



## The Officer at Work: The Ethical Use of Force

Being a person of virtue and good character is integral to being a professional. It is necessary, but not sufficient. A physician may be a person of unassailable character, but to be fully successful in the practice of medicine, she will need to know and be able to apply both the technical skills and the ethical principles that inform and guide such matters as end-of-life treatment options, or whether to be fully truthful with a terminal patient. An attorney might be a person of unquestionable virtue, but he will need to know and be able to apply the principles and rules that spell out the limits on what he is permitted to do in prosecuting a defendant on behalf of the United States, that is, to recognize those actions that might violate his obligations as an officer of the court.

Similarly, in addition to embodying and practicing “soldierly virtues,” the military professional, especially the officer, must know and be able to apply the principles and rules that inform and govern the various types of work in which the military engages. The most obvious and important, indeed *defining*, work of the profession of arms is the conduct of war, more broadly the use of deadly force on behalf of the Nation.

Centuries of tradition and law provide that war, in fact any use of force by professional militaries, is a *rule-governed* activity. Those rules have been derived from what Michael Ignatieff called the “warrior’s honor” in his book of the same title:

*While these codes vary from culture to culture, they seem to exist in all cultures, and their common features are among the oldest artifacts of human morality. . . . As ethical systems, they were primarily concerned with establishing the rules of combat and defining the system of moral etiquette by which warriors judged themselves to be worthy of mutual respect.<sup>1</sup>*

The basic notion of the warrior's honor, that not all killing and destruction are legitimate, is nearly universal, transcending historical periods and cultures. It serves more than one purpose: distinguishing between those who fight honorably and those who do not, regulating acceptable weapons and practices, and defining acceptable treatment of prisoners and the wounded. Only men and women who fight under such codes are members of an honorable profession. They are soldiers and warriors, and can proudly call themselves such. Those who fight outside or without such codes are not members of an honorable profession. With no code to inspire and bind them, they are, instead, barbarians, pirates, or criminals. "For war, unconstrained by honor and high moral principle, is quickly reduced to murder, mayhem, and all the basest tendencies of mankind."<sup>2</sup>

## **The Just War Tradition and the Law of Armed Conflict**

For sons and daughters of the Western heritage, the primary ethical code governing the resort to and conduct of war is the Just War tradition. David Fisher, a retired British civil servant, wrote:

*Just War . . . is not based on a fixed body of doctrine but is rather a tradition that has evolved over the centuries and is still evolving in response to the changing circumstances and nature of war. . . . But within this shifting tradition there is a reasonably settled set of core principles, built up and crafted over the centuries, which are designed to provide guidance to our thinking about war.<sup>3</sup>*

This moral tradition has many kinds of roots—in philosophy, theology, law, the practice of statecraft, and military codes such as chivalry.

The moral principles that inform and govern the member of the profession of arms regarding war and the use of force are not inherently inconsistent with more practical military considerations. While there often is tension between the demands of strategy or tactics and the demands of ethics and law, there is no necessary or fundamental conflict between the two, viewed from the perspective of a successful final outcome.

The Just War ethical principles are customarily divided into two parts: *jus ad bellum*, which informs and governs the decision to go to war or to resort to the use of armed force; and *jus in bello*, which informs and governs the use of force on the battlefield. Michael Walzer has aptly distinguished between the two, saying that the former has an adjectival character (is this a *just* war?) and the latter an adverbial character (is this war being waged *justly*?).<sup>4</sup> The moral burden of *jus ad bellum* falls primarily on political leaders, because they are the ones who make the decision to go to war. The military are not off the hook entirely, however, because they provide military counsel to political leaders, on matters such as feasibility (related to the *jus ad bellum* criterion of probability of success) and on costs and risks (related to the *jus ad bellum* criterion of proportionality) involved in any proposed action.

On the other hand, the moral burden of the *jus in bello* falls primarily on the military. They are the ones who conduct war. Political leaders are not entirely off the hook here either. The means they provide, and their guidance on acceptable actions, can directly or indirectly influence rules of engagement, which will govern the limits imposed on the men and women on the fighting line, and the corresponding risks to Servicemembers these rules entail.

