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SELF-DEFENSE UNDER SIEGE: CREEPING CRIMINALIZATION OF INDIVIDUAL SELF-DEFENSE IN THE U.S. MILITARY

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All U.S. jurisdictions recognize individual self-defense as an inherent right belonging to each person. As an inherent right, self-defense is rooted firmly in natural law, as opposed to positive law, which entails a revocable grant from a sovereign. This article contends that prior legal recognition of such an inherent right precludes a sovereign from unilaterally limiting an individual military member's exercise of or claim to self-defense. The story of U.S. Marine Corps Medal of Honor recipient Sergeant Dakota L. Meyer serves as a vehicle for the argument that the U.S. military is improperly limiting the right of individual self-defense and the closely related doctrine of defense of others. In support of this contention, the scope of individual self-defense guaranteed by the criminal justice systems of the U.S. military and a majority of states is compared with the scope of self-defense permitted for U.S. military personnel operating in a foreign battlespace.

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INTRODUCTION

"[N]ature commits to each his own protection."[1]

A voice crackled across the radio: "If we don't receive fire support, we're going to die out here."[2] Corporal ("Cpl.") Dakota L. Meyer of the United States ("U.S.") Marine Corps heard the call and cringed. On September 8, 2009, in the Ganjgal Valley of Afghanistan, a battle raged. A joint American-Afghan contingent sent to interface with local village leadership was ambushed by Taliban fighters firing rocket propelled grenades, mortars, and machine guns from houses and fortified positions on the slopes above. Positioned a short distance from the melee, Cpl. Meyer could only watch as the valley erupted with gunfire.[3]

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1. STEPHEN C. NEFF, HUGO GROTIUS ON THE LAW OF WAR AND PEACE: STUDENT EDITION 82 (2012).

2. The Obama White House, *Medal of Honor for Sergeant Dakota L. Meyer*, YOUTUBE (Sept. 15, 2011), https://www.youtube.com/watch?v=vahLBesP3yk.

3. *Id.*; CJ Chivers, *Top Medal for Marine Who Saved Many Lives*, N.Y. TIMES, Sept. 16, 2011, at A14.

Another voice came across the radio. Fire support was denied. The words from headquarters hit Cpl. Meyer hard. He radioed headquarters for permission to engage the enemy in defense of his colleagues. Permission denied. He requested again and again, a total of four times. Each time he was denied. If his superiors couldn't save his friends, Cpl. Meyer would. "We're going in," he told his friend, Staff Sergeant ("SSgt.") Juan Rodriguez-Chavez.[4] SSgt. Rodriguez-Chavez drove their Humvee into the kill zone while Cpl. Meyer manned the turret, his body exposed "to a blizzard of fire from AK-47s and machine guns, from mortars and rocket-propelled grenades."[5]

The pair rushed headlong into the inferno. Cpl. Meyer picked up fallen Afghan soldiers, placing them in the Humvee and driving them back to safety. They turned back and went in a second time. Then a third. By the fourth trip, Cpl. Meyer was wounded, his arm struck by shrapnel.[6] The end seemed near. In his words: "I didn't think I was going to die. I knew I was."[7] The duo made a final, fifth trip, finding the lifeless bodies of four Americans lying "together as one team."[8] Still under fire, they brought the bodies back to base. All told, their actions saved the lives of thirty-six soldiers.[9]

Cpl. Meyer's exploits earned him the Medal of Honor. A citation from the Department of Defense memorializes his heroism.[10] But his actions could have been memorialized for eternity in the equally official, yet strikingly different, form of a court-martial charge sheet detailing his crimes. In defying direct orders—four of them—Cpl. Meyer broke the law.[11] That he ultimately shared a stage with the President, instead of a cell with another military prisoner, is a remarkable twist in American military history. The irony of this dichotomy—between praise and punishment—was not lost on now-

4. The Obama White House, *supra* note 2.

5. *Id*.

6. *Id*.

7. *Id*.

8. *Id*.

9. *Id*.

10. *See* U.S. MARINE CORPS, *Official Citation: Medal of Honor—Cpl. Dakota Meyer*, https://web.archive.org/web/20111124043800/http://www.marines.mil/community/Pages/MedalofHonorSgtDakotaMeyer-citation.aspx (last visited Feb. 29, 2020).

11. Art. 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C.A. § 892.

Sergeant ("Sgt.") Meyer. He would later reminisce: "I was either going to be a hero or a zero . . . something like either in jail or get a medal."[12]

Sgt. Meyer's story exposes a critical conundrum in modern military law: the role of individual self-defense in the battlespace. It was no accident that higher headquarters denied Sgt. Meyer's calls to engage the enemy in defense of himself and his peers. In modern counterinsurgency warfare, commanders seek to closely control the actions of their troops, lest the actions of a single soldier—even if well-intentioned—produce negative strategic outcomes, potentially undermining the entire campaign. As the Counterinsurgency Manual puts it: "Sometimes Doing Nothing is the Best Reaction."[13] Sgt. Meyer's situation illustrates the fact that commanders cannot control the risk of allowing a military member to personally decide when his and his peers' lives are sufficiently endangered to warrant invocation of self-defense. Thus, self-defense in the battlespace is now by permission only.

The concept of individual self-defense is under siege in the U.S. military. In 2005, the U.S. Joint Chiefs of Staff released a new edition of the Standing Rules of Engagement ("U.S. SROE 2005") that quietly overhauled the rules on self-defense.[14] The version it replaced ("U.S. SROE 2000") heralded individual self-defense as the "*inherent* right to use all necessary means available and to take appropriate actions to defend oneself and U.S. forces in one's vicinity."[15] U.S. SROE 2005 enacted sweeping changes. Most jarringly, individual soldiers no longer enjoy a personal right of self-defense.[16] Instead, the right

12. Marines TV, *Medal of Honor: Dakota Meyer in His Own Words*, U.S. MARINE CORPS (Sept. 15, 2011), https://www.marines.mil/News/Marines-TV/videoid/126303/?dvpTag=Medal%20of%20Honor.

13. U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 1-27 (Dec. 2006) [hereinafter FM 3-24].

14. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION (CJCSI) 3121.01B, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (2005) [hereinafter U.S. SROE 2005].

15. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION (CJCSI) 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES, Enclosure A, para. 5(e) (2000) (emphasis added) [hereinafter U.S. SROE 2000].

16. *See* U.S. SROE 2005, *supra* note 14, at enclosure A, para. 3(a).

belongs solely to unit commanders.[17] Individual self-defense becomes an afterthought—"a subset of unit self-defense."[18]

These changes are more than merely academic. Under the new regime, American military members enjoy weaker self-defense protections on a foreign battlefield than an average American citizen enjoys on the streets of a U.S. city.[19] Military members like Sgt. Meyer are forced to choose between saving themselves and their friends or breaking the law.[20] Imposition of such a conundrum is inherently unjust and unnecessary.[21]

This article articulates four principal reasons why the changes to the concept of self-defense promulgated in U.S. SROE 2005 are improper. The first reason is rooted in natural law, which mandates that the act of self-defense is a right, not a privilege. As a natural law right, it cannot be unduly curtailed by positive law enactments. Preserved from Roman times[22] and refined over the centuries, self-defense constitutes one of several islands of natural law existing within the

17. *Id*.

18. *Id*.

19. *Compare* U.S. SROE 2005, *supra* note 14, at enclosure A, para. 3(a) (classifying individual self-defense as a subset of unit self-defense, thus permitting commanders to withhold permission to use force in self-defense), *with* FLA. STAT. § 776.012(2) (2016) (stating a reasonable belief that use of deadly force is necessary to prevent imminent death or great bodily harm is the only requirement necessary to justify self-defense).

20. North Carolina Congressman Walter Jones raised questions in early 2010 about whether the Rules of Engagement in Afghanistan unduly circumscribed troops' ability to defend themselves. *See* Dan Lamothe, *Lawmaker: Rules of Engagement Must Be Reviewed by Congress*, MARINE CORPS TIMES, Apr. 12, 2010, *available at* https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:7YB2-XG00-Y9DT-J456-00000-00&context=1516831.

21. In a letter to several other Congressmen who had expressed concerns about the rules of engagement, Missouri Congressman Ike Skelton, chair of the House Armed Services Committee, stated he had a "deep interest in ensuring that the members of the Armed Forces serve in conditions which allow them to act in self defense and provide sufficient force protection." He indicated his intent to schedule a classified committee briefing on the topic. *See* Dan Lamothe, *Lawmakers to Review Afghanistan ROE*, MARINE CORPS TIMES, Sept. 27, 2010, *available at* https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:516W-8YF1-DYJJ-P0S8-00000-00&context=1516831.

