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# MILITARY LAW REVIEW

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## RACIAL EXTREMISM IN THE ARMY

MAJOR WALTER M. HUDSON<sup>1</sup>

### I. Introduction

In the early morning hours of 7 December 1995, Michael James and Jackie Burden walked down Hall Street in Fayetteville, North Carolina, a neighborhood they knew well. Two men approached them, one of whom had a gun.<sup>2</sup> He pointed the gun close to their heads and fired at least five times.<sup>3</sup>

By the following afternoon, Fayetteville police arrested two 82d Airborne Division soldiers, Private First Class (PFC) James Burmeister II and PFC Malcolm Wright, for the murders.<sup>4</sup> The following day, Fayetteville police arrested a third 82d Airborne soldier, Specialist (SPC) Randy Meadows, and charged him with conspiring to commit the murders. He allegedly drove Burmeister and Meadows to the scene.<sup>5</sup> Michael James and

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2. Virginia A. White, *Killings Tied to Racism*, FAYETTEVILLE OBSERVER-TIMES, Dec. 8, 1995, at 1A.

3. *Id.*

4. *Id.*

Jackie Burden were black.<sup>6</sup> Burmeister, Wright, and Meadows were white.<sup>7</sup>

After the police arrested the suspects, they searched one of Burmeister's residences in nearby Harnett County.<sup>8</sup> They found, among other things, a Ruger P89 9mm handgun and a book on how to make explosives.<sup>9</sup> They also found various Nazi paraphernalia and white supremacist literature.<sup>10</sup>

The murders were not the typical sort. They were not committed during the course of a robbery. They were not committed during a drug deal gone wrong. They were not motiveless killings by a deranged soldier. Rather, the crimes apparently had a chilling motive; they were committed, or at least primarily motivated, because the victims were black.<sup>11</sup> The suspects were neo-Nazi "skinheads."<sup>12</sup> Burmeister in particular appeared to be a racial extremist who resorted to violence to express his philosophy of white supremacy, race hatred, and race war.<sup>13</sup>

The repercussions were vast and involved many different players. The Secretary of the Army held a press conference. He ordered the creation of a task force to study the subject.<sup>14</sup> National media, from Sam Donaldson to *Esquire* magazine, descended upon Fort Bragg to determine how serious the problem was.<sup>15</sup> Within the 82d Airborne Division and other units at Fort Bragg, commanders ordered investigations to identify

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5. Virginia A. White, *3<sup>rd</sup> GI Charged in Murder*, FAYETTEVILLE OBSERVER-TIMES, Dec. 9, 1995, at 1A.

6. *Id.*

7. *Id.*

8. Information Paper, Office of the Staff Judge Advocate, 82d Airborne Division, subject: Background Information on PFC James N. Burmeister, SPC Randy L. Meadows, and PFC Malcolm M. Wright (14 Mar. 1996) [hereinafter Information Paper on Background] (on file with author and at Office of the Staff Judge Advocate, 82d Airborne Division).

9. *Id.*

10. *Id.*

11. William Branigan & Dana Priest, *3 White Soldiers Held in Slaying of Black Couple*, WASH. POST, Dec. 9, 1995, at A1.

12. Neo-Nazi "skinheads," given their name because of their characteristically shaved heads, are usually loosely affiliated bands of white youths who profess white supremacist beliefs. See *infra* pp. 19-22.

13. Serge F. Kovalski, *Soldiers in White Supremacist Uniforms*, WASH. POST, Dec. 11, 1995, at A1.

14. William Branigan & Dana Priest, *Army Plans to Investigate Extremists Within the Ranks*, WASH. POST, Dec. 13, 1995, at A1.

extremists, especially neo-Nazi skinheads.<sup>16</sup> The “skinhead” controversy at Fort Bragg dominated the Army media in early 1996.<sup>17</sup>

Due to the above tragedy, the Army created a new extremist policy and has taken steps to implement it. But questions about the policy and its implementation remain. Is the policy constitutional? How can a commander use it, along with other measures, to combat destructive racial extremism in his unit? Answering these questions is the purpose of this article.

The first part of this article provides background information on racial extremism. It first examines a standard definition of extremism, and then the Army’s. The article points out the differences between the two definitions and why the Army focuses more on particular types of intolerance in its definition. It next provides background on white supremacy, a form of extremism that has recently caused concern in the military. It examines the more traditional forms of white supremacy—organizations such as the Ku Klux Klan—and examines the neo-Nazi “skinhead” culture associated with Burmeister. The first part of the article concludes with an overview of white supremacist extremism’s infiltration into the military.

The second part of this article examines the Army’s old policy on extremism and its background. It contends that the drafters of the old policy relied on language based on concerns other than extremism. Therefore, the old policy could not properly address the current extremist phenomenon. It then examines the Army’s new policy, comparing it to the old policy and pointing out the great discretion the new policy gives commanders.

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15. Daniel Voll, *A Few Good Nazis*, ESQUIRE, Apr. 1996, at 102-12; Memorandum from Major Rivers Johnson, Public Affairs Officer, 82d Airborne Division, AFVC-PA, to Commander, 82d Airborne Division, Commander, XVIII Airborne Corps, Commander, Forces Command, Secretary of the Army, and Commander, Criminal Investigation Command, subject: ABC Television’s “Primetime” News Show (12 Mar. 1996) (on file with author and at Office of the Staff Judge Advocate, 82d Airborne Division).

16. Memorandum from Lieutenant Colonel David L. Hayden, Staff Judge Advocate, 82d Airborne Division, AFVC-JA, to Commanding General, 82d Airborne Division, subject: Actions Taken by 82d Airborne Division Command and Staff Against Extremism (2 Jul. 1996) (on file with author and at Office of the Staff Judge Advocate, 82d Airborne Division) [hereinafter Memorandum on Actions Taken].

17. See Regina Galvin, *Hate in the Army*, ARMY TIMES, Mar. 25, 1996, at 12; Grant Willis, *EEO System: Not Broken, But Not Perfect*, ARMY TIMES, Apr. 1, 1996, at 12; Regina Galvin, *Redemption of a Skinhead*, ARMY TIMES, May 20, 1996, at 12.

The third part of this article examines the legality of the Army's new extremist policy, especially as applied by commanders. It contends that the policy can be legally defended primarily because of the judicial deference given to the military. This deference has a two-fold basis.

First, the separation of powers in the U.S. Constitution gives authority to the executive (and within it, to the military) and legislative branches to create military policy. The judiciary has little competence in this area. This is particularly true in the field of race relations and racial extremism in the Army. A commander is usually the one person suited to make decisions to control racial extremism in his unit—especially because of the great impact that extremism's violent form of expression—hate crime—has on a unit's good order and discipline.

Second, the military is a separate community, with its own norms and values. The military needs to be separate from society to maintain good order and discipline. This article uses the "institutional/occupational" thesis developed by the sociologist Charles Moskos<sup>18</sup> to explain the notion of the military as a separate community. This article further discusses how the necessity of keeping the military as a "separate community" is especially relevant in the area of race relations.

Both of the above notions justify the judiciary giving great deference to the Army's extremist policy and to commanders' local applications of it. This deference, however, is not unlimited. The fourth part of this article discusses First Amendment concerns. One concern is the possibility that the extremist policy, or local applications of it, violates the First Amendment because it is a form of "viewpoint-based" discrimination.<sup>19</sup> The Supreme Court ruled viewpoint-based discrimination unconstitutional in *R.A.V. v. City of St. Paul*.<sup>20</sup> This article contends that the policy is not unconstitutional generally or in local applications, if a commander can link the rationale for prohibiting certain forms of extremist speech or conduct to the speech or conduct's "secondary effects" on good order and discipline.

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18. See Charles C. Moskos, *From Institution to Occupation: Trends in the Military Organization*, 4 *ARMED FORCES & SOC'Y* 41 (1977).

19. Laws that only prohibit types of speech from a certain viewpoint (e.g., prohibiting speech made by certain political parties or religions) are considered forms of "viewpoint-based" discrimination and are presumptively unlawful. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (the most important recent case in this area).

20. *Id.*

The fourth part of the article also discusses another concern—that a commander may issue an order that prohibits extremist speech or conduct that is too vague or tangential to good order and discipline, because such an order could be unlawful. It examines the Supreme Court case *Parker v. Levy*<sup>21</sup> to provide guidance on how to draft an order or policy that is not vague and that has a direct connection to good order and discipline.

Lastly, this fourth part proposes a method that allows deference to a commander's need for good order and discipline yet addresses the First Amendment concerns. Legal advisors and commanders can use this method, analogized from the so-called *Relford* factors,<sup>22</sup> when drafting a local extremist policy or when determining whether orders that prohibit extremist speech or conduct are lawful.

The article's final part gives three hypothetical situations. Each scenario presents specific facts that involve soldiers and commanders at the unit level. The article suggests the correct answers to the scenarios, using the method discussed earlier to assist in formulating legal and practically sound policies. This article deals primarily with administrative remedies, and focuses on formulating policies to combat racial extremism.<sup>23</sup>

Commanders and their legal advisors must deal with extremism rationally, but also proactively and decisively. When a command brings a soldier to court-martial for an extremist-related offense, in many ways, it is too late. By this time, a tragic crime may have occurred; the command may be inundated with media coverage, congressional inquiries, and investigators; community relations may be damaged; morale may be lowered by racial tensions and resentment; and combat readiness may have been impeded.<sup>24</sup>

Furthermore, while many states have attacked the problem of extremist-type bias crimes through hate crime statutes,<sup>25</sup> and while there has been

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21. 417 U.S. 733 (1974).

22. See *Relford v. U.S. Disciplinary Commandant*, 401 U.S. 355 (1971).

23. This article does not address promulgating hate crime laws in the military, the referral of charges against racial extremists, or court-martial strategies in cases involving racial extremists. It also does not deal with ways to identify racial extremists at the unit level, such as unit tattoo policies.

24. The effect on unit training at the 82d Airborne Division was widespread. Hundreds of hours were spent on classes, investigations, inspections, responding to media inquiries, taking administrative and disciplinary actions against extremists, sensing sessions, and courts-martial. Memorandum on Actions Taken, *supra* note 16.



wide media coverage of bias crimes in the United States, their actual number is extremely small compared to the total number of crimes.<sup>26</sup> The passage of hate crime laws could actually prove to be counterproductive: the decision to charge or not to charge a crime as a bias crime is fraught with extralegal consequences. The outcome of a specifically charged bias crime, in the form of either an acquittal or conviction, has a powerful symbolism that can resonate through the community far more than in other types of crimes.<sup>27</sup>

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25. Several states have passed some sort of bias crime legislation. Alabama, California, Delaware, Florida, Georgia, Illinois, Iowa, Louisiana, Massachusetts, Mississippi, Montana, Nevada, New Jersey, New York, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, and Wisconsin have statutes that either prohibit bias crimes or allow the enhancement of penalties if bias was involved. See ALA. CODE § 13A-5-13 (1994); CAL. PENAL CODE § 422.6 (1998 & West Supp. 1998); DEL. CODE ANN. tit. 11 § 1304 (1995); FLA. STAT. ANN. § 775.085 (West 1992); GA. CODE ANN. § 16-11-37 (1996); 720 ILL. COMP. STAT. ANN. 5/122-7.1 (West 1993); IOWA CODE § 729A.1 (1993); LA. REV. STAT. ANN. § 14:107.2 (West Supp. 1998); MASS. GEN. LAWS. ch. 265 § 39 (West 1990); MISS. CODE ANN. § 99-19-301 (1994); MONT. CODE ANN. § 45-5-222 (1996); NEV. REV. STAT. § 193.1675 (1997); N.J. STAT. ANN. § 2C 44-3 (West 1995); N.Y. PENAL LAW § 240.31 (McKinney 1989); OHIO REV. CODE ANN. § 2927.12 (Anderson 1996); OKLA. STAT. ANN. tit. 21 § 850 (West Supp. 1998); S.D. CODIFIED LAWS § 22-19B-1 (Michie 1998); TENN. CODE ANN. § 39-17-309 (1997); TEX. PENAL CODE ANN. § 12.47 (West 1994); UTAH CODE ANN. § 76-3-2-3.3 (1995); WASH. REV. CODE ANN. § 9A.36.078 (West Supp. 1998); W. VA. CODE § 61-6-21 (1997); WIS. STAT. ANN. § 939.645 (West 1996). While Maine, Minnesota, and Rhode Island do not have statutes prohibiting bias crimes or enhancing penalties because of bias, they have statutes that require bias crime training and reporting requirements for police. See ME. REV. ST. ANN. tit. 25 § 2803-B (West Supp. 1997); MINN. STAT. ANN. § 626.8451 (West Supp. 1998); R.I. GEN. LAWS § 42-28-46 (1993).

26. Two criminologists assert that the "epidemic" of hate crimes in the United States is largely a product of partisan political groups and the media. Some of the specific problems with this claim are: (1) the relatively small number of "hate crimes" (for example, the authors cite that nationwide in 1991, the first year statistics were reported, there were 4588 reported hate crimes out of 14,872,883 (less than .039%); (2) the conflicting data (for example, the FBI reported 12 hate murders in 1991; Klanwatch reported 27); (3) the extremely spotty reporting efforts (there is no consistent method from state to state for collecting hate crime information); and (4) the reporting methodologies of various collection groups (the Antidefamation League (ADL), for example, reports noncriminal acts of bigotry, such as noncriminal verbal harassment, as well as criminal ones). See James B. Jacobs & Jessica S. Henry, *The Social Construction of a Hate Crime Epidemic*, 86 J. CRIM. L. & CRIMINOLOGY 366 (1996).

27. See Mark Fleisher, *Down the Passage Which We Should Not Take: The Folly of Hate Crimes Legislation*, IL. J.L. POL'Y, 27, 28, 34 (1993). Fleisher points out that in a politically or racially charged case, a jury acquittal or a major conviction can carry tremendous symbolism, such as the system is irredeemably racist, or that the jury was prejudiced one way or another. *Id.* at 34.

This article contends that prosecuting extremists, while important, is a secondary goal.<sup>28</sup> Instead, it focuses on administrative, rather than criminal, methods to combat extremism. Therefore, it has a twofold emphasis. First, a commander and legal advisor must proactively identify racial extremism, particularly white supremacist extremism. Thus, it is necessary to discuss the history of white-supremacist extremism. Second, a commander must accomplish this end with reasonable means. This requires an examination of the relevant constitutional and military law.

## II. Racial Extremism

### A. Differing Definitions

In the *Dictionary of Political Thought*, Roger Scruton defines extremism as:

1. Taking a political idea to its limits, regardless of unfortunate repercussions, impracticalities, arguments, and feelings to the contrary, and with the intention not only to confront, but to eliminate opposition.
2. Intolerance toward all views other than one's own.
3. Adoption of means to political ends which show disregard for the life, liberty, and human rights of others.<sup>29</sup>

John George and Laird Wilcox, two of the foremost analysts of right- and left-wing extremism, state that this definition reflects a common proposition about extremist behavior: it is more an "issue of style than of content."<sup>30</sup> What the extremist believes is less important than what behavior he exhibits. Rather, extremism can cut across the political spectrum.<sup>31</sup> Most people can hold radical or unorthodox beliefs in a more or less rea-

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28. As of March 1998, the Army has court-martialed one soldier for violating the revised policy on extremism. In October 1997, Specialist Jeffrey Brigman of the 101st Air Assault Division was convicted at a general court-martial for possessing an explosive device in his barracks room, in violation of local policy and state law, and for distributing extremist literature on post. Brigman had been putting up flyers around post seeking others to join the Clarksville Area Skinheads, a local racist organization. The court-martial found him not guilty of recruiting others to join. He was sentenced to two years confinement and received a bad conduct discharge. Brigman never challenged the constitutionality of the Army's new policy on extremism at trial. Telephone Interview with Major Jonathan Potter, Chief, Military Justice, Office of the Staff Judge Advocate, 101st Air Assault Division and Fort Campbell, Fort Campbell, Ky. (Feb. 27, 1997).

29. ROGER SCRUTON, *DICTIONARY OF POLITICAL THOUGHT* 164 (1982).

sonable and rational manner. Extremists present their views in uncompromising, bullying, and often authoritarian ways.<sup>32</sup>

*Army Regulation (AR) 600-20*, paragraph 4-12 contains the Army's official definition of extremist organizations and activities.<sup>33</sup>

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30. JOHN GEORGE & LAIRD WILCOX, *AMERICAN EXTREMISTS* 54 (1996). George is a professor of political science at the University of Central Oklahoma. Wilcox is the founder of the Wilcox Collection on Contemporary Political Movements at the University of Kansas, one of the largest of its kind in the world, which contains hundreds of thousands of documents on all political movements. *Id.* at 6. He is also editor and publisher of annual guides on extremism. See LAIRD WILCOX, *GUIDE TO THE AMERICAN RIGHT & GUIDE TO THE AMERICAN LEFT* (1997).

31. John George and Laird Wilcox look at extremists as persons psychologically prone to extremism, regardless of political affiliation:

Both of us have had the feeling many times that the Bircher with whom we were talking could just as easily have been a Communist and vice-versa. It may be merely a question of who "gets to them" first. We tend to view the existence of an extremism-prone personality as a more reasonable hypothesis than attempts to account for the "pathology" of a particular point of view.

GEORGE & WILCOX, *supra* note 30, at 66.

32. *Id.* at 54. George and Wilcox list twenty-two common traits of extremists. While all people exhibit some of these traits at times, the important distinction is that "[w]ith bona fide extremists, these lapses are not occasional." *Id.* The traits are: (1) character assassination; (2) name calling and labeling; (3) irresponsible sweeping generalizations; (4) inadequate proof for assertions; (5) advocacy of double standards; (6) tendency to view opponents and critics as essentially evil; (7) Manichean worldview; (8) advocacy of some degree of censorship or repression of opponents and/or critics; (9) a tendency to identify themselves in terms of who their enemies are: whom they hate and who hates them; (10) tendency toward argument by intimidation; (11) use of slogans, buzzwords, and thought-stopping clichés; (12) assumption of moral or other superiority over others; (13) doomsday thinking; (14) a belief that doing bad things in the service of a "good" cause is permissible; (15) emphasis on emotional responses, and, correspondingly, less importance to reasoning and logical analysis; (16) hypersensitivity and vigilance; (17) use of supernatural rationale for beliefs and actions; (18) problems tolerating ambiguity and uncertainty; (19) inclination toward "groupthink"; (20) tendency to personalize hostility; (21) a feeling that the "system" is no good unless they win; and (22) tendency to believe in far-reaching conspiracy theories. *Id.* at 56-61.

33. Message, 201604Z Dec 96, Headquarters, Dep't of Army, DAPE-ZA, subject: Revised Army Policy on Participation in Extremist Organizations or Activities, para. 4-12C.2.A. (20 Dec. 1996) [hereinafter AR 600-20, para. 4-12 (new policy)]. A new Army command policy regulation has not been published. The new Army extremist policy is still only available in the message format.

[O]nes that advocate racial, gender, or ethnic hatred or intolerance; advocate, create, or engage in illegal discrimination based on race, color, sex, religion, or national origin; advocate the use of force or violence or unlawful means to deprive individuals of their rights under the United States Constitution or the laws of the United States, or any state, by unlawful means.<sup>34</sup>

There is a difference between the Army's definition and Scruton's, as well as George's and Wilcox's elaboration on Scruton's definition. The Army's definition does not focus on style or "taking political ideas to their limits." The regulation focuses on *types* of extremism, with particular attention to types that advocate intolerance towards gender and racial, religious, and ethnic minorities. The regulation thus provides a narrower category of extremism than Scruton, George, and Wilcox do. These commentators may help to understand and to explain extremism, but, for the Army, they do not define it.

What, then, does AR 600-20 not cover, at least by name? The range of extremism—from left to right—that the regulation does not cover is vast.<sup>35</sup> One of the regulation's definitions speaks in general terms about activities or organizations that may advocate the "use of force or violence or unlawful means to deprive individuals of their rights . . . ."<sup>36</sup> The regulation, however, does not cover anti-government right-wing extremism, or any purely "political" extremism.<sup>37</sup> This may appear especially odd because right-wing extremism appears sometimes to overlap with white supremacist extremism.<sup>38</sup> This narrow focus on particular types of extremism appears to be a deliberate policy decision by the Department of the Army.<sup>39</sup>

This deliberate limit serves three functions. First, it labels a particular form of extremism. This labeling helps solve the problem of determining the boundaries of extremism. The Army policy does not provide a generalized definition or another approach.<sup>40</sup> It declares a particular type of behavior as extremist: the type that expresses intolerance toward gender,

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34. *Id.*

35. The extremist spectrum includes communist, socialist, environmentalist, homosexual, libertarian, anti-communist, anti-tax, anti gun-control, and so-called "patriot" or anti-government (usually associated with the far right and militias) type extremists. For a complete listing of these groups, see WILCOX, *supra* note 30.

36. AR 600-20, para. 4-12 (new policy), *supra* note 33, para. 4-12C.2.A.

37. Conceivably, if a right-wing extremist advocates the use of force or violence or unlawful means to deprive others of rights, he could fall under the definition; however, the definition does not list right-wing extremism anti-government extremism.

racial, ethnic, and religious groups, and those who advocate violence or unlawful conduct.

Second, by focusing on universally vilified forms of prejudice, violence, and illegality, the Army preserves its tradition of political neutrality, a corollary of the doctrine of civilian control of the military.<sup>41</sup> Because the regulation does not prohibit more “political” extremism, the Army avoids designating certain groups or causes (such as, anti-tax groups or environmentalist activists) as extremist. The Army, therefore, places the issue beyond political debate. The Army also avoids appearing to favor or disfavor certain issues that may be identified with a certain political party or

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38. In an unpublished research paper on right-wing extremism in the Army, Lieutenant Colonel Edwin Anderson contends that both racist and anti-government extremism should be studied. According to Anderson, the Army should develop a strategy for both types, because they “sometimes, but not always, overlap each other” and because certain racist extremist groups will use anti-government causes to lure new members to their organizations. Lieutenant Colonel Edwin W. Anderson, Jr., *Right Wing Extremism in America and its Implications for the U.S. Army* 8 (1996) (unpublished research paper, Air University) (on file with author and Air University library). Joseph Roy, Director of Klanwatch, a division of the extremist watchdog group the Southern Poverty Law Center (SPLC), testified before a House of Representatives subcommittee that members of the white supremacy movement were migrating to the anti-government “patriot” movements. *Hearing on Extremist Activity in the Military Before the Comm. on National Security of the House of Representatives*, 104<sup>th</sup> Cong. 7 (1996) (statement of Joseph T. Roy, Sr., Director of Klanwatch, Southern Poverty Law Center) [hereinafter *Hearing on Extremist Activity in the Military*].

39. Interview with Chaplain (MAJ) Lindsay Arnold, Army Leadership Division, Office of the Deputy Chief of Staff, Personnel (Leadership Division), U.S. Army, in Charlottesville, Va. (Feb. 18, 1997). Chaplain Arnold is overseeing the implementation of the Army’s program to combat extremism.

40. George and Wilcox show three possible approaches: (1) the linear scale/Gallup poll approach that arbitrarily determines that beyond a certain point on a scale is the far right and far left, which serves as the boundary between the political mainstream and extremism; (2) the “popularity contest” approach, in which the popular majority decides what is extremist; and (3) the behavioral approach, which they adopt, and which defines extremism in terms of behavioral characteristics. GEORGE & WILCOX, *supra* note 30, at 11.

41. Major Edwin S. Castle, *Political Expression in the Military* 11 (1988) (unpublished thesis, The Judge Advocate General’s School (TJAGSA)) (on file with TJAGSA library). The list of political activities prohibited for soldiers includes: taking part in partisan political management or campaigns or making public speeches in the course thereof; speaking before a partisan political gathering of any kind to promote a partisan political party or candidate; taking part in any radio, television, or other program or group discussion as an advocate of a partisan political party or candidate; and marching or riding in a partisan political parade. U.S. DEP’T. OF ARMY, ARMY REG. 600-20, ARMY COMMAND POLICY, App. B-2. (30 Mar. 1988).

administration. The Army thus avoids the debate of which “side” it favors on the political spectrum.<sup>42</sup>

Finally, the policy’s focus on race and ethnicity highlights the serious extremist problem that currently exists in the military–racial, and in particular white supremacist, extremism. Political views are not necessarily relevant in racial extremism. Far right extremists exist who are not admittedly racist.<sup>43</sup> Far-left extremists exist as well, though possessing far better credentials than their far-right counterparts which often allow them to hide their extremist tendencies.<sup>44</sup> Additionally, some racist extremists openly disavow “right” or “left” wing affiliations or refuse to be labeled either way.<sup>45</sup>

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42. The political neutrality of the military is a long-standing principle. See *Greer v. Spock*, 424 U.S. 828, at 839 (1976). In *Greer*, a suit was brought to enjoin enforcement of a local army regulation that banned speeches and demonstrations of partisan political nature and prohibited distribution of literature without prior approval of post headquarters. The Court upheld the regulation using the rationale that the regulation did not distinguish among political affiliations and the military authorities did not discriminate against the plaintiffs from speaking based upon their supposed political views:

[T]he military as such is insulated from both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates. Such a policy is wholly consistent with the American constitutional tradition of a politically neutral military establishment under civilian control. It is a policy that has been reflected in numerous laws and military regulations throughout our history.

*Id.* at 839.

43. Morris Dees, the lead attorney of the Southern Poverty Law Center, perhaps the most famous “watchdog” organization of extremist organizations, states:

Not every militia unit has racist or violent tendencies. Some have been formed by people who really believe the units provide a legitimate way to express their anger and frustration with a government that has grown too distant and, in some cases, hostile. These militia members love their country and believe in the Constitution. They aren’t haters and they don’t associate with haters.

MORRIS DEES & JAMES CORCORAN, *GATHERING STORM: AMERICA’S MILITIA THREAT* 41 (1996). Dees goes on to say that “the real danger lies beneath the surface.” *Id.* Language in the extremist policy that included *per se* militia-type extremists could thus encompass the type mentioned by Dees—non-violent and non-racist types who believe militias and similar organizations provide a legitimate mode of expression for their views on the federal government.

Despite the dangers of these other forms of extremism, the policy discusses intolerance based on race, ethnicity, religion or gender, which seem to be the most potent now. In particular, white supremacist extremism seems to pose a threat to the military.<sup>46</sup> It has motivated the crimes of sol-

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44. See DANIEL PIPES, *CONSPIRACY* 158-65 (1997). Pipes asserts that scholars have traditionally viewed conspiracy theorizing (by people who are often political extremists as well) as a far right phenomenon rather than a far left one for several reasons, among them:

- (1) the Left has “better credentials” (“[C]onspiracy theorists on the right consist of skinheads, Neo-Nazis, and other Yahoos who express vicious ideas about Jews and batty ones about secret societies . . . . In contrast, leading leftists boast impeccable educational credentials and sometimes direct work experience.”);
- (2) the Left’s presentation is more sophisticated (“A right-wing conspiratorial anti-Semite cranks out crude tracts with tiny circulation; his leftist equivalent, a writer like Gore Vidal, writes best sellers.”);
- (3) the Left has a more prestigious intellectual heritage (“Compare Nazi and communist writings. The former derive from a mishmash of pseudoscience and fanaticism . . . . The latter evolved out of a tradition of high-powered political theory that called on the noblest of sentiments.”); and
- (4) the Left’s presentation is more subdued (“The Right tends to postulate a vast, historical, all-encompassing conspiracy; the Left usually focuses on a less implausible plot.”).

*Id.*

45. JAMES RIDGEWAY, *BLOOD IN THE FACE* 22 (2nd ed. 1995). Some white supremacists openly disavow right-wing connections. One of the newer supremacist groups, the White Aryan Resistance (WAR), states on its web page that it is “strictly racist” and that “healthy ideas” come from “left and right.” It appears far more moderate, and even “leftist” in its orientation than older groups such as the Ku Klux Klan. Examples include its positions on homosexuals (“[t]he homosexual population is quite small and not a major threat to Aryan survival”), women (“WAR encourages women to involve themselves to the limits of their abilities to further the interests of the race. Qualified women operate at all levels of WAR . . . .”), abortion (“WAR does not promote force against white women to bear unwanted children”), and the environment (WAR is “well aware of corporate greed and its effect on our delicate environment”). See Tom Metzger, *White Aryan Resistance* (visited Mar. 1, 1998) <<http://www.resist.com>>. See also Burney, *America’s Invisible Empire, Knights of the Ku Klux Klan* (visited Mar. 1, 1998) <<http://www.airnet.net/niterider/>> (the web site of America’s Invisible Empire, a Northern Alabama based Ku Klux Klan group, which presents a more “traditional” right-wing view—anti-abortion, regardless of race; strongly anti-gay rights).

46. George and Wilcox view most political extremism as non-threatening. They assert that the various persecutions and constitutional violations committed in the name of fighting extremism are a greater threat: “The net effect of domestic extremism has been negligible. The net attempts to exterminate it have been quite telling, a legacy that haunts us to this day.” GEORGE & WILCOX, *supra* note 30, at 48.

diers and former soldiers.<sup>47</sup> It cuts into unit cohesion and the military's successful racial integration by advocating racial struggle.<sup>48</sup> There is, also, a call to violent action in some of the white racist groups. For example, the fastest growing white supremacist movement, the National Alliance, openly preaches racial conflict.<sup>49</sup> Its leader, William Pierce, author of the infamous *Turner Diaries*,<sup>50</sup> has stated that the National Alliance would attempt to recruit from within the military.<sup>51</sup>

In contrast, the Director of Klanwatch, the most prominent organization in the United States devoted to monitoring bias crimes, stated to Congress that the great majority of far right "patriot" type extremists were relatively harmless. A relatively small percentage of white supremacists in the "patriot" movement were the danger.<sup>52</sup> Far-left extremism, once a

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47. See *infra* pp. 1-2. Also, Timothy McVeigh, convicted of blowing up the Murrah Federal Building in Oklahoma City, is a former soldier with ties to white supremacist extremism. *Hearing on Extremist Activity in the Military*, *supra* note 38, at 13 (statement of Joseph T. Roy, Sr., Director of Klanwatch, Southern Poverty Law Center).

48. See *infra* pp. 21-23.

49. In testimony before the House of Representatives, the Director of Klanwatch, an organization of the Southern Poverty Law Center that monitors extremists, stated that, in the judgment of the Southern Poverty Law Center, the National Alliance was the most dangerous neo-Nazi group in America today. *Hearing on Extremist Activity in the Military*, *supra* note 38, at 12 (statement of Joseph T. Roy, Sr., Director of Klanwatch, Southern Poverty Law Center).

50. See ANDREW McDONALD, THE TURNER DIARIES (1996). *The Turner Diaries* is a novel written by William Pierce under the pseudonym Andrew McDonald. It is about a white revolutionary group called The Order that murders and sets off bombs to trigger a race war; the novel ends with a nuclear attack by the United States on Israel. RIDGEWAY, *supra* note 45, at 112. Timothy McVeigh avidly read *The Turner Diaries* while in the Army, and even gave the book to some of his fellow soldiers. *Hearing on Extremist Activity in the Military*, *supra* note 38, at 13 (statement of Joseph T. Roy, Sr., Director of Klanwatch, Southern Poverty Law Center).

51. *Hearing on Extremist Activity in the Military*, *supra* note 38, at 13 (statement of Joseph T. Roy, Sr., Director of Klanwatch, Southern Poverty Law Center). A former soldier in the 82d Airborne Division posted a National Alliance recruiting billboard outside of Fort Bragg several months before the December 1995 murders. *Id.* at 14.

52. He testified:

90% [of patriot members] are relatively harmless. They are made up of people who are extremely frustrated and angry at the government who are searching for some forum to vent their frustrations. Racism may or may not have anything to do with grinding that ax, so to say. What we're alarmed about is the 10% underbelly that is being infiltrated by current and past members of the white supremacy movements . . . ."

*Id.* at 36. See *supra* note 43 and accompanying text.



potential problem in the Army in the antiwar years of the 1960s and 1970s, has long since faded away. It is, therefore, an improper focus for current extremist policy.<sup>53</sup> The focus is predominately and appropriately on racial extremism.

## B. White Supremacist Extremism

### 1. *The Ku Klux Klan and Other Supremacist Organizations*

White supremacist extremism is an ideology that the white, and, usually more specifically, the Anglo-Saxon “race” is superior. White supremacy has its roots in various prejudices, some long-standing.<sup>54</sup> From the Aryan Nations to the Church of Jesus Christ Christian to the National Alliance, the various white racist groups in the United States have common bonds and origins.<sup>55</sup>

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53. Jerry Anderson, the Equal Opportunity Manager in the Equal Opportunity Office of the Department of Defense wrote:

The [Department of Defense] policy on prohibited activities and supremacist groups was appended to a policy issuance intended to deal with military personnel who were attempting to form unions, to organize anti-Vietnam war organizations, or publish and distribute ‘underground newspapers’ which encouraged unions, anti-war protests, and other counter-culture activities popular among young people in the 1960s. It is not a good policy mix to add hate groups to this milieu.

Jerry Anderson, Draft Unpublished Report on Extremism (Dec. 1996) (on file with author).

54. Prior to the rise of the Ku Klux Klan, the most prominent “racial extremist” group in the United States was the so-called “Know-Nothings” (named because when asked about his political affiliations, a member would respond “I know nothing” to keep his associations secret). They were an anti-immigrant (particularly anti-Catholic and anti-Irish) political party that at one point claimed five senators and 43 representatives. The Irish Catholics had their own extremists, the terroristic “Molly Maguires,” who murdered law enforcement officials and bombed government buildings throughout the mid-nineteenth century. GEORGE & WILCOX, *supra* note 30, at 20.

55. Ridgeway has a chart that lists and links the various groups and their key individuals. The original Ku Klux Klan, for example, has splintered into subgroups, to include other Klan organizations (such as the United Klans of America, the Alabama Knights, and California Knights), and David Duke’s National Association for the Advancement of White People (NAAWP). The White Aryan Resistance (WAR) has links to both the Klan and neo-Nazi skinheads. Its founder, Tom Metzger, was a member of the California Knights, though most of the members of WAR are more affiliated with skinheads. RIDGEWAY, *supra* note 45, at 32-33.

The origin of many of these beliefs is the French Revolution.<sup>56</sup> In the chaos of Republican France, royalists looked for an explanation for the fall of the monarchy, a hidden hand that somehow caused the disaster. The “international Jewish conspiracy” emerged as the scapegoat. The source of this mythology was the fraudulent *Protocols of the Elders of Zion*, a nineteenth century fictitious work about a Jewish plan to rule the world.<sup>57</sup> This anti-Semitic mythology crossed the Atlantic in the latter half of the nineteenth century. It joined with postbellum anxieties about ethnic immigrants and blacks and spawned American white supremacism.<sup>58</sup>

The most famous American white supremacist group is the Ku Klux Klan.<sup>59</sup> In 1865, ex-Confederate soldiers founded the Ku Klux Klan in Pulaski, Tennessee, as a response to what they felt were unjust Reconstruction policies.<sup>60</sup> Eventually, it became a purely racist, anti-immigrant organization and spread throughout the United States.<sup>61</sup> It developed its own symbols, such as white robes and cross burning, similar to other secret societies.<sup>62</sup>

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56. PIPES, *supra* note 44, at 52-75.

57. *Id.* at 84-85. RIDGEWAY, *supra* note 45, at 35-50. According to the Creativity Movement, a newer racist organization, the origins of Jewish “depravity” can be traced to the Talmud. Creativity’s leader, Reverend Matt Hale, produces a long string of quotes from the Talmud, some incorrect and most taken out of context, which, among other things, appear to sanction the killing of “goyim” (Gentiles) (Hilkoth Akum X1: “Do not save Goyim in danger of death”; Hilkoth Akum X1: “Show no mercy to the goyim”); pedophilia (Yebhamoth 11b.: “Sexual intercourse with a little girl is permitted if she is three years of age”); lying under oath (Schabouth Hag.6d: “Jews may swear falsely by use of subterfuge wording”); and other heinous activities, to include a belief in ultimate world domination (Simeon Haddarsen, fol. 56-D: “When the Messiah comes, every Jew will have 2800 slaves”). Hale, in typical white supremacist fashion, also reveals aspects of the “Talmudic Conspiracy” in the Jewish control of electronic news and entertainment media, newspapers, and other mass media. See *The Creativity Movement* (visited Mar. 2, 1998) <<http://www.rahowa.com>>.

58. RIDGEWAY, *supra* note 45, at 51. Other white supremacist groups with nineteenth century origins include the anti-Semitic Church of Christian Identity and the Church of Jesus Christ, which have small followings in the Pacific Northwest. They are based on a century old idea that the lost tribes of Israel are really English and Anglo-Americans, and that modern Jews are cursed. DEFENSE EQUAL OPPORTUNITY MANAGEMENT INSTITUTE (DEOMI), DEOMI SPECIAL TOPICS PAMPHLET 94-1, EXTREMIST GROUPS 10, 12 (1994) [hereinafter DEOMI].

59. RIDGEWAY, *supra* note 45, at 51.

60. GEORGE & WILCOX, *supra* note 30, at 20-21.

61. RIDGEWAY, *supra* note 45, at 52.

62. GEORGE & WILCOX, *supra* note 30, at 21.

The Ku Klux Klan rose and fell over the years. The organization reached its peak, not during Reconstruction in the South, but during the 1920s, when its estimated strength was some four to five million members throughout the United States.<sup>63</sup> Its influence plummeted shortly afterwards due to internal power struggles and intense investigation by the federal government.<sup>64</sup> Despite the Depression of the 1930s and the Civil Rights movements of the 1950s and 1960s, the Klan never regained any significant power in the United States. Today it has somewhere between five and six thousand professing members.<sup>65</sup>

Other white supremacist groups arose in the twentieth century, usually espousing some allegiance to Nazism. Nazism was originally the form of German fascism that professed, among other ideas, extreme anti-Semitism, the natural superiority of the white "Aryan" race, and the glory of militarism.<sup>66</sup> Though the Allies destroyed German Nazism in World War II, its ideologies crossed into postwar America. George Lincoln Rockwell founded the American Nazi Party in 1958.<sup>67</sup> It disintegrated after his assassination in 1966, although some of its members went on to form or to foster other groups.<sup>68</sup>

The 1980s and 1990s were decades of contradiction for white supremacist movements. Former Klansman David Duke, speaking in softer tones but with many of the same ideas, gained a political constitu-

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63. DEOMI, *supra* note 58, at 3-4. The Klan so widely permeated the United States that there were more members in Indiana and Ohio than any single Southern state.

64. *Id.* at 4.

65. *Id.* at 4-5. The Klan enjoyed a brief resurgence in 1980s due to the popularity of David Duke, who presented a less extreme form of the Klan's philosophy and aligned himself with some traditional conservatives. LOREN CHRISTENSEN, *SKINHEAD STREET GANGS* 140 (1994). This proved to be short-lived. According to the latest Southern Poverty Law Center's intelligence report, however, the Klan, after several years of decline, is starting to resurge. Two Klan groups experienced significant increases in 1996-97: the Indiana based American Knights of the Ku Klux Klan grew from one chapter to twelve in 1996, and Thom Robb's Knights of the Ku Klux Klan grew from two chapters to 17 in fifteen states. *The Year in Hate*, 89 S. POVERTY L. CENTER INTELLIGENCE REPORT 6 (1998). According to the same report, the Klan, which derives much of its symbolism from Britain (such as the ancient Scottish practice of cross-burning), is now gathering recruits in England and Scotland. *The Klan Overseas*, 89 S. POVERTY L. CENTER INTELLIGENCE REPORT 19 (1998).

66. For an overview of 20<sup>th</sup> century fascist movements, to include Nazism, see JOHN WEISS, *THE FASCIST TRADITION* 9-30 (1967).

67. DEOMI, *supra* note 58, at 6.

68. One of his lieutenants, William Pierce, went on to form the National Alliance. Another lieutenant, Matt Koehl, founded the National Socialist White People's Party, renamed as the New Order. *Id.* at 7-8.

ency in the late 1980s, made a strong run for the United States Senate in 1990, and was elected to the Louisiana legislature in 1992.<sup>69</sup> Yet, during the late 1980s, supremacists suffered serious blows. A conspiracy trial in 1988 against fourteen prominent white supremacists brought by the Southern Poverty Law Center effectively curtailed the leadership of the movement.<sup>70</sup> Consequently, many white supremacist groups learned to avoid the trappings of a structured organization, such as membership lists and group property.<sup>71</sup> Other white supremacist groups went on crime sprees that ended with most of the members dead or incarcerated.<sup>72</sup>

New organizations nevertheless arose during the 1980s and 1990s. One such organization, aimed at attracting young people to the cause of white supremacy, is the White Aryan Resistance (WAR), founded by Tom Metzger and run by him and his son John.<sup>73</sup> Another group is the National Alliance. Founded by William Pierce, author of *The Turner Diaries* and a prominent member of the old American Nazi Party, it has grown “thirty-fold” since 1990.<sup>74</sup> The membership strength of these groups, however, is

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69. Duke ran for a U.S. Senate seat in Louisiana. Although unsuccessful, he received 40% of the popular vote. Three years later, he won a seat in the Louisiana legislature. *Id.* at 10-11.

70. *Id.* at 11.

71. Interview with Jerry Anderson, Equal Opportunity Manager, Office of the Secretary of Defense, at The Pentagon, Washington D.C. (Jan. 23, 1998) [hereinafter Anderson Interview].

72. Two famous examples are the assassinations of George Lincoln Rockwell and Malcolm X. George Lincoln Rockwell, the founder of the American Nazi Party, was assassinated by dissident party member John Partler in 1967. Later, two of Rockwell’s deputies formed their own splinter groups. On the other end of the ideological spectrum, perhaps most famous is the internecine conflict within the Nation of Islam and its splinter groups. Malcolm X left the Nation in 1965 to pursue a more secularist (and non-racist) form of black nationalism and was assassinated shortly afterwards by Nation of Islam disciples. See DEOMI, *supra* note 58, at 7, 17-18. Recent examples of violence by organized white supremacists include the crime and murder spree of the hate group called The Order, which based its philosophy on *The Turner Diaries*. The Order robbed armored cars and killed a state trooper and a popular Denver radio host. Members of The Order were eliminated in a gun battle with FBI agents in Washington State in 1984. Two years later, “Order II” (with only four members) launched a similar crime spree in Idaho. They were all captured and incarcerated. CHRISTENSEN, *supra* note 65, at 133-34. George and Wilcox contend that hard-core extremists are not temperamentally suited for mainstream politics, which may explain their tendency to look to violent (and ultimately self-destructive) solutions. GEORGE & WILCOX, *supra* note 30, at 77.

73. RIDGEWAY, *supra* note 45, at 191.

74. According to Joseph Roy, the Director of Klanwatch, this is Pierce’s estimate. *Hearing on Extremist Activity in the Military, supra* note 38, at 13 (statement of Joseph T. Roy, Sr., Director of Klanwatch, Southern Poverty Law Center).

not as important as their ability to disseminate their messages to their disaffected white audience.<sup>75</sup> In particular, the information explosion on the Internet has vastly increased the availability of extremist information to the public at large.<sup>76</sup> Massive amounts of information and propaganda are available to anyone with an online service.<sup>77</sup>

Events in the 1990s also kept white supremacists in the news. In August 1992, the Federal Bureau of Investigation (FBI) confrontation with Randy Weaver, who had alleged ties to the Aryan Nations, led to the shooting deaths of Weaver's wife and son.<sup>78</sup> Timothy McVeigh, who blew up the Murrah Federal Building in Oklahoma City, had vague ties to the National Alliance and was an avid reader of *The Turner Diaries*.<sup>79</sup> Most signifi-

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75. "The Internet was one of the major reasons the militia movement expanded faster than any hate group in history." KENNETH S. STERN, *A FORCE UPON THE PLAIN: THE AMERICAN MILITIA MOVEMENT & THE POLITICS OF HATE* 228 (1996), cited in PIPES, *supra* note 44, at 199. As an example of how much personal, instantaneous dissemination of information can occur on the Internet, in October, 1994, 20,000 electronic messages were instantly sent over a white professor's Internet account spreading white supremacist messages in four states. Camilla Nelson, *Hate Crime on the Internet*, 7 NAT'L ASS'N OF ATTORNEYS GENERAL: CIVIL RIGHTS UPDATES 1 (Spring 1997).

76. Some of the advantages the Internet gives to racial extremists include chat room talk and e-mail communications, which expand racial extremists' sense of community; new encryption technology, which make Internet transmissions more secure than ever before, marketing ability to sell hate-group items (from Klan robes to Hitler mugs); as well as an abundance of information on how to build bombs, buy weapons, and learn terrorist/subversive tactics. See *163 and Counting*, 89 S. POVERTY L. CENTER INTELLIGENCE REPORT 25 (1998).

77. Jerry Anderson has over 200 volumes of extremist information taken solely from the Internet. He also maintains a list of hundreds of extremist websites. Three hundred and forty-three of those websites are devoted primarily to neo-Nazi and/or racist skinhead information. See Interview with Jerry Anderson, *supra* note 68; see also List Created by Jerry Anderson of Extremist Websites (undated) (on file with author). The Southern Poverty Law Center gave a recent listing of 163 extremist websites. This does not include Holocaust denial sites and militia sites. *163 and Counting*, *supra* note 76, at 24-5.

78. Gordon Witkin, *The Nightmare of Idaho's Ruby Ridge*, U.S. NEWS & WORLD REP., Sept. 11, 1995, at 42.

79. *Hearing on Extremist Activity in the Military*, *supra* note 38, at 13. Much of the post-Murrah Federal Building bombing press coverage that tried to link McVeigh, Terry Nichols, and others involved in the bombing to various militia groups turned out to be unfounded. In fact, the FBI's extensive investigation failed to significantly link McVeigh or any of the others involved to any militia group. McVeigh most likely learned about explosives and weapons not from a militia group, but from his Army training. McVeigh entered the Army in 1988. He served as an infantryman, rose to the rank of sergeant, was a gunner on a Bradley Fighting Vehicle, and won a Bronze Star in the Gulf War. GEORGE & WILCOX, *supra* note 30, at 246-48.

cantly for the Army, there were the Fayetteville murders in December 1995 by neo-Nazi skinhead soldiers.<sup>80</sup>

The two constants in white supremacist ideologies are anti-black racism and anti-Semitism. The Ku Klux Klan emphasizes the former and the various neo-Nazi groups the latter.<sup>81</sup> Some differences exist. The Ku Klux Klan asserts that it is a Christian organization, and many of its branches have publicly announced non-violence.<sup>82</sup> New neo-Nazi groups disavow Christianity<sup>83</sup> and advocate race conflict and ultimate solutions such as forcible relocation to solve America's "race problem."<sup>84</sup> Ultimately, however, all these groups have similar themes—hatred of minorities and a feeling that minorities are destroying America.

## 2. "Skinheads"

Understanding organizations that form the historical basis for racial extremism is helpful. White supremacist extremism, however, exists beyond established structures and organizations. Indeed, the continual ebb and flow of fortune in these organizations have made any attempt at numbering white supremacists or evaluating what threat they pose highly difficult.<sup>85</sup> One reason for this difficulty is that racial extremists often are not "card-carrying" members of formal organizations. Rather, they have loose

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80. *See supra* pp. 1-2.

81. DEOMI, *supra* note 58, at 2, 6.

82. *Id.* at 2.

83. The racist Creativity Movement, "an organization which is dedicated to the dissemination of truth and the pursuit of justice" and headed by Reverend Matt Hale, is openly anti-Christian. In the "FAQ" (frequently asked questions) part of its website, Hale responds to the question: "[Isn't] it part and parcel of your religion to hate the Jews, blacks, and other colored people?": "[I]f you love and want to defend those whom you love - your own family, your own white race, then hate for your enemies comes natural and is inevitable." And responding to the question about Christianity teaching "love and understanding":

The Christian religion is a good case in point when we talk about liars and hypocrites. Whereas they talk about love, the history of the Christian movement shows that they were as vicious and brutal in savagely hunting down their enemies, labeling them as 'heretics' and burning them at the stake, torturing and killing them, as are the Jewish communists of today.

*See The Creativity Movement* (visited Mar. 2, 1998) <<http://www.rahowa.com>>.

84. DEOMI, *supra* note 58, at 2; *see* RIDGEWAY, *supra* note 45, at 168-69 (showing a map that illustrates where such "relocations" for minorities would take place).

affiliations with such organizations. They are not members of any organization, but rather associate with like-minded persons in their communities. The neo-Nazi “skinhead” movement is a good example—it is a social phenomenon, not an organization.<sup>86</sup> An understanding of this movement illustrates that white supremacism is more a web of beliefs and associations than a traditional array of formal groups.

Neo-Nazi skinheads are loosely knit bands of youths<sup>87</sup> without formal allegiance to white racist organizations such as the Ku Klux Klan.<sup>88</sup> Skinheads generally do not possess any formal organization or hierarchy, at least on a national scale.<sup>89</sup> They did not originate in the United States. Rather, the skinhead movement originated in England in the late 1960s and early 1970s.<sup>90</sup> It is likely that the original skinheads in England were working class successors to “Mods,” a youth movement of the early 1960s.<sup>91</sup>

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85. In 1996, the Director of Klanwatch testified before Congress that he estimated the numbers of white supremacists at 25,000. *Hearing on Extremist Activity in the Military*, *supra* note 38, at 12 (statement of Joseph T. Roy, Sr., Director of Klanwatch, Southern Poverty Law Center). The most recent estimate, however, by the Southern Poverty Law Center is much higher. It stated in its most recent report that the number of hate groups grew dramatically in 1997, up 20% to 474 (127 Klan organization, 100 neo-Nazi groups, 42 skinhead groups, 81 Christian Identity groups, 112 a “hodge-podge of hate-based doctrines and ideologies,” and 12 black separatist groups). Christian Identity, a particularly violent group, has apocalyptic leanings, and according to the report, it alone has 50,000 followers in North America. *See The Year in Hate*, *supra* note 65, at 6.

86. The Southern Poverty Law Center’s claims about the strength and ubiquity of white supremacist groups have met with criticism. George and Wilcox dispute their assertions that the Ku Klux Klan and neo-Nazi groups have penetrated the militia groups to any significant degree. GEORGE & WILCOX, *supra* note 30, at 250. Accusations have been made that watchdog groups such as the Southern Poverty Law Center “need” the Klan and other groups to keep donations coming in. Phillip Finch, *Can the Klan Ride Again?*, THE NEW REPUBLIC, Sept. 5, 1983, at 18, 20-21.

87. Finch, *supra* note 86, at 22. There are no accurate counts of the number of skinheads, though some rough numbers exist. Monitoring organizations put their numbers at between 10,000 and 20,000 nationally (as of 1994) with approximately ten times the number in passive supporters, putting the total of passive supporters and active members at 200,000. *Id.*

88. This is not to say that Ku Klux Klan, Posse Comitatus, and various “race churches” do not have a tremendous influence on the younger, often very impressionable and naive skinheads. In turn, the younger skinhead groups often energize these tired formal organizations. Skinheads will often be more openly confrontational and violent than the Klan, which will in turn educate its young “warriors” with literature and activities. CHRISTENSEN, *supra* note 65, at 5, 146.

89. *Id.* at 22.

90. *Id.* at 45.

91. *Id.* at 5.

Skinheads began as young working class English who felt threatened by growing waves of immigrants and rising unemployment. They found a different fashion and sound from the hippies of the era. They shaved their heads (hence the name), drank lager instead of smoking marijuana, wore combat boots and leather jackets, affected confrontational attitudes, and espoused a hatred of immigrants, especially the waves of Pakistanis fleeing old British colonies in Africa.<sup>92</sup> Ironically, English skinheads initially identified with black culture: the “ska” music they listened to derived from the West Indies.<sup>93</sup> Given their attitudes towards foreigners and their militarist fashions, the ideas of the skinheads and neo-Nazis became entangled. By the mid-1970s, a virulently racist neo-Nazi skinhead culture based on hatred of Jewish, black, and minority populations emerged in America and Western Europe.<sup>94</sup>

Both racist and non-racist skinheads appear to dress alike, with differences too subtle for an outsider to tell.<sup>95</sup> One cannot necessarily identify a neo-Nazi skinhead at first glance. Skinheads loosely affiliate with one another and do not follow a common ideology.<sup>96</sup> Rather, there are many subgroups of skinheads. Some claim that they are not racist, though some of these non-racist groups are violent.<sup>97</sup> Neo-Nazi skinheads are probably a minority group within the skinhead culture, and many non-racist skinheads disavow the racists.<sup>98</sup> Yet, there are no clear boundaries within the culture, for racist and antiracist skinheads have been known to switch back and forth.<sup>99</sup>

The decline in organized groups such as the Ku Klux Klan is important in understanding the distinction between those groups and loosely confederated groups such as neo-Nazi skinheads. Formal organized hate groups in the United States often self-destruct. Their members kill each other in power struggles and various coups d’etat, or get themselves killed or captured in shoot-outs with law enforcement.<sup>100</sup> Federal legislation and

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92. *Id.* at 5, 146. DEOMI, *supra* note 58, at 8.

93. RIDGEWAY, *supra* note 45, at 182.

94. *Id.* It is not difficult to see how Nazi ideas penetrated the skinhead culture. The skinheads originated out of xenophobia and their culture extols a violent, confrontational posture. The tough “street”-look, the shaved head to accentuate one’s masculinity, the gang-like mentality, and the constant reference to “working class values” can easily be assimilated into a fascist aesthetic and ideology such as the one promulgated by neo-Nazis. For an examination of the fascist aesthetic and ideology see WALTER BENJAMIN, *The Work of Art In An Age of Mechanical Reproduction*, in ILLUMINATIONS 217 (Hannah Arendt ed. & Harry Zohn trans., Schocken 1969); SUSAN SONTAG, *Fascinating Fascism*, in UNDER THE SIGN OF SATURN 73-105 (Vintage Books 1981); FASCISM, AESTHETICS, & CULTURE (Richard J. Golson ed., 1992).



private law suits drive them underground.<sup>101</sup> Skinheads, without any national hierarchy or organization, exist for the most part on their own, bonding together locally.<sup>102</sup> There is no skinhead “organization” to break by suit or law enforcement, just a vague set of ideas and lifestyle choices. This may explain, in part, why they surfaced at Fort Bragg in 1995-1996.

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95. Identifying a skinhead usually is not difficult. A publication for police on recognizing signs and symbols of gangs lists the following identification signs:

- (1) White male, 14-24 years of age;
- (2) Shaved head, or very short-trimmed hair;
- (3) Blue or black denim pants, or six pocket fatigues;
- (4) Black or O.D. green flight jackets;
- (5) Suspenders (called “braces”);
- (6) Military style boots, steel toed or “Doc Martens” with either red or white laces;
- (7) Tattoos or slogans with neo-Nazi or white supremacist markings (for racist skinheads).

See MARK S. DUNSTON, *STREET SIGNS: AN IDENTIFICATION GUIDE OF SYMBOLS OF CRIME & VIOLENCE* 49 (1994).

While a shaved head is the most distinguishing characteristic, it is not required. The point of a shaved head is to give the person a menacing look. But as Christensen points out: “[O]n some skins, the absence of hair will make weak eyes appear weaker and a skinny neck scrawnier . . .” so it is not a definitive indicator one is a skinhead. CHRISTENSEN, *supra* note 65, at 26.

96. CHRISTENSEN, *supra* note 65, at 25.

97. This includes the SHARPS (for Skinheads Against Racial Prejudice) who exhibit more of a gang style rivalry with neo-Nazi skinheads. SHARPs made alliances with left-wing and gay rights activist groups on the Pacific Coast in the late 1980s and early 1990s, who welcomed them into their ranks and used them as security for their demonstrations and marches. The activists soon concluded, after a SHARP smashed a young girl in the head with a hammer because he thought she was Nazi, that they were a “violent street gang.” CHRISTENSEN, *supra* note 65, at 60.

98. GEORGE & WILCOX, *supra* note 30, at 347.

99. CHRISTENSEN, *supra* note 65, at 4, 30. Christensen, a Portland, Oregon police officer was the leader of a skinhead task force (Portland has been called the “Skinhead capital of the United States”). Regarding the fluid nature of the skinheads, he writes: “In rewriting this text, I found I had used a large number of qualifying adjectives, such as *most*, *some*, and *many*, to describe how skinheads think and act. Thinking I had used them too often, I tried to delete many of them, but I could not.” *Id.* at 5.

100. See *supra* note 72.

101. See *supra* pp. 16-17.

102. CHRISTENSEN, *supra* note 65, at 22.

### 3. *White Supremacist Extremism in the Military*

White supremacists have a natural attraction to the military. They often see themselves as warriors, superbly fit and well-trained in survivalist techniques and weapons and poised for the ultimate conflict with various races.<sup>103</sup> Military virtues such as fitness, proficiency with weapons and tactics, physical courage, and camaraderie fit comfortably with a white supremacist ethos.<sup>104</sup> Soldiers who are strongly drawn to military virtues might, if led down a stray path, learn to extol not just military virtues, but supremacist ones.<sup>105</sup>

White supremacist extremism appeared intermittently in the military before the Fayetteville murders in December 1995. There were reports of only insignificant extremist activity in the Army for that year.<sup>106</sup> In a survey conducted of seventy-seven installations, both in the continental United States and outside of it, forty-three indicated that there had been no extremist activity.<sup>107</sup> Of the installations that reported extremist activity, only four reported hate/bias-based crimes. Of these four, only two appeared to be racially motivated.<sup>108</sup> At the Department of Defense level, before the murders there was only slight anecdotal evidence that extremists had entered the ranks.<sup>109</sup> The absence of anecdotal or statistical evidence may have been the product of the suits brought against the Klan in the early 1980s, and the establishment of equal opportunity programs.<sup>110</sup>

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103. The image of white supremacists as “racial warriors” appears often in white supremacist publications. Two widely known acronyms in white supremacy are WAR (White Aryan Resistance, the neo-Nazi group) and RAHOWA (Racial Holy War), which is the rallying cry for the Creativity Movement. JESSE DANIELS, *WHITE LIES: RACE, CLASS, GENDER, & SEXUALITY IN WHITE SUPREMACIST DISCOURSE* 35-37 (1997).

104. At meetings of the Aryan Nations Congress, the famous German marching song of the storm troopers, the “*Horst Wessel Lied*,” is its anthem. Its lyrics emphasizing both military camaraderie (“The flags high! The ranks tightly closed!”) and gruesome anti-Semitism (“When the Jew’s blood spurts from the knife!”). RAPHAEL S. EZEKIEL, *THE RACIST MIND* 38 (1995).

105. McVeigh, up to the point that he failed out of Special Forces training and left the Army in disgust, had been an excellent soldier who made the rank of sergeant in three years. GEORGE & WILCOX, *supra* note 30, at 248.

106. CRIMINAL INVESTIGATION COMMAND (CID), 1995 CID SUMMARY REPORT, *EXTREMIST ACTIVITIES* 3 (2 Sept. 1996) [hereinafter 1995 CID SUMMARY REPORT]. The Army Equal Opportunity Office reported only one incident of racial violence within the preceding four years, involving a black soldier at Fort Richardson, Alaska who was racially harassed by a white superior and subject to a mock lynching. Information Paper on Incidents of Racial Violence by Mr. Jerry Anderson, Equal Opportunity Manager, Office of the Secretary of Defense (8 Dec. 1995) (on file with author) [hereinafter Information Paper on Incidents of Racial Violence].

Yet over the years, some disturbing facts indicated a rise in extremist and hate group recruiting and activity in the military. In 1986, active duty personnel were discovered to be members of a Klan group called the White Patriot Party. An ex-Marine also sold military weapons to the White Patriots for their training.<sup>111</sup> In 1991, two Special Forces soldiers were convicted for plotting to stockpile weapons for a race war.<sup>112</sup> Most infamously, ex-soldier Timothy McVeigh blew up the Murrah Federal Building in Oklahoma City in 1995. McVeigh, according to his lawyer, had been influenced by hate groups operating near Army bases overseas.<sup>113</sup>

At the 82d Airborne Division, there were no filed reports of extremist activity, and there had only been three racial complaints filed with the 82d Airborne Division Equal Opportunity Office during fiscal year 1995.<sup>114</sup> Yet, in and around Fort Bragg, signs indicated potential trouble with white supremacist “skinheads.” In October 1994, skinheads allegedly committed six assaults on the University of North Carolina, Chapel Hill campus.<sup>115</sup> Two more assaults took place in November 1994 and March 1995.<sup>116</sup> In all of the assaults, local police suspected that some of the skinheads were soldiers. In the winter of 1995, a Chapel Hill police officer allegedly told an Army investigator at a conference on gangs that Fort

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107. 1995 CID SUMMARY REPORT, *supra* note 106, at 3. During this time, Department of the Army Equal Opportunity Offices did not routinely receive Army serious incident reporting system (SIRS) documents, which are under the control of military police. This may have caused an underreporting of racial incidents. Information Paper on Incidents of Racial Violence, *supra* note 106. Nationwide in 1995, 7947 hate crime incidents were reported to the FBI to include 20 murders and 1268 aggravated assaults. Fifty-nine percent of the offenders reported were white, 27% black, with the remaining offenders from other or multi-ethnic groups. 1995 FBI CRIMINAL INFORMATION SERVICES DIVISION HATE CRIME REPORT 1 (on file with author).

108. 1995 CID SUMMARY REPORT, *supra* note 106, at 3. The four identified incidents were: (1) spraying of racial graffiti on the wall of a male latrine in an enlisted club (Fort Irwin); (2) two members of rival gangs fighting over a gang bandana (Fort Stewart); (3) a simple assault and aggravated assault that were racially motivated (Fort Hood); and (4) a stabbing in the face and chest by a subject who was motivated by the victim’s race and national origin (Grafenwoehr, Germany). *Id.*

109. Anderson Interview, *supra* note 71. Mr. Anderson recalled that individuals had been rejected for service because of possible extremist connections. He also specifically remembers that most of those were from the Navy.

110. *Id.* Mr. Anderson said that there was a decline in racial violence throughout the 1980s.

111. The weapons included 13 LAW rockets, 10 claymore mines, and nearly 200 pounds of C-4 explosives. *Hearing on Extremist Activity in the Military*, *supra* note 38, at 15 (statement of Joseph T. Roy, Sr., Director of Klanwatch, Southern Poverty Law Center).

112. *Id.*

Bragg soldiers were involved in skinhead crimes in Chapel Hill.<sup>117</sup> In April 1995, there was an off-post fight between rival skinhead gangs, both gangs apparently had soldiers in them. Neo-Nazis and the “Skinheads Against Racial Prejudice” (called SHARPs) clashed, and a neo-Nazi allegedly shot a SHARP in the chest.<sup>118</sup> Fayetteville police investigated the incident, but the case lay dormant for several months due to apparent lack of evidence.<sup>119</sup>

In August 1995, PFC Burmeister fought with a black soldier after Burmeister made some racially offensive remarks.<sup>120</sup> Burmeister’s room apparently had Nazi flags and regalia. When a follow-up inspection took place, these items had disappeared.<sup>121</sup> Burmeister’s local personnel file

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113. See Richard Serrano, *Radicals Recruit Soldiers*, FAYETTEVILLE OBSERVER-TIMES, Dec. 17, 1995, at 1A. The Secretary of Defense issued a memorandum to the secretaries of the military departments in the wake of the Oklahoma City bombing. The memorandum reiterated *DOD Directive 1325.6* on dissident and protest activities. It asked the service secretaries to “direct commanders and supervisors to disseminate this memorandum throughout their organizations and to ensure that their personnel are briefed on this guidance in this memorandum, *DOD Directive 1325.6* and Service implementing documents.” Memorandum from Secretary of Defense to Secretaries of Army, Navy, and Air Force, subject: Dissident and Protest Activity (5 May 1995). The language of the memorandum shows the apparent disconnection between the policy and what actually happened at Oklahoma City. McVeigh, a loner, had vague ties to extremist groups, but was not a card-carrying member of any organization; whereas the focus of the Directive was on “dissident and protest” organizations and “active participation” in such groups. While the service secretaries did issue the memoranda to their services, this amounted to practically no more than publishing a memorandum. The Secretary of the Army’s task force on extremism states in its report: “Few soldiers or leaders below brigade-level recalled such briefings [on *DOD Directive 1325.6*].” THE SECRETARY OF THE ARMY’S TASK FORCE ON EXTREMIST ACTIVITIES: DEFENDING AMERICAN VALUES 17 (21 Mar. 1996) [hereinafter TASK FORCE REPORT].

