

W. Chadwick Austin, Shawn D. McKelvy
U.S. Air Force Academy,* United States

THE RELUCTANT WARRIOR: THE CHALLENGE TO INSTILLING LAW OF WAR VALUES IN TODAY'S PROFESSIONAL WARRIOR

*Only the Dead have seen the end of war.*¹

George Santayana

*Wars happen. It is not necessary that war will continue to be viewed as an instrument of national policy, but it is likely to be the case for a very long time. Those who believe in the progress and perfectibility of human nature may continue to hope that at some future point reason will prevail and all international disputes will be resolved by nonviolent means . . . Unless and until that occurs, our best thinkers must continue to pursue the moral issues related to war. Those who romanticize war do not do mankind a service; those who ignore it abdicate responsibility for the future of mankind, a responsibility we all share even if we do not choose to do so.*²

Malham M. Wakin

If wars are to “happen” for the foreseeable future as Professor Wakin counsels, then the effective regulation of the conduct of warfare is essential to the preservation of a civilized world. General Douglas A. MacArthur emphasized this point in confirming the death sentence for Japanese General Tomoyuki Yamashita who was tried for war crimes committed by troops under his command during World War II, writing:

* W. Chad Austin is a Professor of Law in the Department of Law at the U.S. Air Force Academy. He is also a reserve Colonel in the U.S. Air Force Judge Advocate General's (JAG) Corps and a Fulbright Scholar. Shawn D. McKelvy is a Lieutenant Colonel in the U.S. Air Force JAG Corps and is a Senior Military Faculty and Associate Professor of Law in the Department of Law at the U.S. Air Force Academy. Among other courses, both authors teach courses to cadets focusing on the Law of War. The views expressed in this article are those of the authors and may not reflect the position of the U.S. Air Force Academy, the U.S. Air Force, or the U.S. Department of Defense.

¹ George Santayana, *Soliloquies in England and Later Soliloquies*, number 25 (1922).

² Malham M. Wakin, *Introduction in War, Morality, and the Military Profession*, 224 (Malham M. Wakin ed., 2nd rev. ed. 1986).

The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason of his being. When he violates this sacred trust, he not only profanes his entire cult but threatens the fabric of international society.³

In order to earn this sacred trust referenced by General MacArthur above, today's soldier⁴ must at once conform to notions of honor, decency and common humanity, while at the same time carrying out with ferocious lethality the imperatives of war. Achieving this delicate balance of humanity and military necessity is a herculean task for any seasoned military officer, let alone a young enlisted member who may be experiencing the stress of combat for the first time. This article seeks to demonstrate the importance of, and challenges to, instilling law of war⁵ values into today's soldier in the pursuit of developing 'reluctant warriors' that seek to preserve the civilized world.

1. THE PROBLEM... ENTER THE BEAST

In 1902, a Senate committee investigated U.S. military atrocities in the Philippine-American War. The conflict cost the lives of as many as 200,000 civilians,

³ General Douglas MacArthur, *Action of the Confirming Authority*, Feb. 7, 1946, United States v. Yamashita (U.S. Military Commission, Manila, Dec. 7, 1945), Levie, Documents On Pows 298 ("It is not easy for me to pass penal judgment upon a defeated adversary in a major military campaign. I have reviewed the proceedings in vain search for some mitigating circumstance on his behalf. I can find none. Rarely has so cruel and wanton a record been spread to public gaze. Revolting as this may be in itself, it pales before the sinister and far reaching implication thereby attached to the profession of arms. The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason for his being. When he violates this sacred trust, he not only profanes his entire cult but threatens the very fabric of international society. The traditions of fighting men are long and honorable. They are based upon the noblest of human traits, – sacrifice. This officer, of proven field merit, entrusted with high command involving authority adequate to responsibility, has failed this irrevocable standard; has failed his duty to his troops, to his country, to his enemy, to mankind; has failed utterly his soldier faith. The transgressions resulting therefrom as revealed by the trial are a blot upon the military profession, a stain upon civilization and constitute a memory of shame and dishonor that can never be forgotten. Peculiarly callous and purposeless was the sack of the ancient city of Manila, with its Christian population and its countless historic shrines and monuments of culture and civilization, which with campaign conditions reversed had previously been spared.”).

⁴ The word soldier is used in a colloquial sense but is intended to include men and women from all branches of the armed forces.

⁵ Law of war is that part of international law that regulates the resort to armed force; the conduct of hostilities and the protection of war victims in both international and non-international armed conflict; belligerent occupation; and the relationships between belligerent, neutral, and non-belligerent States. It is often called the 'law of armed conflict' (LOAC) or 'international humanitarian law' (IHL).

and though many of these deaths were from famine and disease,⁶ as veterans wrote home or returned from war, stories of rampant brutality by American soldiers began to surface.⁷ Years later, the ongoing violence in the Philippines would inspire a young George C. Marshall, famed U.S. World War II general and eventual U.S. Secretary of State and Nobel Peace Prize winner, on his first assignment fresh out of military school, to tell a fellow officer:

Once an army is involved in war, there is a beast in every fighting man which begins tugging at its chains. And a good officer must learn early on how to keep the beast under control, both in his men and himself.⁸

Sadly, the experiences detailed in the Philippines above more than a century ago were not the end of examples of military members abusing their sacred trust. The beast within, which is ever present in every soldier, took control. Even for nations possessing a reputation for stringent compliance with the law of war, the annals of history, to include more contemporary military engagements, are littered with cases of atrocities committed by soldiers. As Stephen Ambrose writes:

When you put young people, eighteen, nineteen, or twenty years old, in a foreign country with weapons in their hands, sometimes terrible things happen that you wish never happened. This is a reality that stretches across time and across continents. It is a universal aspect of war, from the time of the ancient Greeks up to the present.⁹

All too often the beast wins, and because every nation has an obligation to minimize the reality described above, nations must continue to dedicate time, thought and resources to best prepare their forces for future military operations.

2. COST TO THE MISSION

More than 150 years ago, as Francis Lieber completed his *Instructions for the Government of Armies of the United States in the Field, General Order No 100*

⁶ Department of State, Office of the Historian, *The Philippine-American War, 1899–1902*. Available at: <https://history.state.gov/milestones/1899-1913/war> (accessed: 16.09.2018).

⁷ Paul Kramer, *The Water Cure, Debating torture and counterinsurgency – a century ago*, “The New Yorker”, February 25, 2008, (“A letter by A. F. Miller, of the 32nd Volunteer Infantry Regiment, published in the Omaha World-Herald in May, 1900, told of how Miller’s unit uncovered hidden weapons by subjecting a prisoner to what he and others called the “water cure.” “Now, this is the way we give them the water cure,” he explained. “Lay them on their backs, a man standing on each hand and each foot, then put a round stick in the mouth and pour a pail of water in the mouth and nose, and if they don’t give up pour in another pail. They swell up like toads. I’ll tell you it is a terrible torture.”).

⁸ Luke Mogelson, *A Beast in the Heart of Every Fighting Man*, “The New York Times Magazine”, April 27, 2011.

⁹ Stephen E. Ambrose, *Americans at War*, 1997, p. 152.

(discussed more fully later), he recognized that the value of adherence to his “warrior Code” went beyond being the “right” thing to do. In writing to General Henry Halleck, the General-in-Chief of the U.S. Army, Lieber highlights the strategic military benefits of compliance, writing (*emphasis added*):

I know by letters from the West and the South, written by men on our side, that the wanton destruction of property by our men is alarming. It does *incalculable injury*. It *demoralizes our troops*; it *annihilates wealth irrecoverably*, and *makes a return to a state of peace more and more difficult*. Your order, though impressive and even sharp, might be written with reference to the Code, and pointing out the *disastrous consequences of reckless devastation*, in such a manner as *not to furnish our reckless enemy with new arguments for his savagery*...¹⁰

Francis Lieber recognized early on that unrestrained warfare was not only contrary to his Code, but also had a direct negative military impact on both winning the war and winning the peace. This corollary remains as true today as it has ever been.