22. David B. Kopel, *The Natural Right of Self-Defense: Heller's Lesson for the World*, 59 SYRACUSE L. REV. 235, 241 (2008) [hereinafter Kopel, *The Natural Right of Self-Defense*].

ocean of positive international law.[23] Substantial authority suggests natural law rights of this sort continue to play a role in both domestic[24] and international[25] legal systems.

The second reason centers on comparative considerations, namely the place of self-defense in the laws of U.S. allies in the North Atlantic Treaty Organization ("NATO"). Unlike the U.S., NATO protects individual self-defense on the battlefield by affirmatively acknowledging its status as an *inherent right*, incapable of undue regulation by a sovereign.[26]

The third argument against U.S. SROE 2005 is pragmatic. Sound military theory, encapsulated within the U.S. Army's mission command doctrine, is premised upon individual decision making regarding the use of force. Indeed, "[i]ndividual initiative is the key component of mission command" because "the willingness to act in the absence of orders, when existing orders no longer fit the situation, or *when unforeseen opportunities or threats arise*" has long been understood as the key to military success.[27] The Army relied, to a great extent, upon the German military doctrine of *Auftragstaktik* when developing its mission command and unified land operations concept.[28] *Auftragstaktik* implicitly requires commanders to empower individual

23. 2 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 397 (reprint of 1737 English translation by John Morrice of the 1724 annotated French translation by Jean Barbeyrac) (1625), *available at* http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php?title=1877&Itemid=99999999.

24. For an example in American law see District of Columbia v. Heller, 554 U.S. 570, 592 (2008) ("[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'"). The opinion further notes the "inherent right of self-defense has been central to the" understanding of the "Second Amendment right." *Id*. at 628.

25. *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27).

26. NORTH ATLANTIC TREATY ORGANIZATION, NATO MC 362/1, NATO RULES OF ENGAGEMENT (2003) [hereinafter NATO ROE].

27. U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS 3-3 (2008) (emphasis added).

28. Major Brett Matzenbacher, *The U.S. Army and Mission Command: Philosophy versus Practice*, MIL. REV., Mar.–Apr. 2018, at 62.

troops to make decisions regarding their use of force.[29] Treating self-defense differently than allied nations do also introduces a source of friction that can potentially hinder coalition-based operations.[30] In an era where multinational coalitions are the norm, the interoperability of rules of engagement across nations becomes critically important. The policy change articulated in U.S. SROE 2005 makes already delicate coalition operations even more fragile.

The final reason is constitutional. Separation of powers is a feature of constitutional design adopted by the founders as part of the checks and balances system.[31] Each branch is granted specific powers which are both complimentary and contradictory to those of the other branches. The purpose of such a power distribution is to enhance overall accountability by fostering internal rivalry, thus precluding a consolidation of power by one branch.[32] Both the executive and legislative branches have overlapping constitutional authority relevant to the SROE. The self-defense changes adopted by the executive branch in U.S. SROE 2005 created an ongoing conflict between the proper exercise of legislative and executive power.

The argument proceeds in four parts. Part I outlines the basic concepts behind self-defense and natural law, both individually and nationally. Part II explicates the U.S. approach to self-defense with an analysis of the SROE, the Uniform Code of Military Justice ("UCMJ"), and state criminal law. Part III explores individual self-defense within NATO military operations. Finally, Part IV asserts that the U.S. should restore the right of individual self-defense to its natural prominence. As a natural law right, individual self-defense is immune from regulation, both on and off the battlefield. Considerations of military theory also

29. Major General Werner Widder, German Army, *Auftragstaktik and Innere Führung: Trademarks of German Leadership*, MIL. REV., Sept.–Oct. 2002, at 9 ("The decisive foundation for Auftragstaktik is peacetime training with a deliberate focus on training soldiers to think independently and to act according to the superior commander's intent. The superior's specified objective, his confidence in his subordinates' capabilities, his and his subordinates' acceptance of their respective responsibilities, and their freedom to act are the four cornerstones of Auftragstaktik on the one hand and its secret on the other.").

30. INT'L INST. OF HUMANITARIAN LAW, SAN REMO HANDBOOK ON RULES OF ENGAGEMENT 2 (2009) [hereinafter SAN REMO HANDBOOK].

31. *See* Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 523–526 (2015).

32. *Id*. at 525–26.

inform this analysis, urging policy-makers and commanders to safeguard the preeminent, ancient right now under fire. Moreover, in fundamentally altering individual self-defense within the SROE, the executive branch may have exceeded its constitutional authority by creating a conflict with the broader self-defense right granted to military members by military criminal law.

Sgt. Meyer is surely not the first military member to confront the ugly side of the changes announced in U.S. SROE 2005. Nor will he be the last. Unfortunately, others may not be as fortunate. In claiming the right of self-defense for themselves, and sometimes defying orders to do it, they risk committing a crime. Servicemembers should not face so cruel a choice.

I. "THE FIRST LAW OF OUR NATURE":[33] NATURAL LAW, INDIVIDUAL SELF-DEFENSE AND NATIONAL SELF-DEFENSE

In the twenty-first century, natural law is relegated to the backwoods of scholarly and professional debate. Nothing is more "unfashionable" than predicating a legal argument upon natural law concepts.[34] But, to borrow from Professor Noah Feldman, the "possibility of a natural duty to obey at least some just laws, regardless of association with a political entity that enacted them, is not as outré as it might at first sound."[35]

Indeed, natural law "continues to lurk beneath the surface" of modern law.[36] It is underappreciated, but not eliminated. This part sketches the role natural law plays in the modern legal world through the prism of the archetypical natural law right: self-defense.

33. Letter from Lord Ashburton to Mr. Webster (July 28, 1842), *available at* http://avalon.law.yale.edu/19th_century/br-1842d.asp.

34. *See* Noah Feldman, *Cosmopolitan Law?*, 116 YALE L.J. 1022, 1058 (2007) (book review).

35. *Id.* at 1059.

36. SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 10 (2006); *see also* Stephen C. Neff, *A Short History of International Law*, in INTERNATIONAL LAW 12, 17 (3d ed., Malcolm D. Evans 2010).

A. Overview of Natural Law: Past & Present

Natural law is law that stems from logic and moral reasoning rather than the decisions of a political community.[37] The concept is perhaps best described as "the view that there are a number of true directives of human reason that every person can easily formulate for himself."[38] Certain "natural inclinations" are so basic to humanity that they are, and must be, "recognized as law."[39] These principles of "right and wrong" are "fixed and universal; they do not change depending upon political inclinations or cultural predispositions."[40]

Natural law has a rich history. Its early formulation is traceable to the mind of Aristotle, who described two classes of law: civil law, which was "just because enacted," and natural law, which was "enacted because just."[41] Ancient Romans imported this concept into the empire, believing every society held certain principles in common.[42] Stoic writers stretched the idea even further.[43] To them, the globe was but one "'world city-state' (or *kosmopolis*) governed by the law of nature."[44] Writing in this period, Cicero memorably described natural law, as something

> not written, but born with us—which we have not learned, or received by tradition, or read, but which we have taken and sucked in and imbibed from nature herself; a law which not taught, but to which we were made—which we were not trained in, but which is ingrained in us . . . .[45]

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37. *See* Major John J. Merriam, *Natural Law and Self-Defense*, 206 MIL. L. REV. 43, 47 (2010) (describing natural law as a "rule of human reason").

38. Ralph McInerny, *The Principles of Natural Law*, 25 AM. J. JURIS. 1, 2 (1980).

39. Thomas E. Davitt, *St. Thomas Aquinas and the Natural Law*, in ORIGINS OF THE NATURAL LAW TRADITION 39–40 (Arthur L. Harding ed., 1954).

40. MURPHY, *supra* note 36, at 10.

41. Albert Broderick, *The Radical Middle: Natural Right of Property in Aquinas and the Popes*, in NATURAL LAW 175 (ed. John Finnis, 1991).

42. Neff, *supra* note 36, at 5.

43. *See id.*

44. *Id.*

45. ASCONIUS PEDANIUS, ON CICERO'S PRO MILONE (John Paul Adams trans., 1996), *available at* http://www.csun.edu/~hcfll004/asconius.htm.

