive and humanitarian than international law.

Courage, also, occupies a central place in this pantheon of martial virtues. This virtue includes, at least potentially, the courage necessary to disobey a clearly unlawful order.⁵² 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. In fact, integrating soldiers 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.

Such virtues can best be cultivated in some degree of isolation from the secular temptations and material gratifications of contemporary society.⁵³ For such reasons, the United States Supreme Court "has long recognized that the military is, by necessity, a specialized society separate from civilian society."⁵⁴ The rationale, as noted by one senior officer, has been that "[t]he values necessary to defend [a democratic]

obligatory by the general consent of mankind They derive immediately and specifically from the consensual process" and "ultimately from principles") [hereinafter WALZER, WARS].

50. Clausewitz defended the view that "[a]t 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 arms—such an army is imbued with the true military spirit." *Id.* at 187 (quoting Clausewitz).

51. *The Day We Stopped the War*, NEWSWEEK, Jan. 20, 1992, at 18. This use of the term is consistent with DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 3 (1956). There were, of course, other considerations supporting Powell's decision not to pursue the Republican Guard.

52. On the courage sometimes entailed in such disobedience, see Sir Compton MacKenzie, *Refusing to Obey in World War*, in CERTAIN ASPECTS OF MORAL COURAGE 139-63 (1962). For a recent official recognition of resistance to 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.).

53. For evidence that cadets become socialized into the distinctive value hierarchy of their armed service, see Stevens, *supra* note 39, 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").

54. *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).

society are often at odds with the values of the society itself."⁵⁵ To serve her country effectively in combat, the professional soldier must live *within* modern democratic society without being entirely *of* it.⁵⁶

Civilian society tends to disparage martial virtues as antiquarian, just as professional soldiers often disparage civilian society as decadent or morally corrupt.⁵⁷ Despite their radically different *weltanschauung*,⁵⁸ 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.⁵⁹ 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. One leading scholar concludes that, 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.⁶⁰

55. Gen. Walter Kerwin, *The Values of Today's Army*, 33 *SOLDIERS* 4 (Sept. 1978).

56. See RICHARD GABRIEL, *TO SERVE WITH HONOR* 15, 112 (1982).

57. See A.J. Bacevich, *Tradition Abandoned: America's Military in a New Era*, 48 *NAT'L INTEREST* 16, 19 (1997). Bacevich observes that "[m]ilitary '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 ST. J.*, July 27, 1995, at A1.

58. 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 37, at 79.

59. Those favoring such separation fear not only excessive "civilianization" of the armed forces, but also militarization of civilian society. For recent expressions of the latter concern among military intellectuals, see Col. Charles J. Dunlap, Jr., USAF, *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 *WAKE FOREST L. REV.* 341 (1994); Donald H. Horner, Jr., 22 *ARMED FORCES & SOCIETY* 307 (1995-96) (reviewing JAMES WILLIAM GIBSON, *WARRIOR DREAMS: VIOLENCE AND MANHOOD IN POST-VIETNAM AMERICA* (1994)) (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 & KEVIN ROBINS, *CYBORG WORLDS* (1989); PAUL VIRILIO & SYLVRE LOTRINGER, *PURE WAR* 31-52, 159-72 (Mark Polizotti trans., Semiotext(e) 1983).

60. See 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, "[w]e 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).

It might first appear that this separatist approach, with its confidence in virtues internal to the calling, will 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.⁶¹ When the internal norms of soldiers give out, civilians will need to step in, imposing more universalistic and humanitarian ideals of justice.

The horrific situations in Bosnia and Rwanda, however, are the rare exception, according to this second view. The worst war crimes in Bosnia were committed by civilian police, not by professional military officers, and the greatest share of the Rwandan slaughter has been attributed to civilians.⁶² Moreover, the military sometimes leads the way in social change. 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.⁶³

The second 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 internal conventions of the officer class.⁶⁴ 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.

The two contrasting positions I have just described are, to some extent, conceptual constructions, ideal types. They lay out end points

61. See 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).

62. See ARYEH NEIER, *RETHINKING TRUTH, JUSTICE AND GUILT AFTER BOSNIA AND RWANDA* (1995).

63. On the relative success of racial integration in the American armed forces, see CHARLES C. MOSKOS & JOHN SIBLEY BUTLER, *ALL THAT WE CAN BE* (1996); SHERIE MERSHON & STEVEN SCHLOSSMAN, *FOXHOLES AND COLOR LINES* (1998).

64. For particularly thoughtful, recent statements of this longstanding view, 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 soldiery—a sort of modern substitute for chivalry"); GABRIEL, *supra* note 56, at 15, 91-99. 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 50, at 28. See also Gen. Maxwell D. Taylor, *A Professional Ethic for the Military?*, 28 *ARMY* 18 (1978).

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 was surely wrong when he said that virtue of character is enough and that good men need no laws. Conversely, "[a]ccounts 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."⁶⁵ Thus, the two approaches can, in principle, be complementary. Experience suggests, however, that there is a genuine danger that they will work at cross purposes, each undermining the other.

One purpose of this Article is 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. As long as a powerful international criminal court remains unlikely,⁶⁶ and perhaps undesirable,⁶⁷ 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."⁶⁸

C. *Civilian and Military Approaches to Legal Error*

The capacity of the human mind to process complex information in situations of extreme adversity, such as those on the battlefield, is quite limited.⁶⁹ Criminal law often faces the question of how far to go in

65. O'NEILL, *supra* note 42, at 9.

66. See 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] [w]e are a long way from creating it in the culturally heterogenous world which we inhabit today." MICHAEL HOWARD, *WAR AND THE LIBERAL CONSCIENCE* 132 (1978).

67. See 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* 168-69 (1997).

68. The term is Fuller's, who employs it in a different sense. See FULLER, *supra* note 45, at 41-44. For one defense of restraint through the internal morality of soldierly virtuosity, see Groll-Ya'ari, *supra* note 64, at 463 (noting that "[t]he 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").

69. 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). Gabriel, a leading military psychiatrist, 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 direction of reducing liability in light of such inherent cognitive constraints.⁷⁰

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.⁷¹ Some offenses are defined to require awareness that one's act is unlawful.⁷² In such cases, any mistake causing one to believe one's act lawful 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 mistake⁷³ and the incentive for citizens to remain informed of their duties.⁷⁴ 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.⁷⁵ Even so, the defense of reasonable mistake of law has been significantly enlarged within the American legal system in recent years,⁷⁶ bringing it into greater conformity with the German and other continental systems.⁷⁷

70. 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.

71. See, e.g., MODEL PENAL CODE § 2.04(1)(a) (1985). See also MODEL PENAL CODE § 2.02(9) (1985) (providing that "[n]either 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").

72. 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).

73. See JOHN AUSTIN, LECTURES ON JURISPRUDENCE, 498-500 (3d ed. 1869).

74. See OLIVER WENDELL HOLMES, THE COMMON LAW 48 (Harvard University Press 1963) (1881); DOUGLAS STROUD, MENS REA 52 (1914).

75. See MODEL PENAL 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").

76. 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. See Michael L. Travers, *Mistake of Law in Mala Prohibita Crimes*, 62 U. CHI. L. REV. 1301 (1995).

77. In German law (like Argentine and that of other legal systems greatly influenced by the German), the error is called "unavoidable." Judgment of Mar. 18, 1952, 2 BGHSt 194; HANS WELZEL, DAS DEUTSCHE STRAFRECHT 164-74 (4th ed., 1971). See also George P. Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1296 (1974).

Still, soldiers are treated more leniently than civilians under both international law and the municipal military law of most states. Virtually everywhere, the law requires soldiers to presume the lawfulness of their orders. Military legal systems vary in the ease and manner in which this presumption is rebutted.⁷⁸ 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.⁷⁹ 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. To judge from the litigated cases, this subset has virtually always involved atrocities.

D. Current Law as Compromise

The traditional rule excusing non-atrocious errors by soldiers reflects a compromise between the interests of military discipline and the supremacy of the law.⁸⁰ 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.⁸¹

78. See KEIJZER, *MILITARY OBEDIENCE* 216-18 (1976); L.C. GREEN, *SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW* 236-41 (1976) (general overview), 33-34 (South Africa), 46, 50 (Canada), 70-71 (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 & Ved P. Nanda eds., 1973).

79. DINSTEIN, *supra* note 17, at 31-37.

80. See Albin Eser, "Defences" in *War Crimes Trials*, in WAR CRIMES IN INTERNATIONAL LAW 251, 255, 259 (Dinstein & Tabory eds., 1996) (describing the manifest illegality rule as "a middle of the road approach[]").

81. 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, 80-84 (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). 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* 264-65 (T.W. Craik ed., 1995).

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.⁸² The drawbacks of either extreme are almost universally recognized by all students of the problem.⁸³

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

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 contexts, the doctrine does not excuse the subordinate who does his employer's bidding but simply makes the employer a culpable party as well. In international military law, by contrast, the doctrine is understood to mean that the superior *alone* is accountable for the subordinate's illegal conduct.

82. This approach was favored by Grotius and Locke. See 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 368 (Francis Kelsey ed., 1995); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* ¶ 151, at 386 (Peter Laslett ed., Cambridge Univ. Press 1970) (2d ed. 1694).

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*. "[I]t 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. See WILLIAM C. DE HART, *OBSERVATIONS ON MILITARY LAW* 165 (1859) (citing the 9th Article for War for the proposition that "[t]he 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 Dragan Erdemovic before the International Tribunal for the Former Yugoslavia.

83. See, e.g., DINSTEIN, *supra* note 17, at 235 (1965) (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).

legality.⁸⁴ 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 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.

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, conduct 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

84. See, e.g., MODEL PENAL CODE § 2.10 (1962) (providing that "[i]t is an affirmative defense that the actor, in engaging in the 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"). The Comment to this provision lists state statutes treating the issue as it arises in connection with members of each state's militia. See *id.* at 388-92. Many states add the requirement, absent from the Model Code provision, that the subordinate's mistake has to be reasonable for it to excuse his obedience to criminal orders. For similar provisions of other Western countries, see GREEN, *supra* note 78, at 58. For Argentine law, see Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: the Case of Argentina*, 100 YALE L.J. 2619, 2626 (1991). Early advocates of this approach included Augustine and Pufendorf. See Keijzer, *supra* note 78, at 146 nn.30 & 39; Keijzer, *supra* note 78, at 95 (citing Augustine's argument that an unjust order makes the king responsible and "preserves the innocence of the soldier"); AUGUSTINE, *Contra Faustum Manichaem* XXII, ch. 76, in 26 OEUVRES COMPLÈTES 224 (Peronne ed., Paris 1870); SAMUEL PUFENDORF, 2 DE JURE NATURAE ET GENTIUM LIBRI OCTO 168 (C.H. Oldfather & W.A. Oldfather trans., Clarendon Press 1934) (1688).

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.⁸⁵

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."⁸⁶ This provision was employed to hold Argentina's *junta* members liable for the acts of their subordinates during the "dirty war"⁸⁷ kidnapping, torture, murder, disappearance, and so forth.

Here, having followed a superior's command is not merely a fact relevant to determining whether the subordinate acted in error. It is presumptively sufficient to establish that ignorance. Argentine law thus creates a rebuttable presumption that 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.⁸⁸

By contrast, international law treats the superior orders defense in a less forgiving fashion. Obedience to a superior's order is simply one relevant fact, among others, in determining whether he acted in error of his legal responsibilities.⁸⁹ But both this approach and the preceding reject the choice between *respondeat superior* and *ignorantia juris non excusat*.

This compromise ensures that some measure of "sociological ambivalence"⁹⁰ 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."⁹¹ To be sure, general attitudes of

85. L. OPPENHEIM, 2 INTERNATIONAL LAW 571-72 (H. Lauterpacht, ed., 7th ed. 1952).

86. Cód. JUST. MIL. art. 514 (1985).

87. 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. See ALISON BRYSK, THE POLITICS OF HUMAN RIGHTS IN ARGENTINA 37-43, 125-35 (1994).

88. See, e.g., *Riggs v. State*, 43 Tenn. (3 Cold.) 85, 85 (1866); *Keighly v. Belle*, 176 Eng. Rep. 781 (C.P. 1866); GREEN, *supra* note 78, at 97-110 (Israel), 170-71 (Italy).

89. See DINSTEIN, *supra* note 17 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.

90. On this concept, see ROBERT K. MERTON, SOCIOLOGICAL AMBIVALENCE AND OTHER ESSAYS 1 (1976).

91. *Id.* at 18 (emphasis omitted).

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,"⁹² 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.

E. 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. The moral defensibility of the excuse 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. . . . [Y]ou lose your sense of the definite, hence your sense of truth itself. . . .⁹³

Reading such accounts has a tendency to propel even the most civilized of individuals into a more primitive mindset. The measure of cognitive and moral disorientation produced by long periods of ground combat, through fatigue, hunger, and omnipresent filth, ensures that "[i]n 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."⁹⁴

92. *Id.* at 8 (emphasis omitted).

93. TIM O'BRIEN, *THE THINGS THEY CARRIED* 88 (1990).

94. *Id.* at 79.

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,

[W]ar experience is nothing if not a transgression of categories. In providing bridges across the boundaries 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."⁹⁵

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. 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 Nineteenth 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,

[a]n 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 instance as this the duty of soldiers is, even at the risk of disobeying their superior, to obey the law of the land.⁹⁶

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

95. ERIC J. LEED, *NO MAN'S LAND* 21 (1979).

96. A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 304 (10th ed. 1959).

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.⁹⁷

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.⁹⁸

Even in the civilian context, there are situations implicating a strong societal interest in immediate obedience by ordinary citizens to directives from officials.⁹⁹ The Model Penal Code provides a legal excuse for those who obey unlawful directives (usually from police) in civil emergencies.¹⁰⁰ In exigent circumstances, civilian legal authorities who demand assistance from laymen will inevitably make occasional mistakes about what the law permits or requires in a given case.

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.

97. *Id.*

98. *Id.* at 305 (quoting JAMES FITZJAMES STEPHEN, 1 *THE HISTORY OF THE CRIMINAL LAW OF ENGLAND* 205-06 (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.

99. *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"); *see also* HYMAN GROSS, *A THEORY OF CRIMINAL LAW* 173 (1979) (stating 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").

100. *See* MODEL PENAL CODE § 2.04(1)(a) (1985).

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.¹⁰¹

The fact that warfare requires them to risk death 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," committing oneself to the point of death.¹⁰² 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 tactical 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.¹⁰³ 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. After all, "nearly everybody's judgment is disturbed by the anticipation of calamity."¹⁰⁴

Rule consequentialism triumphs here. The consequences of a rule requiring unwavering obedience to superiors, it is thought, yields better overall results 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.

101. For a forceful statement of these arguments, see Richard Wasserstrom, *Conduct and Responsibility in War*, in COLLECTIVE RESPONSIBILITY 179 (Larry May & Stacey Hoffman eds., 1991).

102. LT. GEN. SIR JOHN WINTHROP HACKETT, *THE PROFESSION OF ARMS* 63 (1962).

103. This is a common theme in the memoirs of veterans. See, e.g., PAUL FUSSELL, *DOING BATTLE* 124 (1996).

104. ALAN DONAGAN, *THE THEORY OF MORALITY* 207 (1977).

I

OBEDIENCE TO SUPERIOR ORDERS: THE UNCERTAIN SCOPE
OF MANIFEST ILLEGALITY

The following sections discuss four different types of uncertainty in the scope of manifest illegality. These can be called legal, practical, theoretical, and attributional. It is not entirely clear which crimes, committed under what circumstances, fall within the subset of manifestly illegal acts and which do not. 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, which it was never intended to do. The precise scope and contours of this special subset of crimes, not simply illegal, but manifestly so, has 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 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 otherwise—particularly in time of war—there 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"¹⁰⁵ 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."¹⁰⁶

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."¹⁰⁷ As a result of

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

106. *In re von Leeb*, 11 Nuernberg Military Tribunals 511, 511 (1948) (emphasis added).

107. *U.N. Yugoslavia Report*, *supra* note 18, art. 1 ¶ 33 (emphasis added).

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 criminal offenses have only recently been identified as such. This is particularly true of many crimes against humanity, such as forced deportation of populations—"ethnic cleansing" as it is now often called—and 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.¹⁰⁸

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.¹⁰⁹ Field commanders who received such orders had the right to presume their legality and were therefore acquitted on grounds of obedience to orders.¹¹⁰

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 it was 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.

108. See HUGO GROTIUS, ON THE LAW OF WAR AND PEACE BOOK THREE 690 (1964) (concluding from ancient sources that "[a]ccording to the law of nations all persons captured in a war that is public become slaves"). 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).

109. See THE UNITED NATIONS WAR CRIMES COMMISSION, XII LAW REPORTS OF TRIALS OF WAR CRIMINALS 88-89 (1949); see also A.P.V. ROGERS, LAW ON THE BATTLEFIELD 144 (1996).

110. See *id.*

A. *The Nature of the Defense*

Where a soldier must exercise situational judgment in order to ascertain the unlawfulness of a superior's order, that order is not 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 overkill was both very great and readily foreseeable in advance. 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 anticonsequentialist. 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-military 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.

1. *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

[t]he 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.¹¹¹

In short, if the subordinate reasonably believed the unlawful order to be legal, he is not culpable for the crime in question.¹¹² Current German military law is virtually identical.¹¹³

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" that 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. Through such deliberation, the illegality of the order may become apparent, even if it was not apparent immediately upon receipt.¹¹⁴

111. U.S. v. Calley, 48 C.M.R. 19, 27 (1974). 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. See MODEL PENAL CODE § 2.10 (1985) (stating that "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 Crimes*, 21 J. OF PUB. L. 7, 8-12 (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, 226-27 (Peter D. Trooboff ed., 1975).

112. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *HANDBOOK ON CRIMINAL LAW* 441 (1972).

113. See DONALD ABENHEIM, *REFORGING THE IRON CROSS* 109-20 (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).

114. Conversely, though more controversially, there may be some acts, such as torture, now classified as manifestly illegal under all circumstances that might nevertheless under particular circumstances—highly exigent ones, to be sure—appear legally excusable to a reasonable soldier, even if his belief in this regard proves mistaken. For example, "moderate physical pressure" has apparently proven quite successful in extracting information crucial to saving the lives of many innocents. See *Israel Defends Use of Force in Interrogation*, N.Y. TIMES, May 8, 1997, at A14 (quoting statements of Israeli officials that bombings have been averted by use of "moderate physical pressure" against members of Palestinian terrorist groups, a practice publicly defended by former Prime Minister Yitzhak Rabin); Stephen Flatow, *Israel's Fine Line*, N.Y. TIMES, May 19, 1997, at A15

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 military has not sought to prosecute acts of obedience to criminal orders unless these were also manifestly illegal on their face.

2. *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

(citing the claim of Shin Beth officials that some 90 planned terrorist attacks have been averted in the last two years, partly through the use of such methods). For arguments about when torture might reasonably appear defensible to soldiers, see Henry Shue, *Torture*, 7 PHIL. & PUBLIC AFF. 124 (1978). In societies facing serious threat to domestic security from terrorist movements, this scenario is no mere professorial hypothetical.

At times, defenders of Lt. William Calley argued in this fashion. They contended that in the circumstances of national insurgency and guerrilla warfare in which women and children dressed as noncombatants often attacked American soldiers, orders from superiors to kill women and children were no longer always manifestly illegal on their face. Calley's situation, however, was not nearly as exculpatory as this abbreviated characterization suggests. See *U.S. v. Calley*, 48 C.M.R. 19, 22, 24 (1974). The circumstances surrounding the My Lai incident were in fact highly inculpatory. Calley's troops captured unarmed civilians. The prisoners did not resist detention and remained completely under the troops' control. The victims were women, children, and old men. Women and children had been recently found carrying explosives and initiating attacks on United States forces, but at the time of the murders, the prisoners were gathered in a ditch outside the village and closely guarded by soldiers armed with automatic weapons. Furthermore, Calley himself reportedly expended 15 to 20 magazines of ammunition from his weapon during these shootings. In any event, the American rule has never been interpreted as excusing, on grounds of exigent tactical circumstances, unlawful obedience to orders like those Capt. Medina gave Calley. See *id.* at 19, 23. Calley testified that at the initial briefing for the mission, Medina ordered the troops to "kill every living thing—men, women, children, and animals . . ." Calley further testified that Medina, upon being notified that a large number of villagers had been detained, told him to "waste [the Vietnamese]." *Id.* at 23-24. But see H.F. Kuenning, *Small Wars and Morally Sound Strategy*, in *ETHICS AND NATIONAL DEFENSE* 187, 209 (James C. Gaston & Janis Bren Hietala eds., 1993) (contending that Medina's orders to Calley "were vague enough that he could interpret them as an order to murder; if his orders had *specifically* forbidden deliberate noncombatant/detainee casualties, the massacre probably would not have occurred").

soldier from the duty of obedience upon him and make him criminally responsible for his acts.¹¹⁵

Legal institutions rarely define "manifest" any more precisely than did the Israeli court in this moving but rather purple and overheated passage.

The United States Army Manual is comparatively unusual in listing several specific acts that officers are forbidden to order under any circumstances.¹¹⁶ Section 504 expressly prohibits:

[m]aking 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.¹¹⁷

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 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.¹¹⁸

115. 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. 279-83, (1958), Ofer v. Chief Military Prosecutor, (A) vol. 44: 362).

116. 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." THE LAW OF LAND WARFARE, *supra* note 51, § 502 (prohibiting Grave Breaches of the Geneva Conventions of 1949 as War Crimes) (emphasis added). 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).

117. THE LAW OF LAND WARFARE, *supra* note 51, § 504, at 180.

118. See, e.g., U.S. v. Griffen, 39 C.M.R. 586, 588 (1968).

Obedience to superior orders may at most warrant mitigation of sanction for such offenses.¹¹⁹ 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.

3. "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.

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."¹²⁰ These formulations do not take 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.¹²¹

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 Intifadah, have been children, often in their early teens, sometimes younger.¹²² Child soldiers have no vocational identity as professional soldiers and no corresponding sense of warrior's honor.¹²³ Much less is manifestly wrongful to a child than to

119. See PHILIP R. PICCIGALLO, *THE JAPANESE ON TRIAL* 68-72 (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).

120. DINSTEN, *supra* note 17, at 15-16, 79, 128, 129, 174, 212 (quote at 15) (discussing the countries and commentators adopting these various formulations); see also GREEN, *supra* note 78, 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); ANDERSON, *supra* note 31, 257-58; 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 wrong—such as rounding up women and children and then mowing them down, shooting babies out of mothers' arms, and raping").

121. To a somewhat greater degree, military law has resisted adopting a subjective standard. It does not often ask whether the defendant's legal error would have been reasonable for a soldier of his age, experience, intelligence, and rank. Hence, in several Vietnam era courts martial of United States soldiers, jury instructions did not allow consideration of the defendants' subnormal measured intelligence. See GARY D. SOLIS, *SON THANG* 159, 272, 274 (1997).

122. See generally ILENE COHN & GUY S. GOODWIN-GILL, *CHILD SOLDIERS* (1994). Child soldiers have been common in over thirty wars within the last ten years. See Howard W. French, *When the Gun Play Kills the Kids' Play*, N.Y. TIMES, May 12, 1996, at E3.