Most formulations of *jus ad bellum* include the following criteria:

- Just cause—the reason for going to war must be sufficiently grave.
- Competent authority—only the duly constituted civil authorities may order the initiation of war.
- Right intention—those initiating war must not have a hidden or ulterior motive.
- Probability of success—there should be a reasonable prospect of success.

- Proportionality—the harm that will be done in the war must not exceed the good that will be accomplished.
- Last resort—war should be undertaken only if nonviolent means to resolve the issue have failed or are unlikely to succeed.

As stated above, consideration of the ethical principles governing the resort to war often parallels consideration of strategy and policy. While ethicists might speak of *probability of success* in assessing whether a proposed war would be just or not, military planners would be deeply engaged in assessing the *feasibility* of various courses of action under consideration.

Similarly, considerations of the *jus ad bellum* criterion of proportionality will be not unlike the military planner's calculations of costs, risks, and the unintended consequences of assigned limitations and the long-term effect of the neglect of such limitations. For example, in 1956, in deciding whether the United States should take military action in support of Hungarians who rose up against Soviet occupation of their country, President Eisenhower probably calculated that the risks of a U.S.-Soviet nuclear war in Europe vastly outweighed any good that might be accomplished by any conceivable U.S. military intervention on behalf of the lightly armed, but valiant citizens of Budapest facing off against Soviet tanks. An ethicist looking at the same decision in terms of *proportionality* in the *jus ad bellum* sense would probably also have concluded that the harm that would ensue from a possible U.S. or Soviet use of nuclear weapons would likely be far greater than the good to be accomplished in helping an oppressed people regain their freedom.

According to *jus in bello*, for a war to be conducted justly it must, *inter alia*, meet two basic criteria:

- discrimination, which deals with intentions<sup>5</sup>
- proportionality, which deals with consequences.

The principle underlying *discrimination* (between those who are legitimate targets of attack—combatants—and those who are not legitimate targets of attack—noncombatants) is noncombatant immunity: noncombatants may never be the object of an intentional direct attack.

This is the realm of *intentions*. The soldier may not *intend to kill or harm* noncombatants. In Just War terms (though the legal terminology may be different), noncombatants include not only civilians caught up in the maelstrom of war, but unresisting enemy soldiers who are wounded and out of the fight, and those who have surrendered and been taken prisoner. In ethical terms, combatants include not only most military personnel, but also civilians actively engaged in the war effort (for example, delivering ammunition to the front lines or taking up weapons themselves). Walzer argues that distinction is based on *rights*, including the right not to be attacked:

*We try to draw a line between those who have lost their rights because of their warlike activities and those who have not. On the one side are a class of people, loosely called “munitions workers,” who make weapons for the army or whose work directly contributes to the business of war. On the other side are all those people who, in the words of the British philosopher G.E.M. Anscombe, “are not fighting and are not engaged in supplying those who are with the means of fighting.”<sup>6</sup>*

*Proportionality* is the realm of the *consequences* of military operations. It says that the harm likely to be done in any particular military operation should not outweigh the good likely to be accomplished by that military operation; that is, it must not be disproportionate to the legitimate gains to be achieved by the military operation. Proportionality acknowledges, in effect, that some noncombatants may be harmed or killed in a military operation, not by direct intent of those conducting it, but as accidental, unintended results, what are often referred to as “collateral damage.”

In their 1983 pastoral letter *The Challenge of Peace*, the U.S. Catholic bishops posed the problem this way: “When confronting choices among specific military options, the question asked by proportionality is: once we take into account not only the military advantages that will be achieved by using this means but also all the harms reasonably expected to follow from using it, *can* its use still be justified?”<sup>7</sup> In its discussion of proportionality and discrimination, the U.S. Army and Marine Corps *Counterinsurgency Field Manual* (2007) states:

*In COIN [counterinsurgency] operations, the number of civilian lives lost and property destroyed needs to be measured against how much harm the targeted insurgent could do if allowed to escape. If the target in question is relatively inconsequential, then proportionality requires combatants to forego severe action, or seek noncombative means of engagement.*<sup>8</sup>

Two slightly different vocabularies, but a similar logic, are at work in these very different documents with very different sets of authors.