As America’s wars in Iraq and Afghanistan demonstrate, despite the overwhelming advantage in combat power, and despite winning virtually every battle from a tactical sense, it may still “lose the war.” U.S. Army intelligence officer, Major Douglas A. Pryer, writes, “Reports of misconduct inspire enemy fighters, serve as recruitment boons for our enemies, turn local populations against us, degrade support for our foreign conflicts at home, and undermine the relationship between our nation and allies.”¹¹ He goes on to argue that when we get it “wrong” in today’s information age, where high-speed communications devices like digital cameras, personal computers and the internet are ubiquitous, the world quickly learns of abuses and the adverse publicity does immeasurable harm. One need look no further than that events Abu Ghraib and others to see the full impact when soldiers violate the sacred trust of protecting those in their care. What is worse, Major Pryer points out, “These defeats did not come at the hands of our enemies. Sadly, we inflicted these defeats upon ourselves, through unethical actions.”¹²

3. A TOLL ON THE SOUL... THE INVISIBLE WOUNDS OF WAR

*The soldier above all others prays for peace, for it is the soldier who must suffer and bear the deepest wounds and scars of war.*¹³

General Douglas MacArthur

¹⁰ Letter from Francis Lieber to General Henry Halleck, New York, May 20, 1863.

¹¹ Major Douglas Pryer, *Controlling the Beast Within: The Key to Success on 21st-Century Battlefields*, “Military Review” January–February 2011, Vol. 5.

¹² Pryer at 5.

¹³ General Douglas MacArthur’s “Duty, Honor, Country” Farewell Speech given to the Corps of Cadets at West Point, May 12, 1962. Available at: <https://nationalcenter.org/MacArthurFarewell.html> (accessed: 16.09.2018).

While a national image may suffer from how wars are fought, it is the individual soldier who must return home carrying the weight of what happens during war. An often overlooked cost of war is the physical and psychological trauma placed on those whom nations send into harm's way to do its bidding. According to the most recent statistics from the U.S. Department of Veterans Affairs, 15% of U.S. veterans of the wars in Iraq and Afghanistan have been diagnosed with PTSD (post-traumatic stress disorder).¹⁴ While this is not a surprising result given the accounts of psychological symptoms following trauma experienced in war dating back to ancient times,¹⁵ what is worthy of continued study is an emerging focus on an invisible wounds of war referred to as "moral injuries" in the context of war.

"Moral injury is the damage done to one's conscience or moral compass when that person perpetuates, witnesses, or fails to prevent acts that transgress their own moral and ethical values or codes of conduct."¹⁶ "In the context of war, moral injuries may stem from direct participation in acts of combat, such as killing or harming others, or indirect acts, such as witnessing death or dying, failing to prevent immoral acts of others, or giving or receiving orders that are perceived as gross moral violations (2). The act may have been carried out by an individual or a group, through a decision made individually or as a response to orders given by leaders."¹⁷

The U.S. Department of Veterans Affairs report initial studies showing that while killing in war is an important indicator in the risk of developing frequent and severe PTSD symptoms, "those who endorsed killing a non-combatant or killing in the context of anger or revenge were more likely to belong to the most symptomatic PTSD."¹⁸

¹⁴ U.S. Department of Veterans Affairs, *War Related Illness and Injury Study Center, (PTSD)*. Available at: <https://www.warrelatedillness.va.gov/education/healthconditions/post-traumatic-stress-disorder.asp> (accessed: 16.09.2018).

¹⁵ U.S. Department of Veterans Affairs, *War Related Illness and Injury Study Center, (PTSD)*, Matthew J. Friedman, *History of PTSD in Veteran's: Civil War to DSM-5* ("Nostalgia" and "Soldier's Heart" were reported in the Civil War described by symptoms such as feeling sad, sleep problems, anxiety, rapid pulse, and trouble breathing. In World War I, "shell shock" was reported with symptoms of panic and sleep problems. In World War II, "shell shock" was replaced with Combat Stress Reaction (CSR), also known as "battle fatigue." Up to ½ of the military discharges were said to be the result of combat exhaustion. PTSD entered the lexicon in 1980 following research involving returning Vietnam War veterans, Holocaust survivors, and sexual trauma victims.) Available at: <https://www.ptsd.va.gov/public/ptsd-overview/basics/history-of-ptsd-vets.asp> (accessed: 16.09.2018).

¹⁶ The Moral Injury Project, Syracuse University, <http://moralinjuryproject.syr.edu/about-moral-injury/>.

¹⁷ U.S. Department of Veterans Affairs, *War Related Illness and Injury Study Center, (PTSD)*, *Moral Injury in the Context of War*. Available at: https://www.ptsd.va.gov/professional/co-occurring/moral_injury_at_war.asp (accessed: 16.09.2018).

¹⁸ *Id.*

It would be hard to disagree with General Marshall that the unrestrained beast is an unwelcome and dangerous member of the military ranks. Now armed with the knowledge that this soldier will also likely return home with significant moral wounds that will haunt him well beyond the battlefield, it is important to determine what qualities make a soldier both effective and desirable, while considering how a nation can best instill and cultivate those qualities and values.

4. WHAT IS THE RELUCTANT WARRIOR?

*Any soldier worth his salt should be antiwar; and still there are things worth fighting for.*¹⁹

General Norman Schwarzkopf, USA

*If, in order to kill an enemy, you had to hit somebody innocent, don't take the shot. Wait another day. Don't create more enemies than you take out by some immoral act.*²⁰

General James N. Mattis, USMC

What is meant by a 'reluctant warrior'? Put simply, a reluctant warrior is one who while ready to employ lethal force when the situation demands, is not eager to do so in "the moment". This moment, as Sir John Keegan describes, is where honor and decency meet on the battlefield, at a point where "there are no judges, more to the point, no policeman at the place where death is done in combat ... all turns on the values of the junior leader present at the moment when the opponent's capacity or will to resist fails, he ceases to be a combatant and he must hope for the mercy of the suddenly stronger."²¹ This moment can also be one that affords the soldier the luxury of time and perhaps even distance, it is the proverbial moment when no one is looking, and where right action is required. The reluctant warrior is one who when confronted with a complex wartime situation, perhaps under intense pressure to compromise his values, has the necessary knowledge and training, coupled with the ability to ethically reason and apply moral fortitude, makes the right call. He answers the questions: "Can I, If I,

¹⁹ General Herbert "Stormin'" Norman Schwarzkopf Jr. was a U.S. Army general whose career culminated as the Commander of U.S. Central Command (CENTCOM). In that capacity, he led all coalition forces in the First Gulf War. Available at: <https://www.forbes.com/sites/kevinkruse/2012/12/27/norman-schwarzkopf-quotes/#2b9af0e14eeb> (accessed: 10.09.2018).

²⁰ *Ethical Challenges in Contemporary Conflict: The Afghanistan and Iraq Cases*, Lecture by (then) Lt Gen James Mattis (U.S. Naval Academy Center for Professional Military Ethics 2004). Available at: https://www.usna.edu/Ethics/_files/documents/MattisPg1-28_Final.pdf (accessed: 10.09.2018).

²¹ J. Keegan, *If you won't, we won't: Honour and the decencies of battle*, "The Times Literary Supplement", issue 4834, 11 (Nov. 24, 1995; London, England).

