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To be Judged by Twelve or Carried by Six? Quasi-Involuntariness and the Criminal Prosecution of Service Members for the Use of Force in Combat - A Grunt's Perspective

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COMMENTS

TO BE JUDGED BY TWELVE OR CARRIED BY SIX? QUASI-INVOLUNTARINESS AND THE CRIMINAL PROSECUTION OF SERVICE MEMBERS FOR THE USE OF FORCE IN COMBAT—A GRUNT’S PERSPECTIVE

Lupe Laguna*

Post-9/11 conflicts have altered the way that the United States of America and her allies fight wars. Over the last ten years military commanders have embraced counterinsurgency doctrine as the path to victory in the War on Terror. As they have done so, commanders have been faced with the difficult task of balancing the need to protect local civilian populations with the need to proactively target insurgent fighters. To accomplish this mission, the military has adopted rules of engagement that allow a service member to engage a target when he or she perceives that the target exhibits “hostile intent.” The difficulty in applying this standard in the field has been highlighted by a number of high-profile criminal investigations

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that, in some cases, have resulted in service members being convicted of homicide offenses for mistakenly engaging civilians. This Comment argues that since counterinsurgency has changed targeting doctrine via a change in the rules of engagement, the standard for assessing the reasonableness of a service member's decision to use force should also change. Specifically, the author maintains that a purely subjective standard, which makes the justification question turn on whether the service member acted in good faith, is the most appropriate way to analyze the combatant's decision to use force in a counterinsurgency environment.

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INTRODUCTION

As a warrior, you might one day face the single most difficult task any person will ever have to face: to decide whether to use deadly force and take a life. . . . If you choose to take a life when you should not, or if you fail to take a human life when you should, a world of hurt will come down on you.¹

“Roger, lead victor down, status of Marines inside unknown.” When the Marine heard this transmission crackle across the radio from inside his

¹ LT. COL. DAVE GROSSMAN, ON COMBAT: THE PSYCHOLOGY AND PHYSIOLOGY OF DEADLY CONFLICT IN WAR AND IN PEACE 144 (2004).

Humvee, on a crisp, late-fall day in 2005, he had been operating as an Infantryman in Haditha, Iraq² for less than three months. He had been in the Marine Corps for barely a year. He was in combat for the first time, and an improvised explosive device had just destroyed the vehicle in front of him moments before.

“We gotta find the triggerman,” the Marine’s vehicle commander told him, “Dismount now.”

As the Marine opened the door to the Humvee and bounded toward the nearest piece of cover—a small cement curb—his eyes scanned for improvised explosive devices. His palms were sweating and his heart was racing. His mind was filled with uncertainty. He was uncertain about the safety of his comrades inside the downed vehicle, uncertain that he would pass the test of combat, and unsure about what lay beyond the raised curb, which was the only thing protecting him from a sniper’s bullet.

He began to scan for targets and a possible location for the enemy fighter who had detonated the improvised explosive device. Just ahead, a raised berm paralleled the road the Marines were driving on, with several six-foot-wide underpasses cutting underneath. A perfect hiding spot for a triggerman. The Marine’s team leader saw the berm too, and the two Marines instantly began bounding toward the underpasses. The junior Marine reached it first and, consistent with his training, prepped a M67 fragmentation grenade³ to throw into the tunnel before breaching the threshold. But his team leader clasped his arm and told him, “No, remember November 19th.”

The author was the junior Marine in this scenario, which highlights the difficulty in determining when to use deadly force in a counterinsurgency environment. The date the author’s team leader was referring to, November 19, involved another squad in the author’s battalion. That squad encountered a similar situation, but they made the decision to use deadly force.

That incident, dubbed by the media as the “Haditha Massacre,”⁴ led to one of the most controversial criminal investigations of a service member’s

² Haditha is a city located in Al Anbar Province, Iraq. For most of 2005, it was largely under the control of foreign fighters. Omer Mahdi & Rory Carroll, *Under US Noses, Brutal Insurgents Rule Sunni Citadel*, GUARDIAN (Aug. 21, 2005 19:09 EDT), <http://www.theguardian.com/world/2005/aug/22/iraq.rorycarroll1>, archived at <http://perma.cc/C43E-Q7AL>.

³ See *M67 Fragmentation Hand Grenade*, PROJECT MANAGER CLOSE COMBAT SYS., <http://www.pica.army.mil/pmccs/combattmunitions/grenades/lethalhand/m67frag.html> (last visited Nov. 29, 2014), archived at <http://perma.cc/YHH6-SLTX>. The M67 is an anti-personnel fragmentation grenade that bursts into fragments when detonated. *Id.*

⁴ See James Joyner, *Why We Should Be Glad the Haditha Massacre Marine Got No Jail Time*, ATLANTIC (Jan. 25, 2012, 3:00 PM), <http://www.theatlantic.com/international/archive/2012/01/why-we-should-be-glad-the-haditha-massacre-marine-got-no-jail-time/251993/>, archived at <http://perma.cc/84XC-J462>. For a more detailed summary of the Haditha incident,

use of force in combat to date, leading to international condemnation of American forces.⁵ In that instance, an improvised explosive device struck the Marines' patrol and they were ambushed.⁶ The bomb killed one Marine and seriously injured two others.⁷ After locating the source of incoming small-arms fire, and believing the use of force was authorized under the rules of engagement, the Marines counterattacked. In the ensuing confusion, twenty-four Iraqi civilians were killed. Although none of the combatants were ultimately convicted of murder,⁸ the military filed criminal homicide charges against multiple Marines,⁹ and the subsequent criminal investigation dramatically shaped public perception¹⁰ of the war and influenced on-the-ground military decisions for years afterwards.¹¹

The criminal prosecution of combatants for killing in combat is a relatively recent phenomenon. Since the invasions of Iraq and Afghanistan, military courts have convicted at least twenty-eight service members of homicide offenses for using defensive force in combat.¹² Fifteen others have been prosecuted but later acquitted.¹³ Before the conflicts in Iraq and Afghanistan, the convictions of service members who used deadly force in combat, and who in good faith believed such force was necessary, were seemingly much less common.¹⁴

see Michelle Singer, *The Killings in Haditha: Marine Tells 60 Minutes He's Sorry Civilians Were Killed, but Insists He Made Right Decision*, 60 MINUTES (Mar. 15, 2007), <http://www.cbsnews.com/news/the-killings-in-haditha/>, archived at <http://perma.cc/QUE4-RJD5>; <http://perma.cc/6ZLU-4LS6>; <http://perma.cc/JVX6-88GP>; <http://perma.cc/B445-ZEP5>; <http://perma.cc/YQ24-87TQ>; <http://perma.cc/BZH9-EALZ>.

⁵ See Mary Slosson, *Marine Pleads Guilty, Ending Final Haditha Trial*, REUTERS (Jan. 23, 2012, 6:13 PM), <http://www.reuters.com/article/2012/01/23/us-marine-haditha-idUSTRE80M1U620120123>, archived at <http://perma.cc/2LM7-D6SS>.

⁶ See Singer, *supra* note 4.

⁷ *Id.*

⁸ *Case Dropped Against Officer Accused in Iraq Killings*, N.Y. TIMES, June 18, 2008, at A9.

⁹ *Marine Takes Plea Deal in Killing of 24 Iraqis*, USA TODAY, Jan. 24, 2012, at 3A.

¹⁰ See Joyner, *supra* note 4.

¹¹ See Rowan Scarborough, *Shades of Vietnam: Spike in U.S. Troop Deaths Tied to Stricter Rules of Engagement*, WASH. TIMES (Dec. 5, 2013), <http://www.washingtontimes.com/news/2013/dec/5/increase-in-battlefield-deaths-linked-to-new-rules/?page=all>, archived at <http://perma.cc/2CVS-GX5G> (noting that complaints about civilian casualties have generally influenced the application of supporting force in Afghanistan).

¹² See Charlie Savage & Elisabeth Bumiller, *An Iraqi Massacre, A Light Sentence and a Question of Military Justice*, N.Y. TIMES, Jan. 28, 2012, at A17.

¹³ *Id.*

¹⁴ In prior conflicts, convictions were generally limited to service members who, outside the context of an ongoing combat engagement, killed civilians without provocation and without any honest belief that the victims were enemy combatants. See, e.g., *United States v.*

The current prosecutions of service members in criminal court for the use of force in combat can be attributed in part to a change in the rules of engagement, which were formed in response to a changing battlefield.¹⁵ In previous conflicts against a conventional force, service members were authorized to engage enemy combatants based solely on their status as a member of the opposing force, known as “status” targeting.¹⁶ However, with the United States’ recent engagements against irregular forces in Iraq and Afghanistan, where enemy combatants blend in with the civilian population, service members are now tasked with distinguishing enemies from civilians by “conduct.”¹⁷

The U.S. military’s movement from “status-based” targeting to “conduct-based” targeting has been a difficult transition.¹⁸ In an attempt to provide a model for conduct that distinguishes a civilian from an enemy combatant, the United States developed rules of engagement that limit a service member’s use of force to situations where he or she has positive identification of a “hostile act” or “hostile intent.”¹⁹ Considering that law students in a classroom can debate endlessly whether an individual’s conduct is “intentional,” it is no surprise that service members engaged in dynamic and chaotic situations have had difficulty determining what conduct constitutes “hostile intent.”