Implicit in the *jus in bello* principles of discrimination and proportionality is the notion that soldiers, especially their officers, are responsible for noncombatants in their area of operations. Michael Walzer captured this idea in the 1980 essay “Two Kinds of Military Responsibility.” In it, he argued that in addition to what he called “the hierarchical responsibilities of the officer,” that is, to those above and below in the chain of command, there is another set of responsibilities, which are nonhierarchical. “As a moral agent, [the officer] is also responsible *outward*—to all those people whose lives his activities affect.”<sup>9</sup> Those noncombatants, Walzer argues, have rights, including the right not to be harmed or killed, at least not intentionally. This line of thinking is not confined to political philosophers such as Walzer. One can see it in official military publications, such as the *Counterinsurgency Field Manual*. In this document, the argument is made in the context of counterinsurgency, but the point has broader applicability: senior leaders, the manual says, must “assume responsibility for everyone in the [area of operations].”<sup>10</sup>

While the Just War tradition has its primary roots in the West, its underlying principles have been enshrined in the Law of Armed Conflict (LOAC) and International Humanitarian Law (IHL), bodies of international law that are considered binding across the globe for nations with different philosophical, religious, and cultural traditions. Indeed the U.S. Army’s *Law of Armed Conflict Deskbook* cites Aristotle, Cicero, Thomas Aquinas, and other philosophers in its discussion of the roots and evolution of LOAC.<sup>11</sup> These principles are formalized in international law, ratified in treaties, and embodied in national military codes. The principles provide a common ground for distinguishing warriors from barbarians, and honorable soldiers from war criminals.

Acts that violate this code offend the human conscience. Thus for the military member, the principles underlying the Just War tradition and the laws of war are not mere abstractions. The importance of these principles to the profession of arms is seen most clearly in the fact that a U.S. Servicemember who violates the LOAC or IHL may be held criminally liable for war crimes and court-martialed under the Uniform Code of Military Justice.

The American military, by and large, depends on material solutions to strategic and tactical problems. Expenditure of material, sometimes massive expenditure, is used to reduce risk to American combatants. Unchecked, however, this practice can lead to actions entirely disproportionate to the intended gains or potential losses both tactically and strategically. Aside from being unnecessarily costly in economic terms, there is in this practice something fundamentally opposed to American values when it leads to unnecessary casualties to noncombatants, or former enemy combatants now under U.S. control. In conflicts that depend upon support, or at least acquiescence, by the local population, failure to discriminate can quickly turn liberators into invaders and impose significant additional manpower demands on local commanders. Portrayal of unnecessary killing in support of nonexistential political goals can produce opposition on the home front that is reflected ultimately in loss of public support for the effort. At the same time, disproportionate friendly losses attributed to overly restrictive rules of engagement have a detrimental effect on soldier morale and also can impact public support. This imposes a requirement on military professionals to discriminate in the use of force, for both practical and ethical reasons.

Though Just War and LOAC limits can impose some immediate risk to soldiers on the firing line, they can, and often do, point toward imposing reciprocal limits on war at the cutting edge, and more broadly on the resort to and the use of military force at the highest levels.

## **Examples from the American Profession of Arms**

The idea that war is a rule-governed activity is deeply embedded in the American psyche and in the DNA of American practitioners of the profession of arms. The idea has been reinforced over the centuries.

In the 18<sup>th</sup> century, the idea that war is to be rule-governed was made clear even before the Declaration of Independence. As Yale Law professor John Fabian Witt noted:

*In June 1775, as the War of Independence got underway, the Continental Congress wrote the laws of war into George Washington's commission as commander in chief of the Continental Army. "You are to regulate your conduct in every respect," the Congress told Washington, "by the rules and discipline of war."*<sup>12</sup>

Later, the author and signers of the Declaration of Independence included in their bill of particulars against King George items related to military actions under his purview:

- "That he has been protecting [British soldiers], by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States."
- "He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people."
- "He is at this time transporting large Armies of foreign Mercenaries to compleat the works of death, desolation, and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy of the Head of a civilized nation."<sup>13</sup>

In the 19<sup>th</sup> century, during our bloodiest war, the Civil War, President Abraham Lincoln ordered the publication of General Orders No. 100, drafted by Francis Lieber, a law professor and student of the laws of war, and revised by a Board of Officers. Among its provisions were:

- "15. 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."
- "16. Military necessity does not admit of cruelty, that is, the infliction of suffering for the sake of suffering or for revenge,



nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor for the wanton destruction of a district. . . . in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.”