Later, during the tumultuous Middle Ages, Catholic thinkers took up the interpretative baton for application of natural law concepts.[46] Thomas Aquinas developed a theory of natural law that brought intellectual rigidity to an otherwise ephemeral concept. All law, he reasoned, is based on the principle that "good ought to be done and pursued and that evil ought to be avoided."[47] Natural law consists of a set of principles that effectuate these ends. Aquinas defined "goods" broadly and objectively, as goals that "all men" would accept.[48] One essential good was that of self-preservation.[49] No inclination is stronger than the desire to preserve one's own life. From this principle, Aquinas developed intricate theories of self-defense for individuals and of just wars for political collectives.[50]

Spurred by Aquinas' work, natural law flourished. In the next epoch of natural law thought, scholars writing in the seventeenth and eighteenth centuries began to factor in state practice alongside natural law principles.[51] Dutchmen Hugo Grotius—often referred to as the father of international law—led the charge, applying and expanding Aquinas' rationalistic conception of natural law to the law of nations.[52] Much like Aquinas, Grotius viewed natural law as rooted in logic, labeling it the "dictate of right reason . . . ."[53] Beginning there, Grotius put flesh on natural law's then-slender bones, presenting a comprehensive body of international law in a momentous work, *De*

46. *See* Neff, *supra* note 36, at 6 ("The European Middle Ages became the great age of natural-law thought.").

47. SAINT THOMAS AQUINAS, SUMMA THEOLOGICA, pt. 1.2.94, art. 2., *quoted in* THOMAS AQUINAS, TREATISE ON LAW: THE COMPLETE TEXT (Alfred J. Freddoso trans., St. Augustine's Press 2009).

48. Merriam, *supra* note 37, at 50.

49. *Id*.

50. *See id*.

51. Professor Neff helpfully notes that this period should not be viewed as one of increasing "secularization of natural-law thought." *See* Neff, *supra* note 36, at 8. Rather, "[n]atural law itself was (and had always been) primarily secular in nature." *Id*. Professor Neff's cautionary note suggests that critics should not be so quick to attack natural law as a purely parochial creation.

52. *See id*. at 9.

53. Merriam, *supra* note 37, at 55 (quoting DAVID J. HILL, *Introduction* to Hugo Grotius, THE RIGHTS OF WAR AND PEACE 11 (A.C. Campbell ed. & trans., M. Walter Dunne Publ. 1901)).

Jure Belli ac Pacis (On the Law of War and Peace), published in 1625.[54]

In the centuries after Grotius, following the rise of the Westphalian system of sovereign principalities in 1648,[55] scholars and statesmen began to value state practice over natural-law concepts.[56] International lawyers confronted a crucial "riddle: How can there be law among sovereigns when sovereignty, by definition admits no higher authority?"[57] Natural law could not produce a satisfying answer.[58] If states were truly sovereign, no amount of logic or "right reason" could bind them.[59] This thesis breathed new life into the positive theory of law, centered on the idea that consent alone can bind a sovereign state.[60] Positivist theory draws from private contract law principles to propose agreements govern the conduct of states, just as they govern the conduct of individuals.[61] Scholars began to view international law as an "outgrowth or feature of the will of the States of the world," rather than an overarching, moralizing framework.[62] In this view, law was a servant of states, and no longer a master.[63]

54. *See* Neff, *supra* note 36, at 9. For an explanation of Grotius' enduring impact, see Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1 (1946).

55. The precise date in question is 1648, which marked the end of the Thirty Years War in the Treaty of Westphalia. The treaty "acknowledge[ed] the sovereign authority of various European princes," and is generally recognized as the inception of modern international law." Harold Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2607 (1997).

56. *See* Neff, *supra* note 36, at 12–14.

57. David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 17 QUINNIPIAC L.R. 99, 113 (1998).

58. *See id*.

59. *See* Koh, *supra* note 55, at 2606.

60. Positivism is not a recent development, but its ascendancy is. *See generally* ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 164–85 (2d ed., 1958).

61. *See id*. ("International legal positivism is simply the working out of the private law metaphor of contract applied to a public legal order."). *See also* Koh, *supra* note 55, at 2608 ("Sovereign states functioned as the chief actors within the system.").

62. Neff, *supra* note 36, at 9.

63. *See id*. at 15.

Ideas of sovereignty did not alone contribute to the rise of positivism. Spurred by Enlightenment-Age gains in knowledge, nineteenth century scholars also became fixated upon applying scientific concepts to jurisprudence.[64] The scientific emphasis upon observable phenomenon and rigid analysis necessarily eschewed areas which were based upon "conjecture," religion and morality among them.[65] This new outlook left natural law adrift. Natural law ideas were too closely associated with moralistic ideas of right and wrong to find a home in the scientific arena.[66] Meanwhile, positivism flourished under this new regime because its primary subjects, custom and state practice, were susceptible to the type of exacting analysis seen in the natural sciences.[67] Accordingly, both customary law and "state practice came to be seen as primary sources of the law of nations," even as they "largely mirrored and ratified state conduct."[68]

It was a seismic legal shift. In the span of little more than two centuries—the nineteenth and twentieth—positive law largely displaced two millennia of natural law jurisprudence.[69] When modern lawyers examine the puzzle of international institutions and treaty regimes, they see a legal universe built upon positivism, not natural law. The post-World War II international system reaches nearly every aspect of human activity.[70] Specialized treaty regimes govern global economics, diplomatic relations, and even war—developments unthinkable only two hundred years ago. Enacted laws create and fuel these mechanisms. The wispy dreams of natural law theorists seem unnecessary in their wake.

Beyond its apparent irrelevance, several other biting complaints can be lodged against natural law. First, its overt reliance upon right and wrong seems incongruous with an age of rationalism.[71] Natural law "seems metaphysical or at least vaguely religious. In any case it

64. *See* Stephen Hall, *The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism*, 12 EUROPEAN J. INT'L. L. 269, 277 (2001).

65. *Id*.

66. *See id*. at 278–79.

67. *Id*. at 277.

68. Koh, *supra* note 55, at 2608.

69. Hall, *supra* note 64, at 270.

70. *See* Koh, *supra* note 55, at 2614.

71. *See, e.g.*, Diarmuid F. O'Scannlain, *The Natural Law in the American Tradition*, 79 FORDHAM L. REV. 1513, 1515 (2010).

seems plainly wrong."[72] Second, natural law lacks the clarity and consistency of positive law. What appears "logical" to one person will appear illogical to another. Thus, "right reason" alone cannot govern as law. One need only examine the works of natural law theorists—all of whom discovered new and different principles—to find evidence of its elasticity. Third, because of its lack of clarity, adhering to natural law is an invitation for abuse by judges and politicians alike.[73] In the U.S., critics of natural law find evidence of its excesses in the Supreme Court case *Lochner v. New York*, in which the majority "invalidated an employment law on the grounds that it violated a substantive due process right to 'liberty of contract.'"[74]

So serious are these critiques, and so triumphant is positivism, that most attorneys assume natural law no longer exists. It comes as no surprise then, in the words of Professor Ronald Dworkin, that "no one wants to be called a natural lawyer."[75] But, while there may be few natural lawyers left, natural law persists. In fact, it is "surviving rather better than has generally been appreciated."[76] Natural law can be difficult to find, however, because it usually appears in camouflage.[77] One example of natural law's continuing survival lies in international economics. Though not immediately obvious, the modern international economic structure—with its abundance of transnational interactions—owes its existence to natural law's emphasis on shared human community not confined to national boundaries.[78]

In the U.S., natural law continues its creeping influence upon Supreme Court decisions, even in the post-*Lochner* era. Substantive due process decisions such as *Lawrence v. Texas*,[79] which based a right

72. Ronald A. Dworkin, *"Natural" Law Revisited*, 34 U. FLA. L. REV. 165, 165 (1982).

73. *See* O'Scannlain, *supra* note 71, at 1515.

74. *See id*. at 1516.

75. Dworkin, *supra* note 72, at 165.

76. Neff, *supra* note 36, at 17; *see also* MURPHY, *supra* note 36, at 10; Feldman, *supra* note 34, at 1058 ("[V]estiges of natural law theory may be found in various places in our legal universe.").

77. Neff, *supra* note 36, at 18 ("One reason that natural-law ideas were not always recognizable was that, to some extent, they were re-clothed into a materialistic and scientific garb.").

78. *See id*.

