

Do We (*Really*) Want Obedient Soldiers?
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*There is never an obligation to be obedient to orders which it would be
pernicious to obey – St. Augustine*

*The entire aim of military training is to reduce the foot soldier [to an
automaton], to eliminate any traces of ego, and to assure, through extended
exposure, an internalized acceptance of military authority – Stanley Milgram*

*In my mind at the time, [the Iraqi man] had this I.E.D. hidden out there
during the day and he was going to set it in place, Mr. Strasburg said. “We
radioed it in. They said, ‘Whatever, use your discretion. So, I popped him.”*

Abstract: After articulating an account of the virtue of obedience, I reflect on whether military institutions in liberal democratic societies (such as the United States) should inculcate that virtue in their soldiers. I argue that soldiers should have the virtue of obedience in significant part because virtuously obedient soldiers will be disposed to *disobey* the kinds of orders citizens in liberal democracies should expect them to disobey. Unfortunately, virtuously obedient soldiers will be unable to comply with what many military professionals regard as a soldier’s most important professional responsibility – to obey a legal order to fight in a given war no matter whether that war is just or unjust. This leaves us with an ambivalent conclusion – we have powerful moral reason to expect those who are vocationally dedicated to our protection to have virtues that preclude them from fulfilling their military responsibilities.

1.0 Introduction. I will assume throughout that some wars are justly and therefore permissibly fought. Since a war can be permissibly fought only if at least some persons permissibly wage that war, it seems that some persons may become soldiers and thereby be shaped in the most profound respects. For as professional soldiers are well aware, those who choose to inhabit the social role of soldier have not only embarked upon a project that requires them to develop the skills, engage in the training, and learn the doctrine conducive to success in waging war. They have also decided to become a certain sort of person. Military organizations, to include the

United States military, profoundly shape the character and moral identity of their members.¹

The U.S. military's primary aim in shaping the character and identity of soldiers is surely to enable them to fulfill their military responsibilities (as distinct from enabling them to discharge their civic responsibilities or to please God). Given that soldiers clearly have a right to expect that their fellows are able to fulfill their military responsibilities and given that they have expert knowledge of the demands of soldiering, the U.S. military should play a decisive role in determining which character traits should be cultivated in soldiers. But such determinations are not solely the military's prerogative. Because we citizens of the United States play an enabling role in training and authorizing our soldiers to fight, we thereby acquire a powerful moral obligation to do what we feasibly can to insure that our soldiers employ military violence in a morally just manner. One important way to achieve that aim is to do what we feasibly can to inculcate in soldiers virtues that enable them to fight in a morally responsible manner. We have not only the standing but the obligation to 'have our say' on what those virtues are, whether by voting for certain political representatives or by participating in public political discourse about the kind of military we ought to have.²

¹. On the notion of a moral identity, see Christian Smith, **Moral Believing Animals: Human Personhood and Culture**, (Oxford: Oxford University Press, 2003). The United States military explicitly acknowledges that the virtues play a militarily crucial role in achieving military success. So, for example, "Warfighting," the United States Marine Corps succinct statement of its 'philosophy of war,' includes the following:

As we have said, war is a social phenomenon. Its essential dynamic is the dynamic of competitive human interaction rather than the dynamic of art or science. Human beings interact with each other in ways that are fundamentally different from the way a scientist works with chemicals or formulas or the way an artist works with paints or musical notes. It is because of this dynamic of human interaction that fortitude, perseverance, boldness, esprit, and other traits not explainable by art or science are so essential to war" (Marine Corps Doctrinal Publication 1, p. 19).

Of course, given that the virtues are crucial to military success, it's not surprising that military institutions like the Marine Corps are intent on developing them in its members.

². Recall, for instance, the furor engendered by then Lt. Gen. James Mattis' expression of joy at the prospect of killing and brawling with 'bad guys.' Eric Schmitt, "General Is Scolded For Saying 'It's Fun To Shoot Some People,'" *NYTimes*, Feb 4, 2005.

How should our military shape the character and moral identity of those vocationally dedicated to our protection? Most particularly, which of the virtues should we expect our soldiers to exhibit? There are, of course, plenty of plausible candidates. So, for example, given the kinds of fear-inducing circumstances in which soldiers sometimes find themselves, a soldier should have that complex of dispositions and emotions that enables him effectively to overcome fear. That is, we have good reason to insist that our soldiers are courageous. And we don't want them to have the correlative vices: we cannot trust cowards to protect us. Hence, we have good reason to want our military to take reasonable measures to inculcate in soldiers the virtue of courage – and to vet its ranks so as to remove the rash and cowardly.

Similarly, it seems, for obedience: we can no more trust rebels than cowards to protect us and so we have good reason to expect our soldiers to have the virtue of obedience. This is an exceedingly common view. So, for example, John Gross Barnard, George McClellan's chief engineer, defended the United States Military Academy as the nation prepared for civil war by highlighting its role in forming obedient cadets:

The first duty God requires of man is OBEDIENCE. The first duty the country requires of its citizens is OBEDIENCE (obedience to her laws). The first virtue of soldiers is *obedience*. The first virtue of the system of education at the Military Academy inculcates, the first duty she requires is obedience....³

Echoing the same sensibility, the United States Naval Academy's Alfred Thayer Mahan claimed that obedience is the chief of military virtues, that "military virtue on which all the others depend," "the cement of the structure."⁴ The claim that soldiers should be obedient is just about as platitudinous as the claim that they should be courageous.

Nevertheless, that platitude merits careful reflection. No doubt, we want soldiers to have a powerful disposition to obey the commands directed at them by legitimate military and political authorities. Presumably, a soldier

³. Quoted in Harry Stout, **Upon the Altar of the Nation: A Moral History of the Civil War**, (New York, NY: Viking, 2006), p. 22.

⁴. "The Military Rule of Obedience," **Retrospect and Prospect**, (Boston, MA: Little, Brown and Co., 1902), pp. 282-83.

who has the virtue of obedience, whatever that turns out to be, will have just such a disposition. But the virtue of obedience is a complex mix of interacting dispositions, only some of which will lead a soldier to obey the commands of even legitimate authorities. As I will soon argue, the virtuously obedient soldier is always and invariably a potentially defiant soldier. This duality counts *in favor of* the claim that we should want virtuously obedient soldiers: because there is an array of cases in which soldiers ought to disobey orders directed at them by both military and political superiors, and because a virtuously obedient soldier will sometimes disobey the demands of legitimate political and military authorities – at the right time, in the right place, and for the right reasons, to be sure -- we, the citizens of the United States, should want and expect soldiers to have the virtue of obedience.

Obviously, this position depends on various disputed claims – that obedience is a virtue, that soldiers should sometimes disobey military and political authorities, and that the virtue of obedience facilitates disobedience in the appropriate exception. I can hardly hope to vindicate each of those claims in this paper – not in any systematic way, at least. But I will have to say something in support of each. I'll begin by explicating the 'grammar' of obedience and so identify the salient features of that virtue (2.0 and 3.0), articulate several reasons we citizens of the United States should expect soldiers to have a powerful disposition to obey their military and political superiors (4.0), and dismiss a common consequentialist argument for *the doctrine of absolute obedience*, viz., the claim that soldiers should *never* disobey the orders directed at them by military superiors (5.0). This leads us to the difficult and contentious task of identifying the kinds of circumstance in which we should expect soldiers to disobey. I begin by articulating *the doctrine of obedience to law*, viz., that soldiers have an extremely powerful prima facie obligation to defy illegal orders and an absolute obligation to obey legal orders (6.0 and 7.0). Although a decided improvement over the doctrine of absolute obedience, the doctrine of obedience to law is still too restrictive. I argue that we should accept instead *the doctrine of conscientious obedience to law*, viz., that soldiers should obey legal orders save in those exceptional circumstances in which doing so egregiously violates innocents (8.0). Because having the virtue of obedience enables soldiers to comply with the doctrine of conscientious obedience to law, we have powerful reason to want our soldiers to be virtuously obedient (9.0). Unfortunately, we also have powerful reasons of

a pragmatic sort to deny that our soldiers should be virtuously obedient and so I conclude my discussion on a decidedly equivocal note: we have reason both to affirm and to deny that our soldiers should have the virtue of obedience and it's not clear how we should weigh those conflicting reasons (10.0).

2.0 Legitimate Authority. Vaguely, an obedient person allows someone else to direct her actions – she complies with some other person's demands. But if a moral virtue is, roughly, an excellent disposition to think, feel and act that furthers common human flourishing, then it's doubtful that an *indiscriminately* compliant person – one who is disposed to comply with the directives of just anyone – has the virtue of obedience. After all, obeying a local thug's command to hand over my wallet needn't have anything like the kind of excellence we rightly associate with moral virtue. The thug lacks any moral right to demand my wallet, and so my obeying his command, while perhaps expedient, needn't have anything at all by way of moral merit or personal excellence. Moreover, it would be positively vicious for me to be disposed to obey his commands because I morally ought to. In short, only certain kinds of compliance with the demands of others count as morally virtuous. Which kinds?

Here is an overarching proposal. A person's acts are acts of virtuous obedience just in case they are an excellent response to the fact that some other person has legitimate authority over her. And a person has the virtue of obedience just in case she is reliably disposed to respond excellently to the demands of legitimate authority. So on this proposal, virtuous obedience and legitimate authority are intimately associated indeed: the claim that obedience is a virtue presupposes that some persons have legitimate authority over others, that legitimate authorities make demands of various sorts, and that it is possible to respond well or poorly, excellently or not, to such demands. Now I do not intend to show that some persons have legitimate authority over others. I'll just assume that to be the case and then articulate various respects in which a person can respond well (or poorly). Nevertheless, since having some rough conception of legitimate authority will help to identify what counts as an excellent response, I will briefly explicate in what legitimate authority consists.

Consider the case of Admiral Vazquez and Ensign Eberle. Ensign Eberle wants to determine how to use some free time he has on his hands. He's

vacillating over the merit of pursuing either of two exclusive options: will he fix the broken lock on a nearby hatch or paint the railing on the starboard side of the ship? He decides to paint the railing: it's not a big deal, and he could responsibly have concluded otherwise, but taking that course of action strikes him as a marginally better use of his scant resources than the alternative. However, just before he begins to paint, Admiral Vazquez happens upon Ensign Eberle, evaluates the situation, and without waiting for Eberle to speak up, *orders* Eberle to paint the railing. Now if and when Admiral Vazquez orders Eberle to paint the railing, his command renders morally obligatory what would otherwise be a merely marginally preferable action. Looked at from Eberle's point of view, though Eberle has come to the conclusion that it's wise, prudent or otherwise sensible to paint the railing, he needn't take himself to be obliged to do so –not until Admiral Vazquez has issued his order, that is. The Admiral's order transforms what Ensign Eberle had merely good reason to do but would have done anyway into something the Ensign ought to do regardless of his opinion on the matter. And of course, this transformation has far-reaching consequences: now, if Ensign Eberle decides not to paint the railing, he's morally and legally culpable and might merit personal censure or even a trip to the brig....

Let's reflect on this case for a moment. Prior to the Admiral's command, Eberle had no obligation to paint the railing, but at the very moment the Admiral issued his command, Eberle had to paint the railing. What accounts for that alteration in Eberle's normative condition? Well, obviously, something having to do with Admiral Vazquez's command. But what?

It's not by virtue of Admiral Vazquez's *desires* or *intentions* when commanding Eberle, nor even by virtue of Vazquez's *communication* to Eberle of his desires or intentions, that Ensign Eberle was obliged to paint the railing. That is, no desire, intention or communication on Admiral Vazquez's part suffices to explain why Eberle ought to paint the railing. After all, suppose that Admiral Vazquez very much wants Eberle to paint the railing, that he informs Eberle of his wishes, and yet that, because Admiral Vazquez also wants Eberle to paint the railing on his own initiative, he expressly lets Eberle know that he is not ordering Eberle to paint the railing. So, he says, "I wish you to paint the railing, but I am leaving it up to you to decide whether to accommodate my wishes. So I am

not going to order you to paint the railing.”⁵ In that case, I take it, Eberle is not morally required to paint the railing, even though Admiral Vazquez has expressed quite clearly what he wishes Ensign Eberle to do.⁶

It's not by virtue of Admiral Vazquez's *reasons* for issuing his command, nor by virtue of the *quality* of his reasons, that Eberle is obliged to paint the railing.⁷ That is, no reasoning on Admiral Vazquez's part, of whatever quality, explains why Eberle ought to paint the railing. We can see why this

⁵. "...To say that an action is obligatory is to say more than that it is the best thing to do. It is to say that one in some sense *has* to do it, and that various sanctions against not doing it are appropriate. For many reasons, we often do not want people to be *obliged* to do what we want them to *do*." Robert M. Adams, **Finite and Infinite Goods**, (New York, NY: Oxford University Press, 1999), p. 261.

⁶. Thomas Cutler narrates a disagreement between President Roosevelt and Admiral King Ernest J. King that exemplifies this point. "Inside the large aircraft were Admiral Chester Nimitz, CINCPAC and his boss, Admiral Ernest J. King, known cryptically as COMINCH. This title was an incomplete acronym for Commander in Chief United States Fleet. It had come into use when Admiral King was first elevated to command of all of the Navy's operational forces immediately after Pearl Harbor. King insisted on the acronym COMINCH because CINCUS, when pronounced, sounded like 'Sink us,' which would never do as far as Ernie King was concerned. He was a 'Sink THEM' kind of admiral. A few weeks earlier, President Roosevelt had told his Chief of Staff, Admiral Leahy, that he would like the Navy to drop the title "Commander in Chief" from its fleet titles, thus ... transforming King from "Commander in Chief United States Fleet" to Commander United States Fleet." Roosevelt believed that there should be only one 'commander in chief,' and that should be the President, who was, according to the U.S. Constitution, "Commander in Chief of the Army and Navy.' Leahy dutifully passed the President's wishes on to King, who replied that he would comply if Roosevelt specifically ordered him to do it. ...The President sent word to King that he preferred not to order it, but would merely like to have it done. King remained COMINCH." **The Battle of Leyte Gulf: 23-26 October 1944**, (Annapolis, MD: Naval Institute Press, 1994), p. 18. Contrast this with another case. President Truman decided that it was time for General MacArthur to return from Japan to the United States in order to testify to Congress about post World War II military needs. "The President's request was not presented as an order. It read, "I suggest that you make a visit home," but as everyone who has ever served in the armed forces knows, be it ever so politely expressed, a suggestion from your commanding officer is really an order" Geoffrey Perret, **Old Soldiers Never Die: The Life of Douglas MacArthur**, (Holbrook, MA: Adams Media Corporation, 1996), pp. 498-99. Of course, there might be circumstances in which a suggestion counts as a command, and thereby imposes a requirement. But certainly a commanding officer can suggest without obliging. Perhaps Roosevelt availed himself of that possibility --- as did Admiral King.

⁷. I think that Admiral Vazquez's command to paint the railing can oblige Eberle even if his reasons for so commanding are terrible reasons, or even if the Admiral has no reason whatsoever for commanding as he did.

is the case by altering the scenario somewhat. Faced with the same decision and armed with the same resolution to paint the railing, Eberle is now accosted by Citizen Kane. Citizen Kane used to be an Admiral in Navy, just like Admiral Vazquez, but he has recently retired – the previous week, say. He is led by the same rationale that persuaded Admiral Vazquez to arrive at the same conclusion – that Ensign Eberle should paint the railing.⁸ Having done so, Citizen Kane gives in to force of habit and orders Eberle to paint the railing.

Now I take it that Ensign Eberle is not required to paint the railing, even though the retired admiral has issued the same order as the active duty admiral and has done so for the same reason. The explanation for this difference is obvious: since Citizen Kane is a retired admiral, he's not in Ensign Eberle's chain of command and so lacks a status that enables his orders to oblige Eberle. In this respect Citizen Kane differs importantly from Admiral Vazquez: Citizen Kane lacks Admiral Vazquez's capacity to transform an otherwise wonderful idea into an obligation and he lacks it just by virtue of his lacking the appropriate normative status. He lost that capacity when he retired.

So, what makes it the case that, whereas at one point in time Eberle had no obligation to paint the railing, at a later point he did have such an obligation? That a person with the appropriate normative status commanded Eberle to paint the railing: a superior in his chain of command not only wished, requested, or desired but ordered Eberle to paint the railing and that order obliged Eberle irrespective of his superior's reasons for doing so.

This pattern of relations between normative status, command and obligation isn't limited to highly formalized contexts like the Navy. Consider a familial context. I sometimes direct my son Nate to clean his room. I take Nate to be obliged to obey such directives. Now Nate sometimes wants to clean his room -- it gets too messy even for his tastes -- and in such a situation Nate has perfectly intelligible reason to clean his room. But when I tell him that he must clean his room, Nate *must* clean his room, irrespective of any desire he might or might not have to do so. My having the status of being Nate's parent, in combination with my

⁸. This is exactly what one would expect to be the case if it would be obvious to a person of experience what Eberle would best do in the circumstances.

demanding that Nate clean his room, thereby imposes on Nate an obligation to clean his room. But Nate lacks any obligation to obey my neighbor's demand that he clean his own room, my neighbor's room, or my neighbor's child's room. After all, my neighbor lacks any status by virtue of which my son must comply with her commands. And, of course, since she lacks any such status, her command fails to oblige Nate even if she issues her command for the very reason I issue mine.

We could run through all manner of variations on this theme -- police officers, legislatures, university instructors, abbots, etc. But I think that each variation will exemplify three familiar truths. First, it's possible for a person morally to oblige others by issuing commands. Second, a person's commands can make something morally obligatory only if that person has the appropriate *normative status*: only if she inhabits a position by virtue of which those to whom she addresses her commands have a standing moral obligation to obey her commands.⁹ Third, a person who has the appropriate normative status can morally oblige others to perform some action even if those to whom she issues her command would not be obliged to perform that action had she not so commanded. (So, command-generated obligations have a 'but-for' quality: but for a legitimate authority's command, the obligation might not have obtained.¹⁰)

That one human being can morally oblige others by issuing commands is a startling fact about the human condition -- particularly when we realize that a legitimate authority can command others to perform actions that they would not otherwise have been obliged to perform but which can be life altering and even life endangering. (Given the "unlimited liability" that obliges soldiers to obey orders that pose a grave threat to their well-being, this fact about the human condition is a stark reality of their vocation.¹¹) So it's natural to wonder what makes it the case that a person has the kind of

⁹. On the concept of a standing moral obligation, see Nicholas Wolterstorff, "God, Justice, and Duty," in **Religion in the Liberal Polity**, (Notre Dame, IN: University of Notre Dame Press, 2005), pp. 15-42.