123. See Michael Ignatieff, *The Gods of War*, N.Y. REV. OF BOOKS, Oct. 9, 1997, at 10-13.

an adult. Children's moral sensibility develops gradually over time.¹²⁴ Also, 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 apparently made such a mistake in Somalia, to lethal effect.¹²⁵ Though some commentators are content to invoke general formulas about manifest illegality at such times, military courts more often feel obliged to assess the defendant's exercise of situational judgment, puzzling through the factual and moral complexities of his situation, whether or not the applicable legal formulas so authorize.¹²⁶

4. *Why and When Legal Errors Must Be Reasonable*

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.¹²⁷ 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. Mistakes as to justification function as an excuse.¹²⁸ They must therefore meet the requirement

124. See generally LAWRENCE KOHLBERG, *MORAL STAGES* (1983); JEAN PIAGET, *JUDGMENT AND REASONING IN THE CHILD* (1959).

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

126. United States law, as I observed *supra* at 111, more readily authorizes such particularized inquiry.

127. After 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).

128. See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 695-96 (1978).

of any excuse: that the defendant's mistake be faultless or nonculpable.¹²⁹

Consider, for example, the Argentine officers prosecuted for human rights abuses during the "dirty war." Their alleged mistakes were ones of justification.¹³⁰ 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.¹³¹

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.¹³² 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 ascertain the accused's actual knowledge of what he was doing.¹³³ 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 *mens rea* 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

129. Mistakes of justification do not negate culpability unless they are blameless. *See 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. *See* Gunther Arzt, *Ignorance or Mistake of Law*, 24 AM. J. COMP. L. 646 (1976).

130. *See* 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").

131. *See* Mark Osiel, *The Making of Human Rights Policy in Argentina*, 18 J. LAT. AM. STUD. 135, 168-69 (1986).

132. *See* FLETCHER, *supra* note 128, at 707.

133. *See, e.g.,* MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 490, 495 (1959); AUGUST VON KNIERIEM, THE NUREMBERG TRIALS 244 (Elizabeth D. Schmitt trans., 1959).

mistake.¹³⁴ 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*. I shall discuss each of these considerations in turn.

B. Legal Uncertainty

1. How Legal Uncertainty Erodes the Manifestness of Illegality

First, for an act to be manifestly wrongful, the law prohibiting it must be very clear, not unsettled or riddled with uncertainty. As Dinstein notes, "[m]anifestly illegal orders and an indistinct law, enveloped in mist, are mutually contradictory."¹³⁵ 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."¹³⁶ 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."¹³⁷ Any act the wrongfulness of which can be discerned only by a trip to the library, let us agree, is not manifestly illegal.

Many key issues in the law of armed conflict remain unclear, as all students of the subject acknowledge.¹³⁸ A leading Air Force lawyer notes,

134. See SHELTON GLUECK, *WAR CRIMINALS, THEIR PROSECUTION, AND PUNISHMENT* 152-53 (1944).

135. DINSTEIN, *supra* note 17, at 33.

136. 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. See HANS Kelsen, *PEACE THROUGH LAW* 106 (1944). TELFORD TAYLOR, *NUREMBERG AND VIETNAM* 33-38 (1970) (defending a similar view). See also Wasserstrom, *supra* note 101, at 185; Richard Wasserstrom, *The Laws of War*, 56 *MONIST* 1, 8-9 (1972).

137. U.N. WAR CRIMES COMM'N, *The German High Command Trial, Trial of Wilhelm von Leeb et al.*, 12 *LAW REPORTS OF TRIALS OF WAR CRIMINALS*, 74 (1949). 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 452-53 (1st ed. 1906) (emphasis added).

138. See ROGERS, *supra* note 109, at 27-33, 151.

"The law of war is different [from labor or environmental law] in that there are more gray areas than black and white."¹³⁹ 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."¹⁴⁰ Similarly, reprisals against civilians and prisoners of war are prohibited absolutely.¹⁴¹ 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,"¹⁴² and is to be avoided "as far as military requirements permit."¹⁴³ 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."¹⁴⁴ Destruction of an entire village, with all its civilian

139. Maj. William Hays Parks, *The Law of War Adviser*, 18 MIL. L. & L. OF WAR REV. 357, 385 (1979). See also Hilaire McCoubrey, *The Nature of the Modern Doctrine of Military Necessity*, 30 MIL. L. & L. OF WAR REV. 215, 218 (1991) (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. See 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."); 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").

140. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 40, 1125 U.N.T.S. 3, 22; 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 INT'L LEGAL MATERIALS 88 (1977).

141. See Protocol I to the 1949 Geneva Conventions, *supra* note 140, arts. 20, 50-56, at 15, 26-28.

142. YEHUDA MELZER, *CONCEPTS OF JUST WAR* 88-93 (1975) (quoting Int'l L. Comm'n, *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal* (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. See GEOFFREY BEST, *WAR AND LAW SINCE 1945* 188 (1994).

143. 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).

144. PAUL CHRISTOPHER, *THE ETHICS OF WAR AND PEACE* 167 (1994).

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.¹⁴⁵

Second, whatever clarity may exist in the definition and scope of particular offenses, the defendant often may raise affirmative defenses, the scope of which 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 Geneva Conventions, there was considerable debate about how the defense should be defined and delimited.¹⁴⁶ Agreement proved completely impossible. Many states wished to preserve a strong version of the obedience defense.¹⁴⁷ The upshot, as one leading scholar of international law laments, is that

any defense counsel in a future war crimes trial would be 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.¹⁴⁸

2. *Soldiers' Conflicting Duties under Municipal and International Law*

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

145. See WALZER, *WARS*, *supra* note 49, at 317-18 (citing the historical example of the French town of St. Lô, 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.

146. See M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 433-34 (1992).

147. See 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.").

148. Levie, *Rise and Fall*, *supra* note 13, at 204. 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 body—and 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. See ROGERS, *supra* note 109, at 146. A recent American casebook includes a section on "superior orders" under a chapter titled "Viable Defenses." See JORDAN J. PAUST ET AL., *INTERNATIONAL CRIMINAL LAW* 1361 (1996).

duties in the event of conflict,¹⁴⁹ 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,¹⁵⁰ then the individual soldier, answerable to both legal systems, may find it impossible to act, or refrain from acting, without violating some legal duty.

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.¹⁵¹ Prosecution of the young East German border guards presented this predicament in especially poignant form.¹⁵²

Many assume that such conflicts of 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.¹⁵³ 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.¹⁵⁴

But the actual measure of divergence between international and municipal military law on this issue is not nearly as great as these facts

149. 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, Nov. 4, 1950, art. 1, E.T.S. 5.

150. See MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 83-84 (1988) (explaining dualism and monism in international law and the predominantly dualistic position adopted by nation-states). 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.

151. 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 & NIGEL D. WHITE, *INTERNATIONAL LAW AND ARMED CONFLICT* 342 (1992) ("[P]otentially 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.").

152. See Adams, *supra* note 8, at 281-86 (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 law—and punishing by death—citizens from exercising that right).

153. See Charter of the International Military Tribunal, *supra* note 15, at 279. 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. See *Einsatzgruppen Case (United States of America v. Otto Ohlendorf et al.)*, 1948 Judgment, N.M.T., vol. 4, at 587-89 (Apr. 8, 9).

154. See KEUZER, *supra* note 78.

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.¹⁵⁵ Certain nonwestern legal systems, such as the Islamic, have long maintained some version of this exception.¹⁵⁶ Even the Third Reich's military law formally retained the exception on its books.¹⁵⁷

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.¹⁵⁸ 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.

Second, as one leading scholar observes, the evolution of international law since the Nuremberg proceedings has not closely followed their lead in this area.¹⁵⁹ 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.¹⁶⁰ This unwillingness is perfectly intelligible. In such societies, after all, states are weak precisely

155. See BASSIOUNI, *supra* note 146, at 416-21; GREEN, *supra* note 78, at 71; KEUZER, *supra* note 78, at 169, 175, 179, 190, 204, 205, 210-18 (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 GLUECK, *supra* note 134, at 140-50. 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. See *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)).

156. See 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. 1 (1988) (quoting provisions prohibiting maltreatment of POWs and other noncombatants).

157. See 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).

158. 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.

159. See Levie, *supra* note 13, at 30-31.

160. See Mohammed Ayoob, *State Making, State Breaking, and State Failure*, in MANAGING GLOBAL CHAOS 37-51 (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).

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."¹⁶¹ 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. Where the central task of politics 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. In fact, the state itself is often little more than a legal fiction in such societies, insofar as it fails to monopolize the legitimate use of violence.¹⁶² Historically, for that matter, it was only through military conflict, waged by increasingly strong and disciplined armies, that the modern state came into existence.¹⁶³ State-building is necessary for public order, but the process is closely and uncomfortably akin to organized crime.¹⁶⁴

For this reason, state-building elites do not emphasize the desirability of disobedience to criminal orders. It is no accident that *respondet 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."¹⁶⁵ 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.

161. SAMUEL DECALO, *COUPS & ARMY RULE IN AFRICA* 14-15 (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 A11 (reporting "fighting between the national army and a militia loyal to a former head of state . . .").

162. 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. See MAX WEBER, *ECONOMY AND SOCIETY* (Guenther Roth ed., Univ. Cal. Press 1978) (1956).

163. See Charles Tilly, *War Making and State Making as Organized Crime*, in BRINGING THE STATE BACK IN (Peter B. Evans et al. eds., 1985).

164. See *id.* (likening state-building to a protection racket); KAREN BARKEY, *BANDITS AND BUREAUCRATS* (1994).

165. William James, *The Moral Equivalent of War*, in WILLIAM JAMES: WRITINGS 1902-1910, at 1290 (Bruce Kuklick ed. 1987).

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.¹⁶⁶ 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 "operational control" of their United States superiors.¹⁶⁷ 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.

A situation could therefore 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.¹⁶⁸

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.¹⁶⁹ Some U.S. troops eventually concluded that, as this greater stringency became apparent to Somali thieves and antagonistic clan forces, the latter tended to concentrate their attacks on

166. Such operations are authorized under Chapter VII of the U.N. Charter.

167. See PRESIDENTIAL DECISION DIRECTIVE 25 (May 3, 1994), in David J. Scheffer, *United States: Administration Policy on Reforming Multilateral Peace Operations*, 33 INT'L LEGAL MATERIALS 795 (May 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 (visited Aug. 19, 1998) <<http://sunsite.unc.edu/jwsnyder/wisdom/pdd25.html>>.

168. See Alex de Waal, *Humanitarian Jugernaut*, LONDON REV. BOOKS, June 22, 1995, at 10. 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 Pakistanis. See *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 Pub 0-2, UNIFIED ACTION ARMED FORCES, ch. IV (Feb. 24, 1995).

169. See Laura L. Miller & Charles Moskos, *Humanitarians or Warriors?: Race, Gender, and Combat Status in Operation Restore Hope*, 21 ARMED FORCES & SOC'Y 615, 626-27 (1995).

United States soldiers, rather than other national forces comprising the U.N. presence.¹⁷⁰

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.¹⁷¹ 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 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.

170. See *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. See *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. *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 Ponders Its Peacekeeper Role: Warriors or Watchdogs?* N.Y. TIMES, Apr. 13, 1997, at A16.

171. See 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, "[t]he 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); see also UNIF. CODE OF MIL. JUST. art. 92 (1949).

3. *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.

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.¹⁷² It does so primarily through the principles of proportionality¹⁷³ and military necessity.¹⁷⁴

The Kantian norms take the form of strict side-constraints, direct prohibitions on certain, specified uses of force. The utilitarian norms, in contrast, take the form of general principles.¹⁷⁵ 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 her "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

172. See WALZER, *WARS*, *supra* note 49, at 251-54 (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*, *PHIL. & PUB. AFF.* 1, 145 (1972) (reviewing utilitarian and general approaches to the law of armed conflict); Alan Ryan, Book Review, *J. Narveson's Morality and Utility*, 9 *PHILOSOPHICAL BOOKS* 14 (1968).

173. The principle of proportionality governs the relation between the means employed in combat and the ends desired. The amount of force cannot be disproportionate. See GREENSPAN, *supra* note 133, at 313-14. But there is much disagreement concerning what the principle requires of belligerents, a question that "invites endless argument." See R.R. Baxter, *Modernizing the Law of War*, 78 *MIL. L. REV.* 165, 178-79 (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.").

174. 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, 102-05 (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: "[t]he 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 SHELLY 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) (emphasis omitted).

175. 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. See RONALD DWORKIN, *LAW'S EMPIRE* 247-48 (1986).

disagreement among legal authorities, moreover, concerning what these principles actually mean and require, even where they are agreed to apply. They "invite endless argument"¹⁷⁶ and their requirements are sometimes counter-intuitive.¹⁷⁷

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,¹⁷⁸ 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."¹⁷⁹ 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 "[f]ixed establishments and mobile medical units of the Medical Service may *in no circumstances* be attacked."¹⁸⁰ 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 actually several circumstances in which such

176. Paul W. Kahn, *Lessons for International Law from the Gulf War*, 45 STAN. L. REV. 425, 435 (1993).

177. 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 injury—it has to be in relation to 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).

178. The current United States' LAW OF LAND WARFARE manual, *supra* note 51, 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 & Chris T. Antoniou eds., 1994). On the lack of serious analysis of the issue by military commanders and their lawyers, see ROGERS, *supra* note 109, at 17. Philosophical analysis of the issue is also undeveloped. See ROBERT NOZICK, SOCRATIC PUZZLES 302 (1997).

179. G.H. Gallie, *Essentially Contested Concepts*, 56 PROC. OF THE ARISTOTELIAN SOC'Y 167-69 (1955-56) (identifying certain terms, the meaning of which "no amount of discussion can possibly dispel," terms "which, although not resolvable by argument of any kind, are nevertheless sustained by perfectly respectable arguments and evidence").

180. 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).

medical facilities can be lawfully attacked. This is because the surrounding rules prohibit the use of protected non-military 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.¹⁸¹

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?¹⁸² This practice is quite common in war.¹⁸³ 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, with a view to influencing the positions taken by its member states toward the larger conflict.

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 matériel 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 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, Hague, but not Geneva, law authorizes reprisals. Whereas the former contain "strict, non-derogable prohibitions" on certain types of conduct, the latter "are vaguely worded and permissive," giving commanders wide latitude to plan and implement battle strategies.¹⁸⁴ How then can an order to participate in attacks on hospitals ever be manifestly illegal to

181. See 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").

182. See Maj. W. Hays Parks, *Air War and the Law of War*, 32 A.F.L. REV. 1, 57-59 (1990).

183. See Meilinger, *supra* note 139, 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.*

184. Chris af Jochnick & Roger Normand, *The Legitimization of Violence*, 35 HARV. INT'L L.J. 49, 52-53 (1994).

subordinates who must often rely entirely on intelligence from superiors regarding the actual use to which the particular facility is being put?¹⁸⁵

The tension between Kantian and utilitarian moralities is particularly clear in the law of reprisal.¹⁸⁶ 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."¹⁸⁷ Similar requirements of reciprocity and mutual trust between opponents are central, of course, to prevailing notions of professional ethics in other fields.¹⁸⁸

Subordinates must generally trust superiors that a given order, expressly prohibited by the *jus in bello*, is permitted under the 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.¹⁸⁹ 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 people's 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

185. 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.

186. See CHRISTOPHER, *supra* note 144, at 189-200.

187. C. J. Greenwood, *Reprisal and Reciprocity in the New Law of Armed Conflict*, in *ARMED CONFLICT AND THE NEW LAW* 230 (Michael A. Meyers ed., 1990).

188. See J. Gregory Dees & 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").

189. See generally JAMES F. WILLIS, *PROLOGUE TO NUREMBERG* (1982).

be targeted at a population center, consisting almost entirely of non-combatants. 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.¹⁹⁰ 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.¹⁹¹ Leading Air Force generals during the Vietnam 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.¹⁹² In many areas of military law, the tension between Kantian and utilitarian intuitions about the nature of morality has not been clearly resolved.¹⁹³ The upshot is to leave much of the law still too unsettled to activate the manifest illegality rule at all.

Only some professional philosophers feel the need 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,¹⁹⁴ according to which both Kantian and utilitarian principles are true and must be accorded variable weights depending on the

190. See GEORGE FEIFER, *TENNOZAN* 579-84 (1992).

191. See, e.g., WILLIAM O'NEILL, *A DEMOCRACY AT WAR* 420-26 (1993); RONALD SCHAFER, *WINGS OF JUDGMENT* at 131-38 (1985). But see GAR ALPEROWITZ, *ATOMIC DIPLOMACY* 19-27, 284-87 (1985); MICHAEL SHERRY, *THE RISE OF AMERICAN AIR POWER* 335-36 (1987).

192. See SCHAFER, *supra* note 191, at 210-13.

193. 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., *THE LAW OF LAND WARFARE*, *supra* note 51, at 4. Taylor does 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. See TAYLOR, *supra* note 136, at 32-39. Some top Pentagon lawyers today defend similar, even more sanguinary views. See, e.g., Parks, *supra* note 182, 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. See ROBERT L. HOLMES, *ON WAR AND MORALITY* 103 (1989).

194. Current defenders of this view include THOMAS NAGEL, *MORTAL QUESTIONS* 128-41 (1979); JOSEPH RAZ, *THE MORALITY OF FREEDOM* 321-66 (1986); Amartya Sen, *Plural Goods*, in *PROCEEDINGS OF THE ARISTOTELIAN SOCIETY* (1981); Charles Taylor, *The Diversity of Goods*, in *PHILOSOPHY AND THE HUMAN SCIENCES* (Charles Taylor ed., 1985).

particular circumstance of their application.¹⁹⁵ Wise application of such principles relies more on situational judgment, even traditional casuistry, by people of virtuous character than on any formal decision procedure, easily and equally applied by anyone.¹⁹⁶ The war convention rests upon, even embraces, the fact of moral plurality.¹⁹⁷

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 Article defends an affirmative answer to that question.

4. *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.

The manifest illegality rule sets their incentives 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 manifest illegality rule 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

195. See WALLACE, *supra* note 43, at 21 ("[I]n 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 . . .").

196. See generally VIRTUE ETHICS (Roger Crisp & 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." CLAUSEWITZ, *supra* note 41, at 138.

197. See Michael Walzer, *A Response*, 11 ETHICS & INT'L AFF. 99, 104 (1997).

statutes are strictly construed. A commanding officer might be initially unclear, for instance, about the legal propriety of using a new weapon such as non-lethal sticky foam.¹⁹⁸ 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.¹⁹⁹ But the results of many modern military conflicts often turn on one side's use of novel technologies, such as smart bombs, information warfare,²⁰⁰ blinding lasers, and other non-lethal weapons.²⁰¹ 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

198. Sticky foam is one of a large class of non-lethal weapons now deployed or under development. Non-lethal weapons are "designed to fill the gap between verbal warnings and deadly force." F. M. Lorenz, *Non-Lethal 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).

199. 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. See Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 *INT'L LEGAL MATERIALS* 800 (1993).

200. 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).

201. See generally NICK LEWER & STEVEN SCHOFIELD, *NON-LETHAL WEAPONS* (1997); Lorenz, *supra* note 198, 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, slccp-inducing spray, bean bag projectiles, sticky foam, acoustic disorientation devices, and vortex shock guns); Stanton, *supra* note 198, at 63 (explaining problems presented by such new weapons).

commander to fight!" acknowledged Jean S. Pictet, senior representative for the International Committee of the Red Cross, during drafting of the 1977 Geneva Protocols.²⁰²

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.

Unfortunately, in many areas, the law of armed conflict has become more complex without becoming more clear. The best way to make the law a more effective deterrent to wrongdoing is to ensure that its rules are not merely clear but also comport closely, wherever possible, with basic notions of fairness. In this way, we can ensure that the ordinary commander or soldier can readily grasp the legal restrictions bearing on a given combat situation.²⁰³

C. *Practical Sources of Uncertainty*

1. *Moral Gravity as a Source of Manifest Illegality*

A law's clarity is a necessary but insufficient condition for a finding of manifest illegality. The gravity of the wrong must also be very great.²⁰⁴ This 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

202. See Parks, *supra* note 182, 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).

203. 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 182, at 75.

204. See DINSTEN, *supra* note 17, at 15; U.S. MANUAL FOR COURTS MARTIAL 416 (1951).

of ambivalence about success in this endeavor.²⁰⁵ Just as people in other jobs learn to suppress the expression of negative feelings, such as those toward customers,²⁰⁶ 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 civilians generally may 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 conclusively to 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"²⁰⁷ 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.²⁰⁸

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 habits of revulsion extend easily into civilian contexts and thus are commensurable with ordinary peacetime experience.²⁰⁹ The acts thus reproached evoke

205. See ERICH MARIA REMARQUE, *ALL QUIET ON THE WESTERN FRONT* 113, 195-96, 219-229 (1929). Such memoirs often speak of the anguish of seeing so many civilian casualties. See, e.g., ERIC M. BERGERUD, *RED THUNDER, TROPIC LIGHTNING* 210-25 (1993) (quoting infantrymen of the U.S. 25th Division, recalling their frontal attack on enemy-controlled villages during the 1968 Tet Offensive).

206. See ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART* 6-7 (1983).

207. *McCall v. McDowell*, 15 F. Cas. 1235, 1241 (C.C.D. Cal. 1867) (No. 8,673).

208. 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. See IRIS CHANG, *THE RAPE OF NANKING* 81-142 (1997) (offering a gruesome, detailed account).

209. On the ancient and medieval prohibitions against poison and poisoned weapons in war, see GROTIUS, *supra* note 108, at 651-53. Leonard A. Cole discusses the stigma associated with biological and, to a lesser extent, chemical weapons. See LEONARD A. COLE, *THE ELEVENTH PLAGUE* 213-26 (1997) (noting the historical association with the use of poison in war); MICHAEL MANDELBAUM, *THE NUCLEAR REVOLUTION* 32-33, 37-38 (1981) (noting that "the poison taboo recurs through time and

a particular repugnance, moral opprobrium, and sense of abhorrence toward their perpetrators.²¹⁰ 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, *unreasoning*.

The way in which certain kinds of killing acquire such historical stigmata is "ultimately mysterious,"²¹¹ however, making it 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."²¹²

At various points in history, new weapons such as the pike, the crossbow, firearms, and the machine gun²¹³ have been stigmatized for a time as especially dishonorable, their use seen as unfair.²¹⁴ But these ethical sentiments arose only because the new weapons undermined an aristocratic officer class whose power rested on its monopoly over older and suddenly ineffective methods of violence.²¹⁵ 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.

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 war,²¹⁶ strikes few contemporaries as much more terrible than death by any number of other weapons, many of them lawful. Most

across cultures"). 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).

210. COLE, *supra* note 209, at 12-14, 213-25 (using these terms to describe prevailing attitudes toward biological weapons).

211. 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).

212. MARTIN VAN CREVELD, *TECHNOLOGY AND WAR* 72 (1989).

213. See JOHN ELLIS, *THE SOCIAL HISTORY OF THE MACHINE GUN* 47-75 (Arno Press 1981) (1975).

214. See generally STEPHEN PETER ROSEN, *WINNING THE NEXT WAR* (1991) (detailing the history of resistance to new weapons).

215. See Maj. Ralph Peters, *A Revolution in Military Ethics?*, *PARAMETERS* 102-03 (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."); STRICKLAND, *supra* note 26, at 180-81.

216. See ALBERICO GENTILI, *2 DE IURE BELLI LIBRI TRES* 155-61 (John C. Rolfe trans., 1993) (marshalling ancient and medieval sources in support of this conclusion).

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. It would therefore 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 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.²¹⁷ 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.²¹⁸ Yet Kyoto was no more nor less lawful a target than Hiroshima.

The law of war employs distinctions that often sit uneasily with our ordinary moral intuitions. For instance, it permits laying siege to cities but not firebombing cities.²¹⁹ As Walzer notes, "more civilians died in the siege of Leningrad than in the modernist infernos of Hamburg, Dresden, Tokyo, and Nagasaki, taken together."²²⁰ 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."²²¹ Thus, there is no clear manifest relation between the degree of harm that methods of war impose on noncombatants and the lawfulness of their use.

