Deadly Force Is Authorized, but Also *Trained*

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Introduction

In the January issue of *Naval Institute Proceedings*, Colonel Hays Parks, U.S. Marine Corps Reserve (Retired), warns that restrictive and unsuitable rules of engagement (ROE)[2] today handicap and endanger U.S. forces, especially ground troops on peace-support missions. Identifying the problem as one of ignorance on the part of individual Marines, sailors, and soldiers, including service judge advocates, over when deadly force is authorized, Parks sounds an alarm that America's young men and women in uniform "need to know when they may resort to deadly force to protect their lives."[3]

Parks' Argument

Parks second-guesses assorted real-life decisions in which ground troops have refrained from opening fire, suggesting these decisions were caused by foolish ROE. In one of these examples, he derides the official commendation of a young U.S. Army sergeant whose platoon held its fire even as he and his soldiers were being struck by Bosnian Serbs bearing rocks and clubs. This situation, Parks urges, placed the soldiers in a situation where they were "legally entitled to use deadly force."[4] In another example, he cites unspecified "Kosovo beatings" to illustrate risks faced by peace-support forces. Parks maintains that these and other instances of restraint are "representative rather than isolated incidents," and he cautions that "operating under bad ROEs invites mission failure, usually with fatal consequences to men and women who deserve better."[5]

Parks' extended argument is sweeping in scope and damning in tone. He condemns the current Joint Chiefs of Staff Standing Rules of Engagement (SROE)[6]—a document that has evolved from maritime origins and contains tolerably clear guidance for commanding officers on the open seas. Parks maintains the SROE is a poor vehicle for commanders to inform individuals in port or on the ground when they may use deadly force to protect themselves and others. The lack of commanders' "tools" in the SROE on the matter of individual self defense, he claims, combined with a propensity for micromanagement on the part of senior administration officials naïve to the bad things that can happen when force is used, has resulted in peace-support ROE that place servicemen and women at undue risk.[7]

Parks further argues that military lawyers writing ROE for field commands compound the problem. They misapply international law, he says, cut and paste ROE from bogus sources, fail to read U.S. court decisions relating to use of deadly force by domestic law enforcement agents, and ignore basic truths about wound ballistics and close-quarters marksmanship under stress. Parks holds military commanders ultimately responsible, however, because they delegate ROE drafting and training to lawyers, because they hide behind ROE to avoid making tough decisions, because they rarely have the spine to stand up to civilian leaders when restrictive rules are being imposed, or because they fail to provide soldiers, sailors, and Marines sufficient firearms training to be effective in a gunfight or other violent confrontation.[8]

At various points during this argument, Parks suggests curative measures. The most important of these appears to be the military's adoption—with input from Navy Special Warfare

1. I thank the following people for their assistance in preparing this article: Captain Larry Gwaltney, Lieutenant Colonel Mike Ellerbe, Major Paul Wilson, Staff Sergeant Rod Celestaine, Lieutenant Colonel Bill Hudson, Colonel Dan Wright, Lieutenant Colonel Kevin Govern, Lieutenant Colonel Jeff Lau, Captain Mike Roberts, Captain Koby Langley, Major Kevin Hendricks, Colonel Dan Bolger, Colonel John Scroggins, Lieutenant Colonel Renn Gade, Lieutenant Colonel Ted Westhusing, Brigadier General Dave Petraeus, Major General John Ryneska, and Major General John Altenburg. I alone am responsible for any errors.

2. Rules of engagement are defined as "Directives issued by competent military authority which specify the circumstances and limitations under which forces will initiate and/or continue combat engagement with other forces encountered." JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (19 Mar. 1998).

3. W. Hays Parks, *Deadly Force* Is *Authorized*, U.S. NAVAL INST. PROC., Jan. 2001, at 32-37, *available at* http://www.usni.org/Proceedings/Articles01/PROparks1.html.

4. *Id.* at 33.

5. *Id.*

6. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (15 Jan. 2000) [hereinafter SROE].

7. Parks, *supra* note 3, at 33-34.

and Army and Marine Corps infantry representatives—of a uniform deadly force policy and training system similar to that used by the Federal Bureau of Investigation (FBI). Colonel Parks contends that every young American on point for the nation should know how to defend himself when attacked.[9]

Parks' aims are undoubtedly noble, and his track record is that of someone who has wrestled with the predicaments faced by individual soldiers, sailors, and Marines for much of his professional life. Certainly, his recommendation for meaningful involvement by ground force commanders in top-level policy on use of force also has considerable merit.

Respectfully, Sir, That's Not Quite Right

Still, there is much to disagree with in Parks' argument, at least as presented in *Proceedings*. He overstates several premises and incompletely recounts important facts. More significant, he mistakes the problem—subtly but critically—at its core.

Individual soldiers, sailors, and Marines facing bad actors or nasty crowds get no help from legal formulas for when deadly force is authorized. The document used by the FBI and offered by Parks as a model states that "the necessity to use deadly force arises when all other available means of preventing imminent and grave danger to officers or other persons have failed or would be likely to fail" and that use of deadly force "must be objectively reasonable under all the circumstances known to the officer at the time."[10] To know these verbal incantations is to know nothing particularly helpful in a jam.

Far more important to a soldier in a firefight are those trained reactions that enable the soldier to deal with the bad actor appropriately and before the bad actor can do him harm. Far more important to a soldier facing a nasty crowd are those trained actions that produce a conditioned response and enable the unit to accomplish its task and purpose while protecting the force. The successful missions performed by thousands of brave and dedicated young Americans in the Balkans are the strongest evidence available that leaders have gone well beyond merely authorizing deadly force: They have ensured that soldiers and units are well-trained and equipped for the situations they face.

Ready and Willing to Fire, if Necessary

On the morning of 7 March 2001, U.S. Army soldiers moved by foot into the village of Mijak, near the border between Kosovo and the Former Yugoslav Republic of Macedonia (FYROM), with the mission of conducting a search for weapons and armed ethnic Albanian guerrillas that had been reported in the town.[11] They secured the town and began entering buildings in their search. At about 9 a.m., an armed man walked toward soldiers at an observation point. The soldiers detained him. Minutes later, five armed men departed one of the buildings under observation. The men maneuvered toward the soldier's position, took up firing positions, and oriented weapons toward the soldiers. The soldiers fired their weapons, wounding two of the men. One of the men was shot in the abdomen and in the leg. Unknown individuals dragged the other wounded man into a nearby building, and his condition remains unknown. No U.S. soldiers were injured. There was no second-guessing of the soldiers' decision to shoot their armed adversaries.[12]

The Mijak incident was typical of the operation. Between June 1999 and May 2000, the month when Parks was defending the honor of American military men and women in Sandhurst against ninja turtle jokes delivered by British officers,[13] American soldiers and Marines in Kosovo were executing tens of thousands of squad-sized missions, some of them deadly violent.[14] In contrast to the suggestion by Parks that U.S. forces in the Balkans are trigger shy and cowering within their shells, these data support a different picture—one of seriousness and strength.[15]

The soldiers who accomplished their mission at Mijak did so because they and their unit were well trained for that scenario, beginning in basic training and continuing through mission predeployment. In basic rifle marksmanship, trained first upon initial entry, periodically thereafter, and again in the weeks immediately prior to heading to Kosovo, the soldiers fired hundreds of rounds from prone and foxhole positions at popup silhouette

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8. *Id.* at 35-37.

9. *Id.* at 36-37.

10. U.S. Dep't. of Justice, Office of Investigative Agency Policies, Policy Statement: Use of Deadly Force para. III (Oct. 16, 1995) [hereinafter DOJ Deadly Force Policy] (Commentary on the Use of Deadly Force in Non-Custodial Situations). The deadly force policy adopted by the Department of Justice resulted from leadership by the FBI to establish uniformity. *See* U.S. Dep't of Justice, Federal Bureau of Investigation, Ensuring Public Safety and National Security Under the Rule of Law: A Report to the American People on the Work of the FBI 1993-1998, 75 (1999). The Department of Treasury adopted a policy closely resembling that of the Department of Justice the very next day. *See* U.S. Dep't of Treasury, Treasury Order 105-12, Policy on the Use of Force (Oct. 17, 1995) [hereinafter Treasury Order 105-12].

11. Memorandum for Record, CPT Koby Langley, U.S. Army, subject: Summary of TF 1-325 Airborne Infantry Regiment Direct Fire Engagement with Ethnic Albanian Armed Group (9 Mar. 2001) (on file with author) (providing details about the Mijak incident).

12. *Id.*

targets between fifty and 300 meters away.[16] This training prepared soldiers for success in their Kosovo mission.

