OBEYING ORDERS:

ATROCITY, MILITARY DISCIPLINE AND THE LAW OF WAR[1]

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I. Introduction

A middle-echelon officer, a major on a staff perhaps, is ordered to "transmit commands from headquarters to his subordinates requiring them to assemble prisoners of war for rail departure at a particular time or place." If it turns out that these prisoners are to be shipped to a factory where they will manufacture armaments, that would be a violation of the law of war. The person who gave the order to that middle-echelon officer would likely be guilty of a war crime. But what about that major, the one who transmitted the commands? Would he also be guilty of a law of war violation?

There are two possible outcomes under existing defenses. Under the so-called "manifest illegality" rule, if the major was ignorant of the ultimate destination and purpose, his ignorance would excuse him of any culpability because the order was not illegal on its face. Under the so-called "reasonableness" standard, even if the order was not illegal on its face, he could still be held responsible if he should have known that the ultimate destinations for those prisoners were forced labor camps.

This is a scenario Mark Osiel posits in his book *Obeying Orders*. Osiel argues for the acceptance in many, if not all modern militaries, of the latter "reasonableness" standard, as opposed to the more traditional "manifest illegality" rule. In coming to this conclusion, he has written an important, timely, and provocative book.

What makes Osiel's book so impressive is that it weaves together information from various disciplines. He explores concepts in criminal and international law. Moral philosophers–from Aristotle to Alasdair

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MacIntyre–provide rich insights that are complemented by equally provocative insights from military sociologists and psychologists. Compared to many so-called "post modern" works, filled with convoluted paths of prose, thickets of jargon, and patches of quotes from unreadable theorists, Osiel's book is generally lucid and straightforward.

What's more, Osiel has taken considerable time to talk, read, and listen to military commentators as well, to include active duty judge advocate general (JAG) officers and other army officers. Thus, Department of the Army lawyers such as Lieutenant Colonel Mark Martins and Hays Parks are frequently cited, and articles from military journals such as *Parameters* and *Military Review* noted and quoted.

Osiel, a law professor at the University of Iowa, thus displays little of the dismissiveness and smug elitism that is rampant throughout academia when dealing with the military. The divide between the modern academy and the military, at least in the United States, often appears to be insurmountable, with stereotypes abounding on both sides. This is unfortunate. After all, for something as serious as devising realistic, useful ways to prevent atrocity and war crime, no one should be excluded from the discussion. But, if informed civilians have a right to be heard, soldiers deserve not to be patronized.

Osiel's efforts to bridge this gap, as well as his scholarship, for the most part pays off. If he, on occasion, adopts what military practitioners may consider an "ivory tower" pose, he makes considerable efforts to understand both sides. If his scholarship does not always validate his overall argument for preferring the "reasonableness" standard over the "manifest illegality" rule, it provides the kind of information that raises questions and that causes both the professor and the practitioner to reflect deeply on this most serious of subjects.

II. "Manifest Illegality" vs. "Reasonbleness": Rules vs. Standards

In understanding the distinction between the "manifest illegality" and the reasonableness defense, the reader must first understand that in American military courts the latter defense *is* the current defense. As Rule for Court-Martial (R.C.M.) 916(d) states: "It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or *a person of ordinary sense and understanding would have known the orders to be unlawful*."[3] An American judge advo-

cate may ask, if indeed Osiel's position is already the U.S. military's current "formal" position, whether there is a reason to read this book.