217. See 2 THE COLLECTED ESSAYS, JOURNALISM, AND LETTERS OF GEORGE ORWELL 254 (Sonia Orwell & Ian Angus eds., 1968).

218. See BARTON J. BERNSTEIN, HIROSHIMA AND NAGASAKI RECONSIDERED 15 (1975); DAN KURZMAN, DAY OF THE BOMB 363-65 (1986).

219. See 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).

220. WALZER, WARS, *supra* note 49, at 160. The siege of Leningrad resulted in more than 1.3 million civilian deaths, most of which were due to starvation and artillery fire. Meilinger, *supra* note 139, at 112.

221. Meilinger, *supra* note 139, at 112. Col. Meilinger adds that "the 'productive' elements of a war society—the military forces and industrial workers—are usually the last to suffer, since they will receive what food and medicine are available." *Id.* See also Peters, *supra* note 215, at 106 (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).

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 the witnessing of atrocity "more with fascination than disgust."²²² Technology often enhances this aesthetic dimension of combat. Modern weaponry offers those using it a sensory cornucopia of sight and sound.²²³ 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.

This not only dispels any sense of revulsion in those using such technology, but also can stimulate their sensory experience in highly seductive ways, even when the violence they inflict is unlawful, often murderously so. Soldiers may 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 war crimes.²²⁴

In summary, the expectation that one would feel revulsion before a commanded atrocity does not necessarily inculcate. Likewise, the absence or weakness of such feelings does not necessarily exculpate. Battlefield atrocities often result despite the very real revulsion the perpetrator would normally feel toward such acts. Competing emotions simply overpower, if not altogether eliminate, revulsion.

2. *Procedural Irregularity as a Source of Manifest Illegality*

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

222. SAMUEL HYNES, *THE SOLDIERS' TALE* 20 (1997).

223. See CHRIS HABLES GRAY, *POSTMODERN WAR* 87 (1997).

224. See PETER WATSON, *WAR ON THE MIND* 244 (1978).

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 the military's standard operating procedures.²²⁵ 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.²²⁶

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.²²⁷ The exceptional, out-of-the-ordinary quality of Eichmann's acts, she noted, "is of prime importance for recognizing the criminality of an order executed by a subordinate."²²⁸ From this perspective, the doctrine of manifest illegality does not require the soldier to consult his conscience but merely his understanding of routine and settled practice.²²⁹

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.²³⁰ 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, or immigrate to outer Mongolia.

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.²³¹ 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

225. On how certain civil law systems adopt this approach, see FIERRO, *supra* note 6, at 38-40, 60-76. 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").

226. GWYNNE DYER, WAR 136 (1985).

227. ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 292 (1996).

228. *Id.*

229. This foundation for the doctrine is sometimes eroded in a criminal state, one that straightforwardly authorizes and routinizes its most repressive policies. *Id.* at 293-95.

230. Even the proverbial "bad man" (of Holmes' devise) can easily know his legal duties, after all, without need for recourse to his conscience—non-existent, *ex hypothesi*. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

231. See Elaine Sciolino, *From a Love Affair to a Court-Martial*, N.Y. TIMES, May 11, 1997, at A1.

adultery exceeded the scope of his lawful authority, entitling Flynn to disobey it. On this view, the order was *ultra vires*.

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 judicial order.²³² 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,²³³ 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 torture a POW.

A proceduralist approach to the rule would also have the unfortunate effect of classifying as manifestly illegal 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.²³⁴ 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.²³⁵ These intercessions by de Gaulle and Juan Carlos, however 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.

232. *United States v. United Mine Workers*, 330 U.S. 258 (1947).

233. *See Walker v. Birmingham*, 388 U.S. 307 (1967).

234. 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).

235. *See* Carolyn P. Boyd & James M. Boyden, *The Armed Forces and the Transition to Democracy in Spain*, in *POLITICS AND CHANGE IN SPAIN* 94, 109-12 (Thomas D. Lancaster & Gary Prevost eds., 1985); PILAR URBANO, *CON LA VENIA . . . YO INDAGUÉ EL 23-F* 289-291 (1982).

3. *Eliminating "Manifestness" by Redescription*

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.²³⁶ Recent work in cognitive psychology²³⁷ as well as long-standing experience in public opinion surveys²³⁸ suggests that how a question is formulated and the issues framed often make an enormous difference in the response it receives.

Defense counsel for a soldier accused of manifestly illegal acts try to construct their 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.²³⁹ 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 non-combatants for the Vietcong, Calley's subnormal measured 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

236. See 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).

237. See Paul Slovic et al., *Response Mode, Framing, and Information-Processing Effects in Risk Assessment*, in DECISION MAKING 152, 152-56, 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 & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, in DECISION MAKING, *supra*, at 166.

238. See HERBERT ASHER, *POLLING AND THE PUBLIC* 42-56 (1988).

239. W.V.O. Quine, *Reference and Modality*, in REFERENCE AND MODALITY 15 (Leonard Linsky ed., 1971).

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.²⁴⁰

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 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.²⁴¹ 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.²⁴² But it is this choice that allows Calley's conduct to be described as involving a manifestly illegal act.

One might be tempted to resolve the matter 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 this 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."²⁴³

240. For classic statements of the problem, particularly as it arises in negligence law, see CLARENCE MORRIS & 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 is—or is not—foreseeable is fluid and often embarrasses attempts at accurate prediction."). See also H.L.A. HART & TONY HONORÉ, *CAUSATION AND THE LAW* 449-53, 481-82 (2d ed. 1985).

241. Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959, 999-1001 (1992).

242. Richard H. Pildes, *Conceptions of Value in Legal Thought*, 90 MICH. L. REV. 1520, 1529-42 (1992).

243. See, e.g., *Riggs v. State*, 43 Tenn. (3 Cold.) 85, 85 (1866) (holding that "[a]n 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"); *Levie*, *supra* note 13, at 185. 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. See 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

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.²⁴⁴ This is particularly true for charges of crimes against humanity as opposed to traditional war crimes.²⁴⁵

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.

often a wide variety of factual situations. But this is not true of military orders, even most 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.

244. 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 (1974) 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, whether 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 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 a discussion, see Aubrey M. Daniel, III, *The Defense of Superior Orders*, 7 U. RICH. L. REV. 477, 500-03 (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 excusable.

Author's correspondence with Juan Méndez (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").

245. 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).

4. *Atrocities as Ultra Vires*

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.²⁴⁶

An act of military service is one that can be performed lawfully under at least some set of circumstances, however limited. 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.²⁴⁷

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.²⁴⁸ This argument was rejected. The defendant's conduct, like that of a torturer, was *ultra vires*. The court rightly held that rape is simply not an act of military service. Whether the defendant's conduct constitutes an act of service is thus a threshold question. If the answer is no, the court does not even reach the question of whether superiors actually authorized the conduct.

Analysis becomes more difficult where the soldier's crime at least arguably involves an act of service. Shooting a person is an act of

246. FIERRO, *supra* note 6, at 125-39; see also *Argentina, supra* note 5, at 510-11 (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 further provides that an "order requiring the performance of a military duty may be inferred to be legal." U.S. MANUAL FOR COURTS-MARTIAL ¶ 216d, at 29-5 (rev. ed. 1969).

247. For criminal offenses that do not involve genuine acts of service, environing circumstances are legally irrelevant to a finding of liability. 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."

248. See John F. Burns, *Two Serbs to Be Shot for Killing and Rapes*, N.Y. TIMES, March 31, 1993, at A6.

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, 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.²⁴⁹ 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.²⁵⁰ 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

249. 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 & Honore, *supra* note 240, at 484. It deserves mention, nevertheless, that there have been several interesting attempts and advances toward resolving the problem. See ALONZO CHURCH, AN INTRODUCTION TO MATHEMATICAL LOGIC 1-9, 23-27 (1956); W. V. QUINE, WAYS OF PARADOX 158-177 (1976); W.V. QUINE, WORD AND OBJECT 138-56, 191-232 (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 GOTTFRIED FREGE 56 (Peter Geach & Max Black, eds., 1966).

250. See Arthur Applbaum, *Are Lawyers Liars?*, 4 LEGAL THEORY 63 (1998).

the enemy.²⁵¹ 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. If an alternative existed that would not greatly increase the platoon's risks while allowing it to respect the rights of surrendering forces, then killing the prisoners would 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 or 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.²⁵² They insisted that the

251. See TAYLOR, *supra* note 136, at 132; WILLIAM O'BRIEN, *THE CONDUCT OF JUST AND LIMITED WAR* 123 (1981); PAUL RAMSEY, *THE JUST WAR* 437 (1968). *But see* Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Geneva Convention III), October 21, 1950, art. 85 (forbidding the killing of surrendering troops even "on grounds of self-preservation" or because "it appears certain that they will regain their liberty").

252. See J.M. RODRIGUEZ DEVEZA, *LA OBEDENCIA DEBIDA EN EL DERECHO PENAL MILITAR* 24-25 (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 'atrocities'"); Guillermo A.C. Ledesma, *La Responsabilidad de los Comandantes Militares por las Violaciones de Derechos*

defendants' acts be described as 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.²⁵³ One reason for adopting this description, persuasive to some Court members,²⁵⁴ 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.²⁵⁵ But if it departs too greatly from these considerations, it quickly comes to be ignored and, to the extent it rests on custom and state practice, thereby ceases even to be formally binding.²⁵⁶

Most people, especially those knowledgeable about the Argentine officer corps, doubted that purely verbal stratagems could enhance the law's deterrent effect.²⁵⁷ In episodes of large-scale administrative massacre, such as Argentina's dirty war, the law's enforcement agencies

Humanos, in *EL LEGADO DEL AUTORITARISMO* 121 (Leonardo Senkman & Mario Sznajder eds., 1995).

253. *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). For a later defense of the Court's holding by one of its members, see Ledesma, *supra* note 252, at 128-29 (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").

254. Interview with confidential informant, in Buenos Aires, Argentina (June 1985 & June 1987).

255. One indicator of its apparent superfluity 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., Parks, *supra* note 139, at 374 (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").

256. This is apparently Taylor's view. See TAYLOR, *supra* note 136. Taylor 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 Holmes. See HOLMES, *supra* note 193, at 104 (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).

257. Interviews with confidential informants, in Buenos Aires, Argentina (June 1985 & June 1987).

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.²⁵⁸ 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 described in a way encompassing inculpatory circumstances.²⁵⁹ In Part III of this Article, 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 questions²⁶⁰ to a single one of whether the defendant's professed error about the legality of his orders was reasonable, all things considered.²⁶¹ 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.

258. See ARENDT, *supra* note 227, at 272-279, 288-294.

259. 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.

260. 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).

261. 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.

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.²⁶²

The upshot of Part I is that the manifest illegality rule in its present form presents us with several unresolved and perhaps unresolvable problems. These imperil efforts to convict war criminals in ways that are conceptually 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 close look at changes in the nature of military operations such as the recent increase in multilateral peace enforcement operations and in prevailing understandings of even the most 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.

D. Theoretical Sources of Uncertainty

1. Positivist and Natural Law Approaches to Manifest Illegality

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.²⁶³ This moral law binds all rational creatures who know it by virtue of their rationality.²⁶⁴ 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

262. It disappears, as a matter of legal doctrine and institutional procedure, but not conceptually or analytically. At these latter levels, it is more accurate to say that the problem would simply be placed aside as a foundational or ontological question that, however troubling to philosophers of logic and language, should not obstruct the law's realization of its more mundanely pragmatic purposes. The problem would reappear only in certain appellate cases, where the court might have to offer some verbal account of the defendant's acts in order to assess whether a reasonable jury could have found them to be manifestly illegal. At that point, the court might simply adopt whatever description the defendant himself had reason to know would be applied to him, given his training in the law of war and prior cases of its application to similar situations.

263. For natural law perspectives on the manifest illegality rule, see DINSTEIN, *supra* note 17, at 16, 24; FIERRO, *supra* note 6, at 152.

264. See DONAGAN, *supra* note 104, at 26-32.

illegality of his orders.²⁶⁵ 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"²⁶⁶ 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.

Many soldiers agree. "The conditioned obedience expected in battle is compatible with the refusal to do what is immoral," insists one officer.²⁶⁷ "Military training may attempt to make obedience totally automatic, but it cannot, simply because of human nature."²⁶⁸ 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.²⁶⁹

Legal positivists would take a very different tack in justifying soldiers' liability for manifest illegality. Skeptical of metaphysical speculations about human nature,²⁷⁰ they would stress instead the attentiveness by society's members to its fundamental mores, or positive morality.²⁷¹ 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. Training material issued to United States forces adopts this view, reminding soldiers that "crime such as murder, rape, pillage or torture" is "*clearly* criminal because it violates common-sense rules of decency, social conduct, and morality."²⁷²

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.²⁷³

265. See GREEN, *supra* note 78, at 54 (discussing the Wirz trial).

266. McCall v. McDowell, 15 F. Cas. 1235, 1241 (C.C.D. Cal. 1867) (No. 8,673).

267. Richard T. De George, *Defining Moral Obligations*, 34 ARMY 22, 29 (1984).

268. *Id.*

269. See JAMES Q. WILSON, *THE MORAL SENSE* 39 (1993).

270. 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.

271. See H.L.A. HART, *CONCEPT OF LAW* 175-76 (1961).

272. U.S. TRADOC, *Your Conduct in Combat Under the Law of War*, FIELD MANUAL 27-2, 26 (1984) (emphasis added).

273. This is an example of what has been called an "incompletely theorized agreement." CASS SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 35-61 (1996).

The transparent immorality of atrocities ensures that their illegality is manifest. The wrongs in question—torture, murder, violent abduction—unequivocally 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.”²⁷⁴ 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.²⁷⁵ Professional legal advice becomes essential only when officers can be held liable, as this Article 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 under custody.²⁷⁶ Therefore, the defendants could not successfully raise the superior orders defense.²⁷⁷ 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.”²⁷⁸

2. 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.²⁷⁹ These assumptions were largely the creation of France

274. See ARENDT, *supra* note 227, at 293. A leading German legal scholar expressly defends this assumption, stating, “[t]he rationale underlying the ancient . . . doctrine is basically sound; we *do know* the prohibitions which are at the core of our criminal law.” Arzt, *supra* note 129, at 666 (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.

275. 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 of the German Army [that] were obviously criminal.” *Id.*

276. See Ronald Dworkin, *Introduction* to NUNCA MÁs, 26-53, 282-92 (1986).

277. Nino, *supra* note 84, at 2626-27.

278. Jeffery L. Sheler, *Jail Time for Argentine Jailer*, 101 U.S. NEWS & WORLD REP., 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).

279. See Luther Martin, *Truth, Power, Self: An Interview with Michel Foucault*, in TECHNOLOGIES OF THE SELF 9, 15 (Luther H. Martin et al. eds., 1988) (“[T]his idea of man has

and England in the 18th century. From the perspective of other cultures, they appear exceptional if not outright bizarre. The Islamic law of war, for instance, does not distinguish combatants from noncombatants, a distinction at the core of the Western *jus in bello*.²⁸⁰ 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.²⁸¹ 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.

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 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.

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 complacent and unfounded. 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 that he finds morally distasteful. Modern industrial capitalism, in some post-modern 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.²⁸²

In other words, the severe hierarchy and regimentation experienced by subordinates in contemporary civilian and military workplaces belie the very conception of self, as free and rational, autonomously choosing its course of action, on 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."²⁸³ It thus no longer allows much space for

become normative, self-evident, and is supposed to be universal. Humanism may not be universal but may be quite relative to a certain situation . . . [H]umanism . . . presents a certain form of our ethics as a universal model for any kind of freedom.").

280. See John Kelsay, *Islam and the Distinction Between Combatants and Noncombatants*, in CROSS, CRESCENT, AND SWORD (James Turner Johnson & John Kelsay eds., 1990).

281. See NORBERT ELIAS, 1 THE CIVILIZING PROCESS 193-204 (Edmund Jephcott trans., Basil Blackwell 1982) (1939).

282. On the displacement of the heroic subject by industrialized methods of warfare, see, e.g., WILLIAM CHALOUFKA, KNOWING NUKES 27-33, 37 (1992); LEVIDOW & ROBINS, *supra* note 59, at 169; PETER SLOTERKUIJ, CRITIQUE OF CYNICAL REASON 100-02 (1987).

283. HYNES, *supra* note 222, at 143.

individual heroism,²⁸⁴ particularly that entailed in resistance to imprudent or atrocious orders, having become instead "a matter of grinding mass against mass."²⁸⁵

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 dominant conventions of his larger society, which demand very little in the way of disobedience to unjust authority, only exacerbate this tendency. In radical 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 radical evil in his superiors and quick 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 greatly eroded with 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 possible that this entire analysis is exaggerated, of course.²⁸⁶ But it is plausible enough to warrant more serious inquiry into the defensibility of current law.

E. Attributional Uncertainty

The two following Sections discuss problems in attributing responsibility for atrocities to individual soldiers under certain circumstances. They examine two forms of such attributional uncertainty.

284. See CHALOUKKA, *supra* note 282, at 26-37; LEED, *supra* note 95, at 30-31; SLOTERKIJK, *supra* note 282, at 100-02; PAUL VIRILIO, *SPEED AND POLITICS* (Mark Polizzotti trans., Semiotext(e) 1986) (1977); Paul Edwards, *The Army and the Microworld*, 16 SIGNS 102, 116 (1991).

285. HYNES, *supra* note 222, at 140.

286. Many memoirs of soldiers continue to speak of the sense of freedom they feel in combat. See HYNES, *supra* note 222, at 48-49, 90-91, 139-145.

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 Part III.

1. *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,²⁸⁷ 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.²⁸⁸

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:

1. "When orders are manifestly illegal, there can be no room for mistake of law"

H. Lauterpacht²⁸⁹

2. "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 Arendt²⁹⁰

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

287. See ARENDT, *supra* note 227.

288. 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 and still rather undeveloped. See James Friedman, *Arendt in Jerusalem*, 28 ISRAEL L. REV. 601 (1994); Pinina Lahav, *The Eichmann Trial, the Jewish Question, and the American-Jewish Intelligentsia*, 72 B.U.L. REV. 555 (1993).

289. See DINSTEIN, *supra* note 17, at 105.

290. ARENDT, *supra* note 227, at 253 (emphasis added).

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 had been his job as chief administrator of deportation to the death camps.²⁹¹ "The trouble with Eichmann was precisely that so many were like him, and that many were neither perverted nor sadistic, that they were, and still are, terribly and terrifyingly normal."²⁹²

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*."²⁹³ Eichmann was "a law-abiding citizen of a criminal state."²⁹⁴

A totalitarian regime, in Arendt's view, conducts administrative mass murder "within the frame of a legal order."²⁹⁵ It thereby vitiates the manifestness of its evil by cloaking its policies in "legal paraphernalia."²⁹⁶ 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 "run[s] counter to his ordinary experience of lawfulness."²⁹⁷ 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 wrongfulness thereby vitiated. Eichmann's acts, after all, had been at least arguably consistent with the positive law of the Third Reich.²⁹⁸

291. *See id.* at 146-49.

292. *Id.* at 253.

293. *Id.* at 135 (emphasis in original).

294. *Id.* He 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).

295. Hannah Arendt, *Personal Responsibility Under Dictatorship*, *THE LISTENER*, Aug. 6, 1964, at 185.

296. ARENDT, *supra* note 227, at 149.

297. *Id.* at 148.

298. Of course it is true, as István 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

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 Führer principle made his word the formal foundation of all legal authority.²⁹⁹ The Führer'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."³⁰⁰ It may or may not have been ultimately "reasonable" for citizens to rely on these appearances. The question is arguable. But such appearances of legality make it clearly impossible to say that the illegality of these official regulations was "manifest" to all.

Moreover, the Führer 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.³⁰¹ Many autocrats have commonly assumed that authority. This was true, for instance, of the Argentine juntas.³⁰² What is distinctive about the Führer 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 Führer'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 Führer principle, thus make a mockery of the manifest illegality rule in ways to which Arendt only vaguely alluded. Once the Führer Principle had been adopted, even the most reliable indicia of legality, published statutes and regulations, ceased to

happened to be Polish priests, professors, journalists and lawyers." István Deák, *Misjudgment at Nuremberg*, THE N.Y. REV. OF BOOKS XL 46, 51 (1993).

299. On the use of this argument by Eichmann's attorney, see DINSTEIN, *supra* note 17, at 188-89, 206-13. To be sure, statutes prohibiting murder, assault, and other serious offenses 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 have pointed out that the Führer doctrine established a kind of supremacy principle, overriding all contrary sources of domestic law. *Id.* at 141-42.

300. ARENDT, *supra* note 227, 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.*

301. 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. See DINSTEIN, *supra* note 17, at 141-42.

302. See Patricia Weiss Fagen, *Repression and State Security*, in FEAR AT THE EDGE 39, 52 (Juan E. Corradi et al. eds., 1992).

offer the conscientious subordinate any sure guidance in assessing the lawfulness of his orders.³⁰³

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.³⁰⁴ 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.³⁰⁵ There would normally be no methodological warrant, of course, for attacking the law's conceptual framework on the basis of its weaknesses in grappling with a single case against a particular defendant. But Arendt viewed Eichmann as a representative specimen of the bureaucratic mass murderer.³⁰⁶ She claimed that her thesis about his mental state largely explained the behavior of other members of this class³⁰⁷ 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.³⁰⁸ Honest mistakes are possible. Even reasonable mistakes are possible in the sense that only extraordinary individuals

303. 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 MARK J. OSIEL, *LAWFUL ATROCITY, TORTURED LEGALITY* (forthcoming 1999).

304. 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. See 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.

305. See ARENDT, *supra* note 227, 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).

306. 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 305, 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").

307. 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. See 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.

308. See ARENDT, *supra* note 227, at 292-95.

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 offenses, it is preposterous to conduct a criminal proceeding according to traditional juridical concepts.³⁰⁹ 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.³¹⁰ 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.³¹¹ The approach proposed in this Article 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.

2. *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

309. I owe this formulation of her argument to Jeremy Waldron.

310. 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.

311. 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).

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 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.³¹²

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*.³¹³ 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.³¹⁴ They are particularly acute when parties to crime know that state authorities will do everything they can to ensure the impunity of all involved.³¹⁵ 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.³¹⁶ But when a person knows that he can be held responsible 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

312. See *LA SENTENCIA*, *supra* note 253, at 517, 522.

313. See MARION SMILEY, *THE BOUNDARIES OF RESPONSIBILITY* 12, 110-17, 179-248 (1992).

314. 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).

315. The Argentine court that convicted the military juntas laid special emphasis on these assurances of impunity. See *LA SENTENCIA*, *supra* note 253, at 517, 521, 523.

316. 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. See Jaime Malamud-Goti, *Punishment and Human Dignity*, 2 *S'VARA* 69 (1991).

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.³¹⁷

However, the problem of perverse incentives does not suggest that the law ought to impose shared responsibility among all people involved in such episodes. 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.³¹⁸ Their superiors self-consciously employed this fact to their own ends, successfully securing a spectacular measure of discipline and cohesion under the most adverse of combat circumstances.³¹⁹

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 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

317. 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, Argentina (Aug. 1987).

318. See OMER BARTOV, *HITLER'S ARMY* 71, 101, 126, 169-70 (1991).

319. *Id.*

sensationalist magazine would have compensated dearly for the story) is highly illustrative of the military's cohesiveness.³²⁰

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.

In summary, the three traditional indicia of manifest illegality bear 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. 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.

II

AVERTING ATROCITY: A SOCIOLOGY OF MILITARY LAW

This Part shows how recent work in sociologically informed military history has 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 organizations, with a view to enhancing the efficacy and morality of their members. Part III develops and defends this latter conclusion.