- “22. [A]s civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.”
- “25. [P]rotection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exceptions.”<sup>14</sup>

In the 20<sup>th</sup> century, General of the Army Douglas MacArthur stated, “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 . . . [a] sacred trust.”<sup>15</sup> Moral soldiers do not harm prisoners, and they accept additional risk to safeguard the helpless. As S.L.A. Marshall wrote in the original edition of *The Armed Forces Officer*, “The barbarian who kills for killing’s sake and who scorns the laws of war at any point is repugnant to the instincts of our people, under whatever flag he fights.”<sup>16</sup>

In the early 21<sup>st</sup> century, then-Major General James N. Mattis sent a letter to all those in the First Marine Division (Reinforced) as they were about to cross the line of departure in the Iraq War, telling them in part:

*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 for people who have endured a lifetime under Saddam’s oppression.*<sup>17</sup>

## The Challenge for the Officer

The challenge for the division commander is to ensure that these high sentiments have credibility and vitality four or five levels below, in the squads and sections where combat occurs. The challenge and the moral danger for the soldier who fights under such a code are that in the heat and fury of combat, Clausewitz's fog and friction, there are powerful forces, the "forces of moral gravity," which tend to drag the soldier down to the enemy's level. Not least among these is a well-developed survival instinct. At the sharp end, restrictions on the range of acceptable actions often carry increased personal risk to the warfighters that must be weighed against other considerations that may be governing their actions.

The enemy's reciprocity of respect for humanitarian codes—or lack of reciprocity—will weigh heavily with the members of the infantry squads. Notwithstanding the enemy's conduct, the moral and legal codes that should govern the conduct of American military professionals are those they bring with them to the war, not those the enemy brings to the fight. They must resist being dragged down to the level of an unscrupulous enemy, no matter how strong the temptation. To do this, they need help. Resisting the forces of moral gravity is the work of ethics, the law, training, education, leadership at all levels, and command. Fundamentally, it is a matter of discipline.

Attention to the laws of war is the special responsibility of officers. Junior officers, dedicated to ensuring the lowest possible losses to their troops, must be reminded that it is neither their responsibility, nor within their abilities, to make combat operations risk free, especially by compromising standards of legal conduct. Achieving the proper balance between mission accomplishment and risk to noncombatants and soldiers is one of the reasons why Presidents place "special trust and confidence" in the Armed Forces officer. The more forces that pull against the forces of moral gravity, the less the likelihood that individual soldiers will succumb to that downward pull. These stabilizing influences, which must be implanted before the battle, are the responsibility of commanders and other leaders. They require continuous and deliberate inspection and tending.

It is particularly the officer's duty to see that Servicemembers are not compromised by unworthy actions, even in the heat of battle. The

U.S. Army and Marine Corps *Counterinsurgency Field Manual* places a demanding ethical burden on leaders, a burden that falls most heavily on officers, especially commanding officers. These officers must

- “provide the moral compass for their subordinates.”<sup>18</sup>
- “work proactively to establish and maintain the proper ethical climate of their organizations.”<sup>19</sup>
- “serve as a moral compass.”<sup>20</sup>
- “maintain the ‘moral high ground’ in all their units’ deeds and words.”<sup>21</sup>
- “not allow subordinates to fall victim to the enormous pressures associated with prolonged combat.”<sup>22</sup>
- “establish an ethical tone and climate that guards against the moral complacency and frustrations that build up in protracted . . . operations.”<sup>23</sup>

Understanding all these principles, and being able to apply them in practice, are demanding tasks, requiring both classroom learning and frequent practical field training that confronts leaders with the dilemmas of restrictive rules of engagement. Professional military education, especially officer education, plays a central role in this process. What is taught and learned will vary across the career spectrum of military schools and individual experience in training or operations.

For those in officer accession programs (Service academies, Reserve Officers Training Corps, and officer candidate schools), as well as for junior officers, it is critical to master, and indeed internalize, the *jus in bello* aspects of the ethics of the use of force. It is junior officers leading and commanding at the tactical level who will be expected to make the critical decisions, often involving risk of injury and death, without much opportunity for on-the-spot reflection, and usually without the benefit of significant combat experience. They will be responsible and accountable as well for the decisions made by those they command, often men and women of greater age and more experience, who may be more emotionally engaged in the immediate problem. If the first time an officer thinks about the ethical aspects of the use of force is in combat, under fire, the outcomes for the officer, the troops, and innocent noncombatants in the area are likely to be more unfortunate than they might otherwise be.