There is a reason. To Osiel, the law on the "books" is a legal formalism that may not be observed in either the courtroom or the battlefield. While democracies such as the United States and Germany have the "reasonableness" standard, "even these rich democracies have yet to appreciate the full repercussions of this approach to war crime, for they do not seriously investigate, much less prosecute, unlawful obedience where its criminal nature would not be immediately manifest to all."[4] Thus, the United States military "has not sought to prosecute acts of obedience to criminal orders unless these were also manifestly illegal on their face."[5]

Osiel clearly understands–as many civilian commentators do not–that simply having (or changing) the law on the books is just the beginning of the solution. The election to investigate, to prosecute, and to render a verdict, all are influenced by many factors beyond the particular Rule for Court-Martial. What Osiel seeks is a kind of "acculturation" of this reasonableness standard within the military communities that will presumably abide by it. This is where Osiel again differs from many of his civilian colleagues, for he recognizes that this sort of acculturation is only possible within the "internal life of military organizations."[6] Only if the culture itself is informed of the standard (indeed, trains to the standard) will it have any meaning to that culture. Laws of war will be most effectively enforced and complied with not in the procedural rules, defenses, or threats of punishment that may occur after the battle is done, but rather in the training that a soldier receives–well before the soldier finds the possibility of atrocity before him.

The way to do this is to incorporate the "reasonableness" standard as a kind of military virtue, rather than rely on the bright line "manifest ille-

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3. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 916(b) (1998) (emphasis added) [hereinafter MCM].

4. OSIEL, *supra* note 1, at 362.

5. *Id.* at 76. Furthermore, this reasonableness standard is used as exclusively as a defense–that is, it is used as an after-the-fact legal argument. When it comes to whether obeying an order is appropriate or not, American military law is clear: "Unless the order requires an obviously illegal act, or is obviously beyond the issuer's authority, the service member will obey the order . . . ." United States v. New, 50 M.J. 729, 739 (Army Ct. Crim. App. 1999). While this presumption to obey orders unless obviously illegal is not quite the same as the "manifest illegality" rule (which would allow as a complete defense the fact that the order was lawful on its face), the distinction may be difficult to see.

6. OSIEL, *supra* note 1, at 163.

gality" rule. At first blush, having such a bright line rule, particularly during the chaos of combat, seems especially beneficial. The "reasonableness" standard, on the other hand, is not as clearly defined, and is indeed defined primarily by its cultural context. Yet, this cultural context is exactly what Osiel depends upon in enforcing the standard:

> The highly chaotic nature of war, despite all efforts to rationalize and routinize it, ensures that professional warriors will always be governed by some form of "virtue ethics." The law should take this into account, governing soldiers by way of general standards that build upon virtues internal to the calling, allowing professionals themselves to play the primary part in defining these.[7]

This approach may raise some eyebrows. After all, the first inclination is to think that the military is based on strict rules, regimentation, and unthinking obedience. But anyone familiar with the military, and with such publications as Army *Field Manual 22-100*, will know that the "unthinking" type of obedience, known as "directing" leadership, is only one type of military leadership.[8] As Osiel points out, in the U.S. military, tremendous emphasis is constantly placed on decentralizing decision-making, allowing subordinates "on the scene" to make decisions. Osiel contends that there are sound reasons for this. One critical reason is the considerable sociological data that suggests that "[e]fficacy in combat now depends more on tactical imagination and loyalty to combat buddies than on immediate, unreflective adherence to the letter of superiors' orders, backed by discipline of formal punishment."[9]

The irony, as Osiel points out, is that the military, deeply cultured in its own norms and practices, is often far less rule-based than civilian society. In civilian society, laws are routinely determined to be "void for vagueness" precisely because they are not clear as to what sort of conduct

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7. *Id.* at 285.

8. *Field Manual 22-100* refers to three "leadership styles." The "directing" style is used when the leader "tells subordinates what he wants done, how he wants it done, where he wants it done, and when he wants it done and the supervises closely to ensure they follow his directions." The other two leadership styles are the "participating" style (involving the subordinates "in determining what to do and how to do it") and the "delegating" style (delegating both the "problem-solving and decision-making authority to a subordinate or to a group of subordinates"). U.S. DEP'T OF ARMY, FIELD MANUAL 22-100, MILITARY LEADERSHIP, app. B (31 July 1990).