¹⁰. See, for example, Vitoria's reflections on divine and human authority in "On Civil Power," **Vitoria: Political Writings**, Anthony Pagden and Jeremy Lawrence, eds., (Cambridge: Cambridge University Press, 1991), p. 34. Command-generated obligations are similar in this respect to promise-generated obligations, with the important difference that promises oblige the person who performs the act of promising, whereas commands oblige not the commander but those to whom the command is directed.

¹¹. Gwynne Dyer, *War*, p. .

normative status that enables her commands to generate moral obligations. I doubt that there is a general answer to this question. A person can acquire the normative status of a legitimate authority in various and sundry distinct ways. So, for example, a person can acquire that normative status when some other person promises to obey her commands: presumably Ensign Eberle's having taken the Oath of Commissioning that all are required to take as a condition of becoming an officer in the United States Navy is (a crucial part of) what makes it the case that Admiral Vazquez has the power to oblige Ensign Eberle by command. I take God to have the status of legitimate authority by virtue of God's being a maximally excellent Person: God has the status of legitimate authority by virtue of God's nature. But neither of these will account for parental authority: children are obliged to obey their parents long before they are capable of promising, and no parent, however wonderful, is a maximally excellent person. Perhaps a parent has a 'natural right' to generate obligations by command. Perhaps she has that right by way of 'divine delegation.' Or perhaps there is some other explanation. In any case, there doesn't seem to be any one way for a person to have the status of a legitimate authority.

What's important for my purposes is not a general theory of what makes for legitimate authority, but an explication of in what such authority consists – the normative power to impose moral obligations, where, but for some command, there would be no obligation. For once we clarify in what legitimate authority consists, we're much better positioned to see why obedience is a moral virtue. Given that some persons possess the normative power to impose moral obligations by command, and given that it's morally excellent for a person to fulfill her moral obligations, then it's morally excellent for a person to fulfill command-generated obligations. Since a person who has the virtue of obedience will be reliably disposed to comply with the obligations imposed on her by the command of legitimate authority, the virtue of obedience seems to be a character trait that disposes a person to act in morally excellent ways – one hallmark of a moral virtue. Moreover, moral virtues are closely associated with human flourishing. And the virtue of obedience seems to further common human flourishing: our lives would be unimaginably poorer were it the case that no person has legitimate authority over another or were it the case that, although some persons have legitimate moral authority, few obey their orders. The phenomenon of a legitimate authority imposing obligations on

others is so pervasive a feature of the human condition and so crucial to the way human communities achieve necessary social, religious, cultural and political goods, that I'm confident we'd be utterly disoriented in its absence.¹²

3.0 The Grammar of Obedience. If a person who has the virtue of obedience responds well to the command of legitimate authority, in what does such a response consist? It seems to me that a fully excellent response has (1) doxastic, (2) detective, (3) behavioral, (4), motivational, (5) discriminatory and (6) deliberative constituents. I take those constituents to be individually necessary and jointly sufficient for a person's having the virtue of obedience, though I have no idea how to show that to be the case.¹³

(1) The Doxastic Component of the Virtue of Obedience. Some persons have legitimate authority over others -- that's my assumption. What constitutes an excellent response to that normative fact? At the very least, that normative fact must be reflected in the content of a person's beliefs. Although it's difficult to identify precisely what this amounts to, we can say something definite: at the minimum, a virtuously obedient person must

¹². St. Augustine articulates what I take to be a plausible theological case for the claim that obedience is a virtue. For him a person who has the virtue of obedience submits to the Supreme Good and in so doing achieves the greatest good available to human beings. "But God's command required obedience, and this virtue is, in a sense, the mother and guardian of all the other virtues in a rational creature. For man has been so made that it is to his advantage to be subject to God, and harmful to him to act according to his own will rather than that of his Creator. ...In a remarkable way, therefore, there is in humility something which exalts the mind and something in exaltation which abases it. It may seem paradoxical to say that exaltation abases and humility exalts. Godly humility, however, makes the mind subject to what is superior to it. But nothing is superior to God; and that is why humility exalts the mind by making it subject to God." **City of God**, R.W. Dyson, ed., (Cambridge: Cambridge University Press, 1998), p. 607, 609.

¹³. Why isn't the existence of legitimate authority a necessary constituent of the virtue of obedience? There's a distinction between what's necessary for obedience to be a virtue and what's necessary for the virtue itself. Just as the existence of danger is a necessary condition of it's being the case that courage is a virtue without it also being the case that danger is a necessary component of the virtue of courage, so also the existence of legitimate authority is a necessary condition of it's being the case that obedience is a virtue without it also being the case that the existence of legitimate authority is a necessary condition of the virtue of obedience. Virtues are excellent responses to other realities, and so do not include those realities, even though they presuppose their existence.

believe that some persons are legitimate authorities. A thorough-going anarchist, who denies that there are any legitimate authorities, cannot have the virtue of obedience. No doubt there is more: not only must a person believe that there are legitimate authorities, she must also believe that some other person might have legitimate authority *over her*.¹⁴

Plausibly, there is still more: a virtuously obedient person will have (roughly) correct beliefs about those persons who do in fact have legitimate authority over her. So, for example, in order for Ensign Eberle to have the virtue of obedience, he has to believe that there are persons (Admiral Vazquez, most particularly) whose commands in fact oblige him and thereby require some appropriate response. I leave to the reader the task of filling in the further details.

(2) *The Detective Component of the Virtue of Obedience.* Life is full of charlatans, usurpers and imposters – those who claim to have the authority to oblige by command when in fact they lack that authority. Since the virtuously obedient person obeys the commands of legitimate authorities, not those who falsely pose as having legitimate authority, she cannot be disposed to obey or disobey just anyone. This requires some facility in distinguishing legitimate authorities from imposters. Virtuous obedience requires powers of detection and discernment. So, for example, Ensign Eberle can't be said to obey virtuously if he is not reliably disposed to distinguish between those in his chain of command and those outside his chain of command – even if it turns out to be the case that the only orders he receives happen to be issued by legitimate authorities and so he never actually complies with an order issued by someone who lacks authority over him. Over and above his actual track record, he has to be disposed to detect legitimate authorities and thus discern whether the person who issues him an order is, say, an active duty or retired admiral.

(3) *The Behavioral Component of the Virtue of Obedience.* Suppose that Admiral Vazquez issues Ensign Eberle a command and that Eberle recognizes that Admiral Vazquez occupies a position by virtue of which his commands generate obligations. Then, I take it, Eberle must be powerfully disposed to obey that command – other things being equal, he must then

¹⁴. Hence, God cannot have the virtue of obedience: God can believe that there are legitimate authorities (including God!), but cannot believe that some persons have authority over God. Comparable points apply to some of the other components of the virtue of obedience.

obey that command. After all, if the admiral has legitimate authority over him, then Eberle is thereby *prima facie* obliged to perform that command. Since an obligation is at least a particularly powerful reason that counts in favor of a person's performing some action, an excellent response to Admiral Vazquez's obligation-engendering but undefeated command is – performance of the action commanded.

(4) *The Motivational Component of the Virtue of Obedience.* Suppose that Ensign Eberle believes that there are legitimate authorities, has facility in detecting legitimate authorities, and is reliably disposed to obey the commands directed at him by legitimate authorities. That's not sufficient for his having the virtue of obedience. In order to see why, suppose that Eberle performs the actions he has been commanded to perform because he espies some adequate rationale for those actions that makes no reference at all to the commands of legitimate authority. Suppose, moreover, that he would refuse to perform any action for which he cannot discern such a 'command-independent rationale.' He consistently acts just as those who have authority over him command him to act but he never does so, even in part, *because* he has been so commanded. I take it that Ensign Eberle lacks the virtue of obedience: although he has the correct beliefs about legitimate authority, and although he performs the correct actions, he lacks the right connection between belief and action. How so?

As I noted above, a legitimate authority's commands, not the reasons for her commands, generate obligations. For Eberle to be unwilling to perform any action that Admiral Vazquez commands other than those actions for which he can spy some command-independent rationale is to deny that Admiral Vazquez's commands generate obligations irrespective of the reasons for his commands. The command itself, by virtue of the obligation it generates, is sufficient reason for Eberle to act as commanded. To demand more is implicitly to deny that Admiral Vazquez's commands generate obligations and so decisive reasons for Eberle to act (absent countervailing considerations). But for Ensign Eberle implicitly to deny that Admiral Vazquez has legitimate authority over him is surely a deficient response to a command addressed to him by a legitimate authority. And of course, our guiding principle about virtuous obedience is that the virtuously obedient person responds well to the commands of legitimate authority.

It should go without saying that Ensign Eberle doesn't even slightly imperil his status as a virtuously obedient person if he typically has and is motivated by command-independent reasons to act as his superiors order him to act. He doesn't imperil that status if he actively searches for command-independent reasons to obey Admiral Vazquez's commands. He doesn't imperil that status if he's sufficiently motivated by those command-independent reasons that he would act as Admiral Vazquez orders him to act *even if* Admiral Vazquez did not so order. What's defective is Eberle's refusal to comply with the commands of legitimate authority absent an adequate command-independent rationale.

(5) *The Discriminatory Component of the Virtue of Obedience.* Each of the components of the virtue of obedience I have so far identified facilitates compliance with the demands of legitimate authorities. For convenience sake, I'll refer to the complex of doxastic, detective, behavioral and motivational components of the virtue of obedience as the *compliance* components. These do not exhaust the virtue of obedience, however, for it seems that a person who responds well to the demands of a legitimate authority recognizes that she need not always obey the commands of even legitimate authorities. How so?

It is sometimes the case that a legitimate authority orders his subordinates to perform actions that he has no right to order them to perform. That is, a person who has legitimate authority can issue a command that he has no right to issue and so need not be obeyed, even though the issuing of that order does not undermine the commander's otherwise intact right to oblige by command. So, for example, if Admiral Vazquez demands that Ensign Eberle repudiate his religious convictions (perhaps on grounds that to do so would render Eberle more adequately prepared for combat), then Admiral Vazquez has issued an order he has been legally forbidden to issue, such that that order does not in fact oblige Eberle – even though Admiral Vazquez nonetheless retains his authority to oblige Eberle to paint railings and such. (Of course, if word got out, Admiral Vazquez might not long retain his authoritative standing.) If Eberle has the virtue of obedience, he'll be able to discern that Vazquez has issued an invalid order, will not (*ceteris paribus*) take himself to be obliged by that order, and so

will not be moved by that order to act (even if he does perform the act ordered).¹⁵

It's plausible to suppose, then, that a person who is disposed to respond well to the commands of legitimate authority must be able reliably to determine when a person who has legitimate authority issues an invalid command – a command that is, as it were, outside of his jurisdiction. This is the first of the two *defiance* components of the virtue of obedience, that is, components that lead subordinates to disobey a legitimate authority's commands.

(6) The Deliberative Component of the Virtue of Obedience. Suppose that Ensign Eberle believes that others have legitimate authority over him, has facility in detecting legitimate authorities and imposters, is reliably disposed to act in accord with the valid commands of legitimate authorities, and is willing to do so at least in part because he has been so commanded. That's not sufficient for his having the virtue of obedience. For Ensign Eberle might consistently fail to accord due normative weight to the valid commands directed to him. What does that mean? The commands of a legitimate authority generate *prima facie* obligations – obligations that have varying amounts of normative weight and hence obligations at least some of which can be overridden by competing normative considerations.¹⁶ A proper response to each such command is surely to give to each command-generated obligation its normative due and so to accord each obligation its actual normative weight in practical deliberation. So the virtuously obedient person will be reliably disposed to accord to the commands of each legitimate authority no more and no less normative weight than that command deserves. Hence, if a command-generated obligation is overridden by weightier normative considerations, then a virtuously obedient person will not be reliably disposed to comply with that order.

¹⁵. It should go without saying that although unauthorized commands don't generate obligations, they may very well enjoin command-independently wise or prudent actions. Indeed, they might very well enjoin command-independently obligatory actions – the person who is issued an unauthorized command might have promised to act as commanded, and so is obliged to perform that action by her act of promising not the command. For more on this, see section 6.2.

¹⁶. This holds for all authorities save God, Whose commands cannot be overridden by competing normative considerations.

This last component of the virtue of obedience is particularly important, given that it serves as a crucial bulwark against an all too common defect in the way we human beings respond to the demands of legitimate authority. What kind of defective response is that? It's not what one might initially expect.

By reputation, we human beings have an 'authority problem.' We are, it is said, inveterately prideful, our bloated egos render us hostile to superior authority, and we are therefore unwilling to submit to the legitimate authority of others, which authority is a standing affront to our prized normative autonomy. Nowhere is this authority problem more clearly manifest than in our rebellion against God. As the prophets tirelessly complain, the children of God are stiff-necked rebels who refuse to submit to the benign authority of their heavenly Father. Of course, our authority problem afflicts not only our attitudes toward God but also toward our fellow human beings. After all, if our swollen pride drives us to spurn divine authority, how much more so the demands of fallible human authorities?

Given this conception of humanity's fundamental dispositions, the main impediment to our responding well to legitimate authority, and so to acquiring the virtue of obedience, seems to be that we are strongly disposed to downplay (where we do not outright deny) the normative force of even the valid commands of legitimate authorities. We refuse to give those who have authority over us their normative due by giving their commands less normative weight in our practical deliberations than they deserve.

No doubt we fail to respond well to legitimate authority for all sorts of complicated reasons and in various distinct respects. No doubt overweening pride has an important role to play in explaining that failure. Nevertheless, our predisposition to respond defectively to the authority that human beings have over us often has different motivational sources than our defective response to divine authority. We are, in fact, powerfully disposed to give far too much weight to the normative force of the commands of those human beings who have authority over us. More particularly, we give far too much weight to the commands of *proximate* legitimate authorities. The salience of a legitimate authority who insists that we obey what is in fact an order that falls within his jurisdiction

greatly *magnifies* our estimation of the normative weight of that authority's commands, with the consequence that we are likely to accord to that authority's commands their actual normative weight only if we exert great effort.

Stanley Milgram's 'obedience experiments' exemplify this phenomenon exceedingly well. Milgram's baseline experiment is well-known: subjects are solicited to participate in an experiment that is ostensibly about the effects of negative reinforcement on memory but that is actually designed to assess willingness to obey – in this case a 'scientist' who orders the subject to ask questions to a 'learner' (a confederate of the 'scientist') and who demands that the subject inflict increasingly painful shocks on a learner who answers incorrectly.¹⁷ Although each subject is informed that the learner has a heart condition, and so would be endangered by any significant electric shock, and although each subject hears protests of various sorts, agonizing screams, and eventually deathly silence, 65% of subjects inflicted the maximum punishment – flipping a lever clearly marked with an ominous 'XXX'. The baseline experiment powerfully illustrates the "extreme lengths human beings will go to obey the commands of legitimate authority."¹⁸ I take it that Milgram's baseline experiment powerfully exemplifies our common human disposition to inflate the normative force of the commands of those human beings who have genuine authority over us.

There is more to Milgram's story, however. Less well known than his baseline experiment are the numerous variations Milgram conducted in order to isolate various factors that influence compliance rates. In alternative scenarios, the subject is located in the same room as the learner, the subject is ordered to force the learner's hand on a shock plate, the subject is aided in conducting the experiment by other 'subjects' (confederates, in fact) who refuse to continue at various points, etc. Many of these variations provide fascinating insight into the factors that shape our response to the commands of a legitimate authority. The variation that most interests me is a scenario in which the 'legitimate authority' is physically absent: unlike the baseline experiment, in which subject and

¹⁷. Milgram most describes and analyses his obedience experiments most thoroughly in his **Obedience to Authority: An Experimental View**, New York, NY: Harper and Row, 1974).

¹⁸. Stanley Milgram, **Obedience to Authority**, p. 5.

scientist are located in one room and the learner in another, in the ‘Phone Call’ variation, the scientist calls in his orders by telephone.¹⁹ In that scenario, only 20% of subjects inflicted the maximum of 450 volts: the physical absence of the commanding authority reduces the rate of compliance from 65% to 20%. This result highlights the difficulty human beings have in disobeying the commands of legitimate authorities whose presence is particularly salient to them. Indeed, it’s striking that the absence of the commanding authority reduces obedience rates more effectively than the physical proximity of the person on whom the painful shocks are inflicted: Milgram’s subjects were deterred less by the express pain of the victim than the absence of the commanding authority.

Milgram’s experiments graphically exemplify the normatively disorienting effects of the presence of a legitimate authority on ordinary human beings. We willingly, though often with great anxiety, inflict great harm on our fellow human beings upon being ordered to do so by those who have legitimate authority, even when we have compelling moral reasons to disobey, and most particularly when we find ourselves in the presence of a commanding authority whom we have a standing moral obligation to obey.²⁰ When it comes to responding well to the demands of legitimate human authority, the temptation most of us face is not that of prideful defiance but meek submission. Given the horrific actions that legitimate authorities can and have ordered their subordinates to perform – actions that subordinates would perhaps not have performed but for the command of those authorities – it seems absolutely crucial that human beings have this last, deliberative component of the virtue of obedience. That is, we should want human beings to give legitimate authority its due – no less and no more.

4.0 Obedience as a Military Virtue. I’ve briefly indicated why the virtue of obedience as I’ve construed it is a *moral* virtue: it is morally excellent as well as conducive to common human flourishing that we are reliably

¹⁹. Stanley Milgram, **Obedience to Authority**, pp. 59-62.

²⁰. According to Christopher Browning, many of Milgram’s insights were exemplified by the ‘ordinary men’ of Reserve Police Battalion 101, leading Browning to wonder whether “the massacre at Jozefow [was] a kind of radical Milgram experiment that took place in a Polish forest with real killers and victims rather than in a social psychology laboratory with naïve subjects and actor/victims.” **Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland**, (New York, NY: HarperPerennial, 1998), pp. 173-74.

disposed to respond to the demands of legitimate authorities in the doxastic, detective, behavioral, motivational, discriminatory, and deliberative respects I have articulated. It is, of course, possible that the virtue of obedience is a moral virtue without its also being a *military* virtue. Perhaps obedience is like meekness –a perfection of human nature that is not fitting for soldiers. More plausibly, perhaps soldiers should have certain components of the virtue of obedience, but not others: not the genuine virtue of obedience, but a suitably constrained facsimile. That is a position to which I suspect some will be attracted, which I will explore for the next few sections.