As a result of this ambiguity, in both Iraq and Afghanistan, civilians are occasionally killed by U.S. forces after being mistaken as enemy

McMonagle, 38 M.J. 53, 54, 61 (C.M.A. 1993) (reversing the soldier’s conviction for the murder of a female civilian during Operation Just Cause, in part, because there was a factual issue as to whether the soldier thought he was receiving hostile fire when he fired his weapon); *United States v. McGhee*, 36 C.M.R. 785, 800–01 (N.B.R. 1966) (affirming the murder conviction of a Marine that was based, in part, on the jury’s finding that he did not honestly believe the Vietnamese civilian was an enemy combatant); William George Eckhardt, *My Lai: An American Tragedy*, 68 UMKC L. REV. 671, 675 (2000) (discussing the My Lai killings that occurred in Quang Ngai Province in the Republic of South Vietnam in March of 1968 in which American forces were accused of systematically executing approximately 500 non-combatants).

¹⁵ See Major Eric D. Montalvo, *When Did Imminent Stop Meaning Immediate? Jus In Bello Hostile Intent, Imminence, and Self-Defense in Counterinsurgency*, 2013 ARMY LAW. 24, 26–29 (2013).

¹⁶ *Id.* at 30.

¹⁷ *Id.* at 25. Since insurgent forces blend in with the local population, the only method of distinguishing enemy combatants from civilians is conduct amounting to a “hostile action” or “hostile intent.” *Id.*

¹⁸ See *id.* at 26–27. Moving to a conduct-based targeting model requires Soldiers and Marines to distinguish between civilians and combatants within seconds while operating in a dynamic combat environment. *Id.* at 26. As a result, civilian casualties are bound to occur. *Id.*

¹⁹ *Id.* at 30–31.

combatants.²⁰ In an attempt to deter the use of force against civilians, some within the military have advocated for harsh repercussions for violating the rules of engagement—even when the combatant was acting in good faith.²¹ Such repercussions can include administrative punishment, which may end a service member’s career,²² or criminal prosecution for homicide crimes, such as murder or manslaughter, in military court.²³

Despite these proponents’ alleged desire to deter excessive use of force by punishing rules of engagement violators, the recent prosecutions have been relatively limited in scope, potentially minimizing any possible deterrent effect. Notwithstanding the fact that the use of drone strikes, close-air-support, and other supporting arms results in allegedly high numbers of civilian casualties,²⁴ the military’s prosecutions have been limited to junior enlisted and junior officer ground-service personnel who engage suspected combatants with small arms.²⁵ Thus, it is difficult to rationalize the prosecutions of ground troops from a deterrence perspective when there seemingly has been little punishment of other combatants who also inflict civilian casualties, making the pragmatic benefits of these prosecutions questionable.

²⁰ Sabrina Tavernise & Andrew W. Lehren, *Buffeted by Fury and Chaos, Civilians Paid Heaviest Toll*, N.Y. TIMES, Oct. 23, 2010, at A1.

²¹ See, e.g., Montalvo, *supra* note 15, at 34. Major Montalvo argues that prosecuting service members who, acting in good faith, violate the Rules of Engagement “accomplishes two things: (1) provides opportunities for commanders to conduct more focused ROE training based on a substantiated problem and (2) increases the credibility of the commander in the eyes of higher headquarters and the public because he accepts responsibility for a mistake and takes corrective action.” *Id.*

²² See, e.g., Sara A. Carter, *Marine’s Career Threatened by Controversial Rules of Engagement*, WASH. EXAMINER (Jan. 23, 2012, 7:05 PM), <http://washingtonexaminer.com/article/167369>, archived at <http://perma.cc/Z4SK-A3S3>.

²³ See *supra* notes 4–13 and accompanying text. Any distinction between military courts and the civilian criminal justice system is noted where relevant.

²⁴ Michelle Nichols, *Pakistan Tells U.N. at Least 400 Civilians Killed by Drone Strikes*, REUTERS (Oct. 18, 2013, 7:41 PM), <http://www.reuters.com/article/2013/10/18/us-un-drones-idUSBRE99H16Z20131018>, archived at <http://perma.cc/88X7-4KGW>.

²⁵ See e.g., Associated Press, *Clint Lorange Guilty: Army Officer Charged with 2 Counts of Murder for Afghanistan Shootings*, WORLD POST (Aug. 1, 2013, 9:25 PM), http://www.huffingtonpost.com/2013/08/01/army-officer-found-guilty_n_3692757.html, archived at <http://perma.cc/6AXZ-MAT6> (reporting that a United States Army 1st Lieutenant was found guilty of murder when he ordered his soldiers to engage two individuals he believed were exhibiting hostile intent); *Marine Charged with Murder in Fallujah Killing*, SFGATE (Aug. 21, 2007, 4:00 AM), <http://www.sfgate.com/news/article/Marine-charged-with-murder-in-Fallujah-killing-2508908.php>, archived at <http://perma.cc/PBZ5-8PA5> (reporting on a Marine Sergeant charged with murder for violating the rules of engagement during combat operations in Fallujah, Iraq).

Additionally, prosecuting combatants for traditional homicide crimes poses a number of doctrinal problems, and there are signs that military courts are uncomfortable with prosecuting service members under self-defense standards for actions in combat. The United States Supreme Court recently denied certiorari to the Court of Appeals for the Armed Forces, which asked whether a service member loses his right to self-defense as a matter of law when he, without legal authorization, points his weapon at a suspected enemy combatant.²⁶ The confusion among military courts is an indication that criminal law doctrine as currently applied to combat engagements might be ill-suited for counterinsurgency. But given that most military commanders accept the notion that the United States will likely engage in counterinsurgency conflicts in the future,²⁷ military courts must be prepared to apply criminal law to combat engagements in a counterinsurgency environment. This can be done, but it will require some doctrinal evolution in order to keep in step with the evolution of modern combat.

This Comment will focus on the appropriate standard for assessing the “reasonableness” of a combatant’s decision to use force. In each case of an alleged rules of engagement violation, both the actus reus and the mens rea will often be satisfied: it is usually known that the defendant did the killing, satisfying the actus reus of a homicide crime, and it is usually surmised that when a service member uses force in combat against an enemy combatant he intends to kill or cause great bodily injury to the suspected enemy fighter, satisfying mens rea. In these circumstances, a combatant will most likely have to argue that his use of force was justified under the rules of engagement.²⁸ Thus, the key inquiry will likely be whether it was “reasonable” for the combatant to conclude that he was authorized to use deadly force.

Courts and reviewing officers analyze the reasonableness of a service member’s use of force in much the same manner that a civilian jury assesses the reasonableness of a criminal defendant’s self-defense claim.²⁹ Currently,

²⁶ *United States v. Behenna*, 71 M.J. 228, 230 (C.A.A.F. 2012), *reconsideration denied*, 71 M.J. 375 (C.A.A.F. 2012), *cert. denied*, 133 S. Ct. 2765 (U.S. 2013).

²⁷ See U.S. DEP’T OF THE ARMY, THE U.S. ARMY/MARINE CORPS COUNTERINSURGENCY FIELD MANUAL, at li (2007) (noting that since “[t]he United States possesses overwhelming conventional military superiority . . . [t]his capability has pushed its enemies to fight U.S. forces unconventionally, mixing modern technology with ancient techniques of insurgency and terrorism”).

²⁸ Although a mistake-of-fact instruction would seem appropriate, as opposed to a self-defense instruction, in none of the cases analyzed in this Comment did military courts offer a mistake-of-fact instruction to the jury. The rationale behind this is unclear.

²⁹ See Montalvo, *supra* note 15, at 30. Major Montalvo notes a service member’s use of force, similar to the common law general intent standard, must be both “honest and

when assessing the reasonableness of a defendant combatant's use of force, military courts apply Rule for Court Martial 916(e), which—like traditional self-defense doctrine—requires a defendant's use of force to be both subjectively and objectively reasonable.³⁰

But much as the current rules of engagement have evolved to allow combatants to engage in “conduct-based” targeting, the standard of review for assessing the reasonableness of a combatant's use of force must too evolve. This can best be accomplished by analyzing the “reasonableness” of a service member's use of force with a purely subjective standard, much like courts do for the defense for battered persons (referenced in this Comment as the “battered woman defense”). Unlike the dual standard currently used by the military courts, which asks both whether the defendant honestly believed use of force was necessary and whether that belief was reasonable, the purely subjective standard only asks whether the actor honestly believed the use of force was necessary.³¹

In a combat environment, an objective standard is inappropriate because it assumes an actor's actions are completely voluntary.³² The rules of engagement, and the obligation placed on combatants to use deadly force in order to accomplish their mission, will be shown to make the combatant's

reasonable.” *Id.* at 31. *See also* Kim Murphy, *Soldier is Cleared in Afghanistan Shooting*, L.A. TIMES, Aug. 10, 2012, at AA2. In dismissing charges against an Army Sergeant who shot and killed an Afghani woman in the middle of a firefight, the reviewing officer determined a “reasonable person” would have thought the service member's use of force was necessary. *Id.*

³⁰ *See* Lt. Colonel Randall Bagwell, *The Threat Assessment Process (TAP): The Evolution of Escalation of Force*, 2008 ARMY LAW. 5, 12 (2008). The standard for assessing the reasonableness of a Soldier's use of force is objective, in accordance with the Manual for Courts-Martial, United States, RCM 916(e) (2008), which states:

It is a defense to a homicide, assault involving deadly force, or battery involving deadly force that the accused: (A) Apprehended, on reasonable grounds, that death or grievous bodily harm was about to be inflicted wrongfully on the accused; and (B) Believed that the force the accused used was necessary for protection against death or grievous bodily harm.