Close-Quarters Training: Hard But Effective

Because the infantry unit was likely to be given cordon-search, checkpoint, and similar missions in built-up areas of Kosovo, their soldiers also received many hours of close-quarters combat training before deployment. This involved repetitive and stressful training of close-quarters techniques on several Fort Bragg ranges. The soldiers mastered methods of movement, firing stances, weapon positioning, and reflexive shooting.[17]

These discriminating techniques were devised with appreciation for precisely the physiological responses and wound ballistics Colonel Parks discovered at the FBI Academy.[18] Army doctrine properly touts these techniques as the most effective way to accomplish Military Operations Other Than War (MOOTW) missions that have turned violent. Such missions are accomplished "while minimizing friendly losses, avoiding unnecessary noncombatant casualties, and conserving ammunition and demolitions for subsequent operations."[19]

Although the soldiers at Mijak never needed it, they received training in reflexive shooting, and specifically the "aimed quick kill" technique, which requires the most practice.[20] It involves a departure of point of aim from "center of mass," taught in basic training, to the center of the cranium.[21] Parks notes that a

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13. Parks, *supra* note 3, at 34. Parks relates:

> At the American-British-Canadian-Australian Army meeting at Sandhurst in May 2000, the United States was berated constantly for its "ninja turtle" (heavily armed and armored, cowering within its shell) approach to peace-support operations by senior British officers, who suggested that U.S. forces were ineffective as a result of leadership timidity. It might be an unfair characterization of U.S. field commanders, who are constrained by administration-driven ROEs, but the British charges have foundation.

Id.

14. About fifty incidents involved the firing of shots in the vicinity of U.S. forces. Although many of these consisted of Kosovar-on-Kosovar violence, in no fewer than twenty incidents, U.S. ground troops were attacked or threatened with deadly attack and responded by firing a variety of arms, including M16s, MK19s, and M203s. The troops fired at least 450 rounds during these incidents, and probably many more. Interestingly, not all U.S. rounds fired were shots to kill: more than twenty were warning shots, which enjoyed varying degrees of effectiveness in dispersing crowds, and more than ten were illumination rounds. Also, during an April 1999 civil disturbance in Sevce, military police fired ninety-two nonlethal M203 rounds and released two canisters of CS gas to disperse a large crowd. In all, four U.S. soldiers and Marines received minor injuries. Three assailants were killed, four were seriously wounded, and dozens were detained in these engagements. Memorandum, Commanding General, 1st Infantry Division, to Chief of Staff, Army, subject: Authorization for Wear of Shoulder Sleeve Insignia-Former Wartime Service (SSI-FWS) for Soldiers Assigned to Selected Task Force Falcon Units (25 Sept. 2000) (on file with author) (including spreadsheet describing these incidents in Kosovo).

15. Journalist Frank Viviano provided a more insightful alternative to the "ninja turtle" description.

> A visitor is immediately impressed with the conduct of the GIs in Bosnia. With their discipline, seriousness of purpose—and literal sobriety. Unlike their counterparts from Britain, France, Russia and other allied nations, American soldiers are not allowed to drink alcoholic beverages in Bosnia, not even on U.S. bases . . . . There are no American soldiers looking for girls in Tuzla or what's left of Brcko. No drunken GIs [are] looking for fights.

Frank Viviano, *GIs Try to Keep Bosnia's Uneasy Peace: U.S. Soldiers Know "Something" Could Happen Any Time*, San Francisco Chronicle, Nov. 3, 1997, at A1.

16. Telephone Interview with MAJ Willard Burleson, Operations Officer, 1st Battalion, 325th Airborne Infantry Regiment (Mar. 28, 2001) [hereinafter Burleson Interview] (conducted while MAJ Burleson was deployed to Vitina, Kosovo). *See generally* U.S. Dep't of Army, Field Manual 23-9, M16A1 and M16A2 Rifle Marksmanship (3 July 1989) (basic marksmanship requires aiming at center of mass and mastery of sighting, breathing, and adjusting windage or elevation).

17. Burleson Interview, *supra* note 16. *See generally* U.S. Dep't of Army, Field Manual 90-10-1, An Infantryman's Guide To Combat In Built-Up Areas app. K (3 Oct. 1995) [hereinafter FM 90-10-1] (describing the training techniques referred to in this section of the article).

18. Parks, *supra* note 3, at 36-37. In addition to its close-quarters combat ranges on many installations, the Army's training facilities include state-of-the art MOUT (military operations on urban terrain) towns at Fort Knox, Kentucky, Fort Polk, Louisiana, and Fort Benning, Georgia. Also, thirteen Fire Arms Training Simulators (FATS) of the type described favorably by Parks are coming on line in U.S. Army, Europe's 7th Army Training Center. Press Release, John Morelli, *Firearms Training Systems, Inc. Announces Contract Award to Support U.S. Army Deployed Forces* (Sept. 29, 2000). At Fort Bragg, North Carolina, two Engagement Skills Trainers (EST) were installed on 1 May 2001. An additional thirteen trainers, consisting of ten lanes each will be installed in coming months. The EST is a next-generation simulation system that replicates individual and collective marksmanship environments. E-mail from Michael Lynch, Fort Bragg Readiness Business Center, to author (Apr. 16, 2001) (on file with author).

19. FM 90-10-1, *supra* note 17, app. K-1.

20. Burleson Interview, *supra* note 16.

21. FM 90-10-1, *supra* note 17, app. K-1.

shot so placed is more likely to achieve rapid incapacitation.[22] Such a shot also avoids the protective vests that may be worn by adversaries. Early in the unit's preparation, infantry rifle squads also conducted collective live fire training on the most fundamental of battle drills—React to Contact. This drill forms the nucleus of the rifle squad's collective skill set.[23]

IRT, STX and Mission Rehearsal

Effective training with issued weapons was part of a comprehensive predeployment training program designed specifically to ensure that soldiers could handle situations like Mijak.[24] Individual readiness training (IRT) and situational training exercises (STX) featuring uncooperative role players confronted soldiers and squads with a variety of dangerous situations, including snipers, landmines, crowd disturbances, criminal acts by Kosovars, and speeding vehicles and armed persons at checkpoints. Immediately before deployment, the unit underwent an intensive Mission Rehearsal Exercise (MRE)—a heavily resourced event that culminates in individual and collective training designed to test soldiers, teams, and leaders in a stressful, Kosovo-like environment.[25]

The most recent MRE, held at the Army's Joint Readiness Training Center in Louisiana, replicated the towns, movement routes, base camps, and border areas of the Multinational Brigade (East) area, that part of the Kosovo province secured by U.S. forces. In addition to reinforcing all of the individual and team tasks already trained, the MRE gave soldiers and leaders firsthand experience with interpreters speaking the Balkan languages, with civil authorities, with nongovernmental officials and private international organizations, with officers from the Polish and Greek battalions serving alongside U.S. forces in Kosovo, and with the specific demographics, economic, and security characteristics of individual neighborhoods.

At the MRE, soldiers and leaders practiced not only fire and movement against ethnic Albanian armed guerrillas, but also effective use of an interpreter and negotiation based on principle. They learned not only how to call for air or artillery support, but also how to coordinate operations with international police forces in the area. The price tag: An estimated 11 million dollars. It was not cheap, to be sure, yet few who have experienced an MRE—and seen how well it prepares soldiers and units to accomplish a difficult mission and come home safely—doubt that it is money well spent.[26]

The Standing ROE: Find Another Punching Bag

Some of Parks' criticism of the SROE is overdone and obscures the true nature of the challenge commanders face in providing clear guidance to ground troops on self defense. True, the SROE acknowledges U.S. commitments under the United Nations (U.N.) Charter—and indeed all of its international agreements[27]—because any responsible national security policy document must do so. Reasonable people, however, can disagree with Park's statement that, "Nothing in the history of the Charter suggests that it was intended to apply to the actions of individual service personnel . . . ."[28] The Charter expressly incorporates previously assumed international obligations,[29] among them treaties and customary law dealing with war crimes. As a matter of international law, an individual defendant can plead self-defense to a criminal charge, just as a defendant in an excessive use of force prosecution can plead self-defense under U.S. domestic law.[30] Thus, Parks' statement is questionable. Also, regardless of personal self-defense guarantees under international law, the SROE is replete with caveats that make clear that no international obligation may be interpreted to infringe upon individual self-defense.[31]

Army judge advocates expressly invoked one of these SROE caveats in late 1999. This was necessary after NATO attorneys at higher headquarters responded to a hypothetical but very possible encounter with a "Mad Mortarman" in Kosovo.[32] Their response—that U.S. forces could not fire upon the fleeing

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22. Parks, *supra* note 3, at 37.

23. Burleson Interview, *supra* note 16.

24. *Id.* The commander refined his mission essential task list (METL) to account for the tasks, threats, terrain, and environmental factors extant and expected in Kosovo. He and the senior noncommissioned officers in the unit ensured that training on individual tasks supported the collective tasks on the METL. The commander understood conditions on the ground in the theater of operations, because he and other unit leaders had conducted a leaders' reconnaissance, poured over after-action reports provided by previous units in Kosovo, and maintained communication with leaders still in Kosovo throughout the training process. *Id.* This predeployment training process followed Army training doctrine. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 25-100, TRAINING THE FORCE (15 Nov. 1988).

25. Interview with MAJ Mark Gerges, XVIII Airborne Corps Assistant Operations Officer for KFOR and SFOR Missions, at Fort Polk, La. (Mar. 28, 2001).