The most plausible version of this position begins by distinguishing between the compliance and defiance components of the virtue of obedience. With that distinction, or something like it, as background, the advocate of the view I have in mind is in a position to claim that soldiers should possess only those components of the virtue of obedience that facilitate compliance with the demands of military superiors. That is, soldiers should possess the compliance but not the defiance components of the virtue of obedience.

The claim that soldiers should possess *at least* the compliance components of the virtue of obedience should be uncontroversial. Consequently, I'll mention just a couple relevant considerations in its favor.

First, there are narrowly military reasons to want soldiers to have the compliance components of the virtue of obedience. A modern military such as we have in the contemporary United States is an immensely complicated institution and is tasked to carry out exceedingly difficult tasks under the most trying circumstances. In order for those tasks to be carried out efficiently (or even at all), a modern military must, as a matter of pragmatic necessity, have a clearly delineated hierarchy of military authorities and soldiers must be disposed to obey the commands of the relevant authorities. Absent a soldiery that exhibits a steadied disposition to obey legitimate military authorities, no military would be able to carry out the kinds of operations required to win a modern war. That's the sort of consideration that led A. T. Mahan to tout the military virtues of obedience, by which I understand him to endorse the compliance components of obedience:

“To frame the plan, to initiate and control the movement, to give it direction..., to sustain its energy, is the duty of one man, upon whom in the last analysis depends the unity of thought and act which inspires and vivifies the whole; but the transmission of the impulse and energy through the mass, so that the oneness of the head is realized in the unity of the whole, is insured by the military rule of obedience, and by that only. Obedience is the cement of the structure....”²¹

Second, there are important political reasons to want soldiers to have the compliance components of the virtue of obedience. In his well-known tome on civil-military relations, Samuel Huntington argues that an obedient soldiery has immense political import.

The military profession exists to serve the state. To render the highest possible service the entire profession and the military force which it leads must be constituted as an effective instrument of state policy. Since political direction comes from the top, this means that the profession has to be organized into a hierarchy of obedience. For the profession to perform its function, each level must be able to command the instantaneous and loyal obedience of subordinate levels. Without these relationships military professionalism is impossible. Consequently, loyalty and obedience are the highest military virtues: [here quoting Mahan] ‘the rule of obedience is simply the expression of that one among the military virtues upon which all the others depend...’. When the military man receives a legal order from an authorized superior, he does not argue; he does not hesitate; he does not substitute his own views; he obeys instantly.”²²

If Huntington is correct, obedient-cum-compliant soldiers can be trusted to carry out the state’s policies rather than to pursue agendas of their making. And he seems to be correct that this subordination of the military to the civilian is a cure for many grave political dysfunctions.

²¹. “The Military Rule of Obedience,” p. 283.

²². **The Soldier and the State**, (Cambridge, MA: Belknap Press, 2005), p. 73.

Third, there are important moral reasons to want soldiers to have the compliance components of the virtue of obedience. So, for example, such soldiers might wage war in a morally better manner than they would were they to lack the virtue of obedience. How so? I take as moral bedrock the claim that enemy combatants have a moral right to surrender. Hence, for a soldier intentionally to target a surrendering enemy combatant is for that soldier to commit a grave moral wrong. It's true, of course, that the right to surrender is easily abused: some have used and will use their immunity from intentional attack as cover to assail those who accept their apparent surrender. Given the occurrence of such deception, it's hardly surprising that soldiers are sometimes unwilling to allow enemy combatants to surrender. However understandable, a "Too late, chum" attitude is morally indefensible and soldiers can be *ordered* to combat it. This was apparently the case during the unimaginably brutal battle for the island of Okinawa, as an American Marine wrote to his parents: "we were not in favor of allowing the Japs a chance to surrender, but orders are orders."²³ In this Marine's case, 'obedience to orders' was conducive to respect for the moral rights of enemy combatants in circumstances in which those rights were most easily, and apparently often, violated.²⁴ And so long as soldiers are ordered to respect the moral rights of enemy combatants, war can be far less brutal than might otherwise be the case.

5.0 The Doctrine of Absolute Obedience. I doubt that more needs to be said in support of the position that we should want soldiers to have at least the compliance components of the virtue of obedience. What we want to know is whether soldiers should have *only* those components. There is an instructive argument – one that has been persuasive to many persons – to the affirmative. The idea is that *any* insubordination – disobedience of any sort at all, no matter the grounds or circumstances -- compromises important military goods, and so we should cultivate in soldiers a deep-

²³. George Feiler, **Tennozan**, (New York, NY.: Tickner and Fields, 1992), p. 483.

²⁴. "“When they started surrendering,’ another man remembered, ‘we were supposed to take them back to the MPs at the command post or to some guys who came up from regimental headquarters. But we never took a lot of them back. We shot them -- me too. We did it because ... what we'd been through all that time, understand? It was that terrible combat. Then it was Japs pretending to surrender so they could shoot *you*. One dressed in civilian clothes suddenly whips his pistol from behind his back and tries to get us with it. I saw plenty of things like that, but one was enough for everybody. So not many prisoners made it back at command posts until the very last days.” **Tennozan**, pp. 485-86.

seated disposition to obey the demands of their military superiors without hesitation or moral reflection. In the words of Father William Corby, famous for exposing himself to enemy fire in order to pronounce absolution on Union soldiers during the Battle of Gettysburg, “Among officers and veterans, it is an axiom to obey first and if there be a supposed injustice, to speak of it afterward; not, however, before showing absolute obedience to the order given, be it right or wrong.”²⁵ Corby's axiom was explicitly affirmed by at least one veteran of the American Civil War, a colonel with the Union army: “A soldier should have naught to do with politics.... The nearer he approaches a machine ... the more useful he becomes to the service.”²⁶

The claim that soldiers should ‘absolutely obey’ the commands of their military superiors seems not to be only wishful thinking. For it seems that some such claim was operationalized in at least some military organizations. For example, British army regulations in 1871 provided that “every order given by a superior must be obeyed at once and without hesitation. Its propriety must not be disputed or questioned at the moment.”²⁷ Something like this practice seems to have been explicitly endorsed and widely followed by the Japanese military during WWII. According to an Imperial Rescript, inferiors were required to “regard the orders of their superiors as issuing directly from Us,” that is, the Emperor, a divine being.²⁸ “Obedience was necessary, no matter how absurd or dangerous the orders,” even to the point of intentional humiliation.²⁹ For example, George Feifer describes the unfortunate Norio Watanabe who was beaten by a “senior private” until he complied with the latter’s demand that he lick the human waste off of his boots. Watanabe was

²⁵. Quoted in Michael Baxter, “In Place of an Afterward,” **The Sword of the Lord: Military Chaplains from the First to the Twentieth Century**, Doris Bergen, ed., (South Bend, IN: University of Notre Dame Press, 2004), p. 262. Father Corby’s axiom was echoed by the British Parliamentarian for whom “[soldiers] are a body of men distinct from the body of the people; they are governed by different laws, and blind obedience, and an entire submission to the orders of their commanding officer, is their only principle.” Quoted in Eliot Cohen, **Supreme Command: Soldiers, Statesman and Leadership in Wartime**, (New York, NY: Anchor Books, 2002), p. 241.

²⁶. James McPherson, **What They Fought For**, p. 5.

²⁷. Quoted in Mark J. Osiel, **Obeying Orders: Atrocity, Military Discipline and the Law of War**, (New Brunswick, NJ: Transaction Publishers, 1999), p. 218.

²⁸. George Feifer, **Tennezon**, p. 48.

²⁹. Yuki Tanaka, **Hidden Horrors: Japanese War Crimes in World War II**, (Boulder, CO.: Westview Press, 1996), p. 32.

supposed to conclude, and apparently did conclude, from the experience that “no matter what, we must blindly obey everyone of higher rank.”³⁰

The rationale for this *doctrine of absolute obedience* is seductive. Success in war occurs under only the most trying circumstances – those in which a lack of information and confusion couple with extreme danger to life and well-being to provide soldiers with powerful incentive to disobey what are in fact militarily necessary orders. Given such extremely trying circumstances, rigorous discipline and obedience is necessary: soldiers must obey the orders of their military superiors even when they might seem to themselves to have compelling reason to disobey. Anything less than absolute obedience courts military anarchy, mass insubordination, or a life-endangering confusion on the battlefield. Hence, soldiers ought to obey their military superiors without exception.³¹

To be clear, this argument neither implies, nor even slyly hints, that soldiers should obey superior orders because those orders are morally respectable, legally correct or otherwise normatively in the clear. Any claim even in that ballpark is absurd on its face and advocates of the position I have in mind have no need to make it: they are more than free to grant that the doctrine of absolute obedience will inevitably have the regrettable consequence that soldiers obey some orders that should never been issued in the first place. The point is, however, that it’s not the proper function of those lower down in the military hierarchy to make normative judgments about the orders directed at them by their superiors. Rather, the good order and discipline crucial to military success functionally requires a rigorous division of labor: soldiers should obey superior orders no matter what, and if they are given an order that should not have been issued, then it’s someone else’s job to make that determination, not the soldier to whom the order is directed. Inferiors are never to defy the orders directed at them by those higher up in the military hierarchy and, indeed, can

³⁰. George Feifer, **Tennezon**, p. 104.

³¹. Malhim Wakin expresses this sentiment as follows: “In a world where men who wear uniforms are highly educated and where creativity is indeed nourished, there is room for discussion and contributions from those who are concerned enough and able enough. But when the contributions are all evaluated and decisions are made, then military men are obliged to obey the orders of their superiors, just as ordinary citizens are obliged to abide by the laws of the state. In either case, other alternatives seem to lead inevitably to chaos.” **Integrity First: Reflections of a Military Philosopher**, (Lanham, MD: Lexington Books, 2000), p. 72.

meritoriously obey an order that should never have been issued in the first place.³²

If we have compelling reason to expect soldiers to obey their military superiors absolutely and unthinkingly, then we have powerful reason to want soldiers to be equipped with some very distinctive dispositions – roughly, the compliance components of the virtue of obedience but not the defiance components. And we should train them accordingly. That the United States military actually does so is a popular impression – one well captured by Stanley Milgrim’s assertion that “the entire aim of military training is to reduce the foot soldier [to an automaton], to eliminate any traces of ego, and to assure, through extended exposure, an internalized acceptance of military authority.”³³ Milgrim’s well-known assertion is widely echoed. So, for example, Laurie Calhoun: “The soldier’s profession also necessitates that he suppress his faculty of reason so long as he is a member of the military. For the soldier is required not to criticize but to submit, not to reflect but to obey. Indeed, soldiers are positively indoctrinated to not criticize and to not reflect; in other words, to be ready and willing to do whatever they are told to do.”³⁴

What should we make of the doctrine of absolute obedience? Does a modern military such as we have in the United States functionally require that subordinates absolutely obey superior orders?

We should grant to the argument I’ve articulated what we must. The primary function of the U.S. military is “warfighting” and so the functional demands of successful warfighting will rightly play a crucial part in

³². “The now disfavored alternative of *respondeat superior*, by contrast, refrained from apportionment of responsibility between superior and subordinate. It assigned all legal responsibility to the superior, regardless of the facts of the case or the severity of the offense, and offered the subordinate a simple *quid pro quo*, complete immunity for criminal conduct pursuant to orders, in exchange for his unqualified obedience. The rationale for this approach was ... pragmatic: the belief that society’s interests in protection from external foes demanded a degree of discipline within its armed forces that required a concession of total impunity to its soldiers.” Mark Osiel, **Obeying Orders**, p. 58. Although Osiel claims here that the doctrine of *respondeat superior* is now disfavored, he elsewhere notes that some countries still affirm it (**Obeying Orders**, p. 44).

³³. **Obedience to Authority**, p. 181.

³⁴. Laurie Calhoun, “Just War? Moral Soldiers?,” *The Independent Review* 4/3 (1999): 332.

shaping the moral and legal requirements of soldiering. Warfighting places soldiers in (to this citizen) unimaginably dangerous and disorienting circumstances. Consequently, when military institutions prepare ordinary citizens to wage war, they must subject those citizens to training of an exceedingly rigorous sort, designed to shape not only the body but also the mind. One of the central aims of that formative process must be to shape soldiers so that they are willing to comply with militarily necessary orders even when those orders seem pointless, dangerous, or defective.

That said, the argument I've articulated in favor of absolute obedience is premised on wildly inflated concerns about the remote consequences of highly unlikely concatenations of events. We can begin to see how far off the mark this argument is by clearing up the popular *misimpression* expressed by Milgram. Whatever might be the case with respect to other militaries, the claim that soldiers ought without exception to obey the orders issued by those higher up in a military chain of command doesn't reflect the current practice of the United States military. Our military is highly regulated by its civilian superiors, who lay down all sorts of obligations and prohibitions that constrain how soldiers fulfill their vocational responsibilities. Soldiers are, at the very least, legally required to comply with those constraints. That is, soldiers in the United States military are now legally required to *disobey illegal orders*.³⁵ So, for example, soldiers have a legal obligation to comply with the Uniform Code of Military Justice (UCMJ) and the UCMJ forbids soldiers to shoot a harmless and helpless prisoner of war. Should a military superior order a subordinate to shoot a prisoner of war, then that subordinate is legally required to disobey. Similarly with respect to so-called 'rules of engagement,' viz., the various military regulations that specify the acts of violence soldiers are authorized to perform in a given theater of operations. These rules can be extremely complex, they can shift over time and location, and they can be extraordinarily difficult to apply in particular circumstances. Nevertheless, soldiers are legally required to comply with

³⁵. See Mark Osiel, **Obeying Orders**, throughout but particularly pp. 292-94. There is much room for disagreement about what this legal requirement amounts to – most particularly whether soldiers are to disobey only those orders that are “manifestly illegal,” reasonably believed to be illegal given the facts of the situation, or otherwise. (Osiel's book objects to the manifest illegality standard and advocates for a more capacious understanding of when soldiers should be required to disobey superior orders.) There are further distinctions to be made and I mark one of them shortly.

the prevailing rules of engagement, they are legally required to disobey any order from a military superior to violate an extant rule, and some subordinates have been prosecuted for failing to do so. Given these facts about current military practice, no automaton could fulfill the extant role-obligations of a soldier in the U.S. military. At the very least, a soldier must be able to distinguish between legal and illegal orders and be prepared to disobey illegal orders even if issued by those who have, and retain, command authority.

How is this fact about current military practice relevant to the argument under consideration? It puts paid to the overblown concern that anything but absolute and unwavering obedience harbors the potential for military dysfunction. The concern that permitting soldiers to disobey superior orders licenses a pervasive anarchy that compromises military success is belied by the fact that our military now requires such disobedience and doesn't face the realistic prospect of anarchy, fragging, or the breakdown of good order and discipline. Since we now forbid absolute obedience, since soldiers are not now trained to be automatons, and since that doesn't cause widespread military dysfunctions, it is clear that toleration of some defiance is consistent with military success. The serious question is how much and under what circumstances.³⁶

³⁶. The argument I've articulated in favor of absolute obedience is a consequentialist argument: if soldiers do not exercise absolute obedience with respect to the orders directed at them by their military superiors, then all manner of bad things will happen – military anarchy and such. The basic flaw in the argument is that we have compelling reason to believe, as we reflect on the current practice of the U.S. military, that the ill consequences predicted by the advocate of absolute obedience are simply not in the offing. Now suppose that we take that to heart, reject the claim that soldiers should absolutely obey the orders directed at them by military authorities, and then articulate an account that specifies particular circumstances in which soldiers may or should defy orders. Notice that for *any* specification of those circumstances, C, critics can resurrect a duly qualified version of the consequentialist argument in favor of absolute obedience. That is, for any claim the soldiers should disobey superior orders in C, critics can avail themselves of the claim that expecting defiance in C will have militarily dysfunctional consequences.

We should be wary of any such move. It's not that no such argument is plausible. Far from it: I'm confident that we could mount a rather robust consequentialist argument against the position that soldiers may disobey the commands of military superiors whenever they feel like it. Permitting soldiers such latitude would be morally and militarily disastrous: we cannot trust hippies to protect us. My point is not a substantive but a cautionary one: any consequentialist argument mandating obedience will inevitably depend on empirical claims about the future consequences of disobedience, it's natural to

6.0 The Doctrine of Obedience to Law. If we reject the doctrine of absolute obedience, and so do not require soldiers to obey superior orders in all cases, in which circumstances should we expect soldiers to defy superior orders?

Let's begin with current practice. Granted that the U.S. military requires soldiers to defy illegal orders, and that it does so without widespread dysfunction, are there persuasive reasons for this requirement? It might seem obvious that there are. In fact, it might seem that such a requirement falls out of an adequate understanding of the nature of military authority in a liberal democracy. I'll begin by articulating that argument.

6.1 A Liberal Argument for the Doctrine of Obedience to Law. No claim is more central to the moral sensibility of a liberal democratic polity than that each and every human being has great and equal worth, unless it's the further claim that each and every human being has certain rights by virtue of each human being's having great and equal worth.³⁷ A liberal democracy aspires to protect those worth-grounded rights and a moderately well-functioning liberal democracy, such as we currently have in the United States, does so with at least moderate effectiveness. A moderately well-functioning liberal democracy is an uncommonly rare moral achievement and so more than worth defending from aggressors. Consequently, we have all the moral reason we need to maintain a military establishment that's able effectively to defend the United States from unjust attack. Yet any military powerful enough to defend us from external attackers also poses a standing threat to the liberal democracy it is tasked to defend. Consequently, we have good moral reason to domesticate our military establishment, that is, to subordinate our military to democratic

overplay the importance of those consequences for an institution which depends heavily on a general willingness to obey, and so we should be duly skeptical of such empirical claims. This will be important to bear in mind as my argument develops.