79. Lawrence v. Texas, 539 U.S. 558 (2003).

"to be free from prohibitions on consensual same-sex conduct in an account of human functioning," rely upon implicit application of natural law.[80] Indeed, the modern Court defines liberty in terms strikingly reminiscent of Aquinas and Grotius: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[81] Just as natural law seems to influence judicial decisions, some assert it also retains continued relevance in forming an "understanding of the Constitution's original meaning."[82] The U.S. Declaration of Independence unequivocally references natural law,[83] proclaiming "the Laws of Nature and of Nature's God" provide the right to rebel against English rule.[84]

In international law, certain schools of thought still draw upon natural law principles. The New Haven School of International Law, for instance, is "an entirely secular theory of law but . . . takes the perspective long associated with natural law, that of the decision maker." Its goals—to apply policy in "ways that maintain community order and, simultaneously, achieve the best possible approximation of the community's social goals" [85]—resemble Aristotle's formulation of natural law as seeking public good. Certain doctrines also utilize natural law principles. The Responsibility to Protect doctrine (R2P in popular parlance) espouses a duty for states to intervene to prevent or alleviate humanitarian crises. Referenced in a 2005 World Summit Outcome Document following a high-level meeting of the United Nations General Assembly,[86] the doctrine draws strength from "the

80. Feldman, *supra* note 34, at 1058 n. 146; *see also* Davin J. Hall, *Not So Landmark After All? Lawrence v. Texas: Classical Liberalism and Due Process Jurisprudence*, 13 WM. & MARY BILL RTS. J. 617, 620 (2004).

81. Feldman, *supra* note 34, at 1058 n.146 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

82. O'Scannlain, supra note 71, at 1515.

83. *Id*. at 1515–16.

84. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

85. W. Michael Reisman, *The View from the New Haven School of International Law*, 86 PROCEEDINGS OF THE ANN. MEETING (AM. SOCIETY INT'L LAW) 188, 120 (1992). For a similarly helpful perspective, see Iaian Scobbie, *Wicked Heresies or Legitimate Perspectives? Theory and International Law*, in INTERNATIONAL LAW 71–72 (3d ed., Malcolm D. Evans).

86. *See* G.A. Res. 60/1, 2005 World Summit Outcome, at 30 (Sept. 16, 2005) ("Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity . . . The international

resurgence of natural law principles," namely the fusion of law, policy, and morality.[87] In this view, sovereignty includes a predicate responsibility to protect one's people; failing to meet this baseline responsibility deprives a state of its sovereign rights and justifies outside intervention.[88] This "normative concept of sovereignty" finds good company in natural law.[89]

Other facets of international law even more closely resemble natural law. Professor Mary Ellen O'Connell maintains that one familiar source of international law—*jus cogens*—is explainable only by natural law theory.[90] Defined in Article 53 of the Vienna Convention on the Law of Treaties, *jus cogens* refers to "peremptory norm[s] . . . from which no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character."[91] Positivists will take careful note of that last clause. Positive laws cannot override *jus cogens*, but *jus cogens* can supersede positive laws.

Jus cogens tend to involve ethical or moral norms almost exclusively,[92] with the most prominent examples being prohibitions on genocide, slavery, and torture.[93] Operating much like the public policy doctrine in contract law, *jus cogens* can be used to void existing agreements based upon a judicial finding that such agreements contradict an overarching public good.[94] Not knowing how to label *jus*

community should, as appropriate, encourage and help States to exercise this responsibility . . . .").

87. Silva D. Kantareva, *The Responsibility to Protect: Issues of Legal Formulation and Practical Application*, 6 INTERDISC. J. HUM. RTS. L. 1, 1 (2011); *see also* Beth Van Schaack, *"The Grass that Gets Trampled When Elephants Fight:" Will the Codification of the Crime of Aggression Protect Women?*, 15 UCLA J. INT'L L. & FOREIGN AFF. 327, 376 (2010).

88. *See* Schaack, *supra* note 87, at 376.

89. *Id*.

90. Mary Ellen O'Connell, Jus Cogens*: International Law's Higher Ethical Norms*, in THE ROLE OF ETHICS IN INTERNATIONAL LAW 78 (Donald Earl Childress III ed., 2012).

91. Vienna Convention on the Law of Treaties, Art. 53, May 23, 1969, 1155 U.N.T.S. 331.

92. O'Connell, *supra* note 90, at 79.

93. For a list of likely *jus cogens* norms, see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (AM. LAW INST. 1987).

94. O'Connell, *supra* note 90, at 83–88.

cogens, some scholars have taken to calling it "super customary law" or even "normative positivism."[95] Professor O'Connell, however, maintains that positivism wholly fails to explain *jus cogens* because these norms operate completely outside the requirement of state consent.[96] While customs only become law when states adhere to them out of a sense of legal obligation, *jus cogens* norms exist independently.[97] These norms translate the most basic protections of human dignity into a form of "super law," not voidable by international agreements. We have only one theory to explain such a phenomenon: natural law.[98] Professor O'Connell postulates that judges asked to enforce *jus cogens* should apply natural law principles, examining positive law sources for evidence "about the international community's highest ethical norms" which might merit recognition as a peremptory norm.[99] Whatever the method used to define *jus cogens*, they are inexplicable on grounds other than natural law. As Hersch Lauterpacht put it, *jus cogens* and other modern international law principles are the "more articulate expressions of the law of nature which nurtured the growth of international law and which assisted powerfully in its development."[100]

If natural law is still salient in the modern world, what value does it offer? The most striking example of its utility comes from examining the effects of its absence. In pre-World War II Germany, jurists wholly embraced the promise of legal positivism, believing it

> was the only theory of law that could claim to be "scientific" in an Age of Science. Dissenters from this view were characterized by positivists with that epithet modern man fears above all others: "naïve." The result was that it could be reported by 1927 that "to be

95. *Id*. at 83.

96. *Id*. ("*Jus cogens* norms are norms apart from and above the rules and principles derived from the primary, positivist sources of international law, including customary international law.").

97. *Id*. (noting "*Jus cogens* norms do not depend on consent.").

98. *Id*. at 93.

99. *Id*. at 93–94.

100. Hersch Lauterpacht, *International Law—The General Part (1954)*, reprinted in 1 INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 52 (E. Lauterpacht ed., 1975) (noting that various international legal rules pertain "not to an ascertained direct expression of the will of States, but to the reason of the thing").

> found guilty of adherence to natural law theories is a kind of social disgrace."[101]

Adherents divorced the law from any conception of morality.[102] Law became whatever the government enacted—nothing more, nothing less. Such blind faith in the law may have propelled the legal community to turn a blind eye to the rise of the Nazis. Hitler, of course, "did not come to power by a violent revolution."[103] His first assaults on the country "were on ramparts which, if they were manned by anyone, were manned by lawyers and judges."[104]

This is not to say, of course, that positivism produces radical political philosophy or dictatorship. Within its sphere, positivism encourages a healthy attention to the words of the law and the intentions of its makers. But, like anything, it can be taken too far, especially when long-recognized rights or traditions are involved.

Next, we move to an examination of two similar yet distinct concepts saturated with natural law principles: individual and national self-defense.

B. Individual Self-Defense

Perhaps no legal canon enjoys deeper historical roots than the doctrine of individual self-defense. It is "Nature's eldest law" and, as such, the prototypical natural law right.[105] The right owes itself more to psychology and evolution than law. When Cicero spoke of natural law as "not written, but born with us," he was specifically referring to the law of self-defense.[106] In his words, "if our life be in danger from . . . open violence or from the weapons of robbers or enemies, every

101. Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart (1958)*, in LAW AND MORALITY: READINGS IN LEGAL PHILOSOPHY 67, 93 (David Dyzenhaus, Sophia Reibetanz Moreau, & Arthur Ripstein, eds., 3d ed. 2007).

102. *Id*. at 94.

103. *Id*.

104. *Id*.

105. JOHN DRYDEN, ABSALOM AND ACHITOPHEL (J.T. & W. Davis 1682).

106. MARCUS TULLIUS CICERO, ORATION FOR TITUS ANNIUS MILO ch. IV, *available at* http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.02.0020:text=Mil.:chapter=4&highlight=not+written%2C (last visited Mar. 8, 2020).

means of securing our safety is honourable."[107] A corollary from Cicero's conclusion is that states do not create the right of self-defense; they merely protect it. John Locke, whose writing profoundly shaped Anglo-American political philosophy, agreed self-defense is a "pre-political" right that exists independently of sovereign states.[108] Even if society disintegrated, the necessity to defend oneself against attack is so intrinsic to human functioning that it must be observed. Locke viewed this inclination in terms similar to Cicero, as reflecting nothing less than a "fundamental law of nature."[109]

A terse historical examination illustrates the extent to which the right of self-defense is embedded in law and culture. The earliest Western civilization, ancient Athens, recognized a right of self-defense,[110] as did the ancient Hebrews.[111] The Romans likewise honored the principle that "it is permissible to repel force by force," which they viewed as "conferred by nature."[112] Importantly, the right belonged to "all persons," not solely to male landowners.[113] With this firm foundation in positive and natural law, self-defense would survive the fall of the Roman Empire and play an especially prominent role in the writing of later scholars.