26. The training provided at the MRE includes skills extolled by James Fyfe, an expert on training appropriate use of force, in *Zuchel v. City and County of Denver*, 997 F.2d. 730, 739 (10th Cir. 1993).

27. SROE, *supra* note 6, encl. A, para. 1c(3).

28. Parks, *supra* note 3, at 35.

29. U.N. CHARTER, pmbl, art. 1, sec. 1.

mortarman—infringed upon the right of self-defense as captured in the SROE caveat, which states:

> US forces assigned to the operational control (OPCON) or tactical control (TACON) of a multinational force will follow the ROE of the multinational force for mission accomplishment if authorized by the NCA. US forces always retain the right to use necessary and proportional force for unit and individual self-defense in response to a hostile act or demonstrated hostile intent.[33]

This hypothetical involves an individual who is discovered at the precise grid coordinate where a Q36 radar acquired a mortar round being fired moments earlier. The individual's actions—running away from KFOR soldiers toward a nearby vehicle, carrying a mortar base plate—suggest complicity in a pattern of mortar attacks over the preceding weeks on various targets from nearby points. Some of those targets were close to KFOR bases, and the attacks claimed Kosovar lives, though no KFOR soldiers were injured.[34]

Army judge advocates in Kosovo correctly argued that, even though the immediate attack had ended, the individual's failure to obey commands to halt, along with his continuing ability and opportunity to fire again, constitute "hostile intent" sufficient to engage him with deadly force. In addition to informing higher NATO headquarters that U.S. forces would not be bound by the restrictive response of NATO attorneys (that is, suggesting U.S. forces could not fire upon the fleeing mortarman), the Army lawyers quoted the SROE and offered analogous examples from U.S. case law relating to fleeing felons.[35]

It is difficult to understand Parks' frustration with the self-defense principles stated in the SROE. The SROE separates self-defense into two major elements—necessity and proportionality. Necessity exists "when a hostile act occurs or when a force or terrorist(s) exhibits hostile intent."[36] A proportionate response is one whose nature, duration, and scope do not exceed "that which is required to decisively counter the hostile act or demonstrated hostile intent and to ensure the continued protection of US forces or other protected personnel or property."[37] When one gets past Parks' apparent suspicion of the SROE as a maritime rather than a ground-force product, one strains to figure out his objection to these SROE self-defense principles.

Admittedly, the term "hostile intent" requires elaboration and further definition through concrete examples of intent indicators, and determining proportionality is a lawyerly balancing act type that irritates laymen. Yet these are not problems unique to the SROE's formulation of individual self-defense. The FBI policy preferred by Parks also includes a version of "necessity" that is incomprehensible without reference to specific examples. Also, American law enforcement officers comply with an unlabeled doctrine of proportionality, because necessity only arises "when all other available means of preventing imminent and grave danger to officers or other persons have failed or would be likely to fail."[38]

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30. *See, e.g.*, UNITED NATIONS WAR CRIMES COMMISSION, XIII LAW REPORTS OF TRIALS OF WAR CRIMINALS 149-51 (1949).

> The finding of the Court [to acquit Erich Weiss and Wilhem Mundo, tried on 9-10 November 1945 by U.S. military commission for the alleged unlawful killing of an American prisoner] is evidence that self-defence which, according to general principles of penal law is an exonerating circumstance in the field of common penal law offenses when properly established, is also relevant, on similar grounds, in the sphere of war crimes.

Id. See also R.Y. Jennings, *The Caroline and MacLeod Cases*, 32 AM. J. INT'L L. 82, 91 (1938).

> Even Webster, in his letter of April 24, 1841, the source of the formulation of the classic definition of self-defense, says: "It is admitted that a just right of self-defence attaches always to nations as well as to individuals, and is equally necessary for the preservation of both."

Id.

31. *See, e.g.*, SROE, *supra* note 6, encl A, paras. 2a, 3a, 5e.

32. Interview with CPT Larry Gwaltney, Deputy Legal Advisor (Dec. 1999-June 2000), Task Force Falcon, at Fort Polk, La. (Mar. 28, 2001) [hereinafter Gwaltney Interview].

33. SROE, *supra* note 6, encl A, para. 1c.

34. Gwaltney Interview, *supra* note 32.

35. *Id.*

36. SROE, *supra* note 6, encl. A, para. 5f(1).

37. *Id.* encl. A, para. 8a(2).

38. DOJ DEADLY FORCE POLICY, *supra* note 10, para. III (Commentary on the Use of Deadly Force in Non-Custodial Situations).

Perhaps, as Parks urges, the SROE should contain the FBI policy's reminder that "the reasonableness of a decision to use deadly force must be viewed from the perspective of the man on the scene—who may often be forced to make split-second decisions in circumstances that are tense, uncertain, and rapidly evolving—and without the advantage of 20/20 hindsight."[39] This valuable standard forecloses most second-guessing. Still, it is difficult to imagine a single scenario in which the self-defense standard under domestic federal law differs from the self-defense standard under the SROE.[40] This notion, that by following the SROE we are sacrificing soldiers' inalienable rights on the altar of international cooperation, simply does not persuade.

Making a Federal Case Out of Force Continuums

Parks finds appealing the federal cases and policies relating to law enforcement use of deadly force. Yet law enforcement tasks, organization, weapons, and operations are different from military ones, and domestic legal fights over police use of deadly force are raised in contexts governed by distinct constitutional and statutory provisions. The military is properly wary of borrowing too much from a law enforcement model.[41]

Parks' concern about what he calls "the level of force continuum" is understandable, but his broadside against military judge advocates is unfair.[42] He states that lawyer-inspired ROE "require" gradualism, yet consider these typical cautions against gradualism excluded from Parks' analysis:

> (1) *If possible*, apply a graduated escalation of force.
>
> (2) Measure your force, *if time and circumstances permit.*
>
> (3) *Omit lower level . . . measures* if the threat quickly grows deadly.

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39. This language is drawn almost verbatim from *Graham v. Connor*, 490 U.S. 386, 396-97 (1989).

40. Though interesting as a matter of comparative legal studies, the differences in self-defense formulations between jurisdictions noted by Lieutenant Colonel W.A. Stafford, USMC, are academic distinctions on which no actual criminal convictions have turned. *See* Lieutenant Colonel W.A. Stafford, *How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE and the Rules of Deadly Force*, ARMY LAW., Nov. 2000, at 1. The case of Corporal Banuelos, who shot and killed a civilian in Texas on 20 May 1997, is of central interest to both Colonel Parks and Lieutenant Colonel Stafford. Though grand jury investigations by Texas and the U.S. Department of Justice occurred, and though Texas law was interpreted to apply, no indictments resulted. *Id.* at 1-2. Parks' own intervention surely helped bring about this good outcome. By its own terms, the SROE does not apply in domestic operations. SROE, *supra* note 6, encl. A, para. 3a. I certainly agree with Parks to the extent he is arguing that basic self-defense rules should be applied wherever a soldier is, and that soldiers and Marines should not have to learn different formulations in Texas, California, and Thailand.

41. Wariness of that model in the domestic context stems also from the traditional—and statutory—exclusion of the military from law enforcement duties in the United States. *See* 18 U.S.C. §1385 (2000).

42. Historically, ground force operations orders and soldier cards have indeed included something described in Army doctrine as "scale of force/challenging procedure." By the author's estimate, this rubric is one of ten functional categories of rules that have fit technically, if sometimes uncomfortably, within the official definition of "rules of engagement." *See* Mark Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1, 30-33 (1994). The ten functional categories follow no rigorous format, and variations have been almost as numerous as missions and units. Yet with all of their risks and perceived advantages to commanders and staffs, they fit within the technical definition of ROE and have been issued as such in various military orders and plans since the 1960s. The ten functional categories are:

Type I:	Hostility Criteria
Type II:	Scale of Force/Challenging Procedure
Type III:	Protection of Property and Foreign Nationals
Type IV:	Weapons Control Status/Alert Conditions
Type V:	Arming Orders
Type VI:	Approval to Use Weapons Systems
Type VII:	Eyes on Target
Type VIII:	Territorial or Geographic Restraints
Type IX:	Restrictions on Manpower
Type X:	Restrictions on Point Targets and Means of Warfare

These are not mere academic distinctions. Recognition that military headquarters tend to transmit ROE in these different ways is helpful in identifying the risks and benefits of including a specific type in an operations order while at the same time referring to it as a "*rule* of engagement." In addition to taking aim at Type II, Parks also, properly, blasts Type V in his discussion of the 1986 Ranger Regiment example and in his speculation about whether the crew of the *U.S.S. Cole* was subjected to restrictions on carrying loaded firearms. Recognition that not all types need to be known by every soldier also recommends the packaging of the basic SROE self defense principles of necessity and proportionality, along with Types I, II, and III, into a memorable form to permit vignette training. It was this idea of packaging for a training purpose that led to the development of the RAMP training aid. *See id.* at 86-90.

In his third example, Parks excerpts a continuum of force that merely suggests techniques for the "M" element when confronting an unarmed and unfriendly crowd ("Measure the amount of force that you use, if time and circumstances permit"). He misleadingly makes no reference to the baseline principle. He also swaps two very different notions of the word "rule"—that is "requirement" versus "technique"—when he says that ROE "require" soldiers to proceed sequentially along a force continuum. Parks, *supra* note 3, at 36.