114. Information Paper on Equal Opportunity Complaint Reports, by Captain John Trippon, Equal Opportunity Officer, 82d Airborne Division 1 (30 Oct. 1995) (on file with author and at Office of the Staff Judge Advocate, 82d Airborne Division).

115. Scott Mooneyham, *Shooting Spotlighted Skinheads Suspected of Extremism*, FAYETTEVILLE OBSERVER-TIMES, Feb. 24, 1996, at 1A.

116. *Id.*

117. *Id.*

118. Information Paper on Violent Incidents in Fort Bragg/Fayetteville N.C., Fort Bragg Criminal Investigation Command 2 (14 Dec. 1995) (on file with author and at Office of the Staff Judge Advocate, 82d Airborne Division). See also Information Paper on White Supremacists Groups on Fort Bragg, Fort Bragg Criminal Investigation Command (12 Dec. 1995) (on file with author and at Office of the Staff Judge Advocate, 82d Airborne Division).

119. *Id.*

120. Information Paper on Background, *supra* note 8.

121. *Id.*

revealed that he had been counseled earlier that year for wearing a Nazi-like medallion.<sup>122</sup>

Nothing linked Burmeister to the earlier shooting or assaults. Nevertheless, it appeared that bits and pieces of information did exist to indicate the potential for a serious problem. The Fayetteville Police Department was working on a crime involving rival skinhead gangs;<sup>123</sup> evidence existed of violent skinhead activity in Chapel Hill;<sup>124</sup> Burmeister's chain-of-command was aware that he had an interest in Nazi regalia, had fought with a black soldier, and used racial slurs.<sup>125</sup> While it is easy to speculate about what the command could and should have done to prevent Burmeister from carrying out the murders, the conclusion of the Commander, XVIII Airborne Corps, in a press conference in May 1996 that "warning signs were missed" seems justified.<sup>126</sup>

Burmeister received a life sentence in a highly publicized trial.<sup>127</sup> The trial of Burmeister, and the subsequent trials of Wright and Meadows, however, were just one part of the story. After the shootings and arrests,

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122. *Id.*

123. *Id.*

124. The connection of soldiers to the Chapel Hill incidents was never firmly established. Fort Bragg CID reported that Fort Bragg soldiers were involved in the Chapel Hill incidents only as witnesses. See Ronald L. Simpson, Fort Bragg Criminal Investigation Report No. 1282-95-CID023 3 (23 Dec. 1995) (on file with author and Fort Bragg Criminal Investigation Command) [hereinafter CID Report].

125. Information Paper on Background, *supra* note 8. Specialist Randy Meadows, also accused of the December murders, had no documented history of racist or extremist beliefs. In October 1995, PFC Malcolm Wright's commander counseled him for wearing the number '666' on his forehead, but he denied being involved in any extremist groups. He also reportedly had a spiderweb tattoo on his elbow, but its meaning was unknown at the time. *Id.*

126. Lieutenant General John Keane, XVIII Airborne Corps Commander, was quoted as saying: "We missed the signals, the signs . . . some of which were so blatant that action should have been taken. Some leaders did, some did not." Amy Clarkson, *Generals Address Racism Issues at Fort Bragg*, RALEIGH POST, Mar. 27, 1996, at A1. In its assessment, the task force found that before the murders of Jackie Burden and Michael James there were few strong indicators that extremist organizations were "at issue at Fort Bragg. Subsequently, extremism received only passing attention in equal opportunity training." TASK FORCE REPORT, *supra* note 113, at 33.

127. See *Man Convicted of Racial Killings*, WASHINGTON POST, Feb. 27, 1997, available at <<http://www.washingtonpost.com>> (visited 1 Mar. 1998). Specialist Meadows also received a life sentence at a later trial. *Second E-Paratrooper Gets Life in North Carolina Racial Killings*, N.Y. TIMES, May 13, 1997, at A17. Private First Class Wright, who testified against both and averred that he had no prior knowledge that the two had planned to commit the murders, was convicted and sentenced to time served. *Id.*

other questions arose. If Burmeister, Wright, and Meadows were racist skinheads, how far had white supremacist ideology penetrated into the 82d Airborne Division, Fort Bragg, and the Army as a whole? How many of these neo-Nazi skinheads were there? If the command identified them, what would it do with them?

The problems of identification and action had a myriad of legal and non-legal concerns. Who fits the definition of a “white extremist?” Once the command identifies him, is he disciplined? If a soldier believes in a racist ideology but takes no criminal action, can or should any action be taken against him at all? How does a command formulate a workable policy to answer these questions?

Identifying other Burmeister types turned into a process that spanned months.<sup>128</sup> Yet, the numbers remained low and consistent throughout the identification process.<sup>129</sup> A preliminary inquiry to determine the number of 82d Airborne Division paratroopers involved with extremist organizations did not find widespread evidence of participation or involvement in extremist organizations.<sup>130</sup> Twenty-two division soldiers had links to several different extremist groups, but they fell into different subcategories.<sup>131</sup> Of the twenty-two soldiers, only eleven could be definitely categorized as firmly associated with racist, neo-Nazi hate groups. Four others were SHARPS, one was a so-called “Independent” (a type of multi-ethnic and non-racist skinhead), and eight others did not fit in any particular category.<sup>132</sup> Two soldiers from the XVIII Airborne Corps, the higher headquarters for the 82d Airborne Division also located on Fort Bragg, also had ties to local skinhead groups.<sup>133</sup> These numbers remained low throughout subsequent investigations. A follow-up report in March 1996 found that the number rose to twenty-six.<sup>134</sup> Finally, in April 1996, the widely publicized tattoo inspections of every soldier in the 82d Airborne Division identified only four more soldiers as possible racist skinheads.<sup>135</sup>

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128. See Memorandum on Actions Taken, *supra* note 16.

129. CID Report, *supra* note 124.

130. Information Paper, subject: Status of Investigation and Administrative and/or UCMJ Actions Taken Regarding 82d Airborne Soldiers Identified as “Skinheads,” CPT Walter M. Hudson, Office of the Staff Judge Advocate, 82d Airborne Division (29 Jan. 1996) (on file with author and at Office of the Staff Judge Advocate, 82d Airborne Division).

131. *Id.*

132. Press release 512-014 from Public Affairs Office, 82d Airborne Division (22 Dec. 1995) (on file with author and at Public Affairs Office, 82d Airborne Division).

133. CID Report, *supra* note 124.

Army-wide, the task force appointed by the Secretary of the Army concluded that there was “minimal evidence of extremist activity.”<sup>136</sup> The task force visited twenty-eight major Army installations in the United States, Germany, and Korea during early 1996, conducted 7638 interviews, and analyzed 17,080 confidential written surveys.<sup>137</sup> Of those interviewed, less than one percent (0.52%) reported that they knew a soldier or Army civilian who was a member of an extremist group. Three and one-half percent of those interviewed reported that they had been approached to join an extremist group in the surveys.<sup>138</sup> Of those surveyed, the numbers were high: 7.1% reported that they knew another soldier whom they believed was a member of an extremist organization; 11.6% of soldiers surveyed believed they knew a soldier who was an extremist, but not a member of an extremist organization.<sup>139</sup>

If the numbers were low, one may ask whether the command should spend significant time and effort on racial extremism. A follow-up survey done in 1997 suggests that there may be even fewer extremists in the Army than originally thought.<sup>140</sup> Furthermore, the extremist controversy of late 1995 and 1996 was supplanted by other controversial events, including

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134. Information Paper on Fort Bragg Skinhead Investigation, Lieutenant Colonel Robert McFetridge, Staff Judge Advocate, 82d Airborne Division (19 Mar. 1996) (on file with author and at Office of the Staff Judge Advocate, 82d Airborne Division). In April 1996, every soldier in the 82d Airborne Division was examined for racist or gang-related tattoos, per order of the Commanding General. Four more soldiers were identified as possible racist skinheads because of those inspections. Information Paper on 82d Airborne Division's Tattoo Inspection Results, Lieutenant Colonel Robert McFetridge, Staff Judge Advocate, 82d Airborne Division (2 May 1996) (on file with author and at Office of the Staff Judge Advocate, 82d Airborne Division) [hereinafter Information Paper on Tattoo Inspection Results].

135. Information Paper on Tattoo Inspection Results, *supra* note 134.

136. TASK FORCE REPORT, *supra* note 113, at I, 5-7.

137. *Id.*

138. *Id.*

139. *Id.*

140. In the spring of 1997, the Army Research Institute conducted its biannual sample survey of military personnel (SSMP). For the first time questions were asked about soldiers' knowledge of extremist activity in the Army. The SSMP asked the same survey questions (no interviews were conducted) as the task force survey: 2% of the soldiers surveyed stated they had been approached to join an extremist organization since joining or working for the Army (3.6% in the task force survey); 4.8% said they knew someone well in the Army who they believed to be members of extremist organizations (7.1% in the task force survey); 12.9% stated that they had come in contact with extremist material such as pamphlets, recruiting posters, graffiti, or electronic mail messages (17.1% in the task force survey). No reasons were posited for the lower percentages in the follow up survey. Interview with Lieutenant Colonel David Hoopengardner, Office of the Deputy Chief of Staff, Personnel, U.S. Army, at The Pentagon, Washington D.C. (Jan. 23, 1998).

issues of sexual harassment first brought to light at Aberdeen Proving Ground and in the court-martial of the former Sergeant Major of the Army.

Yet, while the survey numbers appear low, both the interviews and surveys that formed the basis of the study were approximations. Army Research Institute analysts stated that the weighted survey results in particular could “not be used to accurately estimate the level of extremist activity” in the Army.<sup>141</sup> Additionally, the survey only covered extremist activity in general. It did not distinguish statistically between white supremacist extremism, for example, and other varieties (such as anti-government or black extremism).<sup>142</sup>

Furthermore, not only is a tragedy such as the murders of Jackie Burden and Michael James one tragedy too many, but the tragedy reveals what tremendous and disproportionate impact a handful of extremists can have on a military unit.<sup>143</sup> If, as Scruton opined, an extremist views his opponent as someone not just to be confronted but eliminated,<sup>144</sup> this can translate into devastating destruction when the extremist has been trained in weapons or combat methods.<sup>145</sup>

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141. *Id.* The task force report stated:

The written survey was not as precise in determining the exact extent of possible extremist activity as face-to-face interviews. Interviewers found that, while some organizations were unanimously viewed as extremist, there were considerable differences of opinion on many others, including ethnic and racial groups, whose ideas may be controversial. Live interviewers were better able to distinguish more generally accepted instances of extremism and to determine when one identified instance of extremism was referred to by multiple soldiers (i.e. double counted). Daily interviewer wrap-up sessions clearly showed that activities of a few individuals were repeatedly cited in different interview groups. In contrast, the survey instrument did not provide for this level of refinement.

*Id.* at 7.

142. *Id.* The follow-up survey used the same method. *See supra* note 140 and pp. 28-29.

143. After talking extensively to soldiers and commanders, the task force on extremism stated: “Although there were relatively few extremists identified in the Army, leaders recognize that even a few extremists can have a pronounced dysfunctional impact on the Army’s bond with the American people, institutional values, and unit cohesion.” TASK FORCE REPORT, *supra* note 113, at 29.

144. SCRUTON, *supra* note 29 and pp. 7-8.

145. *See supra* pp. 1-2 and notes 47, 50, and 79.



Despite all the pain and humiliation caused by the Aberdeen Proving Ground scandal and the court-martial of the Sergeant Major of the Army, no one has pulled bodies out of rubble or said final good-byes to loved ones in either of those cases. In an Army where unit cohesion is vital to military efficiency and combat success, and the force is over one-third minority and over one-quarter black,<sup>146</sup> a single racial/extremist incident, such as the December 1995 Fayetteville murders, can have repercussions far beyond a single unit or post. With this in mind, was the Army's policy on extremism appropriate to deal with such an incident? Is the new policy adequate?

### III. The Army's Policy Toward Extremism

#### A. The Old Policy

At the time of the 7 December 1995 shootings, the Army policy on extremism was in the 30 March 1988 version of *AR 600-20* at paragraph 4-12.<sup>147</sup> It stated that “[t]he activities of extremist organizations are inconsistent with the responsibilities of military service.”<sup>148</sup> It then defined “extremist organizations” as organizations that: (a) espouse supremacist causes; (b) attempt to create illegal discrimination based on race, creed, color, gender, religion, or national origin; or (c) advocate the use of force or violence, or otherwise engage in efforts to deprive individuals of their civil rights.<sup>149</sup>

The regulation distinguished so-called “passive” participation, such as “mere membership, receiving literature in the mail, or presence at an event” from “active” participation, which included recruiting others to join and participating in public rallies or demonstrations. The policy did not prohibit passive participation in extremist organizations, though it did not condone it. It prohibited active participation, though did not indicate whether those prohibitions were punitive.<sup>150</sup>

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146. As of 1995, when the Fayetteville murders took place, the Army was 62.2% white, 27.2% black, 5.1% Hispanic, with 5.4% listed as other minorities. Information Paper on Infantry Brigade Demographics, Major John Trippon, Equal Opportunity Officer, 82d Airborne Division (17 Dec. 1995) (on file with author and at Equal Opportunity Office, 82d Airborne Division).

147. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, para. 4-12 (30 Mar. 1988) [hereinafter *AR 600-20*, para. 4-12 (old policy)].

148. *Id.* While all the services came out with extremist policies, the Army was the only service that listed “prohibited activities.” Anderson Interview, *supra* note 71.

149. *AR 600-20*, para. 4-12 (old policy), *supra* note 147, para. 4-12a.(1), (2), (3).

Much of AR 600-20, paragraph 4-12 came almost verbatim from *Department of Defense Directive 1325.6, Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces (change 2)*.<sup>151</sup> At the time the directive was initially promulgated in 1969, the Defense Department was concerned with the infiltration of anti-war and anti-military organizations within the services.<sup>152</sup> The directive focused on dissident and protest activities within the military, and especially on activities such as underground newspapers, on-post demonstrations, and serviceman organizations.<sup>153</sup>

In 1986, following the discovery that military personnel in North Carolina were involved with the White Patriot Party, the Secretary of Defense updated the directive. The directive's new language prohibited "active" participation in "extremist organizations." It was silent, however, on whether "passive" participation could also be prohibited, or why it only prohibited active participation in extremist organizations/groups, rather than extremist activity itself.<sup>154</sup>

This use of "active" participation in "extremist organizations" comes from language in Executive Order (EO) 11,785.<sup>155</sup> President Eisenhower

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150. *Id.* para. 4-12c.(7).

151. U.S. DEP'T OF DEFENSE, DIR. 1325.6, GUIDELINES FOR HANDLING DISSIDENT & PROTEST ACTIVITIES AMONG MEMBERS OF THE ARMED FORCES (12 Sept. 1969) (change 2, 8 Sept. 1986) [hereinafter DOD DIR. 1325.6 (1986 change)].

152. *See supra* note 53.

153. DOD DIR. 1325.6 (1986 change), para. III.C., D., E.

154. Paragraph III.G. of the directive states:

Prohibited activities. Military personnel must reject participation in organizations that espouse supremacist causes; attempt to create illegal discrimination based on race, creed, color, sex, religion, or national origin; advocate the use of force or violence; or otherwise engage in efforts to deprive individuals of their civil rights. Active participation, such as publicly demonstrating or rallying, fund raising, recruiting and training members, organizing or leading such organizations or other wise engaging in activities in relation to such organizations or in furtherance of the objectives that are viewed by command to be detrimental to the good order, discipline, or mission accomplishment of the unit, is incompatible with Military service, and is therefore, prohibited. Commanders have authority to employ the full range of administrative procedures, including separation or appropriate disciplinary action against military personnel who actively participate in such groups.

*Id.* para. III.G.

had issued its predecessor, EO 10,450 in 1953, during the height of the Cold War, when the government feared Communist infiltration.<sup>156</sup> Executive Order 10,450 stated that the government had wide authority to investigate its employees to determine “whether the employment in the federal service of the person being investigated is clearly consistent with the interests of the national security.”<sup>157</sup> The government could investigate the following:

Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.<sup>158</sup>

By 1974, the national mood had dramatically changed. Executive Order 11,785 amended EO 10,450. It forbade designating *any* groups as “totalitarian, fascist, Communist, or subversive” and forbade any circulation or publication of a list of such groups.<sup>159</sup> Furthermore, action against federal employees now required “knowing membership with the specific intent of furthering the aims of, or adherence to and *active participation* in” a group which “unlawfully advocates or practices the commission of

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155. Exec. Order No. 11,785, 3 C.F.R. 874 (1971-1975) *reprinted in* 1974 U.S.C.C.A.N. 8277.

156. For a summary of some executive and congressional actions against communist subversion during the late 1940s and early 1950s, and the courts' responses to those actions, see Alan I. Bigel, *The First Amendment and National Security: The Court Responds to Governmental Harassment of Alleged Communist Sympathizers*, 19 OHIO N.U. L. REV. 885 (1993).

157. Exec. Order No. 10,450, § 8(a), 3 C.F.R. 936 (1949-1953) *reprinted in* 1953 U.S.C.C.A.N. 1007. Executive Order 10,450 required loyalty investigations of all governmental departments. Any federal employee could be dismissed if an agency department head determined that the employee's continued employment was not in the national interest. *Id.*

158. *Id.* § 8(a)(5).

159. Exec. Order No. 11,785, *supra* note 155. Executive Order 11,785 was a further dismantling of EO 10,450 begun by EO 11,605, published in 1971. It required the old Subversive Activities Control Board to make specific findings whether an organization was “totalitarian, Fascist, Communist, or subversive” rather than relying on a list. It was revoked by EO 11,785. See Exec. Order No. 11,605, 3 C.F.R. 580 (1971-1975) *reprinted in* 1971 U.S.C.C.A.N. 2560.

acts of force or violence to prevent others” from exercising constitutional rights.<sup>160</sup>

Both the term “*active participation*” and the focus on organizations carried over into *DOD Directive 1325.6* and the subsequent Army policy on extremism.<sup>161</sup> In doing so, the directive and regulation adopted language not intended for extremism, but for subversion. In the 1950s, the executive branch decided to attempt to investigate infiltration (especially by Communists) into the government. Years later, that seemed an overreaction, and in 1974, the President severely limited what could be investigated.

Extremism, particularly white supremacist extremism, posed different challenges and required its own definitions. This need became apparent following the Fayetteville murders. The Army policy caused confusion among commanders and judge advocates; questions arose.<sup>162</sup> What was an “organization?” Did it mean a formal organization with membership, recruiting drives, and dues? Was it something far less formal? Where did someone like Burmeister fit in? He apparently was not a formal member of any hate group or white supremacist organization like the American Nazi Party or the Ku Klux Klan. He seemed to be involved with an informal network of neo-Nazi skinheads in and around Fort Bragg.<sup>163</sup>

“Active” and “passive” participation caused confusion also. If a soldier were a “passive” participant, presumably the command could not punish or tell him to stop his “passive” activity.<sup>164</sup> How could the command punish him if the Army said passive activities were “not prohibited”?<sup>165</sup> There were also questions over whether anything in the policy was punitive or could be made punitive. It listed six prohibitions, but did not state that they were punitive, though the regulation stated that commanders

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160. Exec. Order No. 11,785, *supra* note 155, § 3 (emphasis added).

161. TASK FORCE REPORT, *supra* note 113, at 17. (“The first time the terms *knowing membership* and *active participation* were used to determine policies toward individual involved in extremist organizations was in Executive Order 11,785, published in 1974.”)

162. At a teleconference following the shootings, the topic of what constituted an extremist “organization” was much debated. Forces Command Staff Judge Advocate Teleconference on Extremism (teleconference broadcast, Dec. 18, 1995).

163. Virginia White, *Swastikas, ‘Skinheads’ Part of Suspect’s Life, Soldiers Say*, FAYETTEVILLE OBSERVER-TIMES, Dec. 10, 1995, at 1A.

164. AR 600-20, para. 4-12 (old policy), *supra* note 147, para. 4-12b.

165. *Id.*

could initiate “UCMJ action against soldiers whose activities violate military law.”<sup>166</sup>

At the 82d Airborne Division, these problems became real. According to reports, twenty-two soldiers had alleged skinhead connections.<sup>167</sup> Fayetteville police charged and arrested three—Burmeister, Wright, and Meadows—for murder or conspiracy to commit murder.<sup>168</sup> Other soldiers either were charged with violent crimes or had committed other acts of separate misconduct.<sup>169</sup> This left twelve identified as possible neo-Nazi skinheads or associates.<sup>170</sup> Further investigation revealed that three of these twelve had no ties to racist skinheads, leaving nine soldiers in a gray area. These nine were involved to varying degrees with racist skinhead activities but had not committed any offenses.<sup>171</sup>

Thus, in several cases, the command took no disciplinary action against avowed skinheads, even racist ones.<sup>172</sup> This frustrated commanders, as indicated in the task force’s report.<sup>173</sup> The language of the regulation contributed to this frustration. The regulation focused exclusively on organizations. It gave commanders unclear direction on what was active and passive extremist participation. It appeared to be non-punitive.<sup>174</sup>

For these reasons, the task force recommended several changes to the regulation. It recognized that “[t]he current policy on participation in extremist organizations is confusing and complicates the commander’s interpretation of extremist activity.”<sup>175</sup> The task force recommended the

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166. Commanders could thus take action, either judicially or non-judicially, against soldiers for violating certain articles of the UCMJ, to include: Article 92, failure to obey an order or regulation or general order (for example, participation in non-approved on-post meetings or demonstrations, or distribution of literature without approval); Article 116, riot or breach of peace; Article 117, provoking words or gestures; or Article 134, conduct which is disorderly or service discrediting (the “general” article). AR 600-20, para. 4-12 (old policy), *supra* note 147, para. 4-12d.(5)(a), (b), (c), & (d).

167. CID Report, *supra* note 124.

168. Memorandum from Captain Walter Hudson, Office of the Staff Judge Advocate, 82d Airborne Division, to Commanding General, 82d Airborne Division, subject: Summary of Possible UCMJ/Administrative Actions Against 82d Airborne Soldiers Identified as Skinheads (4 Jan. 1996) (on file with author and at Office of the Staff Judge Advocate, 82d Airborne Division).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. TASK FORCE REPORT, *supra* note 113, at 34.

174. *Id.* at 11.

following: “[E]liminate the confusion created by the distinctions between active and passive participation in organizations and activities[,] . . . specify more clearly when commanders will counsel and/or take adverse action against soldiers who are displaying extremist behavior, and . . . make the regulation punitive.”<sup>176</sup>

### B. The New Policy

The task force findings and recommendations caused the Army to change its extremist policy.<sup>177</sup> The new policy speaks directly to, and is a mandate for, commanders. The old policy does not refer to command authority until the second to last subparagraph.<sup>178</sup> The new policy begins

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175. *Id.* at 34.

176. *Id.* at 37.

177. The extremist policy in *DOD Directive 1325.6* was subsequently changed as well. The new policy reads:

Prohibited activities. Military personnel must reject participation in organizations that espouse supremacist causes; attempt to create illegal discrimination based on race, creed, color, sex, religion, or national origin; advocate the use of force or violence; or otherwise engage in efforts to deprive individuals of their civil rights. Active participation, such as publicly demonstrating or rallying, fund raising, recruiting and training members, organizing or leading such organizations or other wise engaging in activities in relation to such organizations or in furtherance of the objectives that are viewed by command to be detrimental to the good order, discipline, or mission accomplishment of the unit, is incompatible with Military service, and is therefore, prohibited. Commanders have authority to employ the full range of administrative procedures, including separation or appropriate disciplinary action against military personnel who actively participate in such groups. Functions of command include vigilance about the existence of such activities; active use of investigative authority to include a prompt and fair complaint process; and use of administrative powers, such as counseling, reprimands, orders, and performance evaluations to deter such activities. Military Departments shall ensure that this policy on prohibited activities is included in initial active duty training, pre-commissioning training, professional military education, commander training, and other appropriate service training programs.

U.S. DEP'T OF DEFENSE, DIR. 1325.6, GUIDELINES FOR HANDLING DISSIDENT & PROTEST ACTIVITIES AMONG MEMBERS OF THE ARMED FORCES, para. C.5.h (1 Oct. 1996). Note the DOD directive retains the definitions focusing on organizations used in the older directive, as well as “active participation.” The new language in the directive starts at the sentence beginning “[f]unctions of command . . . .”

by highlighting the commander's responsibility regarding extremist activity.<sup>179</sup> It has a subparagraph entitled "Command Authority":

Command authority. Commanders have the authority to prohibit military personnel from engaging in or participating in any . . . activities that the commander determines will adversely affect good order and discipline or morale within the command. This includes, but is not limited to, the authority to order the removal of symbols, flags, posters, or other displays from barracks, to place areas or activities off-limits (see AR 190-24), or to order soldiers not to participate in those activities that are contrary to good order and discipline or morale of the unit or pose a threat to health, safety, and security of military personnel or a military installation.<sup>180</sup>

Commanders have responsibility and authority to act against extremists. Showing how broad this mandate is, the paragraph uses an example that might trigger First Amendment analysis. Commanders have the authority to order the "removal of symbols, flags, posters, and other displays from barracks . . ." <sup>181</sup>

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178. Beginning in subparagraph d., it states: "Commanders should take positive actions when soldiers in their units are identified as members of extremist groups and/or when they engage in extremist group activities." AR 600-20, para. 4-12 (old policy), *supra* note 147, para. 4-12d.

179. AR 600-20 para. 4-12 (new policy), *supra* note 33, para. 4-12C.2.

180. *Id.* para. 4-12C.2.C.

181. *Id.* The Secretary of the Army reiterated this mandate in relation to the First Amendment in a news briefing following the release of the task force investigation:

And incidentally, if they see a swastika or something hanging on a wall, [in reference to] the bright line test you wanted [from] me, I saw today in an article where a law professor said, ["W]ell, the Army doesn't have the authority to take banners off the wall. They'll have to take them all off except for Old Glory or leave them [all] up.["] That's not the Army's view. That is not the Secretary of the Army's direction. If a commander or NCO sees on the wall of any government building, an item, an object, a display, that is calculated to disrupt the good order, discipline, moral cohesiveness, ability to operate as a unit of that unit, he or she has all the authority necessary to take it down and to discipline the soldier who sponsors it.

Dep't of Defense News Briefing, Subject: Findings & Recommendations On the Task Force on Extremist Activities, Defending America's Values 9 (21 Mar. 1996).

Two more subparagraphs reference the commander. Subparagraph D,<sup>182</sup> entitled “Command Options,” states the options available to the commander, from UCMJ punishments to administrative actions (somewhat similar to subparagraph d. in the older version).<sup>183</sup> The new regulation includes a new subparagraph E, entitled “Command Responsibility.” Here the language not only empowers, but demands action: “In any case of apparent soldier involvement with or in extremist organizations or activities, whether or not violative of the prohibitions in subparagraph B, commanders *must take* positive actions to educate soldiers . . . .”<sup>184</sup> Subparagraph E(3) also mandates:

The commander of a military installation or other military controlled facility under the jurisdiction *shall* prohibit any demonstration or activity on the installation or facility that could result in interference with or prevention of orderly accomplishment of the mission . . . . Further, such commanders *shall deny* requests for the use of military controlled facilities by individuals or groups that engage in discriminatory practices . . . .<sup>185</sup>

The new policy does more than provide a broad mandate for commanders. It clarifies the commander’s role. It defines extremism more broadly, as “participation in extremist organizations *or activities*.”<sup>186</sup> Commanders and legal advisors no longer have to engage in legal hair-splitting as to what is an “organization.”<sup>187</sup> Furthermore, the old policy included the definition that an organization must “espouse[s] supremacist causes.”<sup>188</sup> The new policy is more specific: “Extremist organizations or activities are ones that advocate racial, gender, or ethnic hatred or intolerance; [or] advocate, create, or engage in illegal discrimination based on race, color, sex, religion, or national origin . . . .”<sup>189</sup> The policy resolves defining “supremacist causes” by labeling them as hatred or intolerance regarding gender and minorities.

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182. AR 600-20, para. 4-12 (new policy), *supra* note 33, para. 4-12C.2.D. Various subparagraphs in the new policy (in ALARACT message format) are all in upper case. To avoid confusion, they are cited as they appear in that text.

183. *Id.*

184. *Id.* para. 4-12C.2.E (emphasis added).

185. *Id.* para. 4-12C.2.E.(3) (emphasis added).

186. *Id.* para. 4-12C.2.B (emphasis added).

187. *See supra* note 141 and p. 29.

188. AR 600-20, para. 4-12 (old policy), *supra* note 147, 4-12a.



The regulation prohibits six activities: (1) participating in a public demonstration or rally; (2) attending a meeting or activity knowing the activity involved an extremist cause, when on duty, in uniform, or in a foreign country (whether on or off duty or in uniform); (3) fundraising; (4) recruiting or training members; (5) creating, organizing, or taking a visible leadership role in such an organization or activity; (6), and distributing extremist literature on or off the military installation. The policy makes these six prohibitions punitive, and it allows the commander to make others punitive as well.<sup>190</sup>

Finally, the new regulation no longer uses “active” and “passive” participation to distinguish prohibited from non-prohibited conduct. Eliminating this distinction apparently gives commanders much greater discretion.<sup>191</sup> The new policy eliminates the language that “[p]assive activities, such as mere membership, receiving literature in the mail, or presence at an event . . . are not prohibited by Army policy.”<sup>192</sup> Instead, the regulation states that:

Any soldier involvement with or in an extremist organization or activity, such as membership, receipt of literature, or presence at an event, could threaten the good order and discipline of the unit . . . . In any case of apparent soldier involvement with or in extremist organizations or activities, whether or not violative of the prohibitions in subparagraph B, commanders must take positive actions to educate soldiers . . . .<sup>193</sup>

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189. AR 600-20, para. 4-12 (new policy), *supra* note 33, para. 4-12C.2.B. The other definitions for extremist activities or organizations are:

Extremist organizations and activities are ones that . . . advocate the use of or use force or violence or unlawful means to deprive individuals of their rights under the United States Constitution or the laws of the United States, or any state, by unlawful means.

*Id.*

The substance of these definitions is the same as in the old definitions.

190. It states: “Violations of the prohibitions contained in this paragraph or those established by a commander may result in prosecution under various provisions of the [UCMJ].”

*Id.* para. 4-12C.2.

191. *See supra* pp. 33-4.

192. AR 600-20, para. 4-12 (old policy), *supra* note 147, para. 4-12b.

193. AR 600-20, para. 4-12 (new policy), *supra* note 33, para. 4-12C.2.E.

The new policy lists some of these “positive actions.” They include: (1) educating soldiers regarding the Army’s equal opportunity policy; (2) advising soldiers of the inconsistency of involvement in extremism with Army goals, beliefs, and values; and (3) stating that extremist participation can be a factor in evaluating duty performance and promotions.<sup>194</sup>

Ironically, the abolition of the active/passive participation dichotomy is the new policy’s only real source of ambiguity. While it eliminated the distinction, the policy does not clearly state when commanders can act against activities once considered “passive,” such as mere membership. While testifying before the House Subcommittee on National Security, the Secretary of the Army indicated that he did not think that the Army policy prohibited membership alone.<sup>195</sup> One may conclude that formerly “passive” activities are still only administratively actionable and that the old active/passive distinction perhaps comes in through the back door.

Yet, the regulation also states that a unit commander may “order soldiers not to participate in those activities that are contrary to good order

194. *Id.* para. 4-12C.2.E.(1) & (2).

195. Secretary West stated:

We have attempted to avoid the confusion between merely passive and merely active, [sic] however, by saying that if you prepare to take punitive action, it must be based on action, based on conduct. That is consistent with the position we have taken in a number of similar situations across the Department.

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When I say that membership is not without its disadvantages, the Army regulation will continue to point out that membership itself is, in the Army’s view, not to be encouraged. That can be taken into account when considering things like promotion or assignments. That’s different from when you take it into account for purposes of punishment or separation.

That depends on conduct. That will be the way the AR, as it is currently drafted, is focused. We think it’s a lot clearer and commanders shouldn’t be trying to decide between what’s active and what’s passive. The question is their conduct. If it contributes to the disruption of the morale and discipline of the unit, the commander acts.

*Hearing on Extremist Activity in the Military*, *supra* note 38, at 168 (statement of Secretary of the Army Togo West). When further questioned whether membership was *per se* prohibited, he stated: “[A]s it exists in draft now, there is not a position that says that membership is directly punishable.” *Id.* at 169.

and discipline of the unit or pose a threat to health, safety, and security of military personnel or a military installation.”<sup>196</sup> This appears to give the commander great authority. One can reconcile the two by focusing on what a soldier *does*, not what he believes. The regulation focuses on prohibiting participation in organizations and *activities*, not mere beliefs. Read this way, the boundary for what a commander can prohibit is at “mere” membership or association. A soldier who is a “mere” member, but does not act, distributes no literature, or propagates no views, cannot be prohibited from being a member. His conduct, however, is another matter. Once he engages in activity beyond merely being a member or merely having extremist beliefs, the commander can act to prohibit that activity.<sup>197</sup>

In contrast to the language in the old policy, the new policy directs commanders to “lean forward” to aggressively combat extremism in their units. This makes the role of the judge advocate more demanding, and fortunately, more explicit. Subparagraph F states that “commanders should seek the advice and counsel of their legal advisor when taking actions pursuant to this policy.”<sup>198</sup> The new policy, thus, specifically tasks the judge advocate, not the equal opportunity officer, the chaplain, or anyone else, with advising the commander.

This tasking is not surprising because the new policy has potential constitutional ramifications. It recognizes a commander’s inherent authority to prohibit actions and speech that might appear protected under the First Amendment. This requires two questions to be answered. First, is such a policy lawful? Second, at the unit level, how does a commander ensure that a local extremist policy is lawful? These questions are addressed in the next part of this article.

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196. AR 600-20, para. 4-12 (new policy), *supra* note 33, para. 4-12C.2.C.

197. Likewise, and in keeping with the apparent intent of the regulation’s change, the soldier who simply *acknowledges* his beliefs when asked by his chain-of-command, but takes no actions as a result of them (e.g., displays no posters or paraphernalia, attends no meetings, and disseminates no propaganda) should be considered in the same category as a soldier who is a “mere” member. Thus, a commander can take the same “administrative” actions regarding the soldier (education, counseling, and consideration in making duty evaluations and promotions), but no sanction-type action. *See supra* pp. 39-40 and note 195. Whether a commander can legitimately ask such a question must be examined in light of the standard of legal orders. *See infra* pp. 72-3.

198. AR 600-20, para. 4-12 (new policy), *supra* note 33, para. 4-12C.2.F.

## IV. The Legality of the Army's New Extremist Policy

## A. The Idea of Deference

Whether a policy is lawful requires an understanding of how the courts review military policy. Because of First Amendment challenges brought during the Vietnam War era, the Supreme Court issued a series of opinions that upheld military policies, rules, and regulations.<sup>199</sup> The cases vary in their standards of review of military policies. In *Parker v. Levy*,<sup>200</sup> the Court stated that the standard of review for a vagueness challenge in the military would be the same as for statutes that regulate economic affairs.<sup>201</sup> In *Brown v. Glines*,<sup>202</sup> the Court upheld a Navy regulation because it protected a "substantial government interest."<sup>203</sup> In *Goldman v. Weinberger*,<sup>204</sup> the Court deferred to the Air Force's own policy justification.<sup>205</sup>

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199. The major cases in the past 25 years involving the military and the First Amendment are: *Goldman v. Weinberger*, 475 U.S. 503 (1986) (upholding an Air Force regulation that prohibited the plaintiff from wearing a yarmulke); *Brown v. Glines*, 444 U.S. 348 (1980) (upholding an Air Force regulation that controlled the circulation of petitions on an air base); *Greer v. Spock*, 424 U.S. 828 (1976) (upholding a local Army regulation that banned on-post political speeches and demonstrations without prior approval); *Secretary of the Navy v. Ekvold*, 454 U.S. 494 (1982) (ruling that Article 134 of the UCMJ, which prohibits conduct prejudicial to the good order and discipline of the armed forces, is not unconstitutionally vague); *Parker v. Levy*, 417 U.S. 733 (1974) (ruling that Article 133, which prohibits conduct unbecoming an officer and a gentleman, as well as Article 134, are neither vague nor overbroad). Other important military cases involving challenges to military policies, though not involving the First Amendment, are: *Chappell v. Wallace*, 462 U.S. 296 (1983) (ruling that enlisted military personnel may not sue superior officers for alleged constitutional violations); *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding all-male selective service legislation); *Middendorf v. Henry*, 425 U.S. 25 (1976) (ruling that a summary court-martial is not a "criminal prosecution" within the meaning of the Sixth Amendment).

200. 417 U.S. 733 (1974).

201. "Because of the factors differentiating military society from civilian society, we hold that the proper standard of review for a vagueness challenge to the articles of the Code is the standard which applies to criminal statutes regulating economic affairs." *Id.* at 756. That standard, announced in a previous Supreme Court case, is that as long as an economic entity knew *or should have known* its actions violated an economic statute, the statute is not unconstitutionally vague. *See United States v. National Dairy Products Corp.*, 372 U.S. 29, 32-34 (1963).

202. 444 U.S. 348 (1980).

203. "These regulations, like the Army regulation in the *Spock* case, protect a substantial Government interest unrelated to the suppression of free expression. Like the Army regulation that we upheld in *Spock*, the Air Force regulations restrict speech no more than is reasonably necessary to protect the substantial governmental interest." *Id.* at 354.

204. 475 U.S. 503 (1986).

The unifying theme in these cases has not been a consistent standard of review, but the idea of deference to either the military<sup>206</sup> or Congress<sup>207</sup> to determine and to create policies for the military. This deference extends to the military's policies that restrict individual rights, which are constitutionally protected for civilians.<sup>208</sup> The Supreme Court has not held that the

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205. "The considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission . . . . The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment." *Id.* at 509.

206. In *Brown v. Glines*, upholding an Air Force regulation that related to the circulation of petitions on air bases, Justice Powell wrote: "Because the right to command and the duty to obey ordinarily must go unquestioned, this Court long ago recognized that the military must possess substantial discretion over its internal discipline." *Brown*, 444 U.S. at 356. In *Goldman v. Weinberger*, upholding an Air Force regulation that prohibited the plaintiff from wearing a yarmulke, Justice Rehnquist stated:

Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society . . . . The considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank. The Air Force considers them as vital during peacetime as during war because its personnel must be ready to provide an effective defense on a moment's notice; the necessary habits of discipline and unity must be developed in advance of trouble.

*Goldman*, 475 U.S. at 507-8.

207. In *Parker v. Levy*, Justice Rehnquist wrote: "For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter." *Parker*, 417 U.S. at 756. In *Rostker v. Goldberg*, upholding the all-male selective service provision, the Court deferred to Congress. "Whenever called upon to judge the constitutionality of an Act of Congress . . . the Court accords great weight to the decisions of Congress." *Rostker*, 453 U.S. at 64 (citing *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973)). The Court went on to say: "This is not, however, merely a case involving the customary deference accorded congressional decisions. The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference." *Id.*

208. "The rights of military men must yield somewhat to meet certain overriding demands of discipline and duty . . . ." *Parker*, 417 U.S. at 744 (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion)).

Constitution and the Bill of Rights are inapplicable to the military,<sup>209</sup> but it has held that the military and Congress have extraordinary leeway to determine the extent of those rights. Accordingly, the military may curtail a service member's rights far more than civilian authorities can curtail a civilian's rights.<sup>210</sup>

The absence of a constant standard of review and the great deference to military policy has caused confusion and controversy. On rare occasions, the Supreme Court has not been deferential to a military policy and has applied the same sort of review that it would apply to a similar civilian case.<sup>211</sup> Consequently, some federal appellate courts have adopted their own standards of review.<sup>212</sup>

Furthermore, commentators have attacked the idea of deference.<sup>213</sup> They have criticized the idea that the military is a "separate community" deserving great deference. Two commentators have argued that deference does not reflect how closely intertwined the military and civilian communities are in the present era.<sup>214</sup> Another commentator posits that First Amendment protections of freedom of speech are particularly valuable to

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209. Shortly after the UCMJ was promulgated and the military court system was formalized, the Supreme Court asserted that the Bill of Rights should apply to military personnel. *Burns*, 346 U.S. at 137 (military actions subject to habeas corpus review).

210. "The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." *Goldman*, 475 U.S. at 506.

211. In cases that involve discrete personnel matters with little long range ramifications for the military, the Court has generally subjected those actions to some form of scrutiny. In cases that involve significant constitutional challenges to regulations themselves that might affect a military function, the Court has allowed far more deference. See John Nelson Ohweiler, Note, *The Principle of Deference: Facial Constitutional Challenges to Military Regulations*, 10 J.L. & Pol. 147, 166-7(1993). In *Frontiero v. Richardson*, 411 U.S. 677 (1973), for example, the Supreme Court invalidated an administratively convenient policy in which male members of the military could automatically claim wives as dependents before being allowed dependent status, while female members had to produce evidence of husband's dependence before being allowed such status.

212. The most widely used standard is the so-called *Mindes* test. See *Mindes v. Seamen*, 453 F.2d 197 (5th Cir. 1971). For the *Mindes* test to apply, the plaintiff must first meet a threshold requirement: the court will not review a claim unless there is an abridged constitutional right and the claimant has exhausted his administrative remedies. If this threshold is met, then the court uses a four-part balancing test to determine if the claim is reviewable. The court balances: (1) the nature and strength of the plaintiff's challenge; (2) the potential injury to the plaintiff if the challenge is denied; (3) the type and degree of anticipated interference to the military if the challenge is upheld or allowed; and (4) the extent to which exercise of military expertise or discretion is involved. *Id.* at 201.

the military.<sup>215</sup> Within the Supreme Court, the notion has been the subject of heated debate. Justice Brennan, for example, has stated that it is the judiciary's role, not the executive's or legislative's, to determine the boundaries of constitutional protections in the military. According to him, the Supreme Court should establish a consistent standard of review, even in matters with wide ranging impact.<sup>216</sup>

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213. Some of the academic literature attacking this proposition includes: Stephanie A. Levin, *The Deference That is Not Due: Rethinking the Jurisprudence of Judicial Deference to the Military*, 35 VILL. L. REV. 1009 (1987) (arguing, among other points, that the deference the judiciary gives to the military is not rooted in Constitutional history: rather the Founders expressed great distrust toward the military's potential power and influence); C. Thomas Dienes, *When the First Amendment is Not Preferred: The Military and Other "Special Contexts,"* 56 U. CIN. L. REV. 779 (1986) (arguing that the excessive judicial deference to the military reveals "a tendency to seek to solve problem cases by adopting conceptualistic, categorical, formalistic approaches which fail to identify and assess the competing interests actually at stake in particular factual contexts"); Edward Zillman & Edward Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 NOTRE DAME L. REV. 397 (1976) (a post-Vietnam critique of the military as unfettered in its dispensing of constitutional rights of service members and as isolated from civilian society, therefore requiring greater judicial scrutiny of its policies). For the most sustained defense of the principle of deference, see James M. Hirschorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177 (1984).

214. See Zillman & Imwinkelried, *supra* note 213, at 397.

215. See Richard W. Aldrich, Comment, *Article 88 of the UCMJ: A Military Muzzle or Just a Restraint on Military Muscle?*, 33 UCLA L. REV. 1189, 1195 (1988). The author argues that not allowing military officers to criticize government officials cuts off criticism of policies by those most familiar with the process. "It seems that a self-governing society is notably hampered if it muzzles the sector of society that is most intimate with the details of such important national concerns [as national defense]." *Id.*

216. Brennan states in a dissent in *Goldman*:

Today the Court eschews its constitutionally mandated role. It adopts for review of military decisions affecting First Amendment rights a sub-rational standard . . . . If a branch of the military declares one of its rules sufficiently important to outweigh a service person's constitutional rights, it seems that the Court will accept that conclusion, no matter how absurd or unsupported it may be.

*Goldman*, 475 U.S. at 515 (Brennan, J., dissenting). See Brennan's dissent in *Greer v. Spock*: "The Court gives no consideration to whether it is actually necessary to exclude all unapproved public expression from a military installation under all circumstances and, more particularly, whether exclusion is required of the expression involved here. It requires no careful composition of the interests at stake." *Greer*, 424 U.S. at 855 (Brennan, J., dissenting).

Why should there be judicial deference to the Army's policy on extremism? There are two principal reasons. First, the Constitution's separation of powers doctrine gives control of the military to the legislative and executive branches, with no explicit role for the judiciary. Second, the military is a "separate community" with a highly unique mission that requires it to be separate and unique from civilian society, with more stringent standards and less constitutional protections for soldiers than for civilians.<sup>217</sup> Both of these are especially relevant when reviewing the Army's extremist policy.

### 1. *The Separation of Powers Doctrine*<sup>218</sup>

The Supreme Court cites the separation of powers doctrine as a basis for deferring to either Congress or the military to create military policy.<sup>219</sup> The idea of separation of powers comes from the text of the Constitution itself. The articles of the Constitution assign each branch distinct roles and functions. The Constitution gives the power to raise, to support, and to train the armed forces to the legislative branch<sup>220</sup> and the authority to com-

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217. These two bases for the notion of deference are taken, to some extent, from Hirschorn, *supra* note 213. Hirschorn justifies the "separate community" doctrine on four grounds: (1) the distinct subculture of the armed forces which subordinates the individual; (2) the existence of this subculture indicates that it serves the armed forces' internally and society as a whole; (3) the judiciary's distrust of its ability to reconcile individual rights with the armed forces' functioning; and (4) the unique nature of the armed force—to fight wars. *Id.* at 201-2. In this article, 1, 2, and 4 of these rationales are all subsumed under the "separate community" doctrine. Rationale 3 is distinguished from the idea of the military as a separate community and a corollary of the idea of separation of powers. *See infra* pp. 48-50. Hirschorn also separately discusses the idea of separation of powers. Hirschorn, *supra* note 213, at 210-212. Some revisionists have begun to question the viability of rationale 4 in other contexts by some revisionists, given the military's newer "peacekeeping" type missions in the post-Cold War era. *See, e.g.,* MARTIN VAN CREWELD, *THE TRANSFORMATION OF WAR* (1991); Edward Luttwak, *Toward Post-Heroic Warfare*, 74 *FOREIGN AFFAIRS* (May/June 1995) at 109-22. "Revisions of the revision," however, have already appeared as well. *See, e.g.,* PHILIPPE DELMAS, *THE ROSY FUTURE OF WAR* (1997).

218. While separation of powers is often defined as a doctrine through which one branch of government prevents another from imposing its unchecked will, that actually defines the related concept of checks and balances. Furthermore, separation of powers is often thought of as an "inefficient" concept. However, in the case of discussion here, this article intends to show that efficiency is the basis for separation of powers among branches of the government as to which controls the military. *See also* Hirschorn, *supra* note 213, at 210-12.

219. *See Goldman*, 475 U.S. at 507-8; *Rostker*, 453 U.S. at 64-5; *Chappell*, 462 U.S. at 301.

220. U.S. CONST. art. I, § 8, cls. 11-16.



mand them to the executive branch.<sup>221</sup> The Constitution assigns no such role to the judiciary.<sup>222</sup>

By granting the elected branches plenary and command power over the military, the Constitution links military control to the democratic will and the democratic process. Because the people will feel the burden of war, the elected branches can best respond to that will.<sup>223</sup> Furthermore, in granting power to the elected branches to control the military, the Constitution acknowledges that the elected branches grant a degree of legitimacy to military policy that courts cannot. These elected branches can best reflect and respond to the societal consensus, a particularly relevant and important concern when dealing with national security.<sup>224</sup>

Of the three branches, the judiciary has the least competence to evaluate the military's formation, training, or command. It has, as one court stated, "no Armed Services Committee, Foreign Relations Committee, Department of Defense, or Department of State" nor does it have the same access to intelligence and testimony on military readiness as does Congress or the President.<sup>225</sup> The Supreme Court has thus repeatedly cited its own lack of competence to evaluate military affairs.<sup>226</sup>

To analyze the oft-criticized judicial deference to military matters, it is important to understand the structural differences between the ability of the elected branches and the courts to determine policy. The elected branches use regulatory decision making to determine policy. Regulatory

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221. *Id.* art. II, § 2, cl. 1.

222. Hirschorn, *supra* note 213, at 210 (referencing explicit authority only).

223. *Id.* at 217-8.

224. The Fourth Circuit Court of Appeals cites this rationale in upholding the military's "don't ask, don't tell" homosexual policy in *Thomasson v. Perry*:

Even when there is opposition to a proposed change as when Congress abolished flogging in the 19<sup>th</sup> Century or when President Truman ended the military's racial segregation in 1948—the fact that the change emanates from the political branches minimizes both the likelihood of resistance in the military and the probability of prolonged social division. In contrast, when courts impose military policy in the face of deep social division, the nation inherently runs the risk of long-term social discord because large segments of our population have been deprived of a democratic means of change. In the military context, such divisiveness could constitute an independent threat to national security.

*Thomasson v. Perry*, 80 F.3d 915, 926 (4<sup>th</sup> Cir. 1996).

225. *Id.* at 925.

decision-making, which is the creation of administrative policy through internal-rule formation, is a far more efficient means of policy making than adjudicated decisions.<sup>227</sup>

There are several problems with adjudication as a means of rule making. Adjudication is more costly and more time consuming. Years and millions of dollars can be spent in litigating one issue that involves one individual.<sup>228</sup> Adjudication concerns itself with an individual remedy based upon “a small set of controverted facts” that are highly contextual and may or may not be applicable to a larger class of individuals.<sup>229</sup> Furthermore, adjudication sets up elaborate procedures according to its ultimate goal—to determine whether a particular individual should prevail in a particular case.<sup>230</sup>

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226. The Supreme Court stated in *Gilligan v. Morgan*:

[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.

*Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

See *Rostker*, 453 U.S. at 65-6 (“Not only is the scope of Congress’ constitutional power in this area broad, but the lack of competence on the part of the courts is marked.”); *Simmons v. United States*, 406 F.2d 456, 459 (5<sup>th</sup> Cir. 1969), cert. denied, 395 U.S. 982 (1969) (“That this court is not competent or empowered to sit as a super-executive authority to review the decisions of the Executive and Legislative branches of government in regard to the necessity, method of selection, and composition of our defense forces is obvious and needs no further discussion”); *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953) (“Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.”).

227. See J. Skelly Wright, *The Courts and the Rulemaking Process: the Limits of Judicial Review*, 59 CORNELL L. REV. 375.

228. *Id.* at 376.

229. *Id.* at 379. The power of interest groups representing individuals in such disputes is also especially relevant. The debate about hate speech and legislation prohibiting it has been largely shaped by free speech groups such as the American Civil Liberties Union (ACLU), with no comparable support from groups such as the National Association for the Advancement of Colored People (NAACP) supporting hate speech restrictions. The lack of such powerful advocacy groups may explain why the Court has never allowed any significant restrictions on hate speech. See SAMUEL WALKER, *HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY*, 13, 23-24 (1994).

230. Wright, *supra* note 227, at 378.

Dissenters, in particular Justice Brennan, have asserted that the Court decides issues that are far more technically complicated than adjudicating rather straightforward rules on discipline.<sup>231</sup> Yet that argument does not address rules formation in an administrative, as opposed to an adjudicative, system.

Military policy-making is, by its nature, meant to do precisely what administrative policy-making does: allocate rights, benefits, and sanctions, among large groups using consistent standards.<sup>232</sup> What makes military policy making along administrative rule-making lines even more advantageous is that the military's primary concern is ensuring military discipline and combat effectiveness of units, rather than focusing primarily on individuals themselves. Applying consistent and predetermined norms among large groups is what administrative rule making is best equipped to do.<sup>233</sup>

Where Brennan's argument may appear to be the most persuasive is where the potential "penalties" cut into the interests that the adjudicative process is best suited to protect—namely, constitutional protections. In dealing with constitutional protections, individual rights often trump majority concerns. Discerning whether individuals should be granted these protections may not be particularly complex, on the surface.<sup>234</sup> When viewing the grant of constitutional protections in relation to the military's goal—successful combat operations—this argument loses force. This is because "simplicity" as defined in civilian contexts often does not have the same meaning in the military context. Clausewitz, the Prussian general and author of the military classic, *On War*, once famously stated: "Everything in war is very simple, but the simplest thing is difficult."<sup>235</sup>

Clausewitz terms all the uncertainties and problems that accompany wartime operations as "friction."<sup>236</sup> Friction can be defined as the "realm of uncertainty and chance, even more [is] it the realm of suffering, confusion, exhaustion, and fear"<sup>237</sup> that accompanies military wartime operations. All these exist to a much higher degree in war, because, as

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231. *Id.*

232. *Id.* at 379.

233. *Id.*

234. For an example of judicial deference in administrative policymaking in economic matters, see *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 33-34 (1976).

235. CARL VON CLAUSEWITZ, *ON WAR*, bk. I, ch. 7, 119 (Michael Howard & Peter Paret eds. & trans., 1989).

236. *Id.*

Clausewitz points out, in war, not only is chance and uncertainty a constant,<sup>238</sup> but also one side is trying to impose its will on its opponent, which is an “animate object that reacts.”<sup>239</sup> In other words, in war, you are seeking to overcome an opponent who is reacting to (and may be anticipating) your movements, who is trying not only to defeat but to destroy you, and who may not be constrained by your own laws, customs, and behavior.

It is not thus simply the lack of judicial competence in military affairs, but the effects that the lack of competence may have that is an additional “friction” in the military environment. The problem in applying a standard of review similar to the kind used for civilian society is not just that the court may err, but the ramifications of such an error given the uncertainty of conflict.<sup>240</sup> An error in military policy making could impede military effectiveness and thereby jeopardize national security.<sup>241</sup> These judicial decisions put the courts squarely into the political arena. Judges unwittingly become “strategists”—unelected and ill-equipped officials deciding matters of potentially ultimate importance.

Judicial deference, therefore, is generally appropriate to military decision-making, and in particular, a unit commander’s decision-making on extremism. Extremism’s disproportionate impact on the community where it occurs is an impact that can only be magnified in a military unit. The best way to appreciate that impact is to look at the gravest danger posed by racial extremists—the violent hate crime.

If the courts rely solely on the statistics that compare the few numbers of bias crimes committed in relation to total crimes, they may be misled about the effect on good order and discipline.<sup>242</sup> The courts may not be aware of the totality of information about extremist hate crimes. The vast majority of bias-oriented crimes are crimes against persons, not property.

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237. MICHAEL HOWARD, *CLAUSEWITZ* 25 (1983). For an example of friction, see EDWARD LUTTWAK, *STRATEGY, THE LOGIC OF WAR & PEACE* 10-15 (1987).

238. “War is the realm of chance. No other human activity gives it greater scope: no other has such incessant and varied dealings with this intruder. Chance makes everything more uncertain and interferes with the course of events.” *CLAUSEWITZ, supra* note 235, bk. I, ch. 3, 101.

239. *Id.* at bk. 2, ch. 3, 149.

240. Hirschorn, *supra* note 213, at 182.

241. *Id.*

242. One bias crime expert has stated: “Raw numbers [alone] mean absolutely nothing in this business.” John Cook, Major, Maryland State Police Criminal Intelligence Unit, *quoted in* Brian Levin, *Bias Crimes: A Theoretical and Practical Overview*, 4 *STAN. L. & POL’Y REV.* 165, 172 (Winter 1992-3).

These crimes are also more likely to involve physical assault than non-bias crimes.<sup>243</sup> Usually, at least four or more individuals commit them.<sup>244</sup> The median age group is among young adults.<sup>245</sup> Loosely associated individuals, not organized extremist groups, commit most hate crimes.<sup>246</sup> Furthermore, the most explosive element about the crimes is not necessarily the criminal act. Rather, the race or bias motivation can cause a community to polarize and even to explode.<sup>247</sup> This impact is essential to the military's need for judicial deference to extremist policies—at both the local commander policy level and the Army policy level.

The separation of powers doctrine supplies a constitutionally based rationale for judicial deference, based upon the division of governmental powers. But is there a basis, apart from the government's structure, for this deference? Is there, more specifically, a policy basis for deference in the institution of the military itself? The following section examines this policy basis, which falls under the heading of the "separate community" doctrine.

## 2. *The Military as a "Separate Community"*

The Supreme Court often refers to the military as a "separate community" with the wholly unique purpose of providing for the nation's defense and waging the nation's wars.<sup>248</sup> The Supreme Court expressed this idea

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243. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE REPORT TO THE NATION ON CRIME & JUSTICE 12 (2d ed. 1988). According to this 1988 report, the first major study on the subject, assaults make up more than 30% of all bias crimes. The year before the Murrah Bombing and the Fayetteville murders, the statistics remained the same. Assaults in 1994 made up over 30% of all bias crimes (simple assault: 18%; aggravated assault: 14%). The report stated that crimes against persons constituted 72% of hate crime offenses reported. U.S. DEP'T OF JUSTICE, 1994 HATE CRIME REPORT.

244. Abraham Abramovsky, *Bias Crime: A Call for Alternative Responses*, 19 *FORDHAM URB. L.J.*, 875, 887 (1992).

245. Different statistics regarding median age of bias crime confirms the relative youth of offenders. The median age group for most bias criminals in New York City was 18-25. James Garofolo, *Bias and Non-Bias Crimes in New York City*, 11 (Nov 9, 1990) (unpublished manuscript presented to the American Society of Criminology) *cited in* Levin, *supra* note 219, at 166. A study done by an attorney general task force in Minnesota found that 65% of bias crimes were committed by persons between the age of 11-20. *Bias Related Crime Development, Minnesota Hate Crime Legislation*, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL CIVIL RIGHTS UPDATES, Spring 1997, at 2.

246. Abramovsky, *supra* note 244, at 886-7.

247. Levin, *supra* note 242, at 167. Levin gives the example of a fatal car accident in New York in August 1991 that became racially polarizing. It resulted in 1500 police officers being called out to contain riots that lasted for four days and resulted in 180 arrests. *Id.*

most notably in *Solorio v. United States*.<sup>249</sup> In this case, the Court granted the military criminal jurisdiction over all of its active duty personnel at all times.<sup>250</sup>

Courts base the argument for the separate community doctrine on the military's exigent function, on which the survival of the nation depends, and which has no analogue or parallel in civilian society.<sup>251</sup> This function can best be accomplished by designating the military as a separate community. To provide for the nation's defense and survival, this separate community abides by strict rules of discipline that will necessarily involve restriction of otherwise constitutionally provided protections.<sup>252</sup>

In the context of the Army's extremist policy, understanding the separate community doctrine is important. It provides a justification for the Army's extremist policy and for local unit extremist policies as well. The doctrine derives from the military's special demands for discipline and cohesion necessary to make its units combat effective. Some sociological data exists that indicates that a military must indoctrinate its personnel into a total or near-total system to make them perform under combat conditions.<sup>253</sup> This system must have the authority to punish resistance, to establish a hierarchy that demands obedience to orders, and to create unit cohesion.<sup>254</sup> Commentators frequently question the proposition of a "separate community"; this article will address some of these questions, as follows.

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248. "The military constitutes a specialized community governed by a separate discipline from that of the civilian." *Chappell v. Wallace*, 462 U.S. 296, 300 (1983). "[T]he different character of the military community and of the military mission requires a different application of [First Amendment] protections." *Parker v. Levy*, 417 U.S. 733, 758 (1974).

249. 438 U.S. 435 (1987).

250. *Id.*

251. *See* *Brown v. Glines*, 444 U.S. 348 (1980); *Middendorf v. Henry*, 425 U.S. 25 (1976) (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955)); *Schlesinger v. Councilman*, 420 U.S. 738 (1975); *Parker*, 417 U.S., at 743-44; *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953); *Chappell*, 462 U.S. at 300. *See also* Hirschorn, *supra* note 213, at 201-2.

252. *See supra* note 208. *See also* Hirschorn, *supra* note 213, at 213-14. Hirschorn bases the separate community doctrine on the nature of international armed conflict, which has no parallel in the domestic arena. When the government commits itself to war, it does not operate under the standard principles that would necessarily bind opponents in domestic arenas. Rather, in going to war, the government engages in activities—the deliberate killing and destruction of the other side—that would, in any other context, be unlawful. The military is the government's legitimate means to accomplish this unique task. *Id.* at 236.

253. *See* Hirschorn, *supra* note 213, at 219.

*Does the modern military need to be a “separate community”?*—Some critics, however, contend that the “separate community” doctrine fails to address the realities of the modern military.<sup>255</sup> They argue that the military, especially the post-World War II military, resembles a vast civilian-like corporation with a massive bureaucracy, where a relative few of its members actually perform traditional military, combat-type functions.<sup>256</sup> The civilian and military spheres have dramatically converged. Technicians crossover readily from the military to the civilian markets, and senior officers transfer their managerial skills into the executive world.<sup>257</sup>

Such arguments, however, are insufficient in themselves, for they only address current similarities with the civilian community, and not current distinctions. The military may be “more” or “less” separate from the civilian community as times and standards change, but its patterns of obedience and its overtly hierarchical structure remain unique. No other government or civilian agency has, for example, a separate criminal code of justice, or the ability to punish its members criminally for acts such as being disrespectful to superiors.<sup>258</sup> Furthermore, the military has not eliminated its unique combat role.<sup>259</sup>

Alternatively, some critics argue not that the separate community rationale is largely a fiction, but rather that the rationale rests on a faulty premise.<sup>260</sup> Specifically, these critics assert that the cornerstone of the “separate community” doctrine—the military’s unique need for consistent and authoritarian discipline—is not particularly important in the area that the military stresses soldiers need it most, on the battlefield.<sup>261</sup> Rather, what really makes soldiers combat effective is their adherence to their “primary groups” in combat. These are the “small groupings in which social behavior is governed by informal, intimate, face-to-face relations.”<sup>262</sup> In these small groupings hierarchical discipline has less impact in making such units effective, and is de-emphasized by the contemporary military

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254. *Id.* at 219-21. Studies on bureaucratic organizations include: AMITAI ETZIONI, A COMPARATIVE ANALYSIS OF COMPLEX ORGANIZATIONS: ON POWER, INVOLVEMENT, & THEIR CORRELATES 40-78 (1975); BARRINGTON MOORE, INJUSTICE: THE SOCIAL BASIS OF OBEDIENCE & REVOLT 3-48 (1978). For a classic study of military discipline and organizations in combat situations, see S.L.A. MARSHALL, MEN AGAINST FIRE: THE PROBLEM OF BATTLE COMMAND IN FUTURE WAR 138-178 (1947).

255. See, e.g., Courtney W. Howland, *The Hands-Off Policy and Intramilitary Torts*, 71 IOWA L. REV. 93, 106-21 (1985).

256. *Id.* at 106-10.

257. *Id.* at 109.

258. UCMJ arts. 89, 91 (1998).

itself.<sup>263</sup> Therefore, changes in the military community that make it more similar to the civilian society may impact on its authoritarian and hierarchical control structure, but will have little impact on the battlefield.<sup>264</sup>

Sociologists have compiled considerable data in support of the theory that “primary groups” in combat mean more to soldiers than other extrinsic factors such as love of country, ideology, and externally imposed military discipline.<sup>265</sup> It is oversimplified, however, to assert that external disciplinary controls are relatively unimportant in combat environments, and that challenges to those controls through adjudication will not undermine com-

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259. Sociologist Morris Janowitz, one of the most prominent scholars of the growing “civilianization” of the military, even in the context of Cold War nuclear warfare, states:

[W]hile it is true that modern warfare exposes the civilian and the soldier to more equal risks, the distinction between military roles and civilian roles has not been eliminated. Traditional combat-ready military formations need to be maintained for limited warfare. The necessity for naval and air units to carry on the hazardous tasks of continuous and long-range reconnaissance and detection, demand organizational forms that will bear the stamp of conventional formations.

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More important, no military system can rely on expectation of victory based on the initial exchange of firepower, whatever the form of the initial exchange may be. Subsequent exchanges will involve military personnel—again, regardless of their armament—who are prepared to carry on the struggle as soldiers, that is, subject themselves to military authority and continue to fight.