Should I”²² and then takes decisive action – or employs uncommon restraint – with a goal of accomplishing the mission all the while staying true to the value imbedded in the Marines’ Hymn, “to keep our honor clean”.²³

To fully develop the ‘reluctant warrior’ needed on today’s and tomorrow’s battlefields, this article will look at the role of legal regulation and the practice of military education and training, as well as some of the other factors that influence behavior and decision-making during instances of armed conflict.

5. A STARTING POINT... THE ROOTS AND ROLE OF REGULATION

In June of 1859, Swiss businessman Henri Dunant looked on in horror while witnessing the Battle of Solferino, a brutal fight between the allied French and Sardinian Armies against the Austrian Emperor Franz Joseph I. Upon his return to Geneva, Dunant wrote, in *A Memory of Solferino*, “Here is a hand-to-hand struggle in all its frightfulness; Austrians and Allies trampling each other underfoot, killing one another on piles of bleeding corpses, felling their enemies with their rifle butts, crushing skulls, ripping bellies open with sabre and bayonet. No quarter is given; it is sheer butchery; a struggle between savage beasts, maddened with blood and fury. Even the wounded fight to the last gasp. When they have no weapon left, they seize their enemies by the throat and tear them with their teeth.”²⁴ The experience of witnessing such carnage completely changed the direction of Dunant’s life. His recount of the gruesome details of war spurred a movement ultimately leading to the creation of the International Committee of the Red Cross in 1863 whose mission today is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance.²⁵ Dunant’s work also resulted in the adoption of the First Geneva Convention in 1864.²⁶

²² The “can I, if I, should I” sequence refers to the authors’ framework of thinking that requires a soldier to first ask oneself does the law permit a particular military action; the soldier then considers the consequences of both action and omission; and finally the soldier weighs all factors to determine whether or not he should engage in the proposed military action. Some operational law attorneys frame their legal advice in this fashion.

²³ Marines, The Official Website of the United States Marines Corps, The Marines’ Hymn. Available at: <https://www.marineband.marines.mil/About/Library-and-Archives/The-Marines-Hymn/> (accessed: 5.09.2018).

²⁴ Henri Dunant, *A Memory of Solferino*, American Red Cross 1939–1959, p. 19.

²⁵ The ICRC’s mandate and mission. Available at: <https://www.icrc.org/en/mandate-and-mission> (accessed: 17.07.2018).

²⁶ The First Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864.

During this same period of time, far across the Atlantic Ocean, chaos reigned as fighting raged in the American Civil War. During some of the darkest days of the war, President Abraham Lincoln and his administration turned to Francis Lieber to draft a code of conduct for military forces. An awesome undertaking, this law professor from New York, would toil for months, ultimately producing in 1863 a Code of 157 articles, titled *Instructions for the Government of Armies of the United States in the Field, General Order No 100*, but better known today as the Lieber Code.²⁷ The Lieber Code established the rules for right conduct with accompanying rationale and general principles underlying the rules. Revolutionary for its time as the first comprehensive attempt to codify the customary laws of war, not only would the Lieber Code advance the respect for the rule of law in America, but it was quickly adopted by many European nations and served as the basis for future law of war treaties, namely the Hague Peace Conferences of 1899 and 1907, that would further cement the notion that war is not unlimited.²⁸

Five years following President Lincoln's issuance of the Lieber Code to the Union Army, an International Military Commission assembled in St. Petersburg to consider forbidding the use of certain projectiles in time of war. In 1868, the Declaration of St. Petersburg became the first formal agreement prohibiting the use of certain weapons in war. The stated purpose of the treaty was to fix "the technical limits at which the necessities of war ought to yield to the requirements of humanity" with the Parties declaring "[t]hat the progress of civilization should have the effect of alleviating as much as possible the calamities of war."²⁹ The 1860s initiated a welcome era of positive law to regulate the conduct of hostilities, which flourished during the 20th Century following both of the World Wars, with treaties incorporating traditions and norms that had been developing over centuries,³⁰ becoming a bedrock for how civilized nations conduct themselves on the fields of unfriendly strife.

Along with the development of positive law, came the duty of States to disseminate the law of war and to teach it to their armed forces. This was first codified

²⁷ E. D. Townsend, *Assistant Adjutant General, General Orders No. 100, Instructions for the Government of Armies of the United States in the Field*, Apr. 24, 1863, reprinted in "Instructions for the Government of Armies of the United States in the Field" 1898, Vol. 2, Government Printing Office ("The following 'Instructions for the Government of Armies of the United States in the Field,' prepared by Francis Lieber, L.L.D., and revised by a Board of Officers, of which Major General E. A. Hitchcock is president, having been approved by the President of the United States, he commands that they be published for the information of all concerned").

²⁸ ICRC, *Treaties, States Parties and Commentaries*. Available at: <https://ihl-databases.icrc.org/ihl/INTRO/110> (accessed: 10.09.2018).

²⁹ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November/11 December 1868.

³⁰ See, e.g., Leslie C. Green, *The Contemporary Law of Armed Conflict*, 2000, pp. 20–23 (describing references to warrior codes from ancient Israel, China, India, Greece, Rome, and Islam).

in the 1906 and 1929 Geneva Conventions,³¹ and was subsequently restated in the 1949 Geneva Conventions and their Additional Protocols, in the Hague Convention for the Protection of Cultural Property and its Second Protocol, and in the Convention on Certain Conventional Weapons, all of which specify that the obligation to teach these Conventions to armed forces applies in time of peace as in time of armed conflict.³² The treaties also require States to ensure that members of the armed forces who have duties under those treaties are trained commensurate with those duties.³³

Instituting a system of regulation is a necessary and important starting point. The more daunting challenge is in properly developing the soldiers who will carry out its mandate. This step begins with educating the soldier on the law of war and attempting to instill its best values.

6. KNOWLEDGE IS POWER... SOLDIERS NEED TO THINK

*The nation that will insist on drawing a broad line of demarcation between the fighting man and the thinking man is liable to find its fighting done by fools and its thinking done by cowards.*³⁴

Sir William Francis Butler

*Think like men of action, and act like men of thought!*³⁵

General James N. Mattis

³¹ 1906 Geneva Convention, Article 26; 1929 Geneva Convention, Article 27.

³² First Geneva Convention, Article 47; Second Geneva Convention, Article 48; Third Geneva Convention, Article 127; Fourth Geneva Convention, Article 144; Additional Protocol I, Article 83 (adopted by consensus); Additional Protocol II, Article 19 (adopted by consensus); Hague Convention for the Protection of Cultural Property, Article 25; Second Protocol to the Hague Convention on the Protection of Cultural Property, Article 30; Convention on Certain Conventional Weapons, Article 6.

³³ For example, see DoD Directive 2311.01E, *DoD Law of War Program*, 5.8 (May 9, 2006, Incorporating Change 1, November 15, 2010, Certified Current as of February 22, 2011) (“The Secretaries of the Military Departments shall develop internal policies and procedures consistent with this Directive in support of the DoD Law of War Program to: ... 5.8.1. Provide directives, publications, instructions, and training so the principles and rules of the law of war will be known to members of their respective Departments. Such knowledge will be commensurate with each individual’s duties and responsibilities”).

³⁴ Lt General Sir William Francis Butler, *The Life of Charles George Gordon*, Macmillan and Co., Limited, New York 1901.

³⁵ Transcript of speech delivered by General (ret) James N. Mattis, 2014 Marine Corps University Foundation Semper Fidelis Award Dinner. Available at: <https://www.military1.com/army/article/460220-gen-mad-dog-mattis-gives-the-ultimate-award-speech/> (accessed: 29.08.2018).