(4) *Risks*: Initiative may suffer if soldiers feel the need to progress sequentially through the measures on the scale.[43]

Note also that deadly force is nowhere characterized in the ROE training aids as a "last resort." It is easy to concur with Parks, however, that "last resort" language should be expunged from the ROE vocabulary because it can too easily be interpreted to mean that a shot must be last in a chronological sequence of measures.[44] But here, Parks has misfired.

Parks wrongly accuses fellow lawyers of imposing "an obligation to exhaust all other means before resorting to deadly force, even when deadly force is warranted."[45] Moreover, he seems to forget that law enforcement officers daily use techniques along a force continuum.[46]

The force continuum is also firmly embedded within the time-tested techniques for dealing with extraordinary, large-scale civil disturbances. In addition to verbal warnings, shoves, holds, and pepper spray, such techniques include use of riot sticks and shields, as well as extreme-force options involving volley fire of nonlethal projectiles, and deadly force.[47] Mentioning options such as use of pepper spray or firing nonlethal projectiles in the text of a training aid can create a healthy stimulus for leaders to obtain, issue, and train soldiers on such nonlethal weapons, because soldiers who face crowd confrontations will inevitably ask the sensible question, "Sir, when are we going to be issued pepper spray and sponge grenades?"

Parks' aversion to the level of force continuum is still more curious in light of the Justice Department's own requirement

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43. *See* Center for Army Lessons Learned, *ROE Training*, CALL NEWSLETTER 96-6 (1996) (Appendix B, Performance Measure 5); Martins, *supra* note 42, at 111.

44. "Last resort" language appears in several military references. *See, e.g.*, U.S. DEP'T OF ARMY, REG. 190-14, CARRYING OF FIREARMS AND USE OF FORCE FOR LAW ENFORCEMENT AND SECURITY DUTIES paras. 3-1a, 3-2f (12 Mar. 1993) [hereinafter AR 190-14]; U.S. DEP'T OF DEFENSE, INSTR. 5210.56, USE OF DEADLY FORCE AND THE CARRYING OF FIREARMS BY DOD PERSONNEL ENGAGED IN LAW ENFORCEMENT AND SECURITY DUTIES para. B (25 Feb. 1992) [hereinafter DODI 5210.56]. Note that the provisions of the Army regulation do not apply to DA personnel engaged in military operations and subject to rules of engagement. AR 190-14, *supra*, para. 1-5e.

45. Parks, *supra* note 3, at 36.

46. It is well established that police use of force typically occurs at the lower end of the force spectrum and involves grabbing, pushing, or shoving. In one study of 7,512 adult custody arrests, for example, roughly 80% of arrests in which police resorted to force involved weaponless tactics. Grabbing was used about half the time. Only about 2.1% of all arrests involved use of weapons by police. When weapons were used, chemical agents, such as pepper spray, were resorted to most frequently. Firearms were used least often (.2% of cases). U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA vii (1999). *See also* Samuel D. Faulkner & Larry P. Danaher, *Controlling Subjects: Realistic Training v. Magic Bullets*, L. ENFORCEMENT BULL., Feb. 1997, *available at* http://www.fbi.gov/publications/leb/1997/feb974.htm.

> No device or physical maneuver guarantees 100 percent success when confronting subjects. Therefore, training should provide officers with various methods to address combative subjects and surprise assaults. It then should prepare officers to be flexible in their responses to confrontations.

Id.

47. *See generally* U.S. DEP'T OF ARMY, FIELD MANUAL 19-15, CIVIL DISTURBANCES (15 Nov. 1985) [hereinafter FM 19-15]; *Ken Hubbs, Riot Response: An Innovative Approach*, L. ENFORCEMENT BULL., Jan. 1997, *available at* http://www.fbi.gov/publications/leb/1997/jan972.htm. It is significant that the continuum of civil disturbance measures is to be applied only after a unit has undergone careful task organization (such as squad arrangement, skirmish line formation, leader positioning, riot control agent dispersers, selected firer of nonlethal force projectiles, and special reaction teams), threat analysis, mission planning, and specialized, stressful, repetitive training involving all equipment and well-rehearsed role players. FM 19-15, *supra*. Soldiers who have dealt with civil disturbances attest that, far from handicapping them or obligating them to exhaust every avenue in checklist fashion, these many options give them greater ability to accomplish the larger mission and come away uninjured. *See, e.g.*, Specialist Gary C. Goodman, *Civil Disturbance Training*, FALCON FLIER, Aug. 15, 2000, at 1. Data collected by Tom McEwen of the Department of Justice support this conclusion that nonlethal weapons are effective tools.

> One way of organizing data collection and analysis falls under the category of a force continuum, which envisions a range of options available to police officers from verbalization techniques to deadly force. In the middle of that range lies the variety of less-than-lethal weapons now available to police. Tom McEwen and Frank Leahy . . . discuss several types of less-than-lethal weapons under four general categories:
>
> - Impact weapons (for instance, batons and flashlights)
> - Chemical weapons (for example, pepper spray)
> - Electrical weapons (for instance, electronic stun guns)
> - Other less-than-lethal weapons (such as stunning devices and projectile launchers)
>
> In their survey of police departments and sheriffs' agencies, McEwen and Leahy found that 93% reported at least one type of impact weapon available, 71% had chemical weapons, and 16% had electrical weapons. With regard to the incidence of use of less-than-lethal technologies, an article in the Law Enforcement News reported that use of pepper spray--a cayenne pepper-based chemical spray--by New York City police officers has increased dramatically with use of the spray in 603 arrests during the first 10 months of 1995, compared to 217 uses for the same period in 1994. By comparison, nightsticks were employed 188 times during the same 10 months of 1995, and 158 times in 1994. The proliferation of these less-than-lethal technologies, especially chemical agents such as pepper spray, expands the data collection effort on use of force.

TOM MCEWEN, NATIONAL DATA COLLECTION ON POLICE USE OF FORCE 21-23 (1996) (internal citations omitted).

that a verbal warning be given, if feasible, and in view of its statement that "if other force than deadly force reasonably appears to be sufficient to accomplish an arrest or otherwise accomplish the law enforcement purpose, deadly force is not necessary."[48]

Warning Shots: Don't Overuse, but Don't Ban

Parks' claim that "Justice Department Guidelines [and] U.S. Law . . . [prohibit] warning shots"[49] is not strictly correct. The Justice Department's guidelines expressly permit warning shots in the prison context "if reasonably necessary to deter or prevent the subject from escaping from a secure facility" or "if reasonably necessary to deter or prevent the subject's use of deadly force or force likely to cause grievous bodily harm."[50] Moreover, a ban on warning shots, such as that imposed by the Justice Department outside the prison context, is not necessarily appropriate for soldiers in a MOOTW.

Soldiers and leaders on the ground, without the benefit of other nonlethal means, may suddenly encounter unarmed but unfriendly civilians. Prohibiting warning shots under such circumstances would deny soldiers a useful, nonlethal option to maintain control and accomplish the mission.[51] In the official commentary to its deadly force policy, the Department of Justice acknowledges the importance of a force continuum:

> The Department of Justice recognizes and respects the integrity and paramount value of all human life. Consistent with that primary value, but beyond the scope of the principles articulated here, is the Department's full commitment to take all reasonable steps to prevent the need to use deadly force, as reflected in Departmental training and procedures.[52]

The fact is that Parks' preferred method, articulated in the Department of Justice deadly force guidelines and its implementing documents, contains a force continuum. These sources incorporate, albeit in a wordy and confusing formula, the very proportionality principle that Parks mocks.

Parks further claims that, under military ROE, Indiana Jones would be required to risk death by closing with his sword-wielding assailant in *Raiders of the Lost Ark*. This assertion is simply false. Under the "RAMP" training device outlined in U.S. Army doctrine,[53] Indy's decision to shoot the threat is an excellent example of "A-Anticipate Attack." Indy—like the Army soldiers who fired at their prospective attackers in Mijak—had seen hostile intent that required immediate application of deadly force.

An FBI agent's training at the Academy in Quantico on a similar scenario might have emphasized the difference between "imminent"[54] and "instantaneous" harm to help the agent understand the concept of "objective reasonableness."[55] A soldier's training, however, causes him to look at the subject's hands, activity, and weapon to judge whether he is under attack.[56] Military training on the use of force specifically stresses that, before killing an attacker, a soldier need neither take the first shot nor surrender an advantage provided by the standoff range of his weapon.[57] Measuring force, captured under the "M" in "RAMP," simply does not apply,[58] and it is through repetitive training, rather than talk, that soldiers become conditioned to shoot instead of measuring force in this scenario.