MORRIS JANOWITZ, *SOCIOLOGY & THE MILITARY ESTABLISHMENT* 20 (rev. ed. 1965).

260. Howland, *supra* note 254, at 115-21; Jonathan P. Tomes, *Feres to Chappell to Stanley: Three Strikes and Servicemembers Are Out*, 25 U. RICH. L. REV. 93, 107-10 (1990).

261. Howland, *supra* note 255, at 115; Tomes, *supra* note 260, at 107.

262. Howland, *supra* note 255, at 115.

263. Tomes, *supra* note 259, at 108-9.

264. Howland argues for allowing service members to sue one another for torts committed incident to military service. Howland, *supra* note 255, at 94-5. Tomes contends that service members should be allowed to sue the government for torts. Tomes, *supra* note 260, at 133-4.

265. The two most famous studies regarding unit cohesion based upon loyalty to “primary groups” are Morris Janowitz’s and Edward Shils’ study of the Wehrmacht in World War II, and Samuel Stouffer’s immense study of World War II American servicemen. Morris Janowitz & Edward Shils, *Cohesion and Disintegration in the Wehrmacht in World War II*, 12 PUB. OPINION Q. 284 (1984); SAMUEL STOFFER ET AL., *THE AMERICAN SOLDIER* (1949).



bat effectiveness. Rather, the sociologist Morris Janowitz points out that effective primary groups arise from both the larger military as well as civilian communities, and that primary groups can be highly cohesive yet nevertheless impede military success.<sup>266</sup>

Military success is at its most optimal level when there is a strong link between the formal authority's standards and those of the primary group.<sup>267</sup> When formal authority gives way (as when units disintegrate during mutiny, mass flight, or massacre) the primary groups seem to disintegrate as well. Soldiers become mobs, whether *en masse* refusing to obey orders, blindly fleeing before an advancing foe, or turning into mass murderers.<sup>268</sup>

Asserting that either formal disciplinary controls are predominant in ensuring combat effectiveness, or conversely, that they are of little value, does not fully address the question. Rather the two are linked together. When they work in concert, military success is more attainable than when either is absent. Thus, if formal discipline remains a valid premise for the "separate community" doctrine in general, the next question to be answered, in light of defending the Army's extremist policy, is whether the military's unique formal disciplinary system resolves racial problems, and what effects extremism would have in that system.

*How does being a "separate community" enable the military to perform its mission?*—The "institutional/occupational" (I/O) thesis, first developed by the sociologist Charles Moskos, helps to understand the notion of the military as a deliberately separated society and in understanding the Army's success at racial integration.<sup>269</sup> According to the I/O thesis, the leaders of an "institutional" organization legitimate the organization in terms of values and norms that deliberately devalue individual goals and self-interests for the higher goals of the organization. Marketplace considerations, such as supply and demand, legitimate an "occupational" organization.<sup>270</sup> Occupational organizations tend to rely more on extrinsic motivation (such as increased pay for skills); institutional organizations

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266. JANOWITZ, *supra* note 259, at 78.

267. *Id.*

268. This is the theme developed by Bruce Allen Watson in *When Soldiers Quit: Studies in Military Disintegration* (1997), which studies military failures and breakdowns as disparate as the French Army mutinies of 1917, the disintegration of the 106<sup>th</sup> Infantry Division during the Battle of the Bulge in 1944, and the My Lai Massacre in the Vietnam War in 1968.

rely more on intrinsic motivation (such as value based motivations, like, patriotism and self-pride).<sup>271</sup> Institutions are also far more hierarchical than occupations. In institutions, for example, aggrieved parties do not resolve those grievances themselves (for example, strikes) but address them through the institution's hierarchical structure.<sup>272</sup>

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269. Moskos developed this thesis in the late 1970's when the military shifted to an all-volunteer force. For the seminal article propounding the I/O thesis, see Charles C. Moskos, *From Institution to Occupation: Trends in the Military Organization*, 4 *ARMED FORCES & SOCIETY* 41 (1977). The I/O thesis was the subject of an international conference held at the Air Force Academy in 1985. The papers presented there made up the book *See Acknowledgements to THE MILITARY: MORE THAN JUST A JOB?* xi (Charles C. Moskos & Frank R. Wood eds., 1988). Studies on unit cohesion in the military have cited Moskos's I/O thesis as well. In a study by the Defense Management Study Group on Military Cohesion, the authors state:

Charles C. Moskos, Jr., has captured the imagination of many people with his writings on an alleged shift of the military from an "institution" (where membership is legitimated in terms of a "calling or profession, which implies self-sacrifice and moral commitment) to an "occupational" model (where membership is legitimated in terms of the economic marketplace; that is, duties are performed in exchange for material benefits). If Moskos is correct, the shift from an institutional to an occupational model has important implications for military cohesion.

DEFENSE MANAGEMENT STUDY GROUP ON MILITARY COHESION, *COHESION IN THE U.S. MILITARY* 2 (1984). See LIEUTENANT COLONEL WILLIAM DARRYL HENDERSON, *COHESION: THE HUMAN ELEMENT IN COMBAT* 57-60 (1985).

270. Moskos states:

An *occupation* is legitimated in terms of the marketplace. Supply and demand, rather than normative considerations, are paramount . . . . In a modern industrial society, employees usually enjoy some voice in the determination of appropriate salary and work conditions. Such rights are counterbalanced by responsibilities to meet contractual obligations. The cash-work nexus emphasizes a negotiation between individual (or workers' groups) and organizational needs. A common form of interest articulation is the trade union. The occupational model implies the priority of self-interest rather than that of the employing organization.

Charles C. Moskos, *Institutional and Occupational Trends in the Armed Forces*, in *THE MILITARY: MORE THAN JUST A JOB?* 16-19 (Charles C. Moskos & Frank R. Wood eds., 1988).

271. Moskos lists several basic traditional distinctions between occupational and institutional models. Among them are societal regard (institutional: esteem based on notions of service; occupational: prestige based on level of compensation); recruitment appeals (institutional: appeals to character and lifestyle; occupational: appeals to technical training and higher pay); and basis of compensation (institutional: rank and seniority; occupational: skill level and manpower shortages). *Id.* at 16.

According to Moskos, the military has many of the features of an “institution,” among them fixed terms of enlistment, inability to strike or to negotiate over wages, liability for twenty-four hour service, and being subject to military discipline.<sup>273</sup> These “institutional” features set the military apart from the civilian community. They also provide the basis for its distinct ability to impose discipline on its members.<sup>274</sup>

Two Supreme Court rulings on military jurisdiction illustrate the opposing institutional and occupational principles. In *O’Callahan v. Parker*,<sup>275</sup> the Supreme Court held that military courts-martial did not have jurisdiction for non-service connected offenses.<sup>276</sup> A service member who committed an offense off-duty, off-post, and not connected to military performance would fall under exclusive civilian criminal jurisdiction.<sup>277</sup> As Moskos states: “The net effect of [*O’Callahan* and similar decisions] was to move toward a legal redefinition of the military from one based on tra-

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272. *Id.* See Hirschorn, *supra* note 213, at 218-19:

The armed forces are an example of a rational bureaucracy: a hierarchical organization characterized by a specialized division of labor according to system and authority based on role rather than personality, in which each individual’s role is to pursue goals established by the heads of the hierarchy through methods that they have calculated will attain these goals.

*Id.*

273. Moskos, *supra* note 270, at 16.

274. Moskos does not assert that the military is “purely” institutional or the civilian community purely occupational. Rather he assumes:

[A] continuum ranging from a military organization highly divergent from civilian society to one highly convergent with civilian structures . . . . Concretely, of course, military forces have never been entirely separate or entirely coterminous with civilian society, but the conception of a scale, along which the military more or less overlaps with civilian society, highlights the ever-changing interface between the armed forces and society.

*Id.* at 15.

For critiques of the I/O thesis see Morris Janowitz, *From Institution to Occupation: The Need for Conceptual Clarity*, 4 *ARMED FORCES & SOCIETY* 41-50 (1977); John H. Faris, *The Social Psychology of Military Service and the Influence of Bureaucratic Rationalism*, in *THE MILITARY: MORE THAN JUST A JOB?* 57-75 (Charles C. Moskos & Frank R. Wood, eds. 1988).

275. 395 U.S. 258 (1969).

276. *Id.*

277. *Id.*

ditional status toward one more consistent with generally accepted contract principles."<sup>278</sup> Relying in large part on the doctrine of the military as "separate community" with its particular need for discipline, the Supreme Court overturned *O'Callahan in Solorio v. United States*<sup>279</sup> and permitted court-martial jurisdiction over active duty service members regardless of status, time, or location.<sup>280</sup>

The I/O thesis helps in understanding the military's, and especially the Army's, success at racial integration.<sup>281</sup> Before President Truman's compelling desegregation by Executive Order 9981 on 26 July 1948,<sup>282</sup> task force studies indicated that most military officers did not want such a change.<sup>283</sup> Despite such opposition, once ordered, integration came relatively quickly to the ranks. By the mid-1960s, the military, compared to the rest of American society, was not only desegregated, but also remarkably racially harmonious.<sup>284</sup> The late Vietnam-era and post-draft military of the 1970s had serious racial problems.<sup>285</sup> By the time of Desert Shield/

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278. Moskos, *supra* note 270, at 22.

279. 438 U.S. 435 (1987).

280. *Id.*

281. Charles Moskos, *Success Story: Blacks in the Army*, ATLANTIC MONTHLY, May 1986, at 64. "Blacks occupy more management positions in the military than they do in business, education, journalism, government, or other significant sections of American society. The armed forces still have race problems, but these are minimal compared with the problems that exist in other institutions, public and private." *Id.*

282. Exec. Order No. 9981, 3 C.F.R. 722 (1943-1948) reprinted in 1948 U.S.C.C.A.N. 2673.

283. John Sibley Butler, *The Military as a Vehicle of Social Integration: The Afro-American Experience as Data*, in ETHNICITY, INTEGRATION, & THE MILITARY 39 (Henry Dietz et al. eds., 1991); see CHARLES MOSKOS & JOHN SIBLEY BUTLER, ALL THAT WE CAN BE 30 (1996).

284. According to Moskos and Butler:

By the mid-1950s, a snapshot of a hundred enlisted men on a typical parade would have shown twelve black faces; integration had become a way of Army life. At a time when Afro-Americans were still arguing for their educational rights before the Supreme Court and marching for social and political rights in the Deep South, the Army had become desegregated with little fanfare.

MOSKOS & BUTLER, *supra* note 283, at 31.

Moskos and Butler divide the integration of the military into two phases: (1) organizational integration which put an end to formal discrimination in the ranks (recruitment, training, and living arrangements); and (2) leadership integration, which came after the civil rights movements of the 1960s and in which different races (particularly black) were brought into leadership roles. *Id.*

Storm, however, racial integration of the Army seemed complete, with approximately thirty percent of the Army black.<sup>286</sup>

The sociologist John Sibley Butler points out two reasons for this relatively rapid integration.<sup>287</sup> First, the institutional and hierarchical nature of the military advances integration. Because of the hierarchical structure, decisions regarding race do not have to accommodate individual interests of military personnel.<sup>288</sup> Rather, the institution's greater good trump personal desires.<sup>289</sup> Second, the military as a "separate community" can create its own values different from those of the society at large.<sup>290</sup> The military is a self-contained entity. An individual's values can come from within it and do not have to reflect the outside culture.<sup>291</sup> The military hierarchy

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285. The problems in the Army, however, were not just confined to race. Moskos and Butler see the many problems in the military during and after the Vietnam War (e.g., racial strife, indiscipline, "fragging" of superiors) as part of a general unraveling of the Army during that time. MOSKOS & BUTLER, *supra* note 283, at 32-3.

286. *Id.* at 32-5. There have been other studies to indicate that racial problems remain. In 1994, the House Armed Services Committee Task Force on Equality of Treatment and Opportunity in the Armed Services provided a report on the equal opportunity climate in the military. According to the task force report, its findings comprised "a complex web of good news and bad news." While only one of nineteen military installations reported a high level of racial tension, at nearly every facility minority members expressed concerns. Specifically, concerns about "disproportionate discipline, both in frequency and severity," the prevalence of "good old boy" networks, a fear to express racial concerns by junior leadership, and an overemphasis on sexual harassment training at the expense of training on racial issues. HOUSE ARMED SERVICES COMMITTEE STAFF TASK FORCE ON EQUALITY OF TREATMENT & OPPORTUNITY IN THE ARMED SERVICES, 103<sup>RD</sup> CONG., "AN ASSESSMENT OF RACIAL DISCRIMINATION IN THE MILITARY: A GLOBAL PERSPECTIVE" at 2-5 (1994). The North Carolina Branch of the NAACP appointed a task force to survey the racial climate at North Carolina military installations following the Fayetteville murders. The task force found no evidence of an organized white supremacist movement at the installations it visited. It did state, however, based upon anecdotal evidence, that reports of only 22 "skinheads" in the 82d Airborne Division were "unbelievably optimistic." Further, "the potential for (if not the reality of) organized racist or skinhead activities clearly exists" at Fort Bragg. NORTH CAROLINA STATE CONFERENCE OF BRANCHES, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE TASK FORCE ON COMMUNITY & MILITARY RESPONSE TO WHITE SUPREMACIST ACTIVITIES IN & AROUND MILITARY BASES, TASK FORCE REPORT 16 (1996).

287. Butler, *supra* note 283, at 44-5.

288. *Id.* According to Butler: "[A] factor interacting strongly with the separateness of military society to produce the transformation was the bureaucratic hierarchical power structure of the organization." *Id.* at 45.

289. *Id.*

290. "Although the military is a part of America and its social structure, it has traditionally been a separate entity . . . [T]he net effect of becoming a part of military organizations is to be separated from one's past life both physically, and, to an extent, psychologically." *Id.*

promoted desegregation as a value to its members and continues to promote racial integration. As a separate community, it had and continues to have the ability to create its own values. The military, therefore, transitioned to racial integration faster and continues to have fewer racial problems than civilian society.<sup>292</sup>

The institutional character of the military also helps to explain the so-called “contact hypothesis” proffered by the sociologist Samuel Stouffer in his studies of soldiers during and following World War II and which contemporary scholars still cite.<sup>293</sup> Stouffer found that, under certain conditions, the more contact individuals from different races had with each other, the more positive their attitudes toward each other would be.<sup>294</sup> The four conditions he found necessary were: (1) the authority must positively sanction the interaction; (2) the group must have commonly shared goals; (3) the contact is by individuals with equal status; and (4) the interaction must be cooperative, prolonged, and cover a wide range of activities.<sup>295</sup> These four conditions explained the relatively successful integration of the military, especially at basic entry levels. The conditions there were very controlled, as compared to the far less controlled attempts in the civilian world at large.<sup>296</sup>

In an institutional organization such as the military, the conditions that give rise to the contact hypothesis occur with greater ease. A hierarchical authority sanctions (in the case of the military, mandates) the interaction between the individuals. The goals of unit success subsume individual ones. Especially at entry level, all are the same rank, receive the same pay, and undergo the same training. Finally, as a self-contained society, the members all live together and work for sustained periods on common tasks.<sup>297</sup>

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291. *Id.*

292. One of the many contrasts between civilian and Army life for blacks, as Moskos and Butler point out, is that blacks in the Army are three times more likely to say that race relations are better than their civilian counterparts. MOSKOS & BUTLER, *supra* note 282, at 5.

293. SAMUEL STOFFER ET AL., 1 THE AMERICAN SOLDIER 549 (1949) *cited in* John Sibley Butler, *Race Relations in the Military*, in THE MILITARY: MORE THAN JUST A JOB? 120-121 (Charles C. Moskos & Frank R. Wood eds., 1988). Additional research conducted in the late 1970's supports Stouffer's hypothesis. See John Sibley Butler & Kenneth L. Wilson, *The American Soldier Revisited: Race and the Military*, 59 SOC. SCI. Q. 451-67 (1978).

294. Butler, *supra* note 293, at 121.

295. *Id.*

296. *Id.*

297. See *supra* pp. 54-7.

The reasons that justify the military as an institution and a “separate community” converge when dealing with racial extremism in the military. If the I/O thesis is tenable, then it appears that an expansion of personal liberties in an organization erodes its institutional characteristics and aligns it more with an occupation.<sup>298</sup> Yet it appears that the foundations for the military’s racial integration success is somewhat in the suppression of individual choices and rights that characterize an institution.<sup>299</sup>

If the institution’s goal is racial integration, then in regard to decision making over race, the organization’s needs and desires will take precedence over an individual’s desires.<sup>300</sup> Furthermore, the organization will not only sanction but mandate racial interaction to achieve common goals. Especially at the entry level, the organization will provide a total system wherein the members will work and live together for sustained periods and learn the same values.<sup>301</sup> On the other hand, if the institution’s goal is integration, but its policy is tolerant of racial extremism, the policy will tend to pull the organization toward the “occupational” end of the spectrum. In a policy relatively “tolerant” of racial extremism, an individual’s autonomous desires (e.g., racial supremacy or separatism) take precedence over the organization’s. The organization tolerates to a greater degree certain blatantly anti-institutional ideas, such as racial or ethnic prejudice, thus creating an alternative set of values from the institution itself.

The I/O thesis assists to conceptualize the “separate community” doctrine. It helps to justify deference to both the Army’s extremist policy and a particular commander’s applications of that policy. But an “institution” or “occupation” is neither good nor bad in and of itself. An institution can have goals and foster values that many may consider immoral or unjust. Furthermore, the American military operates within democratic traditions that stress individual rights, and these rights do not disappear when one enters the military.<sup>302</sup> Thus, a commander does not have unlimited deference. He can defend an extremist policy on the idea that the Army is a “separate community” and an institution. He can stress the need for command authority and the ability to sanction anti-institutional behavior. First Amendment concerns, however, still exist and create a tension with this idea of deference.

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298. *See supra* pp. 56-57.

299. *See supra* pp. 57-9.

300. *See supra* p. 59.

301. *See supra* p. 59.

302. *See supra* note 209.

## B. Two First Amendment Concerns

The previous section demonstrates why the Supreme Court should defer, as it generally does in other military areas, to the Army's policy on extremism. Two remaining questions, however, have possible constitutional ramifications.

First, what if a commander decides to prohibit a particular *type* of extremist speech or speech-related conduct? In *Goldman v. Weinberger*<sup>303</sup> and *Greer v. Spock*,<sup>304</sup> the Court deferred to military policies that focused on a broader range of speech/conduct rather than particular, partisan forms of communication.<sup>305</sup> The Army extremist policy, on the other hand, focuses specifically on extremist activity and organizations. It especially focuses on those advocating gender and racial and ethnic intolerance.<sup>306</sup> The policy allows commanders wide latitude to prohibit expressions of those forms of extremism. Second, where does a commander cross constitutional boundaries by issuing an order that is so general that it may be vague and with only an ambiguous link to good order and discipline? Even with judicial deference, a policy or command order must not be vague or ambiguous.

To answer these questions, this article will first analyze the policy in light of the Supreme Court's holding in *R.A.V. v. City of St. Paul*<sup>307</sup> on "viewpoint-based" discrimination. Second, the article will discuss military courts' decisions on invalid orders and examine *Parker v. Levy*,<sup>308</sup> the Supreme Court's ruling on vague speech in the military.

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303. 457 U.S. 503 (1986).

304. 424 U.S. 828 (1976).

305. In *Goldman*, the Court stated: "The Air Force has drawn the line essentially between religious apparel that is visible and that which is not, and we hold that those portions of the regulations challenged here reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity." *Goldman*, 457 U.S. at 509. In *Greer*, the policy in question prohibited the distribution or displaying "of any publication, including newspapers, magazines, handbills, flyers, circulars, pamphlets or other writings, issued, published or otherwise prepared by any person, persons, agency or agencies . . . on the Fort Dix Military Reservation without prior written approval of the Adjutant General, this headquarters." *Greer*, 424 U.S. at 831 (emphasis added). As the Court stated in *Thorne v. Department of Defense*, a case involving the military's "don't ask, don't tell" homosexual policy: "No case has explicitly defined the appropriate level of scrutiny to be applied in content based restriction on speech in the military context." *Thorne v. Dep't of Defense*, 916 F. Supp. 1358, 1369 (E.D. Va. 1996).

306. AR 600-20, para. 4-12 (new policy), *supra* note 33, para. 4-12C.2.C.

307. 505 U.S. 377 (1992).

308. 417 U.S. 733 (1974).



1. "Viewpoint" Discrimination in Extremist Policy<sup>309</sup>

The Supreme Court has held that the Constitution protects a whole range of speech-related conduct beyond oral and written communication.<sup>310</sup> Statutory prohibitions, however, on speech-related conduct continue to exist.<sup>311</sup> The Supreme Court limited these prohibitions in *R.A.V. v. City of St. Paul*.<sup>312</sup> In *R.A.V.*, a St. Paul, Minnesota ordinance prohibited the willful or negligent display of symbols such as Nazi swastikas and burning crosses for the purposes of arousing anger, alarm, or fear in others on the basis of "race, creed, color, or gender."<sup>313</sup> Writing for the court, Justice Scalia stated that the ordinance was "viewpoint-based discrimination" and, hence, unconstitutional.<sup>314</sup>

The lower court in *R.A.V.* held the ordinance constitutional, relying on the doctrine in *Chaplinsky v. New Hampshire*.<sup>315</sup> In *Chaplinsky*, the Supreme Court upheld a statute that prohibited so-called "fighting

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309. In examining the current law regarding hate speech, this article acknowledges that the "absolutist" protections afforded by the Supreme Court to forms of hate speech derive from cases decided during and immediately after World War II that marked the "birth of a national policy on hate speech." Walker, *supra* note 229, at 76. The most important cases decided by the Court during this time involved the rights of Jehovah's Witnesses to distribute literature and promulgate views considered offensive, and not to have to salute or pledge allegiance to the flag. See *Lovell v. Griffin*, 303 U.S. 444 (1938); *Schneider v. Irvington*, 308 U.S. 147 (1938); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Prior to these series of cases, the Supreme Court took a much less absolutist view of the protections afforded to offensive speech under the First Amendment. See Walker, *supra* note 229, pp. 1-49 (reviewing the Supreme Court positions prior to World War II).

310. These include, for example, the right: to hold conventions (*Keefe v. Library of Congress*, 777 F.2d 1573 (D.C. Cir. 1985)); to canvas in political elections (*Hynes v. Mayor of Ordell*, 425 U.S. 610, 616-17 (1976)); to contribute money to political causes (*Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, Ca.*, 454 U.S. 290, 298 (1981)); to solicit for money for political or other causes (*Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 797 (1984)); to distribute literature (*United States v. Grace*, 461 U.S. 171, 176 (1983)); to picket (*Carey v. Brown*, 447 U.S. 455, 460 (1980)); and to hold peaceful demonstrations (*NAACP v. Claiborne Hardware*, 458 U.S. 866, 927 (1982)).

311. Seventeen states, for example, have so-called "anti-mask" statutes that prohibit the wearing of masks, hoods, and disguises in public areas or on the private property of others without permission. These laws were passed following the advent of the Ku Klux Klan in the early 20<sup>th</sup> Century. Jeannine Bell, *Policing Hatred: Police Bias Units and the Construction of Hate Crimes*, 2 MICH. J. OF RACE & L. 421, 430-1 (1991).

312. 505 U.S. at 377.

313. *Id.* at 381.

314. *Id.*

words.”<sup>316</sup> In *R.A.V.*, the Supreme Court accepted the lower court’s determination that the ordinance applied only to expressions considered to be so called “fighting words.”<sup>317</sup> Justice Scalia, however, stated that the St. Paul ordinance was unconstitutional because it “prohibits otherwise permitted speech solely on the basis of the subject the speech addresses.”<sup>318</sup> The First Amendment does not permit “content discrimination” that bans only certain “fighting words” of a particular viewpoint.<sup>319</sup> Scalia distinguished such “viewpoint”-based speech prohibitions from other prohibitions upheld as constitutional:

The proposition that a particular instance of speech can be proscribable on the basis of one feature (e.g., obscenity) but not on the basis of another (e.g., opposition to the city government) is commonplace, and has found application in many contexts. We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not. Similarly, we have upheld reasonable “time,

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315. 315 U.S. 568 (1942). The Supreme Court in that case upheld the statute that allowed the conviction of a Jehovah’s Witness who called a city marshal a “damned Fascist” and a “G- - d - - racketeer.” *Id.* at 569. The Court, in upholding the statute announced that such utterances “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *Id.* at 572. Such utterances, deemed “fighting words” are words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Id.*

316. *Id.* at 572.

317. *R.A.V.*, 505 U.S. at 381 (citing *Chaplinsky*, 315 U.S. at 572). The rationale behind banning fighting words was based upon the reaction they provoke. They trigger an “automatic unthinking reaction, rather than a consideration of an idea” and thus, the Court did not consider them within the realm of protected speech, since they are essentially non-communicative. *Id.* As one commentator has pointed out, however, the “fighting words” doctrine originally focused “primarily on the content of the communication without closely examining the context within which it was uttered.” LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-10 at 617 (1978). The doctrine was modified in subsequent cases in which the Supreme Court distinguished language that may provoke an unthinking reaction but, nevertheless, was the communication of an idea. In *Cohen v. California*, for example, the Court held that the words “F--- the draft” on a jacket were *not* fighting words: “One man’s vulgarity is another man’s lyric,” said Justice Douglas. *Cohen v. California*, 403 U.S. 15, 25 (1971).

318. *R.A.V.*, 505 U.S. at 377.

319. *Id.*

place, or manner” restrictions, but only if they are “justified without reference to the content of the regulated speech.”<sup>320</sup>

In the ordinance, the prohibition *only* applied to content- or viewpoint-based words or symbols. Specifically, it applied to those that aroused anger, alarm, or fear “on the basis of race, color, creed, religion, or gender.”<sup>321</sup> The ordinance did not cover other groups, such as persons of a certain political persuasion, union members, or homosexuals.<sup>322</sup> According to Scalia, “[t]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.”<sup>323</sup>

*R.A.V.* has had a significant impact on laws proscribing speech—particularly on campus speech codes and hate crime legislation.<sup>324</sup> Commentators have criticized it for being confusing,<sup>325</sup> for advancing an agenda harmful to minorities under the guise of viewpoint-discrimination analysis,<sup>326</sup> and for defying reasonable and normal legislative practice.<sup>327</sup>

*R.A.V.* has garnered admiration as well. Courts have applied it to a variety of speech across the political spectrum, from a hate crime statute<sup>328</sup>

320. *Id.* at 385.

321. *Id.*

322. *Id.* at 391.

323. *Id.*

324. Between 100-200 colleges and universities have various hate speech policies. Several of these have been modified in wake of *R.A.V.* Jonathan M. Holdowsky, Note, *Out of the Ashes of the Cross: The Legacy of R.A.V. v. City of St. Paul*, 30 N. ENG. L. REV. 1115, 1173 (1996). See *IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993) as an example of a challenge to a university hate speech policy. New Jersey’s hate crime statute was declared unconstitutional because of *R.A.V.*, and the New Jersey State Senate subsequently rewrote its hate crime bill. *State v. Vawter*, 642 A.2d 349 (N.J. 1994).

325. See Holdowsky, *supra* note 324, at 1165 (criticizing *R.A.V.*’s failure to answer whether it requires that the class of speech be proscribable before determining whether the particular law falls under an exception); Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873, 878-9 (1993) (criticizing the distinction between viewpoint and harmed based analyses as fictive).

326. See Steven H. Shiffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 CORNELL L. REV. 43 (1994).

327. “The notion that a state may not differentiate harms presented by speech, especially when the expression is not protected, contradicts the reasonable expectations that regulating objections may be pursued piecemeal under such circumstances.” Donald E. Lively, *Racist Speech Management: The High Risks of Low Achievement*, 1 VA. J. SOC. POL’Y & L. 1, 27 (1993).

to a decision by transit authorities not to run advertisements by AIDS action committees.<sup>329</sup> As opposed to more vague standards, the restriction on “viewpoint-based” discrimination, in the words of one commentator, “is a concept of real force and influence.”<sup>330</sup> The *R.A.V.* analysis forces a close inspection of speech, even presumably unprotected speech.<sup>331</sup> It also refocuses the rationale for the prohibition of that speech on the consequence of the speech, rather than the speech itself.<sup>332</sup>

*R.A.V.* creates concerns about speech and conduct prohibitions under the Army’s extremist policy. *Army Regulation 600-20*, para. 4-12 explicitly defines, in part, “extremist activity or organizations” as “ones that advocate racial, gender, or ethnic hatred or intolerance [and]; advocate, create, or engage in illegal discrimination based on race, color, sex, religion, or national origin.”<sup>333</sup> The policy then lists six explicit prohibitions.<sup>334</sup> It also permits commanders to take further action to prohibit other forms of speech and conduct.<sup>335</sup> The Army’s policy and a commander’s application of it could constitute a form of viewpoint-based prohibition, similar to the St. Paul Ordinance, since they focus on an unpopular, *particular* type of speech.

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328. See *Vawter*, 642 A.2d at 349; *State v. Sheldon*, 629 A.2d 753 (Md. 1993). State Supreme Courts in both states held that the state hate crimes statute were unconstitutional based upon *R.A.V.*

329. See AIDS Action Comm. of Mass. v. Metropolitan Boston Transp. Auth., 42 F.3d 1 (1st Cir. 1994) (Metropolitan Boston Transportation Authority’s decision not to run advertisements produced by AIDS Action Committee on the basis that they were sexually explicit was viewpoint based discrimination, given that it allowed blatantly exploitative language and photographs featuring women in sexually suggestive manner). See also *Gay & Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997) (University of Alabama’s decision not to fund gay/lesbian groups because sodomy was illegal under Alabama was viewpoint based discrimination).

330. “[A]s opposed to “rational relation” tests “rarely failed by the most outlandish law.” George G. Size & Glenn R. Britton, *Is There Hate Speech?: R.A.V. and Mitchell in the Context of First Amendment Jurisprudence*, 21 OHIO N.U. L. REV., 913, 924 (1995).

331. Edward J. Eberle, *Hate Speech, Offensive Speech, and Public Discourse in America*, 29 WAKE FOREST L. REV. 1135, 1152-3 (1994). Eberle lists three important functions of *R.A.V.*: (1) the method serves as a valuable tool for close inspection of what speech should be protected; (2) it serves as a tool for applying the First Amendment even in presumably unprotected areas; and (3) it forces judges, prosecutors, and lawmakers to focus on what is relevant and worth protecting under the First Amendment. *Id.*

332. *Id.*

333. AR 600-20, para. 4-12 (new policy), *supra* note 33, para. 4-12C.2.A.

334. *Id.* para. 4-12C.2.

335. *Id.* para. 4-12C.2.C.

There are two responses to this challenge, apart from the Court's deference to military policy. The first response is the Army's general policy itself; the policy does not exclusively select particular viewpoints. *Army Regulation 600-20* has a *third* definition of "extremist activity and organizations." It defines these organizations and/or activities as those that "advocate the use of [force] or use force or violence or unlawful means to deprive individuals of their rights under the United States Constitution or the laws of the United States, or any state, by unlawful means."<sup>336</sup>

The focus of this definition is on racial, ethnic, religious, and gender intolerance. This does not mean the policy excludes other forms of extremism. The policy could potentially include extremists of *any* political affiliation if they use or advocate violence or "unlawful means" to deprive others of rights under the Constitution, or federal and state laws.<sup>337</sup> This third definition is broad enough to encompass a much greater range of speech-related conduct than the *R.A.V.* ordinance. For example, gangs whose motivation appears to be to fight other gangs (for example, SHARPs) could be considered "extremist" since they advocate or use violence against racist skinheads.

The second response concerns specific applications of the policy. The Supreme Court has held that even viewpoint-based restrictions, in certain contexts, are constitutional. Specifically, the First Amendment permits regulating airline advertising,<sup>338</sup> banning the promotion of casino gambling,<sup>339</sup> and prohibiting adult movie theatres in certain residential areas.<sup>340</sup> In each of these cases, the statute or ordinance focused on a select class (airlines, casino owners, and adult theatre proprietors) and proscribed their speech or speech-related conduct. In *R.A.V.*, Justice Scalia provides bases for such restrictions.<sup>341</sup> The relevant basis for purposes of the Army's extremist policy concerns speech's "secondary effects." If the restriction of the speech is justified "without reference to the speech," but in reference to its effects, the restriction can be upheld.<sup>342</sup>

What constitutes a "secondary effect" is somewhat contextual. The Supreme Court does require more than the "emotive impact" of the speech on the listener.<sup>343</sup> The speech must have another impact.<sup>344</sup> In *R.A.V.*, Scalia used two examples. First, a state could prohibit only those obscene live

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336. *Id.* para. 4-12C.2.A.

337. *Id.*

338. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992).

339. *Posodovs v. Puerto Rico Assoc.*, 478 U.S. 328 (1995).

340. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

performances involving minors.<sup>345</sup> Second, a law could prohibit sexually

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341. The first basis for an exception is when the reason for the discrimination is the same reason that the “entire class of speech is proscribable.” Therefore, the federal government can single out threats against the President and make them illegal *because* such threats when against the President have “special force.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992). The second basis is that the “secondary effect” of the speech is the rationale for the restriction, not the content of the speech itself. *Id.* at 388. Scalia leaves open the possibility for other bases as well: “[I]t may not even be necessary to identify any “neutral” basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot.” *Id.* at 390. For purposes of examining the Army’s extremist policy, this article focuses on the “secondary effects” rationale as the basis that provides justifications for the policy and local implementations of it. Analyzing speech proscriptions under this rationale focuses on “effects.” In the military context, this is easily explained in terms of impact on morale and good order and discipline. While it is possible to examine extremism, and in particular white supremacism, in relation to the “entire class” rationale, it is more conceptually difficult because the focus is not on easily understood ideas such as good order and discipline but more on the nature of the proscribed speech itself.

342. *R.A.V.*, 505 U.S. at 389. See *Renton*, 475 U.S. at 48. In *Renton*, the Supreme Court sustained a municipal ordinance prohibiting adult theaters within a thousand feet of schools, parks, churches, and residential neighborhoods. *Renton* focused on the “secondary effects” of such theaters: uniquely among businesses, created negative economic consequences in communities where they were present. *Id.* at 48-9.

343. *R.A.V.*, 505 U.S. at 394. Thus, St. Paul’s argument that the ordinance intended to protect minority victimization failed because it focused on victim’s reactions. See *Thorne v. Department of Defense*, 916 F. Supp. 1358 (E.D. Va. 1996).

344. *R.A.V.*, 505 U.S. at 389. The Supreme Court discussed this in *Boos v. Berry*. In *Boos*, the Supreme Court held unconstitutional a District of Columbia code provision that prohibited the display of any sign within 500 feet of a foreign embassy if the sign tended to bring that government into “public odium” or “public disrepute.” *Boos v. Berry*, 485 U.S. 312, 315 (1988). The Court rejected the “secondary effects” argument brought by the District of Columbia (“our international law obligation to shield diplomats from speech that offends their dignity”). Justice O’Connor discussed the doctrine as follows:

To take an example close to *Renton*, if the ordinance there was justified by the city’s desire to prevent the psychological damage it felt was associated with adult movies, then analysis of the measure as a content-based statute would have been appropriate. The hypothetical regulation targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech.

*Id.* at 321. For an application of the “secondary effects” rationale to the military, see *Thorne*, 916 F. Supp. at 1361. In that case, the court rejected the argument that the “don’t ask, don’t tell” military homosexual policy is not aimed at the speech but at the speech’s secondary effects, based upon the disruption to “unit cohesion.” “This argument is unpersuasive, it stretches the ‘secondary effects doctrine’ too far.” The court did not indicate why the argument stretches the doctrine “too far,” but rather cited other cases as examples of the Supreme Court refusing to apply the doctrine. *Id.* at 1368.

derogatory words that also violate Title VII's general prohibition against sexual discrimination in employment practices.<sup>346</sup> In both cases, the focus is not on the speech and conduct, but its effects. The proscriptions' purposes are not to ban speech, but to protect children and prevent illegal sex discrimination.

The secondary effect doctrine may appear limited concerning so-called hate crimes and hate speech legislation. States have been unsuccessful basing such statutes on secondary consequences.<sup>347</sup> Rather, in order to avoid the *R.A.V.* viewpoint discrimination analysis, some states have drafted (or redrafted) their statutes. These new statutes do not focus on viewpoints. Instead, they are neutral proscriptions focusing on threats or acts of violence.<sup>348</sup>

If *R.A.V.* required content neutral proscriptions in statutes, it would void much hate crime legislation; but *R.A.V.* does not require this.<sup>349</sup> At least one state court cited the "secondary effects" doctrine in upholding hate crime statutes.<sup>350</sup> The tenability of the secondary effect doctrine to hate crimes has special relevance to the Army's extremist policy and its

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345. *Id.*

346. *Id.*

347. In *State v. Sheldon*, Maryland argued that the prohibition on cross-burning aimed at the secondary effect of fire hazards to property owners. The Maryland Supreme Court rejected this argument. The court noted that the legislative history of the statute did not aim to protect against fire hazards, rather that the State clearly looked to prohibit the "primary effect" of cross burning, "the political idea it expresses." *State v. Sheldon*, 629 A.2d 753, 761 (Md. 1993).

348. Richard J. Williams, Jr., Comment, *Burning Crosses and Blazing Words: Hate Speech and the Supreme Court's Free Speech Clause Jurisprudence*, 5 SETON HALL CONST. L.J. 609, 662-3 (1995). New Jersey's statutes in this area are a good example of viewpoint based proscriptions redrafted to viewpoint neutral ones. One of the original statutes stated that:

A person is guilty of a crime . . . if he purposely, knowingly, or recklessly puts or attempts to put another in fear of bodily violence by placing on public or private property a symbol, an object, a characterization, appellation or graffiti that exposes another to threats of violence, contempt or hatred on the basis of race, color, creed, or religion, including, but not limited to a burning cross or Nazi swastika.

N.J. STAT. ANN. § 2C:17-3 (West 1996).

Following *State v. Vawter*, the New Jersey legislature passed a new statute with the same language except removing the phrase "contempt or hatred on the basis of race, color, creed, or religion, including, but not limited to a burning cross or Nazi swastika." *Id.* § 2C:33-11.

applications. If the Army could not proscribe speech or activity regarding specific groups, it would essentially have no viable extremist policy. In fact, a commander would have to create a unit policy so broad and indefinite in its meaning as to be vague or invalid.

It may appear that in most cases, one can easily identify extremist speech or activity and thus its secondary effect. But other cases may be more ambiguous. In certain cases, it could be argued that one person's extremist symbol is another's symbol of honor and pride. In such cases, the secondary effect doctrine may help clarify the issue for a commander.

The following is an example of *R.A.V.* analysis and the secondary effect doctrine in a military context. Relying on the command authority language in the Army's extremist policy,<sup>351</sup> an infantry brigade commander prohibits soldiers from displaying Confederate flags or regalia on the walls in their barracks rooms, even if the flags or regalia cannot be viewed from outside the rooms. The commander has thus proscribed a particular "viewpoint." He prohibited no other form of speech or speech-related conduct—soldiers can display other flags or regalia. The unit has no reported racial problems. No reported extremist activity has occurred on the post. Soldiers who displayed the flags and regalia claim that they did it not for white supremacist or racist reasons, but to express their Southern heritage, and within the privacy of their rooms. The commander's

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349. Nowhere in the opinion does Scalia state that St. Paul had to make the proscribed language a threat of violence or other criminal activity. According to one commentator, this is a flaw of *R.A.V.* "[I]ts failure to identify a particularly intolerable mode of communication such as threats of violence or intimidation" that might be utilized as a basis for justifying content—or viewpoint—based discriminations on speech and speech-related conduct. Williams, *supra* note 347, at 650.

350. See, e.g., *People v. Stephen S.*, 31 Cal. Rptr. 2d 644, 648 (Ct. App. 1994). In that case, the California Appellate Court stated that the hate crimes statute proscribed targeted cross burning on one's private property, since the focus was on the "infliction upon a specific victim of immediate fear and intimidation and a threat of specific harm—rather than the racist message conveyed." *Id.*

351.

Commanders have the authority to prohibit military personnel from engaging in . . . activities that the commander determines will adversely affect good order and discipline within the command. This includes, but is not limited to, the authority to order the removal of symbols, flags, posters, or other displays from barracks . . .

AR 600-20, para. 4-12 (new policy), *supra* note 33, para. 4-12C.2.C.



response is that he fears that the flags would offend other soldiers, in particular black soldiers.

A commander has authority to proscribe speech and activities, but the proscription in this example is clearly viewpoint-based. The commander expressly prohibited the speech because of its emotive impact on others. He cannot rely on that emotive impact as a “secondary effect” that could otherwise justify the policy.<sup>352</sup> Furthermore, the soldiers who display the flags claim that they do not advocate white supremacy or racial extremism. Therefore, they consider it an arbitrary exercise of command authority, with a dubious connection to the Army policy. One may argue that the judiciary gives a commander great deference in establishing policies for his unit. This is indeed true, but the basis for that deference is the commander’s need for good order and discipline. Here, the commander has made no argument that unit discipline is affected.<sup>353</sup> His concern is about offending individual sensibilities.<sup>354</sup>

Change the facts in the above example. The infantry brigade is on alert. A soldier in the brigade has made an equal opportunity complaint claiming that his company chain-of-command is racist. A fight between a black soldier and a white soldier occurred in the barracks. It appears racially motivated. Soldiers have seen white supremacist recruiting posters displaying the Confederate flag around post. The commander has noticed what he considers a dangerous racial polarization proceeding in his unit. In this particular context, a commander issues an order similar to the one above. Here, however, his concern is not individual sensibilities, but

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352. For purposes of analytical clarity in the example above, this article leaves out the idea of judicial deference discussed earlier in this paper. *See supra* pp. 41-61 and accompanying notes. Judicial deference is, of course, a major concept that would factor into any analysis regarding the legality of a military policy. Yet if the commander can only provide as his rationale a desire not to offend sensibilities of other soldiers, then the commander has not articulated the very reason for deference—the need for order and discipline so a unit can be combat effective.

353. Of course, a commander *can always* make the “good order and discipline” argument. The problem arises, however, when the definition of what good order and discipline is not statutorily imposed (e.g., disobedience or disrespect to a superior commissioned officer), but reliant on the individual commander. This article discusses the limits of such authority later. *See infra* pp. 72-5. If, on the other hand, the offending of sensibilities were *statutorily* proscribed, that would in itself qualify as a “secondary effect” under *R.A.V.* Justice Scalia cites the example of sexually derogatory language that “may produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices, 42 U.S.C. §2000e-2; 29 C.F.R. §1604.11 (1991).” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992). In the example above, a Title VII argument has little force because the commander’s prohibition extends beyond the workplace to soldiers’ barracks rooms.

the “secondary effect” on good order and discipline in his unit. He can articulate a powerful rationale for prohibiting the speech. His action, strongly linked to preserving good order and discipline, deserves judicial deference.<sup>355</sup>

These examples illustrate that *R.A.V.*’s “secondary effect” doctrine actually provides some clarity to the Army’s extremist policy and its specific implementation by commanders. The judiciary gives the military and its commanders great deference in policymaking, and the extremist policy gives a commander great discretion in restricting extremist speech and conduct.

Yet, *R.A.V.* forces a commander to articulate the impact of the viewpoint-based speech on good order and discipline in the unit. If he can only articulate that impact primarily in terms of offending sensibilities, then there is no underlying rationale for judicial deference to the commander’s discretion.<sup>356</sup> In section IV.C, this article proposes a method to assist a commander to articulate that impact.<sup>357</sup>

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354. In their book, *All That We Can Be*, Charles Moskos and John Sibley Butler discuss why the military does not have explicit “hate speech” criminal codes:

In short, the military code seeks only to limit utterances likely to undermine good order and discipline, not to deal with statements that hurt feelings or cause outrage. Regulations narrowly drawn to regulate disruptive conduct—not its symbolic content—have credibility and authority not usually enjoyed by promulgators of university anti-hate codes, for example. At the same time, since the Army does not assume responsibility for protecting Afro-Americans from all racial slights and hard feelings, its codes presume that black soldiers possess an implicit fortitude and self-control.

MOSKOS & BUTLER, *supra* note 249, at 53.

Moskos and Butler point out that this more limited approach is the result of many factors, among them that blacks in the Army trust the superiors much more than their civilian counterparts trust their civilian superiors. Also, the strong presence of black leadership in Army units, particularly at the senior NCO level. *Id.* at 53-6. The important point is to ensure the policy focuses on the mission at hand, which is unit combat effectiveness. “The Army treats race relations as a means to readiness and combat effectiveness—not as an end to itself.” *Id.* at 53.

355. This article makes the contrasts in these two scenarios sharp to illustrate the application of *R.A.V.* analysis in a military setting.

356. While the Supreme Court case has not made rationality the standard of review for command policy, in the most deferential holding, *Goldman v. Weinberger*, the Court held that the policy regarding the wear of religious garb could be upheld in part because the Air Force asserted a rational basis for it. *Goldman v. Weinberger*, 475 U.S. 503 (1986).

2. *Illegal Orders, Vagueness, and the Extremist Policy*

If *R.A.V.* creates an “inner” boundary, is there an “outer” boundary as well? In other words, might a commander issue a local policy, order, or regulation that is so vague and so tenuously connected to good order and discipline that it is unconstitutional or illegal? Part IV of the *Manual for Courts-Martial* sets forth the standard for an order’s legality:

The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs . . . . Disobedience of an order which has for its sole object the attainment of some private end, or which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under the article.<sup>358</sup>

Hence, a military court held that orders are invalid if they only “tangentially further a military objective, are excessively broad in scope, are arbitrary and capricious, or needlessly abridge a personal right.”<sup>359</sup> Another military court held that a policy was unlawful, stating that no soldier could have any alcohol in his system or on his breath during duty.<sup>360</sup> Other examples of unlawful orders include a Navy policy prohibiting loans for profit between service members without the commander’s consent,<sup>361</sup>

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357. *Infra* pp. 75-8.

358. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, para. 14c(2)(a)(iii) (1998).

359. *United States v. Padgett*, 45 M.J. 320 (C.G. Ct. Crim. App., 1996) (holding that an order forbidding the accused to have any contact with a fourteen year old girl with whom he was allegedly romantically linked was unlawful). The court noted that a primary reason that it found the order unlawful was that the nature of the relationship was unclear. *Id.* at 522. It further stated:

[W]e wish to make clear that an order which effectively requires a service member to cease all contact with another individual is not, per se, patently illegal. As long as such an order furthers the valid military purposes of maintaining good order and discipline and/or protecting the well-being of unit members, such orders will be upheld.

*Id.*

360. *United States v. Green*, 22 M.J. 711 (A.C.M.R. 1986).

“no contact” orders,<sup>362</sup> and an order to file complete personal business reports with a commander.<sup>363</sup>

These cases propose that orders that are tenuous to good order and discipline can be unlawful. Based on these cases, a court might invalidate an unclear extremist order. What would be the test for an unclear policy (that had the effect of an order) on extremism? The Supreme Court case, *Parker v. Levy*, sets forth the test.<sup>364</sup>

Captain Howard Levy was an Army physician stationed at Fort Jackson, South Carolina during the Vietnam War.<sup>365</sup> Levy disobeyed the hospital commandant’s order to train Special Forces soldiers.<sup>366</sup> He also made several public statements to enlisted personnel at the post. He publicly stated that the United States should not be involved in the Vietnam War; that he would refuse to go to Vietnam if ordered to do so; that black soldiers should refuse to go to Vietnam; and that Special Forces soldiers were liars, thieves, and killers of peasants and murderers of women and children.<sup>367</sup> A general court-martial convicted Levy of disobeying the hospital commandant’s order. It also convicted him of violating UCMJ articles 133 (conduct unbecoming an officer and gentleman) and 134 (conduct prejudicial to good order and discipline) for making the public statements.<sup>368</sup>

Levy argued that the language of articles 133 and 134—“conduct prejudicial to good order and discipline” and “conduct unbecoming an officer and gentleman”—was unconstitutionally vague. The Supreme Court rejected the argument.<sup>369</sup> Justice Rehnquist noted that the Supreme Court had on prior occasions voided statutes because they “contained no standard

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361. *United States v. Smith*, 1 M.J. 156 (C.M.A. 1975).

362. *United States v. Flynn*, 34 M.J. 1183 (1992) (order to cease contact with female airman involved in suspected fraternization invalid); *United States v. Button*, 31 M.J. 897 (A.F.C.M.R. 1990) (order to accused to stay away from family quarters and to have no contact with stepdaughter invalid); *United States v. Wine*, 28 M.J. 688, 690 (A.F.C.M.R. 1990) (order to have no contact with dependent wife of another service member invalid); *United States v. Wyson*, 26 C.M.R. 29 (1958) (order not to speak with other soldiers in company involved in an investigation except in the line of duty invalid).

363. *United States v. Milldebrandt*, 25 C.M.R. 139 (1958).

364. *Parker v. Levy*, 417 U.S. 733 (1974). For an historical as well as legal review of the court-martial, see Robert N. Strassfield, *Vietnam War on Trial: The Court-Martial of Dr. Howard B. Levy*, 1994 Wisc. L. Rev. 839 (1994).

365. *Parker*, 417 U.S. at 733.

366. *Id.*

367. *Id.*

368. *Id.*

whatever by which criminality could be ascertained.”<sup>370</sup> The Court did not do so in this case.

Instead, the Court ruled that because of “the factors differentiating military society from civilian society[,] . . .” the standard for “a vagueness challenge to the articles of the Code is the standard which applies to criminal statutes regulating economic affairs.”<sup>371</sup> This meant that Levy could not challenge the articles in terms of hypothetical conduct, but only in light of his own conduct. Because he “could have no reasonable doubt” that his conduct was both unbecoming an officer and prejudicial to good order and discipline, his argument that the articles were vague failed.<sup>372</sup>

While *Parker v. Levy* establishes a standard to evaluate vague speech in the military, it does so in an unusual set of facts. Levy told soldiers not to go to war; he directly disobeyed an order from his superior to train soldiers for combat operations; and he openly disparaged soldiers engaged in combat as war criminals.<sup>373</sup> One can scarcely imagine a more egregious speech-related threat to good order and discipline. While it may have seemed obvious that Levy should have known what he did prejudiced good order and discipline, it may not be so clear in other contexts. How can a commander develop an extremist policy that is within the boundaries of the test set forth in *Parker v. Levy*?

The following example will help clarify the answer to this question. A division commander, after hearing about possible problems regarding extremists, issues the following order: No soldier will participate in any

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369. *Id.* at 755-7. Levy also contended that articles 133 and 134 were “overbroad.” The Supreme Court rejected Levy’s position on this issue as well. Writing for the Court, Justice Rehnquist stated that the “necessity for obedience, and the consequent necessity for imposition of discipline” could permit “imprecise language” even if that language pertained to “conduct which would be ultimately held to be protected by the First Amendment.” *Id.* at 760.

370. *Id.* at 755.

371. *Id.* at 756.

372. The standard for statutes regulating economic affairs was set forth in *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32-33 (1963). In that case, National Dairy Products was charged with violating section 3 of the Robinson-Patnam Act, which made it illegal to sell products at “unreasonably low costs for the purposes of destroying the competition.” *Id.* The Supreme Court rejected National Dairy Product’s argument that the statute was facially void. National Dairy Products could not challenge the statute hypothetically but only in terms of its own conduct. Given the language of the Act and past federal legislation, it knew or should have known its actions were violative of the Act. *Id.* at 29-34.

373. *Parker*, 417 U.S. at 733.

extremist meeting while off-duty and off-post. One division soldier attends a Ku Klux Klan rally and, while there, makes a statement supporting the Ku Klux Klan. Another soldier attends a meeting of a state militia group that is strongly anti-government and is rumored to have ties with white supremacist organizations.

The commander can clearly punish the soldier who attends the Klan rally, and that soldier cannot successfully argue that the order is vague.<sup>374</sup> It seems reasonable to assume that he should have known attending a Klan rally and speaking there violated the order. The second soldier has a stronger argument against punishment. He contends that the organization is not extremist under the extremist policy's definition—it does not advocate racial, ethnic, or religious intolerance, nor does it advocate violence. Furthermore, he claims he simply attended the meeting as an observer and did not speak, donate money, or offer to perform any functions for the organization. In the case of this particular soldier, it appears that the commander's order was vague and thus invalid. The order has the desired effect of prohibiting soldiers from attending extremist meetings as defined in the Army regulation, but may be invalidly vague.

### C. A Proposed Method

*Army Regulation 600-20* gives great authority to a commander to prohibit behavior and to create policy—an authority traditionally and appropriately given judicial deference. This article submits that the boundaries for that authority are set in *R.A.V.* and *Parker v. Levy*.<sup>375</sup> Therefore, this article proposes a method to create a policy that addresses both the granted authority as well as its limitations.

This method helps a commander articulate his rationale in terms of effect on unit good order and discipline. It helps to ensure that the policy does not penetrate *R.A.V.*'s inner boundary of protected viewpoint speech by focusing on the speech or speech-related conduct's "secondary effects." It also ensures that the policy does not exceed the outer boundary of *Parker v. Levy*'s test for vagueness. It also serves a practical purpose of ensuring

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374. See *supra* pp. 72-73 and accompanying notes.

375. The abolition of the "passive/active" participation distinction in the Army's old policy did away with one possible model for guidance, however flawed. AR 600-20, para. 4-12 (old policy), *supra* note 147, paras. 4-12a.-b.

the policy is not simply an arbitrary and unfair double standard, so soldiers will not complain: "Why ban our symbols/flags/posters but not theirs?"

What is proposed is a checklist of factors, along the lines of those established in the case of *Relford v. Commandant*.<sup>376</sup> In *Relford*, the Supreme Court articulated a series of factors for military courts to analyze to determine whether there is service member jurisdiction.<sup>377</sup> The purpose of such factors is to link the punishable conduct with its impact on good order and discipline, and thereby create "service-connection."<sup>378</sup>

While *Relford* factors are no longer relevant to determine jurisdiction after *Solorio*,<sup>379</sup> the method remains sound. The best way to show impact upon good order and discipline is to identify the conduct and show its impact. A commander can do this by looking at the conduct in its totality; a list of factors is the easiest and most efficient way to identify the conduct and its impact.

The factors are arranged in two groups. The first group deals with preliminary factual questions; the second concerns command policy determinations because of those factual questions. The first four factors are:

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376. 401 U.S. 355 (1971).

377. *Id.* *Relford* was decided in the wake of the Supreme Court's establishment of service connection for court-martial jurisdiction in *O'Callahan v. Parker*. See *supra* p. 56 and note 274. The Court listed the factors as:

- (1) The serviceman's proper absence from the base;
- (2) The crime's commission away from the base;
- (3) Its commission at a place not under military control;
- (4) Its commission within our territorial limits and not in an occupied zone of a foreign country;
- (5) Its commission in peacetime and its being unrelated to authority stemming from the war power;
- (6) The absence of any connection between the defendant's military duties and the crime;
- (7) The victim's not being engaged in the performance of any duty relating to the military;
- (8) The presence and availability of a civilian court in which the case can be prosecuted;
- (9) The absence of any flouting of military authority;
- (10) The absence of any threat to a military post;
- (11) The absence of any violation of military property; and
- (12) The offense's being among those traditionally prosecuted in civilian courts.

*Relford*, 401 U.S. at 365.

378. *Relford*, 401 U.S. at 365.

379. *Solorio v. United States*, 438 U.S. 435 (1987). See *supra* p. 57.

- (1) Does the extremist speech/conduct to be proscribed openly challenge military authority/policy (for example, directly attack Army regulations/policy on race relations, attack a unit chain-of-command, or attempt to discredit particular leaders)?
- (2) Is it connected to an actual or possible credible threat of extremist activity in the area (based upon, for example, Criminal Investigative Command (CID)/local law enforcement investigations)?
- (3) Have there been racial/ethnic or similar type disturbances/complaints in the unit?
- (4) What is the status of the unit (e.g., deployed, in training, on alert)?

With these four factual questions answered, they form the basis for answering the remaining command policy questions:

- (5) Should the (policy/order/regulation) single out a particular extremist viewpoint to be proscribed?
- (6) If not, how broad should the proscriptive language in the (policy/order/regulation) be?
- (7) Should the (policy/order/regulation) extend off-post as well as on-post and concern off-duty speech/conduct as well as on-duty?
- (8) How closely do any proscriptions in the (policy/order/regulation) conform to the prohibitions listed in *AR 600-20*, para. 4-12C.2.B.(1)-(6) as well as the command options listed in *AR 600-20*, para. C.2.B.C., D., & E?

Commanders can use this list as a template for developing local extremist policies that will withstand constitutionally based challenges. The “factual” factors (one through four) and factor five deal with the *R.A. V.* problem of viewpoint-based discrimination. They require a commander to articulate the “secondary effect” of the speech or conduct, and to demonstrate the necessity for any particular “viewpoint-based” discrimination.<sup>380</sup>

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380. See *supra* pp. 62-72 and accompanying notes.



Factors six and seven address potential problems of vagueness, addressing issues raised in *Parker v. Levy*.<sup>381</sup> Factor eight causes a commander to articulate whether his policy conforms to AR 600-20's. It thus focuses the commander on whether his own policy represents a significant departure from AR 600-20 and may, therefore, be illegal.<sup>382</sup>

As in the *Relford* factors, no one factor predominates; all factors are weighed together. Taken in totality, they help articulate the underlying constitutional rationale for the policy.<sup>383</sup> Using these factors as a template, this article next analyzes specific scenarios.<sup>384</sup>

## V. Scenarios

The following three scenarios show how the proposed method assists commanders and their attorneys in answering questions dealing with racial extremism policy.

*Scenario 1.* During a health and welfare inspection, a company commander in a Special Forces support unit discovers a copy of *Resistance*<sup>385</sup> magazine in a soldier's barracks room. *Resistance*, which based on reliable information from CID and elsewhere, is created and distributed by soldiers within Special Forces units on post. The magazine expresses disdain, among other things, for United Nations sponsored interventions in areas such as Haiti and Bosnia. It also frequently editorializes about leadership at the installation and at higher levels. When asked, the soldier admits that he subscribes to the magazine, and while not a card-carrying member of any extremist organization, he has certain sympathy to the views in the magazine.

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381. See *supra* pp. 72-75 and accompanying notes.

382. See *supra* pp. 72-73 and accompanying notes.

383. It should be stressed that this is not a "lawyer" but "command" driven decision. Commanders, not lawyers, have ultimate authority in determining any extremist policy. Some may complain that this proposed method represents another example of "lawyering"—excessive rule-creation and interference by lawyers in command prerogatives. While this article recognizes this criticism is often justifiable, in the area of extremism, official Army policy explicitly states: "Commanders should seek the advice and counsel of their legal advisor when taking actions pursuant to this policy." AR 600-20, para. 4-12 (new policy), *supra* note 32, para. 4-12C.2.F. Judge advocates need to have articulable and rationale bases for their recommendations to commanders, as do commanders themselves. The purpose of this template is to provide such a basis for both lawyers and commanders.

384. See *infra* pp. 78-86.

385. *Resistance* is a fictional magazine.

Currently the unit is not deployed but, like many other units, is at a high state of readiness for possible deployment. There have been no reported ethnic or racial disturbances connected to or associated with *Resistance* magazine. Indeed, the language of *Resistance* in its editorials disavows any sort of racism or claims of racial superiority altogether.

The commander wants to know what he can do about *Resistance* (that is, can he order soldiers not to read it?).

*Proposed Solution.* Using the eight-part method we determine that:

(1) *Resistance* openly attacks Army, or at least executive, decision making and the chain-of-command.

(2) It does not appear to be connected with any threatening extremist actions at the time.

(3) There have been no recent ethnic/racial disturbances in the unit.

(4) The unit, while not deployed, is in a high state of readiness. With these predicate factual questions answered, we move to the next factors in fashioning a policy.

(5) The rationale for singling out *Resistance* for proscription, as opposed to other forms of expression, appears at first glance to be slight. *Resistance* apparently has no “extremist” content as defined in *AR 600-20*, para. 4-12. It does not express views of racial or ethnic supremacy, but expresses a highly “anti-government” stance that is strongly critical of the chain-of-command and the Army as an institution. It is thus a highly “political” publication. How is it that different, say, from a popular paramilitary magazine such as *Soldier of Fortune*, which often editorializes disdainfully about governmental policies, particularly U.S. policies with the United Nations?

What makes it demonstrably different is that it expresses criticism for the *local chain-of-command and is apparently produced without authority by soldiers within the unit*. This, then, is the problem with the publication. Having a channel of underground dissent within a unit, which criticizes its leadership, undermines the discipline needed to make the unit combat effective. This becomes especially relevant when dealing with a unit such as the one in the scenario, that must be in a high state of readiness at all times.

(6) With this distinction in mind, if the command issues any policy at all, it should involve proscribing, in some way, *materials that are critical of the local chain-of-command and apparently produced by soldiers within the Special Forces units on post*. This focuses on the harm we are trying to prevent—not the “political content” of *Resistance*, but its undermining of good order and discipline.

(7) The next problem to resolve is the parameters of the proscription. Here, one must ask how far the proscription should extend: on- or off- duty and on- or off- post? The magazine’s criticism of the chain-of-command and that it is produced by soldiers within the command can undermine good order and discipline. Therefore, prohibiting soldiers from reading or discussing *Resistance* on-duty has a close connection to preserving good order and discipline. Soldiers are thus prevented from criticizing their chains-of-command openly among other soldiers, while on duty.

While off-duty, however, the impact of reading or discussing the magazine diminishes significantly. Soldiers are less likely to discuss it among other soldiers. They are less likely to do so in uniform or while undergoing training and taking orders from their leadership. The undermining nature of *Resistance* still exists to a certain degree while a soldier is on the installation, however, even if not on-duty. The soldier is more likely to discuss it with other soldiers on the installation, is more likely to be in uniform, and is more likely to be on his way to duty.

Allowing soldiers to disseminate such literature on the installation may give the impression of a weak and easily undermined chain-of-command that can be openly mocked or derided even in its area of control. Off the installation, however, these concerns are dramatically reduced. The soldier is less likely to be in uniform, to discuss with other soldiers, and less likely to be going to duty. Since the location is outside the installation, there is much less of an impression that the chain-of-command is weak.

(8) The final factor concerns how closely the policy conforms to prohibitions listed in *AR 600-20*, para. 4-12C.2.B.(1)-(6) as well as the command options listed in *AR 600-20*, para. C.2.B.C., D. & E. Here is where the example is most problematic, because *Resistance* magazine probably does not fall under the definitions of *AR 600-20* at all. The magazine does not have “extremist” content as defined. It is more akin to “political” speech, which the Army wants to avoid policing.<sup>386</sup>

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386. See *supra* note 42 and pp. 10-11.

The focus, however, is on the speech's undermining character—its criticisms of the chain-of-command from within the unit itself. Thus, while the speech does not fall under the definition of *AR 600-20*, the speech may be proscribed or prohibited for similar reasons.

With such a parallel in mind, three provisions in *AR 600-20* are especially relevant: (a) *AR 600-20*, paragraph 4-12C.2.B.6's prohibition on distributing literature on or off a military installation that either protes extremist causes or materially interferes with the military mission;<sup>387</sup> (b) *AR 600-20*, paragraph 4-12C.2.E's discussion of command responsibility for soldier activity, such as receipt of extremist literature;<sup>388</sup> and (c) *AR 600-20*, paragraph 4-12C.2.C's discussion of a commander's authority to remove symbols, posters, and other displays from barracks.<sup>389</sup>

*Army Regulation 600-20*, paragraph 4-12C.2.B.6 prohibits distribution, whereas *AR 600-20*, paragraph 4-12C.2.C. discusses the command taking “*positive action*” for such activities as *receipt* of literature. Thus while prohibiting *distribution* of *Resistance*, on or off the installation, and also presumably on- or off-duty, would be in conformity with the intent of the extremist policy, *receipt* of *Resistance*, appears to fall on the non-punitive side.