In order “for men of action” to “act like men of thought” nations must begin to build the foundation of the ‘reluctant warrior’ through law of war dissemination and training. Following the Vietnam War, law of war training developed with four common threads: (1) mandatory training for all; (2) simplicity of principles, (3) linking law of war obligations to military effectiveness, professionalism, and good leadership; and (4) applying a positive approach (i.e. showing the benefits of compliance versus merely focusing on the “don’ts” which can be perceived as placing unwarranted limits on the soldier’s ability to fight and win).³⁶

Fortunately, unlike complexities of the U.S. Tax Code which as of 2015 was over 10 million words long,³⁷ part of the genius of the law of war, despite its myriad sources and technical nuances, is that in many ways the most important concepts can be boiled down to four core principles: distinction, military necessity, proportionality and unnecessary suffering.³⁸ And while the nuances of the full body of law are critical to the military lawyer advising commanders, “at the tactical level, the average soldier need not be overwhelmed with the details of a highly complex and esoteric subject.”³⁹

In pursuit of simplicity, nations have sought over time to distill these concepts in ways that could be readily communicated and easily understood by the end user – the average soldier. An example of these efforts occurred in 1977 when the International Committee of the Red Cross (ICRC), in conjunction with the Polish Red Cross, hosted a working group in Warsaw to develop basic law of war rules for the individual soldier. U.S. DoD law of war legend, W. Hays Parks, participating in the meeting and helping to develop the rules said “the rules were consistent with the “military” principle of “KISS” – keep it simple, stupid.”⁴⁰ These rules were shortly thereafter adopted by the U.S. Marines Corps, and later by the U.S. Army and U.S. Navy. In their present form, the U.S. Army’s ‘Soldier’s Rules’ are as follows:

1. Fight only enemy combatants.
2. Do not harm enemies who surrender – disarm them and turn them over to your superior.
3. Do not kill or torture EPW, or other detainees.
4. Collect and care for the wounded, whether friend or foe.
5. Do not attack medical personnel, facilities, or equipment.

³⁶ W. Hays Parks, *The United States Military and the Law of War: Inculcating an Ethos*, “Social Research”, Vol. 69, No. 4, *International Justice, War Crimes, and Terrorism: The U.S. Record* (winter 2002), pp. 981–1015 (987 and 1006).

³⁷ Scott Greenberg, *Tax Foundation, Federal Tax Laws and Regulations are Now Over 10 Million Words Long*, 2015. Available at: <https://taxfoundation.org/federal-tax-laws-and-regulations-are-now-over-10-million-words-long/> (accessed: 20.08.2018).

³⁸ Gary D. Solis, *The Law of Armed Conflict, International Humanitarian Law in War*, Cambridge University Press 2016, 2nd ed., p. 268.

³⁹ W. Hays Parks, *The United States Military and the Law of War...*, p. 986.

⁴⁰ *Id.*, p. 986.

6. Destroy no more than the mission requires.
7. Treat all civilians humanely.
8. Do not steal – respect private property and possessions.
9. Do your best to prevent violations of the law of armed conflict.
10. Report all violations to your superior.⁴¹

While providing simple and clear guidance is important, it is but one piece of creating the reluctant soldier. Rule 142 of the ICRC's Customary IHL Study notes that for many states teaching of law of war is primarily or exclusively in the form of written instruction or classroom teaching. The Customary IHL Study notes that this approach may not be sufficient to ensure effective compliance during the stress of combat. Addressing this concern, South Africa's LOAC Manual states, "in the circumstances of combat, soldiers may often not have time to consider the principles of the LOAC before acting. Soldiers must therefore not only know these principles but must be trained so that the proper response to specific situations is second nature."⁴²

While it is impossible to know exactly how one will react to the stress and fog of war, the military has become far more sophisticated in simulating that fog. Significant pedagogical strides in military education continue to be made to better reach and influence the soldier. Rather than focusing strictly on a knowledge test, modern education and training often extends beyond classroom instruction or individualized study into, for example, unit training exercises. In many cases, training on law of war requirements may not be classified as "law of war" training, or may be conducted without acknowledgment that the lessons being learned are law of war requirements. Rather, it may be the case that military forces would be trained according to military doctrines or regulations, which have incorporated law of war requirements and have been reviewed for consistency with the law of war.

This type of imbedded training intentionally links compliance with the law of war with successful mission accomplishment while drawing attention to the positive aspects of law of war compliance. After all, it has been said that the laws of war were written by warriors, for warriors,⁴³ and with the particular interests of their armed forces in mind.⁴⁴ Professor Geoffrey Corn writes, "The law of armed

⁴¹ *Operational Law Handbook, 17th Edition, Chapter 2, Appendix A, III*, International and Operational Law Department, The Judge Advocate General's Legal Center and School (2017).

⁴² The International Committee of the Red Cross (ICRC) Customary IHL Study, Rule 142, citing to the South Africa, LOAC Manual (citing to Chapter 4, section 38 para. 343).

⁴³ Francis Lieber was himself an infantryman in the Napoleonic Wars. See, e.g., Major Scott R. Morris, *The Laws of War: Rules by Warriors for Warriors*, "The Army Lawyer" Dec. 1997, p. 4.

⁴⁴ A. Roberts, R. Guelff, *Documents on the Law of War*, Oxford University Press 2000, 3rd ed., p. 31 ("The law has been created by states with their general interests and the particular interests of their armed forces in mind").

conflict is inseparable from its military context.”⁴⁵ As a product of this military context, the law is comprised of rules and regulations that not only seek to preserve humanity, they also make good strategic, operational, and tactical sense.⁴⁶

While law of war training is critical, it is clearly just one aspect of helping soldiers internalize the underlying values contained in the law of war. There are still too many examples of professional soldiers who stop at the “Can I” question, never moving forward to appropriately consider “If I” or “Should I.” And there are others who know the answer to the “Can I” question is an emphatic “NO!” and still proceed anyway.

A 2006 Mental Health Survey conducted by the U.S. DoD of soldiers and Marines in Iraq in the fall of 2006 revealed the following findings: Only 47 percent of soldiers and 38 percent of Marines agreed that noncombatants should be treated with dignity and respect. More than one-third of all soldiers and Marines reported that torture should be allowed to save the life of a fellow soldier or Marine, and less than half of the soldiers or Marines said they would report a team member for unethical behavior. Also, 10 percent of the soldiers and Marines reported mistreating noncombatants or damaging property when it was not necessary.⁴⁷

Alarmed by the results, General David Petraeus, the top U.S. commander in Iraq at the time, wrote an open letter to the members of his command. In his letter, General Petraeus wrote, “Our values and the laws governing warfare teach us to respect human dignity, maintain our integrity, and do what is right. Adherence to our values distinguishes us from our enemy. This fight depends on securing the population, which must understand that we – not our enemies – occupy the moral high ground.”⁴⁸ He stressed that while we are “warriors ... what sets us apart from our enemies is how we fight ... how we behave ...,” and he closed the letter with a call to “... renew our commitment to the values and standards that make us who we are.”⁴⁹

⁴⁵ G. Corn, *The Law of Armed Conflict An Operational Approach*, Wolters Kluwer 2012, p. xxi.

⁴⁶ U.S. DoD Law of War Manual (June 2015 (updated Dec 2016)) Preface (“Nations have developed the law of war to be fundamentally consistent with the military doctrines that are the basis for effective combat operations. For example, the self-control needed to refrain from violations of the law of war under the stresses of combat is the same good order and discipline necessary to operate cohesively and victoriously in battle. Similarly, the law of war’s prohibitions on torture and unnecessary destruction are consistent with the practical insight that such actions ultimately frustrate rather than accomplish the mission.”).