Catholic scholar Thomas Aquinas, writing in the Roman natural law tradition, saw self-defense as the central natural law right because the desire for self-preservation is "man's strongest inclination."[114] Consequently, natural law recognized and protected the right to take

107. *Id.*

108. Kimberly Kessler Ferzan, *Self-Defense and the State*, 5 OHIO ST. J. CRIM. L. 449, 449 (2008).

109. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 14 (C.B. Macpherson ed., 1980).

110. David B. Kopel et al., *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43, 104–05 (2007) [hereinafter Kopel, *The Human Right of Self-Defense*].

111. *See id*. at 106; *see also Exodus* 22:2 ("If a thief is caught breaking in at night and is struck a fatal blow, the defender is not guilty of bloodshed; but if it happens after sunrise, the defender is guilty of bloodshed.").

112. Kopel, *The Human Right of Self-Defense*, *supra* note 110, at 116 n.22 (citing DIG. 43.16.1.27 (Ulpian, Edict 69)).

113. *See* Will Tysse, *The Roman Legal Treatment of Self Defense and the Private Possession of Weapons in the* Codex Justinianus, 16 J. FIREARMS & PUB. POL'Y 163, 165 (2004).

114. Merriam, *supra* note 37, at 50.

another's life when necessary to preserve one's own.[115] Any law that transgressed these principles was "no longer a law, but a corruption of law."[116]

Like Aquinas, Hugo Grotius recognized self-defense as stemming from humanity's inherent desire for self-preservation.[117] Referencing both Aquinas and Roman law, Grotius proposed that if one's life were in danger, "he may not only make *War* upon, but very justly *destroy* the *Aggressor* . . . ."[118] Grotius further referred to individual self-defense as "Private War," and used its essential principles to deduce a set of principles that justified war between nations, which he labeled "Public War."[119]

Later natural law scholars built from this cornerstone. Samuel Pufendorf, writing only decades after Grotius and soon after the Peace of Westphalia, emphasized the necessity of self-defense by imagining the effects of its absence. Were people forbidden from defending themselves, even when "pursued by Force," the resulting state of affairs "would be so far from promoting the Peace, that it would rather contribute to the Ruin and Destruction of Mankind."[120] Without self-defense, humans would be unable to interact with each other. For that reason, Pufendorf designated self-defense as "the foundation of civilized society."[121]

Following Pufendorf's lead, Emerich de Vattel discussed self-defense at length in his influential work, *The Law of Nations, or The Principles of Law Applied to the Conduct and the Affairs of Nations and*

115. *Id*. at 52; *see also* AQUINAS, *supra* note 47, pt. II.2.64, art. 7 ("Therefore this act, since one's intention is to save one's own life, is not unlawful, seeing that it is natural to everything to keep itself in 'being,' as far as possible.").

116. AQUINAS, *supra* note 47, pt. I.2.95, art. 2.

117. Kopel, *The Human Right of Self-Defense*, *supra* note 110, at 76–77 (As Grotius observed, even human babies, like animals, have an instinct to defend themselves.").

118. GROTIUS, *supra* note 23, at 397.

119. Kopel, *The Human Right of Self-Defense*, *supra* note 110, at 77.

120. SAMUEL VON PUFENDORF, OF THE LAW OF NATURE AND NATIONS: EIGHT BOOKS 184 (The Lawbook Exchange, Inc. 2007) (1672) .

121. Kopel, *The Natural Right of Self-Defense*, *supra* note 22, at 242.

of Sovereigns.[122] The title betrays his fidelity to the natural law. Vattel took the notion of self-defense a step further than his intellectual predecessors. He advanced the idea that, far from being simply permissive, self-preservation (and self-defense, by logical extension), is an "obligation imposed by nature, and *no man can entirely and absolutely renounce it*."[123]

While Vattel's belief in the obligatory nature of self-defense is not widely adhered to in modern times, self-defense itself continues to be enormously pervasive. In fact, "self-defense is part of the law of *every* legal system in the world today."[124] Few other legal concepts, if any, have been so widely adopted. Indeed, self-defense is so deeply etched into the world's legal codes that it likely constitutes a "general principle of law," capable of enforcement by the International Court of Justice as an exclusion to criminal liability.[125]

In the U.S., as in many other countries,[126] the right to bear arms is protected in the Constitution.[127] In interpreting this right, the U.S. Supreme Court found the "*inherent* right of self-defense" is "central to the Second Amendment right" to possess weapons.[128] The majority examined natural law sources in finding the Amendment effectuated what Blackstone referred to as "the right of having and using arms for self-preservation and defence."[129] As the above examination made clear, Blackstone drew from the deep well of natural law thought to make his pronouncement and the U.S. Supreme Court—knowingly or unknowingly—drew from the same in its decision.

Treaty law also contains provisions reminiscent of the natural law right to self-defense. The International Covenant on Civil and Political

122. EMERICH DE VATTEL, THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS (Cambridge Univ. Press 2015) (1833).

123. *Id*. at 22 (emphasis added).

124. Kopel, *The Human Right of Self-Defense*, *supra* note 110, at 137.

125. *See generally* John Cerone, *Is There a Human Right of Self-Defense?*, 2 J. L. ECON. & POL'Y 319, 328–29 (2006) (acknowledging that self-defense may be recognized as a general principle of law, even if it is probably only an exclusion to criminal liability and not a positive right).

126. Kopel, *The Human Right of Self-Defense*, *supra* note 110, at 137.

127. *See* U.S. CONST. amend. II.

128. D.C. v. Heller, 544 U.S. 570, 628 (2008) (emphasis added).

129. *Id*. at 594.

Rights ("ICCPR") guarantees the "inherent right to life" to every human being, adding that the right "shall be protected by law," preventing arbitrary deprivations.[130] As Vattel discussed, the right to life must necessarily include the right to protect one's own life.[131] Self-preservation, in other words, entails a right of self-defense. The European Convention on Human Rights takes the ICCPR's language a step further, providing that action taken "in defence of any person from unlawful violence" shall not be regarded as an arbitrary deprivation of the right to life.[132] In a section entitled "General Principles of Criminal Law," the International Criminal Court's Rome Statute likewise excludes from criminal liability those who "act[ed] reasonably to defend himself or herself or another person . . . ."[133]

Individual self-defense continues to boast a remarkable level of influence on the modern legal universe. The concept continues to be "the first law of our nature," and, accordingly, it "must be recognized by every code which professes to regulate the condition and relations of man."[134] Its continued saliency explains why the International Military Tribunal for the Far East, in adjudicating war crimes following World War II, pronounced "[a]ny law, international or municipal, which prohibits recourse to force, is necessarily limited by the right of self-defense."[135]

130. U.N. Gen. Assembly, International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976, adopted by the United States Sept. 8, 1992).

131. *See generally* VATTEL, *supra* note 122, at 22.

132. Human Rights Act, 1998, Art. II(2)(a) (Eng.).

133. Rome Statute of the International Criminal Court, art. 31(1)(c), U.N. Doc. A/Conf.183/9 (1998).

134. Letter from Lord Ashburton to Mr. Webster (July 28, 1842), *available at* http://avalon.law.yale.edu/19th_century/br-1842d.asp.

135. *In re* Hirota and Others, 15 ANN. DIG. & REP. OF PUB. INT'L L. CASES 356, 364 (Int'l Mil. Trib. For the Far East, 1948) (no. 118, *Tokyo* trial). Interestingly, Yoram Dinstein notes the Tribunal's comment "may have always been true in regard to domestic law, and it is currently accurate also in respect of international law," even as he suggests it is wiser to avoid such "axiomatic" statements. YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 170 (2d ed. 1994).