Taking all these factors together, it appears that limited restrictions on, not just *Resistance*, but any unauthorized, soldier-produced publications that criticize the chain-of-command are defensible. The policy could contain the following provisions:

- (a) Prohibiting distribution (selling, handing out free copies, or advertising) of unauthorized, soldier-produced publications that criticize the chain-of-command on or off the installation.
- (b) Prohibiting possession of such publications while on-duty.
- (c) Possession of such publications on the installation, to include the barracks, if not on duty should not be prohibited; however, a soldier can be ordered not to display its contents (posters or manifestoes critical of the chain-of-command) in the barracks. (Soldiers should also be reminded that “loaning” other soldiers a

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387. *AR 600-20*, para. 4-12 (new policy), *supra* note 33, para. 4-12C.2.B.6.

388. *Id.* para. 4-12C.2.E.

389. *Id.* para. 4-12C.2.C.

copy of such publications could be considered “dissemination” and thus punishable.)

*Scenario 2.* A soldier admits to his company commander that he is a white supremacist and a member of a local neo-Nazi “skinhead” organization. The soldier has no prior disciplinary record and has never been a problem in the unit. The CID and local law enforcement officials have indicated the presence of skinhead organizations in the local community that express racist views. While there have been no racial or ethnic disturbances in the unit, there have been some reports of fighting (with other skinhead groups and random violence) by skinheads. The unit is in garrison, and no “real-world” deployments are imminent.

The commander wants to know if he can take action against the soldier, to include directing the soldier not to discuss his white supremacist views with other soldiers, and if he can prevent him from attending off-post meetings of white extremists. The soldier claims he should be able to discuss what he wants with other soldiers and should be able to attend meetings and rallies if he wants.

*Proposed Solution.* Using the method, we determine that:

(1) The soldier’s *views*, non-articulated, do not violate Army policy. It is only when he *expresses* them in some format that they violate the Army extremist policy.<sup>390</sup> The focus in this particular scenario is on the expression of extremist viewpoints and the extremist viewpoints themselves.

(2) There has been reported violent activity off-post involving neo-Nazi skinheads. The soldier is a professed neo-Nazi skinhead with apparent ties to a skinhead organization off-post.

(3) There have been no racial or ethnic disturbances in the unit.

(4) The unit is in a garrison status.

(5) In this scenario, the commander is not creating unit-wide policy, but dealing with a particular soldier. The commander is dealing with one specific viewpoint—that of neo-Nazi skinheads. The commander may want

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390. *Id.* para. 4-12C.2.A. See *supra* note 195 and accompanying text.

to deal with the extremist problem in general after dealing with this particular soldier, but the issue at hand is *this* soldier. Furthermore, the commander has good cause to focus his order on this particular *expression* of viewpoint: the soldier is an admitted neo-Nazi skinhead; such skinheads have apparently caused off-post problems; and the soldier wants to attend meetings with other neo-Nazi skinheads.

The “secondary effect” rationale can be effectively stated here: any proscription of this particular soldier has a direct nexus to good order and discipline, not only given the off-post disturbances involving neo-Nazi skinheads, but also given the Army’s extremist policy prohibiting certain involvement in extremist activity.<sup>391</sup>

(6) Because the commander is dealing with one soldier who professes adherence to one particular type of extremism, the language in any order given to that soldier will, by logic, concern that particular form of extremism.

(7) Because of the off-post activity involving neo-Nazi skinheads, and because the Army policy on extremism explicitly refers to off-post activities, the commander can order the soldier to refrain from extremist activity off-post as well as on-post. Similarly, the commander can order the soldier to refrain from extremist activity off-duty as well as on-duty.

(8) Explicit prohibitions regarding extremist activity are listed in *AR 600-20*, paragraph 4-12B.2.B.(1)-(6).<sup>392</sup> Several prohibitions are applicable in this case and will define the parameters of this commander’s order.

The commander can limit the soldier’s ability to discuss extremist views and to participate in extremist events.<sup>393</sup> Specifically, the commander can order the soldier not to discuss extremist views while on-duty, or to attend the off-post rally. How is the latter restriction possible, given that *AR 600-20* prohibits attending such a meeting if “on duty, in uniform, or in a foreign country”?<sup>394</sup> The soldier could simply state that he intends to go while off-duty and not in uniform.

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391. *AR 600-20*, para. 4-12 (new policy), *supra* note 33, para. 4-12C.2.

392. *Id.* para. 4-12B.2.B.(1)-(6).

393. *Id.*

394. *Id.* para. 4-12B.2.B.2.

The answer lies in AR 600-20, paragraph 4-12C.2.C., which gives the commander authority to “order soldiers not to participate in those activities that are contrary to good order and discipline of the unit . . . .”<sup>395</sup> In this particular scenario, attending the off-post rally is more than being a member; it is activity. This soldier admits to white supremacist views. He would show public allegiance to white supremacy by attending the rally, and perhaps extremists at the rally could persuade him to recruit other soldiers.

The important point in this scenario is to look at the surrounding circumstances that will either allow or restrict a commander’s actions and orders. A blanket prohibition to all soldiers from attending such a rally would be much more difficult to sustain under the current extremist policy. The commander would be within the policy’s parameters if he articulated the rationale outlined above to prohibit this soldier’s attendance at the rally.

*Scenario 3.* A division commander wants to forbid the displaying of “any signs or symbols that may be considered offensive or in bad taste” in the barracks. A black soldier has posters that show Malcolm X and Louis Farrakhan in his barracks room. He says he displays those posters as an expression of “Black Nationalism.” There have been no complaints about the posters.

There has been reputed white supremacist activity off-post, along with alleged problems with black gangs—though white supremacists and black gang members have not clashed. There is no evidence linking the soldier to any gang activity. The company is a line infantry unit at a large installation in the United States, but is not on any alert status. The soldier’s company commander tells him to remove the poster. Other displays such as pictures of other historical figures are allowed in other rooms (for example, one soldier has a picture of Martin Luther King; another has a picture of Ronald Reagan). What is legal, appropriate action?

(1) The particular speech/conduct the commander wishes to proscribe does not directly challenge military authority or policy. The posters simply display black leaders. The soldier’s apparent intent is not “extremist” but an expression of black pride. (If the posters contained language that

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395. *Id.* para. 4-12C.2.C.

expressed views of black racial supremacy, that would change the analysis—then the displays themselves would challenge Army policy.)

(2) There is no evidence that the soldier is involved in gang activity, or in any other activity that is violent or extremist.

(3) There have been no complaints about the posters in the unit and no other racial tensions.

(4) The status of the unit is standard “training” status.

(5) The company commander’s order singles out only the pictures of Malcolm X and Louis Farrakhan, apparently deeming them offensive, whereas other pictures (the pictures of King and Reagan) are not deemed offensive. The question is whether there is ample justification to single out the Malcolm X and Louis Farrakhan pictures apart from other pictures. Using the *R.A.V.* analysis<sup>396</sup> of “secondary effect,” there does not appear to be significant justification for the removal of the Farrakhan and Malcolm X posters exclusively. Nothing indicates that the posters have a disruptive impact on the unit.

(6) Instead, a better solution would be for the company commander to create a policy and order that forbids the display of signs and symbols that are expressions of extremism as defined in *AR 600-20*, paragraph 4-12C.2.A. With that proscriptive language established, he could then order the removal of particular signs and symbols that violate the order, but only after examining such signs and symbols in light of particular circumstances. In other words, the commander could issue a non-viewpoint-based order giving him authority to prohibit extremist signs and symbols in the barracks. The question may arise as to what is “extremist”—a Confederate flag, a picture of Farrakhan? One could prohibit particular signs and symbols based upon a “secondary effect” analysis, using factors one through four of this method.<sup>397</sup>

(7) The limitation of the order would be to restrict the proscription to the soldier’s barracks rooms. Here, the presence of signs and symbols are at their most disruptive. Barracks rooms are government owned property, subject to command inspection, and accessible to other soldiers in the unit. The expectations of privacy of soldiers in such rooms is considerably

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396. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992); *see supra* pp. 62-72.

397. *See supra* p. 77.



lower than in private off-post dwellings or on-post quarters.<sup>398</sup> Therefore, the extent of such a policy would be to barracks rooms only, and not private on- or off-post quarters.

(8) Such a proscription closely conforms with a commander's authority, listed in *AR 600-20*, paragraph 4-12.C., to "order the removal of symbols, flags, posters, or other displays from barracks"<sup>399</sup> and is therefore in keeping with the intent of *AR 600-20*, paragraph 4-12.

## VI. Conclusion

This article reviewed racial extremism in the Army and the Army's policies on racial extremism, focusing on white supremacist extremism. It examined the Army's old and new policies, highlighted their differences, and then proposed arguments to justify these policies under the Constitution, specifically the First Amendment. In doing so, the article fashioned an analytical template for commanders to develop their own policies. Lastly, the article provided a series of scenarios to illustrate some of the proposed analyses and methodologies.

This article does not contend that this survey is complete; however, if a commander understands the legal standards and uses this template, that commander can create a legal policy to control racial extremists. Two considerations are key: first, good order and discipline of our fighting forces; and second, the individual rights of soldiers. Something else matters too: the right of civilians to know that their soldiers are guarding them, not planning their destruction because of their race, origin, or beliefs. The proposed method provides a balanced and rational approach that can hopefully aid commanders and their legal advisors in answering the continuing problem of extremism, especially racial extremism, in the Army.

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398. The military courts have consistently held that soldiers have a greatly reduced expectation of privacy in barracks rooms. *See, e.g.*, *United States v. Middleton*, 10 M.J. 23 (C.M.A. 1981) (no reasonable expectation of privacy during inspections); *United States v. McCarthy*, 38 M.J. 398 (C.M.A. 1993) (diminished or no expectation of privacy of airman apprehended in barracks room without authorization to apprehend from commander); *United States v. Jackson*, 48 M.J. 292 (1998) (proper inspection conducted after commander received anonymous information about soldier possessing and distributing drugs in barracks).

399. *AR 600-20*, para. 4-12 (new policy), *supra* note 33, para. 4-12C.

**THE UNITED STATES REFUSAL  
TO BAN LANDMINES:  
THE INTERSECTION BETWEEN  
TACTICS, STRATEGY, POLICY,  
AND INTERNATIONAL LAW**

CAPTAIN ANDREW C.S. EFAW<sup>1</sup>

*I rather dislike mines, and the whole damn country is full of them. We lose officers daily, mostly with legs blown off or broken.*<sup>2</sup>

Lieutenant General George S. Patton

## I. Introduction

Richard I attacked the French stronghold of Acre in 1191 using such ancient weapons as the longbow and the catapult.<sup>3</sup> The most important weapon he used, however, remains in military arsenals today: the landmine.<sup>4</sup> One ancient historian recorded that in the Battle of Acre, the most important soldiers “were the miners, making themselves a way beneath the

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2. Letter from Lieutenant General George S. Patton, Jr., II Corps Commander, to Beatrice A. Patton, wife (Mar. 15, 1943), reprinted in CARLOS D'ESTE, PATTON: A GENIUS FOR WAR 469 (1996). General Patton continues, “We have to have sand bags in the bottom of the cars. That helps some.” *Id.*

3. See JOHN HEWITT, ANCIENT ARMOUR & WEAPONS 180 (1996).

4. See *id.* See generally MIKE CROLL, THE HISTORY OF LANDMINES (1998).

ground, sapping the foundation of the walls, while soldiers bearing shields, having planted ladders, sought entrances over the ramparts.”<sup>5</sup>

At Acre, landmines were still a relatively new conception, having first appeared on the battlefield only slightly earlier that century.<sup>6</sup> Like the soldiers at Acre, the first sappers mined underneath the wall or tower of a stronghold, supporting their tunnel with pitch-smearred timbers.<sup>7</sup> They then filled the mined cavity with combustible materials and set them on fire.<sup>8</sup> The fire burned away the support timbers, causing the structure above to collapse.<sup>9</sup> In the fifteenth century, some enterprising soldier had the idea of filling a mine with gunpowder to blow up a wall or tower.<sup>10</sup> The idea worked, and explosive mines were here to stay.

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5. See HEWITT, *supra* note 3, at 180 (quoting the historian Devizes).

6. See A.V.B. NORMAN & DON POTTINGER, A HISTORY OF WAR AND WEAPONS, 449 TO 1660, at 54 (1966) (saying that landmines first appeared in the twelfth century); see also WARFARE 88 (Geoffrey Parker ed., 1995).

The terms “landmine,” “land mine,” and “land-mine” will be used interchangeably within quotations and titles in this article, as no standard usage currently predominates. Likewise, the terms “boobytrap,” “booby trap,” and “booby-trap” will be used interchangeably.

This article does not refer to sea mines or to the laws governing their use. See, e.g., Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines, 18 October 1907, 36 Stat. 2332, T.S. 541. See also CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-15, JOINT DOCTRINE FOR BARRIERS, OBSTACLES, AND MINE WARFARE I-4 to I-6 (30 June 1993) [hereinafter JP 15-3] (discussing Hague Convention VIII, the Seabed Arms Control Treaty of 1971, and the 1982 United Nations (UN) Law of the Sea Convention). This article also does not refer to aerial mines or to the laws governing their use. See NORMAN POLMAR & THOMAS B. ALLEN, WORLD WAR II 554 (1996) (defining aerial mines as those mines that were suspended from barrage balloons as air defense measures in London during World War II).

7. See HEWITT, *supra* note 3, at 181; NORMAN & POTTINGER, *supra* note 6, at 54. See generally CHRISTOPHER DUFFY, SIEGE WARFARE (1996) (describing the “burnt prop” method and tracing the history of mine warfare throughout the world); WEAPONS 228-31 (Randal Grey ed. 1990).

8. See HEWITT, *supra* note 3, at 181.

9. *Id.*

10. See *id.* at 138. See also ROBERT COWLEY & GEOFFREY PARKER, MILITARY HISTORY 427 (1996) (saying that the French developed a gunpowder mine during the 15<sup>th</sup> century that “proved surprisingly long-lived”); ROBERT L. O’CONNELL, OF MEN AND ARMS 121 (1989) (claiming that rudimentary landmines were first developed in the early 16<sup>th</sup> century).

Over the next four hundred years mines changed very little.<sup>11</sup> By the dawn of the American Civil War, landmines were still quite rudimentary. Before long, however, the Confederate military managed to develop a self-contained, and hence portable, landmine.<sup>12</sup> Some of these mines were industrially manufactured, but many were merely converted artillery shells.<sup>13</sup> Confederates would simply bury the artillery shells underground with the percussion cap facing up.<sup>14</sup> If someone were to step on the cap or a wagon rolled over it, the shell would explode.<sup>15</sup> Meanwhile, General Grant's soldiers were still mining tunnels underneath enemy positions like their brethren of arms from the previous seven centuries.<sup>16</sup> The Union engineers stuffed these mine shafts with tons of explosives and then detonated the mines beneath the unsuspecting Confederates.<sup>17</sup>

Landmines, in the modern sense of the word, have only been in use since World War I.<sup>18</sup> Yet, even in World War I, most of the mines were still improvised on the battlefield and employed to guard trenches against enemy raids.<sup>19</sup> As warfare evolved, so did the landmine. When the first tanks arrived on the battlefield, the first anti-tank mines arrived with them.<sup>20</sup> Soon the need for mass produced mines became apparent.<sup>21</sup> Research and development during World War I yielded amatol and

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11. See CHRISTOPHER DUFFY, *FIRE AND STONE* 136-43 (1975) (giving a detailed examination of mining during the eighteenth century); Jack H. McCall, Jr., *Infernal Machines and Hidden Death: International Law and Limits on the Indiscriminate Use of Land Mine Warfare*, 24 GA. J. INT'L & COMP. L. 229, 232 (1994).

12. See JEAN F. BLASHFIELD, *MINES AND MINIÉ BALLS* 48, 57 (1997) (giving the credit for mine innovations to Confederate General Gabriel Rains, head of the Torpedo Bureau); see also McCall, *supra* note 11, at 232 (citing MILTON F. PERRY, *INFERNAL MACHINES* 20-27 (1985) (saying that both naval and land mines were called "torpedoes")).

13. See BLASHFIELD, *supra* note 12, at 56; McCall, *supra* note 11, at 232.

14. See BLASHFIELD, *supra* note 12, at 56

15. See *id.*

16. The most renowned of these were the mines at Petersburg and Vicksburg. See NOAH ANDRE TRUDEAU, *THE LAST CITADEL* 98-127 (1991) (giving a detailed account of the mining in Petersburg, including excerpts from Testimony before the Official Court of Inquiry on the Mine). See also GEOFFREY PERRET, *ULYSSES S. GRANT* 340-43 (1997).

17. See PERRET, *supra* note 16, at 340-43. The use of the mine at Petersburg was tactically sound, but Union forces failed to exploit the gap in the Confederate line. *Id.*

18. See U.S. DEP'T OF ARMY, *FIELD MANUAL 5-31, USE AND INSTALLATION OF BOOBYTRAPS* 6 (31 Jan. 1956) [hereinafter FM 5-31]. This manual is no longer in use. See U.S. DEP'T OF ARMY, *PAM 25-30, CONSOLIDATED INDEX OF ARMY PUBLICATIONS AND BLANK FORMS* (1 Oct. 1997). Note that to the extent that this manual or any other military manual in this article is in opposition to an international treaty or convention to which the United States is a signatory, the treaty supersedes the manual and has the force of U.S. law. U.S. CONST. art. IV, cl. 2 (calling treaties part of "the Supreme Law of the Land"); see also U.S. DEP'T OF ARMY, *FIELD MANUAL 27-10, THE LAW OF LAND WARFARE*, para. 7b (18 July 1956).

ammunal—explosives with three times the power of gunpowder.<sup>22</sup> These explosives paved the way for the small, modern mines of today.<sup>23</sup>

In the years between World War I and World War II, the United States did little to develop mines or to train soldiers how to use them.<sup>24</sup> Only as the United States anticipated entering World War II did the U.S. military begin to develop mines as a permanent part of their arsenal and military strategy.<sup>25</sup> In North Africa, Americans first experienced the devastating impact that mines could wreak upon a battlefield. There, minefields derailed several Allied armor attacks<sup>26</sup> and proved effective again in Europe as the German Wehrmacht used mines to halt Allied mechanized attacks.<sup>27</sup>

Today,<sup>28</sup> landmines are much more complicated than their historical forebears are, but they still can be separated into two simple categories: anti-personnel and anti-tank.<sup>29</sup> Anti-personnel landmines, as defined by international law, are “mine[s] primarily designed to be exploded by the

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19. See FM 5-31, *supra* note 18, at 6. Some of the mines in WW I were still of the 15<sup>th</sup> century variety. See JAY WINTER & BLAINE BAGGETT, *THE GREAT WAR* (1996). Nineteen of these mines were buried over the course of eighteen months on the Messines Ridge at Ypres, and then detonated at once. *Id.* The detonation of the Beaumont-Hamel mine under the German front line started the Battle of Somme. *Id.* The mine was simply a tunnel stuffed with almost one million pounds of amatol; the resulting explosion was heard in both Paris and London. *Id.*

20. See FM 5-31, *supra* note 18, at 6.

21. See *id.*; John Owen, *Mines*, in BRASSEY'S *INFANTRY WEAPONS OF THE WORLD 1950-1975*, at 242 (Major General J.I.H. Owen, O.B.E., late Royal Marines ed. 1975).

22. See Owen, *supra* note 21, at 242.

23. See *id.*

24. See FM 5-31, *supra* note 18, at 6 (“Between 1918 and 1938, U.S. armed forces showed little interest in . . . mine warfare. . .”). The British apparently developed the first successful mass produced anti-tank mine in 1935. See Owen, *supra* note 21, at 242-43.

25. See FM 5-31, *supra* note 18, at 6.

26. U.S. DEP'T OF ARMY, *FIELD MANUAL 5-101, MOBILITY 4-1* (23 Jan. 1985) [hereinafter FM 5-101].

27. *Id.* (noting also the Battle of Kursk in 1943, where “the Soviet Army successfully used strong-points reinforced by minefield[s] to slow the attacking German Army and channelize it into kill zones”).

28. A landmine, from this point on in this article, will be defined as “an explosive or other material, normally encased, designed to destroy or damage ground vehicles, boats, or aircraft, or designed to wound, kill, or otherwise incapacitate personnel. It may be detonated by the action of its victim, by the passage of time, or by controlled means.” CHAIRMAN OF THE JOINT CHIEFS OF STAFF, *JOINT PUBLICATION 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 279* (23 Mar. 1994 (as amended through 12 Jan. 1998)) [hereinafter JP 1-02]; JP 15-3, *supra* note 6, at GL-4.

presence, proximity, or contact of a person and that will incapacitate, injure, or kill one or more persons.”<sup>30</sup> The typical anti-personnel mine is a pressure mine. They are designed to detonate whenever three to thirty-five pounds of force are applied to the mine’s trigger.<sup>31</sup>

Generally, anti-tank mines are larger than anti-personnel mines and require significantly more pressure to detonate.<sup>32</sup> Because of their size and

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29. Modern anti-personnel mines were first developed for the sole purpose of protecting anti-tank mines. See Janet E. Lord, *Legal Restraints in the Use of Landmines: Humanitarian and Environmental Crisis*, 25 CAL. W. INT’L L.J. 311, 313 (1995).

30. Protocol on the Prohibitions or Restriction on the Use of Mines, Booby-Traps and Other Devices (Amended Protocol II), amended May 3, 1996, art. 2, U.S. TREATY DOC. NO. 105-1, at 37, 35 I.L.M. 1206 [hereinafter Amended Protocol II]; Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction, art. 2, opened for signature Sept. 8, 1997, 36 I.L.M. 1507 [hereinafter Landmine Ban], available at <[http://www.vvaf.org/landmine/us/updates/events97/treaty9\\_29.html](http://www.vvaf.org/landmine/us/updates/events97/treaty9_29.html)>.

The Landmine Ban offers the following distinction: “Mines designed to be detonated by the presence, proximity, or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices, are not considered anti-personnel mines as result of being so equipped.” *Id.* Also, Marian Nash notes that the definition of anti-personnel mines is “deliberately structured so as not to prevent the traditional use of the Claymore. In a command-detonated mode, the Claymore does not fall within the definition . . . .” Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 91 AM. J. INT’L L. 325, 332-33 (1997). The original Protocol II made no distinction between anti-tank and anti-personnel mines. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, Oct. 10, 1980, 19 I.L.M. 1529 [hereinafter Protocol II].

Historically, the U.S. Army has primarily used four types of AP landmines: the M14, the M16A1, the M18A1, and the M26. U.S. DEP’T OF ARMY, FIELD MANUAL 21-75, COMBAT SKILLS OF THE SOLDIER A-1 to A-21 (3 Aug. 1984) [hereinafter FM 21-75]; see U.S. DEP’T OF ARMY, TECHNICAL MANUAL 9-1345-203-128P, OPERATOR’S AND ORGANIZATIONAL MAINTENANCE MANUAL: LAND MINES [hereinafter TM 9-1345-203-128P]; U.S. DEP’T OF THE ARMY, SOLDIER TRAINING PUBLICATION 5-12B1-SM, SOLDIER’S MANUAL, MOS 12B, COMBAT ENGINEER, SKILL LEVEL 1, 2-1 to 2-21 (describing the installation and removal of M14 and M16A1 anti-personnel mines as “combat-critical skills”); see also discussion *infra* pt. V.

31. See FM 21-75, *supra* note 30, at A-22 to A-30.

32. See *id.*; see also TM 9-1345-203-128P, *supra* note 30. Historically, the Army has primarily used the M15, M21, and M24. FM 21-75, *supra* note 30, A-22 to A-30; see also TM 9-1345-203-128P, *supra* note 30. In U.S. mixed-mine systems, anti-personnel and anti-tank mines are exactly the same size. See Letter from Lieutenant Colonel John J. Spinelli, Policy Analyst, National Security Policy Division, Plans and Policy Directorate, Office of the Deputy Chief of Staff–Operations, Headquarters, Department of the Army, to Captain Andrew C.S. Efaw (Jan. 19, 1999) [hereinafter Spinelli Letter] (on file with author). Also, note most high-tech, anti-tank mines (including all U.S. anti-tank mines) are triggered by the magnetic field of a passing vehicle. *Id.*

the pressure required to detonate them, anti-tank mines are easier than anti-personnel mines to locate and to remove from the battlefield.<sup>33</sup>

Mines can be further classified as either conventional mines or “smart” mines.<sup>34</sup> Conventional or “dumb” mines are mines that once activated, remain lethal until they detonate, decompose, or are demined.<sup>35</sup> In contrast, “smart” mines have limited lives<sup>36</sup> and contain mechanisms that cause the mine to either self-destruct,<sup>37</sup> self-deactivate,<sup>38</sup> or self-neutralize.<sup>39</sup> The technology behind these devices is both simple and fail-safe—

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33. See LIEUTENANT COLONEL DONALD R. YATES, *THE LANDMINE DILEMMA AND THE ROLE OF THE U.S. GOVERNMENT* 2 (1996). The focus of activists and governments has been primarily on the more numerous and treacherous anti-personnel mines. *Id.*

34. Conventional landmines are “landmines, other than nuclear or chemical, which are not designed to self-destruct.” JP 1-02, *supra* note 28, at 100; JP 15-3, *supra* note 6, at GL-3. Conventional mines are sometimes referred to as “dumb” mines and have an average life of 30 years. See Letter from Robert Sherman, Director of Advanced Projects at the United States Arms Control and Disarmament Agency and Deputy Chief Negotiator at Convention on Conventional Weapons 1994-1996, to Andrew C.S. Efav (Dec. 25, 1997) [hereinafter Sherman Letter] (on file with author). They include both pressure mines and command detonated mines, such as the Claymore. “Smart” mines, on the other hand, are mines that either self-destruct, self-neutralize, or passively self-deactivate. ROBERT SHERMAN, *MINE LIFE LIMITATION, INFORMAL NON-PAPER* (Sept. 25, 1995) (used by the U.S. delegation at the first UN Convention on Conventional Weapons (CCW) review conference) (on file with author).

35. See Michael Renner, *Budgeting for Disarmament*, in *STATE OF THE WORLD* 1995, 150, 156 (Linda Starke ed. 1995). Mines are also sometimes “recycled” to a new location by the emplacing unit. See Spinelli Letter, *supra* note 32.

36. The average life of a smart landmine is four hours; after that time, the mine either self-destructs, self-deactivates, or self-neutralizes. See Sherman Letter, *supra* note 34. United States self-destructing mines self-destruct at either 4 hours, 48 hours, 5 days or 15 days, depending on the mine system. See Spinelli Letter, *supra* note 32. On some systems, the unit emplacing the mines can select the time setting; on others, the time is manufactured at a specific setting. See *id.* For example, the mines deployed from the United States’ Volcano and Gator systems can last up to 15 days. See G.E. Willis, *Leaders Fight Ban to Protect Defenses*, *ARMY TIMES*, June 15, 1998, at 12.

37. “‘Self-destruction mechanism’ means an incorporated or externally attached automatically-functioning mechanism which secures the destruction of the munition into which it is incorporated or to which it is attached.” Amended Protocol II, *supra* note 30, art. 1.10. In other words, a self-destruct mechanism is a device that blows up a mine. See SHERMAN, *supra* note 34. If the device fails, an active mine remains. *Id.*

38. “‘Self-deactivating mechanism’ means automatically rendering a munition inoperable by means of the irreversible exhaustion of a component, for example, a battery, that is essential to the operation of the munition.” Amended Protocol II, *supra* note 30, art. 1.12. In other words, “self-deactivation does not use a mechanism of its own, since any such mechanism can fail. Instead, through certain failure of the mine itself, passive self-deactivation invariably causes the mine to become inoperable.” SHERMAN, *supra* note 34.

they operate by battery.<sup>40</sup> If the battery has already failed when the mine is planted, the mine is, obviously, already inert.<sup>41</sup> Once the mine is planted, the battery only has a fixed life.<sup>42</sup> The only way that the battery will never die is if it is never drawn upon, but in that case, the mine never has been activated in the first place.<sup>43</sup> Admittedly, a battery may fail later than expected, but the battery (and, hence, the mine) nevertheless, invariably deactivates.<sup>44</sup>

## II. The Landmine Problem

### A. The Big Picture

Several nations have abject landmine problems.<sup>45</sup> In recent years, many non-governmental organizations (NGOs) estimated that more than

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39. “‘Self-neutralization mechanism’ means an incorporated automatically-functioning mechanism which renders inoperable the munitions into which it is incorporated.” Amended Protocol II, *supra* note 30, art. 1.11. In others words, a self-neutralizing mechanism is a device inside the mine that turns it off. See SHERMAN, *supra* note 34.

40. See generally SHERMAN, *supra* note 34.

41. See Sherman Letter, *supra* note 34.

42. See *id.* For self-destructing mines, this time is usually about four hours, but may be up to 15 days for U.S. mines (CCW permits up to 120). See Letter from Robert Sherman, Director of Advanced Projects at the United States Arms Control and Disarmament Agency and Deputy Chief Negotiator at Convention on Conventional Weapons 1994-1996, to Andrew C.S. Efav (Dec. 31, 1998) [hereinafter Sherman Letter] (on file with author). Self-deactivation times are usually between 14 and 40 days for U.S. mines (CCW permits up to 30). *Id.*

43. See Sherman Letter, *supra* note 34.

44. See *id.*

45. Former UN Secretary-General Boutros Boutros Ghali summarizes the problem, saying mines affect countries in three ways: “Individuals are the victims of inhumane weapons, developing nations are unable to go forward with economic and social programs, and families, localities and nations are compelled to bear an increasingly heavy medical and social burden.” Boutros Boutros-Ghali, *Foreword* to KEVIN M. CAHILL, M.D. & THOMAS ROMA, *SILENT WITNESSES* 11, 12 (1995).

The Landmine Ban refers to “the suffering and casualties caused by anti-personnel mines, that kill or maim hundreds of people every week, mostly innocent and defenseless civilians and especially children, obstruct economic development and reconstruction, inhibit the repatriation of refugees and internally displaced persons, and have other severe consequences for years after emplacement . . . .” Landmine Ban, *supra* note 30, pmb1.

Several commentators have surveyed the landmine problem, region by region. See Lord, *supra* note 29, at 314-20; McCall, *supra* note 11, at 246-50; Brian Owsley, *Landmines and Human Rights: Holding Producers Accountable*, 21 SYRACUSE J. INT’L L. & COM. 203, 210-17 (1995).



one hundred million landmines in over sixty countries lay dormant, waiting for some unsuspecting victim.<sup>46</sup> Current studies, however, have largely debunked these figures as vastly inflated.<sup>47</sup> Most of the international community now agree that the correct figures are about fifty percent of the earlier estimates.<sup>48</sup> Yet even with lowered estimates, the problem of landmines claiming unintended victims remains serious and tragic, “a pandemic of global proportions.”<sup>49</sup>

Though most landmines are laid as part of military operations, their danger usually continues long after hostilities cease.<sup>50</sup> Of the approximately one million landmine victims during the past twenty years, eight out of ten were noncombatants.<sup>51</sup> Many of these victims were children, who are unaware of the danger from mines.<sup>52</sup> Mines seem so ubiquitous in some countries that children can be desensitized to their danger.<sup>53</sup> In Kurdistan, for example, “rural children commonly use mines as wheels for

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46. Others believed the number may be as high as 200 million. See THE ARMS PROJECT OF HUMAN RIGHTS WATCH & PHYSICIAN FOR HUMAN RIGHTS, *LANDMINES: A DEADLY LEGACY* 3 n.3 (1993) [hereinafter *DEADLY LEGACY*]. According to these estimates, one hidden mine existed for every 50 people on earth, and in the 12 countries with the worst landmine problems, one mine had been laid for every three to five people. See Renner, *supra* note 35, at 156. That translated to nearly 800 people killed and 450 wounded each month. See Elizabeth Dole, Press Release, Apr. 21, 1993, reprinted in *DEADLY LEGACY, supra*, at 408. Some placed this number as high as 26,000 victims a year or 70 a day. See YATES, *supra* note 33, at 1; see also President's Message to the Senate Transmitting Protocols to the Chemical Weapons Convention, 33 WEEKLY COMP. PRES. DOC. 14 (Jan. 7, 1997) [hereinafter President's Message] (putting the number of casualties at 25,000 annually).

47. See OFFICE OF HUMANITARIAN DEMINING PROGRAMS, BUREAU OF POLITICAL-MILITARY AFFAIRS, U.S. DEP'T OF STATE, *HIDDEN KILLERS: THE GLOBAL LANDMINE CRISIS* ch. I (1998) available at <<http://www.state.gov/www/global/arms/>> [hereinafter *HUMANITARIAN DEMINING PROGRAMS*]. These inflated numbers appear to be based on a flawed study by the International Red Cross. See Letter from W. Hayes Parks, Law of War Branch, International Law Division, Office of the Judge Advocate General, Department of the Army, to Lieutenant Colonel Richard A. Barfield, International and Operational Law Department, The Judge Advocate General's School of the Army (22 Jan. 1999) (on file with author) [hereinafter Parks Letter]. During a one year period, a Red Cross study totaled all Afghani civilian casualties, regardless of cause, and attributed the total to landmine casualties. See *id.* The researchers then extrapolated the figure globally to arrive at total yearly landmine deaths. See *id.* Other governments and organizations then accepted this obviously flawed study as the basis for their own landmine casualty statistics. See *id.*

48. See *HUMANITARIAN DEMINING PROGRAMS, supra* note 47, ch. I (citing “a growing consensus in the international community that the number may be lower, in the range of 60-70 million”); Spinelli Letter, *supra* note 32 (saying that the State Department believes this number to be inflated by up to 50%).

49. *HUMANITARIAN DEMINING PROGRAMS, supra* note 47, ch. I. Ironically, with the vast majority of these victims are male. See SHAWN ROBERTS & JODY WILLIAMS, *AFTER THE GUNS FALL SILENT: THE ENDURING LEGACY OF LANDMINES* 9 (1995).

toy trucks and go-carts.”<sup>54</sup> Additionally, children are often the ones who collect firewood and herd livestock, tasks that involve high risk of exposure to hidden mines.<sup>55</sup>

Not surprisingly, the countries most negatively affected by landmines tend to be developing Third World countries that depend on agriculture for survival.<sup>56</sup> Mines can affect several segments of the economy simultaneously. First, large tracts of arable land in these countries have been planted with mines, making their agrarian economies untenable.<sup>57</sup> Even where the land itself is not mined, the wells and irrigation systems often are.<sup>58</sup> When the main water supplies and the best land have been rendered unusable, farmers and ranchers often move to marginal, erosion prone

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50. See JAMES F. DUNNIGAN, *HOW TO MAKE WAR* 67 (3d ed. 1993) (“Considering the dozens of people killed each year in Europe because of uncleared World War I and II mines and shells, we have to assume that major modern war will keep on killing for a century after the fighting officially stopped.”). See also Major Vaughn A. Ary, *Concluding Hostilities: Humanitarian Provisions in Cease-Fire Agreements*, 148 MIL. L. REV. 186 (1995) (asserting that in France alone, 630 deminers have been killed since 1946, as they attempted to neutralize unexploded ordnance left from WW I and WW II); Lord, *supra* note 29, at 314 n.18 (asserting that an average of 12 people per year are killed as result of WW II mines); McCall, *supra* note 11, at 236 n.27 (stating that 16 million acres around Verdun have been cordoned off because they are unsafe and asserting that in 1991, 36 farmers died from WW I and WW II era munitions).

51. See Renner, *supra* note 35, at 156. The one million landmine victims may be somewhat misleading because almost all estimates include not only mine casualties but also casualties from unexploded ordnance. See Parks Letter, *supra* note 47.

52. Some contend that not all landmines are buried and intended for enemy soldiers, many are disguised as toys to lure children. See Senator Patrick J. Leahy, *Preface to DEADLY LEGACY*, *supra* note 46, xi, xi; see also R.J. Araujo, *Anti-Personnel Mines and Peremptory Norms of International Law: Argument and Catalyst*, 30 VAND. J. TRANSNAT’L L. 1 (1997) (stating that victims are usually farmers and children); Lord, *supra* note 29, at 335 n.180 (discussing the Soviet “butterfly” mine, the PFM-1, and its legality); Stuart Maslen, *Implementation and International Bodies: Relevance of the Convention on the Rights of the Child to Children in Armed Conflict*, 6 TRANSN’L L. & CONTEMP. PROBS. 329, 339 (1996). *But cf.* ROBERTS & WILLIAMS, *supra* note 49, at 10 (“There is no evidence that landmines are designed like toys to attract children.”).

53. ROBERTS & WILLIAMS, *supra* note 49, at 10.

54. *Id.* (quoting UNICEF, *The Impact of Land-Mines on Children*, in ANTI-PERSONNEL MINES: CHILDREN AS VICTIMS (1994)).

55. See HUMAN RIGHTS WATCH/MIDDLE EAST, *HIDDEN DEATH: LAND MINES AND CIVILIAN CASUALTIES IN IRAQI KURDISTAN* 42 (1992) [hereinafter MIDDLE EAST].

56. See ROBERTS & WILLIAMS, *supra* note 49, at 6-11; see also Owsley, *supra* note 45, at 208 (saying that countries with the worst landmine crises are agrarian).

57. See Lord, *supra* note 29, at 313; ROBERTS & WILLIAMS, *supra* note 49, at 6-11.

58. See Lord, *supra* note 29, at 313; ROBERTS & WILLIAMS, *supra* note 49, at 6.

land, or they deforest valuable timberland.<sup>59</sup> The forests, no matter how important in the long run, inevitably yield to immediate survival needs.<sup>60</sup>

Second, landmines destroy a nation's infrastructure. They disrupt transportation and communication systems.<sup>61</sup> The mining of dams and electrical installations hampers the production of power needed to rebuild war-torn countries.<sup>62</sup> Finally, landmines directly affect the people. The families of victims are faced with "severe financial strain due to the costs of treatment and rehabilitation, loss of the victim's earnings, and the need to support an unproductive relative."<sup>63</sup>

#### B. Northern Iraq: A Case Study

Northern Iraq, or Kurdistan,<sup>64</sup> is a classic example of a region with a severe landmine problem.<sup>65</sup> The people of Kurdistan have sought autonomy from Iraq since the region was incorporated into Iraq after World War I.<sup>66</sup> Since then, the Iraqi government has repeatedly denied Kurdish attempts at independence, quelling resistance with force.<sup>67</sup> Because of

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59. See ROBERTS & WILLIAMS, *supra* note 49, at 11.

60. See *id.* Of course, this deforestation can have dramatic catastrophic effects on the ecosystems of flora and fauna that make these forests their homes. *Id.* Landmines have already directly affected the survival of some endangered species of animals. *Id.* In Afghanistan, for instance, landmines have damaged the environment of the nearly extinct snow leopard, and in Africa, a rare silver-backed gorilla fell victim to a mine. *Id.*

61. See MIDDLE EAST, *supra* note 55, at 4-5.

62. See ROBERTS & WILLIAMS, *supra* note 49, at 6.

63. DEADLY LEGACY, *supra* note 46, at 6.

64. The area is made up of the governorates of Dohuk, Erbil, New Kirkuk and Sulaymaniyah, and is populated by some four million inhabitants. See ROBERTS & WILLIAMS, *supra* note 49, at 255.

65. See Andrew C.S. Efav, *The Landmine Ban Is No Solution*, WASH. TIMES, Dec. 23, 1997, at A15 (naming Afghanistan, Angola, Bosnia-Herzegovina, Cambodia, and Mozambique as problem countries also); Lord, *supra* note 29, at 314-20; McCall, *supra* note 11, at 246-50; Owsley, *supra* note 45, at 210-17.

66. ROBERTS & WILLIAMS, *supra* note 49, at 255. Iraq was only formed as a country following World War I. *Id.*

67. *Id.* Most recently, Kurdish rebels tried to break from Iraq when the government appeared weakened following the Gulf War in 1991. *Id.* Their uprising, however, was short lived, and about 1.5 million Kurds were forced to take refuge in Turkey and Iran. *Id.* Due to public outcry, the United States created a safe-haven for the Kurds in Northern Iraq, not allowing the Iraqi army or any Iraqi aircraft north of the 36th parallel. *Id.* The Iraqi government responded by cutting off funds, supplies, and public services to the region. *Id.* In May 1992, the Kurds held elections, creating a quasi-government. *Id.*

both this internal conflict and the eight-year Iran-Iraq War, Northern Iraq is littered with landmines.<sup>68</sup>

The minefields left by the Iraqi military were unrecorded, unmarked,<sup>69</sup> and contain some three to five million mines that are neither self-destroying, self-neutralizing, nor self-deactivating.<sup>70</sup> Experts estimate that at least 2.5 million anti-personnel mines are in Dohuk, a region of Kurdistan.<sup>71</sup> In the four months prior to the Gulf War, the Iraqi Army returned to Kurdistan and, using 2500 soldiers, laid even more mines.<sup>72</sup> One section of twenty-one men, alone, laid 80,000-100,000 mines on Iraq's border with Syria and Turkey.<sup>73</sup> The minefields were not mapped, which leaves activities as mundane as walking risky in this region.<sup>74</sup> Also complicating the problem is that the region has employed more than twenty-three types of mines from ten different nations,<sup>75</sup> and many of these are booby-trapped to frustrate demining.<sup>76</sup> Finally, the civilian populace of Kurdistan is further endangered due to the "[a]bsence of, or inadequate, warning signs; absence of, inadequate, or incorrectly sighted perimeter fencing; [and] random dissemination of devices in areas regularly used by civilians."<sup>77</sup>

Landmines have injured thousands of civilians since the Iraqi army last withdrew in 1991.<sup>78</sup> From that time until August 1992, landmine casualties were occurring at a rate of twelve to twenty a month.<sup>79</sup> Because of the continuing strain between the Kurds and the Iraqi government, almost

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68. See ROBERTS & WILLIAMS, *supra* note 49, at 256. See also MIDDLE EAST, *supra* note 55, at 1; DEADLY LEGACY, *supra* note 46, at 188 (suggesting that the Iraqi government's mining strategy was to make Kurdistan untenable forever).

69. MIDDLE EAST, *supra* note 55, at 1, 56.

70. See DEADLY LEGACY, *supra* note 46, at 188.

71. ROBERTS & WILLIAMS, *supra* note 49, at 256.

72. *Id.* at 255.

73. *Id.*

74. *Id.*; see MIDDLE EAST, *supra* note 55, at 35 (noting that despite Iraqi claims otherwise, "[i]t is clear that the Iraqi military retained no records of their mine-laying or, if they did, that it was not retained by the local military command").

75. ROBERTS & WILLIAMS, *supra* note 49, at 253. The most common mines found by Middle East Watch in their surveys of Kurdistan were the Italian-made Valmara 69 and the VS-50. MIDDLE EAST, *supra* note 55, at 40. In 1991, seven executives from Valsella, the manufacturers of the Valmara 60 and VS-50, were convicted for illegal exportation of mines to Iraq. *Id.*

76. MIDDLE EAST, *supra* note 55, at 10.

77. *Id.*

78. See DEADLY LEGACY, *supra* note 46, at 188.

79. *Id.*

no government sponsored demining has occurred.<sup>80</sup> In 1991, the Iraqi army conducted limited demining operations in Dohuk by sending in three demining teams; but both lack of skill and equipment limited their efforts.<sup>81</sup> At present, only NGOs are involved in mine clearing operations in Kurdistan.<sup>82</sup>

### III. The United States' Landmine Dilemma: Balancing Military Needs Against Humanitarian Considerations

Though current U.S. military doctrine still views mines as a military necessity, the policies regarding their use have tightened in recent years.<sup>83</sup> In 1992, the United States put a moratorium on the sale, transfer, and export of anti-personnel landmines.<sup>84</sup> Under this moratorium, the Department of State "revoked or suspended all previously issued licenses, approvals, and LOAs [letters of authorization] authorizing the export, sale, or other transfer of landmines specifically designed for anti-personnel use."<sup>85</sup> In May 1996, President Clinton issued a statement forbidding the military from employing "dumb" landmines.<sup>86</sup> Another law forbade the

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80. ROBERTS & WILLIAMS, *supra* note 49, at 256-57.

81. *Id.*

82. *Id.*

83. See *Hearings Before the House Comm. On National Security Fiscal Year 1999 Defense Authorization*, 105<sup>th</sup> Cong., (Feb. 5, 1998) (testimony of General Henry H Shelton) [hereinafter Shelton]. Note, however, that U.S. forces were banned from using anti-personnel mines from 12 February 1999 to 12 February 2000. See Foreign Operations Appropriations Act of 1996 § 580, 110 Stat. 751. This ban has now been suspended. See *infra* notes 88-90 and accompanying text.

A committee of experts, meeting in 1994 for the Red Cross, determined that there was not currently an alternative to military use of landmines. See Paul J. Lightfoot, Comment, *The Landmine Review Conference: Will the Revised Landmine Protocol Protect Civilians?* 18 *FORDHAM INT'L L.J.* 1526, 1527 n.8 (1995) (citing Report of the International Committee of the Red Cross for the Review Conference of the 1980 United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 299 *INT'L REV. RED CROSS* 123, 178 (1994)); see also Peter J. Ekberg, Note, *Remotely Delivered Mines and International Law*, 33 *COLUM. J. TRANSNAT'L L.* 149, 157 (1995) (saying "at the current level of technology, there is no substitute for landmines . . .").

84. National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 1365(c). See SERGEANT JON R. ALSTON ET AL., *OPERATIONAL LAW HANDBOOK* 18-6 (Major Scott R. Morris ed., 1<sup>st</sup> rev. ed. 1997). This legislation makes an exception for command detonated mines. *Id.* Prior to this legislation, "[f]rom 1983 to 1992, the United States approved only ten licenses for commercial export of mines worth \$980,000 and FMS sales of 108,852 antipersonnel mines." McCall, *supra* note 11, at 269 (quoting the National Defense Authorization Act, § 1423(c), 107 Stat. 1807 (1993)).

use of anti-personnel mines for a period of one year, beginning in February 1999.<sup>87</sup> As that date approached, however, military leaders sought to rescind the law because of the deleterious effect that a moratorium would have on U.S. defenses.<sup>88</sup> Congress and the President approved the rescission in 1998,<sup>89</sup> provided the United States is “aggressively” seeking to develop a viable alternative to “smart” mines.<sup>90</sup>

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85. Suspension of Transfers of Anti-Personnel Landmines Notice, 57 Fed. Reg. 55, 614 (1980) (codified pursuant to the Arms Export Control Act, 22 U.S.C. §§ 2752, 2778, 2791; the International Traffic in Arms Regulations § 126.7, 22 C.F.R. pts. 120-30; and the National Defense Authorization Act of Fiscal Year 1996 § 1365). The action includes “any manufacturing licenses, technical assistance agreement, technical data, and commercial military exports of any kind involving landmines specifically designed for anti-personnel use.” *Id.* It further precludes the “exemptions from licensing or other approval requirements included in the International Traffic in Arms Regulations (22 C.F.R. pts. 120-130).” *Id.*

86. See Shelton, *supra* note 83; ALSTON ET AL., *supra* note 84, at 18-6. This is a more restrictive than the proposed February 1999 moratorium in that it did not exempt mines in Guantanamo Bay, Cuba. Thus, the only “dumb” anti-personnel mines currently used by the United States are those on the Korean peninsula, and for training. See Willis, *supra* note 36, at 14. The mines emplaced there are the M14 “toe popper” and the M16A1 “bouncing Betty.” *Id.*

Since the Presidential order, the United States has destroyed over 2.1 million dumb landmines and aims to eliminate the remainder by the end of 1999, exempting those in Korea, of course. See Shelton, *supra* note 83. The Army hopes to have alternatives ready for the dumb mines in Korea by 2006. See Spinelli Letter, *supra* note 32. See also Willis, *supra* note 36, at 14 (saying that the Clinton Administration officials “have their hearts with ban-the-mines movement”). *But cf.* Mark Fritz, *Pentagon Seeks Funds for New Type of Landmine*, L.A. TIMES, Feb. 20, 1999 (questioning President Clinton’s commitment to a global ban as his administration requests funds for a new landmine system) available at <<http://www.latimes.com/>>.

87. Foreign Operations, Export, Financing, and Related Programs Act of Fiscal Year 1996 § 580, Pub. L. No. 104-107, 110 Stat. 751. See also ALSTON ET AL., *supra* note 84, at 18-6. Command detonated mines and mines “along internationally recognized national borders in demilitarized zones with a perimeter marked area that is monitored by military personnel and protected by adequate means to ensure the exclusion of civilians” are excepted from the legislation. *Id.* General Shelton warns that “any [anti-personnel landmine] legislation that is more restrictive than the President’s policy . . . may endanger the lives of troops.” Shelton, *supra* note 83.

88. See Willis, *supra* note 36, at 14.

89. See Department of Defense Authorization Act of Fiscal Year 1999 § 1236, reprinted in 144 CONG. REC. S7475 (daily ed. July 6, 1998); Sherman Letter, *supra* note 40; Willis, *supra* note 36, at 14. But in return for the waiver, the Clinton Administration committed to signing the Ottawa Convention in 2006, provided researchers can find an alternative for landmines. *Id.* (quoting from a May 15, 1998 letter from National Security Advisor Samuel Berger to Senator Patrick Leahy).

In 1997, then-Secretary of the Army Togo D. West, Jr. and the Chief of Staff of the Army, General Dennis J. Reimer, reaffirmed the role of landmines, stating that anti-personnel landmines remain “an integral part of Army warfighting doctrine and a key combat multiplier.”<sup>91</sup> Commanders use mines for “security, defensive, retrograde, and offensive operations in order to reduce the enemy’s mobility.”<sup>92</sup> As “combat multipliers,”<sup>93</sup> they shape the terrain,<sup>94</sup> and give the U.S. military the ability to channel enemy

90. Shelton, *supra* note 83 (giving the target date as 2003); *see also* Willis, *supra* note 36, at 14. (quoting from a May 15, 1998 letter from National Security Advisor Samuel Berger to Senator Patrick Leahy).

91. *Posture of the United States Army Fiscal Year 1998 Before the Comm. and Subcomm. of the United States Senate and the House of Representatives*, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess. ch. 2 (1997) (statement of the Honorable Togo D. West, Jr. and General Dennis J. Reimer) [hereinafter West & Reimer], available at <<http://www.army.mil/aps/chapter2.htm>>. *See also* Captain Bryan Green, *Alternatives to Antipersonnel Mines*, ENGINEER PROF. BULL., Dec. 1996, available at <<http://www.wood.army.mil/ENGRMAG/PB59644/green.htm>> (discussing several inferior replacements for antipersonnel landmines).

Some former flag officers apparently disagree with the assertion that anti-personnel mines are necessary, printing an open letter to the President in the *New York Times*. *Open Letter to the President*, N.Y. TIMES, Apr. 3, 1996 at A9. *See* 142 CONG. REC. S3420-21 (daily ed. Apr. 17, 1996) (reprinting the entire letter, signed by fourteen retired generals and one retired admiral); Nick Adde, *Former Brass Support Ban*, ARMY TIMES, June 15, 1998, at A12 (speaking of the letter and the divisiveness of the letter among high ranking officers); Araujo, *supra* note 52, at 2 (reprinting the letter also). The letter notably never addresses “smart” mines and their role. *Id.* This letter was countered by an open letter to the President stating the fundamental necessity of anti-personnel landmines. *See* 144 CONG. REC. S9759 (daily ed. Sept. 1, 1998) (statement of Senator Inhofe); *Testimony on the Senate Foreign Relations Land Mine Treaty Before the Senate Foreign Relations Comm.* (1998) (statement of General Carl E. Mundy (retired)) [hereinafter Mundy]. Six former Marine Corps commandants and eighteen other generals signed this letter. *Id.*

Others argue that anti-personnel landmines are often used against American soldiers and weaken the Army’s efforts. *See* DEADLY LEGACY, *supra* note 46, at 21-2. One study showed that the casualties caused by mines and boobytraps were as follows: 3% of deaths and 4% of wounds in WW II; 4% of deaths and 4% of wounds in Korea; and 11% of deaths and 15% of wounds in Vietnam. *See* McCall, *supra* note 11, at 275 n.233 (quoting Major General Spurgeon Nee, Dep’t of Army, VIETNAM STUDIES: MEDICAL SUPPORT OF THE U.S. ARMY IN VIETNAM 54 (1973)). *See also* Adde, *supra* note 91, at 14 (quoting Lieutenant General (ret.) Gard saying that over half of American casualties in the Mekong Delta were due to land mines and boobytraps, mostly made with U.S. components).

92. FM 21-75, *supra* note 30, at A-1.

93. YATES, *supra* note 33, at 7-8; *see* DUNNIGAN, *supra* note 50, at 68 (saying that in “mobile situations, mines are used to encourage the enemy to move in another direction. . . .”); ROBERTS & WILLIAMS, *supra* note 49, at 4 (discussing the argument that mines are a “‘force multiplier’ whose effect magnifies the usefulness of other weapons”).

94. *See* Mundy, *supra* note 91 (quoting the “‘64-star’ letter opposing the Leahy landmine ban legislation: ‘Self-destructing landmines greatly enhance the ability to shape the battlefield, protect unit flanks, and maximize the effects of the other weapons systems.’”).

forces into a specific area or to scatter forces over a broad area.<sup>95</sup> Commanders use minefields to disrupt formations, delay movement, and interfere with command and control.<sup>96</sup> As defensive weapons, mines enhance a unit's ability to ward off infantry and armor attacks.<sup>97</sup> They can give the advantage to a numerically inferior force.<sup>98</sup>

Historically, mine fields have also been used to protect borders as a cost-effective solution to shortages of soldiers.<sup>99</sup> At the first review conference of the 1980 United Nations (UN) Convention on Prohibitions and Restrictions on the Use of Certain Conventional Weapons (CCW), China, India, Pakistan, and Russia would not even consider a total ban on anti-personnel mines, because they were considered such a critical element of border defense.<sup>100</sup> The Korean government estimates that U.S. mines on the demilitarized zone (DMZ) might save hundreds of thousands of civilian casualties in the advent of a North Korean invasion.<sup>101</sup>

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95. See Lord, *supra* note 29, at 312-13; YATES, *supra* note 33, at 7-8; see also Lieutenant Colonel Burris M. Carnahan, *The Law of Land Mine Warfare: Protocol II to the United Nations Convention on Certain Conventional Weapons*, 105 MIL. L. REV. 73, 75-76 (1984). "Militarily, minefields are similar to ditches, tank traps and concertina barbed wire in that they are obstacles to enemy movement. Their casualty-producing effects are secondary to this primary effect." *Id.*

96. See Lord, *supra* note 29, at 312-13; YATES, *supra* note 33, at 7-8.

97. See DUNNIGAN, *supra* note 50, at 67-8. Mines act almost as much as a psychological weapon as they do a physical weapon. See GERALD F. LINDERMAN, *THE WORLD WITHIN WAR* 18-19, 116-17 (1997) (speaking of the psychological horror of mines and quoting Richard Tobin as labeling mines as "Hitler's most formidable weapon"); H. NORMAN SCHWARZKOPF, *IT DOESN'T TAKE A HERO* 170 (Peter Petre ed., 1992) (describing his own terror from stumbling into a minefield during the Vietnam War); Lord, *supra* note 29, at 313 (speaking of the demoralizing effect of landmines upon troops); McCall, *supra* note 11, 232, nn. 21-22 (quoting a letter from a Union soldier who claims that landmines "attack both matter and mind").

98. See Mundy, *supra* note 91 (saying anti-personnel landmines allow "American troops to protect vulnerable positions from being overrun by numerically superior enemies").

99. See Shelton, *supra* note 83. See DUNNIGAN, *supra* note 50, at 68 ("Mines are also used to guard an area when you don't have troops available for the job."). See generally *U.S. Army Senate Foreign Relations Land Mine Treaty Before the Senate Foreign Relations Comm.* (1998) (statement of Frederick J. Kroesen, General (retired)) [hereinafter Kroesen] (discussing the indispensable "belt of minefields stretching from the Baltic Sea to Austria" during the Cold War era).

100. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, U.S. TREATY DOC. NO. 103-25, at 6, 1342 U.N.T.S. 137, 19 I.L.M. 1523 [hereinafter CCW]. See Michael J. Matheson, *The Revision of the Mines Protocol*, 91 AM. J. INT'L. L. 158, 159 (1997).



Thus, an uneasy balance exists. Opponents on either side of the issue are reluctant to change positions. Before policy makers choose any course of action, they should carefully examine the options currently available and weigh the possible effects of choosing each.

#### IV. Possible Solutions

##### A. Demining

###### 1. Summary

One approach to the landmine dilemma is simply to do nothing except demine after hostilities cease.<sup>102</sup> Adequate clean-up, or demining, according to international standards means removing 99.9% of the mines from affected land.<sup>103</sup> At this time, however, no machine has been developed that can adequately detect landmines.<sup>104</sup>

The advent of plastic has made landmine detection even more difficult.<sup>105</sup> Plastic not only preserves mines from deterioration, but also decreases the value of metal-sensing mine detectors.<sup>106</sup> With no “silver bullet” cure-all detector on the horizon, a man prodding the ground with a stick remains the detection method of choice for the near future.<sup>107</sup>

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101. See Sherman Letter, *supra* note 34. Chairman of the Joint Chiefs of Staff, General Shelton testified, “In Korea . . . where we stand face-to-face with one of the largest hostile armies in the world, we rely upon [dumb] anti-personnel landmines to protect our troops.” See Shelton, *supra* note 83. See also Willis, *supra* note 36, at 14 (saying that only “dumb” mines are adequate to stop a surprise attack because remotely delivered mines could not be emplaced in time).

However, “[the United States’] Army will no longer employ non-self-destructing anti-personnel land mines anywhere except along the Korean demilitarized zone.” West & Reimer, *supra* note 91, ch. 2. The United States is committed to dropping the requirement for conventional landmines by 2006. See Shelton, *supra* note 83; see also Letter from Robert Sherman, Director of Advance Projects at the United States Arms Control and Disarmament Agency and Deputy Chief Negotiator at Convention on Conventional Weapons 1994-1996, to Andrew C.S. Efav (Dec. 30, 1997) [hereinafter Sherman Letter] (on file with author). The mines used in the DMZ are the M14 and the M16A1.

102. The United States is currently the world leader in demining efforts. See Shelton, *supra* note 83. See generally *Testimony Before the House Military Procurement Subcomm. Research and Development Subcomm. Comm. On Nat’l Security*, (1996) (statement of Brigadier General Roy E. Beauchamp) [hereinafter Beauchamp] (giving a detailed description of the U.S. Army’s inventory of detection, breaching and demining equipment).

## 2. Analysis

Given current technology, demining is an effective impossibility. It takes too long and costs too much. Detecting and neutralizing a single

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103. See Ary, *supra* note 50 (saying “preferably over 99.9%”) (quoting Patrick M. Blagden, *Summary of United Nations Demining*, in SYMPOSIUM ON ANTI-PERSONNEL MINES 117 (International Committee of the Red Cross, Montreux, Apr. 21-23, 1993)). Major Ary points out that even with a 99% clearance, a cleared minefield of 5000 mines would have 50 live mines in it. *Id.* See also DEADLY LEGACY, *supra* note 46, at 11 (saying that the 99.9% is the UN standard). The Landmine Ban requires an even higher standard—100%. Landmine Ban, *supra* note 30, art. 5(2).

2. Each State Party shall make every effort to identify all areas under its jurisdiction or control in which anti-personnel mines are known or suspected to be emplaced and shall ensure as soon as possible that all anti-personnel mines in mined areas under its jurisdiction or control are perimeter-marked, monitored and protected by fencing or other means, to ensure the effective exclusion of civilians, until all anti-personnel mines contained therein have been destroyed.

*Id.*

104. The United States, Germany, Canada, Israel, Sweden, and the United Kingdom all use the Schiebel AN/19-2, which has been moderately successful in detecting anti-personnel mines with low levels of metal. See Letter from George Schneider, Director, Strategic and Tactical Systems, Office of the Under Secretary of Defense, to Mark E. Gebicke, Director, Military Operations and Capabilities Issues, National Security and International Affairs Division, GAO 1-2 (Jul. 22, 1996), *reprinted in* GOA/NSIAD-96-198 Mine Detection (Aug. 1996). The U.S. Army is developing a variety of mine clearing robots. See Sergeant First Class Larry Lane, *Robots Out Front*, SOLDIERS, Apr. 1995, at 14; *Rooting Them Out*, ARMY TIMES, June 15, 1998, at A12; *Detecting Land Mines*, ARMY TIMES, June 15, 1998, at A13; Tony Capaccio, *Warfare in the Information Age*, POPULAR SCIENCE, July 1996, at 52. See also EUREL INTERNATIONAL CONFERENCE, THE DETECTION OF LAND MINES: A HUMANITARIAN IMPERATIVE SEEKING A TECHNICAL SOLUTION (1996). See HUMANITARIAN DEMINING PROGRAMS, *supra* note 47, ch. IV (discussing other nascent technological solutions).

105. YATES, *supra* note 33, at 3. See also GOA/NSIAD-96-198 Mine Detection (Aug. 1996); K. Eblagh, *Practical Problems in Demining and Their Solutions*, in EUREL INTERNATIONAL CONFERENCE, THE DETECTION OF LAND MINES: A HUMANITARIAN IMPERATIVE SEEKING A TECHNICAL SOLUTION (1996). Interestingly, in WW II the Germans used a similarly undetectable mine, made out of wood. See McCall, *supra* note 11, at 236 (discussing the Germans’ wooden Schu (“shoe”) mine). See also Lord, *supra* note 29, at 313 n.13 (listing the following countries as having produced low metal mines, Argentina, Belgium, Brazil, China, Egypt, Germany, Greece, India, Italy, the Netherlands, Pakistan, Portugal, South Africa, Spain, the United States, the former USSR, and the former Yugoslavia).

106. See McCall, *supra* note 11, at 241; YATES, *supra* note 33, at 4. Plastic mines also present an additional health hazard because their shrapnel does not show on x-rays. See Lord, *supra* note 29, at 313 n.13.

107. See DEADLY LEGACY, *supra* note 46, at 257.

landmine can take up to one hundred times longer than laying the mine.<sup>108</sup> This is largely due to the vast quantities of metal shrapnel in minefields.<sup>109</sup> In Cambodia, for example, an average of 129 fragments of metal are found for each live landmine, with each piece of metal shrapnel giving off a false alarm.<sup>110</sup>

The sheer number of mine varieties also increases the time required for demining.<sup>111</sup> Once the mine is located, the deminer must determine its configuration, and how to best defeat its triggering mechanism.<sup>112</sup> In 1995, the U.S. Department of Defense released a catalogue of over 675 different landmines then in existence;<sup>113</sup> the number is undoubtedly larger today. Brigadier General Roy E. Beauchamp, Deputy Chief of Staff for Research, Development and Engineering, U.S. Army Materiel Command, estimates that there are about 2500 mine and fuse combinations in the world today, ranging “from the technically simple pressure fuse to the highly sophisticated [anti-tank] mines which can attack a target with top and side attack munitions up to 100 meters away.”<sup>114</sup>

Homemade mines only add to this problem, and several of the world’s deployed mines are homemade.<sup>115</sup> For example, an estimated twenty-five percent of the two to three million mines deployed today in the former Yugoslavia are homemade.<sup>116</sup> Homemade mines cannot be accurately catalogued and may be manufactured in nearly an infinite variety of ways, making detection and deactivation extremely risky.<sup>117</sup>

Demining is also extremely costly. Mines are easy and cheap to produce at two to ten dollars per mine; the cost of removing a mine can reach one thousand dollars.<sup>118</sup> Clearing the world’s mine fields will cost billions.<sup>119</sup> Of the countries with extensive mine fields, only Kuwait has the money to adequately demine.<sup>120</sup> At one time, most analysts felt that clear-

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108. See Renner, *supra* note 35, at 157.

109. See ROBERTS & WILLIAMS, *supra* note 49, at 7.

110. *Id.*

111. See Beauchamp, *supra* note 102; YATES, *supra* note 33, at 4.

112. See Beauchamp, *supra* note 102; YATES, *supra* note 33, at 4.

113. *Id.* See also DEADLY LEGACY, *supra* note 46, at 19 (“More than 340 anti-personnel landmine models have been produced in at least 48 nations.”).