9. OSIEL, *supra* note 1, at 7. Osiel explores this idea in more detail in Chapters 13-14 of his book.

they prohibit. In contrast, the military is replete with "standard" based laws. Articles 133 ("conduct unbecoming an officer and a gentleman") and 134 ("conduct prejudicial to good order and discipline") are two examples of actual laws that do not define specific conduct beforehand as prohibited, but rather rely on the prevalent and often unspoken standards in the military community to indicate to any reasonable soldier that particular conduct is unlawful.[10]

Osiel, follows moral philosopher Alasdair MacIntyre in constructing this line of argument.[11] He argues that ethical systems are effectively formed within communities that have shared senses of values and purpose. If such values are created within communities that have shared ethical values, real and meaningful reform cannot be imposed from "on high," as it were, in tinkering with rules or statutes, but from within the military culture itself. Furthermore, the military, as a deliberately "separated" community has been able to foster and to promote a set of values that are relatively stable. In contrast, in the civilian culture at large, there is a fragmented ethos, and an ever-widening (and competing) number of "values." In contemporary society, attempts at a coherent, consistent virtue ethic are thus doomed to failure.

Of course, this part of Osiel's book raises enough "food for thought" itself. What it implies is the necessity for the military to retain its complex web of social practices, distinct in many ways from the diffuse moral standards in contemporary liberal societies. That this is a profound argument for resisting "on high," top-driven "social" reforms currently debated for the military is obviously beyond the scope of Osiel's book. But, he raises serious, thought-provoking questions about the necessity to, at least, very

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10. Another example of such a "standard" based law is the offense of "dereliction in the performance of duties," a violation of Article 92 of the Uniform Code of Military Justice. In considering what a "duty" is, the explanatory text in the *Manual for Courts-Martial* states that "[a] duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service." MCM, *supra* note 3, Part IV, para. 16c.(3)(a).

11. Osiel expresses little sympathy for MacIntyre's actual philosophical project, which many academics view as suspiciously reactionary. OSIEL, *supra* note 1, at vii-viii. Indeed, MacIntyre has pretty much written off the modern liberal project and come to embrace Thomism and Catholicism. MacIntyre's best known book is *After Virtue* published in 1981. He has developed his ideas on virtue within communities principally in three other books. *See* WHOSE JUSTICE? WHICH RATIONALITY? (1988); THREE RIVAL VERSIONS OF MORAL ENQUIRY (1990); DEPENDENT RATIONAL ANIMALS (1999).

carefully examine potential serious changes in the network of military norms and practices.

The other important point that comes from this understanding of standards as opposed to "bright line" rules is that for such standards to be effectively "inculturated" they must be trained on and mastered. Realistic training scenarios must be worked out "designed to cultivate practical judgment in the field, particularly in morally hard cases."[12] Osiel points out "standard-based" practical reasoning is already occurring in current U.S. rules of engagement training–pointing to Lieutenant Colonel Mark Martins's "RAMP" concept as a prime example. According to the RAMP principle, the soldier is not given a "bright line" rule, but a set of factors to apply situationally, relying on both his training and common sense.[13]

This is where, in particular, JAG officers come in. Indeed, Osiel not only refers to JAG officers throughout the book, he devotes a chapter to them. Judge advocates are particularly important in the "acculturation" approach because they "can help the law play a more effective and less obtrusive part in preventing war crime than the conspicuous spectacles of *post facto* criminal prosecution (international or domestic), for all its admitted value."[14] Judge advocates should be in the forefront in creating training methods, especially simulated application of engagement rules.[15] Such rules should also "be closely assessed by empirically-oriented social scientists studying military organization."[16] Osiel obviously sees his standard as something worthy of experiment, and, given the expanded role

12. OSIEL, *supra* note 1, at 260.

13. The "RAMP" concept devised by Lieutenant Colonel Martins employs the "real world" problem-solving method of addressing rules of engagement (ROE) questions and adopts a training strategy for ROE akin to methods used to train other soldier skills. Thus the acronym "RAMP" is also a memory aid (mnemonic) that stands for: "Return fire with aimed fire . . ."; "Anticipate attack . . ."; "Measure the amount of force that you use . . ."; and "Protect with deadly force only human life . . . ." *See* Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1 (1994).