³⁷. I explicate this claim in Christopher J. Eberle, "Basic Human Worth: Religious and Secular Perspectives," **New Waves in the Philosophy of Religion**, Erik Weilenberg and Yujin Nagasawa, eds., Palgrave, forthcoming. Michael Perry has done so in **Towards a Theory of Human Rights**, (Cambridge: Cambridge University Press, 2007), and **A Global Political Morality**, as has Nicholas Wolterstorff in his **Justice: Rights and Wrongs**, (Princeton, NJ: Princeton University Press, 2009).

control and thereby insure that its destructive power is used “only for socially approved aims.”³⁸

Crucial to this domesticating project is a division of military labor that has a two-part normative structure. The first and most important part of that normative structure is a distribution of the authority to use military force. In a liberal polity, ultimate political authority resides in the citizenry, which determines the responsibilities and composition of government and in so doing authorizes government to make decisions regarding matters that relate to the common good. One of the most important decisions regarding the common good is the decision to wage war. Consequently, the citizenry delegates to government the *exclusive* prerogative to decide whether or not, as well as how, to wage war. Once government has determined that war ought to be waged, the task of executing that determination falls to the military. Thus the first part of the normative structure constitutive of our division of military labor has a trinitarian structure: *citizens* allocate authority to wage war to a democratically elected government; *government* has exclusive prerogative to decide when and how to wage war; and *military* executes that decision in accord with government’s specifications.

The second part of that normative structure is a government-determined hierarchy *within* the military. So, for example, Admiral Vazquez has the capacity to oblige Ensign Eberle by command because he inhabits a position in a military hierarchy which comes with the requisite normative power. Vazquez has that normative power neither by metaphysical necessity nor by divine decree but by act of government. Government makes it the case that there are admirals and ensigns, that admirals can impose moral and legal obligations on ensigns, and that Vazquez, rather than Eberle, is the admiral. Moreover, in attaching certain normative powers to the position of admiral, government specifies the *scope* of those powers: Vazquez has no admiral-specific authority over Eberle save that which government delegates to him, and if government does delegate authority to Vazquez, then he acquires only those normative powers that government grants him. So in the very act of establishing the authoritative position that Vazquez happens to inhabit, government specifies what Vazquez can and cannot do with his normative authority.

³⁸. Samuel Huntington, **The Soldier and the State**, p. 14.

Government's specifications of the scope of military authority enable us to distinguish, in a very course-grained way, between legal and illegal orders. A legal order is an order that a military superior has been granted the normative power to issue. That is, government delegates to military personnel the standing right to issue certain kinds of orders such that, when a military superior exercises that right, the orders he issues engender obligations in their recipients. By contrast, an illegal order is an order that military superiors have not been granted the normative power to issue. That is, government has not delegated to military personnel the right to issue certain kinds of order such that, if a military superior issues an order he has no right to issue, his subordinates are not obliged to obey.

Given this conception of what makes for an illegal order, it might seem simply obvious that inferiors should, and certainly may, defy illegal orders. Suppose that government lays down a general prohibition forbidding soldiers to attack surrendering enemy combatants but that Admiral Vazquez nevertheless orders Eberle to attack surrendering prisoners. Since government has not granted Admiral Vazquez the authority to order Ensign Eberle to attack surrendering soldiers, the Admiral's order is normatively *inert* – it cannot generate an obligation on Eberle's part. Moreover, government's prohibition on attacking surrendering soldiers engenders a powerful *prima facie* moral obligation to refrain from attacking surrendering soldiers. Given that, when faced with conflicting commands, Eberle should obey the command that has the greater normative weight, and given that a command that has no normative weight cannot override a command that has great normative weight, Eberle morally ought to disobey Vazquez's command. Moreover, we can see that Eberle must disobey Vazquez's order just by reflecting on the normative structure constitutive of our division of military labor: since government's demands *must* trump the competing commands of any military authority, subordinates are not only permitted but required to disobey illegal orders. What could be more straightforward?

6.2 Weakly and Strongly Illegal Orders. Before we can evaluate this argument, we need to qualify it. Suppose that government intends to protect each soldier's right to religious freedom and so does not delegate to military authorities the authority to determine their subordinates' religious practices. Suppose further that Admiral Vazquez orders Ensign Eberle to cease practicing his fundamentalist faith and to attend meetings of

Fundamentalists Anonymous. Ought Ensign Eberle disobey the Admiral's order? Not necessarily. Since Admiral Vazquez's military authority is determined in its entirety by act of government, his order cannot generate any moral obligation on Ensign Eberle's part. But Eberle is free to comply with the Admiral's order: he is free to quit his fundamentalist faith and attend the relevant twelve step program precisely by virtue of the fact that the ensign retains his right to religious freedom. Here we have a case in which a military subordinate has been issued an illegal order that he is free to obey.

In order to accommodate this case, we can distinguish between two different kinds of illegal order. As I noted above, the difference between a legal and an illegal order is a function of the government-determined normative powers possessed by military personnel. A *strongly illegal* order directs a soldier to perform some action that government expressly forbids soldiers to perform. So, for example, the UCMJ forbids any soldier to use military violence against prisoners of war. Any soldier who is ordered to attack a prisoner of war has been ordered to act in a manner prohibited by Congress and so in a manner that Congress cannot have granted a military superior the right to issue. By contrast, *weakly illegal* order directs a soldier to perform some action with respect to which government takes no position but which government forbids military superiors to issue. So, to take our previous case, government takes no position regarding the propriety of a soldier's repudiating fundamentalism, but government forbids military superiors to order subordinates to abandon their religious faith.³⁹

Once we mark the distinction between weakly and strongly illegal orders, it's plausible to suppose that soldiers needn't defy weakly illegal orders and that they are morally and legally required to defy strongly illegal orders. So, we need to reformulate our conceptual argument for the doctrine of obedience to law. According to this reformulated argument, the normative structure constitutive of our division of military labor requires, as a matter of conceptual necessity, that subordinates ought to disobey strongly illegal

³⁹. Of course, these will sometimes overlap. Presumably, government prohibits superior officers to issue legal orders that violate its express prohibitions. If that's the case, then a military superior who issues a strongly illegal order will thereby issue a weakly illegal order. But the reverse is not the case: a military superior can issue a weakly illegal order that is not thereby strongly illegal.

orders. We can see that this is the case just by reflection on our division of military labor and the associated conception of what makes for a strongly illegal order.

So reformulated, is that argument sound?

6.3 A Third-Party Obligation to Government? Not necessarily. Although *Admiral Vazquez* lacks the normative power to oblige Eberle to perform some action that government has expressly forbidden soldiers to perform, *government* might order Eberle to obey the Admiral's order. That is, government has the authority to demand that ensigns obey even strongly illegal orders, and so to demand that Eberle comply with the Admiral's order to attack surrendering soldiers: superiors shouldn't issue strongly illegal orders, but when they do, soldiers should obey and they should do so by order of government. Should government do so, Eberle would have a third party obligation – to government – to obey the Admiral's strongly illegal order.

Because the role-obligations of admirals and ensigns are determined by government, and because government has the normative power to impose on ensigns the obligation to obey even strongly illegal orders, we cannot articulate a compelling argument against absolute obedience just by reflecting on the relative normative weight of governmental and military authority. In order to articulate a compelling argument against absolute obedience, and thereby put that issue to rest, we need to show that government should not demand that soldiers obey strongly illegal orders. Can we do that?

My earlier characterization of our division of military labor suggests one line of argument. For government to require soldiers to obey strongly illegal orders would dangerously weaken our division of military labor. After all, if soldiers were required to obey all of the orders directed at them by their military superiors, even the strongly illegal ones, then soldiers would have an obligation to obey an order issued by a military superior to use military force against the will of government and so even an order to attack the liberal polity that the military has been tasked to protect. Even though the prospect of that happening in the foreseeable future is highly *unlikely* (in the United States, that is, though not in other countries), the moral cost of such insubordination would be exceedingly *grave* and so we

should insist that soldiers regard complying with any such order as unthinkable.⁴⁰ That soldiers defy strongly illegal orders seems crucial to our project of domesticating the military – a project for which we have an entirely sound moral rationale.

This argument discredits the most extreme version of the doctrine of absolute obedience, viz., that soldiers should obey any order issued to them by their military superiors. But there are all sorts of strongly illegal orders obedience to which poses absolutely no threat to the stability of our liberal democratic polity. So, for example, government can forbid our military to engage in religious discrimination but be met with hostility from some in the military who use their authority to order their subordinates to forsake fundamentalism. This is no doubt a very serious wrong, but it's implausible to believe that obedience to illegal orders of that sort could destabilize our liberal democratic polity. Similarly for obedience to orders to attack surrendering prisoners. Similarly for all sorts of illegal orders. It seems, then, that the argument I've articulated against government's requiring absolute obedience doesn't apply to the vast majority of cases. Indeed, it is consistent with, and perhaps even suggests, a doctrine of nearly absolute obedience, viz., that government should require soldiers to disobey military superiors who order them to rebel against government but to obey all other orders, no matter what.

Should we citizens of the United States reject this slightly less extreme version of the doctrine of absolute obedience? Yes, for we have compelling moral reason to do so.

As I mentioned earlier, it's in significant part because our moderately well-functioning liberal democracy effectively respects the great worth of human beings that we have good reason to maintain a sufficiently robust military establishment. That commitment to the great worth of each human being also obliges government (and citizenry) to take feasible measures to prevent its military from violating human beings. This obligation is particularly onerous. Because government provides military with armaments and the training necessary to use those armaments effectively, because the effective use of those armaments has vast

⁴⁰. Perhaps one of the reasons that such insubordination is so unlikely is because insubordination is unthinkable – simply beyond the moral pale for those who have been shaped by the military culture of the United States Armed Forces.

destructive potential, government thereby incurs an exceedingly powerful obligation to prevent its military instrument from violating human beings. As the originating source of the threat to innocents, government ought to take feasible measures to reduce the threat its actions pose to those innocents. Simply put, if we make the weapons, if we train others to use them, and if we then order others to use those weapons, then we are thereby strongly morally obliged to do what we feasibly can to prevent them from using those weapons to violate others.

Of course, government has many means at its disposal to prevent its military ‘instrument’ from going awry. Most pertinently, it can shape authority relations within the military so as to protect human beings, as it does when it forbids military superiors to violate their subordinates’ right to religious freedom, when it forbids soldiers to target surrendering prisoners, when it shames or prosecutes those who violate such prohibitions, and when it honors those who expose violations. Moreover, government can vet the military’s ranks to weed out those who cannot be trusted to abide by those prohibitions. That government’s legal prohibitions generally track egregious violations of human beings and that soldiers are generally committed to obeying those prohibitions is a cure for many morally ghastly evils.

Suppose, however, that a given military superior orders a subordinate to violate the very prohibitions government has enacted to protect human beings. In that case, government can discharge its obligation to prevent its military ‘instrument’ from violating human beings by demanding disobedience. The moral rationale that leads government to forbid soldiers to attack surrendering prisoners also counts in favor of government’s demanding that soldiers disobey any order that violates that prohibition – that each human being, even enemy combatants, have great worth and so must be treated with due respect. It hardly suffices for government to have in place some mechanism for detecting and punishing those who have issued strongly illegal orders. Respect for human beings is sufficiently urgent that we can’t settle for punishing violators after the fact. By then grave moral damage has been done and irreparably so. So government should demand that soldiers defy strongly illegal orders and thereby reject the doctrine of absolute obedience.⁴¹ Ultimately, then, we should reject the

⁴¹. There are other normative considerations – moral, military, and political – that support the argument in this section. I discuss some of those considerations in section 8.0, where I

doctrine of absolute obedience not on grounds of military necessity but on moral grounds – moral commitments basic to liberal democracy preclude us from allowing, much less requiring, soldiers to obey any and all orders from their superiors.

If government does not demand absolute obedience, then a soldier who is issued an illegal order should obey the weightier authority and so ought to defy the offending military superior. In that case, defiance is in fact proper obedience to legitimate authority and so to the structure of normative authority that constitutes a crucial part of our division of military labor. By contrast, to obey a strongly illegal order is insubordinate: absent some government requirement, for a soldier to obey a strongly illegal order is to defy the demands imposed on him by government and so to violate demands weightier than any that could be, in the very nature of the case, imposed on him by any military authority.

6.4 The Doctrine of Obedience to Law. This line of argument suggests what I'll call the doctrine of obedience to law. As a first approximation that doctrine has three components:

- (1) A soldier to whom a military superior issues a legal order is morally and legally obliged to obey that order;
- (2) A soldier to whom a military superior issues a weakly illegal order is morally and legally permitted either to obey or to disobey that order; and
- (3) A soldier to whom a military superior issues a strongly illegal order is morally and legally forbidden to obey that order.

7.0 Modifying the Doctrine of Obedience to Law. Although a clear improvement over the doctrine of absolute obedience, the doctrine of obedience to law is far too strong. For it seems clear that a soldier should sometimes disobey a military superior's legal order and so an order that falls within the scope of that superior's government-determined authority.

articulate various reasons to require soldiers to defy legal orders to violate human beings – a far stronger position than that now under discussion, viz., that government should use its authority to demand that soldiers disobey illegal orders that violate human beings in egregious respects.

That is, (1) is false. In order to give some substance and direction to our discussion, let's reflect on some concrete cases.

(A) A Commanding Officer (CO) orders a crew chief to fix a plane as it should not, for technical reasons, be fixed. Despite repeated attempts to change his mind, the CO is impervious to correction and refuses to relent. The CO's order is clearly a legal order in the relevant sense, since government has given COs the authority to make such determinations. But the CO is afflicted by certain deficiencies – technical ignorance to be sure and probably also arrogance or overconfidence – and as a consequence issues a particularly foolish order, an order the crew knows would be extremely dangerous to obey. So they repair the plane as they know that it should be repaired.⁴²

(B) Japanese machine gun nests had pinned down Sgt. William Manchester and his unit of seasoned Marines behind a seawall on the Pacific island of Tarawa when 2nd Lieutenant Tubby Morris assumed command and ordered Manchester to aid him in leading his unit “over the top.”⁴³ Manchester insisted that to do so would be suicidal and implored Morris to allow another unit the opportunity to envelop the Japanese. Morris responded that Manchester was getting paid to obey not to think, ordered Manchester to get the others to follow him, mounted the seawall alone – his men motionless and their faces expressionless -- and Morris was immediately cut down. The gun nests were eventually taken out as Manchester hoped they would be. He and his experienced Marines knew that their CO had issued them a pointless and suicidal

⁴². This case was related to me by LtCol Gary Slyman. Here's another case of the same mundane sort. Ensign William Rubel was the Officer of the Deck on a ship sailing in formation. He was directed by his CO to execute tactical orders “smartly” and in strict compliance with those orders. Ensign Rubel's CO subsequently ordered him to “come right.” But Rubel realized that compliance with the CO's order would certainly result in a collision with a nearby nuclear powered aircraft carrier. Rubel informed his CO that he couldn't comply with the order. The CO again demanded that Rubel “come right!” Rubel again informed the CO that he couldn't execute the order. Finally, the CO took two steps towards Rubel and yelled “Damn it, Come Right!” Rubel refused, at which point the CO, who then shared Rubel's vantage point, saw the nearby ship, and remarked: “Thank God you didn't turn right: I said ‘right’ but meant ‘left.’”

⁴³. William Manchester, **Goodbye Darkness: A Memoir of the Pacific War**, (New York, NY: Little, Brown and Company, 1980), p. 234.

order, defied Morris' repeated and insistent demands, and Manchester was utterly unrepentant for having done so.⁴⁴

Granted that the crew chief's CO should have had the plane fixed as designed, what should the crew chief have done when ordered otherwise? Granted that Lt. Morris should have listened to his experienced Marines, what should Manchester have done when Lt. Morris issued his suicidal order? Given that a military superior's commands generate obligations even when they lack a plausible rationale, what should we demand that military subordinates do when issued such flawed orders?

Let me begin by laying out what I take to be current practice in the United States military with respect to such cases. Although there are many cases in which subordinates properly obey an apparently foolish or dangerous order because they reasonably believe that their superior has 'privileged

⁴⁴. Here's another case of the same generic sort.

"At some point during our moves, our mortar section completely wiped out an enemy force that had held an elongated ridge for three days against repeated Marine infantry attacks supported by heavy artillery fire. Burgin was observing. He reasoned that there must have been a narrow gully running along the ridge that sheltered the Japanese from the artillery fire. He registered our three mortars so that one fired from left to right, another from right to left, and the third along the crest of the ridge. Thus the Japanese in the gully couldn't escape.

Lieutenant Mac ordered Burgin not to carry out the fire mission. He said he couldn't spare the ammo. Burgin, a three-campaign veteran and a skillful observer, called the company CP and asked if they could get us the ammo. The CP told him yes.

Over the sound-powered phone, Burgin said, 'On my command, fire.'

Mac was with us at the gun pits and ordered us not to fire. He told Burgin the same over the phone.

Burgin told him to go to hell and yelled, 'Mortar section, fire on my command; commence firing!'

We fired as Mac ranted and raved.

When we finished firing, the company moved against the ridge. Not a shot was fired at our men. Burgin checked the target area and saw more than fifty freshly killed Japanese soldiers in a narrow ravine, all dead from wounds obviously caused by our mortar fire. The artillery shells had exploded in front of or to the rear of the Japanese who were protected from them. Our 60mm shells fell right into the ravine, however, because of their steeper trajectory.

We have scored a significant success with the teamwork of our mortar section. The event illustrated the value of experience in a veteran like Burgin compared with the poor judgment of a 'green' lieutenant." E.B Sledge, **With the Old Breed at Peleliu and Okinawa**, p. 234; see also pages 182-184.

access' to information in the light of which that order is perfectly sensible, there are some cases in which that privileged access condition does not obtain and so in which disobedience is morally permissible and perhaps even morally obligatory.⁴⁵ Relevantly similar cases of disobedience are now tolerated by the military hierarchy. (More reason to be skeptical of the consequentialist argument for absolute obedience I discussed earlier.) It should go without saying that the toleration is of an exceedingly cautious sort. It should also go without saying that disobedience to legal orders is not a trivial matter. Far from it: those who disobey a direct, legal order do so at great personal risk. Those who disobey legal orders have little mercy shown for *their* foolishness or lack of information. So, for example, if Lt. Morris had been following a larger plan that required the frontal assault that seemed so pointless to Manchester and his unit, the consequences of their defiance might have been grim indeed, in spite of the fact that they blamelessly lacked any knowledge of that larger plan.

That is current practice (as I understand it). What is to be said in its favor? Well, there is a narrowly military rationale for tolerating sharply circumstanced defiance to legal orders. Our military is a huge, complicated bureaucracy that does not invariably marry qualified personnel to the functions they are expected to perform. Given that fact, our military is surely *more* efficient by virtue of its *toleration* of some disobedience to legal orders than it would be if it tolerated no disobedience to legal orders ... *so long as* the disobedient are liable for the practical wisdom of their disobedience. Sharply circumscribed disobedience to legal orders increases efficiency and so, presumably, enables the military better to carry out government's decision to wage war. How, precisely, does such disobedience further military efficiency?