114. Beauchamp, *supra* note 102.

115. YATES, *supra* note 33, at 4.

116. *Id.*

117. Brigadier General Beauchamp notes that “it is much faster and easier to change a landmine to meet a given countermeasure than it is to develop a countermeasure.” Beauchamp, *supra* note 102.

ing the world's mines would be a several thousand-year task,<sup>121</sup> but now many experts believe that clearance of all emplaced mines could be accomplished within the next ten to fifteen years.<sup>122</sup> A Herculean effort, however, in terms of time, money, manpower, and international cooperation would have to be mounted to achieve that monumental goal.<sup>123</sup>

Ill-equipped and untrained local populaces sometimes attempt mine clearing on their own, using dangerous and unsound methods, with disastrous results.<sup>124</sup> One such method is attempting to destroy landmines by small arms fire.<sup>125</sup> This method has several practical limitations. It requires a high degree of marksmanship, sufficient ammunition, and it requires that the marksman have visual contact with the mine.<sup>126</sup> The practice has been largely ineffective and has resulted in high casualties from firers or observers getting too close to the detonating mines.<sup>127</sup>

A second method often used is burning:

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118. See YATES, *supra* note 33, at 4; *see also* Araujo, *supra* note 52, at 2-3 ("They are inexpensive to manufacture . . . Their individual cost is less than a few dollars . . ."); Ary, *supra* note 50 (claiming that "anti-personnel mines can be purchased for as little as three dollars per mine," while "the detection and removal of a live mine by a demining contractor costs approximately \$1000"); Lord, *supra* note 29, at 313 n.16 (giving the low end price of an anti-personnel mine as \$3, while the price of anti-tank mines are just under \$75); Owsley, *supra* note 45, at 207, 220 (citing an advertisement for a Pakistani mine price at \$6.75).

Robert Sherman claims that the comparison of a \$2 mine to a \$1000 clearance is misleading because "it takes the low end of mine cost and compares it with the high end of demining. It also includes all personnel costs for demining but only acquisition cost for mine emplacement." Sherman Letter, *supra* note 40. A more accurate figure may be \$50 for mine costs and \$500 for clearance. *Id.* *See also* Spinelli Letter, *supra* note 32.

119. Some estimates have projected a price tag of \$200-300 billion, with the cost of removing mines laid during any given year at a whopping \$60 million. See YATES, *supra* note 33, at 4.

120. *See id.*

121. The International Committee of the Red Cross estimated that it would take thousands of years to rid Afghanistan of its mines, and if every citizen of Cambodia contributed his entire income to demining operations for several years, the problem would still persist. *See id.*

122. See HUMANITARIAN DEMINING PROGRAMS, *supra* note 47 (discussing international demining efforts and the United States "Demining 2010 Initiative").

123. *See id.* ch. VI (stating that "Demining 2010 Initiative" can only be accomplished with an infusion of cash and an effective international coordination). *See* Sherman Letter, *supra* note 40. Yet the fundamental point is still valid.

124. MIDDLE EAST, *supra* note 55, at 53.

125. *See id.*

126. *See id.*

Middle East Watch examined several minefields which had been burned and found that while some devices were detonated by heat or rendered inoperable by burning, many were either made unstable or sustained no damage at all. The obvious danger of this practice is that people may be encouraged to believe that the ground is safe for use after burning. In fact, in some instances it may actually prove more dangerous following this treatment. Burning certainly promotes increased vegetation growth, making sighting of mines more difficult.<sup>128</sup>

A third method employed by local communities is driving herds of livestock over suspected minefields.<sup>129</sup> This method has been at least partially successful, but obviously results in the loss of a much needed resource—livestock.<sup>130</sup>

At present, mines continue to be laid faster than they are destroyed.<sup>131</sup> According to the most disturbing reports, governments manage to remove only about eighty thousand mines annually, while about two million new mines are sown in their place during the same period.<sup>132</sup> In 1995, manufacturers were still producing ten to thirty million mines each year, and another one hundred million are believed to be stockpiled.<sup>133</sup>

## B. International Law

Another approach to the landmine dilemma is to restrict their use through international legislation. Despite extensive landmine use since World War I,<sup>134</sup> the international community has only recently addressed mines.<sup>135</sup> The changing nature of warfare created the impetus to form this body of law.<sup>136</sup> First, technological advances allowed landmines to be laid

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127. *See id.* In World War II, Americans soldiers also used this method. D'ESTE, *supra* note 2, at 498 ("Patton devoted a great deal of time perfecting the small but important details of the forthcoming invasion [such as] determining the best means of detonating Teller mines with rifle fire . . ."). Teller mines were German mines, containing 19 pounds of TNT, first used at the battle for Tobruk in 1941. *Id.*

128. MIDDLE EAST, *supra* note 55, at 53.

129. *See id.*

130. *See id.*

131. *See* YATES, *supra* note 33, at 3. This trend appears to be reversing, and the ratio of mines laid to mines cleared is lowering. *See* Spinelli Letter, *supra* note 32.

132. *See* YATES, *supra* note 33.

133. *See id.*

134. *See supra* pts. I, II.

over large areas with great rapidity.<sup>137</sup> Not only could great quantities of landmines be quickly emplaced, they could be delivered from great distances by aircraft and artillery.<sup>138</sup> This capacity prompted fear that mines would be laid indiscriminately and, thereby, endanger civilians.<sup>139</sup> Second, armies began using landmines as offensive weapons.<sup>140</sup> Due to these two factors, many NGOs and the UN felt that the laws of war must correspondingly change.<sup>141</sup> To date, essentially three attempts have been made to control the landmine crisis through international agreement.<sup>142</sup>

*1. The Landmines Protocol (Protocol II)*<sup>143</sup>

*a. Summary*

The first attempt to examine the use of landmines was in 1977 as part of the Additional Protocols to the CCW.<sup>144</sup> These protocols codified the traditional concepts of the laws of war, such as protecting civilians and conducting warfare to minimize suffering.<sup>145</sup> As the 1977 protocols were being developed, the drafters decided to set up a committee to examine certain conventional weapons.<sup>146</sup> The UN Diplomatic Conference on the

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135. See Carnahan, *supra* note 95, at 73 (noting that the 1907 Hague Conventions are silent on the use of landmines); see also Hague Convention IV Respecting the Laws and Customs of War on Land and Annexed Regulations, 18 October 1907, 36 Stat. 2332, T.S. 541.

136. See DEADLY LEGACY, *supra* note 46, at 264.

137. *Id.* at 266; see Carnahan, *supra* note 95, at 75. A minefield that would have taken a company an entire day to lay could now be laid in minutes. *Id.* at 79. This caused concern because mined areas from WW II still were not adequately cleared. See *supra* pt. II.

138. Mines delivered by this technique are known as “remotely delivered mines.”

139. See Carnahan, *supra* note 95, at 79-80.

140. See DEADLY LEGACY, *supra* note 46, at 264. Lieutenant Colonel Carnahan also points out that “[p]olitically, the rise of international terrorism in the 1960s and 1970s stimulated efforts to curb some of the terrorists’ favorite weapons, booby traps and time bombs.” Carnahan, *supra* note 95, at 75.

141. See DEADLY LEGACY, *supra* note 46, at 264.

142. A fourth attempt, not discussed in this article, is the President Clinton-proposed “U.S.-U.K. Control Regime,” which called for the eventual replacement of “dumb” mines with “smart” mines. See G.E. Willis, *A Global Land Mine Time Line*, ARMY TIMES, June 15, 1998, at 15. This effort failed as poor nations balked at the expense. *Id.*

143. See Protocol II, *supra* note 30; see also ALSTON ET AL., *supra* note 84, at 18-5. The U.S. Senate gave its advice and consent to the ratification of CCW and Protocol II on March 24, 1995. See Matheson, *supra* note 100, at 160.

144. See DEADLY LEGACY, *supra* note 46, at 264. See generally Carnahan, *supra* note 95, at 75; Matheson, *supra* note 100, at 158.

145. See DEADLY LEGACY, *supra* note 46, at 264.

Reaffirmation and Development of International Humanitarian Law created the committee that examined, among other weapons, landmines.<sup>147</sup>

The committee's findings were taken to the UN General Assembly during two preparatory conferences in 1978 and 1979.<sup>148</sup> In 1979 and 1980 in a two-session conference, the General Assembly produced the Landmines Protocol (or Protocol II) as part of the CCW.<sup>149</sup> Protocol II entered into force on 2 December 1983, with thirty-six countries as parties.<sup>150</sup>

Protocol II provides specific regulation of landmines.<sup>151</sup> Neither offensive, defensive, nor reprisal uses of anti-personnel mines are authorized for use against civilians.<sup>152</sup> Any indiscriminate use of mines is also prohibited.<sup>153</sup> Article 3 defines "indiscriminate" broadly. It includes any use either when the mines are not targeted against a legitimate military objective,<sup>154</sup> or when the mines are delivered using a method that cannot target the military objective with a reasonable amount of accuracy.<sup>155</sup> Furthermore, the use of landmines cannot cause incidental civilian casualties to persons or property that is "excessive in relation to the concrete and direct military advantage anticipated."<sup>156</sup> The Article concludes its protec-

146. *Id.*

147. *Id.* The International Committee of the Red Cross assisted the UN effort with two conferences of their own, one in Lucerne in 1974 and the other in Lugano in 1976. *Id.* at 265.

148. *Id.* Eighty-five nations, including all major military powers, participated. See Carnahan, *supra* note 95, at 75.

149. DEADLY LEGACY, *supra* note 46, at 265. See Protocol II, *supra* note 30. Eighty-five countries, including all major military powers, participated in the conferences. DEADLY LEGACY, *supra* note 46, at 266.

150. Protocol II, *supra* note 30; see also DEADLY LEGACY, *supra* note 46, at 261 n.1.

151. See Protocol II, *supra* note 30, art. 1. The preamble to the CCW states four guiding humanitarian principles underlying the Protocol: (1) civilians should be protected; (2) combatants are limited by the laws of war; (3) weapons that cause superfluous injury or unnecessary suffering should be banned; and (4) methods of warfare causing long-term and widespread damage to the environment should be banned. See *id.* pmbl.

152. *Id.* art. 3.2. "It is prohibited in all circumstances to direct weapons to which this [a]rticle applies, either in offence, defence or by way of reprisals, against the civilian population as such or against the individual civilians." *Id.*

153. *Id.* art. 3.1. "This Article applies to: (a) mines; (b) booby-traps; and (c) other devices. *Id.*

154. *Id.* art. 3.3(a). "Indiscriminate use is any placement of such weapons: (a) Which is not on, or directed against, a military objective . . ." *Id.*

155. *Id.* art. 3.3(b). This section defines indiscriminate use as using mines in a way that "employs a method or means of delivery which cannot be directed at a specific military objective . . ." *Id.*

tions by requiring that all “feasible precautions” be taken to protect civilians from landmines.<sup>157</sup> Feasible precautions, according to the Article, “are those precautions which are practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.”<sup>158</sup>

Article 4 of the Protocol controls the use of all mines except remotely delivered mines.<sup>159</sup> Precautions to protect civilians must be taken whenever possible.<sup>160</sup> When combat is not occurring or does not appear likely to occur in the near future, Article 4<sup>161</sup> prohibits opposing militaries from employing mines around any high concentration of civilians.<sup>162</sup> Two exceptions, however, are made to this rule.<sup>163</sup> First, the mines can be used when they are emplaced on or near a military objective controlled by the enemy.<sup>164</sup> Second, the mines can be used when steps are taken to protect the surrounding civilian population.<sup>165</sup> Such steps include posting warning signs, issuing warnings, providing fences, or posting guards.<sup>166</sup>

The Protocol also specifically regulates remotely delivered.<sup>167</sup> According to Article 5, they can only be used on a military objective itself or within an area that contains more than one military target.<sup>168</sup> The Article further requires that remotely delivered mines only be used when their

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156. *Id.* art. 3.3(c). Indiscriminate here is further defined as that use of mines “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” *Id.*

157. *Id.* art. 3.4. “All feasible precautions shall be taken to protect civilians from the effects of weapons to which this Article applies.” *Id.*

158. *Id.* art. 3.4.

159. *Id.* art. 4. Remotely delivered mines are defined as any mine “delivered by artillery, rocket, mortar or similar means or dropped by an aircraft.” *Id.* art. 2.1.

160. *See id.* arts. 3-7

161. *Id.* art. 4. “This article applies to: (a) mines other than remotely delivered mines; (b) booby-traps; and (c) other devices.” *Id.*

162. *Id.* art. 4.1. “It is prohibited to use weapons to which this Article applies in a city, town, village or other area containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear to be imminent. . . .” *Id.*

163. *Id.* art. 4.2.

164. *Id.* art. 4.2(a). The mines can be used if “they are placed on or in the close vicinity of a military objective belonging to or under the control of an adverse party . . . .” *Id.*

165. *Id.* art. 4.2(b). Mines can also be used when “measures are taken to protect civilians from their effects . . . .” *Id.*

166. *Id.* art. 4.2(b).

167. *Id.* art. 5. The Protocol defines “remotely delivered mines” as any mine “delivered by artillery, rocket, mortar or similar means or dropped from an aircraft.” *Id.* art. 2.1.



location can be accurately recorded or, alternatively, when the mines are self-neutralizing or self-destructing.<sup>169</sup> Whenever possible, the warring parties are also required to give warnings to the civilian populace before remotely delivering mines.<sup>170</sup>

Article 6 forbids the warring parties from booby-trapping mines by disguising them as “harmless portable objects.”<sup>171</sup> The Article specifically prohibits the booby-trapping of several objects such as Red Cross equipment, living people and bodies, living animals and carcasses, toys, religious objects, and cultural works.<sup>172</sup>

Another important area covered by the Protocol is the mapping of minefields.<sup>173</sup> Parties must record the location of all pre-planned mine-

168. *Id.* art. 5.1 “The use of remotely delivered mines is prohibited unless such mines are only used within an area which is itself a military objective or which contains military objectives . . . .” *Id.*

169. *Id.* art. 5.1(a), (b). Remotely delivered mines cannot be used unless:

- (a) Their location can be accurately recorded in accordance with Article 7(1)(a); or
- (b) An effective neutralizing mechanism is used on each such mine, that is to say, a self-actuating mechanism which is designed to render a mine harmless or cause it to destroy itself when it is anticipated that the mine will no longer serve the military purpose for which it was placed in position, or a remotely-controlled mechanism which is designed to render harmless or destroy a mine when the mine no longer serves the military purpose for which it was placed in position.

*Id.*

The recording standard of Article 7(1)(b) is defined in the technical annex as a location “specified by relation to the co-ordinates of a single reference point and by the estimated dimensions of the area containing mines and booby traps in relation to that single reference point.” *Id.*

170. *Id.* art. 5.2. “Effective advance warning shall be given of any delivery or dropping of remotely delivered mines which may affect the civilian populations, unless circumstances do not permit.” *Id.*

171. *Id.* art. 6.1(a).

Without prejudice to the rules of international law applicable in armed conflict relating to treachery and perfidy, it is prohibited in all circumstance to use: (a) Any booby-trap in the form of an apparently harmless portable object which is specifically designed and constructed to contain explosive material and to detonate when it is disturbed or approached . . .

*Id.*

Tactical surprise or the safety of pilots delivering mines may be justifiable reasons not to warn civilians under Protocol II. *See* Carnahan, *supra* note 95, at 80.

fields and must record the areas where they have made “large-scale and pre-planned” use of booby traps.<sup>174</sup> The technical annex of the Protocol indicates that “records should be made in such a way as to indicate the extent of the minefield or booby-trapped area.”<sup>175</sup> The location must be depicted by providing a coordinate reference point and the estimated dimensions of the affected area in relation to the given reference point.<sup>176</sup>

The Protocol also mandates that the parties attempt to map the location of all unplanned minefields, mines, or booby traps.<sup>177</sup> Once the parties establish peace, they are to take “necessary and appropriate” steps to protect civilians from leftover landmines.<sup>178</sup> This includes, at a minimum,

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172. Protocol II, *supra* note 30, art. 6.1(b). Booby-traps and, therefore, booby-trapped mines can not be used under the following conditions:

(b) Booby-traps which are in any way attached to or associated with:

- (i) Internationally recognized protective emblems, signs or signal;
- (ii) Sick, wounded or dead persons;
- (iii) Burial or cremation sites or graves;
- (iv) Medical facilities, medical equipment, medical supplies or medical transportation;
- (v) Children’s toys or other portable objects or product specifically designed for the feeding, health, hygiene, clothing or education of children;
- (vi) Food or drink;
- (vii) Kitchen utensils or appliances except in military establishments, military locations or military supply depots;
- (viii) Objects clearly of a religious nature;
- (ix) Historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
- (x) Animals or their carcasses.

*Id.*

173. *See id.* arts. 7.1 to 7.3.

174. *See id.* art. 7.1. “The parties to conflict shall record the location of: (a) All pre-planned minefield laid by them; and (b) all area in which they have made large-scale and pre-planned use of booby-trapped.” *Id.*

175. *See id.* technical annex.

176. *Id.*

177. *See id.* art. 7.2. “The parties shall endeavour to ensure the recording of the location of all other minefields, mines and booby-traps which they have laid or placed in position.” *Id.*

178. *See id.* art. 7.3(a)(i). “All such records shall be retained by the parties who shall: (a) Immediately after the cessation of hostilities: (i) Take all necessary and appropriate measures, including the use of such records, to protect civilians from the effects of minefields, mines and booby-traps . . .” *Id.*

providing minefield locations to both the adverse party and the UN Secretary-General.<sup>179</sup> They may also include a mutual plan for mine clearance.<sup>180</sup>

The review and amendment process of Protocol II is controlled by Article 8 of the CCW preamble.<sup>181</sup> Member states with proposals must submit their ideas to UN Secretary-General, who then notifies all the other member states.<sup>182</sup> If a majority, and not less than eighteen, agree that a conference is warranted, the Secretary-General convenes one.<sup>183</sup> All member states are invited, and non-members can attend as observers.<sup>184</sup>

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179. *See id.* art. 7.3(a)(ii)-(iii).

(ii) In cases where the forces of neither party are in the territory of the adverse party, make available to each other and to the Secretary-General of the United Nations all information in their possession concerning the location of minefields, mines and booby-traps in the territory of the adverse party; or (iii) Once complete withdrawal of forces of the parties from the territory of the adverse party has taken place, make available to the adverse party and to the Secretary-General of the United Nations all information in their possession concerning the location of minefields, mines and booby traps in the territory of the adverse party . . . .

*Id.*

180. *See id.* art. 7.3(c). The parties to the conflict shall “[w]henever possible, by mutual agreement, provide for the release of information concerning the location of minefields, mines and booby traps, particularly in agreements governing the cessation of hostilities.” *Id.* *See also id.* art. 9.

After the cessation of active hostilities, the parties shall endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of information and technical and material assistance—including, in appropriate circumstances, joint operations necessary to remove or otherwise render ineffective minefields, mines and booby-traps placed in position during the conflict.

*Id.*

181. *See id.* art. 8.1(a). “At any time after the entry into force of this Convention any High Contracting Party may propose amendments to this Convention or any annexed Protocol by which it is bound.” *Id.*

182. *Id.* “Any proposal for an amendment shall be communicated to the Depository, who shall notify it to all the High Contracting Parties and shall see their views on whether a conference should be convened to consider the proposal.” *Id.*

183. *Id.* “If a majority, that shall not be less than eighteen of the High Contracting Parties so agree, he shall promptly convene a conference to which all High Contracting Parties shall be invited.” *Id.*

The conference can then vote on amendments using traditional UN procedures.<sup>185</sup>

A member can denounce the Protocol by notifying the Secretary-General.<sup>186</sup> The denunciation will only take effect after one year has passed.<sup>187</sup> If the denouncing member is party to an international armed conflict or is occupied, however, the strictures of the Protocol remain in place.<sup>188</sup>

*b. Analysis*

Protocol II has been a practical failure,<sup>189</sup> containing several weaknesses.<sup>190</sup> For example, it does not apply to civil wars—and civil wars have been the source of the most recent mine abuse.<sup>191</sup> The responsibility for clearing mines is not clearly assigned.<sup>192</sup> Instead, Article 9 uses vague

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184. *Id.* “States not parties to this Convention shall be invited to the conference as observers.” *Id.*

185. *Id.* art. 8.1(b).

Such a conference may agree upon amendments which shall be adopted and shall enter into force in the same manner as this Convention and the annexed Protocols, provided that amendments to this Convention may be adopted only by the High Contracting Parties and that amendments to a specific annexed Protocol may be adopted only by the High Contracting Parties which are bound by that Protocol.

*Id.*

186. *Id.* art. 9.1. “Any High Contracting Party may denounce this Convention or any of its annexed Protocols by so notifying the Depositary.” *Id.*

187. *Id.* art 9.2. “Any such denunciation shall only take effect one year after receipt by the Depositary of the notification of denunciation.” *Id.*

188. *Id.*

If, however, on the expiry of that year the denouncing High Contracting Party is engaged in one of the situations referred to in Article 1, the Party shall continue to be bound by the obligations of this Convention and of the relevant annexed Protocols until the end of the armed conflict or occupation and, in any case, until the termination of operations connected with the final release, repatriation or re-establishment of the person protected by the rules of international law applicable in armed conflict, and in the case of any annexed Protocol containing provisions concerning situations in which peace-keeping, observation or similar functions are performed by United Nations forces or missions in the area concerned, until the termination of those functions.

*Id.*

189. Protocol II is still good law in countries that adopted it.

language such as “shall endeavor” and “where appropriate” when describing demining responsibilities.<sup>193</sup> The Protocol also does not prohibit plastic or other non-detectable mines.<sup>194</sup> Thus, under the Protocol, battlefields may remain littered with anti-detector mines long after hostilities cease.

Provisions for remotely delivered mines and hand-emplaced mines are also relatively weak.<sup>195</sup> For example, the Protocol allows mines to be remotely delivered without warning to civilians, if the warning is not feasible.<sup>196</sup> The elasticity of the Article’s wording—“unless circumstances do not permit”—creates an enormous loophole, possibly never actually requiring a warning. Yet the Protocol does not mandate an alert of civilians even after the fact.<sup>197</sup> Likewise, the Protocol’s wording concerning the marking of minefields is ambiguous. The Protocol requires the mapping of “pre-planned” minefields, but then never defines “pre-planned.”<sup>198</sup>

Another major shortcoming of the Protocol is its failure to regulate the production, sale, exportation, or stockpiling of landmines.<sup>199</sup> Without such a provision, the Protocol is ineffective at terminating the problem at its source. Finally, the Protocol lacks teeth, having no effective implemen-

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190. See Matheson, *supra* note 100, at 159 (“[T]he Mines Protocol suffered from serious substantive shortcomings, the CCW covered only international armed conflicts (those between states), and it did not provide for verification or compliance.”); Yves Sandoz, *Turning Principles into Practice: The Challenge for International Conventions and Institutions*, in *CLEARING THE MINES* (Kevin M. Cahill, M.D. ed., 1995) (providing a detailed critique of the protocol).

191. See McCall, *supra* note 11, at 264 (giving as examples, the conflicts in Angola, Afghanistan, Bosnia-Herzegovina, Cambodia, Georgia, Kurdistan, Liberia, and Rwanda); YATES, *supra* note 33, at 13.

192. See Protocol II, *supra* note 30, art. 9; see also YATES, *supra* note 33, at 14.

193. See Protocol II, *supra* note 30, art. 9.

194. See generally Protocol II, *supra* note 30.

195. See *id.* art. 5.2.

196. See *id.* (saying that a warning must be given “unless circumstances do not permit”).

197. See *id.*; see also Carnahan, *supra* note 95, at 80-1 (pointing out that Article 3’s catchall “all feasible precautions” clause would probably require this anyway).

198. See Protocol II, *supra* note 30, arts. 2, 7. See also McCall, *supra* note 11, at 160 (citing the Protocol’s “lack of clear examples and consistent examples”).

199. See generally Protocol II, *supra* note 30; see DEADLY LEGACY, *supra* note 46, at 261. Since 1992, the United States has had a moratorium on the sale, transfer, and export of antipersonnel mines, excluding command detonating mines. See The National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 1365(c) (creating the moratorium); The National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 1423 (exempting command detonating mines).

tation or monitoring mechanism, thus, leaving the member states to act on their honor.<sup>200</sup>

Not surprisingly, Protocol II has been largely ignored. Under the Protocol, landmines continued to be used directly against civilians or in ways that unjustifiably endangered civilians.<sup>201</sup> Moreover, armies and insurgent groups did a notoriously poor job keeping accurate maps of minefields.<sup>202</sup> Yet, with delivery systems that can scatter mines at rates in excess of one thousand mines per minute, accurate mapping becomes a practical difficulty.<sup>203</sup> In short, the Protocol has been grossly ineffective in preventing abuses of human rights through landmines.<sup>204</sup> Under the Protocol, landmines have continued to be used indiscriminately and have even specifically targeted civilian populaces.<sup>205</sup>

Retrospectively, one can easily point out the deficiencies of Protocol II. But as one commentator points out: "By even undertaking the task of codifying and developing the law of land mine warfare . . . the Conference broke important new ground. The Land Mines Protocol thus fill[ed] a major gap in existing humanitarian law."<sup>206</sup> For the first time specific international laws were in place governing the use of mines, and a forum was created to further discuss and legislate restraints on landmine use.

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200. See generally Protocol II, *supra* note 30; see also McCall, *supra* note 11, at 260; YATES, *supra* note 33, at 13; Matheson, *supra* note 100, at 163 ("The . . . Mines Protocol had no provisions for verification or enforcement of compliance.").

201. See DEADLY LEGACY, *supra* note 46, at 263.

202. *Id.* ("No armed force in the last decade is known to have consistently and accurately recorded the location of minefields in actual combat conditions.")

203. See generally *id.*

204. ROBERTS & WILLIAMS, *supra* note 49.

205. See DEADLY LEGACY, *supra* note 46, at 263.

206. Carnahan, *supra* note 95, at 94; see Araujo, *supra* note 52, at 7 ("In spite of its limitations, this protocol gives much needed attention to the lingering problems encountered with the use of [landmines]."); see *supra* pt. II.

## 2. *The Amended Protocol II*<sup>207</sup>

### a. *Summary*

The second piece of international law that attempts to control the use of landmines is the Amended Protocol II. In May 1996, the first review conference of the CCW adopted an amended landmines protocol,<sup>208</sup> an event largely ignored amidst the ballyhoo accompanying the announcement of a possible anti-personnel landmine ban.<sup>209</sup> The original Protocol II provided for a periodic review conference.<sup>210</sup> Amended Protocol II was the result of that first meeting of the review conference. Thus, the Amended Protocol was drafted as an attempt to correct the deficiencies of the original Protocol II and to offer greater protection to innocent civilians from anti-personnel mines.<sup>211</sup> Not surprisingly, Amended Protocol II bears strong resemblance to the original Protocol II in some respects, but it also contains a number of significant changes from the original.

Article 1 contains one of the most important “amendments” to the original Protocol II—the expansion of the law to cover internal armed conflict.<sup>212</sup> This amendment satisfied one of the most virulent criticisms of the

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207. Amended Protocol II, *supra* note 30. President Clinton transmitted Amended Protocol II to the Senate for ratification on 7 January 1997. *See* President’s Message, *supra* note 46; ALSTON ET AL., *supra* note 84, at 18-5.

208. *See* Matheson, *supra* note 100, at 158 (citing Mines Protocol to the CCW, as amended, May 3, 1996, Final Document of the Review Conference of the States parties to the Convention, Conf. Doc. CCW/CONF. I/16 at 14 (1996), 35 I.L.M. 1206 (1996)); *see also* CCW, *supra* note 100, pmb., art. 8 (making provisions for review conferences and the amendment process to the Protocol).

209. *See* Raymond Bonner, *21 Nations Seek to Limit the Traffic in Light Weapons*, N.Y. TIMES, July 13, 1998, at A3 (saying that the Clinton “Administration is determined to avoid a repeat of the land-mines campaign—the ‘Madison Avenue approach,’ . . . meaning a public relations blitz with images of victims”); Efav, *supra* note 65, at A15 (discussing awarding the Nobel Peace Prize to Jody Williams of the International Committee to Ban Landmines); Willis, *supra* note 36, at 12 (speaking of the emotional backing for the ban after the death of Diana, Princess of Wales).

210. *See* CCW, *supra* note 100, pmb., art. 8.

211. *See* President’s Message, *supra* note 46.

212. Amended Protocol II, *supra* note 30, art. 1.3. “In case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply the prohibitions and restrictions of this Protocol.” *Id.* *See generally* Sherman Letter, *supra* note 34; President’s Message, *supra* note 46. But note that “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of similar violence” do not rise to the level of armed conflict; therefore, the Protocol does not apply under those conditions.” Amended Protocol II, *supra* note 30, art. 1.

original Protocol—that civil wars were exempt from landmine restrictions.<sup>213</sup>

Article 3 contains several general restrictions on the use of mines.<sup>214</sup> Mines are not permitted “to cause superfluous injury or unnecessary suffering.”<sup>215</sup> Anti-detector mines, which are mines designed to explode upon detection by a magnetic mine detector, are completely banned.<sup>216</sup> That provision has no transition period but is effective immediately. In addition, if anti-handling devices<sup>217</sup> are used with anti-tank mines, Article 3 requires that the devices must be designed to stop functioning at the same time that the anti-tank mine stops functioning.<sup>218</sup>

Like the original Protocol II, the Amended Protocol II prohibits the use of landmines against civilians—offensively, defensively, or as a reprisal.<sup>219</sup> Also following the original Protocol II, indiscriminate use of landmines is prohibited.<sup>220</sup>

Amended Protocol II adds an important caveat: if there is a “case of doubt as to whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be used so.”<sup>221</sup> If targeted areas are “separate and distinct”

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213. *See supra* pt. IV.B.1.b.

214. Amended Protocol II, *supra* note 30, art. 3. “This article applies to: mines, booby-traps, and other devices.” *Id.*

215. *Id.* art. 3.3. *Cf.* Protocol II, *supra* note 30, art. 3.

216. Amended Protocol II, *supra* note 30, art. 3.5. “It is prohibited to use mines, booby-traps or other devices which employ a mechanism or device specifically designed to detonate the munition by the presence of commonly available mine detectors as a result of their magnetic or other non-contact influence during normal use in detection operations.” *Id.*

217. “Anti-handling” device means a device intended to protect a mine and which is part of, linked to, attached to or placed under the mine and which activates when an attempt is made to tamper with the mine. *Id.* art. 2.14; *see also* Landmine Ban, *supra* note 30, art. 2.3 (giving the identical definition but adding “or otherwise intentionally disturb the mine”).

218. Amended Protocol II, *supra* note 30, art. 3.6. “It is prohibited to use a self-deactivating mine equipped with an anti-handling device that is designed in such a manner that the anti-handling device is capable of functioning after the mine has ceased to be capable of functioning.” *Id.*

219. *Id.* art. 3.7. “It is prohibited in all circumstances to direct weapons to which this Article applies, either in offence, defence or by way of reprisals, against the civilian population as such or against individual civilians or civilian objects.” *Id.* *Cf.* Protocol II, *supra* note 30, art. 3.2 (containing identical language except for the words “or civilian objects”).



and located near a concentration of civilians, the areas cannot be treated as one target.<sup>222</sup>

Echoing again the original Protocol II, the amended version requires that “[a]ll feasible precautions” be taken to guard against civilians being injured by mines.<sup>223</sup> The Amended Protocol, however, gives specific guidance for an all-things-considered determination by the commander.<sup>224</sup> Decision-makers must at least consider the following:

- (a) [T]he short- and long-term effect of mines upon the local civilian population for the duration of the minefield; (b) possible measures to protect civilians (for example, fencing, signs, warning and monitoring); the availability and feasibility of using alternatives; and (d) the short- and long-term military requirements for a minefield.<sup>225</sup>

Finally, Article 3 broadly requires that advanced warning of landmine use always be given to civilians if possible.<sup>226</sup>

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220. Amended Protocol II, *supra* note 30, art. 3.8. The indiscriminate use of weapons to which this Article applies is prohibited. Indiscriminate use is any placement of such weapons:

- (a) which is not on, or directed against, a military objective. In case of doubt as to whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used; or
- (b) which employs a method or means of delivery which cannot be directed at a specific military objective; or
- (c) which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

*Id.*

221. *Id.* art. 3.8(a). *Cf.* Protocol II, *supra* note 30, art. 3.3.

222. Amended Protocol II, *supra* note 30, art. 3.9. “Several clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are not to be treated as a single military objective.” *Id.*

223. *Id.* art. 3.10.

224. *Id.* “Feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.” *Id.*

225. *Id.* *Cf.* Protocol II, *supra* note 30, art. 3.4 (giving no specific guidance).

Article 4 requires that all landmines be rendered detectable,<sup>227</sup> by mandating that each anti-personnel mine contain at least eight grams of iron or its equivalent.<sup>228</sup> This minimum quantity of metal allows for humanitarian demining using “commonly available technology.”<sup>229</sup> The protocol allows nine years for countries to transition to this standard.<sup>230</sup>

The use of conventional or “dumb” mines is restricted, but they can be used under certain conditions.<sup>231</sup> First, minefields must be perimeter marked,<sup>232</sup> fenced, and guarded.<sup>233</sup> Then they must be cleared when the

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226. Amended Protocol II, *supra* note 30, art. 3.11. “Effective advance warning shall be given of any emplacement of mines, booby-traps and other devices which may affect the civilian population, unless circumstances do not permit.” *Id.*

227. *Id.* art. 4. “It is prohibited to use anti-personnel mines which are not detectable, as specified in paragraph 2 of the [t]echnical [a]nnex.” *Id.*

228. *Id.* technical annex.

2. Specifications on detectability

(a) With respect to anti-personnel mines produced after 1 January 1997, such mines shall incorporate in their construction a material or device that enables the mine to be detected by commonly-available technical mine detection equipment and provides a response signal equivalent to a signal from 8 grammes or more of iron in a single coherent mass.

(b) With respect to anti-personnel mines produced before 1 January 1997, such mines shall either incorporate in their construction, or have attached prior to their emplacement, in a manner not easily removable, a material or device that enables the mine to be detected by commonly-available technical mine detection equipment and provides a response signal equivalent to a signal from 8 grammes or more of iron in a single coherent mass.

*Id.*

229. *Id.*; see President’s Message, *supra* note 46.

230. Amended Protocol II, *supra* note 30, technical annex 2.

(c) In the event that a High Contracting Party determines that it cannot immediately comply with sub-paragraph (b), it may declare at the time of its notification of consent to be bound by this Protocol that it will defer compliance with sub-paragraph (b) for a period not to exceed 9 years from the entry into force of this Protocol. In the meantime it shall, to the extent feasible, minimize the use of anti-personnel mines that do not so comply.

*Id.*

231. *Id.* art. 5. *Cf.* Protocol II, *supra* note 30, art. 4 (containing little guidance).

controlling state leaves the area, unless the minefields are accepted by another state that agrees to continue to comply with the Protocol.<sup>234</sup>

The Amended Protocol makes an exception to this standard if the controlling state is forced out of the controlled area by “enemy military action.”<sup>235</sup> If, however, the state regains control of the area or to another

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232. Note the requirements for the marking of minefields. Amended Protocol II, *supra* note 30, technical annex, art. 4.

Signs similar to the example attached and as specified below shall be utilized in the marking of minefields and mined areas to ensure their visibility and recognition by the civilian population: (a) size and shape: a triangle or square no smaller than 28 centimetres (11 inches) by 20 centimetres (7.9 inches) for a triangle, and 15 centimetres (6 inches) per side for a square; (b) colour: red or orange with a yellow reflecting border; (c) symbol: the symbol illustrated in the Attachment, or an alternative readily recognizable in the area in which the sign is to be displayed as identifying a dangerous area; (d) language: the sign should contain the word “mines” in one of the six official languages of the Convention (Arabic, Chinese, English, French, Russian and Spanish) and the language or languages prevalent in that area; (e) spacing: signs should be placed around the minefield or mined area at a distance sufficient to ensure their visibility at any point by a civilian approaching the area.

*Id.*

233. *Id.* art. 5.1-5.2.

1. This Article applies to anti-personnel mines other than remotely-delivered mines.

2. It is prohibited to use weapons to which this Article applies which are not in compliance with the provisions on self-destruction and self-deactivation in the [t]echnical [a]nnex, unless:(a ) such weapons are placed within a perimeter-marked area which is monitored by military personnel and protected by fencing or other means, to ensure the effective exclusion of civilians from the area. The marking must be of a distinct and durable character and must at least be visible to a person who is about to enter the perimeter-marked area . . . .

*Id.*

Article 5.5 mandates that “[a]ll feasible measures shall be taken to prevent the unauthorized removal, defacement, destruction or concealment of any device, system or material used to establish the perimeter of a perimeter-marked area.” *Id.* art. 5.5.

234. *Id.* art. 5.2(b). This article states that mines must be “cleared before the area is abandoned, unless the area is turned over to the forces of another State which accept responsibility for the maintenance of the protections required by this Article and the subsequent clearance of those weapons.” *Id.*

enemy area that contains conventional anti-personnel landmines, the state must maintain or establish the standards for marking, fencing, and guarding the minefields.<sup>236</sup> Some command-detonated mines, such as Claymores in the tripwire mode, are exempted from the above standard.<sup>237</sup> They can be emplaced for up to seventy-two hours if: “(a) they are located in the immediate proximity of the military unit that emplaced them; and (b) the area is monitored by military personnel to ensure the effective exclusion of civilians.”<sup>238</sup>

Article 6 controls the use of remotely delivered mines.<sup>239</sup> The estimated position of remotely delivered mines is to be recorded, usually using the coordinates of the corner points.<sup>240</sup> Then as soon as feasible, those

235. *Id.* art. 5.3.

A party to a conflict is relieved from further compliance with the provisions of sub-paragraphs 2 (a) and 2 (b) of this Article only if such compliance is not feasible due to forcible loss of control of the area as a result of enemy military action, including situations where direct enemy military action makes it impossible to comply. . . .

*Id.*

236. *Id.* art. 5.3-5.4. The end of Article 5.3 states that “[I]f that party regains control of the area, it shall resume compliance with the provisions of sub-paragraphs 2 (a) and 2 (b) of this Article.” Article 5.4 provides that:

If the forces of a party to a conflict gain control of an area in which weapons to which this Article applies have been laid, such forces shall, to the maximum extent feasible, maintain and, if necessary, establish the protections required by this Article until such weapons have been cleared.

*Id.*

237. *Id.* art. 5.6. “Weapons to which this Article applies which propel fragments in a horizontal arc of less than 90 degrees and which are placed on or above the ground may be used without the measures provided for in sub-paragraph 2 (a) of this Article for a maximum period of 72 hours . . .” *Id.*

238. *Id.*

239. *Id.* art. 6. Note the change in definition of “remotely-delivered mine.”

“Remotely-delivered mine” means a mine not directly emplaced but delivered by artillery, missile, rocket, mortar, or similar means, or dropped from an aircraft. Mines delivered from a land-based system from less than 500 metres are not considered to be “remotely delivered,” provided that they are used in accordance with Article 5 and other relevant Articles of this Protocol.

*Id.* art. 2.2. *Cf.* Protocol II, *supra* note 30, arts. 2, 5.

points are to be confirmed and physically marked on the ground.<sup>241</sup> Parties are to record the type and number of mines laid, the date and time the mines were laid, and the self-destruct time.<sup>242</sup> These records are to be “held at a level of command sufficient to guarantee their safety as far as possible.”<sup>243</sup>

If the mines used were produced after the Amended Protocol had entered force, the mines must be indelibly marked with the name of the producing nation, the month, and year of production, and the lot or serial number.<sup>244</sup> Effective warning of an imminent remote delivery of mines is to be given “unless circumstance[s] do not permit.”<sup>245</sup>

Perhaps most important, the Amended Protocol requires that all unmarked anti-personnel mines be “smart.”<sup>246</sup> The “smart” requirement stipulates that at least ninety percent of the unmarked anti-personnel mines must self-destruct within thirty days of emplacement.<sup>247</sup> As an added precaution, if a mine is flawed and does not self-destruct, each mine must also be programmed to self-deactivate within 120 days of emplacement.<sup>248</sup> The required reliability rate for self-deactivation is 99.9%, and this built-in

240. Amended Protocol II, *supra* note 30, technical annex 1(b). “The estimated location and area of remotely-delivered mines shall be specified by coordinates of reference points (normally corner points) . . . .” *Id.*

241. *Id.* Remotely-delivered “shall be ascertained and when feasible marked on the ground at the earliest opportunity.” *Id.*

242. *Id.* “The total number and type of mines laid, the date and time of laying and the self-destruction time periods shall also be recorded.” *Id.*

243. *Id.* technical annex 1(c).

244. *Id.* technical annex 1(d).

245. *Id.* art. 6.4.

246. *Id.* arts. 5.2, 6.2. *See also supra* notes 25-33 and accompanying text. According to President Clinton’s May 16, 1996 policy letter, all mines used by U.S. forces will be “smart.” Since then, the United States has destroyed over two million of its dumb mines and will destroy all the rest by the 2000, except those on the Korean DMZ. Shelton, *supra* note 83.

247. Amended Protocol II, *supra* note 30, technical annex 3(a). “All remotely-delivered anti-personnel mines shall be designed and constructed so that no more than 10% of activated mines will fail to self-destruct within 30 days after emplacement . . . .” *Id.* “All non-remotely delivered anti-personnel mines, used outside marked areas, as defined in Article 5 of this Protocol, shall comply with the requirements for self-destruction and self-deactivation stated in sub-paragraph (a).” *Id.* technical annex 3(b).

248. *Id.* technical annex 3(a). “[E]ach mine shall have a back-up self-deactivation feature designed and constructed so that, in combination with the self-destruction mechanism, no more than one in one thousand activated mines will function as a mine 120 days after emplacement.” *Id.*

redundancy provides a failure rate approaching zero percent.<sup>249</sup> Countries that join the treaty have nine years to transition to this standard.<sup>250</sup>

Article 7 provides a prohibition against using anti-personnel mines to booby-trap certain common items.<sup>251</sup> Like the original Protocol II, the amended version forbids the booby-trapping of objects such as Red Cross equipment, living people and dead bodies, living animals and carcasses, toys, religious objects, and cultural works.<sup>252</sup> It also prohibits parties from booby-trapping mines by disguising them as “harmless portable objects.”<sup>253</sup>

Amended Protocol II, however, does allow for the narrowly tailored use of booby-trapped mines.<sup>254</sup> These can be used around cities, towns, and villages where combat is occurring or appears imminent.<sup>255</sup> In the absence of combat or imminent combat they may be used if: “(a) they are placed on or in the close vicinity of a military objective; or (b) measures are taken to protect civilians from their effects, for example, the posting of warning sentries, the issuing of warnings or the provision of fences.”<sup>256</sup>

Article 8 controls the transfer of mines.<sup>257</sup> Parties are to “undertake not to transfer” mines that are the type prohibited by the Protocol.<sup>258</sup> This Article also mandates that parties who are deferring compliance to certain

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249. See Robert Sherman, FRIENDS’ COMMITTEE ON NAT’L LEGIS. NEWSL., Aug. 1996; see also Sherman Letter, *supra* note 34.

250. Amended Protocol II, *supra* note 30, technical annex 3(c).

(c) In the event that a High Contracting Party determines that it cannot immediately comply with sub-paragraphs (a) and/or (b), it may declare at the time of its notification of consent to be bound by this Protocol, that it will, with respect to mines produced prior to the entry into force of this Protocol defer compliance with sub-paragraphs (a) and/or (b) for a period not to exceed 9 years from the entry into force of this Protocol.

During this period of deferral, the High Contracting Party shall:

- (i) undertake to minimize, to the extent feasible, the use of anti-personnel mines that do not so comply, and
- (ii) with respect to remotely-delivered anti-personnel mines, comply with either the requirements for self-destruction or the requirements for self-deactivation and, with respect to other anti-personnel mines comply with at least the requirements for self-deactivation.

*Id.*

251. *Id.* art. 7. See *id.* art. 6.

articles must conform to this transfer rule.<sup>259</sup> States who are about to become parties to the Protocol should “refrain from actions inconsistent” with the transfer rule.<sup>260</sup> Importantly, the Article also requires parties to

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252. *Id.* art. 7.1. Without prejudice to the rules of international law applicable in armed conflict relating to treachery and perfidy, it is prohibited in all circumstances to use booby-traps and other devices which are in any way attached to or associated with:

- (i) Internationally recognized protective emblems, signs or signal;
- (ii) Sick, wounded or dead persons;
- (iii) Burial or cremation sites or graves;
- (iv) Medical facilities, medical equipment, medical supplies or medical transportation;
- (v) Children’s toys or other portable objects or product specifically designed for the feeding, health, hygiene, clothing or education of children;
- (vi) Food or drink;
- (vii) Kitchen utensils or appliances except in military establishments, military locations or military supply depots;
- (viii) Objects clearly of a religious nature;
- (ix) Historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
- (x) Animals or their carcasses.

*Id.*

A new member can only get this nine year transition exemption if it claims the transition at the time ratification. *See* Sherman Letter, *supra* note 40. So far, only China has claimed them, but Pakistan is expected to claim the exception too. *Id.* Russia is expected to claim the exception for self-destruction. *Id.* India is expected to claim the transition period for detectability. *Id.*

253. Amended Protocol II, *supra* note 30, art. 7.2.

254. *Id.* art. 7.3.

255. *Id.*

Without prejudice to the provisions of Article 3, it is prohibited to use weapons to which this Article applies in any city, town, village or other area containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear to be imminent, unless either . . . .

*Id.*

256. *Id.*

257. *Id.* art. 8.

258. *Id.* art. 8.1(a). This has been interpreted to mean that the transfer of non-detectable anti-personnel mines is banned totally and immediately. *See* Sherman, *supra* note 40.

259. Amended Protocol II, *supra* note 30, art. 8.2. “In the event that a High Contracting Party declares that it will defer compliance with specific provisions on the use of certain mines, as provided for in the [t]echnical [a]nnex, sub-paragraph 1(a) of this Article shall however apply to such mines.” *Id.*

“undertake[] not to transfer any anti-personnel mines” to states not bound by the Amended Protocol II, unless those states agree to comply with the Protocol.<sup>261</sup>

The Protocol also sets enhanced guidelines for recording mines,<sup>262</sup> other than remotely delivered mines.<sup>263</sup> Mined areas must be described by giving the grid coordinates to a minimum of two reference points and then providing the estimated size and shape of the area in relation to the reference points.<sup>264</sup> Mines and minefields must also be recorded on maps and military diagrams to show “perimeters and extent.”<sup>265</sup> Finally, each record must show “type, number, emplacing method, type of fuse and life time, date and time of laying, anti-handling devices (if any) and other relevant information on all . . .” mines used.<sup>266</sup> When feasible, the exact location of each individual mine should be noted.<sup>267</sup>

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260. *Id.* art. 8.3. “All High Contracting Parties, pending the entry into force of this Protocol, will refrain from any actions which would be inconsistent with sub-paragraph 1(a) of this Article.” *Id.*

261. *Id.* art. 8.1(c). Each High Contracting Party “undertakes to exercise restraint in the transfer of any mine the use of which is restricted by this Protocol. In particular, each High Contracting Party undertakes not to transfer any anti-personnel mines to States which are not bound by this Protocol, unless the recipient State agrees to apply this Protocol . . .” *Id.* The transfer of mines to sub-state entities, like factions or rebels, is also banned. *See* Sherman Letter, *supra* note 40.

262. Amended Protocol II, *supra* note 30, art. 9, technical annex 1(a). *Cf.* Protocol II, *supra* note 30, art. 7.

263. Remotely-delivered mines are controlled by Article 6 and technical annex 1(b). *See* Amended Protocol II, *supra* note 30, art. 6, technical annex 1(b).

264. *Id.* technical annex 1(a)(i). Parties are to provide “the location of the minefields, mined areas and areas of booby-traps and other devices shall be specified accurately by relation to the coordinates of at least two reference points and the estimated dimensions of the area containing these weapons in relation to those reference points.” *Id.* *Cf.* Protocol II, *supra* note 30, technical annex.

265. Amended Protocol II, *supra* note 30, technical annex 1(a)(ii). “[M]aps, diagrams or other records shall be made in such a way as to indicate the location of minefields, mined areas, booby-traps and other devices in relation to reference points, and these records shall also indicate their perimeters and extent . . .” *Id.*

266. *Id.* technical annex 1(a)(iii).

[F]or purposes of detection and clearance of mines, booby-traps and other devices, maps, diagrams or other records shall contain complete information on the type, number, emplacing method, type of fuse and life time, date and time of laying, anti-handling devices (*if any*) and other relevant information on all these weapons laid.

*Id.* (emphasis added).



At the end of hostilities, parties are to take “all necessary and appropriate measures” to protect civilians, including, but not limited to, the use of the information discussed above.<sup>268</sup> Part of these measures include providing this recorded information to the other parties to the conflict and to the UN Secretary-General.<sup>269</sup> Either party may withhold this information if an adverse party remains in the territory of the other party and “security interest[s] require such withholding.”<sup>270</sup>

Each party has responsibility for the mines remaining in areas under their control after hostilities cease.<sup>271</sup> Parties are to “endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of technical

267. *Id.* technical annex 1(a)(iii). “Whenever feasible the minefield record shall show the exact location of every mine, except in row minefields where the row location is sufficient. The precise location and operating mechanism of each booby-trap laid shall be individually recorded.” *Id.*

268. *Id.* art. 9.2.

All such records shall be retained by the parties to a conflict, who shall, without delay after the cessation of active hostilities, take all necessary and appropriate measures, including the use of such information, to protect civilians from the effects of minefields, mined areas, mines, booby-traps and other devices in areas under their control.

*Id.*

269. *Id.* arts. 9.2, 10.3.

At the same time, they shall also make available to the other party or parties to the conflict and to the Secretary-General of the United Nations all such information in their possession concerning minefields, mined areas, mines, booby-traps and other devices laid by them in areas no longer under their control . . . .

*Id.* art. 9.2.

With respect to minefields, mined areas, mines, booby-traps and other devices laid by a party in areas over which it no longer exercises control, such party shall provide to the party in control of the area pursuant to paragraph 2 of this Article, to the extent permitted by such party, technical and material assistance necessary to fulfill such responsibility.

*Id.* art. 10.3

270. *Id.* art. 9.2.

271. *Id.* art. 10.2. “High Contracting Parties and parties to a conflict bear such responsibility with respect to minefields, mined areas, mines, booby-traps and other devices in areas under their control.” *Id.*

and material assistance, including, in appropriate circumstances, the undertaking of joint operations necessary to fulfill such responsibilities.”<sup>272</sup>

Article 11 expands this idea, providing each party entitlement to technological cooperation and assistance with landmine issues.<sup>273</sup> Each party has the right to get information, material, and equipment from other parties for complying with the Protocol.<sup>274</sup> Article 11 also provides for the creation of an international database on mine clearance.<sup>275</sup> Each party may request assistance with mine clearing through the UN, and each party has “the right to . . . receive technical assistance, where appropriate, from another High Contracting Party on specific relevant technology,” if that technology transfer will allow the other party to reduce “any period of deferral for which provision is made in the [t]echnical [a]nnex.”<sup>276</sup>

Each year the parties to the Protocol must submit an annual report.<sup>277</sup> These reports can concern any of the following topics:

- (a) dissemination of information on this Protocol to their armed forces and to the civilian population;
- (b) mine clearance and rehabilitation programmes;
- (c) steps taken to meet technical requirements of this Protocol and any other relevant information pertaining thereto;
- (d) legislation related to this Protocol;

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272. *Id.* art. 10.4. *Cf.* Protocol II, *supra* note 30, art. 9.

273. Amended Protocol II, *supra* note 30, art. 11. *Cf.* Protocol II, *supra* note 30, art. 9.

274. Amended Protocol II, *supra* note 30, art. 11.1.

Each High Contracting Party undertakes to facilitate and shall have the right to participate in the fullest possible exchange of equipment, material and scientific and technological information concerning the implementation of this Protocol and means of mine clearance. In particular, High Contracting Parties shall not impose undue restrictions on the provision of mine clearance equipment and related technological information for humanitarian purposes.

*Id.*

275. *Id.* art. 11.2 “Each High Contracting Party undertakes to provide information to the database on mine clearance established within the United Nations System, especially information concerning various means and technologies of mine clearance, and lists of experts, expert agencies or national points of contact on mine clearance.” *Id.*

276. *Id.* art. 11.7.

277. *Id.* art. 13.4.

- (e) measures taken on international technical information exchange, on international cooperation on mine clearance, and on technical cooperation and assistance; and
- (f) other relevant matters.<sup>278</sup>

The parties also meet annually “to consult and cooperate with each other on issues related to the operation” of the Protocol.<sup>279</sup> At the conference, parties discuss the success of the Protocol, plan for review conferences, consider technological developments to protect civilians, and discuss any other issues raised by the annual reports.<sup>280</sup>

Compliance with the Protocol is addressed in Article 14.<sup>281</sup> This Article affirmatively obligates member states to incorporate the standards of the Protocol into each nation’s laws and regulations.<sup>282</sup> These laws should include penal sanctions for anyone whose willful actions in violation of the Protocol causes serious injury or death to someone else.<sup>283</sup> Each party must also issue appropriate instructions and adjust the operating procedures of its armed forces to the extent necessary to conform the military to the Protocol.<sup>284</sup> This includes ensuring that military leaders receive training on the Protocol that is commensurate with their duties and responsibilities.<sup>285</sup> Any questions that arise regarding interpreting and applying the Protocol are to be resolved through consulting with other member states

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278. *Id.* art. 13.4. “The High Contracting Parties shall provide annual reports to the Depositary, who shall circulate them to all High Contracting Parties in advance of the Conference . . . .” *Id.*

279. *Id.* art. 13.1. “The High Contracting Parties undertake to consult and cooperate with each other on all issues related to the operation of this Protocol. For this purpose, a conference of High Contracting Parties shall be held annually.” *Id.*

280. *Id.* art. 13.3.

The work of the conference shall include: (a) review of the operation and status of this Protocol; (b) consideration of matters arising from reports by High Contracting Parties according to paragraph 4 of this Article; (c) preparation for review conferences; and (d) consideration of the development of technologies to protect civilians against indiscriminate effects of mines.

*Id.* There is also a review conference schedule for 2001, five years from the date of adoption. *See* Sherman, *supra* note 40.

281. Amended Protocol II, *supra* note 30, art. 14.

282. *Id.* art. 14.1. “Each High Contracting Party shall take all appropriate steps, including legislative and other measures, to prevent and suppress violations of this Protocol by persons or on territory under its jurisdiction or control.” *Id.*

and the UN Secretary-General.<sup>286</sup> Withdrawal provisions in the Amended Protocol remain the same as in the original Protocol.<sup>287</sup>

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283. *Id.* art. 14.2.

The measures envisaged in paragraph 1 of this Article include appropriate measures to ensure the imposition of penal sanctions against persons who, in relation to an armed conflict and contrary to the provisions of this Protocol, willfully kill or cause serious injury to civilians and to bring such persons to justice.

*Id.*

284. *Id.* art. 14.3. “Each High Contracting Party shall also require that its armed forces issue relevant military instructions and operating procedures . . .” *Id.*

285. *Id.* “[A]rmed forces personnel [must] receive training commensurate with their duties and responsibilities to comply with the provisions of this Protocol.” *Id.*

286. *Id.* art. 14.4. “The High Contracting Parties undertake to consult each other and to cooperate with each other bilaterally, through the Secretary-General of the United Nations or through other appropriate international procedures, to resolve any problems that may arise with regard to the interpretation and application of the provisions of this Protocol.” *Id.*

287. *See* CCW, *supra* note 100, pmb., art. 9.

*b. Analysis*

Amended Protocol II is a vast improvement over the original Protocol II. Building on thirteen years of experience with the original Protocol II, every subject that was covered under the original is covered in the amended version too, but with greater detail and specificity. The drafters of Amended Protocol II also addressed and attempted to rectify nearly every deficiency of the original.<sup>288</sup> The law now applies to internal armed conflict (for example, civil wars and insurgencies), where previously it had only applied to conflicts between nations.<sup>289</sup> Furthermore, all anti-personnel mines are required to be detectable, greatly increasing the safety of mine clearers.<sup>290</sup>

Amended Protocol II also clearly assigns responsibility for demining. It imposes the additional requirement that all mines must either self-destruct, self-neutralize, or self-deactivate, thereby drastically reducing danger to civilians from minefields after hostilities end.<sup>291</sup> Transfers of mines are regulated, reducing the access of non-compliant groups.<sup>292</sup> A minimum standard for the marking of minefields is established.<sup>293</sup> For the first time, verifiable compliance measures are emplaced, helping member states assess if nations actually intend to be bound by the Protocols or are merely seeking to curry the favor of the international community.<sup>294</sup>

Nevertheless, Amended Protocol II does have its shortcomings.<sup>295</sup> Most notably, the provisions to verify and to enforce compliance are weak.<sup>296</sup> While member states are required to pass legislation that mandates the standards set forth in the Protocol, no provision was made for transparency inspections<sup>297</sup> or mandatory reports. These would provide some physical proof that nations are actually complying with the Protocol.

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288. *See id.* pt. IV.B.1.b. Parties laying mines are now required to “assume responsibility for them to ensure against their irresponsible and indiscriminate use.” *See* President’s Message, *supra* note 46.

289. *See supra* pt. IV.B.2.a.

290. *See id.*

291. *See id.* Note that the self-destruct/self-deactivate requirement only applies to unmarked anti-personnel mines. *See* Sherman Letter, *supra* note 30.

292. *See supra* pt. IV.B.2.a.

293. *See id.*

294. *See id.*

295. The weaknesses of the Amended Protocol II can be addressed in the periodic review sessions that are required under the law. *See* CCW, *supra* note 100, pmb., art. 8; *see also* President’s Message, *supra* note 46.

296. *See* pt. IV.B.2.a.; *see also* President’s Message, *supra* note 46.

For instance, a member state could transfer mines or not retrofit plastic mines with metal, and other member states may never find out. Another deficiency is the Protocol's failure to address production. Under the current verbiage, a member state could continue to manufacture "dumb" anti-personnel landmines with impunity.<sup>298</sup> Finally, the transition window given for signing countries to transition from noncompliant mines to acceptable mines seems unnecessarily long.<sup>299</sup>

### *1. The Landmine Ban*

#### *a. Summary*

A more radical approach to legislatively curbing the landmine problem is a total ban on landmine possession and use.<sup>300</sup> Until recently, the UN had never seriously considered a ban on landmines under international law because UN procedure allows measures to be easily defeated by member states who disagree with the measure; thus, every nation effectively holds a veto.<sup>301</sup> Even as late as 1995, most analysts felt that an actual international treaty to ban landmines would be years away, perhaps by 2010, and then only accomplished by the UN.<sup>302</sup>

A number of NGOs, however, banded together calling themselves the International Campaign for a Landmine Ban. They managed to bring the issue to the forefront of international politics in 1996.<sup>303</sup> In October of 1996, an unprecedented seventy-four nations attended a conference, in Ottawa, to discuss the ban.<sup>304</sup> By that time, the number of countries supporting the ban in some form had grown from fourteen to forty-seven.<sup>305</sup>

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297. Transparency measures include inspections, reports, and mandatory national laws that allow nations to ensure that a signing nation is not hiding anything (e.g., anti-personnel landmines), hence the measure renders the nation "transparent."

298. These mines can also be transferred since their use is permitted in marked areas. See Sherman Letter, *supra* note 40. One possible solution would be to completely ban use or transfer of "dumb" mines.

299. See pt. IV.B.2.a.; see also President's Message, *supra* note 46.

300. See McCall, *supra* note 11, at 271-72 (calling the movement for a complete ban "the farthest extreme" of the efforts to restrict landmines).

301. Craig Turner, *70 Nations Meet To Consider Ban on Land Mines*, L.A. TIMES, Oct. 5, 1996, A6.

302. Jessica Mathews, *The New, Private Order*, WASH. POST, Jan. 21, 1997, at A11.

303. *Id.* This movement is also known as the Ottawa Convention or Ottawa Process, which reflects Canada hosting the first major ban conference in Ottawa.

304. *Id.*

A final text was decided on in September 1997 with 125 nations signing the document. Several major producers, like China and Russia, have refused to sign.<sup>306</sup> Their refusal has prompted other world powers to decline signing the ban.<sup>307</sup>

Article 1 of the Landmine Ban lays out the basic tenets of the treaty:  
General obligations:

1. Each State Party undertakes never under any circumstances:
  - (a) To use anti-personnel mines;
  - (b) To develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines;
  - (c) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.
  
2. Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in accordance with the provisions of this Convention.<sup>308</sup>

According to Article 4 of the Landmine Ban, each party has a maximum of four years to destroy all stockpiled anti-personnel landmines.<sup>309</sup>

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305. Turner, *supra* note 301, at A6.

306. Jim Mannion, *U.S. Wants Talks on Land Mine Ban Held in Geneva*, AGENCE FRANCE PRESSE, Jan. 18, 1997. Russia and China own most of the world's anti-personnel mines. See Sherman Letter, *supra* note 101. "The vast majority of [anti-personnel landmine] casualties are caused by mines produced, exported, and/or used by Russia and China." Sherman, *supra* note 249. In fact, Russia and China possess more landmines than the rest of the world combined. See Sherman, *supra* note 40. The United States favors an eventual ban on anti-personnel landmines, but not the one resulting from the Ottawa Process. See President's Message, *supra* note 46 (calling Amended Protocol II "an important precursor to the total prohibition that the United States seeks").

307. *Id.* Despite these countries' refusal to sign, the ban could eventually apply to them through customary international practice if their actions and future non-policy statements reflect adherence to the ban. See Major Timothy P. Bulman, *A Dangerous Guessing Game Disguised as Enlightened Policy: United States Law of War Obligations During Military Operations Other Than War*, 159 MIL. L. REV. 151 (1999); W. MICHAEL REISMAN & CHRIS T. ANTONIOU, *THE LAWS OF WAR XX* (1994) (saying that the limitations of treaties often make both scholars and nations eager to "contend that rules that have commenced in a treaty have subsequently been transformed into custom because of the widespread practice of states"). However, as Reisman and Antoniou point out, "This may be very subjective, for the evidence of transformation into custom is often sparse and ambiguous." *Id.*

308. Landmine Ban, *supra* note 30, art. 1.

Article 5 allows a maximum of ten years for a country to rid itself of all anti-personnel mines that are emplaced in minefields under that country's control.<sup>310</sup> The only mines that are excepted from this standard are mines that are retained or transferred "for the development of and training in mine detection, mine clearance, and mine destruction . . . ."<sup>311</sup>

If any member nation cannot comply with the standards, the country can request an extension of up to ten years.<sup>312</sup> The nation submits the request to a review conference or a meeting of states parties. The request must include the duration of the extension; a detailed explanation of reasons for the delay; and the humanitarian, social, economic, and environmental impact that an extension may have on the country.<sup>313</sup> The meeting of the states parties or review conference, then considering all the above factors, decides by majority vote whether to grant the extension.<sup>314</sup> A non-complying party can request extensions as many times as necessary.<sup>315</sup>

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309. *Id.* art. 4.

Except as provided for in Article 3, each State Party undertakes to destroy or ensure the destruction of all stockpiled anti-personnel mines it owns or possesses, or that are under its jurisdiction or control, as soon as possible but not later than four years after the entry into force of this Convention for that State Party.

*Id.* Cf. Amended Protocol II, *supra* note 30, art. 4, technical annex 2.c. (giving nine years for compliance). Destroying mines, however, is easier and faster than retrofitting mines with metal and self-destruct, self-neutralizing, or self-deactivating capabilities.

310. Landmine Ban, *supra* note 30, art. 5.1. "Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in mined areas under its jurisdiction or control, as soon as possible but not later than ten years after the entry into force of this Convention for that State Party." *Id.* Note that member states can gain another 10-year extension under Articles 5.3-5.4, if a majority of members approve. Cf. Protocol II, *supra* note 30, art. 9; Amended Protocol II, *supra* note 30, art. 10 (saying that minefields must be destroyed "without delay" but with no real deadline).