⁴⁷ Mental Health Advisory Team (MHAT) IV Operation Iraqi Freedom 05-07, Final Report. 17 November 2006. Office of the Surgeon Multinational Force-Iraq and Office of the Surgeon General United States Army Medical Command (35).

⁴⁸ General David H. Petraeus, *Letter about Values to Soldiers, Sailors, Airmen, Marines, Coast Guardsmen Serving in Multi-National Force-Iraq*, 10 May 2007. Available at: https://www.globalsecurity.org/military/library/policy/army/other/petraeus_values-msg_torture070510.htm (accessed: 5.09.2018).

⁴⁹ *Id.*

As demonstrated above, the legal failures are typically ethical failures too. So in addition to training soldiers on the law of war, there must be an investment and emphasis on character and ethics development in the military. And then these two must be combined to simulate the environment in which the soldier will need to apply both under the stress of combat.

7. MORALITY MATTERS AND CHARACTER COUNTS

*Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.*⁵⁰

Article 15, Lieber Code

If one were to simplify the law of war to its central core, then perhaps Jean Pictet articulated it best when he wrote: “Humanitarian law receives its impulse from moral science all of which can be summed up in one sentence, ‘do to others what you would have done to yourself.’ This crystallizes the wisdom of nations and is the secret of happiness, or at least, of the best order of society.”⁵¹ This sentiment was echoed by a U.S. Army soldier who became the hero of one of the worst atrocities during Vietnam, the My Lai massacre. Warrant Officer Hugh Thompson was a helicopter pilot who, along with his crew, repeatedly landed his helicopter between advancing U.S. forces and innocent Vietnamese civilians. He confronted his fellow troops, to include higher-ranking officers at the point of machine guns, in an attempt to save as many of the Vietnamese villagers as he could.⁵² Hugh Thompson’s heroic intervention ended the massacre in My Lai. Decades later, during a “Moral Courage in Combat” lecture to U.S. Naval Academy midshipmen, he participated in the following dialogue:⁵³

Question: Do you attribute your ability to see through the moral fog that day, better than those who made the massacre at My Lai happen, to any prior military training or experience?

⁵⁰ Francis Lieber, *War Department, Instructions for the Government of Armies of the United States in the Field art. 15 (1863)*. Available at: http://avalon.law.yale.edu/19th_century/lieber.asp (accessed: 15.08.2018).

⁵¹ See J. Pictet, *The Principles of International Humanitarian Law*, “International Review of the Red Cross” 1996, Vol. 6, pp. 455–462.

⁵² History, My Lai Massacre. Available at: <https://www.history.com/topics/vietnam-war/my-lai-massacre-1> (“We kept flying back and forth ... and it didn’t take very long until we started noticing the large number of bodies everywhere. Everywhere we’d look, we’d see bodies. These were infants, two-, three-, four-, five-year-olds, women, very old men, no draft-age people whatsoever.”) (accessed: 10.09.2018).

⁵³ Lecture by Hugh Thompson, *Moral Courage in Combat: The My Lai Story*, “U.S. Naval Academy Center for Professional Military Ethics” 2003, Vol. 26.

Mr. Thompson: No, I don't believe it was any military training, because I had been through the training that everybody else had been. We had a 50-minute class of instruction on the Geneva Convention, a 50-minute class of instruction on the Code of Conduct, and a 50-minute class of instruction on the rules of engagement. ... But [my parents] always taught me to help the underdog. Don't be a bully and live by the golden rule. That golden rule says so much, and it's so simple and so basic. You know, I can't say it was a leadership 405 or whatever. I just think it was my parents, and they taught me right from wrong".

Not all soldiers may have upbringings based in sound moral values like Hugh Thompson. Further, those who have a solid moral foundation prior to entering the military may still fail when the moment matters most. In an attempt to explain ethical failures, Dr. Martin Cook highlights four different potential explanations: (1) there are always a few 'bad apples' in every organization; (2) there has been a widespread deterioration of ethics in the military and society at large; (3) behaviors that in earlier times were tolerated are now unacceptable, perhaps due to greater media scrutiny, etc.; and (4) individuals who have been ethically sound for years or even decades lose their way or are put in unfamiliar environments where their moral armor fails.⁵⁴

Cook focuses on the fourth possibility as it seems to better explain how an otherwise honorable soldier when confronted with certain situational factors behaves in almost unbelievable ways, raising the possibility that in addition to having a few 'bad apples', there may also be relatively 'good apples' who become tainted by being subjected to 'bad barrels'.⁵⁵ Cook notes that in trying to unravel this conundrum, current research being done in the fields of social science and behavioral economics may provide some answers. Even better, many militaries around the globe have been investing in the study of ethics and its link to these fields and are placing an emphasis on the continued development of its soldiers so that they possess the needed skills to meet the ethical, character, and leadership challenges that define today's military environment.⁵⁶ While good work has begun, more work needs to be done in this area of study as it is an essential component of the 'reluctant warrior'.

⁵⁴ Martin L. Cook, *Reflections on the Relationship Between Law and Ethics*, based on a talk given at the Adelaide Law School, Australia, 28 March 2018.

⁵⁵ For an example of the complete breakdown of ethical and legal standards, see Luke Mogelson, *A Beast in the Heart of Every Fighting Man*, "The New York Times Magazine", April 27, 2011. This article paints in vivid detail the circumstances surrounding murders committed by members of the 5th Stryker Brigade during a tour in Afghanistan.

⁵⁶ See J. Stouffer, S. Seiler (eds.), *Military Ethics, International Perspectives*, Canadian Defence Academy Press 2010.

8. THE IMPACT OF POPULAR CULTURE ON THE SOLDIERS OF TOMORROW

*Brothers . . . what we do in life . . . echoes in eternity.*⁵⁷
General Maximus Decimus Meridius (*Gladiator*)

It is an obvious but important point to remember that new officer or enlisted recruits join the military with preconceived notions of what the military is and what it means to be a professional soldier. In the United States, a 17 year old, with parental consent, can join in the armed forces.⁵⁸ The average potential soldier brings with them a lifetime of “expectations” of what they think the military is what it expects from a soldier. These expectations often come from popular culture where exemplars⁵⁹ are portrayed in a compelling manner. Much like ancient times where young men were enthralled by stories of mythical warriors like Hercules or Achilles, popular culture creates fictional exemplars of what it means to be a soldier in war. Two simple examples may illustrate the point.

First, if one is a fan of the character Maximus in the film *Gladiator*, he may believe that a soldier is expected to exhibit the qualities of excellence, service before self, and integrity.⁶⁰ If such is the case, that person may be more receptive to internalizing the core principles of the law of war. Employing the power of exemplars is a character-building tool utilized by the U.S. Air Force Academy where each class since 2000 chooses an exemplar for their class who epitomizes the type of person the class wishes to emulate.⁶¹ The objective is to reflect on and model the admirable aspects of the chosen exemplar to instill similar character and behavior in cadets. While popular culture and the use of examples can help advance law of war values, it can also have the opposite effect.

A more recent example of *Hollywood* having a negative impact on the armed forces involves the issue of interrogation and torture and its portrayal on television during the early years following the attacks on 9/11. Shows like *24*, *Alias*, and *Lost* spent considerable air time portraying the seductive idea that torture works in so called “ticking time bomb scenarios” to elicit information from detainees.⁶²

⁵⁷ Available at: <https://www.imdb.com/title/tt0172495/quotes> (accessed: 13.09.2018).

⁵⁸ Available at: <https://www.military.com/join-armed-forces/join-the-military-basic-eligibility.html> (accessed: 17.07.2018).