A military superior's particular commands typically serve broader aims. (Lt. Morris ordered a frontal assault because he believed that doing so would further the broader aim of subduing the Japanese forces on Tarawa.) That superior will often communicate to subordinates particular commands, broader aims and how particular commands achieve broader

⁴⁵. I'm not sure whether such disobedience is legally permissible, much less required. I've been informed that it would be very difficult for a military prosecutor to convince a jury to convict a crew that repaired a plane as it needed to be repaired. If so, then perhaps disobedience of the sort exemplified in (A) and (B) is legally forbidden, but unenforced and so legally excused.

ends. (Lt. Morris made it clear to Sgt. Manchester that a frontal assault was supposed to help the American forces subdue their enemy.) But a subordinate will sometimes have information or experience that the superior lacks, that justifies the subordinate in believing that the superior's command doesn't actually serve the superior's expressed broader aims. (Manchester and his unit knew that a frontal assault would not achieve the express aim of subduing the enemy.) In such circumstances, disobedience expresses proper subordination – those who disobey intend to comply, and do in fact comply, with the broader plans that, in combination with incomplete information or inexperience, ground misguided commands. So Lord Nelson: "What would my superiors direct, did they know what is passing under my nose? To serve my King and to destroy the French I consider as the great order of all, from which the little ones spring, and if one of those little ones militate against it, I go back to obey the great order."⁴⁶ The narrowly military usefulness of this kind of 'disobedience' is apparent.

Does this imply that sharply circumscribed disobedience to legal orders is permissible *whenever* a subordinate has information or experience that leads her to conclude (quite properly) that disobedience furthers a superior's broader aims? No. After all, a mistaken order might serve a relatively unimportant aim. The broader aim might be very important, but the mistaken order only marginally detracts from that aim. In such cases, disobedience doesn't achieve a morally serious end. Because a military authority's legal commands generate *prima facie* moral obligations of great normative weight, and because disobedience in such cases achieves no important aims, a soldier can be morally and legally required to obey orders that he realizes are foolish, pointless or cannot otherwise achieve the intended aim.⁴⁷ Only when the moral stakes are high may a soldier disobey a legal order that he knows to be self-defeating or similarly defective. This is, of course, an exceedingly vague standard – a vagueness that will dog our discussion throughout.⁴⁸

⁴⁶. Quoted in Osiel, **Obeying Orders**, p. 317.

⁴⁷. As I noted in section 2.0, a legitimate authority's commands generate obligations whether or not that authority has good reasons to issue her command and so even if her command does not achieve her larger aims.

⁴⁸. Precisely because precision is impossible, moral discernment is crucial to virtuous obedience to legal orders.

Given this general, though vague, standard, what should we say about (A) and (B)? In both cases, an ignorant or inexperienced CO issued an order obedience to which would have risked the death of human beings to no good end. Given the moral cost of compliance in those cases, and given our proper commitment to the great worth of each and every human being, we citizens of the United States have powerful reason to want soldiers to disobey in those cases. That is, soldiers morally ought to disobey a legal order when that order is premised on a lack of information or inexperience and when obedience to that order would result in grave wrong to human beings.⁴⁹ No other policy is consistent with respect for the great worth of each human being and so with the fundamental moral commitment of our liberal democratic polity.

We're now in a position to articulate a canonical formulation of the doctrine of obedience to law. Advocates of that doctrine insist on a division of responsibilities. Government should be led by its commitment to the great worth of each human being to forbid soldiers to violate human beings and so to forbid soldiers to attack surrendering prisoners, target hospitals, torture suspected terrorists, threaten non-combatants and the like. These prohibitions provide soldiers with a moral and legal baseline, but do not determine in many cases what a soldier should do. As a consequence, government also establishes a military hierarchy in which superiors are granted broad discretion to decide in specific cases how military violence ought to be used, with the expectation that superiors will be guided in part by the very commitment to human worth that grounds many of government's express prohibitions. Given familiar facts about the human condition, however, some superiors will inevitably use their position to issue illegal orders, both weak and strong. Unlike the doctrine of absolute obedience, the doctrine of obedience to law permits soldiers to disobey weakly illegal orders and requires soldiers to disobey strongly illegal orders. Given familiar facts about the human condition, some military superiors will inevitably issue legal orders that are vitiated by inexperience or ignorance and that needlessly endanger human beings. The doctrine of obedience to law again diverges from the doctrine of absolute obedience by demanding disobedience. This isn't troubling to the advocate of obedience to law because, as we have seen, disobedience under

⁴⁹. I take no position on whether disobedience should be legally required: perhaps there is a serious moral purpose to be achieved by maintaining a legal prohibition on behavior we grant is morally permissible, and even obligatory.

these circumstances is in fact a kind of subordination – not to the misinformed order but to the broader aims that the duly appointed authorities intend their order to achieve, including the crucial aim of treating each human being as befits her worth. So the doctrine of obedience to law is constituted by the following claims:

- (4) A soldier is morally required to obey any legal order in all but the most unusual circumstances; he is morally permitted, and perhaps even required, to disobey legal orders that are seriously morally flawed and that are issued by a military superior who is either inexperienced or lacks relevant information.
- (5) A soldier to whom a military superior issues a weakly illegal order is morally and legally permitted either to obey or to disobey that order (though there might be command-independent reasons that count decisively in favor of the commanded course of action); and
- (6) A soldier to whom a military superior issued a strongly illegal order is morally and legally forbidden to obey that order.⁵⁰

According to its advocates, the doctrine of obedience to law is a difficult but morally necessary standard, one that accords due weight both to the central normative commitments of a liberal democracy and to the distinctive function that soldiers play in a liberal democracy. Each soldier must play his legitimate but subordinate role in an institutional structure in which government is guided by its commitment to human worth to lay down broad legal constraints, military superiors use their discretion to determine how force is to be applied in specific cases, and subordinates obey the moral determinations of both government and military superiors. This institutionalized division of labor works only if soldiers are humble enough to obey the discretionary judgments that others have rightly and sensibly been given the authority to make. Nevertheless, and precisely because of our commitment to the great worth of human beings, soldiers morally ought to defy certain orders issued to them by their military superiors - legal orders in certain morally freighted conditions and illegal orders that contravene constraints laid down by the civilian authorities.

⁵⁰. The requirements, permissions and prohibitions in (1)-(3) are extremely weighty – not to be overridden in ‘ordinary circumstances,’ but they can be overridden.

8.0 The Doctrine of Conscientious Obedience to Law. Although they differ in morally important respects, the doctrines of absolute obedience and obedience to law converge in their application to morally grounded disobedience to *informed* and legal orders. According to both doctrines, a soldier may never disobey a legal order solely on moral grounds, no matter how weighty: a soldier's role-obligation to obey informed and legal orders cannot be overridden by any command-independent moral rationale.⁵¹ This is an important implication of the doctrine of obedience to law, for it's possible that a military superior issues a legal order, relies on (roughly) the same information available to his subordinates, and yet orders his subordinates to perform a grave moral wrong. Nowhere is this possibility more troubling than in the context of war: if obeying an informed legal order to use lethal military force would implicate a soldier in moral wrongdoing, then that wrong might be quite horrible indeed. And that possibility forces us to ask what we, the citizens of the United States, should expect of soldiers who find themselves so unfortunately circumstanced.

Consider in this regard the actions of Chief Warrant Officer Hugh Thompson and his helicopter crew on March 16, 1968.

(C) Thompson, Larry Colburn and Glenn Andreotta were flying over the Vietnamese village of My Lai when Thompson witnessed an American soldier approach a woman lying on the ground, nudge her with his foot, and then shoot her. Befuddled, he flew to the other side of the village and saw a group of American soldiers standing and smoking near a ditch filled with dozens of bodies. Thompson set the helicopter down, asked a platoon leader, Lt. Calley, to provide medical assistance to the civilians still moving in the ditch, was told to mind his own business, returned to his helicopter and was stunned to be told by Andreotta that the soldiers with whom Thompson had just been speaking were firing into the ditch. Unsure what to do, Thompson flew above the village until he saw other Americans walking towards a crude bunker that contained more villagers, at which point he landed between soldiers

⁵¹. A brief note: I'm interested in articulating a plausible account of the moral responsibilities attached to the social role of soldier in the United States military. Since that account is supposed to apply to actual persons in the world as it is, I don't regard the normative constraints I articulate to apply is distant possible world. Modal claims, such as that a soldier's role-obligation to obey informed and legal orders *cannot* be overridden by any command-independent moral rationale, should be understood accordingly.

and bunker, ordered his crew to fire at their compatriots if necessary, and set about evacuating the terrified villagers. His crew received Thompson's order in disbelief, but Colburn later said that he would have obeyed had that been necessary. (Andreotta died three weeks later, so his perspective on the events is, sadly, forever lost.) After a tense and surreal standoff, Thompson was able to evacuate the villagers, returned to base, and reported the incident.⁵²

The doctrine of obedience to law implicates both Thompson and his crew, though for different reasons. How so? Plausibly, Thompson's command that his crew target their fellow Americans was strongly illegal.

(Thompson believed that it was⁵³ and it's plausible to suppose that he was correct.⁵⁴) If the doctrine of obedience to law is correct, then, according to (6), Thompson's crew ought to have been unwilling to obey his order to attack their fellow Americans. After all, given that Thompson's order was strongly illegal, compliance with his order would have been insubordination – not with respect to Thompson but with respect to the civilian authorities that proscribed American soldiers from attacking one another. Moreover, if Thompson's command was strongly illegal and if government forbids superiors to issue strongly illegal orders, then in issuing his order to target his fellow Americans, Thompson directly disobeyed government's express prohibitions. So it seems that, according to (4), Thompson should not have ordered his crew to target their fellow Americans and, according to (6), his crew should not have been willing to comply with that order. Plausibly, this is morally troubling: although a general prohibition on a soldier's attacking his comrades gets the right

⁵². I'm relying here on lectures by Hugh Thompson and Larry Colburn at the U.S. Naval Academy, as well as George Lucas's synthesis of various news sources in his "Chief Warrant Officer Hugh W. Thompson at My Lai," **Case Studies in Military Ethics**, George Lucas and William Rubel eds., (Boston, MA: Pearson Education, 2005), pp. 77-80, 185.

⁵³. Years later, Thompson said that he thought he would "spend the rest of my life in the brig" for ordering his crew to fire on fellow soldiers. This is my best recollection from a conversation with Thompson during one of his visits to the United States Naval Academy. As it turned out, he was not courts-martialed, but was for years vilified by some in the military community, until recently when he and his crew were awarded the Soldier's Medal by Congress (after persistent efforts by a professor of architecture from Clemson University).

⁵⁴. It's not clear whether his belief was correct: even after a number of conversations with Navy and Marine lawyers, I've been unable to determine whether or not Thompson's order to fire on American soldiers would be legally permissible according to contemporary legal standards, much less those 40 years prior.

results in the vast majority of circumstances, obeying that generally sensible rule in Thompson's exigent circumstances might have impeded him from ending an atrocity.

There are plenty of other cases in which a military or political superior has issued an order obedience to which implicates the recipients of that order in a moral tragedy. Here are two.

(D) Consider the air crews who executed the Allied area bombing campaign during World War II. I take it that that campaign was a series of egregious moral wrongs: the militarily legitimate aims that the Allies achieved as a consequence of the area bombing of German and Japanese cities could have been achieved by the available alternative of precision bombing but without nearly the cost in human suffering.⁵⁵ (800,000 civilians were killed as a consequence of Allied area bombing in the Second World War.⁵⁶) Moreover, I take it that the Allied area bombing campaign was authorized by political and military leaders at the highest levels -- by Churchill, Roosevelt, Truman, Portal, Lemay, and 'Bomber' Harris. So the air crews who carried out their orders to bomb Hamburg, Dresden, Tokyo and Nagasaki were legally ordered to violate their fellow human beings on a stunningly large scale.

(E) On April 11, 1994, a large number of Rwandan Hutus surrounded a school compound intent on massacring the enclosed 2000 Tutsi men, women and children who hoped to be protected by Captain Luc Lemaire and his company of 90 Belgian soldiers. That night, Col. Luc Marchal ordered Lemaire to withdraw from the compound in order to evacuate a small number of Europeans to the Kigali airport. Lemaire was well aware both that 10 Belgian soldiers had recently been seized, mutilated and executed by Hutu militias and that the same militias were in the midst of committing genocide against the Tutsi minority throughout Rwanda. When the Tutsis learned to their horror that Lemaire intended to leave them to the tender mercies of their Hutu compatriots, they begged him to have his soldiers turn their guns on them, as they'd rather be shot by their erstwhile protectors than

⁵⁵. See A.C. Grayling, **Among the Dead Cities: The History and Moral Legacy of the WWII Bombing of Civilians in Germany and Japan**, (New York, NY: Walker and Company, 2006).

⁵⁶. A.C. Grayling, **Among the Dead Cities**, p. 5.

butchered by the militias. Captain Lemaire refused the Tutsis' request, complied with the order to withdraw, and all 2,000 Tutsis were thereafter hacked to death. Though legal, the order issued by Marchal was an order to abandon 2,000 human beings to be slaughtered and seriously wrong.⁵⁷

Granted that Bomber Harris shouldn't have ordered his aircrews to obliterate Dresden, what should his air crews have done upon being ordered to do so?⁵⁸ Granted that Col. Marchal should never have issued his order to abandon 2,000 Tutsis to butchery, should Captain Lemaire have acted as ordered? If he had refused to abandon the Tutsis under his care, would the soldiers under his command have been permitted to disobey LeMaire's order that they protect the Tutsis? Granted that government can't tailor its general prohibitions to fit every conceivable case, should Thompson have issued an order that violated government's directives? Should his crew have obeyed government's prohibition on attacking fellow soldiers – and so defied their immediate military superior? These specific questions raise a more general question: given that our soldiers will in future find themselves in ever different but equally difficult circumstances, what should we, the citizens of the United States, expect of those vocationally dedicated to our protection when they find that obedience to legal orders by authorized superiors egregiously wrongs other human beings?⁵⁹

⁵⁷. I'm relying here on "Case Studies in Humanitarian Intervention," **Case Studies in Military Ethics**, William Rubel and George Lucas, eds., (Boston, MA: Pearson Education, 2005).

⁵⁸. Grayling argues that the airmen ordered to participate in the area bombing campaign should have refused to participate. **Among the Dead Cities**, p. 277. Very few did.

⁵⁹. I've focused on cases in which a soldier's actions impact non-combatants. But there are cases in which soldiers are ordered to pursue a course of action that wastes the lives of combatants. For example, during the Battle of Cold Harbor, three Union corps received 7,000 casualties in a little more than an hour, after having been funneled "like pigs into a slaughter pen," Confederate soldiers laughing and joking as they "poured lead into the hapless Yankees." When ordered to reform his lines for another massed assault, Captain Thomas Barker "declared with an oath that he would not take his regiment into another such charge if Jesus Christ himself should order it." Harry S. Stout, **Upon the Altar of the Nation**, p. 346. Surely soldiers can be, and have been, ordered to waste the lives of their subordinates in fruitless assaults and in so doing be issued an order that violates their subordinates. See Osiel, **Obeying Orders**, p. 225 for a comparable story regarding French troops in World War I.

If the doctrine of obedience to law is correct, the pilots who firebombed Hamburg, Dresden, Tokyo, and Nagasaki should have done so, Lemaire should have abandoned the Tutsis, Thompson should not have ordered his crew to prepare to attack their compatriots, and Thompson's crew should not have been willing to obey his order to do so. I take this to count against that doctrine: if there is some alternative that does not have these implications and that comes without substantial cost, then we'll have powerful reason to affirm that alternative.

8.1 The Doctrine of Conscientious Obedience to Law. The alternative I favor is *the doctrine of conscientious obedience to law*, that is, that soldiers should obey legal orders unless doing so egregiously fails to respect the worth of others. The doctrine of conscientious obedience to law recognizes that no institutional design, however excellent, and no vetting process, however thorough, can prevent their political and military superiors from ordering their subordinates to violate their fellow human beings. When institutional safeguards have broken down, soldiers are sometimes so circumstanced that only they are in a position to avert a grave moral wrong. So, for example, no-one other than Capt. Lemaire was in a position to take the measures necessary to prevent 2000 human beings from being butchered: he knew that, if he refused to protect them, many innocents were certain to suffer a most horrific fate. Given that Capt. Lemaire was the only person well-positioned to avert that tragedy, Capt. Lemaire should have disobeyed Col. Marchal's order. Similarly for Hugh Thompson and his crew. Given that such cases have occurred and will occur again, wholesale, institutionalized respect for human worth is morally inadequate. We have to retail it, and, when institutional precautions falter, individual soldiers, acting on their own best judgment, are our only salespersons.

Should we accept the doctrine of obedience to law or the doctrine of conscientious obedience to law? This is an exceedingly difficult question to answer. No doubt, we are in that messy moral terrain in which any position we take will have serious shortcomings. Moreover, any judgment we reach will depend upon all kinds of empirical claims about the likely consequences of alternative possibilities over long stretches of time and we are manifestly not in a strong epistemic position to evaluate those empirical claims. But our ignorance of the long-term consequences of requiring soldiers to obey either of the doctrines before us hardly enables us to avoid taking some, inevitably contentious, position. Certainly, those

who serve in the U. S. military are forced to take a position. In my view, various considerations, moral and non-moral, tilt the balance in favor of the doctrine of conscientious obedience to law.

8.2 Conscientious Obedience and Basic Human Worth. I'll begin by articulating and then explicating what I consider to be the most weighty argument in favor of the doctrine of conscientious obedience to law.

- (1) We, the citizens of the United States, have powerful reason to expect soldiers to have a motivationally efficacious commitment to the great worth of each human being.
- (2) If soldiers should have a motivationally efficacious commitment to the worth of each human being, we should refrain from taking measures that will undermine that commitment.
- (3) Demanding that soldiers obey legal orders that egregiously violate human beings might undermine any commitment to the worth of each human being that we know is often under considerable pressure in martial contexts.
- (4) Hence, we, the citizens of the United States, have powerful reason to permit soldiers to disobey legal orders that they realize egregiously violate human beings.