³¹ Kevin Jon Heller, *Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 AM. J. CRIM. L. 1, 56 (1998).

³² *Id.* at 14. Heller notes that the objective standard asks only whether “a reasonable person in defendant's circumstances would have perceived self-defense as necessary” and thus would have killed in self-defense, not whether the person who actually killed in self-defense could have avoided doing so. The objective standard embraced . . . therefore, is necessarily predicated upon a presumption of free will. *Id.* (citation omitted). *See also* Donald L. Creach, Note, *Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why*, 34 STAN. L. REV. 615, 617 (1982) (“[The objective standard] assumes people can choose how to respond to an apparent attack. If a defendant tries to explain that her response was partially caused by external conditions, self-defense doctrine does not know what to make of that explanation.”).

use of force somewhere between pure voluntary and involuntary action, or “quasi-involuntary,” and thus incompatible with an objective analysis.³³ The subjective standard, which hinges on the “good faith”³⁴ of the actor, allows courts to reconcile this dilemma while still holding accountable those service members who use force in bad faith.

Part I of this Comment describes the counterinsurgency environment to illustrate the difficult and ambiguous use of force decisions troops must make in modern combat. Part II discusses how the rules of engagement developed into a “conduct-based” standard—in response to counterinsurgency conflicts—that hinges on an individual service member’s own perception of his or her environment. Part III explores the various potential standards for assessing the reasonableness of a combatant’s use of force, addressing the inadequacies of each. Part IV argues that assessing the reasonableness of a combatant’s actions from a purely subjective standard, which hinges on good faith, is most compatible with the current rules of engagement and modern combat. In addition, the rules of engagement, the combatant’s legal obligations to obey orders, and the counterinsurgency environment will be shown to make a service member’s conduct quasi-involuntary, and thus incompatible with an intentionalist-based objective standard. Part V is dedicated to addressing the policy concerns associated with a purely subjective standard.

I. COUNTERINSURGENCY WARFARE

Since September 11, 2001, the nature of combat has changed, with the American military engaging in nation-building and insurgency suppression in both Iraq and Afghanistan. Military commanders agree that, due to the technological superiority of the United States over most of its adversaries, future conflicts will likely involve American forces engaging in some sort of counterinsurgency campaign.³⁵ Both military tactics and the rules of

³³ Creach, *supra* note 32, at 617.

³⁴ In *Moor v. Licciardello*, the Supreme Court of Delaware noted the Delaware Criminal Commentary states that for the subjective, “good faith” standard:

[a]ll that is relevant to the actor’s guilt is that he did honestly believe it necessary to use force in his own defense . . . [I]f he honestly believes he needs to act in self-defense, the criminal law will be powerless to stop him, no matter how unreasonable his belief. It is best, then, that the official statement of the law be realistic.

463 A.2d 268, 272 (Del. 1983). The court also noted that a subjective standard for reasonableness in the context of self-defense makes self-defense doctrine consistent with mistake-of-fact doctrine, which under Delaware statutory law only requires a mistake to be subjectively reasonable. *Id.*

³⁵ See U.S. DEP’T OF THE ARMY, *supra* note 27, at 1.

engagement have been forced to adapt, to a certain extent, in order to effectively fight counterinsurgency conflicts.

An insurgency is “an organized movement aimed at the overthrow of a constituted government through the use of subversion and armed conflict.”³⁶ In the classic insurgency environment, the enemy exploits the local population by blending in with noncombatants.³⁷ By doing so, the insurgent prevents the technologically superior opponent from identifying him and engaging him based on his status as a combatant.³⁸ As a result, the insurgent gains the initiative and is able to determine when to engage the technologically superior force. Counterinsurgency, on the other hand, or “COIN,” is “military, paramilitary, political, economic, psychological, and civic actions taken by a government to defeat insurgency.”³⁹ At the center of counterinsurgency is a struggle for political power, with insurgents seeking to undermine the current power while counterinsurgents seek to support it.⁴⁰

According to U.S. COIN doctrine, long-term victory in COIN conflicts hinges on the local population taking charge of their own security and governance.⁴¹ In order to achieve this goal, the counterinsurgent must gain the trust of the civilian populace.⁴² This trust reduces the insurgent’s ability to exploit the population for concealment and intelligence purposes and increases the occupying forces’ ability to engage in effective nation-building efforts, which in turn, enables the country to take control of its own security.

Mitigating civilian casualties is a fundamental principle of COIN doctrine, as civilian casualties erode the local population’s trust in the occupying force.⁴³ Cutting against the desire to protect civilian casualties, however, are commanders’ obligations to protect their troops against enemy action. Troop protection serves the additional purpose of maintaining public support for the conflict at home.⁴⁴ Such support is necessary to achieve success, as most COIN conflicts require significant time and financial resources.⁴⁵

Balancing the need to eliminate the enemy who blends in with the civilian population with the need to protect the civilian population from harm

³⁶ *Id.* at 2.

³⁷ *See id.* at 4.

³⁸ *See id.*

³⁹ *Id.* at 2.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See id.* at 42–43.

⁴³ *See id.* at 43–44.

⁴⁴ *Id.*

⁴⁵ *Id.* at 43.

creates difficulties for commanders. In traditional symmetrical conflicts, where one uniformed nation force is fighting another uniformed nation force, combatants may engage each other based on “status”⁴⁶: once a combatant identifies a member of the opposing force, he can engage him at any time regardless of the individual’s conduct.⁴⁷ In the COIN environment, where the enemy and the civilian population are indistinguishable, the “status-based” model of targeting is impossible to implement. COIN instead requires the service member to engage in a “conduct-based” targeting analysis, basing his determination to use force on the perceived threat’s actions.⁴⁸

This creates a dynamic, and inherently obscure, environment for ground forces to operate in, which in turn distorts their subjective perception of that environment. Troops patrolling a street could one day be dropping off paper and pencils at a neighborhood school, and the next day be locked in pitched combat on that very same street.⁴⁹ This situation forces individual combatants, who must attempt to distinguish civilians from combatants, to engage in an ad-hoc analysis at a moment’s notice in built-up residential areas.

II. THE RULES OF ENGAGEMENT

In response to the requirement for soldiers and Marines to engage in “conduct”-based targeting in the COIN environment, commanders were forced to adjust the rules of engagement for the conflicts in Iraq and Afghanistan.⁵⁰ According to the *Dictionary of Military and Associated Terms*, rules of engagement (ROE) are “directives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered.”⁵¹ The ROE are supposed to ““give operational and tactical military leaders greater control over the execution of

⁴⁶ See Montalvo, *supra* note 15, at 30.

⁴⁷ *Id.*

⁴⁸ See *id.*

⁴⁹ See U.S. DEP’T OF THE ARMY, *supra* note 27, at 242 (“Success in COIN operations requires small-unit leaders agile enough to transition among many types of missions and able to adapt to change. They must be able to shift through a number of activities from nation building to combat and back again in days, or even hours.”).

⁵⁰ See generally Montalvo, *supra* note 15, at 30 (noting that the U.S. military has moved from status-based to conduct-based targeting).

⁵¹ U.S. DEP’T OF DEFENSE, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 221–22 (Aug. 15, 2014), available at http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf, archived at <http://perma.cc/PZA9-TQ68>; see also Montalvo, *supra* note 15, at 24.

combat operations.’ It is important to recognize that ROE are . . . military directives.’⁵²

In an attempt to achieve the appropriate balance between force protection and civilian protection, military commanders in Iraq and Afghanistan developed an ROE that has gone through significant change over the last decade.⁵³ The predecessor to the current ROE was first developed by the military for American forces in 1981.⁵⁴ Between 1981 and 2004, every form of the ROE reiterated that forces have the inherent right to self-defense when troops are faced with an imminent threat of “hostile intent.”⁵⁵ However, the rules of engagement provided no further explanation of the word “imminent.”⁵⁶ In 2005, in light of the conflicts in Iraq and Afghanistan and the move to conduct-based targeting, military commanders changed the ROE and provided an expanded definition of the word “imminent.” This ROE defined hostile intent as:

The threat of imminent use of force against the United States, U.S. forces or other designated persons or property. It is also the threat of force to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital USG property . . . [t]he determination of whether the use of force against U.S. forces is

⁵² Montalvo, *supra* note 15, at 28 (quoting GEOFFREY S. CORN ET AL., *THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH* 126 (2012)).

⁵³ *See id.* at 28–29. Major Montalvo identifies four definitions of hostile intent prior to the current Rules of Engagement, in chronological order:

1. Worldwide Peacetime ROE for Seaborne Forces, 1981

Hostile Intent—The threat of the imminent use of force by a foreign force against the United States or U.S. forces . . . where the hostile intent amounts to a threat of imminent attack, the right exists to use proportional force in self-defense by all authorized means available.