311. Landmine Ban, *supra* note 30, art. 3. The article conditions this exception saying that "[t]he amount of such mines shall not exceed the minimum number absolutely necessary for the above-mentioned purposes." *Id.*

312. *Id.* art. 5.3.

3. If a State Party believes that it will be unable to destroy or ensure the destruction of all anti-personnel mines referred to in paragraph 1 within that time period, it may submit a request to a Meeting of the States Parties or a Review Conference for an extension of the deadline for completing the destruction of such anti-personnel mines, for a period of up to ten years.

*Id.*



Article 6 of the Landmine Ban provides for international cooperation and assistance among the member states.<sup>316</sup> Each signing country is obligated to give and entitled to receive “the fullest possible exchange of equipment, material, and scientific and technological information concerning the implementation” of the Ban.<sup>317</sup> Countries in a position to do so must “provide assistance for the care and rehabilitation, and social and economic reintegration, of mine victims and for mine awareness programs.”<sup>318</sup> These countries must also assist in mine clearing and destruction of stockpiled anti-personnel mines when possible.<sup>319</sup> Article 6 also provides for creating an international database, listing mine clearance experts, and consolidating information about mine clearance means and technologies.<sup>320</sup>

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313. *Id.* arts. 5.3-5.4

4. Each request shall contain:

- (a) The duration of the proposed extension;
- (b) A detailed explanation of the reasons for the proposed extension, including:
  - (i) The preparation and status of work conducted under national demining programs;
  - (ii) The financial and technical means available to the State Party for the destruction of all the anti-personnel mines; and
  - (iii) Circumstances which impede the ability of the State Party to destroy all the anti-personnel mines in mined areas;
- (c) The humanitarian, social, economic, and environmental implications of the extension; and
- (d) Any other information relevant to the request for the proposed extension.

*Id.*

314. *Id.* art. 5.5. “The Meeting of the States Parties or the Review Conference shall, taking into consideration the factors contained in paragraph 4, assess the request and decide by a majority of votes of States Parties present and voting whether to grant the request for an extension period.” *Id.*

315. *Id.* art. 5.6.

Such an extension may be renewed upon the submission of a new request in accordance with paragraphs 3, 4 and 5 of this Article. In requesting a further extension period a State Party shall submit relevant additional information on what has been undertaken in the previous extension period pursuant to this Article.

*Id.*

316. *Id.* art. 6. “In fulfilling its obligations under this Convention each State Party has the right to seek and receive assistance, where feasible, from other States Parties to the extent possible.” *Id.* art. 6.1. *Cf.* Amended Protocol II, *supra* note 30, art. 11.7.

In Article 7, the Landmine Ban mandates transparency measures.<sup>321</sup> Each signing nation must make an extensive report to the UN Secretary-General not later than 180 days after the entry into force of the Ban for the nation.<sup>322</sup> The report must include national implementation measures

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317. *Id.* art. 6.2.

Each State Party undertakes to facilitate and shall have the right to participate in the fullest possible exchange of equipment, material and scientific and technological information concerning the implementation of this Convention. The States Parties shall not impose undue restrictions on the provision of mine clearance equipment and related technological information for humanitarian purposes.

*Id.* Cf. Amended Protocol, *supra* note 30, art. 11.1.

318. Landmine Ban, *supra* note 30, art. 6.3.

Each State Party in a position to do so shall provide assistance for the care and rehabilitation, and social and economic reintegration, of mine victims and for mine awareness programs. Such assistance may be provided, *inter alia*, through the United Nations system, international, regional or national organizations or institutions, the International Committee of the Red Cross, national Red Cross and Red Crescent societies and their International Federation, non-governmental organizations, or on a bilateral basis.

*Id.*

319. *Id.* art. 6.4-6.5.

4. Each State Party in a position to do so shall provide assistance for mine clearance and related activities. Such assistance may be provided, *inter alia*, through the United Nations system, international or regional organizations or institutions, non-governmental organizations or institutions, or on a bilateral basis, or by contributing to the United Nations Voluntary Trust Fund for Assistance in Mine Clearance, or other regional funds that deal with demining.

5. Each State Party in a position to do so shall provide assistance for the destruction of stockpiled anti-personnel mines.

*Id.* Cf. Amended Protocol II, *supra* note 30, art. 11.5.

320. Landmine Ban, *supra* note 30, art. 6.6. "Each State Party undertakes to provide information to the database on mine clearance established within the United Nations system, especially information concerning various means and technologies of mine clearance, and lists of experts, expert agencies or national points of contact on mine clearance." *Id.*

321. *Id.* art. 7. Cf. Amended Protocol II, *supra* note 30, art. 13.4.

322. Landmine Ban, *supra* note 30, art. 7.1. "Each State Party shall report to the Secretary-General of the United Nations as soon as practicable, and in any event not later than 180 days after the entry into force of this Convention for that State Party . . ." *Id.*

taken,<sup>323</sup> information on stockpiled anti-personnel mines,<sup>324</sup> the location of minefields within the country's control,<sup>325</sup> information on the types of mines retained by parties for training purposes,<sup>326</sup> the status of the closing of landmine factories,<sup>327</sup> information concerning the plan for destroying mines,<sup>328</sup> the number and type of mines destroyed since entry into force of the Ban,<sup>329</sup> the technical characteristics of mines produced by or possessed by a party,<sup>330</sup> and measures taken to provide warning to civilians in mined

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323. *Id.* art. 7.1.a. "The national implementation measures referred to in Article 9 . . . ." *Id.*

324. *Id.* art. 7.1.b. "The total of all stockpiled anti-personnel mines owned or possessed by it, or under its jurisdiction or control, to include a breakdown of the type, quantity and, if possible, lot numbers of each type of anti-personnel mine stockpiled. . . ." *Id.*

325. *Id.* art. 7.1.c.

To the extent possible, the location of all mined areas that contain, or are suspected to contain, anti-personnel mines under its jurisdiction or control, to include as much detail as possible regarding the type and quantity of each type of anti-personnel mine in each mined area and when they were emplaced . . . .

*Id.*

326. *Id.* art. 7.1.d.

The types, quantities and, if possible, lot numbers of all anti-personnel mines retained or transferred for the development of and training in mine detection, mine clearance or mine destruction techniques, or transferred for the purpose of destruction, as well as the institutions authorized by a State Party to retain or transfer anti-personnel mines, in accordance with Article 3.

*Id.*

327. *Id.* art. 7.1.e. "The status of programs for the conversion or de-commissioning of anti-personnel mine production facilities . . . ." *Id.*

328. *Id.* art. 7.1.f. "The status of programs for the destruction of anti-personnel mines in accordance with Articles 4 and 5, including details of the methods which will be used in destruction, the location of all destruction sites and the applicable safety and environmental standards to be observed . . . ." *Id.*

329. *Id.* art. 7.1.g.

The types and quantities of all anti-personnel mines destroyed after the entry into force of this Convention for that State Party, to include a breakdown of the quantity of each type of anti-personnel mine destroyed, in accordance with Articles 4 and 5, respectively, along with, if possible, the lot numbers of each type of anti-personnel mine in the case of destruction in accordance with Article 4;

*Id.*

areas.<sup>331</sup> After the initial report, this information must be updated each calendar year by 30 April.<sup>332</sup> The UN Secretary-General then disseminates the information to all the member states.<sup>333</sup>

Article 8 allows parties to clarify ambiguities in the Landmine Ban.<sup>334</sup> If any party has a legitimate question relating to compliance with the Ban, that nation can request clarification through the UN Secretary-General.<sup>335</sup> If the party does not receive a response within twenty-eight days or is dissatisfied with the Secretary-General's response,<sup>336</sup> the party can require the issue be raised at the next meeting of the states parties.<sup>337</sup> Alternatively, the requesting state may propose a special meeting of the states parties.<sup>338</sup> The Secretary-General is then required to forward all information relating to the issue to all member states.<sup>339</sup> If within fourteen days, one third of

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330. *Id.* art. 7.1.h.

The technical characteristics of each type of anti-personnel mine produced, to the extent known, and those currently owned or possessed by a State Party, giving, where reasonably possible, such categories of information as may facilitate identification and clearance of anti-personnel mines; at a minimum, this information shall include the dimensions, fusing, explosive content, metallic content, colour photographs and other information which may facilitate mine clearance . . . .

*Id.*

331. *Id.* art. 7.1.i. "The measures taken to provide an immediate and effective warning to the population in relation to all areas identified under paragraph 2 of Article 5." *Id.*

332. *Id.* art. 7.2. "The information provided in accordance with this Article shall be updated by the States Parties annually, covering the last calendar year, and reported to the Secretary-General of the United Nations not later than 30 April of each year." *Id.*

333. *Id.* art. 7.3. "3. The Secretary-General of the United Nations shall transmit all such reports received to the States Parties." *Id.*

334. *Id.* art. 8.1. "The States Parties agree to consult and cooperate with each other regarding the implementation of the provisions of this Convention, and to work together in a spirit of cooperation to facilitate compliance by States Parties with their obligations under this Convention." *Id.* Cf. Amended Protocol II, *supra* note 30, art. 13.

335. Landmine Ban, *supra* note 30, art. 8.2.

If one or more States Parties wish to clarify and seek to resolve questions relating to compliance with the provisions of this Convention by another State Party, it may submit, through the Secretary-General of the United Nations a Request for Clarification of that matter to that State Party. Such a request shall be accompanied by all appropriate information. Each State Party shall refrain from unfounded requests for Clarification, care being taken to avoid abuse.

*Id.*

the states parties expresses the desire to hold a special meeting, a special meeting, consisting of a majority of member states, will convene within another fourteen days.<sup>340</sup>

When the meeting of the states or a special meeting convenes, the states try to resolve the problem by consensus.<sup>341</sup> If this fails, the states then decide by majority vote whether to take the issue further.<sup>342</sup> If the vote returns in favor of further clarification, the states form a fact-finding mission and decide on its mandate by majority vote.<sup>343</sup> Once the fact-finding mission returns its report, the meeting of the states parties or special meeting of the states parties reconvenes and considers all the relevant information to include the fact finding mission's report.<sup>344</sup> The states then

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336. *Id.* arts. 8.2-8.3.

A State Party that receives a Request for Clarification shall provide, through the Secretary-General of the United Nations, within 28 days to the requesting State Party all information which would assist in clarifying this matter.

If the requesting State Party does not receive a response through the Secretary-General of the United Nations within that time period, or deems the response to the Request for Clarification to be unsatisfactory, it may submit the matter through the Secretary-General of the United Nations to the next Meeting of the States Parties.

*Id.*

337. *Id.* art. 8.3. "The Secretary-General of the United Nations shall transmit the submission, accompanied by all appropriate information pertaining to the Request for Clarification, to all States Parties. All such information shall be presented to the requested State Party which shall have the right to respond." *Id.*

338. *Id.* art. 8.5. "The requesting States parties may propose through the Secretary-General of the United Nations the convening of a Special meeting of the States parties to consider the matter." *Id.*

339. *Id.* "The Secretary-General of the United Nations shall thereupon communicate this proposal and all information submitted by the States Parties concerned, to all States Parties with a request that they indicate whether they favour a Special Meeting of the States Parties, for the purpose of considering the matter." *Id.*

340. *Id.* art. 8.5.

In the event that within 14 days from the date of such communication, at least one third of the States Parties favours such a Special Meeting, the Secretary-General of the United Nations shall convene this Special Meeting of the States Parties within a further 14 days. A quorum for this Meeting shall consist of a majority of States Parties.

*Id.*

again try to reach a decision by consensus.<sup>345</sup> If a consensus decision again fails, a decision can only be reached by a two-thirds majority of the states present and voting.<sup>346</sup>

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341. *Id.* art. 8.6.

The Meeting of the State or the Special Meeting of the States Parties, as the case may be, shall first determine whether to consider the matter further, taking into account all information submitted by the States Parties concerned. The Meeting of the States Parties or the Special Meeting of the States Parties shall make every effort to reach a decision by consensus.

*Id.*

342. *Id.* art. 8.6. “If despite all efforts to that end no agreement has been reached, it shall take this decision by a majority of States Parties present and voting.” *Id.*

343. *Id.* art. 8.8. “If further clarification is required, the Meeting of the States Parties or the Special Meeting of the States Parties shall authorize a fact-finding mission and decide on its mandate by a majority of States Parties present and voting.” *Id.*

344. *Id.* arts. 8.18-8.20.

The Meeting of the States Parties or the Special Meeting of the States Parties shall consider all relevant information, including the report submitted by the fact-finding mission, and may request the requested State Party to take measures to address the compliance issue within a specified period of time. The requested State Party shall report on all measures taken in response to this request.

The Meeting of the States Parties or the Special Meeting of the States Parties may suggest to the States Parties concerned ways and means to further clarify or resolve the matter under consideration, including the initiation of appropriate procedures in conformity with international law. In circumstances where the issue at hand is determined to be due to circumstances beyond the control of the requested State Party, the Meeting of the States Parties or the Special Meeting of the States Parties may recommend appropriate measures, including the use of cooperative measures referred to in Article 6.

*Id.*

345. *Id.* art. 8.20. “The Meeting of the States Parties or the Special Meeting of the States Parties shall make every effort to reach its decisions referred to in paragraphs 18 and 19 by consensus . . .” *Id.*

346. *Id.* (saying that if not by consensus then “by a two-thirds majority of States Parties present and voting”).

The Ban also has an article controlling the settlement of disputes, but it is very brief and contains no specific procedures. *See id.* art. 10; *cf.* Amended Protocol II, *supra* note 30, art. 14.4. It is likely that member states will follow the procedure in Article 8 to settle disputes.

The ban officially came into effect on 1 March 1999, six months after the 40<sup>th</sup> nation ratified it.<sup>347</sup> As of March 1999, sixty-five of the 133 signing nations have actually ratified the document.<sup>348</sup> The state parties are required to meet annually to discuss any issue relevant to the Ban.<sup>349</sup> Five years after the Ban enters into force, the parties will have the first review conference to discuss and decide any relevant issues.<sup>350</sup> Importantly, only after entry into force can a party propose amendments to the Ban.<sup>351</sup>

Article 20 allows each signing party “in exercising its national sovereignty” to withdraw from the Convention.<sup>352</sup> The withdrawal, however,

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347. Landmine Ban, *supra* note 30, art. 17.1. “This Convention shall enter into force on the first day of the sixth month after the month in which the 40<sup>th</sup> instrument of ratification, acceptance, approval or accession has been deposited.” *Id.* See also Clare Nullies, *U.N. Land-Mine Treaty Takes Effects*, WASH. POST, Mar. 1, 1999, available at <<http://www.washingtonpost.com/wp-svr/digest/intoo5.htm>>.

348. To track the progress of the ban access <<http://www.icbl.org>>; see 144 CONG. REC. S10,576 (daily ed. Sept. 18, 1998) (statement of Sen. Leahy) (memorializing the fortieth ratification of the Landmine Ban).

349. Landmine Ban, *supra* note 30, art. 11.

1. The States Parties shall meet regularly in order to consider any matter with regard to the application or implementation of this Convention, including:
  - a. The operation and status of this Convention;
  - b. Matters arising from the reports submitted under the provisions of this Convention;
  - c. International cooperation and assistance in accordance with Article 6;
  - d. The development of technologies to clear anti-personnel mines;
  - e. Submissions of States Parties under Article 8; and
  - f. Decisions relating to submissions of States Parties as provided for in Article 5.
2. The First Meeting of the States Parties shall be convened by the Secretary-General of the United Nations within one year after the entry into force of this Convention. The subsequent meeting shall be convened by the Secretary-General of the United Nations annually until the first Review Conference.
3. Under the conditions set out in Article 8, the Secretary-General of the United Nations shall convene a Special Meeting of the States Parties.
4. States not party to this Convention, as well as the United Nations, other relevant international organizations or institutions, regional organizations, the International Committee of the Red Cross and relevant non-governmental organizations may be invited to attend these meetings as observers in accordance with the agreed Rules of Procedure.

*Id.* Cf. Amended Protocol II, *supra* note 30, art. 13.

will not take effect until six months after submitting an instrument of withdrawal. If the withdrawing nation is involved in an armed conflict within this six-month waiting period, the withdrawal is of no effect.<sup>353</sup>

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350. Landmine Ban, *supra* note 30, art. 12.

1. A Review Conference shall be convened by the Secretary-General of the United Nations five years after the entry into force of this Convention. Further Review Conferences shall be convened by the Secretary-General of the United Nations if so requested by one or more of the States Parties, provided that the interval between Review Conferences shall in no case be less than five years. All States Parties to this Convention shall be invited to each Review Conference.
2. The purpose of the Review Conference shall be:
  - a. To review the operation and status of this Convention;
  - b. To consider the need for the interval between further Meetings of the States Parties referred to in paragraph 2 of Article 11;
  - c. To make decisions on submissions of States Parties as provided for in Article 5; and
  - d. To adopt, if necessary in its final report, conclusions related to the implementation of this Convention.
3. States not party to this Convention, as well as the United Nations, other relevant international organizations or institutions, regional organizations, the International Committee of the Red Cross and relevant non-governmental organizations may be invited to attend each Review Conference as observers in accordance with agreed Rules of Procedure.

*Id.* Cf. CCW, *supra* note 100, pmb., art. 8.

351. Landmine Ban, *supra* note 30, art. 13. "At any time after the entry into force of this Convention any State Party may propose amendments to this Convention." *Id.*

352. *Id.* art. 20.2.

Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention. It shall give notice of such withdrawal to all other States Parties, to the Depositary and to the United Nations Security Council. Such instrument of withdrawal shall include a full explanation of the reasons motivating this withdrawal.

*Id.*

353. *Id.* art. 20.3.

Such withdrawal shall only take effect six months after the receipt of the instrument of withdrawal by the Depositary. If, however, on the expiry of that six-month period, the withdrawing State Party is engaged in an armed conflict, the withdrawal shall not take effect before the end of the armed conflict.

*Id.* Cf. CCW, *supra* note 100, pmb., art. 9.



*b. Analysis*

Much of what is good about the Landmine Ban is borrowed from Amended Protocol II. The drafters of the Ban recognized and acknowledged the legitimacy of Amended Protocol II, endorsing the Protocol in the Ban's preamble.<sup>354</sup> Moreover, the Ban's drafters capitalized on the improved-Amended Protocol II by adopting wholesale many of the Protocol's provisions. For example, several of the definitions in the Ban are identical to those within the Protocol.<sup>355</sup> Much of the Ban's Article 6, international cooperation and assistance, is taken verbatim from Amended Protocol II's Article 11, technological cooperation and assistance.<sup>356</sup> Articles 9 and 10 of the Ban borrow heavily from the Protocol's Article 14. Directly referencing Amended Protocol II,<sup>357</sup> the Ban has identical requirements for the marking, monitoring, and cordoning off anti-personnel mines from civilians.<sup>358</sup>

In other areas the Ban expands upon Amended Protocol II. Several of these expansions are improvements on the Protocol. Most significant among these are the administrative controls that are contained within the

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354. See Landmine Ban, *supra* note 30, pmbl. ("Calling for the early ratification of this Protocol by all countries which have not yet done so . . .").

355. Compare the Ban's definitions in Article 2 with the Amended Protocol's definitions in Article 2. The Ban has far fewer definitions. Both have identical definitions, however, for "mine" and "anti-handling," while the definitions for "anti-personnel mine" and "transfer" are nearly identical. *But see* Spinelli Letter, *supra* note 32 (calling the use of the word "primarily" in Amended Protocol II "a world of substantive difference").

356. See *supra* notes 274-277, 316-320 and accompanying text.

357. See *supra* notes 282-287 and accompanying text.

358. Landmine Ban, *supra* note 30, art. 5(2).

2. Each State Party shall make every effort to identify all areas under its jurisdiction or control in which anti-personnel mines are known or suspected to be emplaced and shall ensure as soon as possible that all anti-personnel mines in mined areas under its jurisdiction or control are perimeter-marked, monitored, and protected by fencing or other means, to ensure the effective exclusion of civilians, until all anti-personnel mines contained therein have been destroyed. The marking shall at least be to the standards set out in the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices, as amended on 3 May 1996, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects.

*Id.* Cf. Amended Protocol II, *supra* note 30, technical annex, art. 4.

Ban. For instance, Article 5's provisions for gaining an extension to clear minefields mandates a detailed set of steps that member states must complete.<sup>359</sup> Article 10 in Amended Protocol II has no such extension provision, largely because the Protocol contains no deadline for clearing minefields.<sup>360</sup> Theoretically, the clearing could continue forever. The Ban also possesses extremely detailed transparency measures in Article 7, while Amended Protocol II is silent on the subject.<sup>361</sup> Likewise, the Ban's Article 8, facilitation and clarification of compliance, is without analogy in the Protocol.<sup>362</sup> By requiring these additional hoops, the drafters of the Ban close possible loopholes in Amended Protocol II and facilitate the ability of nations to monitor each other's compliance.

The Landmine Ban, however, suffers from two fundamental flaws: (1) the Ban's scope is over inclusive in that it takes "smart" mines, legitimate weapons,<sup>363</sup> from the responsible users;<sup>364</sup> and (2) as a practical matter, the Ban's scope is under inclusive in that it will fail to remove the "dumb" mines from rogue nations and insurgents who are the current abusers of the weapon.

First, the Ban will remove anti-personnel landmines from non-abusers like the United States. The current United States landmine policy offers a classic example of responsible mine use.<sup>365</sup> The United States uses "smart" mines everywhere except the Korean DMZ.<sup>366</sup> In the DMZ and in other similar areas, such as the former border between Eastern and Western Europe during the Cold War, landmines have a legitimate long-term role justifying continued use of "dumb" mines.<sup>367</sup> The remainder and bulk of

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359. See *supra* note 314 and accompanying text.

360. See *supra* notes 272-273 and accompanying text.

361. See *supra* notes 321-333 and accompanying text; see generally Amended Protocol II, *supra* note 30.

362. See *supra* notes 334-346 and accompanying text; see generally Amended Protocol II, *supra* note 30.

363. The argument being that to the degree that anti-personnel landmines are necessary, they are also legitimate. See *supra* pt. III.

364. See *infra* note 365-378 and accompanying text, pt. V.

365. Professor R.J. Araujo concedes that one may justify the use of landmines relying on the principles of *jus in bello*, but he argues that once that the justification disappears "at the conclusion of the conflict (or its relocation to a different theater of operation)." Araujo, *supra* note 52, at 4. His argument has little relevance when applied to the United States use of mines, which self-destruct or self-neutralize after a short time. See *infra* notes 367-375 and accompanying text.

366. See Shelton, *supra* note 83. United States forces also used to have "dumb" mines surrounding the base at Guantanamo Bay, Cuba. They were removed to comply with President Clinton's 16 May 1996 policy statement concerning landmines.

U.S. landmines are laid en masse and in plain sight above ground by air forces, artillery, or combat engineer assets.<sup>368</sup>

United States mines are programmed to self-neutralize, self-destruct, or self-deactivate within hours,<sup>369</sup> and they accurately perform that task over 99.99% of the time,<sup>370</sup> making the advent of a hazardous dud extremely rare.<sup>371</sup> If the rest of the world modeled their use of anti-personnel mines after the United States, then mines would only claim one civilian casualty every three years.<sup>372</sup> Obviously, the unmarked and invisible “killing fields,” responsible for the death of thousands of innocents, are not the result of this type of mining.<sup>373</sup>

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367. ROBERTS & WILLIAMS, *supra* note 49. These mines have been called the silent sentinels, protecting the boundaries between the free and the oppressed. To ignore this reality is to be shortsighted and without historical perspective. See Matheson, *supra* note 100, at 159 (“Russia, China, India, and Pakistan refused to even consider a total ban because they depend heavily on [anti-personnel mines], particularly [for] the defense of borders areas.”). Because these mines are confined to narrow strips of “No Man’s Land,” they pose little danger to civilians. See Efaw, *supra* note 65, at A15. *But see* McCall, *supra* note 11, at 279 (saying that mines are not “silent sentries” when used in terrorizing manner against civilians). The United States has expressed an interest in doing away with the mines if “alternative technologies” can be devised and an adequate amount of time is given for a transition after the technologies are developed. Shelton, *supra* note 83.

368. See U.S. DEP’T OF ARMY, FIELD MANUAL 5-102, COUNTERMOBILITY (14 Mar. 1985); *see also* McCall, *supra* note 11, at 240. Many of these mines are remotely delivered by necessity. See Ekberg, *supra* note 83, at 156-57 (“During hostilities, the ability to deploy rapidly and to position a considerable obstacle to enemy movement can only be accomplished through the use of remotely delivered mines.”); Willis, *supra* note 36, at 12 (“Any potential threat to civilians posed by . . . mines is further reduced . . . by the fact that the mines are dropped by aircraft or artillery and sit on the surface of the ground.”).

369. Anti-personnel mines, used by the United States, are designed to self-destruct within four hours. Sherman Letter, *supra* note 101.

370. Robert Sherman observes: “Our actual self-destruct rate in test[ing] is zero, if you allow a one-hour margin for error. We had one test in more than 32K that was one hour late.” Sherman, *supra* note 101. “The self-deactivation failure rate, both in theory and practice, is zero.” *Id.* See also Spinelli Letter, *supra* note 32. These mines do an internal circuitry test upon deployment; if the mine is not functioning correctly, it immediately self-destructs. See *id.*

Others claim that smart mines do not always work, pointing specifically to the Area Denial Anti-personnel Mines (ADAM) that deliver 36 mines at a time by artillery. See McCall, *supra* note 11, at 240. John Ryle notes that “even a one-per-cent failure rate will leave tens of thousands of unexploded munitions . . .” *Id.* at n.55 (quoting John Ryle, *The Invisible Enemy*, THE NEW YORKER, Nov. 29, 1993, at 130). Nevertheless, McCall admits that mines may remain a viable weapon if the neutralization rate is higher or they are manufactured with enough metal for easy detection. See McCall, *supra* note 11, at 272.

Second, the Landmine Ban leaves anti-personnel mines in the hands of rogue nations and terrorists. The anti-personnel mines that are killing and wounding thousands of civilians each year are not mines deployed by the United States.<sup>374</sup> Rather, they are the mines planted during conflicts such as the ones in Afghanistan, Angola, Bosnia-Herzegovina, Cambodia, Iraq, and Mozambique.<sup>375</sup> Interestingly, none of these nations, or the warring factions within them, is a signatory to Protocol II or the Amended Protocol II, and each has blatantly disregarded the humanitarian spirit behind the Protocol.<sup>376</sup> Instead, the conflicts involving these countries have often been characterized by the intentional targeting of civilians with buried and booby-trapped mines.<sup>377</sup> Therefore, little reason exists to believe that they will honor an outright ban, even if one is implemented.<sup>378</sup>

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371. Critics, such as James Dunnigan, point out that “a large number of self-destruct mines did not work when first used on a wide scale in Kuwait. About 10% of mines stayed active beyond their self-destruct deadline, causing casualties long after the fighting has been successfully concluded.” DUNNIGAN, *supra* note 50, at 68. But Robert Sherman responds that though about 1700 FASCAM “smart” mines failed to self-destruct in Desert Storm, they either passively self-deactivated or failed to arm. SHERMAN, *supra* note 34. Either way, the mines were rendered harmless. He points out, however, that, theoretically, the danger is never completely gone. *Id.* A remote chance exists that a mine that failed to arm may, at some unpredictable point, arm and become lethal for the “design laid life.” *Id.* This could occur “only if the glass acid vial neither broke nor remained intact when the mine was laid, but rather cracked upon laying and broke at a later time.” *Id.* This remote possibility has been dubbed the “La Traviata Effect” after the Italian opera in which the heroine, seemingly dead, revives for one last aria. *Id.* Mr. Sherman knows of no instance of this occurring. *Id.*

Companies who produce “smart” landmines that malfunction seemingly have little incentive to improve their product, short of international law. *See* Ekberg, *supra* note 83, at 164. If a company produces defective mines, soldiers can successfully sue neither the military nor the manufacturer. *See* *Feres v. United States*, 340 U.S. 135 (1950) (stating the *Feres* doctrine that service members cannot sue the military); *McKay v. Rockwell Int’l Corp.*, 704 F.2d 444 (9<sup>th</sup> Cir. 1983) (stating that the “government contract defense” extends immunity to contractors who manufacture defective products); Ekberg, *supra* note 83, at 164.

372. *See* Sherman Letter, *supra* note 34; *see also* Matheson, *supra* note 100, at 166 (“If widely observed, the revised Protocol will limit that exposure to a few months at most—in effect, a reduction of more than 99%.”). Others contend that the “smart” mine will never be a viable option for poorer nations (and insurgent groups) because scatterable “smart” mines cost up to 10 times more than the cost of a hand emplaced “dumb” mine. *See* McCall, *supra* note 11, at 241 n.57. “Smart” mines are not so cheap. A scatterable mine with a self-destruct mechanism was reported to be \$296. *See* Ekberg, *supra* note 83, at 166 n.72. The Italian company Valsella Meccanotecnica S.p.A., however, has sold scatterable mines for as little as \$3 to \$17. *Id.*

373. *See* West & Reimer, *supra* note 91, ch. 2 (saying that the United States’ “legitimate use of APLs does not contribute to post-combat civilian casualties, which result from the indiscriminate use of [non-self-destructing anti-personnel landmines].”).

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374. Some statistics, however, suggest that just fewer than 15% of uncleared “dumb” mines were manufactured by the United States. See HUMANITARIAN DEMINING PROGRAMS, *supra* note 47, at 178. Some of these “dumb” mines, however, actually may be copies of American models. See DEADLY LEGACY, *supra* note 46, at 54; see also Owsley, *supra* note 45, at 218 (casting a “significant burden” on the United States for the landmine crisis). The United States apparently sold over 7.5 million landmines between 1969 and 1992, but between 1983 and 1992, the number of mines sold was only 150,000. *Id.* at 221. As stated earlier, a moratorium has forbade all sales and transfers of mines from the United States since 1992. See *supra* pt. III. Today, all new landmines are “smart.” See Willis, *supra* note 36, at 12. Though 10% of the mines in the U.S. inventory are “dumb,” these are only used in the Korean DMZ. *Id.*

375. See ALSTON ET AL., *supra* note 84, at 18-6 (mentioning “the indiscriminate use of anti-personnel landmines in internal conflicts in places such as Cambodia, Afghanistan, Angola, Mozambique, and the former Yugoslavia”); see also Efav, *supra* note 65, at A15.

376. Many of the nations that do have landmine problems are perennial international law “bad boys,” not holding even to the agreements that they sign. See Mundy, *supra* note 91 (“There is . . . no reason to believe that there will be fewer anti-personnel landmines employed in future conflicts by nations that do not adhere to the treaties they sign.”).

377. According to some reports, Angola, Guinea-Bissau, and Senegal continue to use anti-personnel mines, despite their signing of the Landmine Ban. See Sherman Letter, *supra* note 40; Barbara Crossette, *Security Council Seeks Talks with Angola Over U.N. Mission*, N.Y. TIMES, Jan. 22, 1999 available at <<http://www.nytimes.com/library/review/archive>> (reporting the widespread use of landmines in Angola). See also McCall, *supra* note 11, at 278 (pointing out that the world’s customary use of anti-personnel mines “partly dictates against any absolute bar being placed on their use”).

378. “CCW allows for the continued military use of [anti-personnel mines], while eliminating humanitarian drawbacks. Ergo, it’s more likely to be observed by major landmine states.” Sherman Letter, *supra* note 34. See also McCall, *supra* note 11, at 278 (“Because of the relative cheapness of mines as a weapon, “have-not” nations or rogue regimes may also choose to accept the risk of sanctions, rather than give up land mine usage altogether.”).

## V. Conclusion

Amended Protocol II provides the most practical solution to the landmine crisis to date. The Protocol strikes a balance between meeting military needs and protecting civilians,<sup>379</sup> recognizing that correct employment of anti-personnel landmines, rather than a wholesale ban,<sup>380</sup> strikes that balance.<sup>381</sup> Mine expert, Robert Sherman, points out that “[t]he root of the [anti-personnel landmine] problem is the fact that most mines, by design, function for decades after emplacement.”<sup>382</sup> By contrast, the U.S. armed forces’ current policy on the use of landmines conforms to the mandates of the Amended Protocol,<sup>383</sup> allowing the employment of anti-personnel mines, but only for valid purposes and only using mines that self-neutralize, self-destruct, or self-deactivate.<sup>384</sup> Thus, mines remain a valuable and legitimate part of the United States’ military arsenal.<sup>385</sup>

While President Clinton claims that a global ban on anti-personnel mines is one of his administration’s “top arms control priorities,” his steadfast refusal to sign the Landmine Ban is a recognition “that the United

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379. See Ary, *supra* note 50 (claiming that “[t]he balance between the military effectiveness of mines and the environmental and humanitarian damage that they cause will continue to shape the debate” in the future). *But see* McCall, *supra* note 11, at 259-60 (claiming the rule of proportionality and against excessiveness points to the illegality of anti-personnel landmines).

380. Despite current military policy, the 1996 Foreign Operations Appropriation Act, bans any United States use of anti-personnel landmines from February 1999 to February 2000. See Pub. L. No. 104-107.

381. For discussion of this balance, see ROBERTS & WILLIAMS, *supra* note 49, at 3-4.

382. Sherman, *supra* note 249 (emphasis added).

383. Under the War Crimes Act of 1996, a war crime is specifically defined to include conduct contrary to the provisions of the Amended Protocol II when that conduct results in the willful killing or serious injury of a civilian. 18 U.S.C. § 2401(c) (1994) (as amended by 105 Pub. L. No. 118-583, 111 Stat. 2386). See also Owsley, *supra* note 45, at 223-27 (presenting the historical precedent for holding civilian landmine manufacturers liable for war crimes under certain conditions).

384. YATES, *supra* note 33, at 7-8. See Richard H. Johnson, *Why Mines? A Military Perspective*, in CLEARING THE FIELDS (Kevin M. Cahill, M.D. ed., 1995). *But cf.* ROBERTS & WILLIAMS, *supra* note 49 (arguing against legitimate use of landmines); DEADLY LEGACY, *supra* note 46, at 21-22 (quoting Deborah Shapley’s *Promise and Power: The Life and Times of Robert McNamara*, and suggesting that one-fifth to one-third of all U.S. deaths in Vietnam were caused by U.S. landmines); Richard Falk, *Walking the Tightrope of International Humanitarian Law: Meeting the Challenge of Land Mines*, in CLEARING THE FIELDS (Kevin M. Cahill, M.D. ed. 1995); JAMES F. DUNNIGAN & ALBERT A. NOFL, SHOOTING BLANKS 120 (1993) (making the bold assertion that “[m]ost American casualties [in Vietnam] were from booby traps and mines”).

385. See Nash, *supra* note 30, at 327.

States has international commitments and responsibilities that must be taken into account” before such a ban could be realized.<sup>386</sup> Amended Protocol II recognizes that as long as the militaries of the world see landmines as an integral part of their arsenals, a complete ban of landmines will be unachievable.<sup>387</sup> As Robert Sherman writes: “At the end of the day, the issue will not be the purity of the positions taken by many nations who are *not* the problem. The issue will be the future humanitarian practices of the few nations who *have* been the problem.”<sup>388</sup>

The Landmine Ban is also doomed to failure by economics—anti-personnel mines are low technology and easy to manufacture.<sup>389</sup> This ease of production makes verifying a ban virtually impossible.<sup>390</sup> At an average cost of five dollars each,<sup>391</sup> mines are the exact kind of weapon that impoverished nations or guerrillas resort to as tools of terror and attrition.<sup>392</sup> Mines are the poor man’s weapon—“a high return, low cost investment.”<sup>393</sup>

Abusers realize that the cost of mine victims is far more extensive than just putting a soldier in a body bag and shipping him home.<sup>394</sup> If not

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386. President’s Message, *supra* note 46.

387. *See* Sherman, *supra* note 249.

388. *Id.* (emphasis added). This, of course, obviates a positive aspect of Amended Protocol II, namely that “the broad participation of states—some directly linked to the ‘problems’ APL.” Spinelli Letter, *supra* note 32. *See* McCall, *supra* note 11, at 275 (“Ultimately, however, the final test as to whether or not such measures [such as a ban] will be effective is primarily one of the custom of nations.”).

[B]ecause different antagonist may have quite different conceptions of the objective of war and politics and the relationships between them or they may live by different codes of chivalry or “fair play,” and because, since the Industrial Revolution, the technology of weapons has changed rapidly and competitively, key expectations about the “right way to fight” have often been unstable or uncertain for certain weapons or certain types of tactics. . . . Throughout history, nations who feel that particular legal arrangements favor the enemy and discriminate against them in some current of prospective conflict have struggled to replace them with more advantageous arrangements.

REISMAN & ANTONIOU, *supra* note 307, at xvii; (1994); Lord, *supra* note 29, at 322 (discussing the 1868 St. Petersburg declaration prohibiting the use of dum dum bullets); McCall, *supra* note 11, at 230 n.5, 277 (citing other instances of proscribed or restricted weapons); Captain J. Ashley Roach, *Certain Conventional Weapons Convention: Arms Control Or Humanitarian Law?*, 105 MIL. L. REV. 3 (1984) (arguing that the meaning of international law is ultimately determined by the practices of nations); Captain Paul A. Robblee, Jr., *The Legitimacy of Modern Conventional Weaponry*, 71 MIL. L. REV. 95 (1976) (detailing historical efforts to ban or restrict certain weapons).

killed, mine victims are usually maimed for life, thereby, draining the opposition of money, manpower, and public sentiment.<sup>395</sup> Consequently, mines have become the weapons of choice for rogue nations and insurgents—one they will continue to use even in the face of an international ban.<sup>396</sup> As former Marine Commandant retired General Carl E. Mundy claims, “It is fatuous to believe that an international accord, to say nothing of unilateral U.S. restraint in fielding self-destructing [anti-personnel landmines], will prevent such predations in the future.”<sup>397</sup> Thus, one can see that if the United States signed the ban, it would not result in greater lives saved, but rather in more lives lost, with American soldiers absorbing many of the casualties.<sup>398</sup>

United States minefields usually consist of anti-tank mines surrounded by anti-personnel mines.<sup>399</sup> The anti-tank mines are crucial to

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389. As evidenced by the estimated 500,000 to 750,000 homemade mines currently deployed in the Balkans. *See supra* notes 115-117 and accompanying text. Most third world countries can easily mass-produce mines. *See Owsley, supra* note 45, at 207.

The huge existing stockpiles of mines in the arsenals of the world’s armies almost certainly guarantee that mines will be available somewhere for use by somebody (and some mines will undoubtedly be used, despite the threat of international bans and sanctions) well into the twentyfirst [sic] century, even if their production were to be completely shut off today.

McCall, *supra* note 11, at 278.

390. *See Mundy, supra* note 91 (saying that “there is not a way to verify a ban on production and stockpiling of something as easily and inexpensively manufactured as landmines”). *But see Lightfoot, supra* note 83, at 1561-62 (arguing that a total ban is the only solution because it is more easily enforced than the Protocols).

391. Lightfoot, *supra* note 83, at 1561-62.

392. *Id.* at 3-4. *See also* ROBERTS & WILLIAMS, *supra* note 49.

393. *See* Andrew C.S. Efaw, *Land Mines Have Strategic Value . . .*, L.A. TIMES, Sept. 11, 1997, at B9.

394. *See* Andrew C.S. Efaw, *Land Mines Should Be Limited, Not Banned*, THE SUN (Balt.), Sept. 9, 1997, 17A.

395. ROBERTS & WILLIAMS, *supra* note 49, at 5 (“Many kinds of anti-personnel landmines are designed specifically to maim, a tactic that is deliberately designed to overload an enemy’s logistical system.”); *see* DEADLY LEGACY, *supra* note 46, at 95 (quoting a landmine advertisement as saying that “operating research has shown that it is better to disable the enemy than to kill him”).

396. *See* Ary, *supra* note 50 (saying that landmines’ “continued use and the failure of the international community to impose effective restrictions is an indication of their military usefulness . . .”).

397. *See Mundy, supra* note 91. *See also* Willis, *supra* note 36, at 12 (calling the ban “not elegantly simple, but simply naïve”).



U.S. success on the modern day battlefield.<sup>400</sup> They accounted for over one-third of all tank casualties during World War II and over two-thirds of all vehicle casualties in Vietnam.<sup>401</sup> But because anti-tank mines require several hundred pounds of pressure or exposure to a large magnetic field to detonate, they are worthless without anti-personnel mines in the same minefield.<sup>402</sup>

Without anti-personnel mines to “protect” the anti-tank mines, the enemy could simply walk in, pick up the anti-tank mines (possibly to use against U.S. forces later) and roll right through.<sup>403</sup> Critics say that anti-handling devices,<sup>404</sup> which the Landmine Ban allows, could do this job just as effectively.<sup>405</sup> Yet anti-handling devices may prevent sappers from simply picking up anti-tank mines, but these devices will not stop a dismounted breach of the minefield.<sup>406</sup> The breachers only have to use explosives to quickly clear a lane through the field.<sup>407</sup>

The United States current landmine policy has not and will not result in mass civilian casualties.<sup>408</sup> The U.S. policy saves lives, the lives of U.S.

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398. Some Vietnam veterans and scholars argue that American mines were used more effectively by the Viet Cong against the United States than by the United States against the Viet Cong. See Kroesen, *supra* note 99. But retired General Kroesen maintains that the mines used against Americans using American material were most often booby trapped hand grenades and artillery shells. *Id.*; see also 142 CONG. REC. S3420-21 (daily ed. Apr. 17, 1996) (statement of Senator Leahy that 7400 American soldiers were killed by landmines in Vietnam).

399. See Willis, *supra* note 36, at 12-14; Efaw, *supra* note 65, at A15

400. See Efaw, *supra* note 65, at A15.

401. See DUNNIGAN & NOFL, *supra* note 384, at 76; see also DUNNIGAN, *supra* note 50, at 80 (saying that anti-tank mines are cheap, the most feared anti-tank weapon and accounted for over 20% of tank losses in WW II).

402. See Shelton, *supra* note 83 (stating that the ban would “deny use of our mixed anti-tank munitions, which are critical to defeat enemy armored offensives . . .”); see also DUNNIGAN, *supra* note 50, at 68, 82 (saying anti-tank mines are commonly placed above ground and used in conjunction with anti-personnel mines).

403. See Efaw, *supra* note 65, at A15; Willis, *supra* note 36, at 14.

404. An anti-handling device is “a device intended to protect a mine and which is part of, linked to, attached to, or placed under the mine and which activates when an attempt is made to tamper with or otherwise intentionally disturb the mine.” Landmine Ban, *supra* note 30, art. 2.3.

405. United States studies have found anti-handling devices to be three to ten times less effective in that role than anti-personnel landmines. See Sherman Letter, *supra* note 34. GEN Mundy says the extension of the Ban to anti-personnel landmines that are being used as anti-handling devices is “[o]ne of the most troubling aspects of the Ottawa landmine ban.” Mundy, *supra* note 91.

406. See Spinelli Letter, *supra* note 32.

service members.<sup>409</sup> Most recently, mines saved lives during Operation Desert Storm.<sup>410</sup> The Air Force hastily laid a large minefield in the face of two advancing Iraqi divisions.<sup>411</sup> The minefield halted the Iraqis and protected the vulnerable left flank of the U.S. VII Corps.<sup>412</sup> The Landmine Ban would significantly degrade the armed forces' ability to defend themselves in similar situations in the future.<sup>413</sup> Ultimately, a ban leaves mines in the hands of the "bad guys" and our soldiers defenseless.<sup>414</sup>

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407. See *id.* ("AHD's [anti-handling devices] prevent RE-USE of AT mines. . . . [while] AP [anti-personnel] mines prevent RAPID DISMOUNTED BREACH of AT [anti-tank] mines."). Anti-personnel mines are similarly used to protect concrete anti-tank barriers. See Steven Lee Myers, *One Step at a Time: Why Washington Likes Land Mines*, N.Y. TIMES, Aug. 24, 1994 available at <<http://www.nytimes.com/library/review/archive>>.

408. See Efaw, *supra* note 65, at A15.

409. See Shelton, *supra* note 83 (saying any policy more restrictive than President Clinton's present policy "may endanger the lives of [U.S.] troops. . . ."); see also Mundy, *supra* note 91 (1998) (saying that the landmine ban would "be extremely harmful to our military personnel and their ability to perform their missions").

410. See YATES, *supra* note 33, at 7-8; Myers, *supra* note 407.

411. See YATES, *supra* note 33, at 7-8; Myers, *supra* note 407.

412. See YATES, *supra* note 33, at 7-8; Myers, *supra* note 407.

413. See Efaw, *supra* note 65, at A15; Willis, *supra* note 36, at 14. General Shelton writes, "It is unwise to take this force protection tool from field commanders while the threat exists but alternatives do not." *Id.* Some legislators have suggested that a landmine proscription could be lifted if the United States gets involved in a war. *Id.* General Shelton responds:

It makes little sense to have a law on the books if we would rescind it as soon as the consequences become real. And unless or until it was rescinded, U.S. commanders in the field could face an absurd choice: Accept additional deaths and injuries to men and women of their command, or break the law.

*Id.*

414. See Lord, *supra* note 29, at 355 (saying that proscribing the use of landmines will not work "[u]ntil the military usefulness of landmine warfare subsides"); McCall, *supra* note 11, at 275. "Given current practices, the likelihood of successfully imposing a total ban on the use of such weapons currently appears to be very low, pending changes in custom, clear rejection of the antipersonnel mine as legitimate weapon of war by conventional military forces, and strict international enforcement of anti-mine moratoria." *Id.*

**A DANGEROUS GUESSING GAME  
DISGUISED AS ENLIGHTENED POLICY:  
UNITED STATES LAW OF WAR  
OBLIGATIONS DURING MILITARY  
OPERATIONS OTHER THAN WAR**

MAJOR TIMOTHY P. BULMAN<sup>1</sup>

I. Introduction

Imagine it is the year 2010. United States military forces are invited to the tiny island state of Andar to help quell an insurgency and restore peace and democracy. Acting unilaterally and following a bilateral security agreement, U.S. forces deploy to Andar and immediately commence patrolling in and around the capital city of Tamir.

During the third night of patrols, a firefight erupts on the outskirts of Tamir pitting U.S. forces against the insurgents. The skirmish results in one U.S. soldier being killed and three more wounded. United States forces capture ten heavily armed insurgents wearing distinctive rebel uniforms. After receiving advice from his staff judge advocate, the U.S. commander transfers all of the insurgents to local law enforcement authorities. Once in the hands of the Andarians, the government indicts the insurgents under the criminal laws of Andar.

Less than thirty days later, a local court tries and convicts the insurgents for murder and other terrorist acts stemming from the incident with the U.S. forces. Ten days later, after denial of a direct appeal to the president of Andar for clemency, all ten rebels are publicly executed by firing squad in the capital city. United States forces attend, but do not participate in, the execution.

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## II. The Issues

This article answers four primary questions. First, is it possible that current U.S. policy regarding application of the law of war to Military Operations Other Than War will ripen into customary international law binding on the United States? Second, if the U.S. law of war policy has attained the status of customary international law, what is the significance for the United States? Third, are there any shortcomings in current U.S. policy regarding applying the law of war to Military Operations Other Than War? Fourth, should any changes be made to current U.S. policy that applies the law of war to Military Operations Other Than War?

Although, concededly, the introduction depicts a highly provocative and improbable scenario, it is merely intended to illustrate a single point: the law of war<sup>2</sup> plays a profound role in regulating military conduct during Military Operations Other Than War.<sup>3</sup> This is not surprising considering that the law of war was originally designed to apply to international armed

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2. Also referred to as the law of armed conflict or humanitarian law. See Julianne Peck, Note, *The U.N. and the Laws of War: How Can the World's Peacekeepers Be Held Accountable?*, 21 SYRACUSE J. INT'L L. & COM. 283, 295 (1995).

The Hague and Geneva Conventions embody the laws of war, referred to as the *jus in bello*. The Hague Conventions are a series of treaties concluded at the Hague in 1907, which primarily regulate the behavior of belligerents in war and neutrality, whereas the Geneva Conventions are a series of treaties concluded in Geneva between 1864 and 1949, which concern the victims of armed conflict. In 1977 two Protocols to the 1949 Geneva Conventions, which further developed the protection of victims in international armed conflicts and expanded protections to victims of non-international armed conflict, were opened for signature, but were not as universally accepted.

### *Id.*

One military commentator noted that the core body of the international law of war includes the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 287 [hereinafter *Convention on Prisoners of War*]; Geneva Convention Relative to the Protection of Civilians in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; see Major Michael A. Newton, *Continuum Crimes: Military Jurisdiction Over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 1, 2 n.4 (1996). For a concise history of the development of the law of war from Richard Coeur de Lion to the Lieber Code, see Major Scott R. Morris, *The Laws of War: Rules by Warriors for Warriors*, ARMY LAW., Dec. 1997, at 4.

conflict, not internal insurgencies, civil wars, peacekeeping operations, or humanitarian missions.<sup>4</sup>

This article examines the U.S. policy of applying the law of war to Military Operations Other Than War. To facilitate the examination, the article first discusses the meaning and continuing importance of customary international law. In particular, it focuses on both the potential consequences of states making unilateral resolutions and the renewed vitality of customary international law in the development of the law of war. Next, the article addresses the U.S. law of war policy in Military Operations Other Than War. After examining U.S. policy, the article turns to recent U.S. practice in Military Operations Other Than War, ranging from Operation Urgent Fury in Grenada to Operation Joint Endeavor in the former Yugoslavia. The article then analyzes the significance of these different operations and explains their interrelationship.

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3. The Joint Chiefs of Staff define Military Operations Other Than War as “[o]perations that encompass the use of military capabilities across the range of military operations short of war. These military actions can be applied to complement any combination of the other instruments of national power and occur before, during, and after war.” THE JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEP’T OF DEFENSE DICTIONARY OF MILITARY & ASSOCIATED TERMS 265 (23 Mar. 1994). The purposes of Military Operations Other Than War are to “promote national security and protect national interests.” THE JOINT CHIEFS OF STAFF, JOINT PUB. 1, JOINT WARFARE OF THE ARMED FORCES OF THE UNITED STATES, v (10 Jan. 1995). The U.S. Army defines operations other than war as “military activities during peacetime and conflict that do not necessarily involve armed clashes between two organized forces.” U.S. DEP’T OF ARMY, FIELD MANUAL 100-5, OPERATIONS 2-0 (14 June 1993).

4. Article 2 common to all four Geneva Conventions of 1949 states that the Conventions apply to “all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties . . . (and) to all cases of partial or total occupation . . .” This is the test for determining when the entire body of the law of war becomes applicable to a conflict. *See* Prosecutor v. Tadic, case No. IT-94-1-AR72, Appeal on Jurisdiction (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996) (analyzing the applicability of the law of war to the conflict in the former Yugoslavia). Conversely, Common Article 3 to the Geneva Conventions is the only article of the Conventions that applies, as a matter of law, during noninternational armed conflicts. Essentially, Article 3 proscribes humane treatment for all noncombatants and obligates the collection of the wounded and sick. In addition, it prohibits violence to life and limb, murder, mutilation, cruel treatment and torture, the taking of hostages, outrages on personal dignity, and summary executions during internal armed conflicts.

### III. Customary International Law

#### A. Traditional View of Customary International Law

##### 1. *International Approach*

States create customary international law by following a general and consistent practice, which is motivated by the conviction that international law requires that conduct.<sup>5</sup> To form customary international law, states must meet a two-prong test.<sup>6</sup> The first prong is an act or actual practice of states. The second prong is the belief by states that they are acting under a legal obligation, also known as *opinio juris*.<sup>7</sup>

State practice is the most concrete element of customary international law.<sup>8</sup> To become binding, the practice must be consistent, settled, constant, and uniform, but need not be universal.<sup>9</sup> Accordingly, there is no precise

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5. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES §102(2) (1987); *see, e.g.*, Statute of International Court of Justice, art. 38(1)(b) (defining international custom “as evidenced of a general principle accepted as law”); *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266, 276 (Nov. 20) (explaining that for customary international law to form, the Colombian government must prove that the rule invoked by it is in accordance with a constant and uniform usage practiced by the states in question, and that the usage is the expression of a right appertaining to the state and a duty incumbent in the state). *See generally* A. D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (1971) (explaining the development and scope of customary international law).

6. Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT’L L. 529, 536 (1993). Noting:

Customary international law is the product of state practice and *opinio juris*. A norm of international law is established if states act in conformity with it and the international community accepts that norm as obligatory under law. This development may take some time or it may happen quickly. States, acting through their officials, participate in the evolution of this law by their behavior and by conceptualizing their behavior as obligated under international law. Some maintain that individual states must accept the norm as law. But clearly acceptance is required only by the international community and not by all individual states.

*Id.*

7. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES, §102 cmt. c, at 25 (“For a practice to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation (*opinio juris sive necessitatis*).”) *See* Leslie Deak, *Customary International Labor Laws and their Applicability in Hungary, Poland, and the Czech Republic*, 2 TULSA J. COMP. & INT’L L. 1, 9 (1994) (explaining that *opinio juris* is the element that transforms a simple practice or custom into public international law).

formula to indicate how widespread a practice must be before it evolves into customary international law. It should, however, reflect wide acceptance among the states involved in the relevant activity.<sup>10</sup> In some instances, a practice followed by a few states can create a rule of customary international law, if there is no practice that conflicts with the rule.<sup>11</sup>

The key to understanding how customary international law is formed lies in the distinction between the concepts of “custom” and “usage.”<sup>12</sup> As a term of art, “custom” requires a clear and continuous habit of doing certain acts under the conviction that they are obligatory under international law (*opinio juris*).<sup>13</sup> In contrast, “usage” refers to a habit of doing certain acts without a conviction that the conduct is required under international law.<sup>14</sup> A practice initially followed by states as a matter of courtesy, habit, or policy may evolve into international law when the states generally come to believe that they are legally obligated to comply with it.<sup>15</sup> Determining when state practice has ripened into binding customary international law has never been easy to objectively quantify.<sup>16</sup> Rather, the developmental process depends on subjective interpretations of the facts and motives of state officials.<sup>17</sup>

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8. Deak, *supra* note 7, at 6. See also Michael Akehurst, *Custom As A Source of International Law*, 47 BRIT. Y.B. INT'L L. 18 (1977).

State practice means any act or statement by a state from which views about customary law can be inferred; it includes physical acts, claims, declarations *in abstracto* (such as general Assembly resolutions), national laws, national judgments and omissions. Customary international law can also be created by the practice of international organizations and (in theory, at least) by the practice of individuals.

*Id.*

9. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 433 (1983); see generally Gihl, *The Legal Character and Sources of International Law*, 1 SCAN. STUD. L. 51, 76-77 (1957) (explaining that not every state practice constitutes custom).

10. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES, at 25.

11. Akehurst, *supra* note 8, at 18 (arguing to require otherwise would make the creation of new customary international law an intolerably difficult process).

12. 1 L. OPPENHEIM, INTERNATIONAL LAW, A TREATISE (PEACE), 26 (H. Lauterpacht ed., 8th ed. 1955).

13. *Id.*

14. *Id.*

## 2. American Judicial Treatment of Customary International Law

The United States Constitution does not expressly recognize customary international law as a source of domestic law.<sup>18</sup> As early as 1815, however, the United States Supreme Court acknowledged that the law of nations was a “great source” of law.<sup>19</sup> In 1900, the Supreme Court unequivocally pronounced that “international law is part of our law.”<sup>20</sup>

To determine the scope of customary international law, the Supreme Court looked to the customs and usages of civilized nations as evidenced by the works of jurists and commentators.<sup>21</sup> In *Filartiga v. Pena-Irala*,<sup>22</sup> the Second Circuit interpreted these earlier Supreme Court decisions to mean that federal courts must analyze international law “not as it was in 1789, but as it has evolved and exists among the nations of the world

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15. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES, at 25. See OPPENHEIM, *supra* note 12, at 27.

As usages have a tendency to become custom, the question presents itself, at what time does a usage turn into custom? This question is one of fact, not of theory. All that theory can say is this: Whenever and as soon as a line of international conduct frequently adopted by States is considered legally obligatory or legally right, the rule which may be abstracted from such conduct is a rule of customary international law.

*Id.*

16. Charney, *supra* note 6, at 545 (explaining that proof of *opinio juris* and state practice has never been objectively evident).

17. *Id.* But see M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 25 (6th ed. 1987).

The main evidence of customary law is to be found in the actual practice of states, and a rough idea of a state's practice can be gathered from published material—from newspaper reports of actions taken by states, and from statements made by government spokesmen [sic] to Parliament, to the press, at international conferences and at meetings of international organizations; and also from a state's law and judicial decisions, because the legislature and the judiciary form part of a state just as much as the executive does.

*Id.*

18. The Supremacy Clause of the Constitution, however, does recognize that “all Treaties . . . shall be the supreme Law of the Land; and Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art VI, § 2.



today.”<sup>23</sup> Thus, under U.S. jurisprudence, customary international law is ever-changing.

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19. *Thirty Hogshead of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 198 (1815). In delivering the opinion, Chief Justice Marshall wrote:

The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states throughout Europe and America. This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice: but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by the series of judicial decisions. The decisions of the courts of every country, so far as they are founded on a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.

*Id.*

20. *The Paquete Habana*, 175 U.S. 677 (1900). This case arose from the challenge to the U.S. seizure of a Spanish fishing vessel during the Spanish-American War on the grounds that customary international law prohibited the seizure. In deciding the case, the Supreme Court squarely addressed the issue of the relationship between customary international law and U.S. domestic law. *Id.*

21. *Id.* (“Such works are resorted to by judicial tribunals, not for the speculation of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.”); *see also* *United States v. Smith*, 18 U.S. 153 (5 Wheat.) 153, 161-162 (1820) (explaining that the crime of piracy under the law of nations may be ascertained by consulting the works of jurists, or by the general usage and practice of nations, or by judicial decisions); *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) (holding that under the Alien Tort Claims Act, federal courts find norms of contemporary international law by consulting works of jurists writing professedly on public law, by general usage and practice of nations, or by judicial decisions recognizing and enforcing that law).

22. *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980). This case involved a wrongful death action resulting from acts of deliberate torture. All of the parties to the suit were citizens of the Republic of Paraguay and yet brought suit in the Federal District Court for the Eastern District of New York under the Alien Tort Statute. On appeal, the Second Circuit held that the Alien Tort Statute provided federal jurisdiction over the matter because the alleged torturer was found and served with process by an alien within the borders of the United States. The court further held that deliberate torture perpetrated under the color of official authority violated universally accepted norms of international law.

23. *Id.* at 881.

3. *Emerging Trends In The Development of Customary International Law*

a. *Unilateral Acts Of States*

A state's unilateral act may create, change, or modify customary international law.<sup>24</sup> The Permanent Court of International Justice [hereinafter World Court] first recognized this principle in the *Eastern Greenland* case.<sup>25</sup> The case involved a dispute between the Royal Danish government and the Royal Norwegian government concerning the legal status of certain territories in Eastern Greenland.<sup>26</sup> The dispute arose after the Norwegian foreign minister repeatedly told his Danish counterpart that Norway would not contest Denmark on the question of Denmark's sovereignty over Greenland.<sup>27</sup> At no time, however, did the Norwegian official declare that Norway was acting under any perceived legal obligation to refrain from occupying Greenland.

The issue before the court was whether the statements made by the Norwegian official created an obligation binding under international law that Norway must honor.<sup>28</sup> Notwithstanding the absence of an expression of *opinio juris* by the Norwegian minister, the court concluded that his statements created a legally binding obligation on the Norwegian government.<sup>29</sup> Consequently, Norway was estopped<sup>30</sup> from acting contrary to its declared intent of acquiescing in Danish sovereignty over Greenland.<sup>31</sup> The *Eastern Greenland* case of 1933 is significant to the U.S. law of war policy of 1998. The decision demonstrates that an international court might enforce a state's official pronouncements, even if the state did not intend to reflect *opinio juris*.

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24. W.E. HOLDER & G.A. BRENNAN, *THE INTERNATIONAL LEGAL SYSTEM (CASES AND MATERIALS WITH EMPHASIS ON THE AUSTRALIAN PERSPECTIVE)* 85 (1972). This also seems to be a viable theory of international law development for the United States. See *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES*, at 25 (1987) (discussing how a practice initially followed by states as a matter of courtesy may become law).

25. *Legal Status of Eastern Greenland (Nor. v. Den.)*, 1933 P.C.I.J. (ser. A/B) No. 53, at 22 (June 18). See generally Oscar Svarlien, *The Eastern Greenland Case In Historical Perspective* 1-74 (1964).

26. See *Legal Status of Greenland*, 1933 P.C.I.J. at 23.

27. *Id.* at 73. Known as the Ihlen Declaration of 1919, the statement read in part, "I told the Danish Minister today that the Norwegian Government would not make any difficulty in the settlement of this question." *Id.* Later that year, the Norwegian Minister of Affairs reiterated his country's position on Greenland in a dispatch to the Danish Minister by stating, "it was a pleasure to [sic] Norway to recognize Danish sovereignty over Greenland." *Id.*

28. *Id.* at 70-72.

Over forty years later, the International Court of Justice renewed the significance of unilateral acts by states in *Nuclear Tests*.<sup>32</sup> That case involved a dispute between the government of New Zealand and the French government concerning the legality of atmospheric nuclear tests conducted by France in the South Pacific.<sup>33</sup> New Zealand asked the court to hold that French officials' statements about the halting of nuclear testing in the South Pacific prohibited France, under international law, from resuming nuclear testing.<sup>34</sup> The court remarked:

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the decla-

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29. *Id.* at 73. It is important to note that this conclusion was *not* based on a theory that the Norwegian statements, although not acknowledged as *opinio juris*, nonetheless served as evidence of that factor. According to the court: "It follows that, as a result of the undertaking involved in the Ihlen declaration of July 22nd, 1919, Norway is under an obligation to refrain from contesting Danish sovereignty over Greenland as a whole, and *a fortiori* to refrain from occupying a part of Greenland." *Id.* See also *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 384 (June 27). This case involved a dispute between the United States and Nicaragua concerning U.S. support for the *Contras* against the Nicaraguan government. In a lengthy opinion, the World Court condemned the U.S. support for the *Contras* on numerous grounds, including the U.S. breach of its obligation under customary international law not to intervene in the affairs of another state. In an often ignored part of the opinion, the court ruled against Nicaragua on an issue related to the unilateral acts doctrine. Specifically, the court held that the Junta government of Nicaragua created a binding unilateral obligation under international law by promising to implement the Fundamental Statute and Organic Law and implement its *Programme* immediately after it was installed as the government of Nicaragua. Although this was not a central part of the decision, it nevertheless demonstrates that an international tribunal will enforce official pronouncements by a state, even absent *opinio juris*.

30. Under the unilateral acts doctrine of international law, the term "estoppel" retains its ordinary contract law meaning, namely that a party is prevented by his own acts from claiming a right to the detriment of the other party who was entitled to rely on such conduct and has acted accordingly. BLACK'S LAW DICTIONARY 494 (5th ed. 1979).

31. 1 SCHWARZENBERGER, INTERNATIONAL LAW 553 (3d ed. 1957) ("The typical minimum effect of unilateral acts is to create an estoppel. It prevents the subject of international law, to which the unilateral act is imputed, from acting contrary to its declared intent.")

32. *Nuclear Tests (N.Z. v. Fr.)*, 1974 I.C.J. 457 (Dec. 20).

33. *Id.* at 461.