Ad (1): I intend (1) to be common ground between advocates of the doctrine of obedience to law and of the doctrine of conscientious obedience to law. More particularly, I take it that advocates of the doctrine of obedience to law have powerful reason to want soldiers to have a motivationally efficacious commitment to the worth of each human being in spite of the fact that they deny that soldiers may be led by that commitment to defy informed, legal orders. Why? A soldier so committed is better fitted to fulfill his military responsibilities – responsibilities the advocate of the doctrine of obedience to law takes him to have – than he would be if he lacked that commitment. Why believe that? There are various reasons, the two most important of which I articulate below.

First, a soldier who has a motivationally efficacious commitment to the claim that each human being has great worth has a powerful motivating reason to comply with the *legal requirements* that government should impose on all soldiers. As I've said, government should lay down all sorts of legal prohibitions on how soldiers treat surrendering enemy combatants, children and the infirm, etc. There are some circumstances in which complying with those legal prohibitions greatly increase the danger to a soldier's life and well-being.⁶⁰ So, for example, when a soldier refrains from attacking surrendering combatants, he may very well do so at considerable personal risk. In those circumstances, soldiers have a powerful incentive to disobey and there might be only the most remote possibility that their disobedience will be detected, prosecuted and so deterred. Such soldiers are left to their own motivational and justificatory resources: they have to resist the temptation to protect themselves and their comrades by violating the legal prohibitions that protect innocent human beings. A soldier who is fully committed to the great worth of each human being has a powerful motivation to resist that temptation: if she has a motivationally efficacious commitment to the great worth of each human being, then she will have a motivationally efficacious commitment to the justifying rationale for those legal prohibitions, and will be that much more likely to comply with those prohibitions than she would be were she to lack that commitment to human worth. Otherwise put, although she is morally required to obey legal orders whether or not she has a command-independent rationale for doing so, the fact that she has a command-independent rationale can help her comply with legal order she might be tempted to disobey.

Second, as I earlier argued, because government and citizenry provides our military with armaments of vast destructive potential, we thereby incur a powerful moral obligation to do what we can to prevent our soldiers from using those armaments in a manner that violates basic moral commitments. As I noted, government satisfies this obligation by demanding that soldiers obey legal constraints that track considerations of human worth, by weeding out soldiers who refuse to comply with those constraints, and by requiring soldiers to disobey orders to violate the laws and regulations government has implemented to protect human beings.

⁶⁰. For one much discussed case, see Marcus Luttrell, **Lone Survivor: The Eyewitness Account of Operation Redwing and the Lost Heroes of Seal Team 10**, (Little, Brown and Company, 2007).

But no matter how effectively government achieves those ends, a combat soldier will inevitably have wide legal latitude to perform or not to perform various actions that violate others. No set of legal constraints, however detailed and well-crafted, provide a soldier with precise guidance as to how he ought to act in each of the circumstances in which he must act. A soldier who is on patrol in Fallujah, and who willingly complies with the relevant official constraints, must do so in confusing, dangerous, and unpredictable circumstances and will have to use his own cognitive resources to determine whether and how those official constraints permit him to employ force in *this* set of circumstances. And having determined that the relevant official constraints *permit* the use of force, a soldier will have to rely on his own cognitive resources to determine whether he will act as permitted – knowing that, in some cases, legally permissible uses of force can still violate the innocent. In many cases, individual soldiers have no option but to use their discretion when employing the destructive power at their disposal. We should expect them to do so in a manner that protects the innocent.⁶¹

Consider in this regard the fact that combat soldiers often have to decide how much risk they must assume in order to avoid killing or harming noncombatants. Particularly in the sort of counter-insurgency operations which the U.S. Military conducted in Iraq and Afghanistan, soldiers must rely on their judgment, experience, and moral caution to decide whether to expose themselves to risk or to impose that risk on others. Examples of this kind of discretionary judgment are legion.

Consider in this regard the following case, related to me by a chaplain whose name I cannot now recall. Prior to their (second) assault on the city of Fallujah (in the fall of 2004), the U.S. Marines warned the city's inhabitants of the impending battle and provided them with the opportunity to evacuate. The evacuation of non-combatants permitted relaxed rules of engagement – Marines were authorized to attack armed males (over a certain age) even if they showed no sign of hostile intent.

⁶¹. Deborah Sontag and Lizette Alvarez describe the unfortunate case of Sergeant Seth Strasburg, who, while on patrol near Mosul, Iraq, witnessed what he took to be suspicious behavior by an old man, radioed in for direction. "They said, 'Whatever, use your discretion.' So, I popped him" ("Across America, Deadly Echoes of Foreign Battles, **NYTimes** 1/13/2008). The old man was not emplacing an IED as Sgt. Strasburg believed, but moving a sack of rocks.

After the city had been pacified, its inhabitants were allowed to return and the rules of engagement augmented to require the Marines positively to identify a target as having hostile intent – a difficult psychological transition. While supervising the reentry of the city's inhabitants, the chaplain and his company of Marines witnessed three oncoming busloads of civilians. As the 1st bus passed them, one of the passengers leaned out of a window and began to fire his AK-47. The Marines took cover but refrained from returning fire, as that would undoubtedly have killed many innocent passengers. As the last bus rolled by, they witnessed a passenger in the 3rd bus videotaping the entire event, presumably hoping to capture a staged massacre. The Marines allowed the busses to continue on as the chaplain and his company gathered, wept and prayed out of relief and anxiety.

Here, I take it, was a situation in which Marines whom we have armed and whom we have ordered to fight had to use their discretion to determine whether to attack or refrain from attacking other human beings. No extant authoritative directive, whether from government or military superiors, prohibited them from returning fire on the passenger who attacked them. Nor of course did any extant authoritative directive require them to attack. They were left to use their own judgment and it seems that they judged well: their refusal to respond with deadly force in those very difficult circumstances protected the innocent -- and averted a potential public relations disaster as well.

There is every reason to believe that other soldiers will sometimes be similarly circumstanced.

Strabbing.

Given that those we arm will have to rely on their own cognitive and motivational resources to decide whether or not to use lethal force in such difficult circumstances, given that a soldier armed with a motivationally efficacious commitment to the great worth and dignity of each human being will be that much more likely actually to respect the rights of others, and given our obligation to do what we can to prevent those we arm from violating others, we have powerful reason to expect our soldiers to have a deep and abiding commitment to the worth of each human being. And we

have that reason whether or not we believe that soldiers may disobey a legal order solely on moral grounds.

Ad (2): This claim strikes me as fairly obvious: if we have powerful moral reason to want X, then we have powerful reason to promote X and powerful reason not to discourage X, whether we're referring to excellent art, moral virtue or friendship with God.

Ad (3): The most contentious claim in my brief against the doctrine of obedience to law is that requiring soldiers to obey legal orders they know to be gravely morally wrong undermines the very commitment to the worth of human beings that advocates of the doctrine of obedience to law have powerful reason to expect soldiers to affirm. It's also a very difficult claim to vindicate, as it depends on eminently disputable empirical claims about the effects of that policy on large numbers of diversely committed human beings and indeed claims about the deep tendencies of human beings throughout human history. So I hardly regard (3) as amenable to demonstration! That said, let me begin by reflecting on what I take to be a persistent human tendency to dehumanize our species mates.

If it were the case that human beings were hardwired to act in such a way that our beliefs about the worth of our species-mates had little effect on the manner in which we treat them, then it would not make a great moral difference what our soldiers sincerely affirm the worth of their fellow human beings. In that case, then we'd really not have to worry all that much about the consequences of a soldier's denying that each human being has great worth, and so (3) would be doubtful. By contrast, if a soldier's beliefs about human worth shape action, and if we human beings are only tenuously committed to the great worth of each of our species mates, then we ought to be careful to avoid undermining our soldiers' commitment to that claim.

Alas, we human beings are outfitted with a powerful tendency to deny that each of our species-mates has great worth. It's a matter of historical fact that many human beings have not found our liberal democratic commitment to the sacredness, dignity, or great worth of each human being particularly plausible. We have a powerful penchant for carving humanity up into 'in-groups' and 'out-groups' and then assigning some

lesser normative status to outsiders. That inclination to group egoism has been with us for a very long time and it's not going away anytime soon.

So, for example, however platitudinous the claim that each human being has great worth seems to us, most of the human beings who have graced our planet would have denied it, had it crossed their minds in the first place. On this point, it's worth citing Claude Levi-Strauss in full:

The concept of an all-inclusive humanity, which makes no distinction between races and cultures, appeared very late in the history of mankind and did not spread very widely across the face of the globe. ...For the majority of the human species, and for tens of thousands of years, the idea that humanity includes every human being on earth does not exist at all. The designation stops at the border of each tribe, or linguistic group, sometimes even at the edge of each village. So common is the practice that many of the peoples we call primitive call themselves by a name which means 'men' ... thus implying that the other tribes, groups and villages do not partake in human virtue or even human nature, but are, for the most part, 'bad people,' 'nasty people,' 'land monkeys,' or 'lice eggs.'⁶²

Sometimes philosophers have plied their trade in such a way as to provide intellectual respectability to this tragic tendency to deny the great worth of those so unfortunately ensconced in the relevant out-group. Recall, for example, the Aristotelian claim that some persons lack the full complement of rational capacities, are thereby natural slaves, and hence that some wars are justified in order to acquire natural slaves -- war as a species of hunting, as Aristotle puts it.⁶³ Recall as well the resuscitation of Aristotle's

⁶². Quoted in Michael J. Perry, **Toward a Theory of Human Rights**, (Cambridge: Cambridge University Press, 2007), pp. 22-23.

⁶³. "Now if nature makes nothing incomplete, and nothing in vain, the inference must be that she has made all animals for the sake of man. And so, from one point of view, the art of war is a natural part of acquisition, for the art of acquisition includes hunting, an art which we ought to practice against wild beasts and against men who, though intended by nature to be governed, will not submit; for war of such a kind is naturally just." **The Politics and The Constitution of Athens**, edited by Stephen Everson, (Cambridge: Cambridge University Press, 1996), p. 21. See, more generally, Peter Garnsey, **Ideas of Slavery from Aristotle to Augustine**, (Cambridge: Cambridge University Press, 1996).

rationale by those intent on rationalizing the exploitation of Native Americans during the colonization of North and South America.⁶⁴

Now we moderns don't often run across forthright denials of equal human worth -- not in polite society, that is. So we might think that denying human worth is a thing of the past -- all too common in primitive societies, but nothing we need to worry about. This is, unfortunately, not even close to the truth. Our veneer of respectable moral commitment is all too easily stripped away when we find ourselves under grave threat. Nowhere is this more tragically and recurrently manifest than in violent communal conflict: war powerfully threatens a soldier's already tenuous grasp of the worth of human beings with the consequence that it's only too common for soldiers to deny that the members of 'enemy out-groups' have great worth.⁶⁵

Examples of dehumanization and the denial of human worth in war are legion. Consider in this regard Arthur "Bomber" Harris's response to Winston Churchill's moral qualms over the obliteration of Dresden:

I ... assume that [Churchill's qualms amount to] something like this: no doubt in the past we were justified in attacking German cities. But to do so was always repugnant and now that the

⁶⁴. See Francesco de Vitoria, "On the American Indians," in **Political Writings**, Anthony Pagden and Jeremy Lawrence, eds., (Cambridge: Cambridge University Press, 1991), p. 239-51; Richard Tuck, **The Rights of War and Peace**, (Oxford: Oxford University Press, 1991), pp. 44, 66-67; David Brion Davis, **Inhuman Bondage: The Rise and Fall of Slavery in the New World**, (Oxford: Oxford University Press, 2006), p. 54f.

⁶⁵. By 'enemy outgroups,' I mean both enemy combatants and the populations from which those enemy combatants emerge. This is a familiar theme in much of the literature on war. For several recent discussions of dehumanization in (even) 'good wars,' see John Dower, **War Without Mercy: Race and Power in the Pacific War**, (New York, NY: Pantheon Books, 1986), particularly pp. 32-73; Harry Stout, **On the Altar of the Nation: A Moral History of the Civil War**; and A.C. Grayling, **Among the Dead Cities: The History and Moral Legacy of the WWII Bombing of Civilians in Germany and Japan**, (New York: Walker and Company, 2006). In **Achilles in Vietnam: Combat Trauma and the Undoing of Character**, (New York, NY: Simon and Shuster, 1995), Jonathan Shay attributes this tendency to dehumanize enemy combatants to biblical religion, but that tendency seems to me to be ingrained in the very fiber of human relations. After all, and as Shay acknowledges, the Japanese conception of American soldiers during WWII was no less dehumanizing than the reverse -- America soldiers were regularly construed as bestial demons who raped, collected body parts, and tortured innocents.

Germans are beaten anyway we can properly abstain from proceeding with those attacks. This is a doctrine to which I could never subscribe. Attacks on cities like any other act of war are intolerable unless they are strategically justified. But they are strategically justified insofar as they tend to shorten the war and so preserve the lives of Allied soldiers. To my mind we have absolutely no right to give them up unless it is certain they will not have this effect. I do not personally regard the whole of the remaining cities of Germany as worth the bones of one British Grenadier.⁶⁶

Here we have as candid a justification of (what I take to be) the morally tragic area bombing campaign as we're likely to have and it seems squarely grounded on the claim that some human beings, Germans most particularly, lack much by way of worth. (If the area bombing campaign inflicted morally ghastly suffering and death on some 800,000 civilians,⁶⁷ and some large proportion occurred in German cities, and that large quantity of deaths doesn't warrant the death of even one British soldier, well, then even if Harris was speaking rather loosely, he seems to have believed that British worth far exceeds German.) Although Harris would no doubt not avail himself of the Aristotelian move that the Germans weren't fully rational, he doubtlessly believed that the Germans were responsible for causing vast amounts of unjustifiable suffering and might have taken that as some justification for the denial that German citizens were worth every bit as much as British soldiers.⁶⁸ In so doing he would

⁶⁶. Quoted in Marshall De Bruhl, **Firestorm: Allied Airpower and the Destruction of Dresden**, (New York, NY: Random House, 2006), p. 269. Of all people, the pugnacious Air Marshall knew that a good offense was a good defense, and so threw down the gauntlet: although the war against Germany was as good as won, Japan remained, and were the Allies willing to sacrifice the lives of American soldiers in an invasion of the Japanese homeland without 'softening up' the homeland prior to invasion?

⁶⁷. See A.C. Grayling, **Among the Dead Cities**, p. 5.

⁶⁸. The idea was 'in the air,' so to speak. Consider the following BBC broadcast from 1942:

We are even sorry for the women and children who may have suffered for the stupidity of their menfolk in putting Hitler in power and their cowardice in keeping him there. We are sorry for them, but when we remember Warsaw, Rotterdam, Coventry, and Belgrade, and wonder how many of the women and even the children of Cologne exulted at the activities of the Luftwaffe, then we harden our hearts. For the German women, and even the German children, ought to be capable of recognizing evil and rejecting it."

have articulated a common line of thought, one expressed most repugnantly in Theodore Kaufman's 1940 *Germany Must Perish!*, which began:

Today's war is not a war against Adolf Hitler. Nor is it a war against the Nazis. It is a war of peoples against peoples, of civilized peoples envisioning Light against uncivilized barbarians who cherish darkness.... [Hitler, the Kaiser, Bismark are] merely mirrors reflecting centuries-old inbred lust of the German nation for conquest and mass murder.... This time Germany has forced TOTAL WAR upon the world. As a result, she must be prepared to pay a TOTAL PENALTY. And there is one, only one, such Total penalty: Germany must perish forever! In fact, not fancy!⁶⁹

As if smitten with the same malign virus, Russian soldiers raped and pillaged their way through Germany armed with Ilya Ehrenburg's comparably repulsive rationalization:

Kill! There is nothing that is innocent in the German. Neither in the living nor in the unborn. Follow the directive of Comrade Stalin and trample into the ground forever the Fascist beast in his cave. Break by force the racial haughtiness of German women. Take them as your lawful prey. Kill, you brave advancing Red soldiers.⁷⁰

It's in the context of a generalized dehumanization of the German people that one can best understand the Red Army General who was surprised to find that the German children searching for their parents in a blazing town "were crying in exactly the same way as our children cry."⁷¹ And that dehumanization of the German people was itself a response to an long-

Quoted in Vera Brittain, **One Voice: Pacifist Writings from the Second World War**, (New York, NY: Continuum, 2005), p. 104. This is the view adopted by another architect of area bombing, Curtis LeMay, after the firebombing of Tokyo: "There are no innocent civilians ... The entire population got into the act and worked to make those aeroplanes or munitions ... men, women, and children." Quoted in A.C. Grayling, **Among the Dead Cities**, p. 142.

⁶⁹. Quoted in A.C. Grayling, **Among the Dead Cities**, p. 163.

⁷⁰. Quoted in Robert Holmes, **Acts of War: The Behavior of Men in Battle**, (New York, NY: Free Press, 1985, p. 390.

⁷¹. Anthony Beevor, **The Fall of Berlin 1945**, (New York, NY: Penguin Books, 2002), p. 199.

term project of dehumanization and brutalization the Germans directed at their enemies, as the following Nazi propaganda leaflet exemplifies:

Anyone who has ever looked into the face of a red commissar knows what the Bolsheviks are like. Here there is no need for theoretical expressions. We should insult the animals if we described these mostly Jewish men as beasts. They are an embodiment of the Satanic and insane hatred against the whole of noble humanity. The shape of these commissars reveals to us the rebellion of the *Untermenschen* against noble blood. The masses, whom they have sent to their deaths by making use of all means at their disposal such as ice-cold terror and insane incitement, would have brought an end to all meaningful life, had this eruption not been dammed at the last moment.⁷²

Harris, Kaufman and Ehrenburg express a theme that recurs far too often in violent intra-communal conflict and which it would be utopian to believe will end anytime in the near future (much less that we've already gotten past it!): by virtue of their embracing a morally repugnant project our enemies makes it the case, not only that they forfeit certain rights, but that they no longer have the dignity, sacredness or worth on which those rights are grounded. Of course, this 'theme' has its contemporary manifestations. So, for example, when enemies butcher, mutilate or torture their brothers-in-arms, soldiers must resist the all too human tendency to carve humanity up into insiders and outsiders and then to deny worth to the latter. Very regrettably, some have not.⁷³

⁷². Quoted in Omer Bartov, **Hitler's Army: Soldiers, Nazis and War in the Third Reich**, (Oxford: Oxford University Press, 1992), p. 126.