2. JCS Peacetime Rules of Engagement, 26 June 1986

Hostile Intent—Hostile intent is the threat of the imminent use of force . . . [w]here there is preparation for imminent use of armed force, the right exists to use proportional force, including armed force, in self-defense by all authorized means available . . .

3. CJCSI 3121.01, JCS Standing Rules of Engagement, 1 Oct 1994

Hostile Intent—Hostile intent is the threat of imminent use of force by a foreign force or terrorist unit (organization or individual) against the United States . . . [w]hen hostile intent is present, the right exists to use proportional force, including armed force, in self-defense by all necessary means available to deter or neutralize the potential attacker or, if necessary, to destroy the threat.

4. CJCSI 3121.01A, Standing Rules of Engagement for US Forces, 15 January 2000

Hostile Intent—The threat of imminent use of force against the United States, U.S. forces, and . . . the threat of force to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital USG property.

Id. at 35.

⁵⁴ *Id.* at 28.

⁵⁵ *Id.*

⁵⁶ *Id.*

imminent will be based on an assessment of all facts and circumstances known to U.S. forces at the time and may be made at any level. *Imminent does not necessarily mean immediate or instantaneous.*⁵⁷

This definition of imminent, expanded to include threats that are not necessarily “immediate or instantaneous,” broadens the scope of “hostile intent” to include conduct that under the pre-2005 definition of “hostile intent” may not have authorized the use of deadly force. It enables service members to engage threats before being in immediate danger of being fired upon, but also increases the likelihood of civilian casualties.

Under the new ROE, in order to determine if “hostile intent” exists, service members engage in a situational-based analysis that hinges on their subjective interpretation of a number of factors.⁵⁸ Factors in this totality of the circumstances-like analysis may include the following: the military intelligence available to the shooter, the potential threat’s noncompliance with verbal commands, the location of a potential threat’s hands, the potential threat’s maneuvering into a position to gain a tactical advantage, his general nervousness, and his possession of weapons while engaging in furtive behavior.⁵⁹ However, no factor standing alone can be dispositive of hostile intent.⁶⁰

In a dynamic combat environment, when troops have moments to decide whether to use force and must base that determination on their subjective interpretation of conduct, they are bound to make some mistakes. Some commentators suggest, as a possible solution to this problem, to move to a purely objective ROE, which draws a bright line between “no-go” and “go” use of force scenarios.⁶¹ But given that COIN environments *require* troops to engage in a conduct-based targeting scheme to distinguish civilians from enemy combatants in a moment’s notice, moving away from a conduct-based ROE seems unlikely.

⁵⁷ *Id.* at 35 (emphasis added). Note the additional definition of “imminent use of force” is the most recent version of the ROE. This addition essentially turns an objective analysis into a subjective one.

⁵⁸ *See id.* at 35. The current ROE states that an assessment of whether the use of force is needed is based on all facts and circumstances known to the service member at the time. *Id.*

⁵⁹ *See* Bagwell, *supra* note 30, at 12.

⁶⁰ *Id.*

⁶¹ *See, e.g.,* Montalvo, *supra* note 15, at 34 (arguing for a return to the pre-2005 definition of “imminence” that, he argues, would reduce the chances of service members erroneously using deadly force).

III. SELF-DEFENSE LAW AND THE REASONABLE PERSON

Which brings us to the next question: if the ROE dictates the combatant's use of force decision before the trigger is squeezed, how should courts go about assessing the reasonableness of that decision? Substantial scholarship has been devoted to the various methods of analyzing the reasonableness of a civilian actor's conduct when using defensive force in a domestic setting.⁶² Yet there has been limited, if any, discussion about the appropriate standard for analyzing the reasonableness of a combatant's use of force while engaged in combat.

Civilian criminal law courts have long struggled with how best to judge the "reasonableness" of an individual's use of defensive force.⁶³ When assessing the reasonableness of a defendant's use of force, most American jurisdictions employ one of three standards.⁶⁴ First, the majority of jurisdictions—including U.S. military courts⁶⁵—apply a dual standard, requiring an actor to subjectively believe his use of force was justified and that the actor's use of force be "objectively reasonable."⁶⁶ Second, some jurisdictions apply a purely objective standard, disregarding the actor's subjective state of mind.⁶⁷ Third, a minority of jurisdictions apply a purely

⁶² See, e.g., Heller, *supra* note 31, at 103 (analyzing various standards of reasonableness before noting the purely subjective standard assumes that individuals cannot avoid acting upon an honest belief that self-defensive action is required); Steffani J. Saitow, Note, *Battered Woman Syndrome: Does the "Reasonable Battered Woman" Exist?*, 19 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 329 (1993); Robert Unikel, "Reasonable" Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence, 87 NW. U. L. REV. 326 (1992).

⁶³ See John F. Wagner Jr., Annotation, *Standard for Determination of Reasonableness of Criminal Defendant's Belief, for Purposes of Self-Defense Claim, That Physical Force Is Necessary—Modern Cases*, 73 A.L.R. 4th 993, 996–97 (1989) (indicating that courts have identified three separate standards for assessing the reasonableness of a defendant's use of force).

⁶⁴ *Id.*

⁶⁵ See Bagwell, *supra* note 30, and accompanying text.

⁶⁶ See, e.g., Hall v. United States, 46 F.3d 855, 857 (8th Cir. 1995) ("To sustain the defense, the jury would have to find that Hall used 'such force that he reasonably believe[d] [was] necessary to protect himself from unlawful physical harm about to be inflicted upon him by another.'" (citation omitted)).

⁶⁷ See, e.g., State v. Stewart, 763 P.2d 572, 579 (Kan. 1988) ("We first use a subjective standard to determine whether the defendant sincerely and honestly believed it necessary to kill in order to defend. We then use an objective standard to determine whether defendant's belief was reasonable—specifically, whether a reasonable person in defendant's circumstances would have perceived self-defense as necessary."). The Military Manual for Courts-Martial adopts a similar standard, with jury instructions indicating the first prong is an objective prong, noting that:

[T]he accused's apprehension of death or grievous bodily harm must have been one which a reasonable, prudent person would have held under the circumstances. Because this test is objective,

subjective standard, without any objective limitations.⁶⁸

A. THE DUAL STANDARD

Under the dual standard, a defendant must have actually and honestly believed deadly force was necessary to protect him or herself, and that belief must be one that a reasonable person would have held under the circumstances.⁶⁹ Thus, even if an actor honestly and in good faith believes his or her life is in danger, if that belief is not objectively reasonable from the standard of a “reasonable person,” the actor’s self-defense claim fails.

Courts have historically struggled to define a “reasonable person.”⁷⁰ This objective inquiry has caused the “reasonable person” standard to be criticized as a vehicle for juries to project social, political, and racial bias on the individual defendant’s “situation.”⁷¹ This is because assessing an actor’s

such matters as intoxication or emotional instability of the accused are irrelevant. On the other hand, such matters as the relative height, weight, and general build of the accused and the alleged victim, and the possibility of safe retreat are ordinarily among the circumstances which should be considered in determining the reasonableness of the apprehension of death or grievous bodily harm.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, RCM 916(e) (2012). However the second prong is subjective; “[a]ccordingly, such matters as the accused’s emotional control, education, and intelligence are relevant in determining the accused’s actual belief as to the force necessary to repel the attack.” *Id.*

⁶⁸ See, e.g., *State v. Leidholm*, 334 N.W.2d 811, 818 (N.D. 1983) (stating that “[a] defendant’s conduct” in relation to a claim of self-defense is not to be judged by what an objectively reasonable person would do under like circumstances as the defendant, but what the defendant “himself in good faith honestly believed and had reasonable ground to believe was necessary for him to do to protect himself from apprehended death or great bodily injury.”) (quoting *State v. Hazlett*, 113 N.W. 374, 380 (N.D. 1907) (internal quotation marks omitted)); see also *State v. Thomas*, 468 N.E.2d 763, 765 (Ohio Ct. App. 1983) (“[I]t seems now to be finally determined that guilt is personal, and that the conduct of any individual is to be measured by that individual’s equipment mentally and physically. He may act in self-defense, not only when a reasonable person would so act, but when one with the particular qualities that the individual himself has would so do.”) (quoting *Nelson v. State*, 181 N.E. 448, 449 (Ohio Ct. App. 1932) (internal quotation marks omitted)).

⁶⁹ See *Stewart*, 763 P.2d at 579.

⁷⁰ *People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986). In *Goetz*, the defendant shot four African-American youths on a subway after they approached him and requested five dollars. *Id.* at 43. The New York intermediate appeals court majority found that “reasonableness” should be determined by the actor’s perception of the situation. *Id.* at 46. In dissent, one justice argued that “reasonableness” should be assessed from the perspective of an objective person who is similarly situated to the defendant. *Id.* On appeal, the New York Court of Appeals rejected the intermediate court’s majority opinion and held that “reasonableness” should be an objective inquiry that takes into account the defendant’s individual perceptions of the situation. *Id.* at 52.