As officers rise in rank, and assume positions of greater responsibility both to advise civil superiors and guide subordinate conduct, acquiring a working understanding of *jus ad bellum* is also valuable, and is sometimes necessary, depending on the jobs they hold. Those serving on the Joint Staff, in the Office of the Secretary of Defense, in the State Department, on the staffs of Combatant Commands, or on the National Security Council staff, may well be engaging directly, or indirectly, with senior civilian officials charged with formulating recommendations, or even making decisions, regarding the use of force. At that level, in particular, having a working knowledge of the vocabularies and logics of ethics, and of strategy and policy, can facilitate making recommendations or decisions that are both ethically sound and strategically wise.

To reiterate what was said at the beginning of this chapter, being of good character and embodying the right military virtues are essential for success in the most important work the military does. However, not having an intimate understanding of the relevant ethical principles, or lacking the practiced ability to apply them in the real world, may leave an officer less than ideally prepared, or maybe not even adequately prepared, to successfully navigate the challenges of those life-and-death responsibilities thrust upon him or her. Thus it is incumbent upon the Armed Forces officer to master these principles and legal provisions, to apply them in practice, and to instill them in subordinates at all levels.

### Notes

<sup>1</sup> Michael Ignatieff, *The Warrior's Honor* (New York: Henry Holt, 1997), 116-117.

<sup>2</sup> Colonel John R. Allen, USMC, "Commandant's Intent," February 19, 2002 version (unpublished), 3.

<sup>3</sup> David Fisher, *Morality and War* (Oxford: Oxford University Press, 2011), 64.

<sup>4</sup> Michael Walzer, *Just and Unjust Wars*, 2<sup>nd</sup> ed. (New York: Basic Books, 1992), 21.

<sup>5</sup> The term *discrimination* is traditionally used in Just War discourse. The counterpart term in the legal realm is *distinction*.

<sup>6</sup> Walzer, *Just and Unjust Wars*, 145. In his endnote on Anscombe, Walzer cites the following: "G.E.M. Anscombe, *Mr. Truman's Degree* (privately printed, 1938), p. 75; see also 'War and Murder' in *Nuclear Weapons and Christian Conscience*, ed. Walter Stein (London, 1963)."

<sup>7</sup> *The Challenge of Peace: God's Promise and Our Response*, Pastoral Letter on War and Peace by the National Conference of Catholic Bishops (Washington, DC: United States Catholic Conference, May 3, 1983), 46.

<sup>8</sup> U.S. Army Field Manual No. 3-24/Marine Corps Warfighting Publication No. 3-33.5, *Counterinsurgency Field Manual* (Chicago: University of Chicago Press, 2007), 247-248.

<sup>9</sup> Michael Walzer, *Arguing About War* (New Haven: Yale University Press, 2004), 24-25.

<sup>10</sup> *Counterinsurgency Field Manual*, 239.

<sup>11</sup> *Law of Armed Conflict Deskbook* (Charlottesville, VA: International and Operational Law Department of the Judge Advocate General's Legal Center and School, 2014), 8-12.

<sup>12</sup> John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (New York: Free Press, 2012), 15.

<sup>13</sup> *The Declaration of Independence and the Constitution of the United States of America* (Washington, DC: National Defense University Press, 1994), 33-35.

<sup>14</sup> Witt, 377-378.

<sup>15</sup> As quoted in Walzer, *Just and Unjust Wars*, 317.

<sup>16</sup> *The Armed Forces Officer* (Washington, DC: U.S. Government Printing Office, 1950), 15.

<sup>17</sup> Commanding General Message to All Hands, March 2003, available at <[www.thehighroad.org/archive/index.php/t-14554.html](http://www.thehighroad.org/archive/index.php/t-14554.html)>, April 11, 2015.

<sup>18</sup> *Counterinsurgency Field Manual*, 237.

<sup>19</sup> *Ibid.*, 238.

<sup>20</sup> *Ibid.*, 239.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*, 240.

<sup>23</sup> *Ibid.*