A. Introduction

There are two prevailing perspectives on legal efforts to prevent atrocities; neither has taken this tack. The first, favored by

320. CARLOS SANTIAGO NINO, *RADICAL EVIL ON TRIAL* 109 (1996).

international lawyers and legal scholars, champions the need for military law to prohibit such acts unequivocally, in all circumstances and without exceptions.³²¹ This is the legalist approach.³²² 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 clear its prohibitions and draconian its threats.³²³ 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.³²⁴

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,³²⁵ 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.³²⁶

321. Many have noted and lamented the alleged failure of the international law of warfare to achieve such clarity. See, e.g., Kelsen, *supra* note 136, at 106; Taylor, *supra* note 136, at 28-38, 43-56 (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 PHILOSOPHY, MORALITY, AND INTERNATIONAL AFFAIRS 47 (Virginia Held et al. eds., 1974); Wasserstrom, *supra* note 101, at 179.

322. The scholarly flagship for this point of view is undoubtedly *The American Journal of International Law*.

323. For such skepticism about international criminal law, see George F. Kennan, *AMERICAN DIPLOMACY* 95-101 (1951); Hans J. Morgenthau, *POLITICS AMONG NATIONS* 279-314 (5th ed. 1978); Kenneth Waltz, *MAN, THE STATE, AND WAR* 159-64, 209 (1959).

324. 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. See 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).

325. A psychiatrist has recently written perceptively on the phenomenon of "berserking" by combat soldiers. See Jonathan Shay, *ACHILLES IN VIETNAM* 77-102 (1994).

326. 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

I advocate 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 the battlefield. But realists generally misconstrue and oversimplify these realities, viewing combat as asocial liminality³²⁷ 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."³²⁸ 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.³²⁹

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.

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

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.

327. For accounts of war's liminality, see LEED, *supra* note 95, at 12-25.

328. See Daniel Callahan, *How Shall We Incorporate Ethics Instruction at All Levels?*, in *ETHICS AND NATIONAL DEFENSE*, *supra* note 114, at 135, 142.

329. 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).

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.³³⁰ This frequency suggests the magnitude of what is at stake.

1. *Military Virtues Internal to the Calling*

The United States 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.³³¹ 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.³³²

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,³³³ not to subordinate these to more universalistic norms.

330. 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 services, they knew 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 generalizations about the frequency of atrocities. But it is of some value, however imprecise.

331. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (holding constitutional the prohibition of visible religious accoutrements 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"); *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."); *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"); *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).

332. See JAMES B. JACOBS, *SOCIO-LEGAL FOUNDATIONS OF CIVIL-MILITARY RELATIONS* 22, 25 (1986); Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 3 (1970).

333. 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 longstanding and recurrent activity among professional soldiers and sympathetic commentators, since at least the later middle ages. See 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).

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. It posits that no major transformation of military culture is necessary to effect needed change, just greater clarity concerning the implications of the vocation's 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. As one scholar rightly observes, 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."³³⁴ 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 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 Article aims to reinforce certain aspects of the "professional military ethos,"³³⁵ 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."³³⁶

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

334. JACOBS, *supra* note 332, at 25.

335. This is the standard term in the military literature for soldiering as a vocation. See, e.g., CHRISTOPHER, *supra* note 144, at 125.

336. Bacevich, *supra* note 57, at 23.

the standards by which performances of the activity are judged to be better or worse.³³⁷

Consider how this process now plays itself out within the United States 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 human experience of war to civilians, the so-called CNN factor,³³⁸ makes reform a necessity. 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 interest to revise its rules of engagement so as to preserve both national and international support for its wars and peacekeeping efforts.

The use of more discriminating and non-lethal weapons, in turn, begins to alter our assessments of proportionality and necessity in relation to specific uses of military force. Non-lethal 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. The increasingly routine integration of JAG officers into operational and even tactical decision-making 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."³³⁹ Developments internal to soldierly practice suggest the need for a reinterpretation in military law. It 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.

2. *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

337. WALLACE, *supra* note 43, at 10.

338. See WARREN P. STROBEL, *LATE-BREAKING FOREIGN POLICY* (1994); Frank J. Stetch, *Winning CNN Wars*, 24 *PARAMETERS* 37 (1994).

339. WALLACE, *supra* note 43, at 10.

described as operant conditioning;³⁴⁰ (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.³⁴¹ 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.

Leading social-historical analyses of combat, however, require considerable revision of the first three propositions in ways that demand reconsideration of their derivative conclusions.³⁴² 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;³⁴³ 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.³⁴⁴ Effective leadership depends more on

340. On the predominance of such behaviourist Skinnerian or Pavlovian approaches, see DYER, *supra* note 226, at 65. 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.*

341. 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. See C.E.W. BEAN, *THE STORY OF ANZAC* 47-48 (1921).

342. See generally GEOFFREY BEST, *WAR AND SOCIETY IN REVOLUTIONARY EUROPE, 1770-1870* (1982); BRIAN BOND, *WAR AND SOCIETY IN EUROPE, 1870-1970* (1983); DEREK MCKAY, *WAR AND SOCIETY IN THE AGE OF ABSOLUTISM* (1982).

343. 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* 92-93 (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, 272-98 (1994).

344. These developments in military thinking were first described for civilians by JANOWITZ, *supra* note 44, at 8-9. 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

personal charisma and positive incentives than on coercion. Scholars and some military elites are increasingly acknowledging that, contrary to the third proposition, atrocity has often occurred at the direction of officers. I argue that 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.

3. *Morality vs. Efficacy: A False Dichotomy*

Since the ancient Greeks, practical judgment has been understood to combine both tactical and moral components.³⁴⁵ In military affairs, however, tactical and moral concerns with avoiding war crimes are sometimes thought to be at odds.³⁴⁶ 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.³⁴⁷

Nonetheless, studies of U.S. officers conducted by the military itself conclude that ethical behavior and technical competence are highly correlated, sometimes even inextricable.³⁴⁸ This view has a long vintage. "[T]he military virtues are not in a class apart," argued General Sir John Hackett.³⁴⁹ Courage, fortitude, and loyalty "are virtues which are virtues in every walk of life."³⁵⁰

Even empathy is an essential martial virtue. Effective soldiers never deny the humanity of their adversary. Recognizing key aspects of this humanity is necessary to anticipate the enemy's likely actions and reactions. This process requires "a sort of empathy."³⁵¹ To dehumanize the enemy in one's mind may reduce one's moral qualms about killing

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).

345. Nussbaum offers a recent defense of this view. See Martha C. Nussbaum, *The Discernment of Perception*, in LOVE'S KNOWLEDGE 54 (Martha C. Nussbaum ed., 1990).

346. Since Clausewitz, this has been the avowed view of so-called realists in the study of international relations.

347. This approach to defining war crimes has some support in the doctrine of proportionality, which is essentially consequentialist in its moral premises. But, 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, even to secure gains in the general welfare, regardless of apparent "necessity" in particular circumstances.

348. See U.S. Army War College, *STUDY ON MILITARY PROFESSIONALISM* 13 (June 30, 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* 75-77 (1979) (noting that elite American and French commando units, though often highly effective, have sometimes been particularly inclined toward use of unlawful methods).

349. Col. Anthony E. Hartle, *Do Good People Make Better Warriors?*, 42 ARMY 20, 20 (Aug. 1992) (quoting Lt. Gen. Sir John Winthrop Hackett).

350. *Id.*

351. JOHN KEEGAN, *THE FACE OF BATTLE* 314 (1976).

him. But it also greatly impedes one's ability to outwit him and so to prevail against him.³⁵²

The American involvement in Vietnam provides a painful but powerful example. The U.S. relied excessively on abstract game-theory models, positing hypothetical and indistinguishable rational actors on all sides.³⁵³ This allowed far too little room for the exercise of judgment in the face of uncertainty.³⁵⁴ Judgment informed by a deeper understanding of the political and cultural context often plays a powerful role in shaping strategic calculations.³⁵⁵

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 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, "[b]eing good at deliberating about the conduct of life . . . is both a virtue of character and a virtue of thought."³⁵⁶

B. *Sources of Atrocity, Responses to Atrocity*

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

352. See MARTIN VAN CREVELD, *THE TRANSFORMATION OF WAR* 195 (1991).

353. It is only a light exaggeration to say, as do two military analysts, that "[s]ince 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 & ANGELLO CODEVILLA, *WAR* 73 (1989).

354. See Williamson Murray, *Clausewitz Out, Computer In*, 48 NAT'L INTEREST 57, 63 (1997) (arguing that "[w]hat 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").

355. Alastair Iain Johnston, *Cultural Realism and Strategy in Maoist China*, in *THE CULTURE OF NATIONAL SECURITY* 216 (Peter J. Katzenstein ed., 1996).

356. WALLACE, *supra* note 43, at 39.

is distributed within them. The law thus remains vitally important by defining war crimes and threatening their prosecution.

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.

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.³⁵⁷ 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-impending 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.

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 Section seeks to identify and clarify some of the tacit tensions and resulting trade-offs that military law must make. These choices should be based on the relative strength of different sources of atrocity in different societies and various kinds of military organizations 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 problem.

1. 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

357. See MAX WEBER, *THE METHODOLOGY OF THE SOCIAL SCIENCES* 41-46 (Edward A. Shils & Henry A. Finch eds. trans., The Free Press 1949).

control over those at the bottom.³⁵⁸ 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. 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."³⁵⁹ Let us call this traditional atrocity. The superior orders defense has no bearing on such conduct.

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 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.³⁶⁰

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.³⁶¹ 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.³⁶²

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 1932.³⁶³ Organized criminality, sponsored by the authorities, was seen to pose much less danger to discipline and public order than the more disorganized variety.

358. STEPHEN E. AMBROSE, *AMERICANS AT WAR* 152 (1997) writes, in this vein: "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 across continents. It is a universal aspect of war." On this account, atrocities acquire almost the force of nature. The question almost becomes, not why they occur, but why they do not occur much more often.

359. LORD MORAN, *THE ANATOMY OF COURAGE* 166 (1966).

360. See PETER KARSTEN, *LAW, SOLDIERS, AND COMBAT* at xii (1978).

361. See 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) [hereinafter *THE LAWS OF WAR*].

362. See Parks, *supra* note 139, at 359, 367.

363. See GEORGE HICKS, *THE COMFORT WOMEN* 45 (1995).

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 starvation or from justice."³⁶⁴ 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.

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.³⁶⁵ "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."³⁶⁶ 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."³⁶⁷

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 mechanisms of command, and thus have affinities with non-formalist conceptions of law, particularly legal realism and sociological jurisprudence.

Though 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 mêlée . . . setting foot beside foot, resting shield against shield, crest

364. DYER, *supra* note 226, at 64.

365. Discipline "could only be maintained by liberal use of the lash, the hangman's noose, and the firing squad." *Id.*

366. JOHN BAYNES, *MORALE* 180 (1967) (quoting STEPHEN GRAHAM, *A PRIVATE IN THE GUARDS* 2 (1919)).

367. *Id.* at 182.

beside crest, helm beside helm."³⁶⁸ 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."³⁶⁹

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.³⁷⁰ As one military historian notes, given the importance of uniform conduct to combat effectiveness, displays of "individual valor and initiative might have positively catastrophic consequences."³⁷¹

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.

2. *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

368. 1 ELEGY AND IAMBUS 73-75 (J.M. Edmonds ed. and trans., 4th ed. 1961) (quoting Tyrtaeus).

369. GROTIUS, *supra* note 82, at 788. 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 788-789 (footnote omitted).

370. 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. See ALAN RAMSAY SKELLEY, *THE VICTORIAN ARMY AT HOME* 290-92 (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).

371. OMER BARTOV, *MURDER IN OUR MIDST: THE HOLOCAUST, INDUSTRIAL KILLING, AND REPRESENTATION* 17 (1996).

free-lance self-seeking.³⁷² Such “[a]trocities are the last resource of strategy in its efforts to force an enemy to his knees,” as an American officer once acknowledged.³⁷³

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.³⁷⁴ 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 hierarchically organized military rivals, such as partisan irregulars and guerrilla bands.³⁷⁵

An army has both a formal and an informal organization. The formal consists of the official structure; the informal of uncoded patterns of social interaction among and between soldiers and their commanders.³⁷⁶ In modern atrocities, formal procedures of military bureaucracy, order-giving and order-following, down a chain of command, 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. In fact, the primary legal means toward reducing atrocity by bureaucracy would surely be to codify generous 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

372. See BARTOV, *supra* note 318, at 69-70, 82-90; CHRISTOPHER BROWNING, *ORDINARY MEN: RESERVE BATTALION 101 AND THE FINAL SOLUTION IN POLAND 160-61* (1992); see also YUKI TANAKA, *HIDDEN HORRORS: JAPANESE WAR CRIMES IN WORLD WAR II 207-11* (1996) (describing “the corruption of Bushido,” or the ethic of loyalty to the Emperor).

373. James D. Morrow, *Strategy, Victory, and the Laws of War*, paper presented at the annual meeting of the American Political Science Association, Washington, D.C., Aug. 29, 1997 (manuscript at 1) (quoting United States Army Captain Charles Roess) (emphasis added).

374. See, e.g., Marion J. Levy, Jr., *Armed Forces Organizations*, in *THE MILITARY AND MODERNIZATION* 41 (Henry Bienen ed., 1971).

375. 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 guardsmen 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.* at A12.

376. 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 A. STOUFFER ET AL., *THE AMERICAN SOLDIER* (1949) and Morris Janowitz & Edward Shils, *Cohesion and Disintegration in the German Army in World War II*, 12 PUB. OPINION Q. 281 (1948). For a survey of more recent research, see WM. DARRYL HENDERSON, *COHESION THE HUMAN ELEMENT IN COMBAT* (1985).

confer a legal excuse for disobedience wherever the superior's order reasonably appeared unlawful under the circumstances, even though the orders 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.³⁷⁷ 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.³⁷⁸ The troops were therefore encouraged to question and even disobey superior orders appearing to contravene the Revolution's new legality.³⁷⁹

Since the troops were animated by patriotism, new and more effective methods of warfare became available.³⁸⁰ Open formations replaced closed. Wide distribution of more complex weapons requiring greater concentration, such as the breech-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 non-commissioned officers was no longer perceived as a threat to social order.³⁸¹ France's early military successes were attributable in part to its adversaries, such as Prussia, being more hierarchical societies whose officers were reluctant to adopt such decentralized organizational forms.³⁸²

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

377. See CHRISTOPHER HILL, *GOD'S ENGLISHMAN: OLIVER CROMWELL AND THE ENGLISH REVOLUTION* 79-81 (1970); CHRISTOPHER HILL, *THE CENTURY OF REVOLUTION, 1603-1714*, at 128-39 (1961).

378. See LYNN, *supra* note 361, at 100-01; THEDA SKOCPOL, *SOCIAL REVOLUTIONS IN THE MODERN WORLD* 279, 279-98 (1994).

379. See LYNN, *supra* note 361, at 100-01.

380. See Barry R. Posen, *Nationalism, the Mass Army, and Military Power*, 18 *INT'L SECURITY* 80, 89-109 (1993) (showing how nationalist and revolutionary enthusiasm suppresses the divisive impact of civilian social structures within mass armies, thereby enhancing their power vis-à-vis military adversaries); see also ROSEN, *supra* note 60, at 267.

381. 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).

382. See PETER PARET, *CLAUSEWITZ AND THE STATE* 24-29 (1976); 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.").

achieve.³⁸³ 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.³⁸⁴ In fact, in the Israel Defense Forces' early years, "[o]rders 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."³⁸⁵ 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.³⁸⁶

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 political, then social and economic.³⁸⁷ The modern welfare state was, in many ways, the ultimate, unintended result of mass military mobilization.³⁸⁸ 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

383. JAMES M. MCPHERSON, *FOR CAUSE AND COMRADES* 49 (1997).

384. 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* 44-45 (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 1967-1977* (1978).

385. EDWARD LUTTWAK & DANIEL HOROWITZ, *THE ISRAELI ARMY* 54 (1975).

386. See, e.g., ANDREW F. KREPINEVICH, JR., *THE ARMY AND VIETNAM* 7-17, 165, 258-75 (1986). Writing in the immediate aftermath of the Vietnam War, one expert observes that

These days the basic fighting unit—the infantry battalion—goes 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.

WATSON, *supra* note 224, at 230.

387. FELD, *supra* note 381, at 24-25; see also ERIC FONER, *RECONSTRUCTION* 9-10 (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. Moreover, only very rarely, if ever, has the process worked the other way; the extension of new rights seldom enhances the desire of their recipients to assume new legal burdens and social duties. See generally MORRIS JANOWITZ, *ON SOCIAL ORGANIZATION AND SOCIAL CONTROL*, 226-227 (James Burk ed., 1991), James Burk, *Citizenship Status and Military Service: The Quest for Inclusion by Minorities and Conscientious Objectors*, 21 *ARMED FORCES & Soc'y* 503, 504 (1995).

388. See, e.g., THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS* (1992); Kenneth Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 *UCLA L. REV.* 499, 528 (1991); 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).

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.³⁸⁹ 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.³⁹⁰ The need to satisfy material necessities, however, has never been the only impulse behind traditional atrocity, merely the most readily intelligible and, perhaps, excusable. Military codes of conduct, 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.³⁹¹

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,

389. See JAMES TURNER JOHNSON, CAN MODERN WAR BE JUST? 166 (1984).

390. See Geoffrey Parker, *Early Modern Europe*, in THE LAWS OF WAR, *supra* note 361, at 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.

391. 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, SF [Special Forces] can't 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 58 (1997).

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 as we shall see, this conclusion confuses the conceptual tidiness of the ideal-types with messy empirical realities.

3. *Atrocity by Connivance*

The clarity of the ideal-types is particularly muddled by an important complexity with which the law of military obedience must cope. This complexity is partially 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.³⁹² 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.³⁹³

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 their subordinates is difficult to establish by way of admissible evidence.³⁹⁴

Atrocity by connivance often occurs by means of what the official Report on the My Lai massacre referred to as "a permissive attitude" on the part of commanders "toward the treatment and safeguarding of noncombatants."³⁹⁵ For instance, Vietnamese strikers who accompanied

392. See Osiel, *supra* note 131, at 140-41.

393. BARTOV, *supra* note 318, at 28. Allied forces sometimes engaged in similar methods. The Free French enlisted many Moroccan men by offering them a general license to rape and plunder. WALZER, WARS, *supra* note 49, at 133. 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. See Gunther Rothenberg, *Age of Napoleon*, in THE LAWS OF WAR, *supra* note 361, at 86, 96.

394. To compromise rules of evidence here, allowing easy inferences about what was "really" being intimidated, quickly begins to threaten defendants' rights of due process and not only as these are understood in the U.S. See Andrés J. D'Alessio, *La Violación Masiva de los Derechos Humanos Durante el Gobierno Militar*, in EL LEGADO DEL AUTORITARISMO, *supra* note 252, at 97.

395. GOLDSTEIN ET AL., *supra* note 12, at 314. 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., *supra* note 12, at 465-66.

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."³⁹⁶

In atrocity by connivance, troops are simply given to understand, through winks and nods of acquiescence, that spontaneously-initiated atrocities will not be penalized. Such acts will 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.

Though it is very old, this kind of atrocity has become increasingly prominent in comparison to other types, particularly since the Nuremberg trials. The only hard evidence of connivance is often the record of *post facto* attempts by superiors to conceal more direct evidence from discovery.³⁹⁷ 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.³⁹⁸

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."³⁹⁹ As a result, Alfonsín's lawyers, in prosecuting Argentina's military juntas, could not produce any written evidence or oral testimony explicitly authorizing unlawful

396. PETER G. BOURNE, MEN, STRESS, AND VIETNAM 107 (1970).

397. See SEYMOUR M. HERSH, COVER-UP: THE ARMY'S SECRET INVESTIGATION OF THE MASSACRE AT MY LAI 99-160 (1972).

398. For example, consider this order written by United States Army Brig. Gen. Jacob H. 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." SOLIS, *supra* note 121, at 95.

399. 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 rapporteur. See BRYSK, *supra* note 87 at 46, 51-55. Argentina's military rulers achieved this objective through skillful alliances with their Soviet allies. See IAIN GUEST, BEHIND THE DISAPPEARANCES 68, 118-19 (1990).

acts by subordinates.⁴⁰⁰ Orders to murder a detainee, for instance, were always couched as orders for a transfer.⁴⁰¹ Similarly, in the Bosnian conflict, Croatian leaders often ordered militiamen "to clean up" their prisoners, with the expectation that such prisoners would be murdered.⁴⁰² 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.'⁴⁰³

Scholars often like to explain such euphemisms as an effort to foster moral distancing and psychological desensitizing among those ordered to participate in organizational criminality.⁴⁰⁴ But we should not minimize a more obvious and straightforward reason: the legal usefulness to potential defendants of verbal ambiguity in establishing defenses.⁴⁰⁵

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.⁴⁰⁶ 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.⁴⁰⁷ Later, at their trial, the junta members would indeed disavow responsibility for the crimes of their subordinates.⁴⁰⁸ As one young officer later observed, "[i]n 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."⁴⁰⁹ In South Africa, lower echelons of the security forces received similarly vague directives, with the predictable result of their superiors,

400. 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. See BRYSK, *supra* note 87, at 39.

401. Interview with Argentine prosecutors, Buenos Aires, Argentina (Aug. 1987).

402. See Chris Hedges, *Croatian's Confession Describes Torture and Killing on Vast Scale*, N.Y. TIMES, Sept. 5, 1997, at A1.

403. 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).

404. See generally ROBERT JAY LIFTON & ERIC MARKUSEN, *THE GENOCIDAL MENTALITY* 214-17 (1990).

405. A new term has even been recently coined for this phenomenon: the "semantic defense." See *Ambiguity's Path to Murder*, THE ECONOMIST, Oct. 18, 1997, at 47.

406. 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 & Alex Schmid eds., 1993).

407. Interviews with Argentine military officers, Buenos Aires, Argentina (Aug. 1997).

408. See Osiel, *supra* note 131, at 168-69.

409. Silvio Waisbord, *Politics and Identity in the Argentine Army*, 26 LATIN AM. RES. REV. 157, 165 (1991) (quoting confidential interview by Silvio Waisbord with an Argentine major).

when later accused of ordering murder and disappearance, claiming, "with shock and dismay," to have been misunderstood.⁴¹⁰

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."⁴¹¹ 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 problems—moral, conceptual, and practical—that have not been satisfactorily addressed. 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. After all, such prosecution would invite attention to his own behavior regarding the underlying crimes.

A serious moral problem is that imposing liability for willful blindness illegitimately transforms offenses requiring knowledge into crimes of simple negligence. Still, some version of command responsibility is probably essential. It is uniquely suited for dealing with commanders who contrive to be ignorant of their subordinates' misconduct. The

410. Daley, *supra* note 403, at A4 (quoting Adriaan Vlok, former Minister of Law and Order). Mr. Vlok recently testified to the Truth and Reconciliation Commission that "[n]ow, 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.*

411. *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. SCOR, 48th Sess., Annex, Article 7(3) ¶ 56, U.N. Doc. S/25704 (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).

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 source of atrocity threatens to slip between the cracks of all other legal doctrines.

4. *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.⁴¹² 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.⁴¹³ The problem is that brutalization of soldiers tends to breed brutalization by soldiers.

"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."⁴¹⁴ 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.⁴¹⁵

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 United States Army in Vietnam. As an historian of that episode observes, "[s]oldiers sufficiently angry and vengeful, who are frustrated in their efforts to retaliate against the enemy itself, sometimes vent their aggressions on whoever is available."⁴¹⁶ He suggests that atrocities such as the My Lai massacre almost inevitably result.⁴¹⁷

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

412. See, e.g., FUSSELL, *supra* note 103.

413. On the long history of such fantasies, see MANUEL DE LANDA, *WAR IN THE AGE OF INTELLIGENT MACHINES* 127-79 (1991); GRAY, *supra* note 223, at 43; Chris C. Demchak, Book Review, 19 *ARMED FORCES & SOC'Y* 625 (1993) (reviewing DE LANDA, *WAR IN THE AGE OF INTELLIGENT MACHINES*).