34. *Id.* at 460.

ration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding.<sup>35</sup>

The *Nuclear Tests* case significantly affects the consequences of unilateral acts by states. First, and most importantly, the court underscored the potential legal dangers for states that issue unilateral declarations and then subsequently repudiate them. The court stressed that one of the basic governing principles of legal obligations is good faith.<sup>36</sup> As such, “interested states may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.”<sup>37</sup> Second, for a unilateral statement to have legal effect, the statement does not need to be addressed to a particular state, or be manifestly accepted by any other states.<sup>38</sup> Third, the court created a critical distinction between France’s subjective intent in issuing its unilateral declaration and the actual contents of the declaration. In doing so, the court presumed that France intended its unilateral declaration to be binding. The judges presumed this after they closely scrutinized the actual nature, limits, and terms of the unilateral statement and whether the statement was publicly expressed.<sup>39</sup>

As in *Eastern Greenland*,<sup>40</sup> the absence of any expression of *opinio juris* by French diplomats did not nullify the French obligation to honor its official declarations to cease nuclear testing. Instead, the court only required that France intended *itself* to be bound by its pledge to cease nuclear testing, even if France did not believe that international law required it.<sup>41</sup>

Consequently, in the aftermath of the *Eastern Greenland* and the *Nuclear Tests* cases, a state must be extremely cautious when issuing any

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35. *Id.* at 472. *But see* Alfred P. Rubin, *The International Legal Effects Of Unilateral Declarations*, 71 AM. J. INT’L L. 27 (1977). In his article, Professor Rubin is highly critical of the *Nuclear Tests* case primarily on the grounds there was insufficient evidence to conclude that France intended to be bound as a matter of international law. In summary, Professor Rubin chastises the court for creating a “new rule of international law saddling a state with apparently nonrevocable treaty-like commitments *erga omnes*, arising out of public unilateral declarations with a presumed intention to be bound and nothing more.”

36. *See Nuclear Tests*, 1974 I.C.J. at 472.

37. *Id.* at 473.

38. *Id.* at 474.

39. *Id.* at 475.

40. *See supra* notes 25-31 and accompanying text.

41. *See Nuclear Tests*, 1974 I.C.J. at 472-73.

unilateral statement, because international law may later presume that the state intended the statement to be binding. This is a critical development in international law because a state may *unintentionally* create binding international legal obligations on itself.

*b. The Renewed Vitality of Customary Law in the Development of the Law of War*

The International Court of Justice's recent Appeal's Chamber opinion in *Prosecutor v. Tadic*,<sup>42</sup> profoundly altered the role that customary international law plays in developing the law of war. The opinion marked a fundamental change in the concept of state sovereignty over internal matters.<sup>43</sup> The *Tadic* decision resulted from a defense motion for an interlocutory appeal on the question of jurisdiction.<sup>44</sup> At its heart, the *Tadic* decision purports to begin stripping away the traditional distinction between international and internal armed conflicts. This quote exemplifies the mood of the court:

It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of law and as a protection for those who trample underfoot the most elementary rights of humanity.<sup>45</sup>

Before *Tadic*, it was well settled that the only treaty rules that apply in all noninternational armed conflicts were those set forth in Article 3 common to the four Geneva Conventions of 1949 and, to some extent, Geneva Protocol II of 1977.<sup>46</sup> In *Tadic*, the court concluded that these protections for civilians were grossly insufficient and did not reflect current

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42. *Prosecutor v. Tadic*, case no. IT-94-1-AR72, Appeal on Jurisdiction (Oct. 2, 1995), reprinted in 35 I.L.M. 32 (1996).

43. Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L. L. 238 (1996).

44. The defense jurisdiction motion was made to the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991. *Id.*

45. *Tadic*, 35 I.L.M. at 32.

46. Symposium, *Application of Humanitarian Law in Noninternational Armed Conflicts*, 85 AM. SOC'Y INT'L. L. 94 (1991) (including participants from academic institutions, the International Committee of the Red Cross, the United States Department of State, and the United States Department of Defense (DOD)) [hereinafter Symposium].

customary international law. In the court's words, "a [s]tate-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach . . . . It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned."<sup>47</sup> Consequently, the court determined that certain customary rules of warfare apply in internal armed conflicts, a conclusion that far exceeds the scope of Common Article 3 and Geneva Protocol II.<sup>48</sup>

The opinion of the court is noteworthy, if not revolutionary, because the court applied internal conflict rules originally developed to apply only during international conflicts. The court, however, used the vehicle of customary international law to extend the rules to civil wars and other internal conflicts.<sup>49</sup>

Although the *Tadic* decision dramatically expanded customary international law rules that govern internal armed conflict, the court stopped short of extending all the principles of the law of war to internal conflicts.<sup>50</sup> Instead, the court ruled that only some of the rules and principles governing international armed conflicts have gradually been extended to apply in internal conflicts.<sup>51</sup> In addition, the court further limited its holding by extending only "the general essence" of the rules from international to internal armed conflict.<sup>52</sup> Specifically, the court rejected transferring the detailed regulations of international armed conflict to internal war.<sup>53</sup>

To determine what rules and principles of international armed conflict have extended (via customary international law) to internal war, the court instructs that states should rely primarily on official state pronouncements, military manuals, and judicial decisions, *not on actual state practice*.<sup>54</sup>

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47. *Tadic*, 35 I.L.M. at 54.

48. *Id.* at 67. The court enumerated these rules to include the protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflict and ban of certain methods of conducting hostilities.

49. Meron, *supra* note 43, at 244.

50. *Tadic*, 35 I.L.M. at 67.

51. *Id.*

52. *Id.*

53. *Id.* ("[T]his extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.")

54. *Id.* at 55 (emphasis added).

The court concluded that using the actual behavior of troops in the field is not practical and is subject to misinformation.<sup>55</sup> The court, therefore, cites the *German Military Manual of 1992*<sup>56</sup> as evidence that the general principles of international armed conflict also apply during internal armed conflicts.<sup>57</sup>

The court's reliance on the *German Military Manual* profoundly affects the United States in two ways. First, the language of the *German Military Manual* is strikingly similar to the language of the U.S. law of war policy.<sup>58</sup> This is important because an international tribunal may someday rely on the U.S. law of war policy as evidence of the customary laws of war. Second, neither the German nor the U.S. declarations refer to a legal requirement to apply the law of war to noninternational conflicts. On the contrary, both are couched as "policy" statements, not legal obligations. This is important because the *Tadic* decision has seemingly made this a distinction without a meaningful difference. In fact, the decision suggests that a state can no longer avoid creating customary international law by simply categorizing a state practice as a "policy" rather than a legal obligation. Put another way, a state-manufactured label is insignificant compared with the actual practice of a state.

#### IV. The United States and the Law of War During Noninternational Armed Conflict

##### A. United States Policy

In 1956, the United States Army codified its position that unwritten or customary law of war is binding on all nations and that all U.S. forces must strictly observe it.<sup>59</sup> In 1979, the Department of Defense issued its

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55. *Id.*

56. "Members of the German army, like their Allies, shall comply with the rules of international humanitarian law in the conduct of military operations in all armed conflicts, whatever the nature of such conflicts." HUMANTARES VOLKERRECHT IN BEWAFFNETEN KONFLIKTEN - HANDBUCH. Aug. 1992, DSK AV207320065, para. 211 *in fine*; unofficial translation. *Accord* U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (10 Jul. 1979) (although the United States Department of Defense law of war policy is virtually identical to the German policy cited by the tribunal, there is no indication that the tribunal considered the United States policy, nor explanation for not doing so).

57. *Tadic*, 35 I.L.M. at 64.

58. *See infra* text accompanying notes 66-68.

59. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 7(c) (18 July 1956).

*Law of War Program*, the primary purpose of which was to ensure that all U.S. forces observed and enforced the law of war.<sup>60</sup> To achieve this aim, the *Law of War Program* established mandatory law of war training and instruction for all military personnel commensurate with their duties and responsibilities.<sup>61</sup> In addition, it created a reporting mechanism for alleged violations of the law of war.<sup>62</sup>

For purposes of this analysis, the significant provision of the *Law of War Program* is the following: “The Armed Forces of the United States shall comply with the law of war in the conduct of military operations and related activities in armed conflict, *however such conflicts are characterized.*”<sup>63</sup> With language closely resembling the *German Military Manual of 1992*,<sup>64</sup> the directive clearly envisions applying the law of war to internal, as well as international, armed conflicts. The *Law of War Program*, however, failed to define the meaning of the phrase “the law of war.”

Subsequent regulations employed and expanded the *Law of War Program*. For example, in 1994, the Chairman of the Joint Chiefs of Staff (CJCS) published the *Standing Rules of Engagement for U.S. Forces*, which discuss the applicability of the law of war during armed conflict.<sup>65</sup> Most importantly, the Chairman specifically applied the *Law of War Program* with the issuance of a CJCS Instruction in 1996.<sup>66</sup> The first clause of the applicable paragraph of the Instruction mirrors the language of the original *Law of War Program* and governs situations involving armed conflict. It reads: “The Armed Forces of the United States will comply with the law of war during the conduct of all military operations and related activities in armed conflict, however such conflicts are characterized . . . .”<sup>67</sup> This clause did not advance the original *Law of War Program* because it too failed to define the phrase “the law of war.” Consequently, the issue is whether the phrase “the law of war” encompasses the internationally recognized body of law known as the law of war or something less extensive.

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60. U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (10 July 1979). The impetus for the program was the American experience during the Vietnam War. The purpose of the policy was to assign responsibilities within the DOD for a program to ensure compliance with the law of war.

61. *Id.*

62. *Id.*

63. *Id.* (emphasis added).

64. *See supra* text accompanying note 56.



The second clause of the CJCS Instruction, however, fails to resolve even more questions than the first clause. The second clause governs Military Operations Other Than War. It reads: “[U]nless otherwise directed by competent authorities, [the Armed Forces of the United States] will apply law of war *principles* during all operations that are categorized as Military Operations Other Than War.”<sup>68</sup> Again, U.S. forces are instructed to apply an undefined source of law. This results from the failure to define what is meant by the principles of the law of war.

As drafted, the second clause alone could have multiple interpretations, ranging from minimal (only the targeting principles derived from the Hague tradition)<sup>69</sup> to expansive (including not only the Hague tradition, but also principles derived from the Geneva tradition). For example, is each provision of the four Geneva Conventions a principle of the law of

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65. CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 3121.01, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (1 Oct. 1994). When U.S. forces are operating with multinational forces:

U.S. forces will always comply with the Law of Armed Conflict. However, not all situations involving the use of force are armed conflicts under international law. Those approving operational rules of engagement must determine if the internationally recognized Law of Armed Conflict applies. In those circumstances when armed conflict, under international law, does not exist, Law of Armed Conflict principles may nevertheless be applied as a matter of national policy. If armed conflict occurs, the actions of U.S. forces will be governed by both the Law of Armed Conflict and rules of engagement.

*Id.*

*See also* U.S. DEP’T OF DEFENSE, DIR. 2310.1, DOD PROGRAM FOR ENEMY PRISONERS OF WAR AND OTHER DETAINEES (18 Aug. 1994). The Directive states that DOD policy is:

[T]he U.S. Military Services shall comply with the principles, spirit, and intent of the international law of war, both customary and codified, to include the Geneva Conventions . . . and shall be given the necessary training to ensure they have knowledge of their obligations under the Geneva Conventions . . . before an assignment to a foreign area where capture or detention of enemy personnel is possible.

*Id.*

66. CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (12 Aug. 1996).

67. *Id.*

68. *Id.*

69. *See, e.g.*, INTERNATIONAL AND OPERATION LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, JA-422, OPERATIONAL LAW HANDBOOK 7-3 (1997) (discussing “principles” of the law of war).

war? Furthermore, the clause fails to specify which “competent authorities” are authorized to circumvent law of war principles during Military Operations Other Than War. For example, is a competent authority the Secretary of Defense, a service secretary, a commander-in-chief, a joint task force commander, a brigade commander, or a battalion commander? Put bluntly, the entire clause is so vague that it is almost devoid of any meaning whatsoever.<sup>70</sup>

Regrettably, this policy statement of the Chairman of the Joint Chiefs of Staff codifies the most recent authority of the United States position on applying the law of war during noninternational armed conflicts and Military Operations Other Than War. At its core, the policy is fundamentally flawed because it fails to specify what part of the law of war applies during noninternational armed conflicts and which law of war principles apply during Military Operations Other Than War. For a military commander in the field, resolving these questions carries tremendous import.

#### B. Recent United States Practice

During the past two decades, the U.S. government has frequently deployed its armed forces in non-international armed conflicts and Military Operations Other Than War. Such operations include Grenada, Panama, Somalia, Haiti, and the former Yugoslavia. During each of these missions, U.S. commanders and their judge advocates faced difficult issues applying the law of war. For example, during Operation Urgent Fury in Grenada in 1983, judge advocates were uncertain if they should classify captured personnel as prisoners of war, detainees, or refugees.<sup>71</sup>

On 20 December 1989 during Operation Just Cause, U.S. military forces landed in Panama in the largest military combat operation since Vietnam.<sup>72</sup> For purposes of applying the law of war, U.S. officials viewed the operation as a hybrid international-internal armed conflict.<sup>73</sup> Accord-

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70. It is plausible to argue that such a vague policy provides commanders with a degree of flexibility that would otherwise be lacking by adding definition to the meaning of “principles.” This flexibility, however, is always inherent in any “policy based” dictate, even if it is detailed and defined.

71. Memorandum, Headquarters XVIII Airborne Corps and Fort Bragg, AEZA-JA, to Department of the Army, subject: Operation Urgent Fury (After Action Report and Lessons Learned) (15 Dec. 1983) (on file with author) (explaining that because the staff judge advocate was not informed of the legal basis for the operation in Grenada in a timely manner, providing accurate and complete legal advice was hampered).

ingly, as in Grenada, judge advocates deployed to Panama during the operation wrestled with detainee and prisoner of war issues.<sup>74</sup>

In Panama, U.S. forces detained more than 4100 people during the first few days of the operation.<sup>75</sup> The U.S. Army afforded all detainees the rights and protections of the Geneva Conventions until their precise status was determined following an Article 5 tribunal.<sup>76</sup> Accordingly, U.S. forces fed detainees and provided them medical care on a nondiscriminatory basis.<sup>77</sup> In fact, U.S. medivac helicopters carried wounded Panamanian Defense Force members and U.S. soldiers on the same aircraft and provided each with comparable medical care.<sup>78</sup>

Unlike the operations in Grenada and Panama, Operation Restore Hope in Somalia, commencing in 1992, was unique because there was no sovereign nation to call for, or object to, the military intervention.<sup>79</sup> Somalia was a country not only in chaos but also anarchy.<sup>80</sup> There was no local law or government at any level.<sup>81</sup> United States Central Command determined that Operation Restore Hope would be a humanitarian operation and not an "armed conflict" under international law.<sup>82</sup> As such, the legal status

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72. Major John Embry Parkerson, Jr., *United States Compliance With Humanitarian Law Respecting Civilians During Operation Just Cause*, 133 MIL. L. REV. 31 (1991).

73. *Id.* at 139.

International armed conflict considerations determined how the United States forces conducted the actual hostilities, invoking the full application of the 'law of the Hague' and its proportionality principles. These principles are firmly part of United States military doctrine and enter into the planning and execution in any armed conflict in which the United States forces participate, whether international or internal. United States treatment of protected Panamanians under the 'law of Geneva,' however, illustrated the inherent difficulties in making the clear characterizations that are necessary for satisfactory application of that body of law in an armed conflict like the Panama operation.

*Id.*

74. CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, AFTER ACTION REPORT, UNITED STATES ARMY LEGAL LESSONS LEARNED, OPERATION JUST CAUSE (26-17 Feb. 1990) [hereinafter JUST CAUSE AAR].

75. *Id.* Detainees included members of the Panamanian Defense Force, Dignity Battalions, "and assorted criminals and crazies." *Id.*

76. *Id.* Convention on Prisoners of War, *supra* note 2, art. 5. An Article 5 Tribunal is a law of war procedure to determine the legal status of captured persons.

77. JUST CAUSE AAR, *supra* note 74.

78. *Id.*

79. F.M. Lorenz, *Law and Anarchy in Somalia*, PARAMETERS 29 (Winter 1993-94).

and responsibilities of the United Nation (UN) forces derived from UN Security Council resolutions.<sup>83</sup>

Somalia was also unique in that the operation began as a seemingly simple emergency-relief mission but transformed into an aggressive peace enforcement mission.<sup>84</sup> This left the operation in a “twilight zone” between peace and war.<sup>85</sup> Consequently, determining what international law, if any, applied in Somalia was complex.<sup>86</sup> Such a determination, however, was critical because UN forces apprehended a large number of Somalis during the first few weeks of the operation.<sup>87</sup> The issue arose as to their legal status under international law. Typically, detainees were disarmed, questioned, and quickly released.<sup>88</sup> In the end, because of limited resources, UN forces only continued to apprehend civilians who attacked or threatened the UN force.<sup>89</sup>

Operation Provide Comfort began on 7 April 1991 with the mission of providing humanitarian relief to displaced Kurdish persons near the Turkish-Iraqi border.<sup>90</sup> As in Somalia, Operation Provide Comfort was termed a humanitarian, not a military, operation. As such, the law of war

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80. CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, AFTER ACTION REPORT, UNITED STATES ARMY LEGAL LESSONS LEARNED, OPERATION RESTORE HOPE, 5 DECEMBER 1992-1995, MAY 1993, 3 (30 Mar. 1995) [hereinafter RESTORE HOPE AAR].

81. *Id.*

82. Lorenz, *supra* note 79, at 29.

83. *Id.*

84. Susan L. Turley, Note, *Keeping the Peace: Do the Laws of War Apply?*, 73 TEX. L. REV. 139, 155 (1994).

85. *Id.*

86. *Id.*

[A] clear demarcation between a state of peace and one of war no longer exists, if it ever did . . . and in the shadows of the intervening no-man's land, there may be little or no international law specifically applicable. The distinction is more than theoretical: In the murky business of fighting war as peacekeepers, understanding the rules is half the battle.

*Id.*

See also RESTORE HOPE AAR, *supra* note 80, at 3 (“As an independent state, Somalia had not been ‘invaded’ nor were there, arguably, belligerents. Save for Common Article 3 applicability to the various armed clans, the Geneva Conventions, as a matter of policy as well as international law could not apply.”).

87. Lorenz, *supra* note 79, at 35.

88. *Id.*

89. *Id.*

did not strictly apply;<sup>91</sup> however, the first of the eleven enumerated rules of engagement for the operation read: “All military operations will be conducted in accordance with the Law of War.”<sup>92</sup> Because the entire operation was classified as a humanitarian operation, it is puzzling why the first rule of engagement mentioned the law of war and military operations.

A possible explanation may be the confusion caused by the flawed U.S. law of war policy,<sup>93</sup> and commanders and judge advocates implementing it in the field. For example, at the outset of operations, several Iraqi soldiers “surrendered” to U.S. forces and asked to be taken into refugee camps.<sup>94</sup> U.S. forces did not know how to react.<sup>95</sup> Unsure if the Geneva Conventions applied to the situation, the Americans provided the Iraqi soldiers with food, water, and medical assistance, but gave them no shelter.<sup>96</sup> The American view was that as long as the mission remained humanitarian in nature, the United States lacked the authority to take prisoners of war; Iraqi soldiers were not entitled to prisoner of war status.<sup>97</sup>

During 1994 and 1995, U.S. forces deployed to Haiti in another Military Operation Other Than War, Operation Uphold Democracy. Thousands of U.S. soldiers were present, and thousands of civilians and noncombatants in Haiti were displaced. Politicians and scholars, however, have argued that the law of war did not strictly apply to the deployment because it was permissive and did not involve international armed conflict.<sup>98</sup>

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90. Memorandum for Colonel Richardson, subject: After Action Report on Operation Provide Comfort (14 June 1991) (on file with author) [hereinafter Provide Comfort Memo].

91. *Id.*

92. *Id.* By way of comparison, the Joint Task Force Rules of Engagement in Somalia make no mention of the law of war. In fact, the rules remind the soldiers that “the United States is not at war.” *Id.*

93. *See supra* notes 63-68 and accompanying text.

94. Provide Comfort Memo, *supra* note 90.

95. *Id.* (“Concerns were that we couldn’t accept surrender of soldiers because we weren’t at war, we couldn’t put the soldiers in the camps because we couldn’t guarantee their safety, and we didn’t have the resources to build separate camps for them.”).

96. *Id.* Although a SECRET JCS message dated 281622Z April 1991 authorized the taking of enemy prisoners of war in “extraordinary circumstances,” no such circumstances arose during Operation Provide Comfort and no prisoners of war were taken by U.S. forces. Iraqi soldiers encountered in the exclusion zone were disarmed and briefly detained for hand over to the Iraqi representative through the military coordination center.

97. Memorandum from Colonel Quentin Richardson, to Deputy Commanding General, subject: DCG Note re: CIB release on Iraqi Soldiers Receiving “Refugee Status” (10 May 1991) (on file with author).

Nevertheless, within seventy-two hours of the United States' arrival in the country, the issue of the legal status of "captured" Haitians and the need for a facility to house detained persons became apparent.<sup>99</sup> United States forces elected to treat potentially hostile detained persons during the operation "as if they were prisoners of war."<sup>100</sup> In addition, American judge advocates decided to model detention procedures on Haitian law.<sup>101</sup> From the American perspective, this was done as a matter of policy rather than as a legal obligation.<sup>102</sup>

Judge advocates in Haiti, however, were left to decide what it meant to treat a person as if they were a prisoner of war.<sup>103</sup> For example, must they provide a monthly pay schedule for each prisoner in accordance with the Geneva Convention Relative to the Treatment of Prisoners of War?<sup>104</sup> As judge advocates learned in Haiti, many of the provisions of the Geneva Conventions did not neatly translate from their intended context of war into a Military Operation Other Than War.<sup>105</sup>

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98. Theodore Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 78-82 (1995).

The agreement of September 18, 1994, negotiated in Port-au-Prince between President Jimmy Carter and General Raoul Cedras, and its acceptance by the Aristide government, led to the consent-based, nonviolent, hostilities-free entry of U.S. forces and their peaceful deployment. In such circumstances, the Geneva Conventions on the Protection of Victims of War of August 12, 1949, are not, strictly speaking applicable.

*Id.*

99. CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, AFTER ACTION REPORT, UNITED STATES ARMY LEGAL LESSONS LEARNED, OPERATION UPHOLD DEMOCRACY, 1994-1995, 62 (11 Dec. 1995) [hereinafter UPHOLD DEMOCRACY AAR]

100. *Id.* at 54.

101. OFFICE OF THE STAFF JUDGE ADVOCATE, 10TH MOUNTAIN DIVISION (LIGHT INFANTRY), AFTER ACTION REPORT, UNITED STATES ARMY LEGAL LESSONS LEARNED, OPERATION UPHOLD DEMOCRACY, 29 JULY 1994-13 JANUARY 1995, 9 (undated). American forces provided a judge advocate hearing officer after 72 hours of detention to discuss the facts and circumstances regarding detention with detainees, to review their case files, as well as to provide input into the determination by the multinational force commander on continued detention.

*Id.*

102. UPHOLD DEMOCRACY AAR, *supra* note 99, at 54.

103. *Id.* ("Still, the details of this policy raised very practicable issues for judge advocates, military police, and soldiers in the intelligence community who dealt with the several hundred persons who were detained at some point in the operations.")

104. Convention on Prisoners of War, *supra* note 2, art. 60.

105. UPHOLD DEMOCRACY AAR, *supra* note 99, at 54.

Commencing in 1995, U.S. forces deployed to the former Yugoslavia in Operation Joint Endeavor. The mission called for international military and civilian efforts to restore peace and democracy to a region that had suffered nearly five years of bitter conflict.<sup>106</sup> Several provisions of the legal annex to the Operational Plan (OPLAN) for Operation Joint Endeavor referred to the law of war.<sup>107</sup>

First, the OPLAN required all commanders to exert “every effort” to ensure that persons subject to their authority knew and complied with the law of war.<sup>108</sup> On occasion, U.S. commanders took this a step further and attempted to obtain law of war compliance from the factional forces themselves.<sup>109</sup>

Second, the OPLAN directed that persons involuntarily taken into custody by the UN implementation forces (IFOR) would be classified as “detained persons.”<sup>110</sup> The IFOR categorized detained persons as either civilians or factional personnel.<sup>111</sup> Captured civilians, even those suspected of having committed criminal acts against IFOR personnel or property, were turned over to “appropriate” civilian authorities.<sup>112</sup> Conversely, detained factional personnel involved in hostile acts against IFOR personnel or property were accorded a “standard of care equal to that which would be accorded to Prisoners of War.”<sup>113</sup>

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106. OPERATION JOINT ENDEAVOR REAR DETACHMENT AFTER ACTION REPORT, OFFICE OF THE STAFF JUDGE ADVOCATE, 1ST ARMORED DIVISION, SEPTEMBER 1995- DECEMBER 1996 1 (on file with author) [hereinafter JOINT ENDEAVOR AAR].

107. Message, 281600B Nov 95, Office of the Staff Judge Advocate, Task Force Eagle, subject: Legal Annex to the Operation Iron Endeavor OPLAN (Unclassified) (28 Nov. 1995) (on file with author) [hereinafter Joint Endeavor OPLAN].

108. *Id.* para. 3(e)(1)(a).

109. For example, the U.S. Commander of Task Force Eagle sent a letter to the Acting Commander, East Bosnia Corps, Army of Republika Srpska, complaining of two separate incidents involving the misuse of the protected Red Cross symbol by his soldiers. The terse letter concluded, “[R]equest your immediate investigation into this incident, and await your plan to educate leaders and soldiers on obeying their requirements under the General Framework Agreement for Peace and International law.” Letter from Major General William L. Nash, U.S. Army, to Major General Budimir Gavric, Army of Republika Srpska (undated) (on file with author).

110. Joint Endeavor OPLAN, *supra* note 107, para. 3(e)(1)(c).

111. *Id.* para. 3(e)(1)(c)(1)-(2).

112. *Id.* The OPLAN advised that generally civilians should not be detained longer than 72 hours.

113. *Id.* This provision did not preclude a commander from determining a detained factional person to be an actual prisoner of war in appropriate cases.

Third, the OPLAN acknowledged that the law of war did not apply to the operation because that body of international law normally only applies to international armed conflicts.<sup>114</sup> Nevertheless, the OPLAN mandated that all U.S. forces must comply with the law of war throughout the operation.<sup>115</sup>

From operations in Grenada to the former Yugoslavia, U.S. commanders and judge advocates grappled with complex issues of whether the law of war applied during Military Operations Other Than War. If nothing else, these operations illustrate that the questions of applying the law of war vastly outnumbered the answers provided by the U.S. law of war policy.

Although each of the aforementioned operations was varied and unique, a common law of war legacy has emerged in their aftermath. First, although most of the missions did not involve traditional international armed conflict in the Geneva Convention sense, the U.S. policy, nonetheless, was to affirm that its forces would always comply with the law of war. Second, although U.S. policy mandated adherence to the law of war at all times in every conflict, there was never any attempt to clarify or to define the scope of the policy and its mandate. For example, did every provision of the Geneva Conventions and Hague rules apply during all the operations? In the alternative, did only some provisions apply while others did not? If the latter, how was a commander or a judge advocate to know the difference? Of the dilemmas caused by this lack of definition, the legal status of “captured” persons during the operations posed the most difficult challenge to the judge advocates in the field and was never adequately resolved.

## V. Discussion and Analysis of the United States Law of War Policy

### A. Customary International Law Has Already Emerged

In two ways, the U.S. policy to apply the law of war during all armed conflicts and the principles of the law of war to all Military Operations Other Than War has already ripened into customary international law. First, by issuing the law of war policy and implementing the Chairman of

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114. *Id.* para. 3(f)(1).

115. *Id.* This includes the use of force, treatment of detained persons, and violations of the peace treaty.



the Joint Chiefs of Staff Instruction,<sup>116</sup> the United States has created customary international law by making a “unilateral resolution” on the subject.<sup>117</sup> As such, the United States is estopped from acting contrary to its stated policy<sup>118</sup> and enjoined by the fundamental legal principle of good faith.<sup>119</sup> These are the clear legacies of the World Court’s opinions in *Eastern Greenland*<sup>120</sup> and *Nuclear Tests*.<sup>121</sup> This conclusion is further buttressed by the legacies of the *Tadic* decision. The U.S. law of war policy derives from the highest reaches of the military, it is published in official military references, and it is required training for all members of the U.S. armed forces.<sup>122</sup>

Second, by acting with a general and consistent practice under the belief that it is legally obligated to do so, the United States has arguably also created a customary international law standard that applies to operations other than war.<sup>123</sup> From Operation Urgent Fury in Grenada to Operation Joint Endeavor in the former Yugoslavia, the United States has consistently attempted to adhere to the law of war, albeit with mixed degrees of success.<sup>124</sup> Because the United States is the major military power today and plays a dominant role in operations other than war, the practice of the United States is tremendously significant to forming customary international law.<sup>125</sup>

Some may argue that even if the United States has generated the type of consistent practice required to form customary international law, the second element of *opinio juris* is lacking. Buttressing this argument may be the motivation for the United States to repeatedly categorize its reason for complying with the law of war during all operations as a *policy* decision, not a legal obligation. Therefore, by definition, customary international law cannot be created because *opinio juris* is lacking.<sup>126</sup> Before the *Tadic* decision,<sup>127</sup> this would have been a persuasive argument. The *Tadic* decision,<sup>128</sup> however, emphasized the importance of official pronouncements of state and military manuals to the formation of customary international law.<sup>129</sup> In particular, the International Court of Justice relied on the

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116. See *supra* note 66 and accompanying text.

117. See *supra* notes 24-31 and accompanying text.

118. See *supra* note 30 and accompanying text.

119. See *supra* notes 34-35 and accompanying text.

120. See *supra* notes 25-31 and accompanying text.

121. See *supra* notes 36-37 and accompanying text.

122. See *supra* notes 55-56 and accompanying text.

123. See *supra* notes 5-6 and accompanying text.

124. See *supra* notes 71-114 and accompanying text.

language from the *German Military Manual of 1992* as evidence of custom to justify extending some of the principles of war from international armed conflict to internal conflict.<sup>130</sup> It seems reasonable to conclude that a future international tribunal may adopt a similar approach and use the U.S. law of war policy as evidence of customary international law.<sup>131</sup>

Since the *Tadic* decision,<sup>132</sup> the United States can no longer pick and choose how and when it will apply the law of war during operations by couching the decision as “policy.” Today, even “policy” may unwittingly create *opinio juris* because *opinio juris* can be inferred from the acts or omissions of states.<sup>133</sup> As a noted scholar remarked, proof of *opinio juris* will likely be determined based on subjectively interpreting the facts and motives of state officials, not on objective evidence.<sup>134</sup> Considering the

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125. MALCOLM N. SHAW, *INTERNATIONAL LAW* 7 (3d ed. 1991) (“It is inescapable that some states are more influential and powerful than others and that their activities should be regarded as of greater significance . . . .”); see Meron, *supra* note 43, at 249.

A broader question, however, concerns the degree of weight to be assigned to the practice of various states in the formation of the international customary law of war. I find it difficult to accept the view, sometimes advanced, that all states, whatever their geographical situation, military power and interests, inter alia, have an equal role in this regard . . . . The practice and opinion of Switzerland, for example, as a neutral state, surely have more to teach us about assessment of customary neutrality law than the practice of states that are not committed to the policy of neutrality and have not engaged in pertinent national practice. The practice of “specially affected states”—such as nuclear powers, other major military powers, and occupying and occupied states—which have a track record of statements, practice and policy, remains particularly telling. I do not mean to denigrate state equality, but simply to recognize the greater involvement of some states in the development of the law of war, not only through operational practice but through policies expressed, for example, in the military manuals.

*Id.*

See also Deak, *supra* note 7, at 8 (“The character of the State participating in the act considerably influences the persuasiveness of the customary international law argument.”).

126. See *supra* notes 5-6 and accompanying text.

127. See *supra* note 42.

128. *Id.*

129. See *supra* notes 54-55 and accompanying text.

130. See *supra* notes 56-57 and accompanying text.

131. See Turley, *supra* note 84, at 172 (“Although they are not statements of binding international law, military regulations and guidelines can significantly affect the evolution of that law.”).

132. See *supra* note 42.

cryptic and mysterious nature of *opinio juris*, it is unwise for the United States to feel secure in its apparent belief that it is not legally obligated to comply with its own law of war policy.<sup>135</sup> Even military lawyers within the U.S. Army recognize that the conduct of U.S. forces during military operations “may be regarded as evidence of what the law is at some later date.”<sup>136</sup>

#### B. The Significance of the Law of War Policy as Customary International Law

If the U.S. law of war policy has ripened into customary international law as argued above, the effects on future Military Operations Other Than War could be far reaching. No longer would it be lawful for the United States to comply “to the greatest extent feasible” with the law of war in Military Operations Other Than War.<sup>137</sup> On the contrary, the United States would have a legal duty under international law to *fully* comply with the law of war during all armed conflicts and law of war principles during Military Operations Other Than War.

The fictional Andarian scenario discussed in the introduction to this article underscores the pivotal distinction between customary international law and policy. The former creates a legal obligation whereas the latter does not. From a traditional international law perspective, the U.S. commander’s decision to transfer custody of the captured insurgents to the Andar government for prosecution appears to be legally sound. On its face, the operation in Andar is not an “international armed conflict” within the meaning of Common Article 2 of the Geneva Conventions.<sup>138</sup> Thus,

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133. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES, §102 cmt. c, at 25 (1987) (“Explicit evidence of a sense of legal obligation (e.g. by official statements) is not necessary; *opinio juris* may be inferred from acts or omissions.”).

134. See *supra* note 16 and accompanying text.

135. See Deak, *supra* note 7, at 10 (“*Opinio juris* embodies the essence of customary international law. It is recognizable once it has fully ripened, but deciphering exactly what ingredients are necessary to complete the process remains cryptic.”).

136. INTERNATIONAL AND OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, OPERATIONAL LAW DESKBOOK 2-25 (1997).

137. INTERNATIONAL AND OPERATION LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, JA-422, OPERATIONAL LAW HANDBOOK 13-2 (1997) (explaining that because Military Operations Other Than War do not fit well into any specific category of either public international law or the traditional law of war, military lawyers must turn to *DOD Directive 5100.77* for guidance).

138. See *supra* note 4 and accompanying text.

only the protections of the Geneva Conventions would apply to this situation. If, however, the U.S. law of war policy reflected customary international law, the legal analysis would be dramatically different.

To illustrate, Article 46 of the Geneva Convention Relative to the Treatment of Prisoners of War of 1949 prohibits a detaining power from transferring a prisoner of war into a "less favourable" situation.<sup>139</sup> Under the U.S. law of war policy, Article 46 would apply during any armed conflict and apply during any Military Operation Other Than War if the article was deemed a principle of the law of war. Assuming Article 46 applied in Andar, the insurgents, in the hands of the Americans, would enjoy the protections of prisoner of war status, including immunity for their war-like acts.<sup>140</sup> Whereas, in the hands of the Andarians, the insurgents could be treated as common criminals subject to domestic criminal law and possible execution if adjudged by a legitimate tribunal. Certainly, the Andarian treatment must be viewed as less favorable to the insurgents than the American treatment.

For the insurgents, the issue of whether the law of war applies in Andar is not academic—it may be the difference between life and death. Similarly, American commanders must be concerned with the status and treatment of captured persons because they always desire reciprocal treatment for captured American servicemen. It seems axiomatic that if an army treats captured members of its adversary humanely, its adversary is more likely to do the same. Therefore, whether certain provisions of the traditional law of war reflect customary international law applicable during all operations can have profound consequences.

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139. Convention on Prisoners of War, *supra* note 2, art. 46 ("The transfer of prisoners of war shall always be effected humanely and in conditions not less favourable than those under which the forces of the Detaining Power are transferred."); *id.* art. 12 ("Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention.").

140. *Id.* The Convention on Prisoners of War has the effect of granting prisoners of war immunity from criminal prosecution for war-like acts. This is one of the major reasons why it is critical to know if the Geneva Conventions apply during an operation.

### C. Shortcomings of the United States Law of War Policy

Regardless of whether the United States law of war policy reflects customary international law, the policy itself is fundamentally flawed.<sup>141</sup> According to the *CJCOS Instruction 5810.01*, U.S. forces will apply law of war *principles* during all Military Operations Other Than War.<sup>142</sup> The fundamental problem is that neither the Army, nor the Department of Defense, nor the Joint Chiefs of Staff have defined precisely what are the law of war principles to which the policy refers. By failing to define applicable law of war principles, the policy is inherently crippled by ambiguity.

Some cynics may argue that the drafters' likely motive in the first place was to create a policy so vague that the military could do no wrong and never be held accountable for not complying with law of war principles.<sup>143</sup> Close examination, however, reveals that by failing to clarify its policy, the U.S. military is inadvertently undercutting its own credibility as a leader in developing the law of war.

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141. See Turley, *supra* note 84, at 148 (“[M]ilitary regulations are silent on when an engagement reaches the level of an armed conflict or what demarcates the point at which the laws of armed conflict apply—distinctions that become critically important when dealing with peacekeeping and related operations.”)

142. See *supra* note 68 and accompanying text.

143. See, e.g., Symposium, *supra* note 46, at 90.

I believe that accepting and now maintaining the international/noninternational distinction is a serious policy error which should be rectified. The distinction is an anachronism in the law of armed conflict as much as the metaphysical line between international concern and domestic jurisdiction is in international human rights. The major consequences of the international/noninternational distinction is that it insulates the bulk of armed conflict from the reach of the law of armed conflict. It permits the majority of states that have become parties to the Geneva Conventions, to the Additional Protocols, and who pay lip service to the law of armed conflict in general, to avoid the real obligations which that regime imports, for most of the signatories do not contemplate engaging in “international” conflicts. By creating the noninternational category, signatories have reserved for themselves immunity from the regime they have purported to create for others.

*Id.*

#### D. The United States Law of War Policy—The Overdue Next Step

The time has come for the United States to officially announce which law of war principles contained within the core body of international law of war apply to all U.S. military operations, however the operations are characterized.<sup>144</sup> Commanders and judge advocates need to know. For example, when faced with treatment of prisoners of war, a commander needs to know if he is required to quarter them in conditions as favorable as his own soldiers,<sup>145</sup> to provide them at least monthly medical inspections,<sup>146</sup> to pay them “fair” financial compensation for labor,<sup>147</sup> to permit them to send and receive letters and cards,<sup>148</sup> and so on. In short, the commander needs to know if these or any other provisions of the Geneva Conventions constitute law of war principles within the meaning of U.S. policy.

Similar issues arise under every law of war treaty. Failure to define which specific provisions of the law of war it believes are binding during all operations is tantamount to the United States shirking its responsibilities as the leading nation engaged in Military Operations Other Than War. This failure may ultimately undermine United States legitimacy as a leader of customary international law development in this area.

#### E. Advantages and Disadvantages of Reformation

From an American perspective, the greatest advantage to reforming the U.S. law of war policy is renewed simplicity in military operations. Since the Nuremberg trials of the late 1940s, the international law regulating military operations became more complex. The United States response to this complexity has not kept pace. The United States can correct this if it unequivocally announces that during all future armed conflicts its forces will comply fully with all provisions of the Geneva and Hague Conventions. In addition, the United States should enumerate the precise principles of the law of war that it will always apply during Military Operations Other Than War. By doing so, American commanders, judge advocates,

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144. See Turley, *supra* note 84, at 170 (arguing that the military should take the lead in developing and proposing recommendations for the improvement of the laws of war).

145. Convention of Prisoners of War, *supra* note 2, art. 25.

146. *Id.* art. 31.

147. *Id.* art. 62.

148. *Id.* art. 72.

and service members will know with certainty what is expected of them in future operations.

Another benefit to the United States that may result from law of war reform is an increased likelihood of reciprocity of treatment from adversaries in future operations. By announcing a new policy and following it in practice, the United States will put tremendous pressure on future adversaries and allies to follow a similar course. Even if an adversary flagrantly disregards the law of war, the United States will gain a benefit in the media and, perhaps, garner favorable world opinion.

From a global perspective, a reformation of the U.S. law of war policy could have two important consequences. First, U.S. actions may cause other nations to adopt similar law of war policies. If this occurs, creating customary international law that pertains to the laws of war could be markedly expedited. Second, any reform in the laws of war will almost certainly boost humanitarian protections for the victims of war.<sup>149</sup>

Although reforming the U.S. law of war policy will move the United States in the right direction, the process is not without some risks. First, there is a legitimate danger that if the customary law of war is changed too quickly and these changes are based on superficial assumptions and sweeping generalizations; the law may ultimately become devalued and weakened.<sup>150</sup> Such a result occurs because “[t]he test for the advancement of humanitarian norms lies in their acceptability.”<sup>151</sup> Put another way, if the United States recklessly attempts sweeping changes to its law of war policy, the efforts may backfire due to lack of international support and recognition. Because the creation of customary international law requires international cooperation, the United States must act as a consensus builder to achieve its ends.

From an American perspective, a second possible danger with reforming the law of war is the fear that an international tribunal may someday judge whether the United States complied with the law. On this issue, the U.S. position appears to be absolute. An American accused of a law of war violation should only be tried by a U.S. court and never an inter-

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149. *But see* Morris, *supra* note 2, at 13 n.89 (explaining the danger that if the laws of war are changed by people who do not practice warfare, the rules may lose credibility with the soldiers who must implement them—in turn, this may ultimately result in more suffering for the victims of war).

150. Meron, *supra* note 43, at 247.

151. *Id.*

national tribunal.<sup>152</sup> Rational or not, the fear of an international tribunal presiding over the fate of an American service member is probably the greatest impediment against reforming the U.S. law of war policy. Some argue that it is precisely this fear that currently explains why the United States is advocating a curb on the jurisdiction of the proposed permanent international criminal court at The Hague.<sup>153</sup>

## VI. Conclusion

The view that the United States has already shaped customary international law in applying the law of war to nontraditional military operations is factually supportable; however, the shaping is far from complete. At a minimum, it appears settled that some principles from the law of war apply during all conflicts. The supporting evidence for this conclusion is a fair reading of the *Tadic* decision<sup>154</sup> coupled with the policy and practice of the United States over the past twenty years. Many view this extension

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152. See John M. Goshko, *U.S. Proposes Limit on Global Court*, WASH. POST, Mar. 26, 1998, at A29.

[T]he U.S. position is driven largely by heavy pressure from the Defense Department and its supporters in Congress. Pentagon chiefs vividly remember when foes of U.S. policy in Vietnam during the 1960s and 1970s and Central America in the 1980s called for prosecution of American officials and servicemen as war criminals. They now fear that without very stringent and specific safeguards, an international court could be used by present-day adversaries such as Iraq or Libya to make similar charges.

*Id.*

See also Adrian Karatnycky, *This Court Should Not Be Called to Session*, WASH. POST, Apr. 6, 1998, at A25.

The proposed International Criminal court also could have jurisdiction over loosely defined 'war crimes,' including attacks against nonmilitary targets. United States officials worry that American peacekeepers could be brought up on charges if their operations result in civilian casualties. The U.S. military could be investigated at the behest of such rogue states as Libya or Iraq, against whom the United States has been involved in hostilities that have resulted in the loss of civilian life.

*Id.*

153. *Id.*

154. See *supra* notes 42-58 and accompanying text.



of law of war principles from international armed conflict to internal conflicts as a positive development in international law.<sup>155</sup>

What is troubling, however, is the lack of clarity and precision in determining which specific law of war principles apply during all conflicts.<sup>156</sup> Even with the *Tadic* decision's enunciating some of the fundamental principles of the laws of war,<sup>157</sup> military commanders and judge advocates are not certain what international law specifically requires in each case. A quick review of the operations from Grenada to the former Yugoslavia bears this out.<sup>158</sup> Precision and clarity is demanded in this field, but instead ambiguity largely remains.

To fill the vacuum in the law, the U.S. military should take the lead in shaping customary international law in the area of the laws of war. As others have noted, the military is best suited and, therefore, ought to play a leading role in this regard.<sup>159</sup> Not only does the military have the necessary tools to do so, namely in the form of military manuals and official statements, but, moreover, it is the military that will ultimately be governed by the law of war. Thus, the military is in the best position to balance the utility of a particular rule against its practical effect on an operation. Until the United States specifically enumerates the fundamental principles of the laws of war which govern during all operations, commanders and judge advocates will continue to play a dangerous guessing game with the law.

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155. See, e.g., Symposium, *supra* note 46, at 85.

Obviously, there are many different conflicts. But the terms 'international' and 'noninternational' conflict import a bipartite universe that authorizes only two reference points on the spectrum of factual possibilities. The terms are based on a policy decision that some conflicts-non-international law ones-will be insulated from the plenary application of the law of armed conflict-even though such conflicts may be more violent, extensive and consumptive of life and value than other 'international' ones. The terms are, in effect, a sweeping exclusion device that permits the bulk of armed conflict to evade full international regulation.

*Id.*

156. See Turley, *supra* note 84, at 11 ("As is often true, history-in this case, the not-so-ancient history of the Vietnam War offers important rationales for why the international law involved in any operation must be crystal clear.").

157. See *supra* note 48.

158. See *supra* notes 71-114 and accompanying text.

159. See Turley, *supra* note 84, at 14.

**THE TWENTY-SEVENTH ANNUAL  
KENNETH J. HODSON LECTURE:<sup>1</sup>  
ECHOES AND EXPECTATIONS:  
ONE JUDGE'S VIEW**

WALTER T. COX, III  
CHIEF JUDGE, COURT OF APPEALS FOR THE ARMED FORCES<sup>2</sup>

On 5 June 1964, thirty-five years ago, I, then, Second Lieutenant Walter Cox, reported to the Staff Judge Advocate at Fort Jackson, South Carolina. I stood proudly before Colonel Herbert Meeting, a tough World War II infantryman from Oklahoma who had attended law school on the GI Bill after the war. The Army called him to active duty during the Korean War, and he decided to stay. He took one look at me and said, "Why in the hell did those clowns in Washington send me a second lieutenant who has never been to law school. Cox, report to the Courts and Boards Officer at the first brigade. You are now a trial counsel. Maybe something good will rub off on you."

Fort Jackson was at the tail end of what we called the "Gator Run." The local law-enforcement officers in the southeast routinely picked up absentees and deserters, and they sent them to us for processing. At any

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1. This article is based on a lecture delivered on 16 November 1998 by Chief Judge Walter T. Cox, III, to members of the staff and faculty, distinguished guests, and officers attending the 22nd Criminal Law New Developments Course at The Judge Advocate General's School, Charlottesville, Virginia. The Kenneth J. Hodson Chair of Criminal Law was established at The Judge Advocate General's School on 24 June 1971. The chair was named after the late Major General Hodson, who served as The Judge Advocate General, United States Army, from 1967 to 1971. General Hodson served over thirty years on active duty, and was a member of the original staff and faculty of The Judge Advocate General's School in Charlottesville, Virginia. When the Judge Advocate General's Corps was activated as a regiment in 1986, General Hodson was selected as the Honorary Colonel of the Regiment.

2. I am grateful to the United States Army Judge Advocate General's School for the opportunity to deliver the Hodson Lecture. In the summer of 1970, I had the pleasure of serving as an acting aide-de-camp to Major General Kenneth J. Hodson. In that capacity, I traveled with General and Mrs. Hodson throughout Europe, Iran, Pakistan, Ethiopia, Turkey, and Greece as he visited Army judge advocates stationed in these places. Through that experience, I developed a life-long friendship with the Hodsons. He moved my admission to the Bar of the Court of Military Appeals on 6 September 1984, shortly before I assumed the office as a judge of that court. We were together frequently until his death on 11 November 1995. He would probably be astounded to hear that I was invited to give this prestigious lecture. See *Tribute to Major General Hodson*, 44 M.J. LIX (1996).

given moment, the head count in the local stockade would number two or three hundred soldiers, consisting of both sentenced and pretrial confinees. We would prosecute the soldiers before special courts-martial, five at a time. We would march them in, line them up, arraign them, and accept their guilty pleas. Then we would hear testimony on sentencing, one at a time. There was no military judge, no law officer. The defense counsel were line officers detailed for the duty just as they would be detailed for staff duty officer, pay officer, or the like. Every now and then, someone would plead not guilty and cause a stir in the courtroom, but not often.

As trial counsel, I organized the court-martial, located the members and witnesses, summarized the proceedings, and served the necessary papers on the accused. I would provide the president of the court-martial with the elements of proof and the boilerplate script for the trial. If the soldier had a really bad record, I would recommend to the brigade commander that he consider a general court-martial. The court-martial sentenced almost every accused to six months' confinement, reduction in rank—if he had any rank—and forfeiture of two-thirds of his pay and allowances. His commander would then visit him in the stockade a few days after the court-martial to see if the soldier was ready to train and serve. If so, the sentence was suspended and the soldier returned to duty. The rule was that every soldier was going to serve his two-year obligation to the Army, either as a good soldier or as a prisoner.

In September 1964, I took excess leave from the Army and entered the University of South Carolina to study law. The following June, I once again reported to Colonel Meeting. He said, "Cox, with one year of law school you still can't practice law but you are too experienced as a trial counsel. It would be unfair to send you in against those line officers defending the cases. You are now a defense counsel." I now went from prosecuting ten to fifteen cases a week to defending a like number.

In the summer of 1967, following graduation from law school, I returned for the fourth time to Fort Jackson. Colonel Meeting was still the staff judge advocate, and by this time, he and I had become the "old hands" on the post. He assigned me to assist, as a paralegal, the two judge advocates he had selected to prosecute Captain Howard Levy.<sup>3</sup> One task assigned to me after the trial was to serve Captain Levy with the staff judge advocate review and the record of trial at his place of confinement in a

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3. See *United States v. Levy*, 39 C.M.R. 672 (A.B.R. 1968), *petition for review denied*, 18 U.S.C.M.A. 627 (1969); *Parker v. Levy*, 417 U.S. 733 (1974).

wing of the post hospital.<sup>4</sup> Considering his circumstances, he was most gracious.

I recall these memories to put some perspective into my views about military justice. This was the period that Colonel St. Amand spoke of in his opening reminiscences of Major General Hodson.<sup>5</sup> This was the 1964-1969 period. I was there for the transition occasioned by the Military Justice Act of 1968, of which much has been said.

Before I begin my journey through these thirty-four years of association with military justice, I would make an observation. In 1987, I had the occasion to present a paper at the Army War College as part of a symposium on the Army and the Constitution. This project turned into a seminar-like experience for me as I studied the development of military justice throughout the history of our country.<sup>6</sup> From this experience, I came to realize that military justice has never been a static concept. Rather, it has evolved in tandem with changes in civilian justice.

I have concluded from my studies that there are at least six readily identifiable eras of military justice. The first period, naturally, would be the Continental Army period. One might well imagine what courts-martial looked like in this period.<sup>7</sup> First, there was no defense counsel active in the trial. Second, the court-martial consisted of thirteen members when practicable, presumably a president and twelve members resembling a civil tribunal.<sup>8</sup> Shortly after a court-martial handed down a sentence, the commanding officer approved and executed it.<sup>9</sup> The punishments were often corporal, such as lashes with the cat-o'-nine-tails. There was no appeal.

If you looked at the civilian justice system during that same time-period, you would find that the jurors were all male freeholders. Although

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4. See *Levy v. Resor*, 37 C.M.R. 399, 400 (1967).

5. Colonel Gerard St. Amand, USA, Commandant of the Army Judge Advocate General's School, Opening Remarks to Hodson Lecture, 16 Nov. 1998 (discussing the period 1964-1969 when Major General Hodson reshaped military justice).

6. Walter T. Cox, III, *The Army, The Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1 (1987).

7. JAMES C. NEAGLES, *SUMMER SOLDIERS, A SURVEY AND INDEX OF REVOLUTIONARY WAR COURTS-MARTIAL* (1986).

8. COLONEL WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 77, nn.45-46 (2d ed. 1920 reprint).

9. See generally *id.* at 390-480.

lawyers did appear in the courts of that day, they only appeared if the defendant could afford to pay for one. Many jurors could not read or write and few participants were formally trained in law. In other words, a civilian trial did not differ greatly from a court-martial, and society commonly understood that these were both acceptable methods to judge innocence or guilt and set punishments for the guilty.

The second era might be called the frontier era. The size of the Army diminished greatly after the Revolutionary War. Many of the soldiers were immigrants who were used to living a hard life. They accepted the discipline of the Army. Likewise, life on the frontier was hard, as was the pioneers' justice system.<sup>10</sup>

The next era would be the Civil War era. During this period, there was so much turmoil and so many people involved that there were too many complications for Congress or anyone else to become concerned about courts-martial. Thus, the Articles of War adopted for the Revolutionary War were still in place, with only minor changes.<sup>11</sup>

Military justice in the first one hundred and forty years of our country can be characterized as the period in which the court-martial was an instrumentality of the executive branch of our government. It gave the President and military commanders a tool to assist them in maintaining good order and discipline in the ranks.<sup>12</sup> "The commander was not free to ignore the law but he was free to interpret it and apply it without any institutional checks or balances, legal or otherwise."<sup>13</sup>

The first serious movement to change the military justice system came in the World War I era. An incident in Houston, Texas, sparked a controversy in the office of the judge advocate general of the Army over whether the judge advocate general had the power to revise and review courts-martial proceedings. Brigadier General Samuel T. Ansell, as the senior officer in the office of the judge advocate general, took the position that the power to review and revise existed in that office. At that time, General Crowder was the provost marshal general and was administering the Selective Service Act. He took the position that the review and revision responsibilities of the office were advisory, and not binding on the

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10. GLENN SHIRLEY, *LAW WEST OF FORT SMITH* (1957).

11. Colonel Robert Rollman, *Of Crimes, Courts-Martial and Punishment—A Short History of Military Justice*, 11 A.F. L. REV. 211 (1969).

12. WINTHROP, *supra* note 8, at 48-53.

13. Cox, *supra* note 6, at 10.

field commanders. General Crowder prevailed, at that moment, but as one commentator noted:

The controversy ultimately caused a nationwide clamor for revision of the Articles of War: bitter newspaper denunciation of military justice as administered during World War I; vitriolic speeches in both Houses of Congress; two independent investigations of the military justice system of the United States Army; a statement by the president of the American Bar Association that the military code was archaic and that it was a “code unworthy of the name of law or justice”; lengthy congressional hearings; and finally revision of the Articles of War and the *Manual for Courts-Martial*.<sup>14</sup>

The clamor for change, however, only produced modest revisions. The Army lapsed back into a peacetime existence. The country focused on, initially, postwar prosperity and, later, the dark days of the depression. There was little interest in military justice during this era; however, World War II soon followed.

After World War II, over sixteen million men and women returned from very difficult service abroad. The incredible facts are that there were over 2,000,000 courts-martial, 80,000 of which were general courts-martial.<sup>15</sup> Many of these veterans became leaders in the Congress and in the various bar associations throughout the country.<sup>16</sup> These veterans wanted changes made in the military justice system, primarily to combat command influence over the proceedings. In response, some major revisions were made to the Articles of War in the late 1940s. These changes, however, were short lived. The newly formed Defense Department opened the door to create the Uniform Code of Military Justice, which was signed into law on 5 May 1950 and took effect on 31 May 1951.<sup>17</sup>

The military operated under this new military justice code throughout the Korean War and into the 1960s without any significant changes. Then came the Military Justice Act of 1968. Congress enacted this during my

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14. Major Terry W. Brown, *The Crowder-Ansell Dispute: the Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1, 2-3 (1967).

15. Captain John T. Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39, n.3 (1972).

16. Cox, *supra* note 6, at 12.

17. See generally JONATHAN LURIE, *ARMING MILITARY JUSTICE*, 1992 (providing an excellent description of the evolution of the Uniform Code of Military Justice).

service as a judge advocate, 1964-1972. To understand how and why this Act came about, it seems important to consider the societal and judicial issues of our nation at the time. My views of military justice were shaped in this social and military environment.

First, this was the era of the great Civil Rights movement in the South. Although President Truman had integrated the military almost two decades earlier,<sup>18</sup> the civilian communities that surrounded some of our most important military bases were completely segregated. Clemson College, where I attended undergraduate school, was not yet integrated. Matthew Perry, later a judge on the Court of Military Appeals, brought suit in the United States District Court of South Carolina and obtained a court order forcing Clemson to accept Harvey Gantt, an African-American architecture student, as its first black student.<sup>19</sup> The University of South Carolina Law School was not integrated until 1965, my second year.<sup>20</sup>

This was the era in which the war in Vietnam was escalating amidst angry protests from some segments of our society. These protesters included military officers such as Captain Howard Levy, who refused orders to train special forces personnel to recognize and treat some tropical skin diseases they might encounter in Vietnam, and Captain Noyd, who refused to train combat aviators in the Air Force.<sup>21</sup>

As a young judge advocate officer assigned to Fort Ord, California, in 1968-1969, I spent considerable time reviewing applications for discharge as a conscientious objector and requests for discharges because of homosexuality. I recall the sensational case of Private First Class Amick and Private Stolte, two members of the Fort Ord band who were convicted by a general court-martial for uttering disloyal statements that encouraged other soldiers to organize a union to protest the war in Vietnam.<sup>22</sup>

In the civilian sector, traditional approaches to constitutional rights were also in flux. For example, in *Mapp v. Ohio*,<sup>23</sup> the rule that evidence

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18. Exec. Order 9981, July 26, 1948.

19. Judge Perry is now a senior judge of the United States District Court, District of South Carolina.

20. One of the first African-American law students was The Honorable Jasper Cureton, a judge of the South Carolina Court of Appeals who entered law school following his military service. He is now a retired judge advocate colonel in the U.S. Army Reserves.

21. See *Parker v. Levy*, 417 U.S. 733 (1974); *Noyd v. Bond*, 395 U.S. 683 (1969).

22. See *United States v. Amick*, 40 C.M.R. 720 (A.B.R. 1969).

23. 367 U.S. 643 (1961).

seized in violation of the 4th Amendment must be excluded from trial was first applied to the states in 1961. This case presaged two landmark decisions. In 1963, *Gideon v. Wainwright*<sup>24</sup> gave indigent defendants the right to counsel in criminal cases. In 1966, *Miranda v. Arizona*<sup>25</sup> required the police to give warnings to suspects being interrogated in custodial settings.

In this environment, there was little wonder that Congress became interested in improving the military justice system. The Military Justice Act of 1968 made some significant changes.<sup>26</sup> First, it established a separate military judiciary and gave powers to the military judge traditionally reserved to the president of a court-martial or to a convening authority. Thus, the military judge could conduct hearings outside the presence of the members of a court-martial, and the military judge could grant or deny continuances. Importantly, a military accused could elect trial by a military judge sitting alone as the court-martial.<sup>27</sup> Second, the Military Justice Act of 1968 required that legally trained counsel represent the military accused in special courts-martial if the accused could be sentenced to a bad-conduct discharge.<sup>28</sup>

Quite naturally, these changes were not met with general enthusiasm in the field. First, the changes resulted in a lessening of influence over the proceedings by both the commander and his staff judge advocate. Second, the changes imposed a manpower burden on the respective legal resources available to the judge advocates general of the services. I recall vividly how the various commands scrambled to get “experienced” Army captains certified as military judges. Indeed, Captain “Sparky” Gierke, now my colleague on the court, was tapped to perform the duties of a military judge—a position he filled with distinction in Vietnam and later at Fort Carson, Colorado, from late 1969 until the spring of 1971. Changes in the law also may have had the unintended result of changing the use of the special court-martial as punishment for misdemeanants without the view that the command was seeking to expel the service member with a punitive discharge.<sup>29</sup>

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24. 372 U.S. 335 (1963).

25. 384 U.S. 436 (1966).

26. Pub. L. 90-632; *see* Remarks by Major General Kenneth J. Hodson, USA (Ret.), June 9, 1987, Celebration of the Bicentennial of the United States Constitution, *in* 25 M.J. CXIX (1987).

27. Pub. L. 90-632.

28. UCMJ art. 27.



The ink had scarcely dried on the significant changes when the Supreme Court had an opportunity to expound upon the system. The Supreme Court reviewed the fairness of the military justice system soon after the changes that purported to bring the system in line with modern thought on criminal trial procedure. In *O'Callahan v. Parker*, the Supreme Court held:

While the Court of Military Appeals takes cognizance of some constitutional rights of the accused who are court-martialed, courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law. . . . A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice.<sup>30</sup>

Again, the judge advocates general of the services were called upon to re-evaluate the business of military justice. The Supreme Court had now imposed a new, restrictive requirement upon the military before authorizing trial by courts-martial. It was no longer sufficient that the service member had committed an offense under the Uniform Code of Military Justice. Now the military was required to prove that the offense was "service connected," and as is often the case with appellate courts, there was no clear definition as to what offenses might be "service connected."

In 1971, the Supreme Court re-visited the *O'Callahan* decision and provided some guidance in determining whether jurisdiction existed over a particular person and offense.<sup>31</sup> Nonetheless, the question of whether an offense was truly service connected proved to be fertile ground for military litigants. For example, Professors Gilligan and Lederer, in their noted work on military law, *Court-Martial Procedure*, point out that one vexing

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29. Of course there may be many explanations for the falling number of cases referred to non-BCD special courts-martial. I have not taken the time to prove this hypothesis. In 1984, the year I was appointed to the Court of Appeals for the Armed Forces, there were 1442 general courts-martial, 1401 BCD special courts-martial, and 461 non-BCD special courts martial in the Army. In Fiscal Year 1995, there were only 20 non-BCD special courts-martial reported by the Army. See Annual Reports of Code Committee 1984 and 1995, 20 M.J. and 44 M.J. The Naval services made substantial use of the non-BCD court-martial in 1984, almost equal to the BCD special. By 1995, the BCD special courts-martial were twice the non-BCD special courts-martial.

30. *O'Callahan v. Parker*, 395 U.S. 258, 265, 266 (1969) (footnote omitted).

31. See *Relford v. Commandant*, 401 U.S. 355 (1971).

area of service connection was in determining whether drug offenses were service connected.<sup>32</sup>

By the 1970s, the military community was confronted not only with the political problems associated with the Vietnam War (such as demonstrations and anti-war sentiment), but also social unrest in the military. Drug use and disobedience to authority increased. Military justice was not spared these problems, and there were serious critics of military justice.

In 1969, the book, *Military Justice is to Justice as Military Music is to Music*, was published.<sup>33</sup> *Newsweek* magazine featured a cover story captioned, "U.S. Military Justice on Trial."<sup>34</sup> The trial of First Lieutenant William L. Calley, Jr., for the My Lai incident attracted enormous media and public attention.<sup>35</sup>

The military system was also under attack from within. Retired General Howze noted, "The requirements of military law are now so ponderous and obtuse that a unit commander cannot possibly have the time or the means to apply the system . . . ."<sup>36</sup>

Again, to put this era into historical perspective, it is easy to see that the social turmoil in our society was reflected within the military services. In civilian life, we had the Beatles, with their long hair, singing songs that might be construed as glorifying the hedonistic lifestyle of the flower children, the hippies, and the beatniks. Our African-American community was struggling to establish equality and opportunity in our society. Tensions existed among the peaceful efforts of the Reverend Martin Luther King and his followers (such as Andrew Young, the Reverend Roy Abernathy, and the Reverend Jessie Jackson), the militant views of some of the Black Panthers (such as Eldridge Cleaver or Angela Davis), and the approach of Malcom X and his followers. Drug use became commonplace in certain segments of society. It became "cool" to smoke marijuana, burn

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32. 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, *COURT-MARTIAL PROCEDURE* 74-75 n.202 (1991).

33. ROBERT SHERRILL, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* (1969).

34. *U.S. Military Justice on Trial*, *NEWSWEEK*, Aug. 31, 1970, at 18.

35. *KAN. CITY TIMES*, May 19, 1971, at 5 (quoting General Hodson that he had received more than 12,000 letters about Lieutenant Calley's conviction).

36. General Hamilton H. Howze, *Military Discipline and National Security*, *ARMY MAG.*, Jan. 1971, at 11, 13.

incense, and meditate. Timothy Leary was on the scene with LSD. The Beatles sang *Lucy in the Sky with Diamonds*.

Against this backdrop, the demands and the needs of the Vietnam War meant that many of our young people were drafted into service. The officer corps was young. An officer who entered service as a second lieutenant in the mid 1960s was promoted to captain in approximately thirty months, which meant that the average age of a company commander was twenty-four years. The military asked these young officers to take civilian draftees from this contentious society and train them to fight, respect authority and discipline, and if necessary, die in battle.

Quite expectedly, many problems arose. Many of the young officers were Caucasian and had not even known personally a black man or woman as a friend or acquaintance. The leadership of the services had grown up in a different era. There was a real chasm between the African-American draftees and the officer corps. To superimpose all of these social issues onto the war effort in Vietnam created an incredible environment for the military lawyer to function in the early 1970s—but function we did.