⁷¹ See Kit Kinports, *So Much Activity, So Little Change: A Reply to the Critics of Battered Women’s Self-Defense*, 23 ST. LOUIS U. PUB. L. REV. 155, 167 (2004).

“situation” from the perspective of a notional third person requires jurors to construct their own hypothetical “reasonable person,” which may lead to individual juror bias inadvertently discriminating against the defendant.⁷²

The objective prong of the dual standard is also predicated on the assumption that the actor’s decision to use force was wholly voluntary or that an option besides the use of force was available.⁷³ Criminal law doctrine generally follows an intentionalist model, seeking only to punish individuals for purely voluntary acts.⁷⁴ Under the objective test, the question is whether a “reasonable person” would have thought self-defense was necessary, and not whether the person who actually killed in self-defense could have avoided using defensive force.⁷⁵ Thus, under the objective standard there is an implicit irrebuttable presumption that the defendant’s actions were wholly voluntary.⁷⁶ This irrebuttable presumption makes the objective standard difficult to apply fairly in situations where the decision to use deadly force is either involuntary or not entirely voluntary.

Under the subjective prong of the dual standard, the defendant must have honestly believed the use of force was necessary. The nuances of the subjective prong are discussed below in the context of the purely subjective standard.

B. THE PURELY SUBJECTIVE STANDARD

Some courts choose to avoid the problems involved with jurors attempting to apply a notional “reasonable person” to a defendant’s situation by adopting a purely subjective standard of reasonableness.⁷⁷ In addition, a purely subjective standard avoids the irrebuttable presumption of “voluntariness” implicit in the objective inquiry.⁷⁸ Currently, four states

⁷² See Heller, *supra* note 31, at 4; Kinports, *supra* note 71, at 167; Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1208 (1992).

⁷³ See Creach, *supra* note 32, at 617 (noting that the criminal law only punishes voluntary acts, and traditional self-defense doctrine presumes voluntary action).

⁷⁴ See Heller, *supra* note 31, at 14; see also Lauren E. Goldman, Note, *Nonconfrontational Killings and the Appropriate Use of Battered Child Syndrome Testimony: The Hazards of Subjective Self-Defense and the Merits of Partial Excuse*, 45 CASE W. RES. L. REV. 185, 225 (1994) (noting that in some jurisdictions, when a defendant’s actions are not entirely voluntary, less serious charges and punishments may be imposed).

⁷⁵ Heller, *supra* note 31, at 14.

⁷⁶ See *id.*

⁷⁷ See *id.* at 57, 59.

⁷⁸ See *id.* at 59–60.

employ a purely subjective analysis when determining the reasonableness of defendant's use of force.⁷⁹

Under the subjective standard, the defendant's culpability turns on his own honest belief that the use of force was necessary.⁸⁰ Courts that have applied a subjective standard, as opposed to an objective one, avoid the presumption of voluntariness embedded in the objective inquiry.⁸¹ These courts note that when an actor is placed in a situation where he believes the use of force is necessary to prevent death or grievous bodily harm, the actor's desire to survive creates a situation where he has no choice but to use deadly force.⁸² Thus, the question should not be whether the actor *should* have used deadly force, but rather whether he honestly believed such force was necessary. If the defendant had such a belief, he would have no choice but to act and punishing him for that action would be at odds with the American criminal law's voluntariness requirement.⁸³

Some critics of a subjective standard argue that it weakens the force of homicide law and gives defendants carte blanche to use excessive defensive force.⁸⁴ But this is an oversimplification. Proponents of the objective standard assume the force of law influences the decisions of actors in life-or-death scenarios. Yet when an actor is in honest fear of his or her life, rational behavior cannot be expected. This makes the potential deterrence effect of an objective standard minimal at best. In comparison, the subjective standard only holds accountable the defendant who consciously acted in bad faith. Such actions are wholly voluntary and can be deterred with the appropriate punishment.

Additionally, critics of the subjective standard assume that just because a defendant claims he was in fear of his life, an acquittal will come easily. However, this is not necessarily the case. In most jurisdictions, the burden is on the defendant to prove his or her self-defense claim.⁸⁵ Proving the defendant's own subjective belief is a task that poses numerous evidentiary

⁷⁹ *Id.* at 57 (noting that Delaware, Kentucky, North Dakota, and Ohio are the only states to employ a purely subjective standard when assessing the reasonableness of a defendant's use of force).

⁸⁰ *See, e.g., Moor v. Licciardello*, 463 A.2d 268, 272 (Del. 1983) (citing DEL. CODE ANN. tit. 11, § 464).

⁸¹ *See Heller, supra* note 31, at 59–60.

⁸² *See Moor*, 463 A.2d at 272; *People v. Lennon*, 38 N.W. 871, 872 (Mich. 1888) (“To hold [an objective standard] would be to set at naught, and to rule at variance with, the well-known laws of human nature . . .”).

⁸³ *See U.S. DEP'T OF THE ARMY, supra* note 27, at 14.

⁸⁴ *See, e.g., Heller, supra* note 31, at 65.

⁸⁵ Jeffrey F. Ghent, Annotation, *Homicide: Modern Status of Rules as to Burden and Quantum of Proof to Show Self-Defense*, 43 A.L.R. 3d 221, 226 (1972).

challenges, often requiring the defendant to take the stand, subjecting him or her to cross-examination.

At first glance, jurors may seem ill-equipped to assess the state of mind of the actor at the time he used force. However, jurors are tasked with engaging in the same sort of analysis when they are asked to determine if a defendant satisfies the mens rea requirement of a criminal offense. And asking a juror to assess the honesty of a defendant is simpler than asking a juror to assess the reasonableness of a defendant's actions from a notional third person perspective as it more naturally fits the jury's primary role of evaluating the credibility and truthfulness of witness testimony.⁸⁶ This is because the subjective standard hinges on what the actor honestly and in fact believed at the time of the engagement, which makes the testimony of the defendant crucial to any claim of self-defense. Thus, the subjective standard gives jurors the opportunity to do what they do best: assess the credibility of witness testimony.⁸⁷

C. THE PURELY SUBJECTIVE STANDARD AND THE BATTERED WOMAN DEFENSE

Although only four jurisdictions employ a purely subjective standard of reasonableness for all defensive force cases, many jurisdictions have adopted an essentially purely subjective standard of "reasonableness" in instances where the defendant suffers from battered woman's syndrome.⁸⁸ The classic case of *State v. Leidholm* highlights the justifications for such a standard. There the defendant had been involved in an abusive relationship for a number of years and was often subjected to violence by her spouse.⁸⁹ On the night of the killing, after both the defendant and the victim had been drinking, the two were involved in an argument.⁹⁰ But the argument subsided and the defendant's husband fell asleep.⁹¹ Fearful that her husband would inflict grievous bodily harm on her after he woke,⁹² the defendant stabbed her husband to death while he slept.⁹³ In holding a subjective standard was appropriate for the defendant's self-defense claim the court noted,

⁸⁶ See Heller, *supra* note 31, at 59 (noting that "lie-detection" is the normal function of the jury, making the subjective standard of reasonableness much easier for jurors to apply than the *objective* standard).

⁸⁷ See *id.*

⁸⁸ See, e.g., *State v. Leidholm*, 334 N.W.2d 811, 818 (N.D. 1983).

⁸⁹ *Id.* at 813.

⁹⁰ *Id.* at 813–14.

⁹¹ *Id.* at 814.

⁹² See *id.* at 818–19.

⁹³ *Id.*

The significance of the difference in viewing circumstances from the standpoint of the “defendant alone” rather than from the standpoint of a “reasonably cautious person” is that the jury’s consideration of the unique physical and psychological characteristics of an accused allows the jury to judge the reasonableness of the accused’s actions against the accused’s subjective impressions of the need to use force rather than against those impressions which a jury determines that a hypothetical reasonably cautious person would have under similar circumstances.⁹⁴

Other courts have endorsed the *Leidholm*-type analysis in similar situations,⁹⁵ indicating that:

the defendant’s actions are to be judged against her own subjective impressions and not those which a detached jury might determine to be objectively reasonable. The jury is to consider whether the petitioner reasonably believed that she was in imminent danger of death or great bodily harm, in light of all the facts and circumstances known to her.⁹⁶

Although, similar to the objective standard, the subjective standard uses the term “reasonably believed,” courts have held that the “reasonableness” in the case of battered woman’s syndrome is judged from the position of the accused, as opposed to a notional “reasonable person.”⁹⁷

The rationale behind this subtle change is simple. Self-defense standards, when measured from an objective standpoint, follow an intentionalist model.⁹⁸ Thus, the objective standard assumes a defendant perceived that he had a choice in his course of action, and thus weighed those choices and acted purely voluntarily when deciding to use defensive force. A purely voluntary action is relatively simple for a third party—in this instance the trier of fact—to analyze from an objective standpoint because no inquiry into the actor’s state of mind is necessary. The trier of fact can simply look at the choices that were presented to the actor at the time of the action, and determine if the choice he made was objectively reasonable. In much the same way, a wholly involuntary action is just as simple for a juror to evaluate from an objective standard. For example, if another person pushes a defendant into a victim, causing the victim to fall to his death, it is easy to surmise that the defendant’s involuntary action does not warrant criminal liability because, although he may have fallen into the victim, he made no choice to do so. But in between purely voluntary and involuntary action lays

⁹⁴ *Id.* at 818.