C. National Self-Defense

From the idea of individual self-defense, philosophers and statesmen extrapolated the notion of national self-defense.[136] If an individual could act in self-defense, so too could a state. In this way, the "law of nature" governing individual self-defense became the "law of nations" when applied to the international system.[137] Early formulations of national self-defense were broad and lacking in strict regulation. In Roman times, priests known as the *jus fetiale* were charged with ensuring that any recourse to force satisfied certain basic requirements, lest the use of force be unjust.[138] Perhaps not surprisingly, the requirements were not especially demanding. The priests mandated the state issue a formal demand for satisfaction of grievances followed by a formal declaration of war if such demand went unmet.[139] They also appeared to possess some authority to evaluate the sufficiency of the grievance justifying the conflict.[140]

Centuries later, St. Augustine crafted a theory of just war, fusing Christian philosophy with the baseline of legality provided by Roman law.[141] In his view, war existed not only to right wrongs, but also to enforce justice.[142] St. Augustine's theories were more philosophical than legal, establishing outlines of legality without specifying exacting

136. *See* Kopel, *The Human Right of Self-Defense*, *supra* note 110, at 82; *see also* KINGA TIBORI SZABO, ANTICIPATORY ACTION IN SELF-DEFENCE: ESSENCE AND LIMITS UNDER INTERNATIONAL LAW 37 (2011) (noting this idea is "in line with the practice of ancient Greek and Roman philosophers, who regarded the community as the completion of the self").

137. Kopel, *The Human Right of Self-Defense*, *supra* note 110, at 82.

138. GERALD IRVING ANTHONY DARE DRAPER, REFLECTIONS ON LAW AND ARMED CONFLICTS: THE SELECTED WORKS ON THE LAWS OF WAR BY THE LATE PROFESSOR COLONEL G.I.A.D. DRAPER, OBE 5–6 (Michael A. Meyer & Hilaire McCoubrey eds., Kluwer Law Int'l, 1998).

139. *Id*.

140. *Id*. (noting the *jus fetiale* would assess the moral and religious basis for conflict but ultimate authority for whether to pursue military action belonged to the Roman Senate).

141. Robert J. Delahuty & John Yoo, *From Just War to False Peace*, 13 CHI. J. INT'L. L. 1, 10–11 (2012) (noting "St. Augustine's approach justified a broader scope to war than existed for Cicero" in Roman times); *see also* DINSTEIN, *supra* note 135, at 62.

142. Delahunty & Yoo, *supra* note 141, at 11.

requirements before states could resort to war.[143] St. Thomas refined Augustine's theories, postulating that uses of force must fulfill three predicate conditions: (1) war was invoked and prosecuted by a "public authority;" (2) in order to seek the just cause of "punishing wrongdoers"; (3) with the specific "intent of securing peace and helping the good or avoiding evil."[144]

Natural law theorists writing in the sixteenth and seventeenth centuries—including the jurisprudential giants Grotius, Pufendorf, and Vattel—generally accepted and expanded on this theory, using it to formulate specific causes justifying warfare.[145] Self-defense was not required. While all agreed only just wars were legitimate, "justice" seemed to be in the eye of the beholder.[146] To name only one example, famed Spanish theorist Vitoria sanctified Spain's conquest of the Americas, reasoning the native "Indians had violated the fundamental rights of the Spaniards to travel freely among them, to carry on trade and to propagate Christianity."[147]

Perhaps due to the malleable nature of these restraints, the rules on just warfare became little more than a parchment barrier, affecting state rhetoric more than reality.[148] Two trends would help stem this tide, at least to some extent: (1) the rise of customary international law principles restricting states' recourse to force, which was later supplemented by (2) binding positive law in the form of the U.N. Charter.

Customary international law rules on self-defense gained their shape in a diplomatic incident known as the *Caroline* affair.[149] During an 1837 rebellion in British-controlled Canada, rebels occupied an island on the "Canadian side of the Niagara River."[150] American sympathizers used the steamboat *Caroline* to ferry supplies from the

143. *Id*.

144. *Id*. at 14.

145. DINSTEIN, *supra* note 135, at 63–64.

146. *Id*.

147. *Id*. at 64.

148. *Cf. id*. at 166.

149. *See generally* John E. Noyes, The Caroline*: International Law Limits on Resort to Force*, *in* INTERNATIONAL LAW STORIES 263 (John E. Noyes, Laura A. Dickinson, & Mark W. Janis eds., 2007).

150. DINSTEIN, *supra* note 135, at 227.

American side to the island.[151] This practice continued despite official British complaints. Diplomacy having failed, British troops traveled to the American side, set the *Caroline* on fire, and sent it barreling over Niagara Falls, killing several Americans in the process.[152] Incensed, U.S. Secretary of State Daniel Webster registered an official complaint with the British. His British counterpart, Lord Ashburton, justified the attack on grounds of self-defense. Webster disagreed, arguing self-defense may only be invoked when there is a "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[153] Further, forces acting in self-defense must do "nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."[154] After extended correspondence, the British conceded their stance on the matter. Mr. Webster's contentions built upon earlier restraints on self-defense developed by just war and natural law theorists. For his part, Lord Ashuburton did not contest that self-defense, even in the international sphere, "is the first law of our nature . . . ."[155] "[O]f this great general principle," he wrote, "we seem to be agreed."[156]

From this correspondence arose the two primary restraints on defensive measures now accepted as customary international law.[157] First, actions taken in self-defense must be necessary, meaning "no alternative response be possible."[158] Second, defensive measures must adhere to the principle of proportionality, which mandates that the scale and intensity of armed responses "be limited by the necessity" that supported the action in the first place.[159]

151. *Id*.

152. *Id*.

153. Letter from Daniel Webster to Henry Fox, British Minister to Washington (Apr. 24, 1841), *available at* http://avalon.law.yale.edu/19th_century/br-1842d.asp.

154. *Id*.

155. *Id*.

156. *Id*.

157. *See* Eustace Chikere Azubuike, *Probing the Scope of Self-Defense in International Law*, 17 ANN. SURV. INT'L & COMP. L. 129, 162 (2011).

158. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 150 (3d ed. 2008).

159. Letter from Daniel Webster to Henry Fox, British Minister to Washington (Apr. 24, 1841),

Positive treaty law, in the form of the U.N. Charter, operates alongside these customary principles. Housed in a chapter outlining the "Purposes and Principles of the United Nations," Article 2 of the Charter forbids states from resorting to "the threat or use of force against the territorial integrity or political independence of any state . . . ."[160] These words do not tell the complete story. Article 51 carves out a major exception by announcing that "nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs . . . until the Security Council has taken the measures necessary to maintain international peace and security."[161] Notable within that provision is the use of a term familiar to natural law theorists: inherent. This word does not appear by accident. According to Professor Yoram Dinstein, this "choice of words has overtones of *jus naturale*, which appears to be the fount of the right to self-defence."[162] In this way, modern positive law not only references but explicitly invokes its natural law roots. The International Court of Justice grappled with this language in its well-known decision in *Nicaragua v. United States of America*.[163] Adjudicating a dispute involving U.S. sponsorship of rebel groups in Nicaraguan territory, the Court noted Article 51—consisting of all of 101 words—cannot begin to cover the entirety of the law governing "the use of force in international relations."[164] The Court thus found:

> Article 51 of the charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter.[165]

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available at http://avalon.law.yale.edu/19th_century/br-1842d.asp; *see also* GRAY, *supra* note 158, at 150 (noting "proportionality relates to the size, duration and target of the response").

160. U.N. Charter, art. 2, ¶ 4.

161. *Id*. at art. 51.

162. DINSTEIN, *supra* note 135, at 179.

163. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27).

164. *Id*. at 94.

165. *Id*.

By customary international law, the Court appeared primarily to articulate the rules on proportionality and necessity derived from the *Caroline* affair.

As a result, even in the international sphere, one hears the echoes of natural law in the focus on inherent rights—those that derive not from statute but from structure and primordial values. It is a lesson that gains newfound relevance in the following examination of self-defense in the battlespace.

II. U.S. APPLICATION OF SELF-DEFENSE

The rules of engagement ("ROE") provide guidance for interactions between U.S. military members in a battlespace and enemy personnel. Although provisions within the ROE vary by conflict and theater of operation, Chairman of the Joint Chiefs Of Staff Instruction 3121.01, Standing Rules Of Engagement for U.S. Forces ("SROE") provides unifying, foundational guidance.[166] The SROE explain the various types of self-defense U.S. forces may lawfully act upon, to include: national,[167] collective,[168] unit,[169] and individual[170] self-defense.

The U.S. Constitution grants Congress sole authority "[t]o make Rules for the Government and Regulation of the land and naval

166. *See generally* U.S. SROE 2005, *supra* note 14; U.S. SROE 2000, *supra* note 15.

167. U.S. SROE 2005, *supra* note 14, at enclosure A, para. 3(b) ("Defense of the United States, U.S. forces, and, in certain circumstances, U.S. persons and their property, and/or U.S. commercial assets from a hostile act or demonstration of hostile intent.").