⁵⁹ Exemplar is defined as one that serves as a model or example: such as an ideal model or a typical or standard specimen. Available at: <https://www.merriam-webster.com/dictionary/exemplar> (accessed: 27.07.2018).

⁶⁰ These also happen to be the Core Values of the U.S. Air Force, see: *Air Force Instruction 1-1, “Air Force Culture”* (para. 1.3), dated 7 August 2012, *Incorporating Change 1, 12 November 2014*.

⁶¹ Association of Graduates United States Air Force Academy, USAFA Class Exemplars. Available at: <https://www2.usafa.org/Connect/ClassExemplars> (accessed: 27.07.2018).

⁶² Human Rights First, Rights Reporter, 3, May 2007.

The message from many of these shows had an influence on some military interrogators heading to Iraq. One such military interrogator, Tony Lagouranis, served in Iraq at Abu Ghraib. In those days, he claims that training sometimes contradicted reality, pressure to gain intelligence from detainees was immense, and the guidance from leadership was often unclear or changing. In this void, Lagouranis said that “people were watching movies and watching TV, and getting their [interrogation] ideas from that.”⁶³ It is worth mentioning that upon returning from Iraq, Lagouranis suffered a mental breakdown, a grim reminder of the moral wounds of war discussed above.

Hollywood’s influence on the military was of such a concern that in November of 2006, U.S. Army Brigadier General Patrick Finnegan, then Dean of the U.S. Military Academy at West Point, and a career military attorney, accompanied by three experienced military and F.B.I. interrogators, traveled to Hollywood for a meeting with the producers of *24*.⁶⁴ The purpose of the meeting was to “voice their concern that the show’s central premise – that the letter of American law must be sacrificed for the country’s security – was having a toxic effect ... and adversely affected the training and performance of real American soldiers.”⁶⁵

These two examples offer striking contrasts of the influences from popular culture that accompany men and women when they join armed forces. They illustrate an obvious but often overlooked point that armed forces around the world must recognize new soldiers aren’t blank cyphers and popular culture influences the development and learning of young people.⁶⁶ Education and training on the law of war will need to take into account these potential preconceptions to either leverage the positive influences or combat the negative ones.

9. UNDERSTANDING AND CONTROLLING EMOTIONS

*In everything we do, we must observe the standards and values that dictate that we treat noncombatants and detainees with dignity and respect. While we are warriors, we are also all human beings. Stress caused by lengthy deployments and combat is not a sign of weakness; it is a sign that we are human.*⁶⁷

General David H. Petraeus

⁶³ *Id* at 3.

⁶⁴ Jane Mayer, *Whatever it Takes, The politics of the man behind “24,”* “The New Yorker”, February 19, 2007.

⁶⁵ *Id.*

⁶⁶ DevelopmentEducation.ie (11 June 2009). Exploring Popular Culture in Education. Available at: <https://developmenteducation.ie/feature/exploring-popular-culture-in-education/> (accessed: 12.09.2018).

⁶⁷ See FN 49 Petraeus Letter.

Even if all the aforementioned influences – regulation, education and training, ethics and moral training, and harnessing popular culture – contribute toward developing the ‘reluctant warrior’, one of the most difficult impediments to “mission success” is controlling the emotions of the “beast.” In recognition of this fact, late in 2005, staff of the Research and Advanced Concepts Office of the U.S. Army Research Institute for the Behavioral and Social Sciences (ARI) asked the National Research Council (NRC) to explore research opportunities in the basic behavioral and social sciences. The NRC identified key areas of research that would yield useful results for the U.S. military.⁶⁸ One such area the NRC identified for further research surrounds the study of emotions, writing:

Emotions play a powerful, central role in everyday life and, not surprisingly, they play an equally central role in military planning and training ... and the more recent emphasis on “winning the peace” has placed a premium on soldiers who can understand and defuse the emotions of others.⁶⁹

Further, since emotions can affect judgment and impact decision making, understanding how emotions influence moral decision making should be a priority for the military. The following is a list of the ambitious questions the NRC stated that future research should address:⁷⁰

- Can soldiers be trained to use and rely on fast perceptual processing that occurs with threatening stimuli?
- How can they best minimize false alarms – the perception of threat when threat does not exist?
- How can soldiers maintain a high level of alertness, attentiveness, and “situational awareness” during periods [of anger, terror, and horror interspersed with long periods of boredom]?
- How can military leaders prevent troop boredom from transforming into aggression, despair, or hatred?
- How can soldiers be trained to discern the ethical implications of their actions in a wide variety of situations, including the periods between operations?”
- Given the role of emotion in prejudice and stereotyping, what are the behavioral, cultural, and sociological processes that contribute to dehumanizing effects, such as those observed at the Abu Ghraib prison?
- Can people be trained to resist such effects?
- What role does a long period of vigilance or boredom play in making soldiers susceptible to such effects or other negative consequences?”

Additionally, the NRC identified that when troops interact closely with local populations, as they do during counter-insurgency warfare, there will be times when friendly forces suffer casualties due to “betrayal” by a member of that

⁶⁸ National Research Council. *Human Behavior in Military Contexts*, Washington, DC: The National Academies Press 2008, p. vii–viii.

⁶⁹ *Id* at 55.

⁷⁰ *Id* at 55–61.

population. These events can lead to extreme negative attitudes and prejudices regarding the entire local population and lead to unlawful actions against innocent locals, which, in turn, disrupts attempts to build relationships with the population. Further research may be able to determine if any opportunities exist for the effective remediation of negative emotions in such circumstances.

Lastly, the study highlights the concept of emotional intelligence.⁷¹ While still debated in the field, the NRC stated that “if emotional intelligence is a viable concept, it could be relevant to many military problems, including: prevention and detection of PTSD and the timely return to combat duty, the selection of military recruits for specific roles on the basis of their levels of emotional intelligence, the training of soldiers to recognize emotions in themselves and others and to cope with extreme emotions, the training of leaders to manage emotions in themselves and their subordinates, and the design of training environments to simulate realistic scenarios that require emotionally adaptive skills.”⁷²

The timing of the call for additional research into the military application of human emotions could not have been more appropriate as the 2006 Mental Health Survey referenced earlier disclosed that soldiers and Marines who had high levels of anger were twice as likely to engage in unethical battlefield conduct.⁷³ Further, it found that having a unit member become a casualty or handling dead bodies and human remains were associated with increases in the mistreatment of Iraq non-combatants.⁷⁴ Clearly, there is significant military utility to better understanding the human condition and this is an area of research that will assist nations in more effectively training and treating its military forces and will assist commanders at all levels to better lead.

10. LEADERS (AT ALL LEVELS) MUST LEAD

*Guide the people by law, subdue them by punishment; they may shun crime, but will be void of shame. Guide them by example, subdue them by courtesy; they will learn shame, and come to be good.*⁷⁵

Confucius

⁷¹ Psychology Today.com defines emotional intelligence as “the ability to identify and manage your own emotions and the emotions of others. It is generally said to include three skills: emotional awareness; the ability to harness emotions and apply them to tasks like thinking and problem solving; and the ability to manage emotions, which includes regulating your own emotions and cheering up or calming other people.” Available at: www.psychologytoday.com/us/basics/emotional-intelligence (accessed: 17.09.2018).

⁷² *Id* at 60.

⁷³ See FN 48. MHAT IV FINAL REPORT (38).

⁷⁴ *Id* at 40.

⁷⁵ Confucius, *The Sayings of Confucius*, Barnes & Noble, 1994, p. 5.

*Leadership is a potent combination of strategy and character. But if you must be without one, be without strategy.*⁷⁶

General Norman Schwarzkopf

A well regarded movie, *Remember the Titans*, provides a quote often used by military leaders: “Attitude reflects leadership...”⁷⁷ Considering this simple truth, leaders in the armed forces have an amazing opportunity – and responsibility – to shape a soldier’s attitudes and actions.