One important task was to define the problems. One solution used in Germany, where I was stationed at the time, was to create a Race Relations Task Force. Brigadier General George Prugh asked Captain Curt Smothers, an African-American attorney, and me to serve on the U.S. Army Europe task force. We interviewed a large number of soldiers, noncommissioned officers, and officers, and through this process gave the black soldiers an avenue to communicate their concerns and vent their frustrations. Furthermore, lawyers were now involved in administrative proceedings, giving advice on Article 15s, and representing soldiers in courts-martial. All of these processes meant that an individual soldier could and would be heard if he had a grievance. In my judgment, military lawyers played an important role in ensuring success during these troubled times.

In military justice, the 1970s could be characterized as the decade in which military judges became judges “as commonly understood in the American legal tradition.”<sup>37</sup> Captain (now Brigadier General) John Cooke, in an article written twenty years ago, identified the date June 1975, with the appointment of Chief Judge Albert Fletcher to the Court of Military Appeals, as the embarking point.<sup>38</sup> I would rather credit the Military Justice Act of 1968, but will not quarrel with General Cooke’s con-

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37. United States v. Graf, 35 M.J. 450, 465 (C.M.A. 1992).

tentions. For certain, he cites numerous cases that clearly expanded the role of the trial judge in every aspect of the trial, including review of pre-trial confinement issues, production of witnesses, control of the courtroom, and the like. From my experience with general courts-martial before the 1968 Act, however, the Army had already begun treating its law officers as de facto judges.<sup>39</sup>

Eugene Fidell, a well-respected civilian practitioner of military law, theorizes that over the last three decades an almost complete “flow of power” to the military trial bench has occurred—a shift of the “center of gravity” from a command-oriented system of justice to a judicially-centered system.<sup>40</sup> This “devolution,” Fidell argues, is complete. What remains is for the military or the Congress to decide how to make it work better.

I returned to the military justice scene in September of 1984, when I was appointed to the Court of Military Appeals. At that time, the great anguish that followed the court’s decisions of the late 1970’s had almost abated. The Military Justice Act of 1983 established a commission to study five questions pertaining to military justice. Three of the five questions involved the military judge. First, should the judge be the sole sentencing authority? Second, should the judge be able to suspend sentences? Third, should military judges have tenure?<sup>41</sup> The advisory commission recommended against giving the sentencing power to judges, against giving judges the power to suspend sentences, and against a guaranteed term of office.

Throughout the 1980s, arguments were advanced that the Court of Military Appeals should be reconstituted as a court under Article III of the United States Constitution. The advisory commission also considered this question. The commission recommended Article III status for the court if jurisdiction could be clearly limited to review of courts-martial.<sup>42</sup>

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38. Captain John S. Cooke, *The United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System*, 76 MIL. L. REV. 43, 44 (1977).

39. I fondly remember some great law officers who became military judges. Jack Crouch, Reed Kennedy, and Grady Moore were all superior judges and mentors.

40. Eugene R. Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, 32 WAKE FOREST L. REV. 1213 (1997).

41. Military Justice Act of 1983, Advisory Commission Report, 14 Dec. 1984.

42. *Id.*

The role and status of the military judiciary continues to be of paramount interest, as we shall see from developments in the late 1980s and early 1990s. Before heading in that direction, however, there were several other significant events in military justice in the 1980s that are worthy of note. First, the Military Rules of Evidence were adopted on 12 March 1980.<sup>43</sup> These rules are taken almost verbatim from the Federal Rules of Evidence. The adoption of the rules is consistent with the requirement in Article 36 that the President adopt procedures and modes of proof “generally recognized in the trial of criminal cases in the United States district courts.”<sup>44</sup> Adopting these Rules enhanced the military judge’s role as a gatekeeper of evidence before a court-martial.

The Military Justice Act of 1983 initiated direct review of military cases by writ of certiorari to the Supreme Court.<sup>45</sup> The act also granted the government the right to appeal an interlocutory decision “which terminates the proceedings with respect to a charge or specification which excludes evidence that is substantial proof of a fact material in the proceeding.”<sup>46</sup> Both of these amendments were soon to have profound meaning for military justice.

In 1985, Yeoman First Class Richard Solorio was brought to trial for numerous specifications of sexual misconduct with minor dependents of fellow coast guardsmen. At trial, Solorio moved to dismiss the charges for want of jurisdiction. The military judge, relying on the *Relford* and *O’Callahan* cases, agreed with Solorio and ordered the charges dismissed for lack of jurisdiction.<sup>47</sup> The government appealed pursuant to its newly created rights under Article 62 of the UCMJ.

The Coast Guard Court of Military Review reversed the military judge and reinstated the charges. Solorio appealed to the Court of Military Appeals. We affirmed the Court of Military Review, finding jurisdiction based upon the *Relford* factors.<sup>48</sup> Solorio appealed to the Supreme Court. The Supreme Court lost little time in affirming the decision of the Court of

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43. Exec. Order No. 12198, dated Mar. 12, 1980; Exec. Order No. 12233, dated Sept. 1, 1980 (effective date).

44. UCMJ art. 36.

45. UCMJ art. 67a.

46. UCMJ art. 62.

47. *United States v. Solorio*, 21 M.J. 251, 252 (C.M.A. 1986).

48. *Id.* at 256.

Military Appeals, but it did so by overruling the *O'Callahan* case.<sup>49</sup> The question of jurisdiction over service member's was now resolved.

The 1980s also saw much litigation concerning drug abuse. In several important decisions, the Court of Military Appeals recognized three significant principles. First, "drugs coursing through the body of a user" were an incredible threat to military readiness. Thus, there was no question as to jurisdiction over off-post drug use.<sup>50</sup> Second, the court recognized that compulsory urinalysis may be justified by the same considerations that govern other health and welfare inspections.<sup>51</sup> Lastly, but importantly, the court held that evidence of a controlled substance in the urine sample, together with testimony explaining the evidence, would be sufficient to sustain a conviction for the wrongful use of that substance.<sup>52</sup> In my judgment, these cases along with compulsory urinalysis itself, finally gave the commander the tools needed to bring rampant drug use under control in the military service.

Returning to the topic of military judges, 1988 brought a very unusual case before the Court of Military Appeals. The Navy-Marine Corps Court of Military Review issued a controversial decision in the case of *United States v. Billig*.<sup>53</sup> A general court-martial had tried and convicted Dr. Billig for acts and neglects in the performance of his military duties as a surgeon, resulting in the death of several patients. The Navy-Marine Corps Court reversed his conviction.<sup>54</sup>

Following the announcement of the decision, the inspector general of the Department of Defense received an anonymous tip that members of the Court of Military Review had been bribed. The inspector general initiated an investigation. Ultimately, the judge advocate general of the Navy ordered the judges of that court to cooperate in the investigation. The judges of the Navy-Marine Corps Court petitioned the Court of Military Appeals to enjoin the inspector general from investigating their judicial function in the case. The Court of Military Appeals ultimately concluded that investigation of judicial misconduct must be done in a judicial setting. Because there was no formal process in place to conduct a judicial inquiry, I was appointed as a special master to conduct the investigation.<sup>55</sup> The

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49. *Solorio v. United States*, 483 U.S. 435, 436 (1987).

50. *United States v. Trottier*, 9 M.J. 337, 349, 350 (C.M.A. 1980).

51. *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983).

52. *United States v. Harper*, 22 M.J. 157 (C.M.A. 1986).

53. 26 M.J. 744 (N.M.C.M.R. 1988).

54. *Id.* at 761.

importance of the case is two-fold. First, the case recognized that appellate judges of the Courts of Military Review were indeed judges, thus subject to the American Bar Association Code of Judicial Conduct. Second, it demonstrated that the military judges were willing to assert their judicial independence, even in the face of direct orders of the judge advocate general of the Navy. This act, which took courage and careful thought, set a standard for judicial independence that has far-reaching meaning for an independent military judiciary.

In the 1980s, Chief Judge Robinson O. Everett became keenly interested in the public having a greater understanding of military justice. Under his leadership, the court allowed the television camera into the courtroom, a practice specifically not allowed at the time in federal trial or appellate courts. C-Span has covered several oral arguments. Chief Judge Everett also initiated Project Outreach, a program designed to take our court on the road. We have averaged five or six cases a year outside of Washington. We held the first such case in Charlottesville, Virginia, on 13 November 1987.<sup>56</sup>

The 1990s began with the retirement of Chief Judge Everett and the expansion of the Court of Military Appeals from three judges to five.<sup>57</sup> President Bush appointed Judges Susan Crawford, “Sparky” Gierke, and Robert Wiss to join Chief Judge Eugene Sullivan and me on the court.

Before the new judges were appointed, however, we heard argument and decided the case of *United States v. Curtis*.<sup>58</sup> This was the first in a series of cases in which a service member received the death sentence. Central to the case was whether Congress could delegate to the President the authority to proscribe the rules and procedures for death sentences in the military. The *Curtis* case was remanded to the Navy-Marine Corps Court of Military Review.<sup>59</sup> Ultimately, in 1997, the five-judge Court of Appeals for the Armed Forces<sup>60</sup> reversed Curtis’s death sentence, for other reasons.<sup>61</sup>

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55. *Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328, 341 (C.M.A. 1988).

56. *United States v. Sherrod*, 26 M.J. 30 (C.M.A. 1988).

57. UCMJ art. 252.

58. 32 M.J. 352 (1991).

59. *United States v. Curtis*, 33 M.J. 101, 110 (C.M.A. 1991).

60. On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the name of the U.S. Court of Military Appeals to the U.S. Court of Appeals for the Armed Forces.

Although the *Curtis* case was the seminal decision by our court regarding constitutional questions of capital punishment, it was the case of *United States v. Loving*, in 1994, that first made its way to the Supreme Court.<sup>62</sup> The Supreme Court affirmed Loving's death sentence and approved the death penalty rules and procedures adopted by the President in the *Manual for Courts-Martial*, recognizing that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian, . . . and the President can be entrusted to determine what limitations and conditions on punishments are best suited to preserve that special discipline."<sup>63</sup>

It is my understanding that the Department of the Army has not yet forwarded Loving's case to the President for a decision on whether or not to execute him. Interesting questions remain as to the procedure for forwarding a death case to the President. For example, at the summer 1995 meeting of the American Bar Association, Major Dwight Sullivan, a Marine Corps attorney at the time, questioned whether a case must first go through the secretary of a military department and be subjected to clemency review prior to being advanced to the President. Likewise, the question remains as to whether a case should be staffed through the Secretary of Defense before it goes to the President. There are also lingering questions about new provisions of the *Manual for Courts-Martial* that provide for a sentence to life without parole. I am certain these questions will be resolved in the future, and I will not speculate here how they should come out.

There are a number of death penalty cases pending in our system. Indeed, two cases await a decision from our court, which we will announce shortly.<sup>64</sup> I should note, however, that the military death penalty practice has been carefully structured by the President "to make sure there is no arbitrary imposition of the death penalty in the military."<sup>65</sup> In her opinion in one of the *Curtis* cases, Judge Crawford listed eight significant protections built into the rules.<sup>66</sup>

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61. *United States v. Curtis*, 46 M.J. 129, 130 (1997).

62. *United States v. Loving*, 41 M.J. 213 (1994); *Loving v. United States*, 577 U.S. 748 (1996).

63. *Id.* at 773 (quoting *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)).

64. *United States v. Gray*; *United States v. Murphy*.

65. *United States v. Curtis*, 44 M.J. 106, 166 (1996).

66. *Id.* at 166-67.



Two other significant cases were decided by the Court of Military Appeals within a year after the new judges took office, both of which were ultimately heard by the Supreme Court. In *United States v. Graf*, the Court decided that a fixed term of office was not constitutionally required to establish judicial independence.<sup>67</sup> In *United States v. Weiss*, a split Court of Military Appeals decided that the appointment of military judges by the judge advocates general did not violate the Appointments Clause of the Constitution.<sup>68</sup> The Supreme Court consolidated these issues on appeal.

The Supreme Court held that the Appointments Clause was not violated by the manner in which military judges were chosen, nor did the lack of a fixed term of office render the judges partial, in contravention of the Due Process Clause.<sup>69</sup> The military judge, established by act of Congress in 1968, had come of age. He was now truly a judge in every sense commonly understood in our nation.

The Supreme Court has considered other cases from the military services. The Supreme Court used an Article 31, UCMJ, issue in *United States v. Davis* to clarify what action a policeman must take if a suspect makes an unclear or ambiguous request for counsel during a custodial interrogation.<sup>70</sup> In the *Sheffer* case, the Supreme Court upheld a Military Rule of Evidence that bans polygraph evidence from the courtroom. The Court held that the ban did not violate an accused's constitutional right to present a defense.<sup>71</sup>

One other very important case is presently pending before the Supreme Court. In *Goldsmith v. Clinton*,<sup>72</sup> a majority of our court found jurisdiction under the All Writs Act<sup>73</sup> to prevent the secretary of the Air Force from dropping Major Goldsmith from the rolls of the Air Force pursuant to a recently enacted provision in Title 10 of the United States Code. The result of this case may profoundly impact service members who seek protection from the various courts of criminal appeals or from the Court of Appeals for the Armed Forces.<sup>74</sup>

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67. 35 M.J. 450, 462-64 (C.M.A. 1992).

68. *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992); U.S. CONST. art. 2, § 2, para. 2, cl. 2.

69. *Weiss v. United States*, 510 U.S. 163, 176, 181 (1994).

70. *Davis v. United States*, 512 U.S. 452 (1994) (presenting an issue arising under Article 31 of the UCMJ).

71. *Sheffer v. United States*, 118 S. Ct. 1261, 1269 (1998).

72. 48 M.J. 84 (1998).

73. 28 U.S.C.A. § 1651(a) (1999).

There are several other observations I might share with you about this system of justice that we call military justice. I mention these to contrast my years as a civilian judge and practitioner from those involved in military justice. The first observation involves a four-letter word: the *Care* inquiry.<sup>75</sup> When I arrived at the Court of Military Appeals in 1984, one of the earliest issues we addressed was a certified question that challenged the *Care* inquiry.<sup>76</sup> Because certified counsel were now present in every court-martial, the inquiry was under attack principally from the Navy-Marine Corps Court of Military Review.

In a series of opinions, the court attacked the inquiry as “paternalistic,” “elevating form over substance,” and “an anachronism that should be abolished.”<sup>77</sup> I gave careful thought to these lamentations but concluded that there was significant value to our “paternalistic” approach. First, I felt it was important to have a complete record “to insure that our military justice system . . . is a model of justice in the field of criminal law.”<sup>78</sup> Second, a careful guilty plea inquiry avoids subsequent and costly collateral litigation about the guilty plea. I am satisfied that the extra time it takes to develop a full and complete record is far shorter than defending the pleas in subsequent post-trial litigation. Thus, I concluded that the *Care* inquiry and its progeny are good for the system.

When I returned to the military justice scene yet another development that impressed me was the establishment of separate trial defense offices. It was difficult for me to imagine how the Army, Marine Corps, and Air Force had become convinced to make this change. Even though it took the Naval service several more years, the reorganized Navy legal service offices have accomplished the same goals—separating the defense function from the prosecution function.

So where do the “echoes” of the past take us? There are several lessons to be learned from my experiences. First, change is constant. It is the nature of our political process. Second, I am convinced that the significant changes in military justice have merely mirrored the changes in civilian society. Separate trial defense offices are not much different from public defender offices you might find in any civilian community. Trained mili-

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74. See, e.g., *Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (C.M.A. 1988); *Unger v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989).

75. *United States v. Care*, 40 C.M.R. 247 (1969).

76. *United States v. Johnson*, 21 M.J. 211 (C.M.A. 1986).

77. *Id.* at 216 (citations omitted).

78. *Id.*

tary judges were inevitable as laws, crimes, and the evidence to prove the crimes increased in complexity.

Of course, aspects of our military justice system continue to subject us to criticism. The role of the commander-convening authority in the process is difficult to justify. Why the person who makes the decision to prosecute must be the same person that hand picks the jury to decide the case is simply difficult to explain. Major General Hodson had a vision of a system that would limit a commander's involvement: "Their authority only exists or extends to filing the case with the court and providing the prosecutor."<sup>79</sup> General Hodson urged us to keep the commander in the clemency function. "The commander provides us with a built in probation and parole system, which I believe, is far preferable to one which might be set up and operated by a court-martial command."<sup>80</sup>

The system that General Hodson envisioned is not unlike the current Navy system. The Navy has separated the trial and defense functions differently than the other services. The Naval legal services offices serve the sailors' personal needs for defense counsel, legal assistance, and claims. A trial command supplies prosecutors and legal advice to the various commands regarding military justice matters. The larger commands also have personal staff judge advocates to deal with many of the legal issues of the command such as environmental law, ethics, and operational law.

I recently learned that by regulation the Army has given its military judges a fixed term of office. Although we held in the *Graf* case that this was not constitutionally mandated, it is, nevertheless, a good idea.<sup>81</sup>

In 1993 at our judicial conference, I urged all of the services to consider something quite revolutionary for military judges. I suggested that they experiment with a board that selected military judges from lieutenant colonels who applied. If after three years the judge wanted to remain in the judiciary then he would apply to the judge advocate general of that service. The judge advocate general would convene a selection board of sitting judges who would recommend for or against the selection of the applicant as a permanent military judge. Those selected would be promoted to colonel and remain judges until retirement.

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79. Major General Kenneth J. Hodson, *Perspective: Manual for Courts-Martial 1984*, 57 MIL. L. REV. 1, 15 (1972).

80. *Id.*

81. *United States v. Graf*, 35 M.J. 450, 462-64 (C.M.A. 1992).

Others talking about this idea have added some ruffles and flourishes to the idea such as providing for a “tombstone” promotion to brigadier general as part of the attraction to becoming a military judge. Fran Gilligan suggested the law might be changed to permit military judges to serve beyond thirty years, to say age sixty-five. All of these are good ideas, but I am satisfied that the new Army regulation providing for a fixed term is a giant step forward. I am certain that the services will follow that closely before advancing the ball down the field, so to speak.

I also champion the idea of expanding the jurisdiction of the special court-martial from six months confinement to one year. I understand that there are efforts being made to do that so I will predict that will happen.<sup>82</sup>

If we look outside our military justice system, we find that the legislative bodies are becoming increasingly concerned about judges having too much discretion. Sentencing guidelines have been enacted in the federal system and in many states. Mandatory minimum sentences are in vogue. Indeed, the recent changes to the Uniform Code of Military Justice requiring automatic reductions in rank<sup>83</sup> and automatic forfeitures of pay are arguably attacks on the discretion of the sentencing authority.<sup>84</sup> I do not see sentencing guidelines in the foreseeable future, however. In the latest Defense Authorization Act, Congress instructed the services to study random selection of court-members.<sup>85</sup> All of these matters suggest to me that there is interest in our system at the highest levels of government.

Certainly, military justice is again in the headlines. The Tail-Hook cases, the Kelly Flynn matter, the Black Hawk shooting incident, the recent events in Italy, as well as the press coverage of the Sergeant Major McKinney’s case,<sup>86</sup> have all contributed to the public curiosity.

It is essential in this environment that the military leadership have a clear vision of the core values of our military justice system. Do we need a military justice system in the next century? What values will it protect? These are not idle questions. History has taught us that we can either lead the charge to improve our system, keep the system totally acceptable to the Congress and to the people we serve, or we can follow and accept those

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82. See generally Major James K. Lovejoy, *Abolition of Court Members Sentencing in the Military*, 142 MIL. L. REV. 1 (1993).

83. UCMJ arts. 58a, 58b.

84. *United States v. Gorski*, 47 M.J. 370 (1997); UCMJ arts. 58a, 58b.

85. Pub. L. 105-261.

86. *ABC, Inc. v. Powell*, 47 M.J. 363 (1997).

changes imposed upon us. To me this is the most valuable lesson to be learned from Major General Kenneth Hodson. He was a visionary who could sell his ideas to the military and civilian leadership and accommodate the core values of the system.

What are those core values? Brigadier General John Cooke on several occasions in his last year on active duty made an impressive point. The true value of a military justice system is that it demonstratively rewards those soldiers who obey the law.<sup>87</sup> It proves to them that their obedience is worthwhile. General Cooke concludes the thought as follows:

Any critical analysis of our system must never lose sight of these basic truths. The military justice system is accountable to the American people and their elected representatives. The military justice system must ensure that requirements are consistently applied and that established standards of conduct are met. The military justice system must protect the rights of all men and women who wear the uniform.<sup>88</sup>

To insure this goal however, we must keep the commander, in my judgment, involved. If we are going to hold commanders accountable for the conduct of the troops, they must have the necessary tools to deal with misconduct. How and to what extent Congress and the citizens will continue to give the commander the tools remains always in flux. It is up to us to demonstrate that we have a mature, honorable, and fair system and to strive to make the necessary changes to keep it abreast of modern understanding of criminal justice.

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87. Brigadier General John Cooke, *26<sup>th</sup> Annual Hodson Lecture*, 156 MIL. L. REV. 1 (1998).

88. *Id.* at 6.

## ALL THAT WE CAN BE<sup>1</sup>

REVIEWED BY MAJOR MICHELE E. WILLIAMS<sup>2</sup>

The Army is “the only place in American life where whites are routinely bossed around by blacks.”<sup>3</sup> This is the conclusion of two sociologists who wrote *All That We Can Be*, a thought provoking book about race integration in the U.S. Army. The authors persuasively argue that the Army is “the most successfully racially integrated institution” in America.<sup>4</sup> The authors outline twelve key principles that arise from the Army’s experience and argue that civilian institutions can use these principles to achieve successful race integration.<sup>5</sup> Military insiders may find most of these principles commonsense. Two of these principles, however, are rather controversial and should fuel significant debate.<sup>6</sup> The authors conclude that the civilian world can achieve the Army’s results on a large-scale only through a national service program, which they term the “civic equivalent of the draft.”<sup>7</sup>

The authors’ backgrounds lend strength and credibility to their opinions on race integration and affirmative action. Both authors served in the

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1. CHARLES C. MOSKOS & JOHN SIBLEY BUTLER, *ALL THAT WE CAN BE: BLACK LEADERSHIP AND RACIAL INTEGRATION THE ARMY WAY* (1996).

2. United States Army. Written while assigned as a student, 47th Judge Advocate Officer Graduate Course, The Judge Advocate General’s School, United States Army, Charlottesville, Virginia.

3. MOSKOS & SIBLEY, *supra* note 1, at 2.

4. *Id.* at 132.

5. The twelve principles, or lessons, are: (1) Blacks and Whites Will Not View Opportunities and Race Relations the Same Way; (2) Focus on Black Opportunity, Not on Prohibiting Racist Expression; (3) Be Ruthless Against Discrimination; (4) Create Conditions so that White and Black Youth Can Serve on an Equal Basis to Improve Their Social and Civic Opportunities; (5) Install Qualified Black Leaders as Soon as Possible; (6) Affirmative Action Must Be Linked to Standards and Pools of Qualified Candidates; (7) Affirmative Action Must Follow a “Supply-side” Model, Not a “Demand-side” Model; (8) A Level Playing Field Is Not Always Enough; (9) Affirmative Action Should Be Focused on Afro-Americans; (10) Recognize Afro-Anglo Culture as the Core American Culture; (11) Enhancing Black Participation is Good for Organizational Effectiveness; and (12) If We Do Not Overcome Race, American Society May Unravel. *Id.* at 132-142.

6. These two principles, “Lesson Nine: Affirmative Action Should Be Focused on Afro-Americans” and “Lesson Ten: Recognize Afro-Anglo Culture as the Core American Culture,” are discussed *infra*.

7. *Id.* at 124, 143.

Army after being drafted and view their military experience favorably.<sup>8</sup> Both have studied the military extensively throughout their careers.<sup>9</sup> Their backgrounds also defy racial stereotypes. Mr. Moskos benefited from affirmative action during college but is white.<sup>10</sup> Mr. Butler is a black American<sup>11</sup> and the fourth generation of his family with a college degree.<sup>12</sup> Perhaps most importantly, both have gained “extraordinary access” to the military at all levels.<sup>13</sup> By providing this information, the authors implicitly acknowledge that opinions about race integration often result from our own personal backgrounds. As a result, many readers (especially those with some military experience) will find additional insight and balance in the authors’ views.<sup>14</sup>

One does not have to agree with the authors’ views to find valuable lessons in *All That We Can Be*. Military and civilian leaders should take special note of the authors’ insights on affirmative action. They emphasize that institutions that lower standards to promote less qualified individuals may quickly achieve the “right” race mix and temporary peace.<sup>15</sup> The long-term costs of this kind of affirmative action, however, are resentment by whites and loss of self-esteem for blacks, who are made to feel that they cannot succeed without special favors.<sup>16</sup> The authors argue that the Army’s method is better. This method, which they call “compensatory action,” helps disadvantaged groups to meet the standards of competition.<sup>17</sup> Instead of lowering standards to promote black Americans, the Army educates and trains them up to the standards. Thus, the Army can promote black Americans to leadership positions without suffering a loss in quality.

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8. Charles Moskos served in Germany in the late 1950s, and John Sibley Butler is a decorated Vietnam War veteran. *Id.* at xviii.

9. *Id.* at xiv, xviii.

10. *Id.* at xvii-xviii.

11. The authors use the terms black, black American, and Afro-American interchangeably throughout the book.

12. *Id.* at xviii.

13. *Id.* at xiv, xviii, xxi-xxii. The depth of the authors’ observations and interviews of military personnel is impressive. Mr. Moskos spent time with units deployed all over the world. At least two Army judge advocate general officers contributed to the authors’ research.

14. *But see* Kwame Okoampa-Ahoofe, Jr., *A New Book Affirms America’s “Afro-Anglo” Culture*, THE ETHNIC NEWSWATCH, June 21, 1997, at 30 (describing Moskos and Butler as having “near scriptural optimism” and as veterans, standing “too propagandistically close to their thesis”).

15. MOSKOS & BUTLER, *supra* note 1, at 69, 136.

16. *Id.* at 70, 136.

17. *Id.* at 70.

To their credit, the authors do not try to gloss over the fact that “compensatory action” has not come cheap for the Army. For example, forty percent of black students entering West Point first attend the Military Academy Preparatory School, where the cost of training is \$40,000 to \$60,000 per student.<sup>18</sup> Add the cost of four years at West Point, and the Army has spent close to \$300,000 to make each of these students a commissioned officer.<sup>19</sup> The Army also invests significant resources in its military equal opportunity advisors, sending them away from their units for nearly four months of training at the Defense Equal Opportunity Management Institute.<sup>20</sup> The Institute’s annual budget (not including salaries for the sixty-five military members on its staff) is close to two million dollars.<sup>21</sup>

Leaders in the corporate world are likely to look at these costs of success and wonder how the authors’ twelve principles could possibly be applied to institutions governed by the profit motive. Unfortunately, the authors do not answer this important question but leave the reader yearning for more. The book presents only two arguments on the benefits of race integration: that enhancing black participation is good for organizational effectiveness, and American society will unravel if we do not overcome race.<sup>22</sup> Corporate executives constrained by the “bottom line” are likely to find these arguments more lofty than persuasive. The authors will need to argue more thoroughly and present data if they wish to convince private industry that the long-term benefits of race integration outweigh the significant financial burdens.

This is not to say that *All That We Can Be* is short on usefulness. To the contrary, the book is full of valuable information for current and future military leaders. For example, the book cites somewhat surprising data from the early 1980s showing that black noncommissioned officers rated black soldiers harder than their white counterparts.<sup>23</sup> The authors gathered data showing that junior soldiers still believe this to be the case today.<sup>24</sup> They use this data to show how black noncommissioned officers “assuage whites’ feelings of reverse discrimination.”<sup>25</sup> Although the authors do not

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18. *Id.* at 91, 92.

19. *Id.*

20. *Id.* at 56.

21. *Id.*

22. *Id.* at 141-42.

23. *Id.* at 46.

24. The authors apparently did not gather data to determine whether the soldiers’ *perceptions* on this issue were based in fact (e.g. they did not examine efficiency reports). *Id.*



say so, their data furnishes an even broader lesson for black military leaders (and possibly for women and other minorities as well). That is, we must be mindful not to hold back our own in our efforts to be impartial, credible leaders. Given the Army's success, it would be unfortunate to see further efforts at race integration unknowingly hampered by its own minority leaders.

According to the authors, one of the key components of the Army's race integration success is the large number of blacks.<sup>26</sup> They argue that this brings at least three advantages to the Army: it provides a sufficient pool from which to recruit black leaders, it allows for wider acceptance of the features of black culture that enhance "organizational climate," and it causes whites to recognize diversity among blacks.<sup>27</sup> Of course, the authors note that the Army gains these advantages only because of the failures of our civilian society. They cite hard and convincing statistics to prove their point. "Among qualified youths—those who met the physical and mental standards—an astonishing fifty percent of all blacks joined the military, against only sixteen percent of their white counterparts."<sup>28</sup> Quite simply, the Army is a good place for young blacks because their opportunities in civilian life are so limited.

This raises an interesting question not fully addressed by the authors. If civilian institutions adopt the authors' key principles and achieve race integration, does the Army lose out? It appears that some senior military leaders have answered "yes" to this question during the national service debate.

The authors argue that replicating military service in a large-scale national service program is the most effective way to improve race relations in America.<sup>29</sup> They believe that national service would increase the number of blacks with the tools necessary to compete on a "level playing field," bring blacks and whites together for a common cause, and create a sense of "enlightened patriotism" and "communitarian thought."<sup>30</sup> In order to meet these goals, the authors strongly believe that a national ser-

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25. *Id.*

26. *Id.* at 13.

27. *Id.* at 14.

28. *Id.* at 38.

29. *Id.* at 124.

30. *Id.* at 124, 147, 169. Communitarian thought is recognizing that citizens have responsibilities as well as rights, that the "common good is more important than individual rights," and that the "welfare of the whole supersedes individual rights." *Id.* at 169.

vice program needs to provide post-service educational benefits equivalent to the GI bill.<sup>31</sup>

The military's senior leadership has viewed post-national service educational benefits as taking away too much from the armed forces. The Department of Defense has objected to such proposals on the ground that they would detract from military recruiting.<sup>32</sup> In response to what seems to be a very valid concern, the authors merely footnote to one Army recruiting command study and take only one paragraph to argue that these concerns are unfounded.<sup>33</sup> Given the importance of the military's concerns and potential impact on military readiness, the authors disappoint by not addressing the issue more seriously and in greater detail. Perhaps the authors see the irony in writing a book that speaks so favorably of the Army, yet possibly results in negative consequences to that institution should the book's ideas take hold in the civilian world.

Throughout the book, most of the authors' opinions and arguments seem logical and quite commonsense. The key principles found in lessons nine and ten, however, are rather controversial. Unfortunately, these are also the two most difficult principles, because they are somewhat hard to grasp. In lesson nine, "Affirmative Action Should Be Focused on Afro-Americans," the authors argue that a multicultural approach to affirmative action should be abandoned in favor of expanded equal opportunity for black Americans.<sup>34</sup> According to the authors, one of the reasons for the Army's successful race integration is that the Army gears affirmative action *de facto* to blacks.<sup>35</sup>

The authors believe affirmative action should focus on black Americans because of the "unique conditions of Afro-American life and history."<sup>36</sup> In "Lesson Ten: Recognize Afro-Anglo Culture as the Core American Culture," the authors argue that a multicultural view of America should be abandoned in favor of a "unified national identity whose core is recognized as Afro-Anglo."<sup>37</sup> The authors "hope for an acknowledgement of our common Afro-Anglo heritage" just as "we came to recognize our shared American religious culture as Judeo-Christian."<sup>38</sup>

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31. *Id.* at 146, 169.

32. *Id.* at 161.

33. *See id.* at 162.

34. *Id.* at 121, 139.

35. *Id.* at 139.

36. *Id.* at 121.

These two lessons are controversial, if not bold. The authors are saying we must favor blacks over all other minorities. The shortcoming here is not the authors' lack of political correctness, but their over-simplified approach. They simply do not ask the obvious questions, much less attempt to answer them. If affirmative action focuses exclusively on blacks, what will be the result for other minorities? For women in and out of the military? For Native Americans, whose history and position in American society is arguably as tenuous as that of blacks? For Hispanics, the fastest growing minority-group in America?<sup>39</sup> What effect would an affirmative action policy focusing exclusively on blacks have on relations between black Americans and other minority groups? Is it right to make up for our historical wrongs against black Americans by ignoring other minority groups?

The authors essentially ignore this minefield.<sup>40</sup> Unfortunately, their somewhat light approach to such a heavy topic is distracting from an otherwise well-researched and well-argued proposal for better race integration in civilian institutions.

Despite some shortcomings, *All That We Can Be* is a thought-provoking read for military and civilian leaders at every level. Readers will appreciate that the authors do not write in an overly academic fashion. Further, the book contains a lot of information that is just plain interesting. For example, chapter two discusses a short but very entertaining history lesson about black American service in the military since colonial days. The book is also full of fascinating facts and statistics, some of which should be eye-opening for Army leaders. For example:

Black civilian employees in federal civil service are 2.5 times more likely to be fired than whites.<sup>41</sup>

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37. *Id.* at 130. The authors use "Anglo" to refer to the British heritage of Americans and specifically our language, social customs, and legal and political traditions. "Afro" refers to these aspects of our culture: "moral vision, rhetoric, literature, music, and a distinctive Protestant Christianity." *Id.* at 128.

38. *Id.* at 141.

39. Karen Brandon, *Bush's Campaign Works to Win Over Texas Hispanics*, CHI. TRIB., Oct. 25, 1998, at 6. Hispanics are projected to be the largest minority group in America by 2005. *Id.*

40. The book does note that immigrants have also shaped our national identity. MOSKOS & BUTLER, *supra* note 1, at 128. By way of comment on other minorities, the authors express extreme skepticism about multicultural education in settings without a substantial black presence. "[S]uch education can detract from blacks' opportunity by becoming a vehicle for other 'oppressed' groups . . ." *Id.* at 121.

Black Army soldiers are twenty percent less likely to be involuntarily separated than white soldiers.<sup>42</sup>

Black females are two times as likely as white females to complete their Army enlistments.<sup>43</sup>

Blacks are more satisfied with their Army careers than whites.<sup>44</sup>

The authors should have addressed some of their points further to convince readers that their twelve key principles will lead to racial integration in civilian institutions. One need not be convinced, however, to find this book useful. At a minimum, the authors gave some original and much needed insight into the issue of race integration. Further, they opened what should be extensive debate on the topic in both military and civilian institutions.

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41. *Id.* at 6.

42. *Id.*

43. *Id.* at 42.

44. *Id.* at 5.

**CITIZEN SOLDIERS****THE U.S. ARMY FROM THE NORMANDY BEACHES  
TO THE BULGE TO THE SURRENDER OF GERMANY,  
JUNE 7, 1944 – MAY 7, 1945<sup>1</sup>**REVIEWED BY MAJOR MARY E. HARTMAN<sup>2</sup>

## I. Introduction

Reading *Citizen Soldiers* is like leafing through an old photo album stuffed with snapshots of combat soldiers. The time and place is World War II Europe, and *Citizen Soldiers* connects the snapshots. Attached to each snapshot is a soldier's brief account of the moment the picture was taken. Not much else is written on the snapshots, and sometimes there is only one snapshot of a particular soldier in the whole album. But sometimes the snapshots jump to life, and the reader is swept onto the battlefield with head ducked to avoid German bullets whizzing past. Upon reaching the end of the album, the reader truly understands the combat soldiers' sacrifices to ensure our freedom.

Author Stephen Ambrose's stated goal is to tell the story of the citizen soldiers of the U.S. Army and U.S. Army Air Forces in the European Theater of Operations in World War II. As the founding director of the Eisenhower Center for American Studies, a non-profit research institute located at the University of New Orleans, Ambrose interviewed over one thousand combat soldiers to preserve their memories of World War II. Ambrose's son, Hugh, working with the son of a German WWII veteran, also interviewed dozens of German combat veterans for *Citizen Soldiers*.<sup>3</sup>

Ambrose drew from hundreds of diaries, letters, memoirs, and oral histories of front-line soldiers archived at the Eisenhower Center to tell

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1. STEPHEN E. AMBROSE, *CITIZEN SOLDIERS: THE U.S. ARMY FROM THE NORMANDY BEACHES TO THE BULGE TO THE SURRENDER OF GERMANY, JUNE 7, 1944-MAY 7, 1945* (1997).

2. United States Air Force. Written while assigned as a student, 47th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. AMBROSE, *supra* note 1, at 16.

their stories in *Citizen Soldiers*. He wanted the reader to know “who they were, how they fought, why they fought, what they endured, [and] how they triumphed.”<sup>4</sup> He promises in the introduction not to dwell on the generals, but rather to tell the soldiers’ stories: the GIs, the junior officers, and the enlisted men fighting on the front lines. Ambrose promises to discuss only enough strategy to keep the reader abreast of the “big picture.”

Ambrose does not keep all his promises in this book, but he does give a memorable voice to World War II combat soldiers. Although his analysis of the Allied victory is logically flawed, this book soars when it focuses on the determination, resourcefulness, and bravery of the foot soldiers.

Ambrose begins his mostly chronological account of the citizen soldiers on 7 June 1944, the day after D-Day. Focusing primarily on the front-line soldiers, Ambrose begins with the expansion of the Allied beachhead and the excruciatingly slow hedgerow fighting that stalled Allied progress for weeks. In succeeding chapters, he recounts the breakout from Normandy, the effort to cross the German border, and the setbacks experienced in the Hürtgen Forest and the Battle of the Bulge in December 1944. He tells of soldiers spending Christmas 1944 in the thick of battle and of the winter war on German soil in early 1945. He closes with the crossing of the Rhine River and the Allied victory upon Germany’s surrender on 7 May 1945.

Ambrose also devotes a section of the book to other aspects of life in the European Theater: he leads us through a terrifying night in a foxhole on the front line, he recounts the heroic work of the Medical Corps after facing ridicule in training, and he details some experiences of prisoners of war. Ambrose also tells of the Jim Crow racism of the Army and of the “jerks, sad sacks, and profiteers” of the war. Finally, Ambrose describes and condemns the U.S. Army’s replacement policy that sent young untrained men just out of high school straight to front-line combat.

This review will focus on the “photo album” quality of *Citizen Soldiers*, the logical flaws in its analysis of why the Allies won the war, the revelation of the darker side of the American GI, and what remains after reading *Citizen Soldiers*.

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4. *Id.* at 13.

## II. The Bulging Photo Album

When I began the book, I hoped to learn how the Army transformed a citizen—a farmer, a teacher, a businessman, a recent high school graduate—into a combat soldier. What was the citizen's thought process in changing from citizen to soldier? What life experiences did the citizen draw upon to survive, or to be a hero? Stephen Ambrose supplied almost no information about the soldiers' backgrounds and life experiences, and he did not furnish much insight into how the citizens became soldiers.<sup>5</sup>

What *Citizen Soldiers* gave me instead was a photo album bulging with snapshot moments of soldiers' lives on the front lines, depicting how they fought and what they endured. Ambrose piled one snapshot on top of the last, with little transition between, which gave a somewhat distracting "hodgepodge" quality to the book. Ambrose quotes the soldiers liberally in telling their stories, letting them speak for themselves. But Ambrose rarely presents more than one snapshot of a particular soldier; instead, he quotes a given soldier once and never returns so that we may hear from that soldier again. In this book, Ambrose does not follow individual soldiers chronologically through the war, as he has in previous books.<sup>6</sup> It is to this book's detriment that Ambrose does not tell the reader who the soldier was and what happened to him, as the reader is always left to wonder. *Citizen Soldiers* would have been a better book if Ambrose provided a very brief background and short follow-up on the lives of the soldiers quoted.

Another distraction that interrupts the flow of the citizen soldiers' stories is Ambrose's broken promise not to dwell on generals and strategy. Contrary to his introductory promise, Ambrose stuffed *Citizen Soldiers* with far more snapshots of strategy and the egos of Generals Patton and Montgomery than necessary to keep readers abreast of the "big picture."

*Citizen Soldiers*, however, soars when Ambrose focuses on his stated goal to tell the soldiers' stories. His snapshots of front-line soldiers are spectacular and compelling. He describes the unbelievable agony of a soldier enduring daylong combat, and then at dark, without rest or hot food, digging a foxhole to sleep in the dirt without adequate clothing or cover. He paints a vivid picture of the horror and fear the men faced during com-

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5. My hopes for the book were fostered by the book's title as well as the author's promise in the preface to tell the readers "who [the soldiers] were." *Id.* preface.

6. STEPHEN E. AMBROSE, *D-DAY, JUNE 6, 1944: THE CLIMACTIC BATTLE OF WORLD WAR II* (1994); STEPHEN E. AMBROSE, *BAND OF BROTHERS: E COMPANY, 506TH REGIMENT, 101ST AIRBORNE, FROM NORMANDY TO HITLER'S EAGLE'S NEST* (1990).

bat, witnessing fellow soldiers mangled and killed before their eyes. Ambrose brings home the reality that, for the better part of that year, the men who fought did not live in tents, did not sleep on beds or cots, did not shower, and did not regularly eat hot meals. He depicts the ordinary men who turned and ran in the face of danger, and those heroes who sacrificed themselves in stunning acts of bravery to save the lives of their fellow soldiers.

While the bulging photo album does not live up to all of Ambrose's promises, the snapshots of front-line soldiers not only illustrate how the soldiers fought and what they endured, but also, the snapshots portray the true sacrifices of the men on the front lines in the war against Germany.

### III. Why We Won

A major flaw in *Citizen Soldiers* is Stephen Ambrose's unsupported conclusion that unit cohesion won the war for the Allies. Ambrose does not explain the importance of unit cohesion and does not provide any facts to support his thesis that unit cohesion won the war for the Allies. Ambrose introduces his book with this theory: unit cohesion, teamwork, and the development of a sense of family in the squad and platoon, are why the soldiers fought and how they won the war.<sup>7</sup> After the introduction, however, Ambrose does not explore this theme again until the closing paragraphs of the book. Ambrose fills the pages between with accounts of scores of action-packed battles and skirmishes, jumping from one to the next without taking a breath. Lost in all this exciting action, however, is any analysis of the question Ambrose poses in the introduction: how did untrained young men, considered by many to be far inferior to the disciplined German forces, defeat Hitler's war machine? At the end of the book, Ambrose concludes that patriotism had little, if anything, to do with the motivation of soldiers in the European Theater. "The GIs fought the enemy because they had to. What held them together was not country and flag but unit cohesion."<sup>8</sup>

While most military members understand the importance of unit cohesion in combat, the ordinary citizen reading *Citizen Soldiers* probably finds the concept of unit cohesion to be fuzzy. Notably missing from the book are the soldiers' thoughts on whether unit cohesion affected why they

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7. *Id.* at 14.

8. *Id.* at 473.



fought and why they won. Ambrose does take time later in the book to illustrate the effect of unit cohesion on the German troops: he explains that the Wehrmacht's units were made up of soldiers who grew up together in the same villages, attended the same schools, and trained together from the start. Their effectiveness suffered greatly when members of the unit were killed. Ambrose states that the most devastating experience for a German soldier was to realize that he did not know the soldier next to him.

Additionally, there is a gnawing contradiction in Ambrose's logic regarding the effect of unit cohesion on the war effort. Ambrose devotes an entire chapter to the antithesis of unit cohesion—the Army replacement policy. Rather than rotating battered units out of the combat zone and replacing them with fresh units, General Eisenhower instead kept them on the front lines throughout the last year of the war. He substituted poorly trained eighteen-year-old replacements for the soldiers killed. But the unit's survivors, who had bonded together through months of training and preparation for combat and more months of combat, often left the replacements to fend for themselves, with devastating consequences. Many divisions took one hundred percent casualties of replacement troops, many times within days of the young men's arrival in the unit. Ambrose lambastes the Army's replacement policy as “criminally wasteful,” but does not make the logical connection between the replacement policy and its effect on unit cohesion and the Allied victory.

If Ambrose is correct that unit cohesion won the war for the Allies, how did we win the war despite the replacement policy that tore asunder unit cohesion? How did any of those young replacement soldiers—alone, knowing nobody in the unit, shunned by unit veterans—survive, contribute to the combat effort, and sometimes become heroes? Was it a greater survival instinct—a strong will just to survive and get home? The consensus of the few soldiers that Ambrose actually quoted in the book was that they fought to survive.

Perhaps the reason the Allies won was not unit cohesion or a greater survival instinct, but rather the resourcefulness and determination of the soldiers. Ambrose certainly provides ample evidence for this theory. He describes how, when thick hedgerows in Normandy stopped Allied troops and tanks from advancing, American soldiers improvised and adapted tanks to cut through the bush.<sup>9</sup> When shells crippled our tanks, American soldiers, repaired the damage and drove the tanks back into battle. Not so

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9. *Id.* at 66-67.

the Germans, who left their crippled Panzer tanks smoking in the battlefields.<sup>10</sup>

Ambrose portrays the American soldiers as young men with spirit, determination, ingenuity, and resourcefulness that the Germans could not match. Perhaps it was through sheer determination and resourcefulness, rather than unit cohesion, that a bunch of untrained young men was able to defeat Hitler's war machine.

#### IV. The Darker Side of the American Soldier

Some reviewers have criticized Ambrose's *Citizen Soldiers* for cheer-leading "our boys" to the point of hyperbole.<sup>11</sup> While it is true that Ambrose never wavers in his admiration for the soldiers and what they endured, he does not ignore the darker side of the American soldier. The author includes stories of soldiers who deserted, stole supplies, and killed unarmed German prisoners-of-war (POWs). Ambrose recounts the experience of Lieutenant Fussell and his infantry platoon, which came upon a forest crater where fifteen to twenty German soldiers were gathered:

Their visible wish to surrender—most were in tears of terror and despair—was ignored by our men lining the rim, Fussell later wrote. As the Germans held their hands high, Fussell's men, laughing and howling, hoo-ha-ing and cowboy and good-old-boy yelling, exultantly shot into the crater until every single man down there was dead . . . . If a body twitched or moved at all, it was shot again. The result was deep satisfaction, and the event was transformed into amusing narrative, told and retold over campfires all that winter.<sup>12</sup>

Ambrose makes no comment on the event. He does state that as many as one-third of the one thousand combat veterans he interviewed related incidents in which they saw other soldiers shooting unarmed German prisoners who had their hands up. He recounts the story of an American Airborne officer who murdered ten German POWs while they were under

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10. *Id.* at 64.

11. Ernst-Ulrich Franzen, *Stories of "Citizen Soldiers" Well Told*, LET'S GO ONLINE MILWAUKEE J. SENTINEL (last modified Nov. 2, 1997) <<http://www.onwis.com/news/sunday/books/1102bkambo.stm>>.

12. AMBROSE, *supra* note 1, at 353.

guard, digging a ditch. Ambrose believes the following quote from an eyewitness expresses the general attitude toward the murder of enemy POWs:

I firmly believe that only a combat soldier has the right to judge another combat soldier. Only he knows how hard it is to retain his sanity, to do his duty and to survive with some semblance of honor. You have to learn to forgive others, and yourself, for some of the things that are done.<sup>13</sup>

These stories both sobered and disturbed me. *Citizen Soldiers* altered my view of American soldiers as the “good guys” in the fight against the evil Nazis. Ambrose’s seemingly casual attitude toward the more sinister acts of American soldiers also disturbed me. Ambrose did not analyze or judge their transgressions, and indeed seemed to excuse the soldiers’ behavior because they endured the rigors of combat. After much thought on the subject, I realized that Ambrose is a historian, and not a judge. He recounted the harsh and unflattering facts of war in *Citizen Soldiers*. He wrote the difficult truth that American soldiers were not always the heroic good guys, but were only flawed humans like the citizens for whom they fought. His book shows that combat brought out the worst in some men, and the best in more of them.

#### V. The Soldiers’ Voices Remain

What remains after reading *Citizen Soldiers* is not its shortcomings, but the voices of the soldiers. Ambrose gave voice to the words of Staff Sergeant Bruce Egger, who summed up the experience of the combat soldier serving out the last year of war in the European Theatre:

We were miserable and cold and exhausted most of the time, and we were all scared to death . . . . But we were young and strong then, possessed of the marvelous resilience of youth, and for all the misery and fear, and the hating every moment of it, the war was a great, if always terrifying, adventure. Not a man among us would want to go through it again, but we are all proud of having been so severely tested and found adequate. The only regret is for those of our friends who never returned.<sup>14</sup>

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13. *Id.* (quoting AMBROSE, *supra* note 6, at 210).

14. AMBROSE, *supra* note 1, at 469 (quoting BRUCE E. EGGER & LEE M. OTTS, *G COMPANY’S WAR: TWO PERSONAL ACCOUNTS OF THE CAMPAIGNS IN EUROPE, 1944-1945* (1992)).

*Citizen Soldiers* brought those words to life, reminding us that our soldiers were men worthy of our pride. Stephen Ambrose's unwavering belief in the American soldier is evident in the book's closing sentence. It says what so many Americans feel but cannot put into words: "At the core, the American citizen soldiers knew the difference between right and wrong, and they didn't want to live in a world in which wrong prevailed. So they fought, and won, and we, all of us, living and yet to be born, must be forever profoundly grateful."<sup>15</sup>

Stephen Ambrose's *Citizen Soldiers* is not a perfect book. Like most photo albums, it allows the reader to see only snippets of reality in its pictures of combat. It jumps from one snapshot to the next, never allowing the reader to see the full life of the soldier in the picture. But the snapshots convey the suffering of combat soldiers—through freezing conditions, exhaustion, grisly wounds, hunger, and homesickness—who endured what most of us would consider unendurable. This reader is profoundly grateful to Stephen Ambrose for preserving the memories he assembled in this photo album called *Citizen Soldiers*.

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15. AMBROSE, *supra* note 1, at 473.

## MAKING THE CORPS<sup>1</sup>

REVIEWED BY MAJOR JEFF BRADY<sup>2</sup>

*“Marines, the Nation’s 911 force.”<sup>3</sup> Selective service registration begins today as the Marines take over Congress and the White House!*

Thomas Ricks’ book, *Making the Corps*, explains the Marine “culture” like few others. Ricks, however, takes an otherwise excellent review of the recruit training process and leaps to the radical conclusion that the Corps may eventually rebel against the public it serves. Set against the backdrop of recruit training, Ricks follows sixty-three prospective new Marines through recruit training and the first year after the rigors of Parris Island.

*Making the Corps*, however, is more than a flowery version of the life and times of sixty-three young men aspiring to become Marines. Ricks artfully details the philosophical, psychological, and mechanical processes Parris Island and the Marine Corps use to transform civilians into United States Marines. Unfortunately, although he spent considerable time and effort studying the forging process Parris Island employs to transform civilians into Marines, Ricks never understands fully what makes Marines. Ricks abandons everything he has learned about Marines and the transformation process in his radical conclusion. Perhaps one must be transformed himself to truly understand Marines.

Thomas Ricks is a *Wall Street Journal* Pentagon correspondent. He conceived the idea for this book while observing young Marines in Somalia and other operations. On his first deployment as a Pentagon reporter, Ricks went on a night patrol in Mogadishu, Somalia, with a squad of young Marines. That experience piqued an interest in the Marine Corps and especially its unique “culture.” Ricks’ interest deepened when he observed and interacted with Marines around the globe over the next four years.

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1. THOMAS E. RICKS, *MAKING THE CORPS* (1997).
  2. United States Marine Corps. Written while assigned as a student, 47th Judge Advocate Officer Graduate Course, The Judge Advocate General’s School, United States Army, Charlottesville, Virginia.
  3. Marine Corps recruiting poster.

Ricks used his observations to describe the Marine Corps as a subculture within the culture of the Armed Forces, separate and distinct from the other services. His book is a study of how the Marines “stand out as a successful and healthy institution that unabashedly teaches values to the Beavises and Buttheads of America.”<sup>4</sup>

The author traces the recruit training cycle of Platoon 3086, from initial arrival through graduation and service school training. The author insightfully describes the platoon members’ backgrounds, which allows the reader to understand how each person adapted to the Marine Corps. The first six chapters focus on recruit training at Marine Corps Recruit Depot (MCRD), Parris Island, South Carolina. These chapters also contain short biographical sketches of individual recruits. Ricks thoroughly explains the various phases of recruit training. He allows the reader to empathize with the recruits’ experience of MCRD Parris Island. Chapter titles in the first six chapters are well suited to the various training stages the recruits face during their stay at Parris Island.<sup>5</sup>

Ricks artfully describes the first major transformation tool recruits experience—the “disorientation” phase. This phase begins almost immediately when new recruits reach Parris Island. Ricks’ writing style vividly captures the sensory assault on the new recruits, which allows the reader to be the metaphorical “fly on the wall” at Parris Island. He correctly summarizes the effect of the techniques used. The Marines designed these techniques to strip away an individual’s civilian identity, leaving room to begin building the group culture of Marines. He discusses many examples of this process in the four-day stage marked by lack of sleep and civilian culture breakdown. For instance, when recruits initially step off the bus the drill instructors force them to stand on yellow footprints. These footprints are so close that recruits lose their individual identity and become one mass. Then, the drill instructors strip everything away to include clothing, hair, jewelry, food, friends, and even the recruit’s name. This short four-day period begins the transformation from civilian to Marine.

The reader is unaware while reading *Making the Corps* that Ricks will eventually use this description, and the other transformation tools described in later chapters, to support his final, controversial thesis. This forces the reader, therefore, to reread prior chapters to validate or invali-

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4. Ricks, *supra* note 1, at 20.

5. Chapter 1: Disorientation; Chapter 2: The Forming; Chapter 3: Training; Chapter 4: Warrior Week; Chapter 5: Graduation.

date the final thesis in the last chapter of the book. Ricks' method of organization in *Making the Corps* subtracts appreciably from the force of his argument.

*Making the Corps'* next section amplifies Ricks' previous description, by explaining the second transformation tool Platoon 3086 faces at MCRD Parris Island. He traces the "forming" where members of the receiving barracks formally meet their drill instructors and learn that they are a unit—Platoon 3086. Drill instructors "swarm" the recruits when they arrive at the barracks that will be their home for the next eleven weeks. Ricks points out that this strategy performs two functions. First, the one to two week forming process has an accelerated pace that forces each recruit to perform beyond his perceived limits. Most orders given require teamwork for successful completion. These orders minimize the egocentric philosophy affecting society today. Second, Ricks explains that the drill instructors force recruits to endure a state of "chaos." The drill instructor serves as a symbol of order in this "chaos." This further emphasizes the good of the organization over that of the self. This phase reinforces the lessons learned during the short disorientation phase.

Ricks then explores the beginning of formalized training for Platoon 3086. Here, Ricks includes the personal views of selected Platoon members. He incorporates their response and reactions to the training. While Ricks covers many valuable points in this discussion, including the historical development of recruit training and reflections on the woes of American youth, he makes his first in a series of troubling stereotypes about Marines. Ricks stereotypes drill instructors into two major categories in his analysis: rural southerners and tough city kids. From my practical experience, this is patently false and misleading to the reader. Drill instructors are no different from any cross-section in the Marine Corps—they represent a wide variety of Americans.<sup>6</sup>

Ricks then masterfully traces how James Webb<sup>7</sup> and General Gray<sup>8</sup> revamped and revitalized the Marine Corps after the Vietnam Conflict. He accurately details the efforts that brought the Marine Corps to its current training and operational level. Ricks, however, also sows the seeds for his

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6. There are only two Recruit Depots, one at San Diego, California, and the other at Parris Island. It is more likely that these Marines have tried to get near their homes and families during their tour. Thus, if a Marine is from the East Coast, and does not want to go into the recruiting field, Parris Island is the logical choice of duty assignment. West Coast Marines choose San Diego, and Mid-Westerners shoot for recruiting duty or inspector-instructor duty near their friends and families.

final chapter and his unusual thesis: the Marine Corps' possible split from the society it serves and its potential overthrow of the government. He sets this theme in motion with numerous quotes and surveys. Recruit interviews depict the changed views of several young recruits after they have been indoctrinated into the norms and expectations of the Marine Corps. The views universally change to contempt for the society they serve. Of particular note in his discussion is a quote from James Webb's book, *Fields of Fire*:

These people have no sense of country. They don't look beyond themselves . . . . We've lost a sense of responsibility, at least on the individual level. We have too many people . . . who believe that the government owes them total, undisciplined freedom. If everyone thought that way, there would be no society. We're so big, so strong now, that people seem to have forgotten a part of

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7. See generally RICKS, *supra* note 1, at 132-49. Secretary James Webb was, at the time, the youngest appointee to hold the office of Secretary of the Navy. A decorated veteran of the Vietnam conflict, Secretary Webb was a prolific writer after Vietnam regarding the erosion of patriotism and sense of duty in American culture. Appointed to the position of Secretary of the Navy in the Reagan administration, Secretary Webb sought to reinstall the values of patriotism, valor and sacrifice into the leadership philosophy of the Marine Corps. As part of that effort, Secretary Webb sought and installed General Alfred Gray as Commandant of the Marine Corps to replace General P.X. Kelley when his term expired. General Gray was not a popular candidate for the position, but Secretary Webb was impressed with his "grasp on the spiritual problems of the Corps." Secretary Webb resigned shortly thereafter, but his installation of General Gray marked a redefining moment for the Marine Corps.

8. *Id.* General Alfred Gray was an old "mustang" Marine. He dropped out of Lafayette College in 1950 and enlisted in the Marine Corps where he served in the Korean War and was commissioned as a second lieutenant. His experiences in Vietnam provided General Gray with a broad vision of the needs of the Corps. (General Gray was one of the first officers to serve in Vietnam in 1962 where he performed special operations work. And he was one of the last officers to leave, commanding the Marine ground troops in the evacuation of Saigon in 1975). Soon after assuming the position of Commandant, General Gray instituted a professional reading program for all Marines, corporal and above. Another major contribution of General Gray was a total restructuring of the way in that Marines fight. General Gray reshaped the Marine Corps' tactical thinking and doctrine, focusing on maneuver warfare concepts vice the traditional concepts of attrition warfare. This sparked large debates within the Corps but eventually, the Corps changes its methodology of warfare to encompass a maneuver warfare strategy. As Commandant, General Gray also restructured recruit training to instill combat training and virtues from the very beginning of each Marine's training. General Gray's inspiration and vision revamped the structure and training of all Marines, private to general, and became the bedrock of the force the Corps is today.



our strength comes from each person surrendering a portion of his individual urges to the common good.<sup>9</sup>

Ricks opines that this quote, “in a nutshell, states the ideology that the Marine Corps tries to inculcate today at Parris Island.<sup>10</sup>” This single paragraph serves as the major underpinning to the controversial conclusion that Ricks reaches in the final chapter of his book. The quote, however, is in the middle of the book and does not refer to the author’s thesis. Therefore, the reader must recall this point, or reread portions of the book, to uncover one of the author’s major premises in support of his final point.

Ricks then evaluates the Marine Corps and compares it to the other branches of the Armed Forces. His major premise in this comparison is that the other services try to accommodate themselves to changes in society, while the Marine Corps tries to separate itself from societal changes. This premise is true to some extent. The Marine Corps *is* more hesitant to incorporate *self-imposed* change to accommodate societal shifts. This only makes sense with the Corps’ two hundred twenty-plus year history, which has seen both permanent and temporary societal changes.

History and tradition are a primary building block for the Corps. The Corps’ traditions and history strengthen the inculcation of its values, as Ricks points out in numerous places within the book. What Ricks fails to acknowledge, however, is that the Marine Corps, like all the services, is an institution controlled by civilian society. Numerous changes have occurred in the Marine Corps as a result of changing societal values. Some examples are integration, women in the military, and policies regarding homosexuality. The Corps adapts through a process of civilian-imposed changes instead of internally generated changes based on society’s passing fads. The Marine Corps is not the recalcitrant, isolated, culturally elite society bent on self-determination that Ricks projects. Rather, it responds to important societal changes that its civilian leadership believes in and decides are important enough for the Marine Corps to adopt.

Chapters six, seven, and eight cover the graduation, follow-on training, assignments, and connections to past lifestyles of Platoon 3086’s graduates. Ricks describes the difficulty some recruits experience returning to civilian society, their family, or peer relationships. He uses these examples as further support for his final conclusion that the Marine Corps is cultur-

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9. RICKS, *supra* note 1, at 138 (quoting JAMES WEBB, *FIELDS OF FIRE* (1978)).

10. *Id.*

ally isolated from the society it protects. He opines that the Marine Corps views society as a chaotic state of poor values, decadence, and individualism. He concludes that the Marine Corps' greater political involvement, coupled with its focus on "chaos" as a mission, may lead the Marine Corps to view the next war as being at home.

To support his thesis, Ricks offers some quotes and vignettes from Platoon 3086 members:

In the Marines you get an identity, people who never had a family, they belong to something—maybe for the first time in their lives . . . you know you are in a brotherhood that will never die.<sup>11</sup>

. . . .

[Recruit training] was . . . all the basic things that you should learn growing up, but for some reason society de-emphasizes.<sup>12</sup>

Ricks offers these quotes, and other excerpts, as support for the premise that the Marine Corps has instilled its values into these Marines, thereby separating them from society. He does not stop there, however. He then establishes a series of weak links that attempt to build upon these strengthened values to reach his controversial conclusion.

One of the weak links that Ricks proposes is that the Corps' imparted values cause the recruits to despise the society from which they came. But, there is a more reasonable explanation for this behavior. Throughout the book, Ricks builds upon the point quoted earlier about teaching values to the Beavis and Butthead of America. "[The Marine Corps] does a good job dealing with the bottom half of American society . . . the Corps takes kids with weak high school educations and nurtures them so that many can assume positions of honor and respect."<sup>13</sup> Ricks is partially correct that the recruits' changes in outlook are a product of the heightened values that they receive in recruit training. This new outlook, however, relates more closely to the reason these young men joined the Marine Corps in the first place. If they joined the Marine Corps to get away from the "bottom half of society," as Ricks claims, then it is only natural that they would look even less favorably upon their past. Justification for their enlistment decision, coupled with an improved set of cultural values, would naturally lead to each recruit's downplay of past experiences and values. Jumping from

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11. Ricks, *supra* note 1, at 252.

12. *Id.* at 256.

13. *Id.* at 20.

this observation to the radical conclusion that the Marine Corps views all of society as deprived of morals and deprived of culture is a large leap in analysis.

Ricks attempts to pull these conclusions, along with other observations, together to reach his final, controversial points. In his final chapter, Ricks sets forth three areas of societal change he claims have created a large gap between the military and society. Ricks describes changes in the military, society, and the international security environment that could lead to a potentially dangerous result. He concludes that there is a danger of an autonomous military taking matters into its own hands to clean up society.

Ricks claims that an all-volunteer force of professional soldiers creates a separate class of citizenry. The feeling of superiority over society when added to this class distinction leads to fear and loathing of the government during cutbacks and privatization of military functions. A shift in focus from defending society to defining society through higher morals and values creates a dangerous situation. He adds that this is particularly true where society has grown more fragmented, individualistic, and is less disciplined in areas of family, church, and education. Finally, he claims the post-Cold War shift of missions toward foreign policy enforcement to combat world "chaos" leads eventually to domestic missions involving "cultural chaos" in the United States. These three changes are ostensibly a recipe for self-determination by the culturally elite military over the culturally deprived society in America.

In *Making the Corps*, Ricks correctly identifies numerous problems in modern society; however, he falls short of understanding the essence of the Corps and the military in general. Each member of the Marine Corps understands that he surrenders a portion of his individual urges for the common good as James Webb described in *Fields of Fire*.<sup>14</sup> Each Marine swears an oath to support and defend the Constitution of the United States upon initial entry and upon each enlistment. Marines acknowledge that civilian elected society controls the military. While there may be some reluctance or questioning of societal changes imposed upon the Corps, the Marine Corps carries out civilian directed changes as it has for the past two hundred twenty-two years. Marines understand our system of government and the Corps' place within that system. Their deep respect for that system, our country, and the American people they defend would not allow the actions Ricks fears. Marines would have to abandon all that they

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14. See WEBB, *supra* note 9.

believe in, their “culture” as Ricks defines it, before they would reach the conclusion he suggests; Marines would not engage in such conduct.