414. KEEGAN, *supra* note 351, at 322.

415. See *id.*

416. KARSTEN, *supra* note 360, at 69.

417. See *id.*

turned against the superiors themselves). 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 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 killing—is perceived as moral, legitimate, and meaningful.⁴¹⁸

Japanese military training in World War II carried this approach to extremes. Officers were explicitly instructed that "enlisted men should hate their officers."⁴¹⁹ 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."⁴²⁰ The "skillful" commander could "by treating his men with calculated brutality mold them into a fierce fighting unit against the enemy . . ."⁴²¹ 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, 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.⁴²²

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

418. LEED, *supra* note 95, at 105-06 (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 DYER, *supra* note 226, at 102-03, ("[T]o 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 curse together, and become a truly cohesive group, a unit, a fighting unit.") (quoting an Israeli officer).

419. SABURO IENAGA, *JAPAN'S LAST WAR* 53 (1968); see also ROBERT B. EDGERTON, *WARRIORS OF THE RISING SUN* 308-14 (1997) (describing Japanese methods to this end).

420. *Id.* at 53.

421. *Id.*

422. *Id.*

front.⁴²³ 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.⁴²⁴ Soldiers could be kept at their stations only by draconian discipline.⁴²⁵ The idea was to ensure that soldiers were too afraid of disobeying their superiors to be afraid of engaging the enemy.⁴²⁶

Overzealous discipline generated enormous resentment among soldiers toward their superiors. But a *modus vivendi* developed. German soldiers "were rarely punished for unauthorized crimes against the enemy . . . because they constituted a convenient safety valve for venting the men's anger and frustration caused by the rigid discipline demanded from the men."⁴²⁷

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, 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,

423. See Omer Bartov, *The Conduct of War: Soldiers and the Barbarization of Warfare*, 64 J. MOD. HIST. S32 (1992).

424. See *id.*

425. At least 15,000 German soldiers were executed by the Wehrmacht for desertion, panic, or failing to carry out dangerous orders on the battlefield. See *id.*

426. See BARTOV, *supra* note 318, 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., MCPHERSON, *supra* note 383, at 49-53.

427. BARTOV, *supra* note 318, at 61.

the average soldier becomes violently aggressive toward the enemy and supportive civilians.⁴²⁸

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.⁴²⁹ It might first appear that this approach would necessarily reinstate a degree of formality and legalism at odds with the greater efficacy now seen to flow from more informal, personalistic, and even inspirational modes of military leadership.

But this concern trades upon a false dichotomy. Treating subordinates more like 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."⁴³⁰ These words are studied by all West Pointers to this day.

The hard question is whether civilianization of military law, in the sense of greater due process protections for soldiers as a check against brutalization, can be expected to undermine the sense of caste honor, with its separate virtues, which has provided the principal historical support for restraint in combat. 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, to be sure, 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.

428. For a fictional evocation of this process, see NORMAN MAILER, *THE NAKED AND THE DEAD* 132-41 (1948).

429. "Civilianization" refers to the increasing influence on military law of norms originating in the law governing civilian society, particularly norms of due process, equal protection, and the prohibition on cruel and unusual punishment. On this trend, and its vicissitudes in the American context, see, e.g., JACOBS, *supra* note 332, at 5-30 (parsing several pertinent cases); Eugene R. Fidell, *The Culture of Change in Military Law*, 126 MIL. L. REV. 125 (1989); Sherman, *supra* note 332, at 3.

430. 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)).

C. *Why Men Fight*

The above section has simply sought to show the close relation between each of atrocity's various sources and the legal device best suited to address 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.

The organization of military life has hindered atrocities in several ways: first, by antagonists' common membership in a martial caste; then, by an international legal order based on "universal" Roman Catholicism; later, by revolutionary and democratic élan; then, by formal bureaucratic rules and more diffuse disciplinary practices; and finally, by small-group cohesion.

Such features of macro-sociology have rested upon micro-foundations.⁴³¹ These involve mechanisms that enable the individual soldier to identify a violent act as atrocious on account of its inconsistency either with his caste ideals of martial virtue, with formal rules of bureaucratic discipline, or with the tacit understandings of his fellow soldiers. I examine each in turn, emphasizing the relation between what makes men willing to fight and what makes them willing to fight ethically.

1. *For Class Honor*

Feudal codes of manly honor, as de Tocqueville observed, "sanctioned violence but invariably reprobated cunning and treachery as contemptible."⁴³² 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.⁴³³ 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

431. On how any persuasive social explanation must link the two, see JON ELSTER, *NUTS AND BOLTS FOR THE SOCIAL SCIENCES* 3-13 (1989).

432. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 618 (J.P. Mayer ed. & George Lawrence trans., Doubleday & Co., Inc., 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.

433. See HANS SPEIER, *SOCIAL ORDER AND THE RISKS OF WAR* 273-74 (1952) ("This social homogeneity made for some degree of moral restraint in the conduct of war.").

social inferiors.⁴³⁴ Men in arms thus owed more to those 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."⁴³⁵ 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 non-knightly warriors. Hence at Agincourt, Henry V had to employ his two hundred archers, all yeomen, to murder the French knights his forces had captured.⁴³⁶

As an ethical ideal, honor was not merely a side-constraint on conduct, 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.⁴³⁷ But they also fought partly to win glory, which required the display of martial virtue.⁴³⁸ 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,⁴³⁹ even salvation,⁴⁴⁰ 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, that would endanger his soul.⁴⁴¹ Committing an atrocity against a military peer was thought to have this effect.⁴⁴² 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.⁴⁴³ Knightly peers valued restraint in combat

434. PETER L. BERGER ET AL., *THE HOMELESS MIND: MODERNIZATION AND CONSCIOUSNESS* 86 (1973); see also Paul Kennedy & George Andreopoulos, *The Laws of War: Some Concluding Reflections*, in *THE LAWS OF WAR*, *supra* note 361, at 214.

435. KEEN, *supra* note 333, at 220.

436. See THEODOR MERON, *HENRY'S WARS AND SHAKESPEARE'S LAWS* 159 (1993).

437. On the contractual element within these obligations, see FREDERICK H. RUSSELL, *THE JUST WAR IN THE MIDDLE AGES* 147-54 (1975).

438. See JANOWITZ, *supra* note 44, at 216. 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.

439. See JOHAN HUIZINGA, *THE WANING OF THE MIDDLE AGES* 70-71 (Anchor Books 1954) (1949).

440. See RICHARD W. KAEUPER, *WAR, JUSTICE, AND PUBLIC ORDER* 187 (1988).

441. See RUSSELL, *supra* note 437, at 149, 229.

442. See *id.*

443. 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).

primarily because it gave public witness to personal traits regarded as constitutive of the knightly self.⁴⁴⁴

To be sure, 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."⁴⁴⁵ 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.⁴⁴⁶ 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.⁴⁴⁷

The resulting restraints on combat appear to have been no less effective on that account.⁴⁴⁸ 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.

2. *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

444. See HUIZINGA, *supra* note 439 at 105 ("[I]f 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.").

445. *Id.* at 78.

446. 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, *supra* note 443, at 97 (parsing MARCEL GRANET, *CHINESE CIVILIZATION* 272-73 (1930)).

447. Peters, *supra* note 215, at 105. On the origins of these sentiments in medieval contractual bonds between knightly orders, see KEEN, *supra* note 333, at 51-59. 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 are today very much aware of this problem. See 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").

448. 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 440, at 392; see also *id.* at 7, 188.

achievement of early theorists of natural law was precisely this.⁴⁴⁹ Seeking to buttress long-standing traditions perceived as in decline, they inevitably transformed them in the process, grounding 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.⁴⁵⁰ 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 because of self-perpetuation by the martial stratum.⁴⁵¹ 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.⁴⁵² 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 those created in God's image.

In so doing, they presupposed a pan-European unity based upon the moral hegemony of the Roman Catholic 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 theological qualms and corresponding legal restrictions simply did not apply.⁴⁵³

449. See, e.g., J.B. SCOTT, *THE CATHOLIC CONCEPTION OF INTERNATIONAL LAW* (1934); JAMES BROWN SCOTT, *THE SPANISH ORIGIN OF INTERNATIONAL LAW* 163-242 (1934); Theodor Meron, *Common Rights of Mankind in Gentili, Grotius, and Suárez*, 85 AM. J. INT'L. L. 110 (1991).

450. 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." *THE LAW OF LAND WARFARE*, *supra* note 51, at 3.

451. See generally ALFRED VAGTS, *A HISTORY OF MILITARISM* (1937); see also KEEN, *supra* note 333, at 240 ("[T]he 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.").

452. See ARNO MAYER, *THE PERSISTENCE OF THE OLD REGIME* 176-77 (1981). On how the aristocratic component of the Prussian officer corps waxed and waned significantly during the 19th century, see HUNTINGTON, *supra* note 37, at 40.

453. On the unrestrained military practices of Imperial conquistadors in America, see Harold Selesky, *Colonial America, in THE LAWS OF WAR*, *supra* note 361, at 59-85. On similar practices toward Muslims during the Crusades, see Stacey, *in THE LAWS OF WAR*, *supra* note 361, at 33.

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.⁴⁵⁴ 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.⁴⁵⁵

Legal rules originating in feudalism have sometimes been revitalized into effective instruments of modern society.⁴⁵⁶ But the medieval law of war proved less flexible in the regard. To be sure, the universalistic ethics of the Catholic natural lawyers were secularized by later theorists of international law. In the nineteenth and early twentieth centuries, these ethics were codified into the Hague and Geneva Conventions on the law of warfare.⁴⁵⁷ But growing imperialist rivalries and crises in the inter-state balance of power made short shrift of such commitments.

These commitments proved frightfully ineffective in both the First and Second World Wars as a counter-weight to the fervor engendered by nationalist and racist 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.⁴⁵⁸ 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

454. See 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").

455. See FRANK TALLETT, *WAR AND SOCIETY IN EARLY-MODERN EUROPE, 1495-1715*, at 58-65 (1992).

456. See KARL RENNER, *THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTIONS* 105-08, 114-22 (O. Kahn-Freund ed. & Agnes Schwarzschild trans., Routledge & Kegan Paul Ltd. 1949) (showing how this happened to the law of real property).

457. On this history, see GEOFFREY BEST, *HUMANITY IN WARFARE* 128-215 (1980).

458. See JOHN DOWER, *WAR WITHOUT MERCY* (1986); Michael Howard, *Constraints on Warfare*, in *THE LAWS OF WAR*, *supra* note 361, at 8.

but anachronistic feudal residues, if not outright treason, in such self-imposed restraints.⁴⁵⁹

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.⁴⁶⁰ To recount the history of modern war as an elementary tale about "the decline and fall of moderation" would greatly oversimplify.⁴⁶¹

Modern war has witnessed frequent episodes of extraordinary (and little-noted) self-restraint in the face of extensive illegal practices;⁴⁶² 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. But by the dawn of the twentieth century these precarious pillars of moral guidance and self-restraint in combat had greatly weakened.⁴⁶³

3. *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:

459. See SPEIER, *supra* note 433, 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 *THE LAWS OF WAR*, *supra* note 361, at 86, 88.

460. On the frequency of deviation from these ideals, even in their heyday, see STRICKLAND, *supra* note 26, at 19 ("[T]ensions between ideals of conduct 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.")

461. The quoted wording is from the subtitle to MICHAEL GLOVER, *THE VELVET GLOVE: THE DECLINE AND FALL OF MODERATION IN WAR 141-53* (1982).

462. See EDGERTON, *supra* note 419, at 318-19 (noting several incidents of such refusal to retaliate in kind for enemy brutality on and off the battlefield).

463. For an account of their demise, see GLOVER *supra* note 461, at 141-53.

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 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 onward 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.⁴⁶⁴

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.⁴⁶⁵ 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,⁴⁶⁶ 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 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

464. KEEGAN, *supra* note 351, at 324 (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. Letter from Eliot A. Cohen, Director of Strategic Studies, Paul Nitze School of International Affairs, Johns Hopkins University (Mar. 3, 1997) (on file with author).

465. See discussion *supra* Part II.C.1.

466. On helicopters as instruments of command surveillance in modern combat, see VAN CREVELD, *supra* note 212, at 255. This use of helicopters for this purpose was introduced during the Vietnam War.

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.⁴⁶⁷ A half-century 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."⁴⁶⁸

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."⁴⁶⁹ 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 soldier, such as drills, physical training, organized group recreation, mental testing, medical measurement, examination, and classification.⁴⁷⁰ 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."⁴⁷¹ Witness the burgeoning applications to military schools and academies.⁴⁷²

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, gave birth to the modern citizen and fashioned his soul by acting upon his body. Such

467. See LEVIDOW & ROBINS, *supra* note 59, at 8-9, 170-71. 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").

468. BAYNES, *supra* note 366, at 186.

469. THOMAS DUMM, *MICHEL FOUCAULT AND THE POLITICS OF FREEDOM* 104 (9 Modernity and Political Thought (Morton Schoolman ed., 1996)).

470. See MICHEL FOUCAULT, *POWER/KNOWLEDGE* 135-58 (Colin Gordon ed. & Colin Gordon et al. trans., Pantheon Books 1980).

471. DYER, *supra* note 226, at 108.

472. See *Citadel Applications 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. See *Citadel Dismisses Cadet for Hazing*, CHI. TRIB., Mar. 11, 1997, at 8.

practices rarely rely on penal law. No identifiable class or elite of "oppressors" established them, Foucault observes.⁴⁷³ 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.⁴⁷⁴

Modern disciplinary practices began in the military, but quickly spread outward to prisons, factories, and schools.⁴⁷⁵ In becoming a 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."⁴⁷⁶ 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.

4. *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' concerns does not extend beyond the primary group of fellow soldiers on whose trust and esteem their fates

473. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 87-90 (1977). For analysis, see J.G. MERQUIOR, *FOUCAULT* 110-12 (1985).

474. See DUMM, *supra* note 469, at 116-18.

475. See *id.* at 116; FOUCAULT, *supra* note 473, at 135-95; DANIEL PICK, *WAR MACHINE* 173 (1995). Weber offered an early statement of this view. See Max Weber, *The Meaning of Discipline*, in FROM MAX WEBER 253, 261 (H.H. Gerth & C. Wright Mills eds. & trans., Oxford Univ. Press 1946) ("The discipline of the army gives birth to all discipline."). Foucault himself went so far as to refer to the "military dream of society." FOUCAULT, *supra* note 473, 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.

476. DE LANDA, *supra* note 413, at 72. (parsing FOUCAULT, *supra* note 471, at 162-63). On the inevitability of such dispersal, see DYER, *supra* note 226, 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").

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."⁴⁷⁷

This view initially developed from studies of the battlefield persistence of German draftees during the Second World War.⁴⁷⁸ It was discovered that the recruits had little commitment to Nazi ideology or the expansionist objectives of the Third Reich.⁴⁷⁹ Group solidarity was protected from "disintegrating influences of heterogeneity and national origin."⁴⁸⁰ Wounded soldiers, once recovered, could expect to rejoin their old comrades. To escape combat on account of non-disabling 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 individual meaning and even fulfillment in an era of industrial killing.

The exercise of such individuality within, and on behalf of, one's platoon displayed an egalitarian dimension, lacking in older, Homeric

477. 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 & Michael J. Collins eds., 1981); see also CRAIG CAMERON, *AMERICAN SAMURAI* 192 (1994). (concluding 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") (internal citation omitted).

478. See Janowitz & Shils, *supra* note 376, *passim*. 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).

479. See Janowitz & Shils, *supra* note 376, *passim*. It is true, to be sure, 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. Cohen, *supra* note 464.

480. See Janowitz & Shils, *supra* note 376, at 287. 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. See BARTOV, *supra* note 318, at 31-58.

heroism.⁴⁸¹ This is probably why modern military experience has consistently been found to reduce authoritarian personality inclinations.⁴⁸²

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 "[t]his confraternity of danger and exposure is unequaled in forging links among people of unlike desire and temperament."⁴⁸³ Some soldiers confess to feelings of love and even of immortality, arising from their sense that integral belonging to a group with shared purposes more meaningful than civilian life, with its frequent malaise, indecision, and aimlessness.⁴⁸⁴ 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 acts—recovering one's own wounded, or the dead, or covering a withdrawal."⁴⁸⁵

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

481. On the elements of individualistic self-display in ancient Greek ideals of heroism, see A.A. MANAVALAN, *EPIC HEROISM IN MILTON AND KAMBA* 72-117 (1984).

482. See, e.g., Donald T. Campbell & Thelma H. McCormick, *Military Experience and Attitudes Toward Authority*, 52 AM. J. SOC. 482 (1957); Elizabeth G. French & Raymond R. Ernest, *The Relation Between Authoritarianism and Acceptance of Military Ideology*, 24 J. PERSONALITY 181, 181-91 (1955). This finding is, of course, deeply contrary to prevailing prejudices, particularly among contemporary intellectuals.

483. J. GLENN GRAY, *THE WARRIORS* 27 (1959). Gray also refers to other communitarian aspects of the primary group in combat. See *id.* at 43-46, 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. See PAUL FUSSELL, *THE GREAT WAR AND MODERN MEMORY* 3-18, 139 (1975). But recent scholarship finds continued belief in the meaningfulness of the fraternity, courage, and self-sacrifice evoked by military service. See JAY WINTER, *SITES OF MEMORY, SITES OF MOURNING* (1995); HYNES, *supra* note 222, at 22, 47, 214; LEED, *supra* note 95, at 11; Rosa Maria Bracco, *British Middlebrow Writers and the First World War, 1919-1939* (1989) (unpublished Ph.D. dissertation, Cambridge University).

484. 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* (David Garnett ed., 1939).

485. HYNES, *supra* note 222, at 214.

together.⁴⁸⁶ But "they began to break down in the very situation for which they were created, combat."⁴⁸⁷ 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.⁴⁸⁸

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.⁴⁸⁹ 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."⁴⁹⁰ According to most who have experienced it, however, modern ground combat more closely resembles indescribable chaos,⁴⁹¹ a situation in which bureaucratic rigor is unobtainable.⁴⁹²

486. JANOWITZ, *supra* note 44, at 136.

487. *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 366, 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.").

488. See GRAY, *supra* note 483, at 135-136; JANOWITZ, *supra* note 44, at xix; STOUFFER, *supra* note 377, at 117-24. This conclusion is shared by the distinguished British veteran and military historian Sir Michael Howard. Personal communication with Sir Michael Howard (March 1997). It is still widely resisted by many officers, however. 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.

489. 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* 11-19, 93 (1994). On Vietnam, see JANOWITZ, *supra* note 44, at xxi.

490. JANOWITZ, *supra* note 44, at 39; see also MODEL PENAL CODE § 2.10 cmt. I (1985) ("Even in time of peace obedience is the first duty of the soldier." (quoting *Neu v. McCarthy*, 33 N.E.2d 570, 573 (1941))); DYER, *supra* note 226, at 136 ("Armies in peacetime look preposterously overorganized, but peace is not their real working environment . . . [A]ll [such formalities] find their justification by bringing some predictability and order to an essentially chaotic situation.").

491. This is a recurrent theme in most memoirs of infantrymen. See, e.g., HYNES, *supra* note 222, at 20-21, 152-155; LEED, *supra* note 95, 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.").

492. See ROGER BEAUMONT, *WAR, CHAOS, AND HISTORY* 75-96 (1994); CHRISTOPHER BASSFORD, *THE SPIT-SHINE SYNDROME* 1-21 (1988).

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. Getting one's subordinates to stand, or more precisely, not to disintegrate before the enemy does, is thus largely a matter of maintaining morale under extremely demoralizing circumstances. This is surely what Keegan means when he writes that "[b]attle, therefore . . . is essentially a moral conflict."⁴⁹³

Advances in military technology, however, require highly skilled and highly motivated soldiers.⁴⁹⁴ Modern guerrilla warfare demands frequent maneuvers behind enemy lines; such operations must be highly decentralized.⁴⁹⁵ 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.⁴⁹⁶ Among military managers, the widely accepted answer to why men willingly risk death in combat is the small group theory.⁴⁹⁷

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

493. *Id.* at 296.

494. See FRIEDMAN & FRIEDMAN, *supra* note 35, at 383, 392-393; JANOWITZ, *supra* note 44, 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. See HUNTINGTON, *supra* note 37, at 75 ("Rigid and inflexible obedience may well stifle new ideas and become slave to an unprogressive routine.").

495. See 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); ROBERT R. LEONHARD, *THE ART OF MANEUVER* (1991).

496. Describing how excessive bureaucratic formalism limited the tactical responsiveness of United States ground forces in Vietnam, Luttwak observes that "[n]o organization so complex on the inside could possibly be responsive to the quite varied and often exotic phenomena on the outside." LUTTWAK *supra* note 495, at 200.

497. See DYER, *supra* note 226, 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.").

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.

D. Morale and Morality

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.⁴⁹⁸ 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.⁴⁹⁹

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 which 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."⁵⁰⁰ 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 Führer's imprudent and

498. 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. & trans., W.W. Norton & Co., Inc. 1959) (1922); see also SOLIS, *supra* note 121, at 273 ("In combat, a group dynamic sometimes overtakes individual judgment and one's normal behavior may become submerged in the behavioral commality of the unit, sometimes the lowest common behavioral denominator."); 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."). A psychoanalyst finds support for this Freudian account in his study of Nazi S.S. members. See HENRY V. DICKS, *LICENSED MASS MURDER* 256 (1972).

499. See JACQUES VAN DOORN, *THE SOLDIER AND SOCIAL CHANGE* 133 (1975) ("[S]erious and systematic analysis [of war atrocities] from the side of the social sciences is lacking.").

500. EDGERTON, *supra* note 419, at 314.

unlawful commands.⁵⁰¹ 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.⁵⁰²

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."⁵⁰³

But such isolation need not result. Like obedience,⁵⁰⁴ disobedience often has a sociological dimension.⁵⁰⁵ "[C]ommitments 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."⁵⁰⁶

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.⁵⁰⁷ When officers sought to push soldiers further 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

501. See PETER HOFFMANN, *STAUFFENBERG* 132 (1995).

502. See, e.g., RUTH LINN, *CONSCIENCE AT WAR* 89 (1996).

503. WALZER, *WARS*, *supra* note 49, at 22-23 (quoting Jean Le Meur).

504. The extensive literature on the sociology of obedience is summarized in HERBERT C. KELMAN & V. LEE HAMILTON, *CRIMES OF OBEDIENCE: TOWARD A SOCIAL PSYCHOLOGY OF AUTHORITY AND RESPONSIBILITY* (1989).

505. 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").

506. 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* 25-26 (1979).

507. See SMITH, *supra* note 489, at 17 ("For French soldiers, the issue revolved around whether and under what circumstances they considered the levels of offensive violence expected of them relevant to the goal 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.*

to the shared objective of victory. Hence, disagreements between superiors and subordinates could plausibly be interpreted as concerning only means, and not ends.⁵⁰⁸

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.⁵⁰⁹ In turn, decision-making 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."⁵¹⁰

This sort of practical judgment by French troops had both a tactical and an ethical component. The tactical component lies in the 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.⁵¹¹ 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

508. That was precisely how the most politically sophisticated commanding officers, particularly Marshal Philippe Pétain, chose to interpret these mutinies. *Id.* at 176-77, 215-30.

509. *See 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.").

510. RICHARD HOLMES, *ACTS OF WAR* 334 (1985) (quoting George C. Homans).

511. 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.

officers remain ever-attentive to this possibility in order to ensure that they give only those orders that will be obeyed.⁵¹²

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.