An exemplar of senior leadership done right and the deliberate messaging of law of war values to U.S. Marines took place in March of 2003. When U.S. Secretary of Defense James N. Mattis was Major General Mattis, he was the senior infantry Marine commander to lead the ground offensive into southern Iraq, and would ultimately lead the effort for the fight for control of Baghdad. Before going into battle, he issued a one-page letter to his Marines, which highlights the way he thought about combat then, and likely today.⁷⁸ Below are a few excerpts from this letter (*emphasis added*).

When I give you the word, together we will cross the Line of Departure, close with those forces *that choose to fight*, and destroy them. Our fight is not with the Iraqi people, nor is it with members of the Iraqi army who choose to surrender. While we will move swiftly and aggressively against those who resist, *we will treat all others with decency, demonstrating chivalry and soldierly compassion ... Use good judgment* and act in best interests of our Nation. *Engage your brain before you engage your weapon.* For the mission’s sake, our country’s sake, and the sake of the men who carried the Division’s colors in past battles – who fought for life and never lost their nerve – carry out your mission and *keep your honor clean.*⁷⁹

In many ways, General Mattis captures the very essence of what it means to be a ‘reluctant warrior’. To treat others with soldierly compassion, to think before acting, and to always keep your honor clean. And while there are certainly elements of the law imbedded in the values he was expressing, he did it in such a way as to inspire his Marines without lecturing at them.

⁷⁶ Kevin Kruse (27 December 2012). Forbes, Norman Schwarzkopf: *10 Quotes on Leadership and War*. Available at: <https://www.forbes.com/sites/kevinkruse/2012/12/27/norman-schwarzkopf-quotes/#2b9af0e14eeb> (accessed: 28.08.2018).

⁷⁷ Available at: <https://www.imdb.com/title/tt0210945/quotes> (accessed: 14.09.2018).

⁷⁸ American Military News, Read Epic Gen. “Mad Dog” Mattis’ Letter To The 1st Marine Div. Before Assault On Iraq. Available at: <https://americanmilitarynews.com/2016/11/read-general-james-mad-dog-mattis-letter-to-the-1st-marine-division-before-assault-on-iraq/> (accessed: 10.08.2018).

⁷⁹ Many of Secretary Mattis’ public and private remarks mention the importance of keeping your “honor clean.” The origin of this reference comes from the first verse of the Marines’ Hymn: “First to fight for right and freedom and to keep our honor clean; we are proud to claim the title of United States Marine.”

Based on General Mattis' statements over many years, his approach to behavior on the battlefield appears to be as much about honoring the profession of arms as it is about adherence to the law of war. This is important to understand as it hints toward a deeper "buy in" to many of the fundamental and underlying principles of the law of war, more so than complying with the many rules merely because the law of war requires it. On the latter approach, more than a few military personnel from many countries acknowledge, begrudgingly, that their particular unit or command complies with the law of war because they have to and they "don't want to go to jail." Humanity benefits when military units comply with the law of war, regardless of why they comply; however, one might prefer the deeper buy-in and more meaningful rationale for compliance.

Setting the proper culture at the top of a military organization has a significant impact.⁸⁰ During testimony at the court-martial of a U.S. soldier accused of committing murder, Stjepan Mestrovic, a prominent sociologist specializing in war crimes, was asked to assess whether the shortcomings in leadership might be partly to blame. In response he testified that "In a dysfunctional unit, we cannot predict who will be the deviant – but we can predict deviance."⁸¹

While the leadership tone may be set at the top, sometimes regardless of the official values championed, individual small units will develop their own versions of acceptable behavior. Major Pryer highlights this point while discussing former Navy SEAL Dick Couch's book, *A Tactical Ethic: Moral Conduct in the Insurgent Battlespace*.⁸² Major Pryer writes, "Couch presents the compelling argument that new recruits today leave their initial military training with a thorough understanding of U.S. military values, but when they are assigned to operational units, they may enter a small-unit culture that is not what higher commands want this culture to be. A potentially dangerous subculture, Couch argues, is usually due to one or two key influencers (moral insurgents) who convert or gain silent acquiescence from other members of the unit.⁸³ Since young soldiers want to fit in with their small units, they usually conform."⁸⁴

If Couch is correct, and the evidence of Abu Ghraib, the "Kill Team" of the 5th Stryker Brigade, and numerous other incidents seems to support, leaders at all levels must pay careful attention to the small-unit or "barracks" subcultures that

⁸⁰ Parks at 985 ("Commanders must be convinced of the efficacy of the law of war. So do the troops, although a commander's express intolerance goes a long way toward minimizing the probability of misconduct.")

⁸¹ Mogelson at 1 (At the trial of Jeremy Morlock, a member of the 5th Striker Brigade).

⁸² Pryer at 8.

⁸³ *Id* at 8, citing Couch, 77. ("Perhaps to avoid confusion in the minds of counterinsurgents, Couch actually calls these immoral individuals "pirates" rather than insurgents, even though their role is much more akin to an insurgent's role.")

⁸⁴ *Id* at 8, citing Couch, 54. ("Exacerbating the problem, Couch points out, is that today's generation of recruits (largely consisting of "Millenials") demonstrate a greater "need to belong" than previous generations.")

exist amongst the ranks. More than other types of organizations, military units develop strong bonds with their fellow soldiers, forming a brotherhood based on trust and loyalty. This is important for unit cohesion, building teamwork, and fostering esprit de corps; however, this emotional loyalty to the small-unit can overwhelm the more important allegiance to the mission and to the higher Core Values of the fighting force. While much has been written about the role of officers in taming the ‘beast’, equal time needs to be devoted to growing the junior ranks as they will be some of the greatest influencers, for good or bad, on the vast majority of our enlisted soldiers.

11. TO BE CONTINUED...

While the law of war has become part of the fabric of our military heritage, and obeying it is absolutely the right thing to do, the law of war admittedly provides the floor of and not the ceiling for permissible behavior and right conduct. Just because something may be legally permissible does not mean it is also operationally and ethically the best course of action. As discussed in this article, the law usually supplies the answer to the question “can we do this” but does not necessarily equip a soldier with the tools necessary to answer the question “should we do this,” which is why it is so important to develop soldiers who can think through the complex decision-making process during the stress of combat. While the law of war is the necessary starting point, W. Hays Parks makes this clear, writing, “effective implementation of the law of war requires more than a manual and dissemination. It requires an ethos within the military.”⁸⁵

We have sought to highlight the necessity and challenge of creating that warrior ethos and have touched on some of the internal and external factors that influence that process. In a future article the authors hope to look more closely at these factors while offering suggestions on ways to enhance and improve law of war education and training in the armed forces in pursuit of the ‘reluctant warrior’ who can “honor the precepts of chivalrous and humane warfare in the face of the contrary behavior ...” and “... successfully confront evil without becoming evil.”⁸⁶ Both soldier and the society will be the better for it.

⁸⁵ Parks at 982.

⁸⁶ Charles J. Dunlap, Jr., *A Virtuous Warrior in a Savage World*. Available at: http://www.au.af.mil/au/awc/awcgate/usafa/virtuous_warrior.pdf (accessed: 5.09.2018).