⁷³. Neither have some civilians. In one trenchant and grim variation on our theme, Jonathan Schonsheck has argued that suicide terrorists lack a moral right not to be tortured. If he is correct, the only moral impediment to our torturing a suicide terrorist (or, presumably, experimenting on a suicide terrorist for some worthy medical aim) is "our need to be attentive to our own moral integrity." ("Thwarting Suicide Terrorists: The Locus of Moral Constraints and the (Ir)Relevance of 'Human Rights,'" **Universal Human Rights**, David A. Reidy, ed., (Lanham, MD: Rowman and Littlefield, 2005), p. 222.) This extremely dubious normative claim is predicated on a prior assumption about moral status: because "to be a bearer of moral rights is to be a respecter of moral rights..., the moral community does not automatically include as members the entirety of humanity," most particularly those who demonstrate by thought and action their utter and perfidious repudiation of the worth of their fellow species-mates. ("Thwarting Suicide Terrorists," p. 221.) Here we have, I take it, a candid denial of human worth that avoids outré appeals to race, gender

Now, you might say, it's hardly surprising to find such sentiments expressed in a nazified Wehrmacht or communist Red Army. But similar pressures affect soldiers of all wars, and those pressures have similar effects, as is powerfully expressed in Eugene Sledge's **With the Old Breed at Peleliu and Okinawa**. Reflecting on a fellow Marine he saw cutting the gold teeth from a writhing Japanese soldier, Sledge remarks,

Such was the incredible cruelty that decent men could commit when reduced to a brutish existence in their fight for survival amid the violent death, terror, tension, fatigue, and filth that was the infantryman's war. Our code of conduct toward the enemy differed drastically from that prevailing back at the division C[ommand] P[ost]. ...To the noncombatants and those on the periphery of action, the war meant only boredom or occasional excitement; but to those who entered the meat grinder itself, the war was a nether world of horror from which escape seemed less and less likely as the casualties mounted and the fighting dragged on and on. Time had no meaning; life had no meaning. The fierce struggle for survival in the abyss of Peleliu eroded the veneer of civilization and made savages of us all. We existed in an environment totally incomprehensible to men behind the lines – service troops and civilians.⁷⁴

I suspect that we are ambivalent about human worth. Many (most?) of us are confident that each human being has great worth. In so doing, we take for granted a claim that most human beings have simply assumed to be false and that runs contrary to our persisting tribal predilections. But when we're differently circumstanced our tribal tendencies erupt: when those we love are brutalized and degraded by our fellow human beings, *they* seem to have less than no worth and we have a strong disposition to treat them accordingly. Civilization is a very thin veneer. **As Bishop George Bell argued prior to the Second**

and ethnicity. For a competing view, see Jeremy Waldron, "What Can Christian Teaching Add to the Torture Debate about Torture," **Theology Today** 63 (2006): 330-343.

⁷⁴. **With the Old Breed At Peliliu and Okinawa**, (Oxford: Oxford University Press, 1990), pp. 120-21. See also Jonathan Shay, **Achilles in Vietnam**, pp. 103 ff.

World War, in war we often take seriously arguments we would dismiss out of hand outside of war.

This is no less true of our soldiers than it is of us. If that's the case, and if we want soldiers to retain a motivationally efficacious commitment to the worth of each human being, then we should be extraordinarily careful to refrain from undermining a soldier's sense that others have great worth. But requiring a soldier to obey legal orders to violate human beings does just that. Why think that?

Recall that we are considering the following set of circumstances. A soldier is legally ordered by a military superior to perform some act that the soldier knows is morally repugnant. It's not just that he is ordered to perform some act that he *suspects* is morally repugnant: it *is* repugnant and he *knows* that it is. So we're imagining a case in which, say, an RAF pilot during WWII is ordered to drop incendiary bombs on a housing development, he knows that the civilians living in that development are utterly innocent, and he knows that whatever militarily important aims that he achieves by dropping his incendiary bombs on the women and children below could be better achieved by dropping his bombs on a nearby rail transportation node. And the question is whether we should so construct the social role of soldier that its inhabitants acquire a moral obligation to obey such orders. My view is that, if we were to do so, we would thereby weaken a soldier's already tenuous commitment to the worth of his fellow human beings. Why?

We have a powerful tendency to rationalize the injustices we commit. So if a soldier violates his fellow human beings, he naturally rationalizes and has ready to hand an ingrained strategy for bringing that off: by dividing humanity up into in-groups and out-groups, placing enemy combatants and their home populations into the out-groups, and conceptualizing the out-groups as sub-human, beastly, evil, etc. This rationalizing project deeply shapes the way a soldier construes the members of enemy out-groups – she sees them as Hajji, Hun, Kraut, gook, cockroach, Jap, human animal, bacillus or beast. For a soldier to construe the members of an enemy out-group in that way just is to see them as fit for violation. And, of course, a soldier who construes the members of an enemy out-group as fit for violation is so far forth less likely to treat them as befits their actual worth.

Violation begets further violation by way of self-justification – with potentially tragic consequences for all.

Now it might seem that this argument has very limited scope. After all, very few soldiers in the United States military will be legally ordered to violate human beings: the laws and rules of engagement that apply to the United States military are sufficiently robust that conscientious obedience to those extant regulations will avoid the most egregious and common violations of human beings. Those that remain legal will be so uncommon, and so difficult to verify as violations, that the brutalizing effects of the doctrine of obedience to law will be far too minimal to have much normative weight. Given that any criterion will have some problems in the application, it might not seem that the doctrine of obedience to law fares all that badly.

I'm not persuaded by this – primarily because it seems that compliance with legal constraints on the United States military still permits grave violations of human beings. The cases I've already mentioned sample that actuality. Col. Marchal's order to abandon the Tutsis was legal but a massive and grave failure to respect the worth of those innocent Tutsis. If the Marines who were attacked from the bus returning residents to Fallujah had returned fire, they would likely have killed or maimed innocents but without committing a crime. Etc. But I want to focus on another claim.

It seems to me that the mere willingness on the part of soldiers to comply with the doctrine of obedience to law is deeply compromising. If that doctrine is correct, a soldier must obey a legal order even when he knows that doing so involves the violation of human beings – the death, for example, of large numbers of non-combatants. Any such order need not, should not, but has in fact, been issued. Given that it has been issued, that soldier is now obliged to perform an action that he would otherwise have been morally *forbidden* to perform – that follows from the doctrine of obedience to law and the nature of a legitimate authority's lawful order. Now consider the state of mind of a soldier who is contemplating the doctrine of obedience to law – perhaps he is attempting to determine whether he will serve in the United States military and so is attempting to determine whether he can in good conscience fulfill the obligations attached to the role of soldier. What understanding of the moral status of

his fellow human beings is consistent with his voluntarily consenting to violate his fellow human beings if he happens to be so unfortunately circumstanced that the law permits and his superior demands that he perform some action that results in the death or suffering of untold numbers of people? I doubt that a soldier who makes such a generalized commitment can also firmly commit to the great worth of his fellow human beings. Mere willingness to obey the doctrine of obedience to law compromises and, one fears, corrupts.

So, then, to require soldiers to obey the doctrine of obedience to law might result in some soldiers' actually violating their fellow human beings, with unfortunate results for their perception of the worth of the members of enemy out-groups. Moreover, to require soldiers to obey the doctrine of obedience to law requires of them a willingness to violate others, whether or not they are ever actually ordered to do so, that is best explained by their having, or adopting, or perhaps even embracing, a radically inadequate estimation of the worth of others. Presumably, this is not merely an intellectual peccadillo: a radically inadequate estimation of the worth of other human beings will sometimes result in a failure to treat others as befits their great worth. In that case, we have some reason to believe that (3) is true: requiring soldiers to obey the doctrine of obedience to law compromises an already tenuous commitment to the worth of other human beings. And, of course, from (1), (2) and (3), it follows that we should not demand that soldiers obey the doctrine of obedience to law.

8.3 Further Arguments for the Doctrine of Conscientious Obedience to Law. Suppose not only that this argument is sound but also that it constitutes decisive moral reason to reject the doctrine of obedience to law. That supposition does not settle the issue. After all, it's possible that powerful *non-moral* reasons defeat that moral argument. Perhaps allowing soldiers to defy legal orders solely on moral grounds risks severe military dysfunction and so inhibits the United States from pursuing policies that further its national interests. In that case, advocates of the doctrine of obedience to law might very well claim that, although vulnerable to compelling moral objections, those objections are more than counter-balanced by competing considerations of national interest or communal well-being. I would not be surprised to discover that some are attracted to this line of argument, since the denial that moral considerations are

overriding recurs surprisingly often in the literature on the morality of war.⁷⁵

I do not want to defend the claim that decisive moral reasons must in every case override competing non-moral reasons for action – that’s a very controversial claim and one very difficult to defend. Rather, I want to adduce various reasons to believe that the doctrine of conscientious obedience to law needn’t have seriously dysfunctional consequences. It’s not clear at all how these considerations ‘add up,’ and whether they ‘add up’ in a way that makes it better ‘overall’ for us to require soldiers to obey the doctrine of conscientious obedience to law. Consequently, I’ll just articulate the beneficial non-moral consequences of requiring soldiers to obey the doctrine of conscientious obedience to law and leave it to the reader to reach her own conclusion.

First, if we were to demand that soldiers obey legal orders to commit grave moral wrongs, we would make service in our military inhospitable to many citizens who would otherwise serve with distinction and honor. It is, of course, hard to quantify, but it’s plausible to suppose that many citizens are more than willing to sacrifice their comforts, bodily integrity and even their lives to defend against unjust attack, but that those citizens are unwilling to do so at the cost of intentionally committing grave moral wrongs, or at the cost of being willing to commit grave moral wrongs. I am confident that there are now many who serve in the United States military for whom that is the case.⁷⁶ Were we to demand that soldiers be willing to

⁷⁵. Thus, for example, in defending his doctrine of supreme emergency, Michael Walzer claims that “There are no moments in human history that are not governed by moral rules; the human world is a world of limitation, and moral limits are never suspended – the way we might, for example, suspend *habeas corpus* in a time of civil war. But there are moments when the rules can be and perhaps have to be overridden. They have to be overridden precisely because they have not been suspended.” **Arguing About War**, (New Haven, CO: Yale University Press, 2004), p. 34. I take Walzer’s view to be that we can sometimes have adequate reason to violate an all-in moral obligation (such that moral obligations are generically like the requirements of etiquette in that they can be overridden by competing normative considerations – in Walzer’s case, communal survival). See, generally, David R. Mapel, “Realism and the Ethics of War and Peace,” in **The Ethics of War and Peace: Religious and Secular Perspectives**, Terry Nardin, ed., (Princeton, NJ: Princeton University Press, 1996).

⁷⁶. It seems to me that a very common sort of theist cannot commit to obey the doctrine of obedience to law. I’ve articulated an argument to that conclusion in “God, War and Conscience,” **Journal of Religious Ethics** 35/3 (2007): 479-506.

violate their fellow human beings, we would disqualify them from service, to our great loss. Moreover, we would not similarly disqualify those who lack such compunctions, and we might even attract some who are drawn toward the prospect of committing injustice. That is a prospect we should greatly regret.⁷⁷

Second, committing an injustice can ruin an otherwise fine soldier. Even the entirely unintentional and utterly blameless destruction of an innocent human being can cause severe psychological trauma.⁷⁸ How much more so is willing compliance with an order to destroy human beings who have done absolutely nothing to render themselves liable to lethal attack? If requiring a soldier to commit a grave injustice is a terrific way to ruin him, then we have powerful reasons of a narrowly military sort to demand that soldiers refuse to obey orders to violate their fellow human beings. Of course, we have correlative moral, political, and even self-interested reasons as well.⁷⁹

⁷⁷. See, for example, the disturbing article, "I Came Over Here Because I Wanted to Kill People," **Washington Post** Jan 30, 2006, B01. The first paragraph reads as follows: "I came over here to kill people." Over a mess-tent dinner of turkey cutlets, the bony-faced 21-year-old private from west Texas looked right at me as he talked about killing Iraqis with causal indifference. It was February, and we were at his small patrol base about 20 miles south of Baghdad. "The truth is, it wasn't all I thought it was cracked up to be. I mean, I thought killing somebody would be this life-changing experience. And then I did it, and I was like, 'All right, whatever.' He shrugged. 'I shot a guy who wouldn't stop when we were out at a traffic checkpoint and it was like nothing,' he went on. 'Over there, killing people is like squashing an ant. I mean, you kill somebody and it's like 'All right, let's go get some pizza.'" The speaker, Steven D. Green, was later charged with the premeditated rape and murder of a 14 year-old girl and her family in Mahmudiyah, Iraq. See the grim series of events as described in Jim Frederick's **Black Hearts: One Platoon's Descent into Madness in Iraq's Triangle of Death**, (Crown Books, 2011).

⁷⁸. So, for example, during the recent war in Iraq, Sgt. Rob Serra witnessed an old lady wandering toward another vehicle while patrolling with his fellow Marines in Fallujah. Despite numerous attempts to deter her from approaching the vehicle, she continued on, and, as she neared the vehicle, began to reach into a bag she was carrying. Sgt. Serra fired his weapon in order to alert the other vehicle, which responded by unleashing all of its weapons on her, and in the process ripping her apart. On inspection, she had been reaching for a white flag, not the explosive Serra had feared. Serra's role in that tragedy was, so it seems, entirely blameless. Nevertheless, the traumatized marine was unable to perform his military responsibilities and soon thereafter left the military. I learned of Serra's story both from a 60 Minutes Special, and from conversations with Serra's Chaplain, CDR Tom Webber, who was assigned to the Center for Professional Military Ethics at the United States Naval Academy during the academic year 2005/2006.

Third, I wonder whether we can trust soldiers who are willing to obey legal orders to violate human beings to play their role in the division of military labor that is, as I mentioned earlier, so crucial to the moral and political viability of our liberal democratic polity. We train soldiers in the deliberate and intentional use of force, and provide them with access to armaments with great destructive potential, but only insofar as we can trust them to use their weapons and training in submission to government. Our trust has a moral basis: every soldier in the United States military promises to support and defend the Constitution of the United States and so the hierarchy of political and military authorities established therein. Our confidence that they will use their vast destructive potential in submission to submit to higher authority depends in significant part on our confidence that they will keep that promise. But the very moral seriousness that grounds our confidence that soldiers will use their destructive force in compliance with higher authority should also compel them to defy a morally atrocious order. After all, it's hard to see how a person could sensibly be committed to keep her promises when she's willing to violate human beings. Why so fastidious about keeping promises when she is willing to commit a grave moral atrocity? If a soldier is willing to obey a legal order he knows will violate a fellow human being, it's doubtful that we can trust him to be effectively moved by less weighty moral considerations, such as that he ought to abide by the division of military labor essential to our liberal democratic polity.

Fourth, a soldier who is fully committed to treating each of his fellow human beings as having great worth, and who is willing on that basis to *disobey* a legal order that requires him to violate another human being, may very well be most fastidious in *complying* with legal orders when it's morally most crucial that he do so. As I noted earlier, because obedience to legal orders can be exceedingly dangerous, soldiers can have powerful reasons of personal self-interest to disobey legal orders: obeying a legal

⁷⁹. There is now a large literature on the manner in which participation in war causes *moral injury*. See generally **Tom Frame, *Moral Injury: Unseen Wounds in an Age of Barbarism***, (Sydney: New South Press, 2015); Marc LiVecche, ***The Good Kill: Moral Injury and Just War***, (Oxford: Oxford University Press, forthcoming); Robert Emmett Meagher and Douglas A. Pryor, eds., ***War and Moral Injury: A Reader***, (Eugene, OR: Wipf and Stock, 2018); Peter Marin, "Living in Moral Pain," ***Psychology Today*** (November, 1981): 68-80; Jonathan Shay, ***Achilles in Vietnam: Combat Trauma and the Undoing of Character***, (New York, NY: Scribner, 1994); Jonathan Shay, "Moral Injury," ***Psychoanalytic Psychology*** 31/2 (2014): 182-191.

order to identify a target as a combatant can be far more dangerous than attacking and subsequently verifying the target as a combatant. Those who are so firmly committed to the worth of human beings that they're willing to defy a legal order at great personal and professional risk will be that much more likely to obey legal orders when doing so is personally harmful to them.⁸⁰ Hence, having soldiers who are so shaped that they are compelled to defy certain legal orders might very well result in their generally being willing to obey legal orders in cases where doing so is both crucial and personally dangerous.

Fifth, although it's not the primary function of our military to shape soldiers so that they become better citizens, we should also expect that military service does not make soldiers into worse citizens. We should therefore expect our military not to undermine a soldier's commitment to moral claims crucial to our liberal democracy and so to the claim that each human being has great worth. Since it's plausible to suppose that a soldier's willingness to violate his fellow human beings on being ordered to do so undermines his sense that each of his fellow human beings deserves respect, and since having that sense is an important civic good, we have good reason to expect soldiers to refrain from obeying legal orders to commit injustice.

⁸⁰. Consider in this regard the importance of a motivationally efficacious commitments to the great worth of human beings for soldiers circumstanced in the kind of counter-insurgency war described in Sydney Freedberg's recent article on Post-Traumatic Stress Disorder: "That burden becomes ever greater in an insurgency, in which the "empty battlefield" of the World Wars becomes a crowded city street or marketplace where enemies and innocents intermingle, and the same aggression that produces victory one moment can create an atrocity the next. After the roadside bomb cost one of Powers's men his arm, he recalled, Iraqi civilians gathered to gawk and jeer. "The locals were clapping and cheering." A machine gunner on one of Powers's Humvees began to lose control. "He was getting ready to open up with the .50-caliber into a crowd of about two or three hundred," Powers said. "I had to yell and yell, but he was very angry, with tears in his eyes, and he couldn't hear very good because he had some liquids coming from his ear [from the concussion of the roadside bomb]. I had to hit him in the leg and pull him down out of the hatch to get him away from the weapon." Powers physically hauled the man off the machine gun, calmed him down, and then had to put him right back on the gun to watch for insurgents. "He was mad, he was shaking, but he didn't fire." "Intimate Killing," *National Journal*, 7/21/2007.