The "Shoot to Wound" Fallacy: A Straw Man

Parks' criticism of "shoot to wound," "shoot to disable," or "injure with fire," though understandable, is aimed at a straw man. Consider his comment that, "Requirements to 'shoot to

48. DOJ DEADLY FORCE POLICY, *supra* note 10, para. II (Policy Statement: Use of Deadly Force).

49. Parks, *supra* note 3, at 36.

50. DOJ DEADLY FORCE POLICY, *supra* note 10, para. IV, attachment B.

51. Interview with Lieutenant Colonel Michael Ellerbe, Commander, 3d Battalion, 504th Infantry Regiment (Sep. 1999-Mar. 2000), at Fort Polk, La. (Mar. 28, 2001). Though they are not always effective and though users of warning shots must always consider their twin risks of endangering bystanders and encouraging gradualism, they have been a useful option for soldiers in the Balkans on more than twenty occasions. *See supra* note 14.

52. DOJ DEADLY FORCE POLICY, *supra* note 10, para. III.

53. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS 8-15 (1 Mar. 2000).

54. *See* DOJ DEADLY FORCE POLICY, *supra* note 10, para. III (Commentary Regarding the Use of Deadly Force in Non-Custodial Situations).

> As used in this policy, 'imminent' has a broader meaning than 'immediate' or 'instantaneous.' The concept of 'imminent' should be understood to be elastic, that is, involving a period of time dependent on the circumstances, rather than the fixed point of time implicit in the concept of 'immediate' or 'instantaneous.

Id.

55. *Id.* ("Use of deadly force must be objectively reasonable under all the circumstances known to the officer at the time.").

wound' . . . indicate a serious lack of knowledge of the law, close-quarter marksmanship under stress against a hostile moving target, wound ballistics, and the impracticality of round counting in a gunfight."[59] This comment is misdirected for several reasons.

> (1) The word "requirement" appears nowhere in any of the ROE training aids cited by Parks, and training vignettes do not suggest a soldier should fire lethal munitions other than to kill;[60]
>
> (2) Fire by a covered soldier aiming an M203 grenade launcher loaded with nonlethal munitions, even as other soldiers remain armed and ready with M16A2s, can be helpful in dispersing a crowd and maintaining control;[61]
>
> (3) Army close-quarters marksmanship trainers are fully aware that rapid incapacitation of the threat can generally be expected only with high velocity shots to the head, and shot placement for "reflexive shooting" is trained accordingly;[62]
>
> (4) Much military training is dynamic and specifically designed to inculcate effective responses under the stress of a deadly force encounter, when visual narrowing, auditory exclusion, decreased fine motor skills, and other symptoms are to be expected;[63]
>
> (5) Parks is fixated on a particular scenario—involving elements of "close quarter," "hostile moving target," and "gun"—while useful decision models in training materials need to be geared for a range of scenarios;[64] and
>
> (6) Several military sources, which are outdated but nonetheless still in effect, continue to direct or imply attempts at disabling, if feasible, to lower-level commands.[65]

While federal law enforcement training with firearms discourages shooting to wound, the body of federal law endorsed

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56. *See, e.g.*, DANIEL P. BOLGER, THE BATTLE FOR HUNGER HILL: THE 1ST BATTALION, 327TH INFANTRY REGIMENT AT THE JOINT READINESS TRAINING CENTER 94-100 (1997).

> Did R mean you must eat the first hostile shot? Not at all, said A, because it stood for "Anticipate attack." Here [the RAMP training aid] urged soldiers to use the same target evaluation skills schooled since induction training. Shooters should check the size, activity, location, uniform, time available, and equipment, with special scrutiny of the potential target's hands. Policemen know this method very well. Just because a guy holds an AK-47 does not necessarily make him a badnik. It all depends on what he's doing with the item. Here is discipline distilled to its essence—to shoot or not to shoot, with each individual rifleman calling his shot.

Id. at 99.

57. "Anticipate attack" is consistent with the SROE's restatement of the legal principle of necessity, and while this American notion of "anticipatory self defense" occasionally comes under international criticism for being too robust, the better reasoned view is that it is fully compliant with domestic as well as international law. *See generally* YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE (1988).

58. *See* Bolger, *supra* note 56, at 100. "These suggestions, ranging from a shout to a shot, applied only when trying to control civilians or a crowd that had not yet turned ugly. If the jokers fired or got ready to fire, then R and A applied." *Id.*

59. Parks, *supra* note 3, at 36.

60. *See supra* notes 42-43 and accompanying text.

61. Issue of nonlethal munitions in the Army is generally limited to military police, though other soldiers may be equipped and trained to use them in certain situations. *See generally* Captain Michael Kirschner, Staff Sergeant Chris Callan, and Staff Sergeant Ray Zumwalt, Task Force Falcon Mobile Training Team, Non-Lethal Munition Training PowerPoint Presentation (Feb. 2000) (Camp Bondsteel, Kosovo). When soldiers do not have such munitions, commanders have readily adapted the VEWPRIK memory aid, Martins, *supra* note 42, at 120, to eliminate wounding shots from these nonlethal weapons. *See, e.g.*, Bolger, *supra* note 56, at 99 (making the "I" in VEWPRIK "Injure with Bayonet"); Captain Keith Puls, U.S. Army, After Action Report, 10th Mountain Division Operations in Bosnia 1999-2000 (2000) (changing "VEWPRIK" to "VENS" in the "RAMP Acronyms" section) (on file with the Center for Law and Military Operations).

62. FM 90-10-1, *supra* note 17, app. K-20 to K-21.

63. *See, e.g.*, U.S. DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS 14-2 (14 June 1993).

> Loneliness and fear on the battlefield increase the fog of war. They can be overcome by effective training, unit cohesion, and a sense of leadership so imbued in the members of a unit that each soldier, in turn, is prepared to step forward and give direction toward mission accomplishment.

Id. See also B.K. SIDDLE, SHARPENING THE WARRIOR'S EDGE: THE PSYCHOLOGY AND SCIENCE OF TRAINING 121 (1995); DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY (1995); George T. Williams, *Reluctance to Use Deadly Force*, L. ENFORCEMENT BULL., Oct. 99, at 1 ("Taking their cue from the military, law enforcement agencies have developed training methods to ensure that their officers will employ deadly force when the need arises."); *cf.* UREY W. PATRICK, FBI ACADEMY FIREARMS TRAINING UNIT, HANDGUN WOUNDING FACTORS AND EFFECTIVENESS 16 (1989).

by Parks induces no clear and eternal damnation of such shooting. Parks' statement, "Justice Department Guidelines [and] U.S. Law . . . [forbids] shoot to wound" is not strictly accurate, as federal law enforcement deadly force policy does not actually forbid shooting to disable. Instead, it states: "Attempts to shoot to wound or to injure are unrealistic and, because of high miss rates and poor stopping effectiveness, can prove dangerous for the officer and others. Therefore, shooting merely to disable is strongly discouraged."[66] While not forbidden, the wariness of the federal law enforcement community about shooting to disable provides insight into how policy interacts with training and litigation. It also exposes subtle differences between police officers and soldiers.

This was brought into focus recently after a member of the Secret Service Emergency Response Team (ERT) shot a man who brandished a .38 caliber revolver while walking along the south fence line of the White House. Though the shot struck the man in the right knee, the agent's point of aim was center mass.[67] Still, uninformed media speculation that a federal agent may have intentionally aimed to disable suggests that such a policy would damage the credibility of the law enforcement community.[68]

Whenever an especially well-trained agent—in the rare circumstances where he enjoys the luxuries of time, cover, concealment, standoff range, a good firing position, a suitable firearm, and a controlled heart rate—shoots a limb or even the handgun out of a suspect's hands, howls are understandably heard in police academies. Such a feat is risky, and a pattern of increased shooting to disable could someday cause judges to raise the bar for every agent accused of excessive force in a 42 U.S.C. §1983 complaint.[69]

In addition, Parks' assertion that military lawyers have ignored the post-shooting litigation record is incorrect.[70] Borrowing good ideas and techniques from domestic law enforcement cases is nothing new.[71] The leading Supreme Court cases of *Graham v. Connor*[72] and *Tennessee v. Garner*,[73] and their progeny, make good professional reading for military law-

64. *See* Dean T. Olson, *Deadly Force Decision-Making*, L. ENFORCEMENT BULL., Feb. 1998, at 1.

> The implication of the *Zuchel* decision is that traditional instruction—consisting of periodic firearms qualifications on the gun range, the use of classroom shoot/don't shoot scenarios, and other closed motor skills training strategies—does not adequately prepare law enforcement officers to make effective deadly force decisions. To meet the higher standard imposed by the *Zuchel* decision, deadly force training also must develop decision-making skills that enable officers to avoid confrontations when possible and to minimize the escalation of force when practical. Dynamic training meets this standard.

Id. at 5 (citations omitted).

65. *See* DODI 5210.56, *supra* note 44, para. E2.1.6.2.

> When a firearm is discharged, it will be fired with the intent of rendering the person(s) at whom it is discharged incapable of continuing the activity or course of behavior prompting the individual to shoot.

Id. See AR 190-14, *supra* note 44, para. 3-2g(3) (containing the same language). Similar language is used in the SROE:

> An attack to disable or destroy a hostile force is authorized when such action is the only prudent means by which a hostile act or demonstration of hostile intent can be prevented or terminated.