168. *Id*. at enclosure A, para. 3(c) ("Defense of designated non-U.S. military forces and/or designated foreign nationals and their property from a hostile act or demonstrated hostile intent. Only the President or SecDef may authorize collective self-defense.").

169. *Compare id*. at enclosure A, para. 3(a) ("Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent"), *with* U.S. SROE 2000, *supra* note 15, at enclosure A, para. 7(c) ("A unit commander has the authority and obligation to use all necessary means available and to take all appropriate actions to defend the unit, including elements and personnel, or other US forces in the vicinity, against a hostile act or demonstrated hostile intent.")

170. Individual self-defense is only enumerated separately in U.S. SROE 2000, *supra* note 15.

Forces."[171] At the same time, however, the Constitution names the President as "Commander in Chief of the Army and Navy of the United States."[172] It is ultimately unclear whether SROE are best considered as promulgated under a statutory grant of authority from Congress,[173] under the President's Commander in Chief authority, or a mixture of both.

A. Self-Defense in the SROE

Before beginning any discussion of the current self-defense standards, it is important to note U.S. SROE 2005 incorporated significant revisions to the concept of individual self-defense compared to the preceding version, U.S. SROE 2000. Moreover, U.S. SROE 2005 is purportedly undergoing another round of revisions for future implementation, so the right of individual self-defense may soon be further amended.[174]

The stated purpose of the SROE provides valuable insight regarding the perception and status of self-defense as a legal concept within the promulgating entity, the U.S. Department of Defense. The distinct differences between the purpose statements in U.S. SROE 2000 and U.S. SROE 2005 demonstrate a fundamental shift from self-defense as an individual's constant, natural law right to a malleable, positive law grant from the sovereign. U.S. SROE 2000 states: "The purpose of these SROE is to provide implementation guidance on the application of force for mission accomplishment and the exercise of the *inherent* right and *obligation* of self-defense."[175] In contrast, U.S. SROE 2005 states: "[t]he purpose of the SROE is to provide implementation guidance on the application of force for mission accomplishment and the exercise of self-defense."[176] Thus, according to the U.S. Department of Defense, self-defense was not only an

171. U.S. CONST. art. I, § 8, cl. 14.

172. U.S. CONST. art. II, § 2, cl. 1.

173. *See generally* 10 U.S.C. §§ 101–499 (2017).

174. *See* U.S. SROE 2005, *supra* note 14 (noting "the current SROE is under revision").

175. U.S. SROE 2000, *supra* note 15, at enclosure A, para. 1(a) (emphasis added).

176. U.S. SROE 2005, *supra* note 14, at enclosure A, para. 1(a).

inherent right between 2000 and 2005, but an obligation. After 2005, self-defense apparently lost its status as either a right or an obligation.

The substantive difference between individual self-defense in U.S. SROE 2000 and U.S. SROE 2005 is even more striking. U.S. SROE 2000 defines individual self-defense as:

> The inherent right to use all necessary means available and to take all appropriate actions to defend oneself and US forces in one's vicinity from a hostile act or demonstrated hostile intent is a unit of self-defense. Commanders have the obligation to ensure that individuals within their respective units understand and are trained on when and how to use force in self-defense.[177]

U.S. SROE 2005 no longer contains a separate definition of individual self-defense. Instead, the inherent right of self-defense is collectively defined:

> Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander as detailed below, military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent. When individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense. As such, unit commanders may limit individual self-defense by members of their unit. Both unit and individual self-defense includes defense of other US military forces in the vicinity.[178]

Thus, self-defense was transformed from a recognized individual right existing concurrent with a group right into a subordinate component of a group right subject to veto by the unit commander.

While U.S. SROE 2005 sought to restrict individual self-defense, it simultaneously loosened the criteria justifying invocation of the concept. U.S. SROE 2000 expressly lists the prerequisites for lawful invocation of self-defense:

177. U.S. SROE 2000, *supra* note 15, at enclosure A, para. 5(e) (emphasis added).

178. U.S. SROE 2005, *supra* note 14, at enclosure A, para. 3(a) (emphasis added).

> Application of force in self-defense requires the following two elements:
> (1) Necessity. Exists when a hostile act occurs or when a force or terrorist(s) exhibits hostile intent.
> (2) Proportionality. Force used to counter a hostile act or demonstrated hostile intent must be reasonable in intensity, duration, and magnitude to the perceived or demonstrated threat based on all facts known to the commander at the time.[179]

In contrast, U.S. SROE 2005 simply provides:

All necessary means available and all appropriate actions may be used in self-defense. The following guidelines apply.

> (1) De-escalation. When time and circumstances permit, the forces committing hostile acts or demonstrating hostile intent should be warned and given the opportunity to withdraw or cease threatening.
> (2) Necessity. Exists when a hostile act occurs or when a force demonstrates hostile intent. When such conditions exist, use of force in self-defense is authorized while the force continues to commit hostile acts or exhibit hostile intent.
> (3) Proportionality. The use of force in self-defense should be sufficient to respond decisively to hostile acts or demonstrations of hostile intent. Such use of force may exceed the means and intensity of the hostile act or hostile intent, but the nature, duration and scope of force used should not exceed what is required. The concept of proportionality in self-defense should not be confused with attempts to minimize collateral damage during offensive operations.[180]

Nevertheless, commonalities between U.S. SROE 2000 and U.S. SROE 2005 are readily apparent: necessity and proportionality. U.S. SROE 2000 also includes the concept of de-escalation, however, it lists it separately from necessity and proportionality.[181]

The concepts of hostile act and hostile intent are important to understanding the application of both versions. Fortunately, the definition contained in each version is substantially the same. U.S. SROE 2000 provides:

179. U.S. SROE 2000, *supra* note 15, at enclosure A, para. 5(f).
180. U.S. SROE 2005, *supra* note 14, at enclosure A, para. 4(a).
181. *See* U.S. SROE 2000, *supra* note 15, at enclosure A, para. 8(a)(1).

> Hostile Act. An attack or other use of force against the United States, US forces, and, in certain circumstances, US nationals, their property, US commercial assets, and/or other designated non-US forces, foreign nationals and their property. It is also force used directly to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel and vital US Government property. . . .[182]
>
> Hostile Intent. The threat of imminent use of force against the United States, US forces, and in certain circumstances, US nationals, their property, US commercial assets, and/or other designated non-US forces, foreign nationals and their property. Also, the threat of force to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel or vital USG property. . . .[183]

U.S. SROE 2005 offered only minor edits:

> Hostile Act. An attack or other use of force against the United States, US forces or other designated persons or property. It also includes force used directly to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel or vital USG property. . . .[184]
>
> Hostile Intent. The threat of imminent use of force against the United States, US forces or other designated persons or property. It also includes the threat of force to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel or vital USG property. . . .[185]

In both versions, hostile intent requires an imminent threat. U.S. SROE 2005, however, adds a definition of "imminent use of force," noting "[i]mminent does not necessarily mean immediate or instantaneous."[186] Rather, an imminent threat is simply one that is posed or may be posed at some point in the future.[187]

The concept of pursuit is not one routinely considered in conjunction with self-defense. Nonetheless, both SROE versions

182. *Id*. at enclosure A, para. 5(g).
183. *Id*. at enclosure A, para. 5(h).
184. U.S. SROE 2005, *supra* note 14, at enclosure A, para. 3(e).
185. *Id*. at enclosure A, para. 3(f).
186. *Id*. at enclosure A, para. 3(g).
187. *Id*.

authorize pursuit as a component of self-defense in certain circumstances. U.S. SROE 2000 states: "[s]elf-defense includes the authority to pursue and engage hostile forces that continue to commit hostile acts or exhibit hostile intent."[188] Similarly, U.S. SROE 2005 provides "[s]elf-defense includes the authority to pursue and engage forces that have committed a hostile act or demonstrated hostile intent, if those forces continue to commit hostile acts or demonstrate hostile intent."[189] Minor differences aside, both versions expressly recognize a type of offensive self-defense where a retreating adversary may be chased in order to continue the engagement.

B. Self-Defense in Military Criminal Law

Congress, acting under its authority "[t]o make Rules for the Government and Regulation of the land and naval Forces,"[190] adopted the UCMJ, which articulated the military justice system and all military criminal offenses.[191] For U.S. military members charged with a crime under the UCMJ involving injury or death of another person, the scope and nuance of individual self-defense is enumerated within the Manual for Courts-Martial ("MCM") by Rule for Courts-Martial ("RCM") 916;[192] within Department of the Army Pamphlet 27-9 ("Military Judges' Benchbook");[193] and within relevant case law.