⁹⁵ In *Tourlakis v. Morris*, the court noted that appellate court decisions from twenty-one states and the District of Columbia reflected an acceptance of the battered woman defense, while only six states had expressly refused to adopt the rule. 738 F. Supp. 1128, 1133 (S.D. Ohio 1990).

⁹⁶ *State v. Kelly*, 685 P.2d 564, 570–71 (Wash. 1984) (en banc) (citations and internal quotation marks omitted).

⁹⁷ See, e.g., *Leidholm*, 334 N.W.2d at 818.

⁹⁸ See *Heller*, *supra* note 31, at 14.

a third category of conduct with which the intentionalist model of criminal law struggles.⁹⁹ In this quasi-involuntary category of conduct, an actor has a choice between action and inaction, but external factors, perceived only by the actor, force him or her to make what could be considered an objectively unreasonable decision.¹⁰⁰

The battered woman falls into this category.¹⁰¹ In her case, she has the option of retreating from her home between bouts of domestic violence or using deadly force in self-defense. But external factors leave the woman often feeling like she has no choice at all. Retreat is often not an option for her because the violence is occurring in her home, which is supposed to be her place of safety. She could call the police, but law enforcement intervention in domestic violence situations is often unsuccessful, with officers reluctant to arrest in minor instances of violence, and prosecutors sometimes reluctant to prosecute.¹⁰² These external factors result in the woman being trapped in a state of helplessness,¹⁰³ with no other realistic option but to defend herself

⁹⁹ *Id.* at 81–87.

¹⁰⁰ *Id.* at 87.

¹⁰¹ *Id.* at 86–87.

¹⁰² See Creach, *supra* note 32, at 630 & n.74 (noting that commentators have widely established the inadequacy of the criminal justice system in protecting victims of domestic violence).

¹⁰³ See Jimmie E. Tinsley, *Criminal Law: The Battered Woman Defense*, 34 AM. JUR. PROOF OF FACTS 2D 11–12 (1983). Tinsley notes:

Battered women generally have a low self-esteem and tend to have traditional views concerning family relationships and roles. Battered women often feel shame and guilt, acting on the premise that they themselves are somehow responsible for the violence inflicted on them. They tend to be both emotionally and economically dependent on their husbands, and thus are unable to leave them. Battering men also tend to suffer from low esteem and to have traditional views regarding roles in the family. Battering men tend to alternate between periods of violence and periods of kindness, and often do not believe that they are particularly violent or have a particularly bad temper. Battering men frequently come from families in which their fathers battered their mothers. Battering men often are extremely jealous of their wives, and they tend to isolate their wives from other people. For example, a battering husband may refuse to permit his wife to handle checks or money, and he may take other measures to ensure that she spends most of her time in the home.

Dr. Lenore Walker, a clinical psychologist, has concluded that there are three phases to the battered woman syndrome. During the first phase, which may last for an indefinite time, minor incidents of physical abuse occur as tension builds. The second, or acute stage, occurs when the husband loses control and inflicts a serious beating on his wife. A stage two incident may consist of prolonged beating that seriously injures or even kills the woman. Various factors, most of them seemingly quite trivial, tend to precipitate a stage two attack. For example, minor money disputes often result in acute battering incidents. Also, the battering man is often intoxicated at the time of a stage two incident. Pregnant women are particularly vulnerable, and stage two incidents often occur when a woman is in an advanced stage of pregnancy. Assuming that the woman survives the stage two incident, stage three is a loving stage. During this stage the husband appears to regret his battering behavior and to be a gentle, kind, and

with force. Yet because, from the perspective of a third person, she has an alternative to using force, under an objective analysis her decision to do so would be unreasonable. But since external factors render her choice to refrain from using force a non-choice, she believes her only option is to attack. This makes her decision to use force not purely voluntary or involuntary, but *quasi-involuntary*.¹⁰⁴

IV. THE SUBJECTIVE STANDARD IS MOST APPROPRIATE FOR REVIEWING A COMBATANT'S DECISION TO USE FORCE

Currently, when reviewing a combatant's decision to use force, military courts apply the Manual for Courts Martial (MCM) Rule 916(e).¹⁰⁵ MCM Rule 916(e) follows the "dual standard" approach discussed above and contains both a subjective and objective prong.¹⁰⁶ There are two primary reasons why assessing the reasonableness of a combatant's use of force under the ROE from an objective standpoint is inappropriate. First, a combatant's decision to use force when he or she perceives hostile intent is not purely voluntary, nor it is purely involuntary. This is because the combatant's mission, the ROE itself, and the Uniform Code of Military Justice¹⁰⁷ compel him to act when he perceives hostile intent. As with the battered woman's defense, these factors—among others—make the combatant's decision to use force quasi-involuntary, and thus at odds with the presumption of voluntariness implicit in the objective standard. Second, on a practical level, the ROE—which instructs service members to engage targets they believe exhibit hostile intent—calls on service members to engage in an ad hoc analysis, based on their own subjective impressions of the environment, before using force. These split-second decisions, made in high-intensity environments, are often difficult to reconstruct and review objectively. Thus, the subjective standard is the most functional way to analyze a service member's perception of what constitutes hostile intent.

caring man, thereby leading the woman to believe that perhaps he has repented.
Id. at 11–12.

¹⁰⁴ See *Heller*, *supra* note 31, at 86–87.

¹⁰⁵ MANUAL FOR COURTS-MARTIAL, UNITED STATES, RCM 916(e) (2012). See Bagwell, *supra* note 30 and accompanying text.

¹⁰⁶ Bagwell, *supra* note 30, at 12.

¹⁰⁷ See Article 92 of the Uniform Code of Military Justice, which makes a failure to follow orders or obey regulations criminally punishable. 10 U.S.C. § 892 (2012).

A. THE USE OF FORCE IN COMBAT IS NOT ENTIRELY VOLUNTARY,
MAKING THE OBJECTIVE STANDARD INAPPROPRIATE

Just as the battered woman's use of force falls somewhere on the spectrum between voluntary and involuntary action, the combatant's use of force cannot be called truly voluntary or involuntary. It follows that, just as a subjective standard has been applied to battered spouses, so too should it be applied to combatants who use force in combat. Although the comparison between a battered woman's use of force and a combatant's use of force could be said to be factually distinguishable because combatants are aggressors who are often killing during offensive operations while battered women are in a state of helplessness, this would be an oversimplification. The characteristics of a battered woman, including her fear of leaving her home and her perceived state of helplessness, are external factors that make her use of force decision quasi-involuntary. Similarly, there are many characteristics of a combatant's decision to use force that make his decision quasi-voluntary. These include the characteristics of the ROE, the COIN battle space, the legal obligation to follow lawful orders and to perform his duty, and the combatant's mission and expectation to kill. Thus, the quasi-involuntary nature of killing in combat makes such acts incompatible with the objective standard of reasonableness, which presumes a purely voluntary action has occurred.

A number of external factors impact a combatant's decision to use force, making that decision not entirely voluntary. Although the combatant is still making a decision to use force, that determination is overborne by circumstances outside his control. First, service members have a legal obligation to perform their duty at whatever cost or face legal action.¹⁰⁸ The

¹⁰⁸ Article 99 of the Uniform Code of Military Justice—titled “Misbehavior Before the Enemy”—provides the following:

Any member of the armed forces who before or in the presence of the enemy—

- (1) runs away;
- (2) shamefully abandons, surrenders, or delivers up any command, unit, place, or military property which it is his duty to defend;
- (3) through disobedience, neglect, or intentional misconduct endangers the safety of any such command, unit, place, or military property;
- (4) casts away his arms or ammunition;
- (5) is guilty of cowardly conduct;
- (6) quits his place of duty to plunder or pillage;
- (7) causes false alarms in any command, unit, or place under control of the armed forces;
- (8) *willfully fails to do his utmost to encounter, engage, capture, or destroy any enemy troops, combatants, vessels, aircraft, or any other thing, which it is his duty so to encounter, engage, capture, or destroy;* or

current ROE itself creates an obligation, stating, “[u]nit commanders always retain the inherent right and *obligation* to exercise unit self-defense in response to a hostile act or demonstration of hostile intent.”¹⁰⁹ Thus, the ROE not only dictates standards for the use of force, but it explicitly compels combatants to use deadly force when they perceive “hostile intent.” A failure to use force when the ROE authorizes it may result in the service member being punished criminally.¹¹⁰ Hence, much like the battered woman who faces an involuntary decisionmaking process, a service member has no purely voluntary course of action when he honestly in fact believes he is observing hostile intent.

Although criminal punishment for failing to engage is likely not on the forefront of a combatant’s mind before firing, the mission often is. And the mission of the combatant reflects the same obligation that the law does: to kill the enemy. While many aspects of the military have changed with advances in technology, the role of the ground combatant remains relatively primitive and untouched.¹¹¹ According to the United States Marine Corps Field Manual, the mission of the Marine Corps rifle squad is to “locate, close with, and destroy the enemy by fire and maneuver, or repel the enemy’s assault by fire and close combat.”¹¹² The plain language of this mission statement reflects a commander’s expectation for combat forces to use deadly force against the enemy whenever possible. Again, if a service member fails to meet this expectation, they may be punished under the Uniform Code of Military Justice.¹¹³ But the more important consequence of this mission

(9) does not afford all practicable relief and assistance to any troops, combatants, vessels, or aircraft of the armed forces belonging to the United States or their allies when engaged in battle; shall be punished by death or such other punishment as a court-martial may direct.