14. OSIEL, *supra* note 1, at 363-64.

15. Indeed, the Osiel "reasonableness" standard is discussed and debated in classes taught on war crimes to JAG officers at The Judge Advocate General's School. E-mail Letter from Major Michael L. Smidt, Instructor, International and Operational Law Department, The Judge Advocate General's School (July 14, 1999) (on file with author).

16. OSIEL, *supra* note 1, at 364.

JAGs play in battlefield training exercises, this seems to be within the realm of possibility.

Furthermore, Osiel points out that JAGs are most effective when they are a real part of that internal community that they must nevertheless evaluate and even criticize. Thus he speaks of "seemingly trivial ways" that JAGs win trust of skeptical officers by keeping uniforms and appearance crisp and throwing in "a reference here and there to the von Schlieffen plan, for instance, or a double envelopment."[17] The "Hawkeye Pierce" type, in Osiel's view, is not simply a burr in the command's side. He is, in the long run, ineffectual. While this may appear common sense to most JAG officers, it is startling to see it come from an academic, where military norms and practices are routinely scorned as trivial and demeaning, or even crypto-fascist and murderous.

III. Some Scholarship Problems

Osiel has written a good book with a multidisciplinary approach. Of course the danger in such an approach, is that in covering a lot of ground, one can try to cover too much. Errors thus appear. Some are minor, as when he misidentifies military historian Gwynne Dyer as female.[18] Others indicate a kind of scholarly sleight of hand. For example, late in the book he notes how neither the United States nor Germany actually follow the "reasonableness" defense. But to support this assertion, his cite is not to an example from either country, but to the Israel Defense Forces' prosecutions (or lack thereof) following the Palestinian Intifada.[19]

Other errors reveal an unfamiliarity with military criminal law. For example, Osiel asserts that a soldier who has committed a war crime may state that he honestly believed that the order to commit the crime was either honest or reasonable, and that "[t]he defendant bears the evidentiary burden of proving this defense."[20] This is an incorrect statement of military law. In American military justice, R.C.M. 916(b) clearly states that the burden of proof when defenses are raised (except for lack of mental responsibility and mistake of fact as to age in a carnal knowledge prosecu-

17. *Id.* at 349.
18. *Id.* at 168, n.21.
19. *Id.* at 362, n.10.
20. *Id.* at 48.

tion) remains on the prosecution to prove "beyond a reasonable doubt that the defense did not exist."[21]

Osiel makes the same mistake later in the book when he states that, under the "reasonableness" standard, the accused "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."[22] Osiel apparently confuses a production burden with a persuasion burden. Once some evidence raises the defense, the burden nevertheless remains, at least under the Uniform Code of Military Justice, upon the government to show that the accused knew or should have known the order to be unlawful.[23]

IV. The Perils of Overcomplexity

Another danger with covering so much material is that the information and methodologies taken from other disciplines sometimes fail to fit neatly into an author's purpose. Sometimes, indeed, such information and methodologies create unnecessary complications. This sort of straining and overcomplexity plagues much contemporary academic writing, and the law has not escaped various ham-fisted attempts to make an extralegal theory or premise fit some legal doctrine or idea.[24]

A good example of such overcomplexity is Osiel's applying analytical philosophy in "redescribing" criminal events.[25] For example, when describing how one could "redescribe" the acts of Lieutenant Calley and his men, one could say: If they were "intentionally shooting women and children" they would be guilty of murder; if they are "following superior orders unreasonably believed to be lawful" then they would be guilty of only negligent manslaughter. Each account "focuses the descriptive frame

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21. MCM, *supra* note 3, R.C.M. 916(b).