E. 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 or otherwise?

The theory of primary group loyalty is entirely indeterminate here. Of course, a platoon leader who has established a close personal 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.⁵¹³

If all platoon leaders had this understanding, military rules and regulations would be drafted to give them even 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

512. See generally LAWRENCE B. RADINE, *THE TAMING OF THE TROOPS* 68-69 (1977) (quoting a United States officer who describes this process).

513. See, e.g., McDONOUGH, *supra* note 47, at 61. McDonough says,

I had to do more than keep them alive. I had to preserve their human 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.

Id.

non-combatants under the Geneva Conventions.⁵¹⁴ In this resistance, German officers employed a variety of ingenious stratagems, none of which required expressly challenging the order's legality.⁵¹⁵

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.⁵¹⁶ 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, "[i]mmediate and certain approval from comrades overrides any reason for complying with legal standards or any fear of the consequences of engaging in criminal behavior."⁵¹⁷ In short, unlawful conduct, including atrocity, may result from the culture of the primary group,⁵¹⁸ and from the more extended ties of camaraderie that assemble these small groups into the larger organization.⁵¹⁹

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. 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,⁵²⁰ anomic indiscipline from below,⁵²¹ connivance,⁵²² or brutalization.⁵²³ The

514. See ALFRED M. DE ZAYAS, *THE WEHRMACHT WAR CRIMES BUREAU, 1939-1945* 20 (1979).

515. See *id.*

516. Some analysts characterize this problem in terms of the difference between cohesion and *esprit*. See, e.g., KELLETT, *supra* note 343, at 46-47 ("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 . . .").

517. Jaime Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals?*, 12 HUM. RTS. Q. 1, 9 (1990).

518. One could thus consider pressure from the primary group as a fifth source of atrocity and add it to my list. See discussion *supra* Part II.C.4. But the norms established within primary groups more often serve to restrain atrocities arising both from above and from below.

519. According to one study, this was often the case among American forces in Vietnam. See Stephen D. Westbrook, *The Potential for Military Disintegration, in COMBAT EFFECTIVENESS: COHESION, STRESS, AND THE VOLUNTEER MILITARY* 244, 257 (Samuel Sarkesian ed., 1980).

520. See discussion *supra* Part II.B.2.

521. See discussion *supra* Part II.B.1.

522. See discussion *supra* Part II.B.3.

523. See discussion *supra* Part II.B.4.

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?

III

RULES VERSUS STANDARDS IN MILITARY LAW

*[I]t 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.*⁵²⁴

At first glance, it might seem that military superiors always have a strong interest in maintaining unlimited 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 her thumb, while they enjoy greater liberty to do whatever they please when free of her domination.

But these seeming truisms prove surprisingly inaccurate in many situations. The incentives created by military law contribute to this fact. As we have seen, efficacy in combat and peace operations often depends on ground-level initiative in creating and capitalizing upon fleeting opportunities.⁵²⁵ This initiative inherently escapes complete control from above. The successful commander thus decentralizes much tactical decision-making to the level of infantry officers in the field. 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

524. WALZER, *WARS*, *supra* note 49, at 311-12 (emphasis in original).

525. See *supra* notes 494-97 and accompanying text.

before contact with the enemy,⁵²⁶ 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,⁵²⁷ 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 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 efficient decentralization) verges on strict liability. Strict liability is morally indefensible, all agree, for any of the serious offenses with which he could be charged.⁵²⁸

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 of war crimes.

In short, the self-interest of military subalterns is often better served, all things considered, by a structure of incentives 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 a 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.

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

526. See discussion *supra* Part II.B.4.

527. See *supra* notes 494-97 and accompanying text.

528. See Richard A. Wasserstrom, *Strict Liability in Criminal Law*, 12 STAN. L. REV. 731 (1960).

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. *Promoting Practical Judgment*

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."⁵²⁹

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.⁵³⁰ Yet Vargas Llosa's tone here is ironic, for 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 be reformed to rely less on bright-line rules and more on general standards.⁵³¹

529. MARIO VARGAS LLOSA, *THE TIME OF THE HERO*, 350 (Lysander Kemp trans., Farrar, Straus and Giroux 1986) (1966).

530. 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 (1950).

531. This proposal 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.

"A paradigmatic rule is 'drive at 55 m.p.h. or under.' A paradigmatic standard is 'drive safely.'"⁵³² 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.⁵³³ In so doing, "standards make visible and accountable the inevitable weighing process that rules obscure."⁵³⁴

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.⁵³⁵ So-called multi-factor tests, which now abound in American judge-made law,⁵³⁶ 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.⁵³⁷

532. Larry Alexander & Ken Kress, *Against Legal Principles*, in LAW AND INTERPRETATION 279, 280 (Andrei Marmor ed., 1995).

533. See, e.g., H.L.A. HART, THE CONCEPT OF LAW 126-31 (1961); FREDERICK SCHAUER, PLAYING BY THE RULES 158-62, 222-28 (1991) [hereinafter SCHAUER, PLAYING BY THE RULES]; Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Isaac Ehrlich & 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); Frederick Schauer, *Authority and Indeterminacy*, in AUTHORITY REVISITED: NOMOS XXIX 28 (J. Roland Pennock & John W. Chapman eds., 1987) [hereinafter Schauer, *Authority and Indeterminacy*].

534. Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 67 (1992).

535. See STEVEN J. BURTON, JUDGING IN GOOD FAITH 38-48 (1992); JOSEPH RAZ, THE MORALITY OF FREEDOM 38-69 (1986).

536. For a recent and rather elaborate typology of such tests, see Richard Fallon, *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 67-74 (1997).

537. 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

ROGERS, *supra* note 109, at 19.

The best current thinking among JAG officers favors precisely this multi-factor approach to drafting American and multilateral rules of engagement.⁵³⁸ Thus, standards need not invite the sort of all-things-considered deliberation displayed by Vargas Llosas's officer. When they do, the danger of arbitrariness greatly increases. We rely on clear rules precisely in situations where this danger appears most salient and 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*.'⁵³⁹

The question, then, is whether military law should continue to exclude most ethical and legal considerations from the practical deliberation of soldiers, or whether it should instead authorize attention to such considerations even when the illegality of the superiors' commands is not immediately obvious. 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 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 1.

TABLE 1

		Soldier	
		Obeys	Disobeys
Order is	Legal	OK	Type 1 Error
	Illegal	Type 2 Error	OK

538. See Martins, *supra* note 171, at 91 (proposing a structured standard governing gradual escalation of force, designed to give greater guidance to soldiers than the response, "it all depends"). It should be noted that the movement from rules to standards in 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 SOCIAL JUSTICE 11-17, 126-28, 143-44 (1976). Such authors argue that standards fail to provide sufficiently clear guidance to those who wish to avoid potential liability.

539. See SCHAUER, *PLAYING BY THE RULES*, *supra* note 533, at 152.

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. 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 other words, no excuse is available,⁵⁴⁰ 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. In principle, illegal orders must not be obeyed.⁵⁴¹ But the law permits some excuses for obeying illegal orders. The question at issue here is the scope of this excuse.

Disobedience of Type 1 was exemplified in *Parker v. Levy*,⁵⁴² in which an American physician-draftee refused to train Special Forces airmen during the Vietnam War. 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 disobey orders to commit, or to aid and abet the commission of, atrocities.

540. For U.S. law, the approach defended here requires only clarification; for that of most other states, revision.

541. 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 particularly important that the law reach the right answer to this question.

542. 417 U.S. 733 (1974).

But Levy was unable to produce any significant evidence 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.⁵⁴³ 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.

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.⁵⁴⁴ 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. 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.⁵⁴⁵

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

543. The U.S. Uniform Code of Military Justice, for instance, makes it unlawful to violate or refuse to obey a lawful order that the accused had a duty to obey. 10 U.S.C. § 892, art. 92 (1) (1997).

544. See, e.g., Schauer, *Authority and Indeterminacy*, *supra* note 533, at 31-35.

545. James W. Child, *Specific Commands, General Rules, and Degrees of Autonomy*, 8 CANADIAN J. OF L. & JURISPRUDENCE 245, 254 (1995) (emphasis omitted). See generally NICHOLAS RESCHER, *THE LOGIC OF COMMANDS* (1966).

address to general mandate; from time specific to standing order; from action performance to state realization commands."⁵⁴⁶ Each of these modifications in the directive "trades on a progressively higher notion of autonomy" in the recipient.⁵⁴⁷ 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. Suspicious of excessive bureaucratic 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. 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."

This is the type of legal norm 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."⁵⁴⁸ Bright-line rules 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.⁵⁴⁹ 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

546. Child, *supra* note 545, at 258.

547. *Id.*

548. 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. See *id.*

549. See DYER, *supra* note 226, at 106.

camaraderie) can often be more complex.⁵⁵⁰ 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.⁵⁵¹ 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*⁵⁵² (that is, wise, all-things-considered judgment under rapidly changing circumstances) and discourage rote rule-following.⁵⁵³ 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 particular predicaments. This is especially true when we lack confidence that we can anticipate all such major predicaments, prejudge their precise contours, and draft specific rules to guide people through them wisely.

1. *Martial Courage as Moral Judgment*

Initiative and imagination are so important to effectiveness in combat because of how they influence manifestations of courage. Courage itself, 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."⁵⁵⁴ 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 action—the way the agent carried out his intentions in the

550. See CHARLES PERROW, *COMPLEX ORGANIZATIONS* 79-118 (1986).

551. For examples of cases in which such design has apparently been achieved, see HENDERSON, *supra* note 376, at 152.

552. 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 after the event, see JOHN M. COOPER, *REASON AND HUMAN GOOD IN ARISTOTLE* 9-58 (1975).

553. On how law's use of standards fosters deliberation and discourages rote, unreflective rule-following, see Schauer, *Authority and Indeterminacy*, *supra* note 533, at 31-35; Sullivan, *supra* note 534, at 86-89.

554. DOUGLAS N. WALTON, *COURAGE: A PHILOSOPHICAL INVESTIGATION* 9 (1986). Tocqueville observed this long ago. See TOCQUEVILLE, *supra* note 432, at 223 ("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).

specific circumstances of the action."⁵⁵⁵ 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.

Courage is widely recognized as a moral virtue. Its exercise thus involves not merely judgment *tout court*, but judgment of a specifically moral variety. Charles Larmore 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.⁵⁵⁶

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 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

555. WALTON, *supra* note 554, at 13.

556. CHARLES LARMORE, PATTERNS OF MORAL COMPLEXITY 6-7 (1987) (emphasis added).

conception. After all, what we are grappling with here can be very elemental. But to acknowledge this vulgarly elemental 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.⁵⁵⁷ In Herman Melville's *Billy Budd*, Captain Vere is praised as a man "intrepid to the verge of temerity, though never injudiciously so."⁵⁵⁸ Contemporary military writing similarly stresses that in combat, a balance must be struck between control and latitude, safety and audacity.⁵⁵⁹ 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 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?⁵⁶⁰

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?

557. See ARISTOTLE, *Nicomachean Ethics* 70-71 (Martin Ostward trans., Bobbs-Merrill 1962); see also SARAH BRODIE, *Ethics with Aristotle* 95-103 (1991).

558. Herman Melville, *Billy Budd, Foretopman*, in *SIX GREAT SHORT MODERN NOVELS* 57, 79 (1954).

559. See generally Maj. Andrew M. Warner, "Land Forces" *Rules of Engagement Symposium: The CLAMO Revises the Peacetime Rules of Engagement*, PAMPHLET 27-50-253, ARMY LAWYER 48 (1993).

560. See LARMORE, *supra* note 556, at 6-7.

To answer these questions in seriously mistaken ways, and hence to engage or evade engagement without due basis, is to display poor judgment. 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."⁵⁶¹

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 standing orders and rules of engagement, 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.⁵⁶² 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*.

One familiar response to this recognition is to dispense with the search for rules altogether, even presumptive rules of thumb. In this spirit, a U.S. Army major recently argued,

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

561. Josiah Bunting, *The Conscience of a Soldier*, 16 *WORLDVIEW* 6, 10 (1973).

562. Napoleon sought to contrast judgment with brilliance in this regard. See Jay Luvaas, *Napoleon on the Art of Command*, in MATTHEWS & BROWN, *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 only—as the soldier does—as aids to judgment." CLAUSEWITZ, *supra* note 41, at 157-58.

physical encounter. Thus, in battle, each situation is unique and must be approached on its own merits.⁵⁶³

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.

This view 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.

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,⁵⁶⁴ and that these will be blamed for battlefield failure, even when they played no role in it.⁵⁶⁵

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.⁵⁶⁶ It is very real, but it has arisen largely from demonstrable defects in draftsmanship by top military commanders and their JAG advisers. These defects

563. Hooker, *supra* note 495, at 30.

564. See, e.g., the remarks of Admiral Grant Sharp, in Congressional testimony concerning the 1968 North Korean seizure of the U.S.S. *Pueblo*, in *Inquiry into the U.S.S. Pueblo and EC-121 Plane Incidents: Hearings before the Special Subcomm. on the U.S.S. Pueblo of the Comm. on Armed Serv.*, 91st Cong., 1st Sess., 806 (1969) ("[T]he rules don't make a bit of difference to me, and I would have done what I thought best.").

565. 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* 124 (1997) ("[T]hese damnable rules of engagement . . . prevented American fighting men from using the only tactical assets that gave us an advantage during firefights . . ."); SOLIS, *supra* note 121, at 97 (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"); Maj. W. Hays Parks, *Rules of Engagement: No More Vietnams*, 117 U.S. NAVAL INSTITUTE PROCEEDINGS 27 (March 1991).

566. 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. See F.M. Lorenz, *Law and Anarchy in Somalia*, 23 PARAMETERS: U.S. ARMY WAR C. Q. 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 171, at 64. An Army colonel serving there observed that "soldiers in some cases were reluctant to fire even when fired upon for fear of legal action." *Id.* at 66. See also LINN, *supra* note 502, at 115 (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.

in turn have often been quickly cured by revision, in response to complaints by officers in the field.⁵⁶⁷ 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 this is precisely how rules of engagement are often viewed by military officers jealous of professional prerogative.⁵⁶⁸

The better view, defended by the JAG corps' leading thinkers,⁵⁶⁹ rejects so simple an opposition between untrammelled 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.⁵⁷⁰ This approach introduces two crucial changes in the preceding picture, with a view to attenuating the acknowledged tension between the two desiderata.

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.⁵⁷¹ 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.⁵⁷²

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

567. On such revisions during the Somali peace enforcement mission, see Lorenz, *supra* note 566.

568. See, e.g., Parks, *supra* note 411, at 9; Maj. W. Hays Parks, *Righting the Rules of Engagement*, 115 U.S. NAVAL INSTITUTE PROCEEDINGS 83, 86 (May 1989); Capt. J. Ashley Roach, *Rules of Engagement*, 36 NAVAL WAR C. REV. 46, 46 (1983).

569. 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 Maj. Mark S. Martins. See *supra* note 171.

570. See, e.g., Sagan, *supra* note 548, at 88.

[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.

571. The current U.S. Standing Rules of Engagement adopt this approach. See 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) [hereinafter STANDING RULES OF ENGAGEMENT]; 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.").

572. See CASPAR W. WEINBERGER, FIGHTING FOR PEACE: SEVEN CRITICAL YEARS IN THE PENTAGON 190, 198 (1990).

engagement fully authorize the use of deadly force.⁵⁷³ Such extra-legal restraint is particularly essential where civilians are likely to be harmed,⁵⁷⁴ or where escalation of the larger political conflict is likely to ensue from any use of force, however lawful.⁵⁷⁵ In peace enforcement operations in particular, over-reaction (as opposed to under-reaction) by United Nations 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 it 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.⁵⁷⁶ 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,⁵⁷⁷ 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

573. 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. See Sagan, *supra* note 548, at 82.

574. 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 566, at 39. But cf. Stanton, *supra* note 198, at 65 ("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.").

575. See Parks, *Righting the Rules of Engagement*, *supra* note 568, at 88 (describing incidents in which U.S. aircraft, legally authorized to use deadly force against Libyan jet fighters, "prudently held their fire" in order to avoid escalation of an international political conflict).

576. Situations where soldiers exercise suboptimal judgment often do not rise to the level of criminality, so non-penal sanctions will generally be more appropriate. This is one implication of Maj. Martin's case for a "non-legislative" approach to compliance with rules of engagement. See Martins, *supra* note 171. 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.

577. See Parks, *supra* note 182, at 22 (describing in these terms the law of war training U.S. officers received a generation ago).

judgment in the field, particularly in morally "hard cases."⁵⁷⁸ 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 United States 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."⁵⁷⁹

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 reliance 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. 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.⁵⁸⁰ 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"⁵⁸¹ and for conduct prejudicial to "good order and discipline."⁵⁸² The Supreme Court has upheld the

578. See Martins, *supra* note 171, 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, *supra* note 571, 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).

579. 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).

580. See JAMES E. VALLE, ROCKS AND SHOALS 50 (1980).

581. U.S. CODE OF MILITARY JUSTICE, 10 U.S.C. § 933 (1994).

582. *Id.* To be sure, the Executive Order/Manual for Courts Martial now also lists several specific examples of such conduct, and this listing is 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.

military's use of general standards against "void for vagueness" constitutional challenges.⁵⁸³ 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.⁵⁸⁴ 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.⁵⁸⁵ 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.⁵⁸⁶ Legal concepts like "conduct unbecoming an officer," understood as acts "dishonoring [one's] . . . character as a gentleman,"⁵⁸⁷ may be all that we have left of the memory of feudal courtesy for the purposes of self-regulation of professional soldiers.⁵⁸⁸

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. 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,"⁵⁸⁹ in that their facial vagueness is overcome by the tacit conventions and normative understandings that most competent members share.

The lack of collective memory 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

583. *Parker v. Levy*, 417 U.S. 733, 737 (1974).

584. For such arguments, see *id.* at 744 (Stewart, J. dissenting).

585. See, e.g., MACINTYRE, *supra* note 333, at 169-210. For an incisive critique of this aspect of communitarianism, see STEPHEN TURNER, *THE SOCIAL THEORY OF PRACTICES* (1994).

586. See, e.g., MACINTYRE, *supra* note 333, at 169-210.

587. RICHARD DAHL & 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. See Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 *YALE LJ.* 1239, 1248-51 (1991).

588. See *supra* note 451 and accompanying text.

589. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-101 (1997).

readily identifiable by most soldiers, even in the pitch of the battle, as clearly impermissible.⁵⁹⁰

Rules of engagement offer one 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. But according to the preceding analysis, resorting simply to bright-line rules risks sacrificing the spontaneous, purposive initiative so essential to success in the field, particularly in politically sensitive peace operations.⁵⁹¹

When legal theorists have strayed into the area of military law and organization, however, 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."⁵⁹² He argues that such decentralized methods "weaken[] the distinctions between . . . taskmasters and executors."⁵⁹³ They thereby disrupt the "ready-made script" imposed by "social roles and hierarchies" on "people's practical or passionate dealings."⁵⁹⁴

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 inconstant mood and commitment.⁵⁹⁵ Mao Tse-Tung, the greatest twentieth century theorist and practitioner of guerrilla warfare, said much the same.⁵⁹⁶

590. U.S. military law is already more precise in this regard than that of most states. See *THE LAW OF LAND WARFARE*, *supra* note 51, at ¶¶ 502, 504 (listing particular acts that are forbidden under all circumstances).

591. Defense Secretary William Cohen recently observed in this regard, "a zero-defect 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.

592. ROBERTO MANGABEIRA UNGER, *PLASTICITY INTO POWER: COMPARATIVE-HISTORICAL STUDIES ON THE INSTITUTIONAL CONDITIONS OF ECONOMIC AND MILITARY SUCCESS* 157, 186, 206 (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. See GEORG WILHELM FRIEDRICH HEGEL, *PHILOSOPHY OF RIGHT* 209-10 (T.M. Knox trans., Oxford Univ. Press 1942) (1821).

593. UNGER, *supra* note 592, at 207.

594. *Id.* at 207.

595. T.E. LAWRENCE, *THE SEVEN PILLARS OF WISDOM* (1942), *quoted in* J.C.T. DOWNEY, *MANAGEMENT IN THE ARMED FORCES* 87-88 (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." VAN CREVELD, *supra* note 212, at 161.

596. See MAO TSE-TUNG, *SELECTED MILITARY WRITINGS OF MAO TSE-TUNG* 61, 95-96, 151-52, 163-65, 178-80 (1963).

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 Intifadah.⁵⁹⁷ "A good dose of traditional discipline might not have hurt them at all in this regard," notes Eliot A. Cohen.⁵⁹⁸

The most effective of the decentralized, mission-oriented armies give intermediation by members of a general staff a prominent place. The staff has served as a kind of "institutional brain,"⁵⁹⁹ solving coordination problems arising from the autonomy of line officers at the middle and lower echelons.

Moreover, getting the soldiers with the right kind of training and the right *matériel* into the right place at the right time demands meticulous planning and long-range foresight, not wild-eyed improvisation.⁶⁰⁰ To get soldiers and resources to the front requires a formally organized system of logistics,⁶⁰¹ even if the value of such bureaucratic formality gives out at the moment of combat.⁶⁰² 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 therefore 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.

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."⁶⁰³ An example of this explicitness 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, tactically, or legally improper.

597. On such beatings, see LINN, *supra* note 502, at 62-69, 114-16.

598. Cohen, *supra* note 464.

599. The term is De Landa's. See DE LANDA, *supra* note 413, at 5. On the function of the German general staff, see ELIOT A. COHEN & JOHN GOOCH, *MILITARY MISFORTUNES* 240-41 (1990).

600. See, e.g., M. D. Feld, *Information and Authority: The Structure of Military Organization*, 24 AM. SOC. REV. 15 (1959).

601. See generally MARTIN VAN CREVELD, *SUPPLYING WAR* (1977).

602. 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." DE LANDA, *supra* note 413, at 113.

603. UNGER, *supra* note 592, at 208.

Legal theory offers us a sophisticated range of choices amongst various combinations of rules and standards.⁶⁰⁴ For instance, the current Standing Rules of Engagement offer several indicia of hostile intent.⁶⁰⁵ Together, these indicia establish a general standard concerning when the use of force, in what measure, is justified. But these indicia are expressly supplemented with a rule requiring engagement whenever necessary for self-defense of an individual or unit.⁶⁰⁶

The proper mix of rules and standards depends on many factors. In particular, they include the degree of situational judgment required by soldiers assigned to various tasks and the level of education or motivation the soldiers possess.⁶⁰⁷ Such factors vary greatly 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."⁶⁰⁸ 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. Where loyalties to the state are weak, public order is insecure, and soldiers are poorly educated or unmotivated, strict, bright-line rules 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 recourse to "organized plunder"⁶⁰⁹ if troops are not to die of starvation or exposure.

604. See, e.g., Sullivan, *supra* note 534, at 61 ("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.").

605. See STANDING RULES OF ENGAGEMENT, enclosure A, *supra* note 571, at 1-2 and 1-8. 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 Sagan, *supra* note 548, at 82-83.

606. See STANDING RULES OF ENGAGEMENT, *supra* note 571, at A-3.

607. 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, 21-22, 28 (1995). See also Kenneth M. Pollack, *The Influence of Arab Culture on Arab Military Effectiveness* (1996) (unpublished Ph.D. dissertation, Massachusetts Institute of Technology) (on file with author).

608. Melville, *supra* note 558, at 85.

609. 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., non-nomadic] armies whenever their own supply lines have broken down due to friction." DE LANDA, *supra* note 413, at 113.