10 U.S.C. § 899 (2012) (emphasis added); *see also* United States v. King, NMCCA 200401338, 2006 WL 4573018, at *1 (N.M. Ct. Crim. App. Nov. 14, 2006) (affirming the conviction of a Marine under Article 99 for “misbehavior before the enemy” because he refused to provide security for a convoy in Iraq, out of fear of death).

¹⁰⁹ Montalvo, *supra* note 15, at 31 (emphasis added).

¹¹⁰ Maj. Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1, 61 (1994) (noting that Article 92 of the Uniform Code of Military Justice, which makes a failure to obey a lawful order or directive criminally punishable, provides a channel for which the ROE becomes criminally enforceable).

¹¹¹ *See* David Wood, *Modern Warfare Is Testing an Old U.S. Weapon: The Infantryman*, FREE REPUBLIC (Dec. 6, 2002), <http://www.freerepublic.com/focus/news/804218/posts>, archived at <http://perma.cc/U9Z3-3FQE>.

¹¹² U.S. MARINE CORPS, PCN 143 000112 00, MARINE RIFLE SQUAD at 1-1 (rev. ed. 1997), available at <http://www.marines.mil/Portals/59/Publications/MCWP%203-11.2%20Marine%20Rifle%20Squad.pdf>, archived at <http://perma.cc/JQC4-WXXU>.

¹¹³ *See* United States v. King, NMCCA 200401338, 2006 WL 4573018, at *1 (N-M Ct. Crim. App. Nov. 14, 2006) (affirming the conviction and sentence of a marine serving in Al

statement is that every time a properly trained infantry Marine leaves friendly lines to go on a combat patrol, there is an implied order to seek contact with the enemy and to use deadly force against him or her whenever possible.¹¹⁴

As a consequence of the combatant's mission, society's expectations of him or her in combat are functionally different from the expectations placed on civilians in a self-defense scenario. This distinction is grounded both in common sense and doctrine: the combatant has a legal obligation to proactively seek violent contact with the enemy, while the civilian in the self-defense context has an obligation to retreat whenever possible.¹¹⁵ The important implication of this is that when a civilian chooses to use to use deadly force in self-defense, he should have first considered retreating—which makes his decision to use force purely voluntary. Yet much like battered women, service members do not have the opportunity to retreat. The service member's legal obligation to his mission and unit compels him to seek contact with the enemy and use deadly force against him whenever the opportunity presents itself. These obligations leave the combatant no other option but to use deadly force when he honestly in fact believes he has observed hostile intent. Just as in the case with the battered woman, this is not a purely voluntary action and cannot be analyzed adequately from an objective standpoint.

When looking at the purposes of criminal punishment, this approach makes sense. The criminal law specifically punishes only voluntary action to further the twin aims of punishment: (1) deterrence and (2) retribution.¹¹⁶ First, no deterrence function is served by punishing quasi-involuntary action because if the defendant believes he or she has no other option available, no amount of punishment will deter his or her conduct.¹¹⁷ In the case of the service member who honestly in fact believes he is observing hostile intent,

Anbar Province, Iraq who refused to provide security for a convoy and was sentenced to a year in prison and given a bad-conduct discharge).

¹¹⁴ According to Article 99 of the Uniform Code of Military Justice, a service member who “willfully fails to do his utmost to encounter, engage, capture, or destroy any enemy troops, combatants, vessels, aircraft, or any other thing, which it is his duty so to encounter, engage, capture, or destroy . . . shall be punished by death or such other punishment as a court-martial may direct.” 10 U.S.C. § 899(8) (2012).

¹¹⁵ See *Martin v. Ohio*, 480 U.S. 228, 230 (1987) (holding that the Fourteenth Amendment does not prohibit placing the burden on the defendant to prove that she “did not violate a duty to retreat or avoid danger” in order to establish a claim of self-defense).

¹¹⁶ *Heller*, *supra* note 31, at 13, 60. The subjective standard best serves the “twin aims” of criminal punishment: deterrence and retribution. *Id.* at 60. If a person acts involuntarily, no amount of punishment will be able to effectively deter the conduct. *Id.* Additionally, punishing defendants for involuntary action violates the retributive principle of proportionality. *Id.*

¹¹⁷ *Id.* at 60.

he must use force because if he fails to do so he will not have remained faithful to his mission, he will have endangered others, and in extreme cases he could be punished criminally. Thus, he is bound both morally and legally to use deadly force whenever “hostile intent” is identified.

Second, punishing involuntary action does not further the retributive goals of the criminal law. A fundamental principle of retribution is proportionality.¹¹⁸ Severely punishing service members, who act quasi-involuntarily with the good-faith belief that they are following orders and fulfilling their moral and legal obligations to their command, is grossly disproportionate. The drafters of the Model Penal Code reflected this same view in the Code’s comments indicating that “punishing defendants who honestly but unreasonably kill in self-defense just as severely as defendants who kill in cold-blood violates the basic retributive principle that criminals should be protected against”¹¹⁹ “excessive, disproportionate, or arbitrary punishment.”¹²⁰ Thus, because a combatant has no purely voluntary course of action when he or she honestly in fact believes they are observing hostile intent, criminal punishment is inappropriate.

B. BECAUSE THE DECISION TO USE FORCE IS SUBJECTIVE,
EVALUATING IT FROM AN OBJECTIVE STANDARD IS
INAPPROPRIATE

The quasi-involuntary nature of the combatant’s decision use of force is further complicated by the ROE itself because that decision to use force is one that is explicitly based on his subjective perceptions. This concept is plainly reflected in the ROE’s definition of “hostile intent,” as it was intentionally designed to take into consideration the service member’s subjective perceptions of the battle space, in response to the obscure nature of the COIN environment.¹²¹ Accordingly, it logically follows the standard criminal courts apply when reviewing the reasonableness of a service member’s use of force should adapt as well, and also be made purely subjective.

The ROE, discussed above, indicates that the key to finding “hostile intent,” which authorizes deadly force, is finding “imminency.”¹²² However, the ROE also states that “imminen[ce] will be based on an assessment of all

¹¹⁸ *See id.*

¹¹⁹ *Id.*

¹²⁰ MODEL PENAL CODE AND COMMENTARIES § 1.02(2)(c) (Official Draft and Revised Comments 1980).

¹²¹ *See supra* Part I.

¹²² *See* Montalvo, *supra* note 15, at 26, 28.

facts and circumstances known to U.S. forces at the time and may be made at any level,” where “[i]mminent does not necessarily mean immediate or instantaneous.”¹²³ Thus, the language in the definition of “hostile intent” indicates the determination of a service member’s use of force is a subjective one.

This subjective analysis is bound to cause confusion among service members in borderline cases, and it is those cases that place troops in the most precarious position. Several recent cases highlight the problems associated with courts reviewing this subjective analysis from an objective standpoint.

Take, for example, the case of Army First Lieutenant Clint Lorange, who, in August 2013, was convicted of murder after he ordered his men to engage two suspected Taliban fighters whom he believed exhibited “hostile intent.”¹²⁴ Just prior to the shooting, which occurred in July of 2012 in Kandahar, Afghanistan, Lorange had taken command of his platoon as a combat replacement after the previous leader was wounded in action and sent home.¹²⁵ On the day of the shooting, Lorange led his platoon on a patrol into a village where they had made contact with the enemy a few days prior. Upon leaving his base, intelligence assets reported that radio interceptions indicated enemy forces were watching his patrol.¹²⁶ As the platoon moved closer to the village, the prevalence of improvised explosive devices required Lorange and his platoon to travel single-file down a narrow route, making them vulnerable to attack.¹²⁷ While making their way through the mine-littered landscape, Lorange spotted three men on motorcycles approaching his patrol at a high rate of speed.¹²⁸ The men ignored orders to stop and proceeded towards the patrol.¹²⁹ According to Lorange, intelligence indicated that the Taliban routinely used motorcycles to monitor patrol movements and engage friendly forces.¹³⁰ In fact, two Afghanistan National Army Soldiers in the area had recently been killed by two males riding on a motorcycle.¹³¹ With only

¹²³ *Id.* at 35.

¹²⁴ Associated Press, *supra* note 25.

¹²⁵ Memorandum from John N. Maher, Attorney for Clint Lorange, on Rule for Court-Martial 1105 Submission to Commanding General of the 82nd Airborne Division at 1–2 (Aug. 15, 2014), *available at* <http://nebula.wsimg.com/277002cece417b09c5828724f1394dc3?AccessKeyId=2A131D7BE2224E13EBB0&disposition=0&alloworigin=1>, *archived at* <http://perma.cc/Y9BD-PGQK>.

¹²⁶ *Id.* at 2.

¹²⁷ *Id.* at 5.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 3.