SROE, *supra* note 6, encl. A, para. 8a(3). Finally, a 1991 source advises, "When firing is necessary, if possible, shoot to wound, not to kill." U.S. DEP'T OF ARMY, DEPARTMENT OF DEFENSE CIVIL DISTURBANCE PLAN (GARDEN PLOT) C-8-A-1 (15 Feb. 1991).

66. DOJ DEADLY FORCE POLICY, *supra* note 10, para. IV (Commentary Regarding the Use of Deadly Force in Non-Custodial Situations). Treasury Department guidance contains the same language pertaining to shooting to disable. TREASURY ORDER 105-12, *supra* note 10.

67. Telephone Interview with Official from Federal Law Enforcement Training Center, Glynco, Ga. (Mar. 26, 2000) (the official preferred to remain anonymous).

68. *See, e.g.*, Jane Prendergast, *Cops Not Trained To Wing Armed Suspects Such As Pickett*, CINCINNATI ENQUIRER, Feb. 9, 2001, at A10.

69. John C. Hall discusses raising the standard of reasonableness.

> Noting that most of the major law enforcement agencies had apparently already adopted more stringent policy standards than the common law fleeing felon rule, the Court reasoned that a constitutional standard that does the same thing was not likely to have any significant detrimental impact on law enforcement interests. The Court observed: "We would hesitate to declare a police practice of long standing 'unreasonable' if doing so would severely hamper effective law enforcement."

John C. Hall, *Liability Implications of Departmental Policy Violations*, L. ENFORCEMENT BULL., Apr. 1997 (citing Tennessee v. Garner, 471 U.S. 1, 19 (1985)). Firearms training divisions at law enforcement academies well know that there are a few showoffs in every class who occasionally shoot to disable in training and who must be indoctrinated with the need to follow the deadly force guidance in the agency's policy statement. If they depart from that statement and their risky shot goes awry, they will be defending themselves in court alone, and their chances of obtaining summary judgment under a qualified immunity defense will be severely damaged. Hence, they are drilled: never shoot to wound; shoot to eliminate the threat; aim center mass; fire at the torso, if visible; or, if the torso is not visible, fire at the center of mass of what the subject exposes. Telephone Interview with Official from Federal Law Enforcement Training Center, Glynco, Ga. (March 27, 2000) (the firearms training expert preferred to remain anonymous).

yers.[74] Specific military examples from Beirut, Madden Dam, Brcko, or Mijak, though, are more useful for training soldiers. This is because police objectives, organization, weapons, and operations are significantly different even from military counterparts in a peace-support mission. Also, domestic litigation is raised in distinct constitutional and statutory contexts related to liability and immunity, so the value of the litigation record is limited.

While discussion of domestic excessive force prosecutions or civil liability cases involving deadly force may help prepare police agents for hostile cross-examination on the witness stand, is this precisely the approach commanders should use for training young soldiers? For one thing, although the Supreme Court has indeed developed a doctrine of "reasonableness" that sensibly refrains from second-guessing officers staring down the barrel of a gun, not all federal case results tend to quiet the fears of those who are enforcing the law and keeping the peace.[75] Accordingly, when the onion of domestic litigation extolled by Parks is peeled back, it does not yield the claimed benefits.[76]

Commanders Do Lead

Commanders and judge advocates with experience in developing the right balance of initiative and restraint in soldiers heading to Kosovo and Bosnia learn that soldiers ask typical questions about ROE. In addition to, "When can I shoot?," soldiers ask:

> (1) Can you give me some real examples of when soldiers shot and when they did not?
>
> (2) What happened to those soldiers?
> (3) What are some ideas on other things I can do if my buddies and I are not immediately threatened?
> (4) Will we get any other equipment if controlling crowds becomes a problem?
> (5) Will the chain of command back me if I am trying to do the right thing and I shoot? What if I don't shoot?

Soldiers get answers to these questions and achieve the balance between initiative and restraint through briefbacks, STXs involving hostile role players, and open, frank discussions with leaders built upon a foundation of trust and values. Soldiers are expected to be aggressive and always try to do the right thing. They have to understand that, in spite of best efforts, mistakes will occur. Leaders underwrite honest mistakes and tell soldiers that such mistakes help the entire task force improve at performing difficult missions. Because these leaders' expressions of support are consistent with their all-important supportive actions after a shooting or violent encounter, trust is further reinforced, thus mitigating the extremes of inaction and over aggression. This fully prepares soldiers not only to defend

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70. Parks, *supra* note 3, at 35 n.5 (citing, as the only exception, Captain David G. Bolgiano, *Firearms Training System: A Proposal for Future Rules of Engagement Training*, ARMY LAW., Dec. 1995, at 79). Two years before the article Parks cites as the single exception, the author was advised by at least nine hard thinkers on use of force in the Army and the Marine Corps to probe that very litigation record while a student in the Army's Judge Advocate Graduate Course. These were then Brigadier General Walt Huffman, Colonels John Altenburg, Frederick Lorenz, Pete Lescynzski, Hays Parks, and Lieutenant Colonels Dave Petraeus and Dan Bolger, and Majors Marc Warren and Mac Warner, along with law enforcement experts Jim Fyfe and Sergeant Sean Hayes. Later, the author received instruction from Special Agent John C. Hall at the FBI Academy in Quantico, underwent orientation training on Firearms Training System (FATS) scenarios in the Spring of 1996, and benefited from the insights of former policemen David Bolgiano, whose article on the subject is complimented by Parks. Since that time, several judge advocates have drawn from federal case law for persuasive (if not strictly binding) authority on ROE questions. *See supra* notes 32-34 and accompanying text (discussing judge advocates efforts to address the "Mad Mortarman" question).

71. *See, e.g.*, Martins, *supra* note 42, at 101 & n.329.

72. 490 U.S. 386 (1989).

73. 471 U.S. 1 (1985).

74. Those cases, when combined with practical knowledge of police policies, training, and procedures gained from law enforcement officers, do in fact furnish helpful lessons about when deadly force is authorized. *See, e.g.*, John C. Hall, *Deadly Force: A Question of Necessity*, L. ENFORCEMENT BULL., Feb. 1995.

75. Consider that in one recent five-year period, the Civil Rights Division of the Department of Justice filed charges against 246 law enforcement officers. During that same period, the Division culled through 45,000 citizen complaints and reviewed about 12,500 FBI investigations. The matters deemed by the Division to be most significant were presented to 142 federal grand juries around the country, and formal charges were filed that generated ninety-one indictments and forty-five criminal informations. The results of these charges: 107 guilty pleas, sixty-two jury trials, fifty-two convictions, and ten acquittals, yielding a conviction rate of 73.4%. Now, close study of these cases frequently reveals intentional wrongdoing by a tiny fraction of officers who set out do harm in flagrant violation of law and policy. Still, these are not reassuring statistics to America's law enforcement officers. *See* James P. Turner, *Civil Rights: Police Accountability in the Federal System*, 30 MCGEORGE L. REV. 991 (1999).

76. The law enforcement community is not immune from surprise opinions issued by courts whose reasoning does not exactly track that of the law enforcement academy legal counsel. *See, e.g.*, Hall, *supra* note 69. The author attempts to reconcile the court's reasoning in *Bradford v. City of Los Angeles* with the standard of "reasonableness" articulated in leading cases. The court in *Bradford* concluded it would let a jury decide whether an officer had been reasonable in using deadly force (in this case a vehicle) to eliminate a threat. The jury found that under the circumstances it was not reasonable because other alternatives (such as driving in front of the subject) existed. *Id.*

themselves and accomplish unit missions, but also to serve as representatives of American strength and fairness—eternal themes of national foreign policy.[77]

Command Backing

Parks suggests that commanders are more inclined to court-martial a soldier after a shooting incident than to stand up against restrictive ROE before an operation. The facts do not support this assertion.[78] Only two reported appellate cases involve charges founded in violations of the rules of engagement. Both of these cases—*United States v. McMonagle*[79] and *United States v. Finsel*[80]—arose in Panama, following Operation Just Cause.

Restrictive ROE played no part in the prosecution of either McMonegle or Finsel. These two soldiers were subject to prosecution because, on the night in question, they were drinking alcohol in violation of a no-drinking order, having sex with a woman in a local brothel despite an order prohibiting intimate contact with Panamanians, staging an elaborate mock firefight to cover up Sergeant Finsel's loss of a 9 mm pistol, and finally killing an innocent bystander who fell victim to a wild shot.[81] What the court termed "ROE" violations here—specifically violations of the commanding general's order relating to weapons safety—were incidental to other serious wrongs.

Commanders go to great lengths to avoid second-guessing soldiers' good faith use of deadly force in situations where ROE violations are rumored or informally alleged. Parks' inability to cite examples of criminal convictions for ROE violations is telling. Isolated instances in which post-shooting investigations have occurred, perhaps with the side-effect of chilling other soldiers' initiative,[82] should serve as lessons to all that, when possible, a review of the circumstances should be undertaken as an after-action review rather than as an investigation.