Rules of engagement must reflect the likelihood that such situations will arise. Such rules must 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.⁶¹⁰ Military law 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 Article proposes the standard of reasonable error to determine 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.⁶¹¹ In addition, high rates of re-enlistment 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 three levels.⁶¹² Each level thus requires a different mix of precise rules and more

610. See generally ROSEN, *supra* note 60, at 8-30.

611. See Michael Satchell, *The New U.S. Military: Pride, Brains, and Brawn*, S.F. CHRON., Apr. 20, 1988, at A2 (noting that twenty-five percent of the officers in the Army and nearly sixty percent in the Air Force graduate from civilian colleges).

612. 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 [sic] 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 413, at 83. On the formal definition of the three levels, see Allan R. Millett et al., *The Effectiveness of Military Organizations*, in MILITARY EFFECTIVENESS 1, 10-24 (Allan R. Millett & Williamson Murray eds., 1988) and James R. McDonough, *Building the New FM 100-5 Process and Product*, 71 MIL. REV. 2 (1991).

general standards. Mistakes at one of these levels can often be identified and corrected at other levels.⁶¹³ But, to this end, there must be some 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 Article. Modern American armed forces increasingly tailor rules of engagement to units with particular kinds of operational responsibility, that deploy particular weapons systems in particular kinds of operations.⁶¹⁴ 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.⁶¹⁵

The classified status of most such non-standing rules prevents further jurisprudential analysis of where their various provisions fall on the rules-standards continuum. This ought to be a more prominent focus in the continuing education of elite JAG officers. To a neophyte, the considerable technical literature suggests enough agreement for theoretically informed JAG lawyers to provide some valuable guidance on the proper mix of rules and standards.

It is clear, for instance, that peace enforcement operations often require much more complex situational judgment at the tactical level than bright-line, standing or modified rules of engagement can fully capture. In such operations, troops are often whipsawed between police-like, constabulary functions, where they must calm heated tempers of civilians, and full-fledged combat engagement, where they must "break things and kill people."⁶¹⁶ One military thinker observes that in such operations

[t]he 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 non-lethal 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.⁶¹⁷

613. For instance, tactical obstacles—when they become clearly insurmountable—can necessitate reassessment of larger operational and strategic commitments. The frustrations and failures of trench warfare offer the quintessential example. See Timothy K. Nenninger, *American Military Effectiveness in the First World War*, in *MILITARY EFFECTIVENESS*, *supra* note 612, at 116, 152-53.

614. See Warner, *supra* note 559, at 52.

615. See *id.*; Richard J. Grunawalt, *The JCS Standing Rules of Engagement: A Judge Advocate's Primer*, 42 A.F.L. REV. 245, 252-53 (1997).

616. Warner, *supra* note 559, 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).

617. Lorenz, *supra* note 198, at 60.

Troops in such operations often occupy a nebulous middle ground where it is unclear "who is friend and who is foe."⁶¹⁸ Allies and enemies may switch places very quickly with new developments. Troops must thus be equipped and skilled at shifting between lethal and non-lethal 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."⁶¹⁹ Rules of engagement will be modified on a regular basis,⁶²⁰ but "there is ultimately no substitute for judgment."⁶²¹ Current training therefore focuses on getting rules of engagement, "assimilated into a soldier's judgment,"⁶²² helping him "unpack the self-defense boilerplate into meaningful components."⁶²³

Those writing about the armed forces call for decentralization to varying degrees in operations other than peace enforcement.⁶²⁴ Some blandly call for balancing the imperatives of central coordination and situational judgment:

618. Maj. Mark Warren, *Operational Law—A Concept Matures*, 152 MIL. L. REV. 33, 34 (1996).

619. 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. See STANDING RULES OF ENGAGEMENT, *supra* note 571, 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.

620. See Warren, *supra* note 618, at 56 ("Standing rules . . . may be supplemented or modified in—and often during—an 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.").

621. Grunawalt, *supra* note 615, at 255. See also Parks, *Righting the Rules of Engagement*, *supra* note 568, at 93 ("No amount of rules can substitute for the judgment of [the] individual, and ROE are not intended to do so.").

622. Martins, *supra* note 171, at 20.

623. *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. See *id.* at 56.

624. Compare Kurt Lang, *Military Organizations*, in HANDBOOK OF ORGANIZATIONS 852-53 (James March ed., 1965) (arguing that for the tactical commander and ordinary soldier, "[h]is judgments concern only how to overcome the external difficulties he encounters in the execution of his orders") and Feld, *supra* note 600, at 15 ("The initiative undertaken by individuals must conform to the objectives of the group."), with DEBORAH D. AVANT, POLITICAL INSTITUTIONS AND MILITARY CHANGE 4 (1994) ("[M]ilitary 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."), GRAY, *supra* note 223, at 63 (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), LUTTWAK & HOROWITZ, *supra* note 385, at 54-55 (lamenting the "bureaucratic attitudes" of "[f]ront-line commanders [who] fail to act promptly because they want to be 'covered' by orders from above"), and 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."). For a shrewd characterizations of the United States Army's appreciation of these tensions, see KEEGAN, *supra* note 351, at 53.

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 perpetrated⁶²⁵

This statement is unusual for its lucidity and moral acuity. But vague calls for balancing abound in the military organization literature.⁶²⁶ One suspects that "there is still a deeply rooted belief that 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."⁶²⁷

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.⁶²⁸ 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

625. Hillel Levine, *Between Social Legitimation and Moral Legitimacy in Military Commitment*, in *LEGITIMACY AND COMMITMENT IN THE MILITARY* 9, 18 (Thomas Wyatt & Reuven Gal eds., 1990).

626. See, e.g., U.S. TRADOC, *Force XXI Operations: A Concept for the 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 "[c]ombinations 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 FRIEDMAN & FRIEDMAN, *supra* note 35, at 152 ("Too little information, and the commander will be caught by surprise. Too much information, and he will be overwhelmed and unable to understand let alone act on it.").

627. LT. COL. WILLIAM L. HAUSER, *AMERICA'S ARMY IN CRISIS: A STUDY IN CIVIL-MILITARY RELATIONS* 111 (1973). 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 & E.J. Feuchtwanger eds., 1979).

628. See DEP'T OF THE ARMY, *AN INFANTRYMAN'S GUIDE TO COMBAT IN BUILT-UP AREAS*, FIELD MANUAL 90-10-1, at I-7 (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).

in combat and peace operations.⁶²⁹ These polar views will soon 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.

2. *Information Warfare and the Legal Structure of Armies*

New information technologies promise to radically alter certain kinds of military conflict, perhaps even to "dissipate the 'fog of war.'"⁶³⁰ The new technologies will surely have major implications for the legal design of military organizations. They force us 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, United Nations, or North Atlantic Treaty Organization (NATO) forces to surveil better their enemies' movements, capacities, troop concentrations, logistical logjams, and other strengths and weaknesses and plan their operations accordingly.

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 centralization.⁶³¹ 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.⁶³²

629. See, e.g., Gen. Omar N. Bradley, *On Leadership*, in MATTHEWS & BROWN, *supra* note 562, at 3, 4; Lt. Col. Charles G. Sutton, Jr., *Command and Control at the Operational Level*, in MATTHEWS & BROWN, *supra* note 562, at 74, 77-81.

630. Adm. 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 (reviewing GRAY, *supra* note 227). For recent discussions by U.S. officers, see Lt. Cmdr. Randall G. Bowdish, *The Revolution in Military Affairs: The Sixth Generation*, MIL. REV. 26 (Nov.-Dec. 1995); Maj. Gen. Wallace C. Arnold & Thomas H. Killion, *MANPRINT Battle Command and Digitization*, 75 MIL. REV. 48 (May-June 1995).

631. See FRIEDMAN & FRIEDMAN, *supra* note 35, at 390.

632. See *id.* (describing the rationale for this view).

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.⁶³³ The upshot will be a need for more centralization in some matters, and less in others, in ways that cannot be readily foreseen and that will continually evolve.

To accommodate such uncertainty, armies must be legally structured for considerable flexibility. This 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 their peers and underlings.⁶³⁴ 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.

This second approach also trades upon a very different conception 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.⁶³⁵ 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.⁶³⁶

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.⁶³⁷ Clausewitz argued that

633. See DE LANDA, *supra* note 413, at 78-79. Earlier efforts to rely heavily on statistical data fed into computer models for war-planning proved quite unsuccessful during the Vietnam War. See VAN CREVELD, *supra* note 344, at 253; VAN CREVELD, *supra* note 212, at 246. An influential, early defense of such quantitative methods was offered by HERMAN KAHN, *ON THERMONUCLEAR WAR* at viii-ix, 41 (1960).

634. New technologies will increase the useful information available even to infantrymen. See FRIEDMAN & FRIEDMAN, *supra* note 35, at 383 (describing how technologies like the wireless head-mounted display will do this).

635. The origins of this view are usually traced to Antoine-Henri Jomini. For the more recent history of his epigones, see DE LANDA, *supra* note 413, at 96-97, 206.

636. CLAUSEWITZ, *supra* note 41, at 75.

637. In this respect, Clausewitz's argument resembled the challenge posed by legal realism to Langdellian formalism.

"no prescriptive formulation universal enough to deserve the name of law can be applied to the constant change and diversity of the phenomena of war."⁶³⁸ 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."⁶³⁹

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.⁶⁴⁰

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.⁶⁴¹

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. A similar tension runs through the self-understanding of practitioners in many fields, including the law.⁶⁴²

3. *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.

638. CLAUSEWITZ, *supra* note 41, at 204-05.

639. *Id.* at 361.

640. On this view, see LT. GEN. HACKETT, *supra* note 102, at 40 (observing that the soldier "can be regarded as no more than a military mechanic: a military operation can be considered as just another engineering project").

641. Gabriel offers a lucid, recent defense of this view. See GABRIEL, *supra* note 56, at 39-41, 73, 99.

642. See generally JACK DOWIE & ARTHUR ELSTEIN EDS., *PROFESSIONAL JUDGMENT: A READER IN CLINICAL DECISION MAKING* (1988).

Its "philosophic approach is lenient in terms of the content of the rules themselves but strict in terms of its demand for their observance."⁶⁴³ 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. "[T]hat which is not absolutely prohibited is absolutely permitted: an act is either permissible or not."⁶⁴⁴

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 that 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.⁶⁴⁵

It also allows for a category of actions that are unpunishable in normal circumstances (e.g., non-atrocious 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."⁶⁴⁶ 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.

Clark says nothing about the conditions under which either of these approaches might be preferable to the other. This should be a central question for military criminal law. Legal efforts to avert atrocities now heavily favor the first approach, as they have generally done in the

643. IAN CLARK, *WAGING WAR* 75 (1988).

644. *Id.*

645. *Id.* at 75-76.

646. *Id.* at 76.

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 legal 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. . . ."⁶⁴⁷ 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.⁶⁴⁸ 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."⁶⁴⁹

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 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. The plausibility of this defense would depend on details of the factual configuration confronted by the errant soldier, as recounted by witnesses.

647. HYNES, *supra* note 222, at 19.

648. Argentine Adm. Rubén Oscar Franco conceded in his trial testimony that this was done. See JORGE CAMARASA, RUBÉN FELICE, & D. GONZÁLEZ, *EL JUICIO: PROCESO AL HORROR* 123-24 (1986).

649. FIERRO, *supra* note 6, at 79 ("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. See *id.* at 131-33.

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 I have just described is better directed at that objective than the manifest illegality rule.⁶⁵⁰ This is because standards are more effective than bright-line rules in promoting dialogue and deliberation among those whose conduct they govern.⁶⁵¹

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.⁶⁵² 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. 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

650. 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 law—specifically, that established by the law of war crimes.

651. See Sullivan, *supra* note 534, at 69 ("Rules block the dialogue that standards promote."). Sullivan's 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 psychologists are beginning to study these issues experimentally. See, e.g., Gwen M. Wittenbaum & 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 than individuals, whereas in applying more diffuse standards, individuals do better than groups).

652. See generally FUSSELL, *supra* note 103.

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. 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.⁶⁵³ It is no longer true that "[t]hose who know the least obey the best," as one distinguished officer put it long ago.⁶⁵⁴

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 bias. Hence, "[t]he archetypal old sergeant used to tell the recruits that if the Army had wanted them to think, it would have given them brains."⁶⁵⁵

The soldier in our above scenario knows too little to effectuate his bright-line duty to disobey a 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 of establishing these exculpatory conditions.⁶⁵⁶ 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 immediate target is a military installation located within the city, so that civilian casualties constitute collateral damage.

Graph 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.

653. See DE LANDA, *supra* note 413, at 61, 78-80; Bacevich, *supra* note 57, at 25.

654. Sir George Rodney, Letter from Gibraltar to the Admiralty (Jan. 28, 1780) (quoted in ROBERT DEBS HEINL, JR., *DICTIONARY OF MILITARY AND NAVAL QUOTATIONS* 217 (1966)).

655. FRIEDMAN & FRIEDMAN, *supra* note 35, at 392.

656. 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.

GRAPH 1

OBEDIENCE TO SUPERIOR ORDER IS:

Excused



Not Excused



MANIFEST ILLEGALITY RULE

Superior Order is:

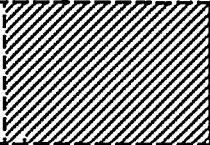
Legal



Illegal



Manifestly Atrocious



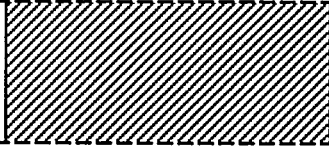
REASONABLENESS STANDARD

Superior Order is:

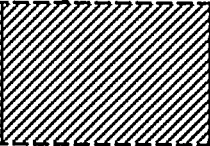
Legal



Illegal



Manifestly Atrocious



Reasonable Errors

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,⁶⁵⁷ 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.

657. This is pertinent only where the particular offense allows for the possibility of negligent commission.

4. *Training, Conduct Rules, and Decision Rules*

Training and access to information play a crucial role in this reform. So do the types of rules we ask soldiers to follow. Consider the confusing process of practical deliberation that current law 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 non-atrociousness, I should obey it, for I will not be punished, whether or not it proves illegal.

The rule defended here, 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 countless simulations and games involving similar scenarios. Realistic simulations duplicate actual field experience and thereby increase the effective degree of compliance with superiors' orders.⁶⁵⁸

Once properly trained according to the system 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 proves unlawful.⁶⁵⁹

658. This is precisely what most troubles current post-modern critics about such methods of training. See GRAY, *supra* note 223, at 57. Orders from superiors will generally demand the use of force and these critics assume that virtually all uses of inter-state 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, non-violent methods for resolving underlying conflicts. For present purposes, I will simply assume—without argument—that such thinking is unduly optimistic.

659. The proverbial “bad man,” unconcerned either with 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 Holmes, *supra* note 230, at 459.

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 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."⁶⁶⁰

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, "[a]lthough you are responsible for promptly obeying all legal orders . . . you are obligated to disobey an order to commit a crime,"⁶⁶¹ that is, any criminal order. In essence, then, American soldiers are being taught that the law of war is that there is no excuse of "obedience to orders." They are being taught that they must disobey all unlawful orders, even if their unlawfulness cannot reasonably be discerned under the circumstances.⁶⁶²

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.

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,⁶⁶³ that restricting the legal duty of obedience would necessarily lead to a breakdown of good order and discipline, 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, 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

660. U.S. TRADOC FM 27-2, *supra* note 272, at 26.

661. *Id.*

662. In fact, international law is less demanding, i.e., to the extent that there is any settled law on the matter.

663. See generally SOLIS, *supra* note 121, at 95 ("In many cases, the better the Marine, the less apt he would be to challenge an illegal order.") (quoting Brig.Gen. Edwin H. Simmons).

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.⁶⁶⁴

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 is 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, current law must choose *ex ante* whether the superior or the subordinate is most likely to apprise correctly the legality of a particular directive. Understandably, current law opts for the superior in the reasonable expectation that the superior 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.

This choice is unnecessary if the law shifts to greater reliance on a general standard of reasonableness. Surely there are some situations 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. Officers are taught to expect the unexpected, because "no battle plan survives contact with the enemy."⁶⁶⁵ 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.

In this spirit, 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

664. See LARMORE, *supra* note 556, at 8-21; Nussbaum, *supra* note 345, at 66-75.

665. DE LANDA, *supra* note 413, at 82 (internal quotation omitted).

the initiative.⁶⁶⁶ From experience to date, this appears to be no less true of peace enforcement operations, where quick action is often necessary to prevent eruption or escalation of conflict, than of traditional combat missions.

B. Misreading Orders Morally

*Remember, gentlemen, an order that can be misunderstood will be misunderstood.*⁶⁶⁷

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.⁶⁶⁸ These include "postponement, evasion, deliberate misunderstanding, loose construction, [and] overly literal construction."⁶⁶⁹

Walzer could have added psychiatric collapse, both real and feigned, for this has been a particularly frequent (and increasing) source of noncompliance with difficult or disagreeable orders.⁶⁷⁰ Even overt disobedience can itself take many forms, from the polite refusal to "fragging"⁶⁷¹ the order-giver.⁶⁷² A careful exploration of Walzer's taxonomy and useful additions to it would employ diverse 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

666. See Maj. Christopher M. Schnaufelt, *Lessons in Command and Control from the Los Angeles Riots*, PARAMETERS: U.S. ARMY WAR C. Q. 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.").

667. HEINL, *supra* note 654, at 226 (quoting Helmuth von Moltke, "The Elder").

668. WALZER, *WARS*, *supra* note 49, at 314.

669. *Id.*

670. See GRAY, *supra* note 223, at 59. Freud himself observed this relationship.

[T]he 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.

FREUD, *supra* note 498, at 27.

671. "Fragging" refers to the murder of non-commissioned officers (NCOs) and junior officers by enlisted personnel. Several dozen such incidents occurred during the Vietnam War.

672. One study notes that in Vietnam "[s]everal atrocities were apparently committed after inexperienced officers had given what the men considered to be impossible orders." WATSON, *supra* note 224, at 246.

and the desired degree of decentralization. Discrete goals can be formulated into orders that are verbally precise. More capacious goals require language that is more diffuse.⁶⁷³ 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.⁶⁷⁴

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 hard to find, and still make wise and ethical decisions.⁶⁷⁵

1. *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 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. . . . [I]t must particularize the conduct expected, or there cannot be any offense against it: an order to . . . perform one's duties

673. See Schauer, *Authority and Indeterminacy*, *supra* note 533, at 33-34.

674. See *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.

675. Maj. Gen. Clay T. Buckingham, *Ethics and the Senior Officer*, in MATTHEWS & BROWN, *supra* note 562, at 135, 138.

[for instance] does not meet this requirement."⁶⁷⁶ 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 inculcating those issuing them.

To take a relatively recent example, in 1989 at Tiananmen Square, "[t]roops were simply instructed to empty [the] Square of demonstrators as quickly as possible."⁶⁷⁷ Their orders stated that soldiers and policemen "had the right to use all means to forcefully dispose of those who defy martial law regulations."⁶⁷⁸ 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."⁶⁷⁹

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 soldiers 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.⁶⁸⁰

676. 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).

677. 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* at xxxix (Michael Oksenberg et al. eds., 1990)).

678. Xinhua, *Martial Law Troops Are Ordered to Firmly 'Restore Order'*, *CHINA DAILY*, June 5, 1989, at 1.

679. Scobell, *supra* note 677, at 200.

680. See *supra* note 79 and accompanying text. 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. See *FIERRO*, *supra* note 6, at 98.

The criminal superior can issue an imprecise order that deliberately fosters such doubts, where a clearer order would not. In this way, the superior greatly increases the likelihood that inferiors will be immunized from punishment.⁶⁸¹ 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 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*. "[I]t 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."⁶⁸² 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.⁶⁸³ It quickly became clear that Sherman would not punish arson or indiscriminate pillaging 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.⁶⁸⁴ 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.

681. 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. See *supra* note 100. 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:

[A]uthorization 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).

682. VAGTS, *supra* note 451, at 22.

683. KARSTEN, *supra* note 360, at 83 (quoting Special Field Order No. 120). Gen. Sherman was himself a lawyer, and had a judge advocate on his staff. See Parks, *supra* note 139, at 396.

684. See KARSTEN, *supra* note 360, at 83.

A recent *New York Times* story, reporting testimony before South Africa's Truth and Reconciliation Commission, lays 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 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.⁶⁸⁵

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.⁶⁸⁶

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."⁶⁸⁷ 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."⁶⁸⁸

But the doctrine came to be more broadly construed to allow National Security Council and Central Intelligence Agency officials to keep vital information from the President, so that his later 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

685. Daley, *supra* note 403, at A4.

686. 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 135-40, 175-79 (1987).

687. In 1948, NSC-4/A, expanded by NSC-10/2, provided the President's first formal authority for covert operations in the postwar period.

688. JOHN PRADOS, *THE PRESIDENTS' SECRET WARS* 29 (1986) (internal quotation omitted).

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 criminal *mens rea*. As the Church Committee rightly described it, the doctrine so conceived "is the antithesis of accountability."⁶⁸⁹

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 observed,

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.*⁶⁹⁰

This danger in turn "generated confusion regarding the exact nature of the order given" in at least two major covert operations.⁶⁹¹ 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. They were to some extent correct in thinking that this was precisely what their superiors hoped of them.⁶⁹²

The doctrine of "command responsibility" can effectively minimize the latitude for such efforts to misallocate responsibility, especially for atrocities. The major appeal of this doctrine, which is widely accepted in both international law and the military law of many nations, is precisely that it imposes liability for negligent oversight.⁶⁹³ It allows courts to deem that a commanding officer, by accepting a position in the chain of command, assumes legal responsibility for taking all

689. 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 277-78 (1975).

690. *Id.* at 278. (emphasis added).

691. 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).

692. 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.

693. See *supra* note 411 and accompanying text.

reasonable efforts to prevent atrocities by his subordinates.⁶⁹⁴ If he fails to do so, he is liable.

Recent technological innovations greatly increase the commanding officer's ability to monitor the movement of his troops.⁶⁹⁵ 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.

2. *Giving Orders by Hints, Intimation, and Suggestions*

For communication among members, all effective institutions rely no less on their informal organization than on their formal structure. What orders are to the latter, suggestions are to the former. Suggestions are often inexplicit but are no less significant for being so. Sometimes the manifestly illegal nature of an order will be clear enough, but its status as an order will not.

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.'"⁶⁹⁶ 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.⁶⁹⁷

This uncertainty about a statement's legal authority has subtle, but important, implications for the scope of the superior orders defense.⁶⁹⁸

694. The commander also assumes legal responsibility to protect his subordinates from undue risk. For a recent illustration of 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. Terry 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. See *id.* at 13.

695. See FRIEDMAN & FRIEDMAN, *supra* note 35, at 384-85.

696. VAN CREVELD, *supra* note 344, at 243-44.

697. See *id.*

698. 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 "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

On one hand, such a directive can be more easily circumvented, since the subordinate can later claim that it was never really a legally authoritative order at all. On the other hand, its status as something less than a formal order leaves the subordinate who obeys it bereft of the presumption of unavoidable ignorance about its unlawfulness. He is excused from non-atrocious 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.

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."⁶⁹⁹ 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.⁷⁰⁰ 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 sources of legal 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."⁷⁰¹ But such seeming rigor only makes it easier to circumvent the purpose

the order itself and the act of compliance with it were merely negligent, not manifestly criminal on their face. *Id.*

699. Osiel, *supra* note 131, at 168-69.

700. Author's interviews with Argentine prosecutors, Buenos Aires, Argentina (Aug. 1987).

701. HERBERT GOLDHAMER, *THE SOVIET SOLDIER* 143, 144, 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. See 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. See RICHARD A. GABRIEL, *THE MIND OF THE SOVIET FIGHTING MAN* 25-28, 69-71, 111-14 (1984).

of an order that euphemistically seeks atrocities without explicitly describing them.⁷⁰²

According to the manifest illegality rule, reasonable doubts about the legality of an order must be resolved in favor of obeying it.⁷⁰³ But there is no such duty to obey if those same doubts can be redescribed as uncertainties about the *meaning* of the order, where its wording allows both a lawful and an unlawful interpretation of its aims. The soldier's duty is to adopt the interpretation that will allow the order to be obeyed lawfully.⁷⁰⁴

3. *The Duty to Seek Clarification and Written Reiteration*

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.⁷⁰⁵ 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, woman and child, even if obviously a noncombatant."⁷⁰⁶ Failure to elicit the desired specificity should make the recipients of an order more cautious.