22. OSIEL, *supra* note 1, at 292.

23. *See* discussion, MCM, *supra* note 3, R.C.M. 916(b): ("A defense may be *raised* by evidence presented by the defense, the prosecution, or the court-martial."). The merest production of evidence by any side will likely satisfy the ""production" burden.

24. For an extended critique of a whole area of such legal scholarship, the so-called "law and literature" movement, see *Richard A. Posner, Law and Literature: A Misunderstood Relation*, published in 1988.

25. OSIEL, *supra* note 1, at 125-30.

very differently, highlighting certain facts while relegating others to legal irrelevance."[26]

How is this particularly helpful? Does Osiel mean to equate rhetorical flourishes by the prosecution and defense in their closing arguments with statements of law? They are not "law" but arguments, and as Osiel points out, can in fact both be "held" simultaneously. At least, under the military criminal law, voluntary or involuntary manslaughter are lesser included offenses of murder.[27] Just because Calley is unreasonably following orders does not exculpate him from further wrongdoing–he would still be committing murder. It is not necessarily an either/or proposition in this case.

Osiel sees such an analysis as a way to a solution to this potential "redescription" problem, however. Under the "reasonableness" defense, he wants to avoid competing "redescriptions" and have only one–whether the "defendant's professed error about the legality of his orders was reasonable, all things considered."[28] In other words, using the "reasonableness" standard "obviates the need for any authoritative description of the defendant's conduct as a necessary predicate to determining whether it is manifestly illegal."[29]

Again, it is unclear how and why this is helpful. Surely "manifest illegality" is subject to a multiplicity of "redescriptions" as well. Furthermore, one may ask that if a "reasonableness" standard will open the door to an endless variety of nonauthoritative "redescriptions" as to what constitutes "reasonableness," whether this is a good thing. Is not the military panel member going to say, "what would the typical, reasonable (soldier, commander, and the like) do here?" And without some kind of bright line rule, is he now more or less likely to go for the more rhetorically explosive, potentially less truthful, description?

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26. *Id.* at 126.

27. Involuntary manslaughter is a lesser-included offense to all murders under Article 118, UCMJ. Voluntary manslaughter is itself considered murder ("act inherently dangerous to others) under Article 118, and is lesser-included offense for other murders under Article 119. UCMJ art. 118 (1998).

28. OSIEL, *supra* note 1, at 136.

29. *Id.*

V. The Practical Problems

The possible confusion caused by Osiel's reference to other disciplines leads to the more practical question raised by his argument. Can such a "reasonableness" standard work? In Western militaries such as the United States and Germany, where education and training of soldiers are very high, reasonableness is the standard, at least on paper. The kind of mass atrocity that concerns Osiel, however, is more likely to occur in less developed militaries where such training and education are exceedingly low. Furthermore, these are the same nations where there is less likely to be an "incultured" value system that can create a kind of standard that will prevent atrocity.

Osiel seems to recognize this issue. As he points out, non-Western states will likely need to adhere 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 insecure, and soldiers are poorly educated and unmotivated, strict, bright-line rules, backed by threat of severe sanction, remain essential."[30] The militaries that are most likely to commit widespread atrocity are precisely those states, many of which are undemocratic, and whose militaries are subject to little, if any, internal scrutiny.

This leaves the Western democracies. But even in the militaries of these countries, one can see why the "reasonableness" standard may be observed more in the breach than in observance. To put it bluntly, it burdens the soldier with doubt.