¹³¹ *Id.*

moments to decide how to best protect his exposed patrol, based on the above information, he ordered a soldier to engage the three men.¹³² The soldier killed two of them and wounded the third.¹³³ The soldier who engaged would later testify at trial that when he pulled the trigger, based on the threat presented, he felt an obligation to protect American forces.¹³⁴ Notwithstanding this testimony, Lorange was subsequently convicted of murder for ordering the soldier to engage.

Whether or not the facts available to Lorange at the time of the shooting amount to “hostile intent” may not be clear to an objectively reasonable person. But based on the ROE’s definition of hostile intent, and given his legal responsibility to use force to perform his mission, Lorange’s order could be reasonable from a subjective perspective, if one assumes he acted in good faith.

In order to better understand Lorange’s decisionmaking process, his other possible courses of action should be considered. First, Lorange could have chosen not to engage the suspected Taliban. The consequences of this choice are obvious: if they were walking into an ambush, like Lorange believed, a failure to act—or a delay in acting—could potentially result in his soldiers being seriously wounded or killed. Alternatively, Lorange could have decided to retreat in the face of uncertainty and return to a secure position. Not only is this counter to the mission of the ground combatant, discussed above, in doing so he could in theory possibly be subject to punishment under Article 99 of the Uniform Code of Military Justice.¹³⁵ Ultimately, his ability to lead in combat would have been put into question, as he essentially would have abandoned his mission. Neither of the above options are realistically viable for a combatant, nor should they be.

Given the facts available to Lorange at the time, it seems plausible that Lorange honestly believed his platoon faced imminent contact with the enemy. But more importantly, his case provides an example of how there is often no clear “right” decision in combat. Combatants, and small-unit leaders especially, are forced to make the *best* decision based on the information available to them at the time and keep moving forward. Unfortunately, with the clarity of hindsight, a decision made on the ground may later appear objectively unreasonable. Leaders are forced to deal with the consequences of these good-faith errors, as the death of teammates, innocent civilians, and

¹³² *Id.* at 6.

¹³³ *Id.* at 2.

¹³⁴ *Id.* at 6.

¹³⁵ See *supra* note 114 and accompanying text.

the burden of self-perceived failure are consequences that may be carried by service members for a lifetime.

To hold these same individuals criminally accountable for good-faith errors made in the heat of combat, because from the safety of a courtroom their errors may appear objectively unreasonable, is incompatible with the ambiguous definition of hostile intent that is based on the combatant's subjective impression of his environment. Moreover, these borderline use-of-force cases are not the product of morally culpable, purely voluntary actions that the criminal law seeks to punish. Rather, they are the product of an ambiguous ROE that is applied in a highly contextual COIN environment by service members who are acting in compliance with their mission and legal obligation to obey orders. A purely subjective standard of reasonableness gives American forces the legal deference they deserve while allowing the courts to punish those troops who use deadly force when they know the ROE does not authorize such action.

V. POLICY CONCERNS

Given the political undertones with all military conflict, a subjective standard of reasonableness is bound to raise concerns among military commanders, legal commentators, and the public. These concerns are addressed in part below.

First, military commanders are, above all, the most concerned with mission accomplishment. In the COIN environment, as discussed in Part I, this in part means winning the support of the local population. Excessive civilian casualties erode this support, thus directly impeding mission accomplishment. Yet commanders cannot assume that prosecuting service members who in good faith believed they were acting in compliance with the ROE will reduce civilian casualties. Soldiers and Marines are taught there is an expectation to use deadly force against perceived threats, and the ROE compels them to do so when they identify a hostile act or hostile intent. Thus, a soldier who in good faith believes his life, or the life of his teammate, is in danger will always resort to force, notwithstanding a criminal prosecution.¹³⁶ The proffered deterrence justification is further belied by the fact that a major source of civilian casualties appears to be supporting arms, both of which are relatively uninfluenced by the prosecutions of ground personnel.¹³⁷

¹³⁶ See Montalvo, *supra* note 15, at 32. Major Montalvo himself, who advocates for punishing service members who violate the ROE in good faith, notes that a prominent ground commander in Iraq stated he did not know “a Marine . . . who would not pull the trigger when their life was truly in danger.” *Id.*

¹³⁷ See Nichols, *supra* note 24, and accompanying text.

If reducing civilian casualties were a commander's primary goal, it could be achieved by altering the ROE itself and returning to the traditional form of imminence in place before 2005.¹³⁸ Doing so would remove some of the ambiguity associated with the current ROE and would make assessing conduct under the ROE from an objective standpoint more tenable. But this reduces the ability for forces to protect themselves in the COIN environment, which requires forces to engage in some form of conduct-based targeting.¹³⁹ Given that future conflicts will likely require troops to continue to engage in COIN, and thus conduct-based targeting, the structure of the current ROE, which evolved to accommodate the austerity of operating in that environment, is likely to remain unchanged. If the ROE is unlikely to revert back to its original form, it is logical for the reasonableness standard of a combatant's use of force to also evolve. A purely subjective standard would best accommodate this change in targeting doctrine.

Second, legal commentators and the public would likely be concerned that a purely subjective standard of reasonableness will weaken the force of military law in combat and make holding ROE violators accountable more difficult. Again, this is an oversimplification. Aside from minor regulatory offenses, the criminal law only seeks to hold accountable those individuals who engaged in purely voluntary actions with a culpable state of mind. For service members who acted in good faith in accordance with the ROE, they are neither acting completely voluntarily nor with a culpable state of mind. And considering the use of force in combat is quasi-involuntary, any deterrence effect is negligible at best. More importantly, those service members who used force in bad faith and who did not honestly believe the use of force was necessary would still be convicted even when their conduct is analyzed under the subjective standard.

In fact, holding individuals accountable for good-faith conduct under the ROE may weaken the force of military criminal law. In the public's eye, many of these ROE prosecutions are politically motivated, which makes the military judicial system appear susceptible to political winds of change and command influence.¹⁴⁰ In the past, these political winds have caused some

¹³⁸ See Montalvo, *supra* note 15, at 32.

¹³⁹ See *id.* at 27.

¹⁴⁰ See Tom Bowman, *Case of Marines Desecrating Taliban Bodies Takes a New Twist*, NPR.ORG (Oct. 31, 2013, 4:00 AM), <http://www.npr.org/blogs/parallels/2013/10/31/241880851/a-marine-controversy-in-afghanistan-takes-a-new-twist>, archived at <http://perma.cc/C29Z-J73U> (noting that unlawful command influence is the "mortal enemy of military justice"); Darlene M Iskra, *Is This Really "Unlawful Command Influence"?*, TIME (Jun. 21, 2013), <http://nation.time.com/2013/06/21/is-this-really-unlawful-command-influence/>, archived at <http://perma.cc/V8N5-PMJ2>.

commanders to hastily condemn the use of force by American troops before an adequate investigation has been completed.¹⁴¹ Once the subsequent investigation reveals that condemnation was in fact unjustified, it makes the condemning authority appear foolish, biased, and unjust. This subsequently could make the prosecution of culpable ROE violators more difficult because the commander's overzealousness fosters a presumption of illegitimacy in ROE investigations, notwithstanding the culpability of the shooter. If legal commentators are concerned with the strength of military law, they should seek ways to promote its legitimacy. By refraining from over-zealously prosecuting service members who act in good faith, and focusing on those that act in bad faith, commanders and members of the JAG Corps will be able to improve the military's reputation as a neutral pursuer of justice.

CONCLUSION

The way the United States fights conflicts has forever been changed by the country's engagements in Iraq and Afghanistan. Accordingly, the Rules of Engagement were changed to match the COIN environment's necessity for conduct-based targeting. The rule of law, MCMR 916(e), a traditional self-defense standard, which governs the reasonableness of a service member's use of force in combat needs to change as well. A purely subjective standard for reviewing reasonableness—one that hinges on the service member proving that he honestly and in fact believed he was in imminent threat of a hostile act or hostile intent—is best suited for alleged ROE violations.

Applying an objective standard is at odds with both the situation on the ground in America's current conflicts and the voluntariness requirement of criminal law. A combatant's good-faith use of force in combat under the ROE is quasi-involuntary, in that the service member is compelled by both ethos and the law to fulfill his or her sworn legal obligation to teammates, superiors, and his or her country when he perceives hostile intent. Analyzing the reasonableness of a service member's use of force with a purely subjective standard will allow military courts to avoid running against the presumption of voluntariness embedded in the objective standard, and match the standard of review of force under the ROE to the ROE itself—the application of which hinges on the service member's subjective perception of an oftentimes rapidly developing situation.

¹⁴¹ See, e.g., Andrew deGrandpre, *Task Force Violent: The Unforgiven: Part I*, MILITARY TIMES, <http://www.militarytimes.com/story/military/2015/03/04/task-force-violent-the-unforgiven/23940295/> (last visited Mar. 24, 2015), archived at <http://perma.cc/E5UY-3CJ8>.

Most importantly, the mission, the combatant, and the law will be better served by the subjective standard. By prosecuting only those Marines, Soldiers, Sailors, and Airmen who act in bad faith, commanders will remain consistent with the principles of counterinsurgency that call for maximum protection of civilians, while also allowing service members to adequately protect themselves. And for people that are willing to sacrifice their lives to defend the Constitution, the law owes them so much.