Meanwhile, commanders aggressively challenge ROE issued by higher headquarters. The 1986 Honduras example cited by Parks, in which the 75th Ranger Regiment Commander insisted upon authority for live and chambered rounds, is representative rather than unusual. The Dayton process, which involved close involvement by senior military commanders and resulted in a "robust" Military Annex to the General Framework Agreement for Peace, is another example in which political and diplomatic considerations were not permitted to dilute the soldiers' employment of force.[83] A final example is the

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77. Parks applauds the rules for use of force by ground forces in Vietnam and asserts that ROE for U.S. forces on peace-support operations today place greater constraint on individual soldiers than existed during that conflict. Parks, *supra* note 3, at 35, 37. Any comparison between wartime and peacetime rules is like comparing apples and oranges, however, because during war, enemy soldiers can be shot on sight. Rules in a MOOTW are for this fundamental reason more constraining. Also, Parks' implied assertion that the Vietnam rules "served us well" would not go unchallenged in some quarters. *See, e.g.*, ANDREW F. KREPENEVICH, JR., THE ARMY AND VIETNAM 199 (1986).

78. Regarding an incident in Bosnia that occurred in the Spring of 1999, Parks writes:

> In Bosnia, Special Forces personnel were threatened by a heavily armed mob. The senior soldier present directed his men to run to avoid the confrontation. As they began to run, the senior soldier was struck in the back by a club. Realizing that were he or any of his men to fall, they would be beaten and possibly killed, he drew his pistol and shot his assailant. Although his action clearly was in self-defense, authorities weighed his court-martial for violating ROEs before ordering him out of the area of operations.

Parks, *supra* note 3, at 33. This account is strongly denied by individuals who were close to the situation. *See, e.g.,* E-Mail from Colonel Michael Kerschner, Commander of the Combined Joint Special Operations Task Force (at the time of this incident), to multiple addressees, subject: Comment on Deadly Force Is Authorized by Colonel W. Hays Parks (Jan. 19, 2001).

> The only feedback the soldier in question ever received from his chain of command was--he had done exactly the right thing . . . . The NCO was moved out of country, not for disciplinary reasons, but for his own protection. His team experienced frequent and prolonged contact with the civilian populace of the region and I did not want him to become a target for Serb retaliation.

Id.

79. 34 M.J. 825 (A.C.M.R. 1992).

80. 33 M.J. 739 (A.C.M.R. 1991).

81. *McMonagle*, 34 M.J. at 856-57, 865; *Finsel*, 33 M.J. at 740, 747.

82. *See* Martin, *supra* note 42, at 64-67 (discussing the *Mowris* and *Conde* cases).

83. *See, e.g.*, Walter B. Slocombe, Undersecretary of Defense for Policy, Prepared Statement Before the House International Relations Committee (Mar. 12, 1998).

> First, the force will be fully able to protect itself. Although the follow-on force will be smaller, it will be sufficient, as judged by our military commanders, in numbers and in equipment to achieve its mission and to protect itself in safety. It will continue NATO's robust ROEs. As has been true throughout, force protection is our highest priority.

Id.

planning and orders-writing process that preceded operations in Kosovo, when U.S. Army commanders refused to rest until they received interpretations of NATO ROE consistent with self-defense and mission success.[84]

The Real Story in Brcko

Events in Brcko, Bosnia, in late August 1997, reveal that commanders are stepping up and leading as their soldiers face tough decisions. Those events, among the ones summarized all-too-briefly by Parks at the start of his article, provide a helpful context for discerning the true role of authority to use deadly force in a military operation. That role is often quite limited.[85]

Around 2 a.m. on 28 August 1997, sirens went off in the town of Brcko. Serb radio had announced that backers of a moderate, elected Serb official were going to attempt to assume control over the local police station. The siren served as a signal for an orchestrated demonstration to begin. A U.S. company-sized task force, providing presence in the town during the anticipated change in civil power, was deployed into a perimeter and at several intersections. Within an hour, a large Serb crowd—about 400-strong—had gathered near the police station, armed with stones and clubs, and many Serbs were throwing stones, bricks, and flower pots at the American soldiers from rooftops. The company commander reported the growing disturbance in the town and began moving the task force to a reinforced position at the nearby Brcko bridge, remaining in frequent contact with his battalion and division headquarters, which would soon have the town under close aerial observation.[86]

Two dismounted squads of soldiers, overwatched by a Bradley Fighting Vehicle with their platoon sergeant in the turret, were starting their movement from an intersection when a crowd member climbed up on the Bradley and struck the platoon sergeant with a two-by-four. The assailant then slipped down into the crowd. The company continued its orderly movement to the bridge, the protection of which was a continuing mission. There, soldiers and the bridge were well protected by earthen barriers, concertina wire, and more Bradleys.[87]

By late morning, the situation escalated. The crowd had grown to several thousand, many of whom were bused to the demonstration by organizers loyal to Bosnian Serb leader Karadzic. A few in the crowd had Molotov cocktails and CS[88] canisters; women with babies and elderly people were being pushed toward the front of the crowd.[89]

The American company in Brcko was part of the Stabilization Force that was implementing the 1994 General Framework Agreement for Peace negotiated at Dayton. Control over the town was so contentious that it could not be decided within the Framework agreement; rather, it was deferred for decision through an arbitration process that both of the former warring factions were still attempting to influence in August 1997. The Serb Republic realistically felt that it could not exist without control of Brcko because the razor-thin Posavina Corridor on which Brcko rests is the sole land link between the two halves of the Serb state.[90]

The Muslim-Croat Federation, meanwhile, felt it would be fatally weakened by the loss of the corridor. Such a loss would isolate Sarajevo from the rest of Europe and weaken the defenses of Tuzla, Bosnia's only major industrial city. Also, to give control to the Serbs would seemingly condone one of the war's clearest examples of "ethnic cleansing." On 28 August 1997, Brcko's population of 34,000 was 98% Serb. Just before the war, in 1992, the population had been 40% Muslim, 30% Serb and 30% Croat or "other."[91]

The company commander maintained excellent command and control throughout the day. The angry crowd was kept at bay with a variety of measures, which included the conspicuous locking and loading of weapons, butt-strokes to individuals who came too close, small arms warning shots, CS grenades and canisters, and eventually a burst of fire from an M240C, 7.62 mm, coaxially mounted machine gun, over the heads of the demonstrators and into a nearby building.[92]

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84. The commanding generals of Task Force Falcon (Brigadier General Bantz Craddock), 1st Infantry Division (Major General Dave Grange), V Corps (Lieutenant General John Hendrix), and United States Army Europe (General Montgomery Meigs), and their judge advocates, were personally and closely involved in the process of obtaining clarifications from NATO relating to use of force rules.

85. Telephone Interview with Major Kevin Hendricks, Former Company Commander, C Company, 2d Battalion, 2d Infantry Regiment (Mar. 28, 2001) [hereinafter Hendricks Interview]; Telephone Interview with Lieutenant Colonel Jeff Lau, Former Executive Officer, 1st Battalion, 77th Armor Regiment (Mar. 26, 2001). The facts in this account of the August 1997 Brcko incident are drawn from these two telephone interviews.

86. Hendricks Interview, *supra* note 85.

87. *Id.*

88. Ortho-chlorobenzylidene malononitrile or "tear gas."

89. Hendricks Interview, *supra* note 85.

90. *Id.*

91. *Id.*

The discipline and resolve of the U.S. forces to remain on the bridge eventually caused the crowd leaders to call an end to the disturbance. Many of the soldiers sustained wounds from rocks and tussles with the crowd, and five injuries—including the platoon sergeant hit with the two-by-four—required medical treatment. One soldier, whose eye was injured, eventually left the Army with a 10% disability; but he has since re-enlisted and is stationed at Fort Bragg.

Although some in the international media portrayed the events as a victory for Serb nationalists because the platoon on the bridge did not kill any of the demonstrators, informed observers are convinced that Serbs would have achieved their objectives by inciting the soldiers to open fire on them. Presumably, Parks believes U.S. soldiers should have fired on the crowd the moment they had legal authority to do so. This would have been the instant when rock throwers, Molotov cocktail hurlers, and club wielders gave the soldiers a reasonable belief that they were in imminent danger of serious physical injury. Setting aside the difficult question of which targets the soldiers should have shot if the threats were submerged in a crowd of unarmed persons, most could agree that legal authority to fire was present at various points throughout the long day—during which the crowd disturbances ebbed and flowed—and that excessive use of force allegations might have run a short course in a post-shooting process under domestic federal policy and law.

Part of the trouble with Parks' analysis is that soldiers were not holding fire because they feared a lack of legal authority, something they certainly also had under ROE disseminated and trained by the unit. They held fire rather because shooting would not have eliminated the threat, would have helped the Serbs achieve their destabilizing aims, would have precluded other techniques, and would have risked spinning the situation in Brcko out of control.[93] The decorations the platoon sergeant and several other men received that day were well-deserved, like any other commendation given to a soldier for placing himself at risk to accomplish a greater good.