> [T]he soldier would no longer be expected to resolve any and all doubts about the legality of superior orders in favor of obeying them . . . . 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.[31]

This kind of passage might induce skepticism, if not downright hostility, from military professionals. Perhaps it conjures up images of soldiers stopping in the midst of some desperate engagement to ponder what Aristotle would do in such a circumstance. Osiel's book is important enough not to be sneered at, and, in fact, if "reasonableness" *is* our stan-

30. *Id.* at 269.
31. *Id.* at 288.

dard, then one can presume that we should train according to it. But a passage like that above raises obvious questions. How would such thinking affect the dynamic of such a combat group? Would it reduce its combat effectiveness? Would it thus make it more dangerous to be in? Could it, via the law of unintended consequences, actually create more atrocity by creating tension and dissension within the group? Might not the unit break down, split apart, turn into a kind of mob and thus do what Osiel wants it to avoid?[32] Here obviously, the only way to realistically find out is to compare in some sort of actual training scenarios. It is far too important a question not to "field test" before implementing.

Furthermore, should the reasonableness standard be applied across the board, to include the young soldier with little experience? There is a difference, all too often, between "professional warriors"–those who have given years to the military, who view it as a calling that they will devote their lives to, and ordinary soldiers. The latter, as this century has seen again and again, may be conscripts–or perhaps volunteers–with minimal training in even basic combat skills, let alone any training in applying practical reasoning to whether orders should be obeyed or not. Even in the most sophisticated militaries, in an era of budget cutting and over-extension, one may be hard pressed to see significant amounts of time devoted to practical reasoning on the battlefield for such soldiers.

Osiel himself suggests allowing for differing standards within the military structure: "The higher the level of education and motivation possessed by soldiers at a given level in the hierarchy, the more that military

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32. These possibilities were raised by the Army Court of Criminal Appeals in the case *United States v. Rockwood*, 48 M.J. 501 (Army Ct. Crim. App. 1998). Captain Rockwood, a counterintelligence officer with the 10th Mountain Division in Haiti, was tried and convicted of several offenses, among them, willfully disobeying a superior commissioned officer. Captain Rockwood, without authority and contrary to orders, conducted an "inspection" of the Haitian National Penitentiary for possible human rights abuses. In upholding his conviction, the Army Court stated:

> The success of any combat, peacekeeping, or humanitarian mission, as well as the personal safety of fellow service members, would be endangered if individual soldiers were permitted to act upon their own interpretation of public Presidential statements without specific orders. The effectiveness of military operations, and lives of a soldier's comrades, depend on precise and timely obedience to orders, especially in tactical environments.

Id. at 506-7.

law should regulate their activities by way of standards, rather than rigid rules . . . ."[33] Perhaps one solution is to hold certain officers and non-commissioned officers to a "reasonableness" standard and other less experienced and/or younger soldiers to the "manifestly illegal" rule. This puts the burden on those who are most likely to have had the opportunity to train for it, and relieves the junior soldier from the anxiety of having to ponder, with bullets possibly flying around him, on whether he should obey his squad leader's order to return fire or not. Indeed, in Osiel's prisoner deporting scenario, the major's "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."[34]

VI. Conclusion

In the concluding chapter of *Obeying Orders*, Osiel states: "For the law of due obedience, however, the challenge is to help the professional soldier acquire a deeper appreciation of the morally problematic features of his calling, features so apparent to the rest of us."[35] One winces at that last clause–"so apparent to the rest of us"–smacking as it does of a kind of presumed moral superiority, and thus betraying much of the earnest effort Osiel has put forth in the book to understand and reach out to the military culture. (Why try to alienate the audience for whom this book seeks to make a difference?) Osiel, however, squarely puts the challenge to both soldier and civilian. Obedience is a kind of necessary evil in the military. Without it, undoubtedly there would be military disaster. But sometimes with it, there can be moral disaster. What makes Osiel's book important, despite its flaws, are not simply the answers it provides, but the questions it raises and the data it explores. As a concerned and knowledgeable civilian scholar, he has contributed significant to the discussion. For that, we can be grateful.

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33. OSIEL, *supra* note 1, at 270.
34. *Id.* at 354.
35. *Id.* at 366.