To similar effect, other military codes have required that certain orders must 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.

702. 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. REINHARD BENDIX, *WORK AND AUTHORITY IN INDUSTRY* 445 (1956).

703. See *supra* note 79 and accompanying text.

704. 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.

705. See THE CHILEAN MILITARY CODE, art. 335, discussed in RAFAEL MACKAY BARRIGA, *EL DELITO DE DESOBEDIENCIA EN EL CÓDIGO DE JUSTICIA MILITAR DE CHILE* (1965); FIERRO, *supra* note 6, at 57 (discussing the pertinent provision of Argentine law).

706. 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*, 31 MIL. L. & L. OF WAR REV. 73, 86 (1992).

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."⁷⁰⁷ While waiting for the superiors' reply, he ordered his men to release their prisoners, allowing them to escape into the jungle.⁷⁰⁸ In the First World War, a French battery commander refused, without written order, to fire on French troops who had disobeyed orders to leave their trenches for combat.⁷⁰⁹ General von Schlieben disobeyed Hitler's order to destroy Paris,⁷¹⁰ just as in the American Civil War, Colonel William Peters disobeyed an order to burn the city of Chambersburg.⁷¹¹ 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

707. See KARSTEN, *supra* note 360, at 114.

708. *Id.*

709. This incident is described in a fictionalized account by HUMPHREY COBB, *PATHS OF GLORY* (1935), and in Stanley Kubrick's memorable film, *PATHS OF GLORY* (Metro-Goldwyn-Mayer 1957).

710. Gen. Dietrich von Choltitz, the Wehrmacht commander-in-chief, similarly refused to obey Hitler's order. See VAN CREVELD, *supra* note 352, at 89.

711. See KARSTEN, *supra* note 360, at 44.

circumstances.⁷¹² 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 apparent 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 cannot excuse themselves from the acts by claiming that an order 'to take care of' a captive or detainee was understood to mean 'execution.'"⁷¹³

The Kantian publicity principle has some real-world impact here, even in highly undemocratic regimes.⁷¹⁴ 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 aggressive than they wish to be.

4. *Disobedience as Creative "Compliance"*

Alternatively, subordinates may accept an order's objectives as legitimate, but reject its formulation and methods as grievously ill-considered. This situation arises commonly, 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 that appears in quite

712. 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 Intifadah, torture and selective murder may help fulfil the mission." Cohen, *supra* note 464. 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.

713. U.S. TRADOC FM 27-2, *supra* note 272, at 26.

714. IMMANUEL KANT, *Eternal Peace*, in *THE PHILOSOPHY OF KANT* 425, 518-25 (Carl J. Friedrich ed. & Theodore M. Greene et al. trans., 1949) (1795); see also JOHN RAWLS, *A THEORY OF JUSTICE* 133, 177-82 (1971).

disparate contexts.⁷¹⁵ 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."

Subordinates who do this 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 orders, orders which, if obeyed mechanically and uncritically, would have had catastrophic consequences. General Erwin Rommel's memoirs report, for instance: "We had continually to circumvent orders from the Führer or Duce in order to save the army from destruction."⁷¹⁶ 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.⁷¹⁷ Initiative of this sort has a long history.⁷¹⁸

The memoir literature is understandably more reticent regarding incidents where unfortunate consequences ensued from letter-perfect compliance with superior orders.⁷¹⁹ 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"⁷²⁰ and caused the deaths of several hundred people.

More recently, the successful 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

715. See John W. Pratt & Richard J. Zeckhauser, *Principals and Agents: An Overview*, in *PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS* 1, 3 (John W. Pratt & Richard J. Zeckhauser eds., 1985).

716. GEN. ERWIN ROMMEL, *THE ROMMEL PAPERS* 321 (B.H. Liddell Hart ed. & Paul Findlay trans., De Capo Paperback 1953).

717. In contrast, Roman military law, consistent with its uncompromising commitment to formal hierarchy, required punishment of soldiers whose disobedient initiatives proved tactically effective. See sources cited *supra* note 5.

718. When they realized that local conditions made orders from home ill-considered, 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."

719. For several examples of catastrophic mistakes arising from unthinking compliance with the letter of superior orders, see the discussion in DIXON, *supra* note 40.

720. *Id.* at 267.

in immediate self-defense.⁷²¹ 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-à-vis 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 would probably have saved many lives.⁷²²

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."⁷²³ The subordinate's motive for reinterpreting unlawful orders as if they 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 his comrades are captured.

5. *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.

What economists call an "agency problem" commonly arises on the battlefield when those at the rear have difficulty monitoring compliance with directives of those at the front.⁷²⁴ While this may be a problem from the superior's perspective, it is also sometimes a solution from the law's perspective. It leaves agents with considerable latitude from their principals,⁷²⁵ latitude which they may employ for good, no less than ill. One former soldier writes in this regard that "[t]he man of

721. See Martins, *supra* note 171, at 11 n.24; Sagan, *supra* note 548, at 82; Col. Frederick M. Lorenz, *Standing Rules of Engagement: Rules to Live By*, MARINE CORPS GAZETTE, Feb. 1996, at 20.

722. This is the conclusion of Lt. Col. Martins, *supra* note 171, at 4.

723. KELLETT, *supra* note 343, at 147 (summarizing historical research on levels of soldierly compliance with combat orders).

724. See Pratt & Zeekhauser, *supra* note 715, at 1-24.

725. See *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).

conscience can survive morally only by following the letter of such [unconscionable] orders and disobeying their intention."⁷²⁶

Employing 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 present. Many a conscientious soldier has discovered he could reinterpret military orders in his own spirit before obeying them."⁷²⁷

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 troops 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 battlefield.

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.⁷²⁸

None of Calley's soldiers who refused to fire ever suffered for their refusal; apparently none of them even expected to be punished.⁷²⁹

6. *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. As stressed in

726. GRAY, *supra* note 483, at 189.

727. *Id.*

728. KARSTEN, *supra* note 360, at 38.

729. *See id.*

Part II, however, this is only one of several possible scenarios that the law must simultaneously address.⁷³⁰

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.⁷³¹

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.⁷³² 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 superiors' orders, just as the rule regarding "decision-making capacity" does the same for senior officers.⁷³³

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.

730. See discussion *supra* Part II.

731. The excerpted quotation at the beginning of this Part, from a novel by Mario Vargas Llosa, suggests the reasoning process by which this risk is likely to materialize. See *supra* note 529 and accompanying text.

732. 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.

733. It is true, of course, that the manifest illegality rule applies to senior officers, no less than to the lowliest private.

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. Commanders have thus been able to interpret these legal norms as they wish, which has 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. The law 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."⁷³⁴

As a practical matter, this may be too much to expect of courts martial, 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 one of training in professional judgment and the cultivation of 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.⁷³⁵ 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 imminent in its conscientious practice.

By no means am I proposing any wholesale replacement of bright-line rules with general standards throughout the law of armed conflict. In fact, my central argument here criticizes a general rule, *obey all orders*, currently qualified by a bright-line exception, *except manifestly illegal ones*. I argue instead for 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

734. Maj. W. Hays Parks, *Teaching the Law of War*, in ETHICS AND NATIONAL DEFENSE, *supra* note 114, at 145, 162.

735. See Martins, *supra* note 171, at 50.

the respective strengths and weaknesses of 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,⁷³⁶ 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 the optimal means of attainment, is the source of two perennial problems often thought to be unrelated. I have argued that 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

736. See discussion *supra* Part I.C.

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 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.⁷³⁷ This in turn would surely affect, in significant measure, the character of the people who become and remain professional soldiers,⁷³⁸ strengthening in them the tragic sense that comes from routinely acting in the face of moral conflict. 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.⁷³⁹

737. I borrow these terms from Martha Nussbaum, who borrows them from Henry James. See Nussbaum, *supra* note 345, at 148 (quoting Henry James).

738. 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, even though 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, ("[W]e 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."). 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." See also JAMES H. TONER, TRUE FAITH AND ALLEGIANCE: THE BURDEN OF MILITARY ETHICS 39-73 (1995). Toner teaches ethics at the U.S. Air War College.

739. 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 287-304 (1983).

There are situations where some degree of moral wrong is certain to result even from honoring one's legal duties.⁷⁴⁰ 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. This remainder of moral wrong should not be quickly dismissed by professional soldiers after they have made their decisions on how to act, even though their decisions give greater weight to competing considerations. Great military commanders have, for this reason, often disclosed surprisingly tragic sensibilities, at least in their memoirs. As the Duke of Wellington observed: "Nothing except a battle lost can be half so melancholy as a battle won."⁷⁴¹

Much of the law governing the professional activity of officers all but disparages such sentiments as mere octogenarian sentimentality. One would hope that this area of law could be revised so as to ensure that such moral sensitivity is not confined to our final moments on earth, to Church confessional, or the "padre's hour."⁷⁴² 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. 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 would cultivate the disposition to engage in such deliberation, as a virtue internal to the calling. The by-product of this approach, simply put, would be better soldiers who are also better human beings: the kind of people about whom a democratic society should have few qualms when bestowing control over weapons of great destructive power.

740. This advantage of general standards over bright-line rules is implicit in Nussbaum's analysis. See Nussbaum, *supra* note 345, at 37-40, 71-73, 155-61. See also STUART HAMPSHIRE, *MORALITY AND CONFLICT* 123 (1983).

741. 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 [T]he soldier, above all other people, prays for peace, for he must suffer and bear the deepest wounds and scars of war.").

742. Bernard Williams is author of the latter phrase. See Bernard Williams, *Professional Morality and Its Dispositions*, in *THE GOOD LAWYER* 259, 266 (David Luban ed., 1984).

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. This would be true even in peace enforcement operations which often require tough resilience to armed, local resistance. Kantians, and many others, would prefer professional soldiers to kill only from a sober recognition of duty, 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.⁷⁴³

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 counter-argument.⁷⁴⁴ It remains to be seen whether "nobility of spirit," as one military author puts it,⁷⁴⁵ can be expected to provide enough officers with enough motivation to risk their lives in proactive ways. Indeed, recent studies of what motivates people to join and remain in the United States armed services suggest much skepticism about the realistic probability of motivating many modern soldiers in this way.⁷⁴⁶

The opposing view, defended by some thoughtful students of the problem,⁷⁴⁷ is more disconcerting: that successful combat requires the vigorous initiative of at least a small cadre of officers distinguished by their "bloody-mindedness." To win wars, these officers must maintain the passionate intensity which they invest in breaking our civilized prohibitions against hurting people and breaking things. Perhaps even the thrill they derive from such flagrant transgressions of society's most deeply entrenched conventions is ultimately necessary.⁷⁴⁸

743. See DYER, *supra* note 226, at 146 (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").

744. See TERENCE IRWIN, *PLATO'S MORAL THEORY* 75-77 (1982); PLATO, *PROTAGORAS* 48-52: 354e3-357e8 (C.C.W. Taylor trans., Clarendon Press-Oxford revised ed. 1991).

745. BAYNES, *supra* note 366, at 97-98.

746. Such studies find an overwhelming tendency, among both today's officers and today's 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.

747. See John A. Ballard & Aliccia J. McDowell, *Hate and Combat Behavior*, *ARMED FORCES & Soc'y* 229 (Winter 1991).

748. For discussion of this Nietzschean element in the motivation of successful combat leaders, see BAYNES, *supra* note 366, at 97-98. 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 possess it, in the expectation that it will increase their aggressiveness in combat. Most readers of this article, to be sure, will dismiss this possibility as

Release of primordial passion may well be no less a source of combat effectiveness than of free-lance atrocity; willfully transgressive Dionysians may make surprisingly effective soldiers. In short, the Foucaultian post-modernists might be right after all, albeit not in ways they expect or desire. But if so, this 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 profession.

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, thus should 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.⁷⁴⁹

7. *The Impact of Legal Advice on the Reasonableness of Client Error*

Today, experienced legal advisers are present and active participants in military decision-making at upper and middle echelons of the American armed forces.⁷⁵⁰ For instance, General Colin Powell claims that during the Gulf War, "[d]ecisions were impacted by legal considerations at every level Lawyers proved invaluable to the decision-making process."⁷⁵¹ More routinely, American naval ships at sea

too unsavory to contemplate. But since military psychologists take it very seriously indeed, see Ballard & McDowell, *supra* note 747, at 229-35, we would 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. See *id.*

749. 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.

750. 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 Keva, *Lawyers in the War Room*, 77 A.B.A.J. 52 (Dec. 1991). See also Protocol I to the 1949 Geneva Conventions, *supra* note 140, art. 82, at 41; Diane Guillemette, *Legal Advisers in Armed Forces*, in IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 132 (Frits Kalshoven & Yves Sandoz eds., 1989); Matthew E. Winter, "Finding the Law"—The Values, Identity, and Function of the International Law Adviser, 128 MIL. L. REV. 1 (1990).

751. Keva, *supra* note 750, at 52; see also Lt. Col. Harry L. Heintzelman & Lt. Col. Edmund S. Bloom, *A Planning Primer: How to Provide Effective Legal Input into the Planning and Combat Execution Process*, 37 A.F.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 A.F.L. REV. 85 (1994).

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.⁷⁵²

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.

[T]he 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 judge advocate for which has identified the potential targets that violate no ROE.⁷⁵³

Lawyers in all United States services are encouraged to be proactive, offering legal counsel *sua sponte*, because commanders, any more than most clients, cannot be expected to spot all legal issues on their own.⁷⁵⁴ JAG officers familiarize themselves with the capabilities of alternative weapons systems, so as to be able to offer competent counsel for questions such as whether contemplated uses of particular weapons will cause "unnecessary suffering," within the meaning of the Hague Conventions.⁷⁵⁵ The ready availability of legal advice, now encouraged

752. See Warren, *supra* note 618, at 69. 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 & 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. David E. Graham, *Operational Law—A Concept Comes of Age*, ARMY LAW. 9 (July 1997); 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).

753. Martius, *supra* note 171, at 59. Most other countries lag behind the United States in this regard. See Winter, *supra* note 750, 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. See *id.* at 17.

754. See Parks, *supra* note 139, at 376. Parks is surely right that it is folly to plan for the interjection of a law of war adviser . . . upon the 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.* See also ROGERS, *supra* note 109, at 154.

755. Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803 Annex at 1811-1825, 187 Consol. T.S. 429 Annex at 436-42, 1 A.J.I.L. Supp. 129 Annex at 134-53, Art. XXIII [1899 Hague Regulations]. For discussion, see Capt. Paul A. Robblee, Jr., *The*

by Protocol I to the Geneva Conventions,⁷⁵⁶ has considerable effects 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 her JAG adviser, present at her 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.

The presence of legal counsel inevitably raises the standard of care required of commanders, in assessing the reasonableness of their errors after the fact.⁷⁵⁷ 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 United Nations Security Council resolutions have on the situation, what bilateral or multilateral agreements the disputing states have signed, and so forth.

To be sure, if the commander has reasonably relied on the advice of counsel, he will find it easier to win acquittal on grounds of error.⁷⁵⁸ 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 obedient overkill.

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

Legitimacy of Modern Conventional Weaponry, 15-16 MIL. L. & L. OF WAR REV. 403, 416-19 (1976-1977).

756. 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." Protocol I to the 1949 Geneva Conventions, *supra* note 140, art. 82, at 41.

757. See Green, *supra* note 31, at 42 ("[W]e 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*.").

758. See Winter, *supra* note 750, at 29.

that of the enemy state into whose hands she falls, and by whom she and her commander can expect to be prosecuted.⁷⁵⁹ Second, the ethics rules for military lawyers clearly identify the JAG's client as the JAG's branches of the armed forces, not the individual superior to whom she offers legal counsel.⁷⁶⁰ 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.⁷⁶¹

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 the criminality was manifest on the face of the orders prior to the commanders receiving legal counsel.

C. Cases

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.

1. The commander of an air force bomber group orders his pilots to attack anti-aircraft artillery and missile installations, located on top of

759. See *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., BRYSK, *supra* note 87, at 83 (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 action—most importantly, to choose lawful over unlawful means to given ends sought by their superiors. The responsibility to interpret orders 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 art—entails 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 because—however vague and imprecise its formulation—*any* of its interpretations would, in application, entail atrocious conduct.

760. See DEP'T OF THE ARMY LEGAL SERVICES, *Rules of Professional Conduct for Lawyers*, Pamphlet 27-26, Dec. 31, 1987. This rule follows MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1998).

761. See 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 ETHICS AND NATIONAL DEFENSE, *supra* note 114, at 77.

earthen dikes in enemy territory. These orders specify use of a conventional type of high-explosive ordinance, 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.⁷⁶² Moreover, there are many circumstances in which use of high-explosive ordinance 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 ordinance would likely destroy 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, *sua sponte*. 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.

2. A field commander is ordered to clear a series of enemy-soldier trenches. To this end, he is supplied with riot-control gas. He obeys the

762. See Protocol I to the 1949 Geneva Conventions, *supra* note 140, art. 2, at 7-8; COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz et al. eds., 1987), Commentary to art. 53, ¶¶ 2009, 2010, at 634.

order, but is eventually prosecuted for violating the Geneva Gas Protocol.⁷⁶³ He claims that the convention does not cover riot-control agents. Legal authorities are split on the question.⁷⁶⁴ 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.

3. 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.

763. See 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.

764. See *id.*

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 actions—participating in prisoner-of-war transportation intended for this purpose—could make him an accessory to the crime of slave 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 *mens rea* 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 my approach, 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.

4. 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.⁷⁶⁵ It specifically prohibits "without qualification, the killing of surrendering enemy soldiers even if taking prisoners impedes an advancing army's progress."⁷⁶⁶ 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."⁷⁶⁷ 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 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 Apache's 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 proposed 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

Clemenceau famously observed that military justice is to justice what military music is to music. His judgment has been shared by many

765. See 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.

766. *Id.*

767. 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. See also THE LAW OF LAND WARFARE, *supra* note 51.

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. So too with military law.⁷⁶⁸

Still, Charles Ives successfully disassembled the simple motifs of Sousa's traditional oompah-marches, recombining them into richer, more complex patterns.⁷⁶⁹ The resulting swirl of disharmony, with its conflicting rhythms, tunes, and keys, disrupts 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 Article 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. Fine distinctions, including legal ones, have always been the first casualty of war.⁷⁷⁰

If military law has been quite skeptical of fine distinctions, this is not due to the nature of war. In fact, the law generally pays very close attention to distinctions between states of *mens rea* when it seeks to encourage types of activity that closely resemble activity that it must discourage.⁷⁷¹ In war, there is a close resemblance between soldier's acts of legitimate, lawful violence and unlawful acts. The two actions are often distinguishable only by the respective mental states of those

768. HEINL, *supra* note 654, at 185 (quoting HOMER, THE ILIAD). Nietzsche observed, more trenchantly, "[h]ow good bad music and bad reasons sound when we march against an enemy." *Id.* (emphasis added).

769. Denise von Glahn Cooney, *A Sense of Place: Charles Ives and "Putnam's Camp, Redding, Connecticut,"* 14 AM. MUSIC 276 (1996).

770. See *Reid v. Covert*, 354 U.S. 1, 35-36 (1957) (Black, J.) (observing, in connection with courts-martial, that "[a] rough form of justice emphasizes summary procedures, speedy convictions, and stern penalties"). Consider also the drumhead court-martial of Melville's *Billy Budd*. See *supra* note 558, at 124-38. 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 A. POSNER, *LAW AND LITERATURE* 155-65 (Rev. & enl. ed. 1998); RICHARD H. WEISBERG, *THE FAILURE OF THE WORD* 133-76 (1984).

771. 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 *mens rea* 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 ones.

performing them.⁷⁷² Thus, 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, even if this proves to entail considerable overkill. 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 atrocity.

This long-standing failure of military law to employ a finer set of distinctions concerning *mens rea* is largely due to the simple historical fact that military law originates as an adjunct to military discipline,⁷⁷³ and has remained tightly tethered to that preoccupation.⁷⁷⁴ 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. I have suggested that many of these costs are unnecessary given what has been learned in recent years about the sources of military efficacy and ethics.⁷⁷⁵

This Article shows how the conventional justification for excusing the subordinate's non-atrocious wrongs relies on mistaken assumptions about why and when men prove willing to risk their lives for others. The law can thus be tailored to secure more ethical conduct from soldiers without compromising their military effectiveness. This is because the demands of both ethics and efficacy increasingly point not toward unthinking obedience, but toward deliberative discernment. The law does

772. To offer another example, acts of piracy often appear on their face exactly the same as acts—lawful even into this century—of maritime privateering. See JANICE E. THOMSON, *MERCENARIES, PIRATES, AND SOVEREIGNS* 140-47 (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. See *id.*

773. See ANDERSON, *supra* note 31, § 118. For an early reference in U.S. military law to this requirement, see COL. WILLIAM WINTHROP, 1 *MILITARY LAW AND PRECEDENTS* 53-54 (1896). ("[C]ourts-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.").

774. See Brig. Gen. Oded Mudrik, *Military Justice: Goals and Identity*, 30-31 *MIL. L. & L. OF WAR REV.* 201, 208 (1991-1992) (noting the enduring fact of "command influence" over court-martial proceedings).

775. Because the twin problems of legal over- 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 that he obeys, even if these do not entail atrocities.

not effectively foster such practical judgment by rigid, bright-line rules like "obey all orders, except those clearly calling for atrocities." Practical judgment is more effectively encouraged when the law relies instead on a general standard of reasonableness under the circumstances, which holds soldiers responsible for their unreasonable mistakes, regardless of whether these involve atrocities.⁷⁷⁶

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 one must stop and think. According to Arendt's account, the failure to do so is a major source of atrocity.⁷⁷⁷ The law's intolerance of ambiguity in this area, widely accepted elsewhere in the law, causes most of the difficulties described throughout this Article. 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 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 quintessential, among several trying ones with which the law must cope.⁷⁷⁸ Many illegal orders, after all, are issued far from any front-line combat hostilities.⁷⁷⁹

776. Soldiers can be held responsible not only by criminal prosecution, but also by milder forms of administrative sanction. In many cases, criminal prosecution offers too blunt an instrument for encouraging the sort of initiative and practical judgment now widely sought from junior officers.

777. See Hannah Arendt, *Thinking and Moral Considerations*, 38 Soc. RES. 416 (1971).

778. 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 many 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. But since wars have come to rely more on attrition, and have thus become much longer, this is no longer true to nearly the same extent. See RUSSELL F. WEIGLEY, *THE AGE OF BATTLES* at x-xiii, 536-39 (1991). The heavy emphasis of military thinkers (such as Rommel, Guerian, Von Manstein, and Von Mellenthin) on "the decisive

In sum, I have argued for a shift in key areas of military law, particularly concerning obedience to illegal orders, from indulgent, bright-line rules to more demanding general standards and multi-factor tests. This change would not offer a cure-all for the several problems here discussed. But it is unlikely to do much harm, and would likely do considerable good. It is therefore, at least, a step in the right direction. The rule defended here will, in some ways, make soldiering even harder than it is, and it is already an ethically difficult vocation. But given the suffering that soldiering often inflicts, the law's over-riding purpose cannot be to make it a great deal easier.⁷⁸⁰

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.

779. The misplaced focus 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*, *supra* note 237, at 9, 24.

780. Walzer reaches the same conclusion in a philosophical analysis of war. See Walzer, *Two Kinds*, *supra* note 49, at 72.