The greater good in this case was significant: In addition to bringing an end to the disturbance without the loss of a single soldier or civilian life, the fragile stability in the Balkans began to take hold. With the 2000 election in Belgrade of a regime committed to democratic reforms, the discipline, resolve, and situational awareness of our soldiers and leaders in Brcko and elsewhere in the Balkans paid enormous dividends for U.S. national security interests.

Another troubling part of Parks' analysis is the extent to which he takes the individual "right" to fire, an idea that competes with Parks' exhortation that "commanders must lead." Soldiers in a platoon, more so than a policeman responding to a call with his partner in a patrol car, take action within a chain of command. The prerogative of individual decision-making occurs only as the soldier's actions—say, while on sentry duty or during clearing operations in urban terrain—require him to operate independently. Soldiers are required to follow orders. The need for any operation against a determined and ingenious adversary to be coordinated and strongly led is one of the deepest military truths and is captured in the principle "unity of command." Does Parks honestly believe that each soldier has the unqualified and personal right to fire at will in a Brcko Bridge scenario, even when every soldier continues to enjoy clear communication with a sergeant or officer-in-charge on the scene who are in a better position to gauge the risk of fratricide?[94] One cannot tell by reading Parks' *Deadly Force Is Authorized*. The distinction in the SROE between ROE for self-defense and ROE for "mission accomplishment"[95] at least acknowledges that unit goals and individual self-interest are not identical.

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92. *Id.*

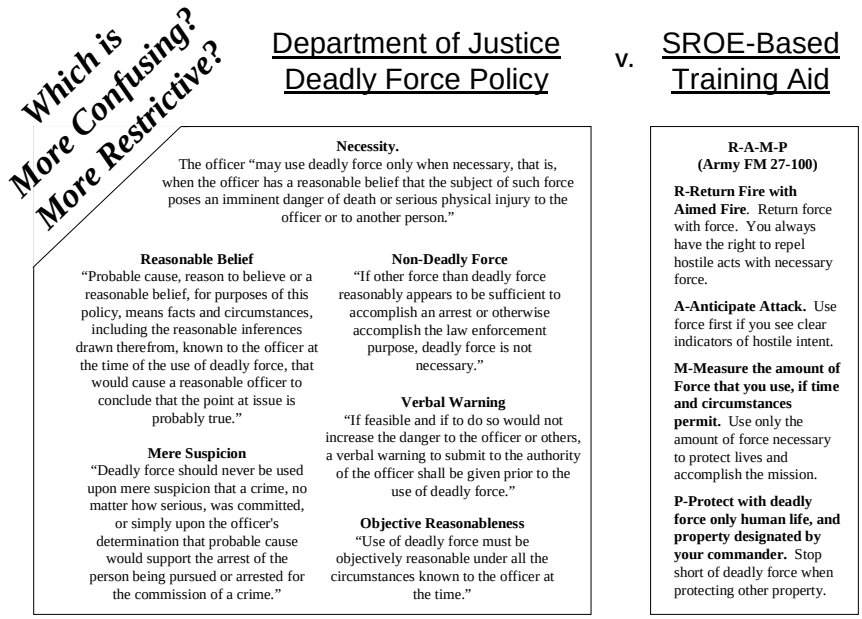
93. United States soldiers who dealt successfully with civil disturbances in Strpce and Mitrovica, Kosovo, in early 2000 concur that holding fire is not the result of ignorance about where the legal line of authority to use deadly force lies. Interview with Lieutenant Colonel Mike Ellerbe, Former Commander, 3d Battalion, 504th Parachute Infantry Regiment, at Fort Polk, La. (Mar. 26, 2001).

94. Consider *Parker v. Levy*, 417 U.S. 733 (1974):

> This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955). In *In re Grimley*, 137, U.S. 147, 153 (1890), the Court observed: "An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier." More recently we noted that "the military constitutes a specialized community governed by a separate discipline from that of the civilian," Orloff v. Willoughby, 345 U.S. 83, 94 (1953), and that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty . . . ." Burns v. Wilson, 346 U.S. 137, 140 (1953) (plurality opinion.

Id. at 743-44.

95. SROE, *supra* note 6, paras. 1a, 6b, 6c, 7; *id.* encl. A, paras. 1a, 1c(1), 3b; *id.* encl. K, para. 3.



We're All Hicks' Now

Parks criticizes commanders for ignoring Hicks' law. Yet while they may not know it by name, military commanders actually employ training techniques for use of force that are fully built upon the insight of Hicks' law and related concepts of information processing. Cognitive psychology models describe three sequential stages for neural information processing related to movement output: (1) stimulus identification; (2) response selection; and (3) response programming.[96] All three stages require time. Hick's law, which relates to the second stage, states that response selection time increases as the number of alternatives increases.[97]

Research shows that response selection time decreases as alternatives are ordered within schemas. Further, all three information-processing stages can be shortened through repetitive practice in a progressively more distracting environment, as well as through improved overall physical conditioning and other influences.[98] Repetitive practice is the hallmark of the Army's "performance-oriented training" system, and effective leaders of all services incorporate these same insights into drills for improving time and quality of performance on a multitude of tasks.

A federal law enforcement agent, who is required by policy to consider nonlethal force and to issue a verbal warning if feasible, faces no fewer alternatives than a similarly armed and situated soldier. Operant conditioning quickens both the agent's and the soldier's response time in firing at identified threats. In a close-quarters firefight, there are only two options: Shoot or don't shoot. Repetition during firearms training must ensure that defensive movements become natural and decisive. At this deadly moment, a training aid's list of continuum of force options or a vague policy reference to nonlethal force must not hamper the response of the threatened soldier or agent. Again, training rather than legal drafting is the key.[99]

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96. R.A. SCHMIDT, MOTOR CONTROL AND LEARNING: A BEHAVIORAL EMPHASIS ch. 4 (1988).

97. *Id.*

98. *See* C.K. Hertzog, M.V. Williams & D.A. Walsh, *The Effect of Practice on Age Differences in Central Perceptual Processing*, 31 J. GERONTOLOGY 428, 428-33 (1976); W.W. Spirduso & P. Clifford, *Replication of Age and Physical Activity Effects on Reaction and Movement Time*, 33 J. GERONTOLOGY 26, 26-30 (1978); David E. Rumelhart, *Schemata: The Building Blocks of Cognition*, in THEORETICAL MODELS AND PROCESSES OF READING 33-58 (Harry Singer & Robert B. Ruddell eds., 3d ed. 1980).

99. Described in terms of the RAMP decision model, a soldier needs a strong foundation of repetitive training in the "A-Anticipate Attack" before all else, and when a threat appears, his or her judgment must have been trained such that the response is instantaneous. This is one of the potential risks associated with RAMP, in that like any other collection of words, it is a poor substitute for the actual training that can develop the good, rapid judgments and muscle memory crucial to effective defense of self and others. To the extent that it is regarded as more than a training aid, it is unhelpful and even counterproductive.

Conclusion

Rules of engagement are not handicapping and endangering ground troops on peace-support missions. United States troops are well organized, equipped, supported, armed, led, and—most significantly—trained. That training, though at times similar to the training of domestic law enforcement agents, is appropriately geared to military rather than police functions. High-level policy statements as well as training materials regarding self-defense and the authority to use deadly force must also recognize the distinction between soldiers and cops.

All is certainly not perfect with the current materials used to convey guidance to units and soldiers on the use of force. Operations orders, soldier cards, and even specific vignettes continue to incorporate a variety of terms and verbal formulas addressing individual self-defense. Force continuums lacking precautions against gradualism and "last resort" language describing deadly force contain troubling boilerplate language. Vignettes also often lack grounding in real situations that have been faced by soldiers situated similarly to the training audience.

Commanders and staffs have wrestled, unsuccessfully to date, to find a standard way of disseminating ground force ROE not related to individual self-defense (such as geographic restrictions, weapons approval authorities, and alert conditions). The lack of consistent language and format, however, has impeded adoption of a uniform training approach at service schools and initial entry bases.[100]

Commanders reassure soldiers with uneven success that actions taken in tense, uncertain, and rapidly evolving circumstances will not be second-guessed with 20/20 hindsight. Most commanders, though, do an excellent job at this important leadership task. The ability of units and soldiers to transition immediately from low threat to high threat and wartime scenarios remains an elusive and essential goal. Not all units perform enough marksmanship and close-quarters combat training. The term "ROE" itself is applied to so many varied types of directives that greater precision in the military vocabulary is needed.

Yet improvement upon these and other aspects of the current system is frustrated rather than advanced by sensationalism. Because he ignites easy biases against other services, against peace support operations, against political and international constraints, and against lawyers, Hays Parks obscures the training imperatives that provide clues to a better way. Deadly force is indeed authorized, but a burning focus on legal authorization rather than training creates more heat than light.

100. I recognize the difficulties in standardizing the dissemination of these higher order rules. For a variety of reasons, I now believe that the "ROECONs" system that I recommended in 1994 is not the answer. *See* Martins, *supra* note 42, at 83 n.280, 92-94, app. D. Still, the basic idea of that system—to standardize ROE dissemination in unit Standing Operating Procedures (SOPs)—has merit and would benefit from further effort at Corps and Division staffs throughout the Army.