As I said, I have no way to show that the spate of arguments I've articulated show that we should adopt the doctrine of conscientious obedience to law. But they seem to make that position at least a reasonable one: that soldiers act in accord with the doctrine of conscientious obedience to law promises to secure important moral, political, personal and military aims. If this is correct, then we have good reason to expect soldiers in the United States military to comply with the doctrine of conscientious obedience to law. Canonically formulated, I understand that doctrine as follows:

- (1) A soldier is morally and legally obliged to obey a legal order unless (A) that order is premised on a lack of information and is seriously morally flawed or (B) that order is not premised on a lack of information but, if obeyed, would egregiously violate human beings.⁸¹
- (2) A soldier to whom a military superior issues a weakly illegal order is permitted either to obey or to disobey that order; and
- (3) A soldier to whom a military superior issues a strongly illegal order is morally forbidden to obey that order, unless obeying that strongly illegal order is necessary to avoid egregious violations of human beings.⁸²

It should go without saying, of course, that the doctrine of conscientious obedience to law is consistent with the claim that soldiers should, in the vast majority of cases, obey the legal orders directed at them. It's only in the exception that sufficiently powerful command-independent considerations override the powerful *prima facie* obligations typically generated by a military superior's legal order. Again, it's only in the exception that sufficiently powerful command-independent considerations override a soldier's powerful *prima facie* obligation to disobey an illegal order. Moreover, nothing I've argued is even slightly in tension with the

⁸¹. To clarify, a soldier who disobeys a legal order when he has relevant information that his superiors lack needs a less weighty moral rationale (the order must only be 'seriously morally' flawed) than he needs when he lacks relevant information that his superiors lack (the order must 'egregiously violate' human beings. I have at this point no particularly useful way to make this distinction.

⁸². I've qualified (3) in response to the predicament of Hugh Thompson's crew, who were issued a strongly illegal order and who should have obeyed that order nevertheless.

claim that a soldier so circumstanced ought to follow the appropriate procedures. And there is no doubt that any time a soldier disobeys a legal order, or obeys an illegal order, she does so at considerable personal risk – if she has acted wrongly, she has violated the law, she has violated a powerful moral obligation, and she is properly punished. Nevertheless, in spite of the risk involved, a soldier must be prepared to defy an order to perform a gravely wrong act, even when that order is lawful. That is, at least, what we, the citizens of the United States, should expect of those vocationally dedicated to our protection.

9.0 Virtuous Obedience and the Doctrine of Conscientious Obedience to Law. My working hypothesis has been that we should expect our soldiers to have the virtue of obedience so long as exercising that virtue enables them better to fulfill their military responsibilities. This assumption has led us to specify not only what makes for the virtue of obedience but also whether and in which circumstances our soldiers should obey or disobey the demands of their superiors. As we have seen, crucial liberal democratic normative commitments provide powerful reason for our soldiers to defy their military and civilian superiors in the appropriate exception. I take the doctrine of conscientious obedience to law to specify those exceptional circumstances in a very general way.

Now we can imagine our soldiers complying with the doctrine of conscientious obedience to law. We can easily fabricate sea stories about soldiers who realize that they ought to defy a legitimate authority's order and then straightaway do so. But of course it's one thing to *imagine* soldiers who comply with the doctrine of conscientious obedience to law and quite another for actual, living, breathing human beings to do so. As most of us know, and as Milgrim has exemplified, we human beings do not easily defy the demands of those who have legitimate authority over us even when compliance implicates us in grave moral wrong. That powerful predisposition to obey is no doubt reinforced by the peculiar circumstances of soldiering: because a soldier should almost always comply with the commands of her military and civilian superiors, because each soldier will therefore be trained to obey her military and civilian superiors,⁸³ because the consequences of mistaken defiance can be extremely costly, and because a soldier's predisposition to obey will often be reinforced by

⁸³. See generally Thomas Ricks, **Making the Corps**, (Scribner, 1998).

pressures to conform to group expectations,⁸⁴ it will be extremely difficult for a soldier to defy in those exceptional circumstances in which he ought to.

Given the difficulty of complying with the doctrine of conscientious obedience to law, we have powerful reason to expect our soldiers to have the cognitive and motivational resources to resist their powerful disposition to obey.⁸⁵ We should want them to have a moral identity so firmly wedded to human dignity that they cannot comply with a legitimate authority's demand that they violate the innocent – even when that authority does so within the limits of the law and so in accord with the normative powers that government has granted that authority. Put the other way around, we should want a soldier to accord the commands of a legitimate authority their *due* normative weight in deliberation and action, *therefore* to recognize that those commands can be overridden by considerations of human worth, and so we should want a soldier to be powerfully disposed to defy commands that fail to treat human beings as befits their great worth.

Soldiers so formed – *virtuously* obedient soldiers – seem best able to fulfill the doctrine of conscientious obedience to law. Because a virtuously obedient soldier has the doxastic, detective, behavioral and motivational

⁸⁴. On the distinction between obedience (compliance with a superior's commands) and conformity (compliance with group expectations), see Milgram, **Obedience to Authority**, pp. 113-21.

⁸⁵. I have nothing but vague and useless generalities to offer about how to achieve that end. So, for example, given that our soldiers should (almost always) defy strongly illegal orders, they should have some appropriate understanding of the relevant legal constraints on their behavior and hence the appropriate legal training. There is, after all, little point in demanding that our soldiers disobey strongly illegal orders if we do not ensure that their training includes familiarization with the law as it applies to their vocation. We can prosecute soldiers who wrongly obey and in so doing express our moral condemnation – see the tortured case of Eddie Gallagher. David Philips, **Alpha: Eddie Gallagher and the War for the Soul of the Navy SEALs** (Crown Books, 2022). We can refuse to prosecute those who rightly disobey, and in so doing condone their disobedience. Again, we can honor soldiers who disobey in the appropriate exception – as Congress honored Hugh Thompson many years after his role in ending the massacre at Mai Lai, and after he had long been vilified by many military professionals. We can include in the training of our soldiers the opportunity to reflect on cases in which disobedience is morally appropriate, as now occurs at the United States Naval Academy. We can, of course, also have our soldiers reflect on cases of improper disobedience, as is also done at the U.S. Naval Academy.

components of the virtue of obedience, he will recognize that the vast majority of the commands he is issued by his military superiors generate moral obligations of very great normative weight, whether or not he takes them to be morally sound and pragmatically prudent, and he will perform the action commanded (at least in part) because he has been so commanded. But he will also have the discriminatory and deliberative components of the virtue of obedience, and so recognize that the commands his superiors direct at him can misfire in a number of respects. Most particularly, he will recognize that his superiors can legally order him to act in a way that egregiously violates innocent human beings. If he has the virtue of obedience -- the genuine article, not the desiccated simulacrum that leads to unthinking obedience -- then he will accord to the commands of his military superiors their due normative weight and therefore will be powerfully disposed to defy any such order. Given the doctrine of conscientious obedience to law, this is exactly what we want. So it seems that, if we want soldiers to comply with the doctrine of conscientious obedience to law, we'll also want them to have the virtue of obedience.

10.0 An Equivocal Conclusion. Our reflections on the virtue of obedience have thus far been straightforwardly positive. But I'm quite confident that many military professionals would have a rather less rosy estimation of the virtuously obedient soldier than mine. I want to conclude this paper by giving voice to one of the concerns I'd expect them to have.

10.1 Virtuous Obedience and *Ad Bellum* Disobedience. We now morally and legally require soldiers to obey legal orders to fight in even unjust wars and so we forbid soldiers to disobey a legal order to fight on grounds that a given war is unjust. That is, we forbid soldiers to exercise *ad bellum* disobedience. But it seems that a virtuously obedient soldier cannot fight in a war he knows to be unjust and so must exercise *ad bellum* disobedience. Hence, soldiers who marry the virtue of obedience to a motivationally efficacious commitment to human worth are unable to satisfy one of the most important extant responsibilities of soldiering.

This is, of course, a controversial argument -- in a number of respects. So I'll briefly amplify it, though I have no pretense of providing an exhaustive treatment.

- (1) A virtuously obedient soldier cannot obey even a legitimate authority's command that he knowingly and intentionally violate the innocent.
- (2) If a virtuously obedient soldier cannot obey even a legitimate authority's command that he knowingly and intentionally violate the innocent, then he cannot comply with an order that requires him to fight in an unjust war.
- (3) If a virtuously obedient soldier cannot comply with an order that requires him to fight in an unjust war, then he cannot fulfill crucial military responsibilities.
- (4) If a virtuously obedient soldier cannot fulfill crucial military responsibilities, then virtuously obedient soldiers are unfit for military service.
- (5) Hence, virtuously obedient soldiers are unfit for military service.

Ad (1): Crucial to virtuous obedience, as I have construed that concept, is the deliberative component – the disposition to accord due normative weight in deliberation and action to a legitimate authority's commands. As we have seen throughout, a military superior can employ his normative authority to oblige subordinates to perform actions against which there is a sound command-independent rationale, such that, as William of Ockham observed, "the superior sins mortally in commanding, and yet the subordinate merits in obeying."⁸⁶ But there are limits to any legitimate authority's normative powers: no normative authority can successfully oblige subordinates egregiously to violate the innocent and so, correlatively, subordinates ought to disobey even a legitimate authority's order that they commit an egregious injustice (such as the intentional killing of the innocent). Given that a soldier who has the virtue of obedience cannot obey a legitimate authority when he has adequate normative reason to refrain from obeying, and given that a soldier cannot be morally obliged to obey even a legitimate authority's command that he violate the innocent, a soldier who has the virtue of obedience cannot obey even a legitimate authority's order to violate innocent human beings.

Ad (2): Let us assume that a soldier has been ordered to fight in a war that lacks a just cause. If he obeys that order, then all of the people he kills are 'innocents,' whether they are professional soldiers who use lethal force

⁸⁶. William of Ockham, **A Short Discourse on Tyrannical Government**, Arthur Stephen McGrade, ed., John Kilcullen, trans., (Cambridge: Cambridge University Press, 1992), p. 19.

against him in order to repel his country's unjust attack or infants who cannot do him the slightest harm. That is, they are human beings who have great worth, and so a natural, human right to life, and so a right to be free from violent assault unless *something* happens to make it permissible to attack them.⁸⁷ And in the case we're considering, *nothing* has been done, either by the soldiers or by their government, to render them liable to lethal assault.⁸⁸ So a soldier who kills enemy combatants who are trying to repel his country's unjust attack thereby kills innocent human beings. Correlatively, a soldier who intends to kill those he knows to be defending against his country's unjust attack thereby intends to kill those he knows to be innocent human beings. He therefore has the strongest of reasons to refuse to obey any order to attack them. As Vitoria argues, "...If [a given] war seems patently unjust to the subject, he must not fight, even if he is ordered to do so by the prince. This is obvious, since one may not lawfully kill an innocent man on any authority, and in the case we are speaking of the enemy must be innocent."⁸⁹ It seems that a soldier who is ordered to fight in a war that lacks a just cause has exceedingly powerful moral reasons to disobey – reasons that no normative authority's commands can override.

Ad (3): By common consent, one of a soldier's most important responsibilities is his obligation to fight when called upon to do so by the governing authorities. For military professionals, it's a matter of personal honor and moral duty that, when required by government to fight in a given war, they obey, whatever their estimation of the overall moral propriety of that war and whatever the personal sacrifice that obedience involves. From their perspective, to disobey a legal order to fight is to violate an exceedingly important requirement of the moral code of military

⁸⁷. Obviously, my understanding of 'innocence' differs from the understanding employed by some Just War Theorists such as Michael Walzer, for whom 'innocent' is roughly synonymous with 'non-combatant.' In my view, the Polish cavalry officers who were attacked by the Wehrmacht in 1939 or the sailors lounging on the deck of the USS Arizona on Dec. 7, 1941 had a right to be free from lethal attack – and their rights were brutally violated by their attackers.

⁸⁸. I am, of course, assuming that no human being becomes liable to lethal attack just by virtue of being unjustly attacked by others and that no human being becomes liable to lethal attack just by virtue of defending himself from an unjust attack – even when she defends herself with lethal force.

⁸⁹. Francesco de Vitoria, "On The Laws of War," **Vitoria: Political Writings**, Anthony Pagden and Jeremy Lawrence, eds., (Cambridge: Cambridge University Press, 1991), p.307.

officership: “to refuse a combat assignment is to commit the most serious offense against one’s military honor and to break faith with one’s peers.”⁹⁰ This is the case even if a soldier is confident that the war in which he’s been ordered to fight lacks a just cause and so should not have been declared in the first place.⁹¹

Ad (4): If soldiers must comply with the governing authority’s decision to wage war -- full stop, and if virtuously obedient soldiers cannot comply with an order to fight in a war that lacks a just cause, then virtuously obedient soldiers are not fit to serve in the United States military. Like the pacifist who cannot promise to fight in any war, the soldier who cannot promise to fight in an unjust war is unfit for military service – both are no doubt fine and admirable human beings, but neither is able to fulfill crucial military responsibilities. Bluntly put, we demand that our soldiers obey orders to violate those they know to be innocent in at least one crucial case. Plausibly, we make them promise to do so as a condition of becoming a soldier: the Oath of Commissioning that candidates take as a condition of entering the social role of officers is understood to impose on the oath taker a duty to fight even in wars that the oath taker believes (correctly) to be unjust.

The argument under consideration faces us with an unsettling choice: deny that we want virtuously obedient soldiers and so soldiers who have the moral fortitude to defy superior orders in the sorts of circumstances in which Thompson found himself or affirm that we want virtuously obedient soldiers and thus soldiers so formed that they cannot fulfill what is, arguably, their most important military responsibility. It’s unclear, then, whether we really want virtuously obedient soldiers after all.

⁹⁰. Malham Wakin, **Integrity First**, p. 72. This opinion is not held only by military officers, but also by citizens as well. So, for example, William Safire, commenting on the refusal of some Israeli soldiers to participate in the forced withdrawal of settlers from Gaza, claimed that such disobedience is “beyond the pale.” **New York Times**, Jan 5, 2005.

⁹¹. In my experience, some soldiers who take this position nevertheless claim that morally grounded disobedience to legal orders is sometimes permissible. Most relevantly, they are willing to grant that a soldier may, in rare cases, disobey a legal order to perform a morally objectionable action during the conduct of a given war, whereas a soldier may never disobey a legal order to fight in a war on grounds that it is unjust. So they seem to regard as permissible *in bello*, but not *ad bellum*, disobedience to legal orders to fight. I doubt that this position, though popular, is morally sound.

10.2 An Unsettling Conclusion. There are, however, a number of ways in which we can circumvent this stark dilemma. Two come immediately to mind. First, we might adopt the position taken by many military officers, and by some advocates of the Just War Tradition, viz., that soldiers should comply with the doctrine of conscientious obedience to law but should not exercise *ad bellum* disobedience. That is, we might try to show that, contrary to initial appearances, even soldiers who are fully committed to treating each of their fellow human beings as befits their worth can coherently promise to fight in unjust wars.⁹²

This is a moral circle I find difficult to square. For the various reasons I earlier articulated, we should want our military to be populated by soldiers who are powerfully disposed to defy orders that fail to treat other human beings as befits their great worth – we want soldiers to have a motivationally efficacious commitment to the great worth of each human being and a deep-seeded disposition to defy superior orders when respect for the worth of others requires defiance. But we cannot reasonably expect soldiers so formed to collude in an unjust war. After all, *if* we rightly praise Thompson for having the moral fortitude to disobey (what he took to be) Congress’ prohibition on ordering his subordinates to attack their fellow soldiers, then we must also praise Thompson for being the sort of person who cannot obey government’s demand that he intentionally kill North Vietnamese soldiers – *so long as* those soldiers were no less innocent than the villagers targeted by Calley and his rampaging collaborators. But that is exactly what they were if the United States lacked a just cause to wage war against North Vietnam. More generally, because the normative case for *ad bellum* disobedience is at least as strong as the normative case for *in bello* disobedience, we cannot reasonably expect soldiers who have a moral identity that compels them to exercise *in bello* disobedience to refrain from exercising *ad bellum* disobedience. So it seems to me that this first attempt to escape our dilemma is a non-starter.

Second, we might deny that soldiers should be required to fight in unjust wars.⁹³ After all, we’ve seen that disobedience is already tolerated, and indeed, required of soldiers in certain kinds of circumstances. So we might think that *ad bellum* disobedience is just another one of those rare kinds of

⁹². So, we might reject (2) above.

⁹³. So, we might reject (3) above. I have attempted to defend this claim in “God, War and Conscience,” *Journal of Religious Ethics* 35/3 (2007): 479-506.

circumstances in which our soldiers may defy superior authority. Indeed, it might seem that this conclusion is supported by the kinds of argument that grounds disobedience in other cases we have discussed: just as the liberal commitment to human worth requires us to reject the doctrine of absolute obedience, as well as the doctrine of obedience to law, it might be the case that our deepest normative commitments also lead us to permit soldiers to refuse to fight in wars that the civilian authorities have authorized, that their military superiors demand they execute, but that they reasonably believe to be unjust. Perhaps *ad bellum* disobedience is the inevitable implication of the line of argument that requires a liberal democracy such as the United States to disavow the doctrines of absolute obedience and obedience to law.

Unfortunately, as a number of military professionals have informed me, tolerating *ad bellum* disobedience would lead to severe military dysfunctions. Military units spend inordinate amounts of time in training. The members of a military unit work in unison over extended periods of time to develop the skills and coordination necessary to military success. Their shared exertions lead them to trust and depend on one another. Should even a rather small percentage of our soldiers opt out prior to the onset of military hostilities, some soldiers who would otherwise survive would die and some missions would fail that would otherwise succeed. However high-minded and idealistic, permitting soldiers to exercise *ad bellum* disobedience would have militarily deleterious consequences and is therefore simply unworkable.

Of all the objections to *ad bellum* disobedience, I find this sort the most powerful. Although various considerations seem to me to blunt its force, it nevertheless retains significant weight: judged strictly from the perspective of military efficiency, it's hard to deny that permitting soldiers to exercise *ad bellum* disobedience would be very bad policy. If so, then we seem stuck between a moral rock and a pragmatic hard place. The moral case in favor of *ad bellum* disobedience is compelling, yet the pragmatic, military case against *ad bellum* disobedience is formidable. We have a powerful moral obligation to insure that our soldiers not use the arms and training we provide them to violate the innocent, and so we have extremely powerful reason to want soldiers to be so shaped that they cannot obey even legal orders to violate the innocent, yet soldiers so formed seem unable to fight when tasked to do so by government and so are unfit for military service.

Given these conflicting considerations, we cannot expect our soldiers to have the virtue of obedience without harboring some strong reservations: if we want them to have the virtue of obedience, as I think we must, then we cannot do so without recognizing the danger that this poses to the capacity of the military to defend the liberal polities it is their primary function to defend.