BIBLIOGRAPHY

- Air Force Instruction 1-1, "Air Force Culture"* (para. 1.3), dated 7 August 2012
- Ambrose S.E., *Americans at War*, 1997
- Association of Graduates United States Air Force Academy, USAFA Class Exemplars.
Available at: <https://www2.usafa.org/Connect/ClassExemplars> (accessed: 27 July 2018)
- Butler W. F., *The Life of Charles George Gordon*, Macmillan and Co., Limited, New York 1901
- Confucius, *The Sayings of Confucius*, Barnes & Noble, 1994
- Corn G., *The Law of Armed Conflict an Operational Approach*, Wolters Kluwer 2012
- Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868
- Department of State, Office of the Historian, *The Philippine-American War, 1899–1902*.
Available at: <https://history.state.gov/milestones/1899-1913/war> (accessed: 16.09.2018)
- Dunant H., *A Memory of Solfernio*, American Red Cross 1939–1959
- Dunlap Ch. J. Jr., *A Virtuous Warrior in a Savage World*. Available at: http://www.au.af.mil/au/awc/awcgate/usafa/virtuous_warrior.pdf (accessed: 5.09.2018)
- Green L. C., *The Contemporary Law of Armed Conflict*, 2000
- Greenberg S., *Tax Foundation, Federal Tax Laws and Regulations are Now Over 10 Million Words Long*, 2015
- Keegan J., *If you won't, we won't: Honour and the decencies of battle*, "The Times Literary Supplement", issue 4834, 11 (Nov. 24, 1995; London, England)
- Kramer P., *The Water Cure, Debating torture and counterinsurgency – a century ago*, "The New Yorker", February 25, 2008
- Letter from Francis Lieber to General Henry Halleck*, New York, May 20, 1863
- Lieber F., *War Department, Instructions for the Government of Armies of the United States in the Field art. 15 (1863)*. Available at: http://avalon.law.yale.edu/19th_century/lieber.asp (accessed: 15.08.2018)
- MacArthur D., "Duty, Honor, Country" Farewell Speech given to the Corps of Cadets at West Point, May 12, 1962. Available at: <https://nationalcenter.org/MacArthurFarewell.html> (accessed: 16.09.2018)
- MacArthur D., *Action of the Confirming Authority*, Feb. 7, 1946, *United States v. Yamashita* (U.S. Military Commission, Manila, Dec. 7, 1945), *Levie, Documents On Pows* 298
- Marines, *The Official Website of the United States Marines Corps, The Marines' Hymn*.
Available at: <https://www.marineband.marines.mil/About/Library-and-Archives/The-Marines-Hymn/> (accessed: 5.09.2018)
- Mattis J., *Ethical Challenges in Contemporary Conflict: The Afghanistan and Iraq Cases*, Lecture by (then) Lt Gen James Mattis (U.S. Naval Academy Center for Professional Military Ethics 2004). Available at: https://www.usna.edu/Ethics/_files/documents/MattisPg1-28_Final.pdf (accessed: 10.09.2018)
- Mayer J., *Whatever it Takes, The politics of the man behind "24,"* "The New Yorker", February 19, 2007

- Mental Health Advisory Team (MHAT) IV Operation Iraqi Freedom 05-07, Final Report. 17 November 2006
- Mogelson L., *A Beast in the Heart of Every Fighting Man*, “The New York Times Magazine”, April 27, 2011
- Morris S. R., *The Laws of War: Rules by Warriors for Warriors*, “The Army Lawyer” Dec. 1997
- National Research Council, *Human Behavior in Military Contexts*, Washington, DC: The National Academies Press 2008
- Operational Law Handbook, 17th Edition, Chapter 2, Appendix A, III*, International and Operational Law Department, The Judge Advocate General’s Legal Center and School (2017)
- Parks W. H., *The United States Military and the Law of War: Inculcating an Ethos*, “Social Research”, Vol. 69, No. 4, *International Justice, War Crimes, and Terrorism: The U.S. Record* (winter 2002)
- Petraeus D. H., *Letter about Values to Soldiers, Sailors, Airmen, Marines, Coast Guardsmen Serving in Multi-National Force-Iraq*, 10 May 2007. Available at: https://www.globalsecurity.org/military/library/policy/army/other/petraeus_values-msg_torture070510.htm (accessed: 5.09.2018)
- Pictet J., *The Principles of International Humanitarian Law*, “International Review of the Red Cross” 1996, Vol. 6
- Pryer D., *Controlling the Beast Within: The Key to Success on 21st-Century Battlefields*, “Military Review” January–February 2011, Vol. 5
- Roberts A., Guelff R., *Documents on the Law of War*, Oxford University Press 2000, 3rd ed.
- Santayana G., *Soliloquies in England and Later Soliloquies*, number 25 (1922)
- Solis G. D., *The Law of Armed Conflict, International Humanitarian Law in War*, Cambridge University Press 2016, 2nd ed.
- Stouffer J., Seiler S. (eds.), *Military Ethics, International Perspectives*, Canadian Defence Academy Press 2010
- The First Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864
- The Moral Injury Project, Syracuse University, <http://moralinjuryproject.syr.edu/about-moral-injury/>
- Thompson H., *Moral Courage in Combat: The My Lai Story*, “U.S. Naval Academy Center for Professional Military Ethics” 2003, Vol. 26
- Townsend E. D., *Assistant Adjutant General, General Orders No. 100, Instructions for the Government of Armies of the United States in the Field*, Apr. 24, 1863, reprinted in “Instructions for the Government of Armies of the United States in the Field” 1898, Vol. 2, Government Printing Office
- U.S. Department of Veterans Affairs, *War Related Illness and Injury Study Center, (PTSD)*, Matthew J. Friedman, *History of PTSD in Veteran’s: Civil War to DSM-5*. Available at: <https://www.ptsd.va.gov/public/ptsd-overview/basics/history-of-ptsd-vets.asp> (accessed: 16.09.2018)
- U.S. DoD Law of War Manual (June 2015 (updated Dec 2016))
- Wakin M. M., *Introduction in War, Morality, and the Military Profession*, 224 (Malham M. Wakin ed., 2nd rev. ed. 1986)

THE RELUCTANT WARRIOR: THE CHALLENGE TO INSTILLING LAW OF WAR VALUES IN TODAY'S PROFESSIONAL WARRIOR

Summary

George C. Marshall, famed U.S. World War II general and eventual U.S. Secretary of State and Nobel Peace Prize winner, on his first assignment fresh out of military school, told a fellow officer:

Once an army is involved in war, there is a beast in every fighting man which begins tugging at its chains. And a good officer must learn early on how to keep the beast under control, both in his men and himself

Even for nations possessing a reputation for stringent compliance with the law of war, the annals of history, to include more contemporary military engagements, are littered with cases of atrocities committed by soldiers. All too often the beast wins, and because every nation has an obligation to minimize the reality described above, nations must continue to dedicate time, thought and resources to best prepare their forces for future military operations. Unrestrained warfare has a direct negative military impact on both winning the war and winning the peace. This corollary remains as true today as it has ever been.

What is meant by a 'reluctant warrior'? Put simply, a reluctant warrior is one who while ready to employ lethal force when the situation demands, is not eager to do so in "the moment". He answers the questions: "Can I, If I, Should I", and then takes decisive action – or employs uncommon restraint – with a goal of accomplishing the mission all the while staying true to the value imbedded in the U.S. Marines' Hymn, "to keep our honor clean".

To fully develop the 'reluctant warrior' needed on today's and tomorrow's battlefields, this article will look at the role of legal regulation and the practice of military education and training, as well as some of the other factors that influence behavior and decision-making during instances of armed conflict. This article will also comment on the costs to the individual soldier and to the mission when a nation fails to prepare 'reluctant warriors'.

KEYWORDS

US military law, US military history, international law of war, war crimes

SŁOWA KLUCZOWE

amerykańskie prawo wojenne, historia militarna Stanów Zjednoczonych, międzynarodowe prawo wojny, zbrodnie wojenne