RCM 916 addresses most potential criminal defenses available to military members. It expressly recognizes self-defense as falling within the category of a special defense.[194] Special defenses do not deny commission of an illegal act, but instead seek to establish that the act was not illegal in the context of its commission.[195] As a special defense, self-defense may be explicitly asserted by defense counsel or simply

188. U.S. SROE 2000, *supra* note 15, at enclosure A, para. 8(b).

189. U.S. SROE 2005, *supra* note 14, at enclosure A, para. 4(b).

190. U.S. CONST. art. I, § 8, cl. 14.

191. *See* UCMJ, 10 U.S.C. §§ 801–946 (2017).

192. THE JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL, UNITED STATES, RCM 916(a) (2008) [hereinafter MCM].

193. U.S. DEP'T OF ARMY, PAMPHLET 27-9, MILITARY JUDGES' BENCHBOOK (2010) [hereinafter MILITARY JUDGES' BENCHBOOK].

194. Special defenses are also known as affirmative defenses. MCM, *supra* note 192, RCM 916(a).

195. *Id*.

become applicable due to evidence presented by any party.[196] Indeed, the Military Judges' Benchbook imposes an obligation upon military judges to instruct the fact-finder on self-defense, *sua sponte*, when the issue has been raised by some evidence, regardless of its credibility.[197] After self-defense is raised, however, the burden of proving its inapplicability rests solely on the prosecution.[198] In other words, an accused need not specifically assert self-defense, nor prove any fact, to benefit from it. Rather, the prosecution must disprove it in order to obtain a conviction.[199]

Based upon the scope of application and the burden of proof, military criminal law appears to recognize and treat individual self-defense as an inherent right. A fact-finder's overt legal obligation to consider self-defense based upon any evidence suggesting its relevance implies a right that exists on its own. This interpretation is strengthened by the fact that an accused need not invoke self-defense in order for the defense to apply. Moreover, if the prosecution must disprove self-defense in order to obtain a conviction, the ability to defend oneself without committing a crime must be inherent in the fact of existence. This independent aspect of criminal self-defense hints at a natural law source.

Self-defense contains two overlapping, component elements. RCM 916(e) articulates the relevant elements as follows:

> It is a defense to a homicide, assault involving deadly force, or battery involving deadly force that the accused:

196. MCM, *supra* note 192, RCM 916(b) discussion.

197. MILITARY JUDGES' BENCHBOOK, *supra* note 193, at para. 5-1.

198. MCM, *supra* note 192, RCM 916(b)(1).

199. Another special defense unique to the military, obedience to orders, is worth briefly noting due to the ancillary relevance of its standard. An accused may assert the fact that he was following orders as a defense to an alleged UCMJ criminal violation. The key question determining applicability is whether "the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful" MCM, *supra* note 192, RCM 916(d). The standard is potentially relevant to self-defense cases if a military member is ordered not to defend himself when attacked in a battlespace. Engaging the enemy in violation of that order could constitute a punishable violation of Articles 90, 91, or 92 of the UCMJ, depending upon who issued the order. In such a situation, obedience to orders would not be applicable, but the defense may seek to assert the converse – unlawfulness of an order excessively impeding exercise of self-defense. *See id*.

> (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.[200]

The first element is objective. In regards to that element, a military judge would instruct fact-finders:

> The test here is whether, under the same facts and circumstances present in this case, an ordinary, prudent adult person faced with the same situation would have believed that there were grounds to fear immediate death or serious bodily harm. Because this test is objective, such matters as intoxication or emotional instability of the accused are not relevant.[201]

However, objectivity of the standard is not absolute. A military judge is able to qualify the standard based upon special factors such as an accused's gender or age.[202] The objective component equates with the necessity element found in both U.S. SROE 2000 and 2005.

Although the existence of a legitimate threat is considered objectively, the second element defers entirely to an individual's personal characteristics with a subjective assessment of the force employed to negate the threat. For this element, a military judge would instruct:

> To determine the accused's actual belief as to the amount of force which was necessary, you must look at the situation through the eyes of the accused. In addition to the circumstances known to the accused at the time, the accused's (age) (intelligence) (emotional control) (_____) are all important factors to consider in determining the accused's actual belief about the amount of force required to protect (himself) (herself). As long as the accused actually believed that the amount of force (he) (she) used was necessary to protect against death or grievous bodily harm, the fact that the accused may have

200. MCM, *supra* note 192, RCM 916(e).
201. MILITARY JUDGES' BENCHBOOK, *supra* note 193, at para. 5-2-1.
202. *Id*.

> used excessive force (or a different type of force than that used by the attacker) does not matter.[203]

Thus, force used in response to a threat may be objectively excessive as long as the individual had an honest belief it was necessary.

Unlike many civilian jurisdictions, a military member is not required to withdraw from a location to preclude an escalating possibility of violence.[204] While evidence of the opportunity to withdraw is a factor courts will consider, self-defense applies so long as the individual is at a place where he has a right to be.[205] In contrast, the application of self-defense may be precluded for an individual who intentionally provokes an incident or voluntarily engages in mutual combat.[206] A military judge would advise the fact-finder:

> A person has provoked an attack and, therefore, given up the right to self-defense if (he) (she) willingly and knowingly does some act toward the other person reasonably calculated and intended to lead to a fight (or a deadly conflict). Unless such act is clearly calculated and intended by the accused to lead to a fight (or a deadly conflict), the right to self defense is not lost.[207]

Deprivation of self-defense, while possible, thus requires the prosecution to conclusively demonstrate an accused's subjective intent to provoke a situation as a justification to use deadly force.

An accused who provoked an incident or voluntarily engaged in mutual combat, however, may still be entitled to claim self-defense based upon an opponent's actions. If an opponent escalates the level of conflict to a point where an accused developed a legitimate, immediate fear of serious bodily injury or death, self-defense once again applies.[208] A military judge's instructions would read:

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203. *Id*.
204. *Id*. at para. 5-2-6.
205. *Id*.
206. *Id*.
207. *Id*.
208. *See, e.g.*, United States v. Cardwell, 15 MJ 124, 126 (C.M.A. 1983); United States v. Dearing, 63 MJ 478, 483 (2006); United States v. Lewis, 65 MJ 85, 87–89 (2007).

> Even if you find that the accused (intentionally provoked an attack upon (himself) (herself)) (voluntarily engaged in mutual fighting), if the adversary escalated the level of the conflict, then the accused was entitled to act in self-defense if (he) (she) was in reasonable apprehension of immediate death or grievous bodily harm. Therefore, if the accused (intentionally provoked an attack upon (himself) (herself) by using force not likely to produce death or grievous bodily harm) (voluntarily engaged in mutual fighting not involving force likely to produce death or grievous bodily harm), and the adversary escalated the level of the conflict to one involving force likely to produce death or grievous bodily harm and thereby placed the accused in reasonable apprehension of immediate death or grievous bodily harm, the accused was entitled to use force (he) (she) actually believed was necessary to prevent death or grievous bodily harm.[209]

In this situation too, the prosecution bears the burden of proving an adversary did not escalate the conflict to a level where the accused feared serious injury or death.[210] If the prosecution fails to meet this burden, self-defense must be the default finding.

Another unique factor impacting the application of self-defense is whether a military accused was performing a law enforcement function at the time of the incident.[211] The nature of law enforcement often requires officers to create situations that may otherwise be deemed as provoking an incident or voluntarily engaging in mutual combat. A law enforcement officer, however, has a "duty to protect the public as well as to subdue his adversary."[212] Accordingly, a law enforcement officer has no duty to "retreat from an affray and stand idly by."[213] In essence, law enforcement personnel acting in an official capacity benefit from a broader application of the self-defense doctrine.

In sum, a U.S. military member charged under the UCMJ with killing or injuring another person is automatically granted the legal protection of self-defense, whether or not requested, if any evidence suggests it may apply. The UCMJ applies to military personnel anywhere in the world, so the protection of self-defense applies across

209. MILITARY JUDGES' BENCHBOOK, *supra* note 193, at para. 5-2-6.

210. *Id*.

211. United States v. Thomas, 11 MJ 315, 317 (C.M.A. 1981).

212. *Id*.

213. *Id*.

the face of the globe. However, the self-defense doctrine does not apply on the battlefield, where the ROE control and failure to obey an order is a crime unto itself.

C. Self-Defense in Civilian Law

Until relatively recently, state self-defense laws across the U.S. were similar in that they were modeled after English Common Law and included a duty to retreat if reasonably possible.[214] In 2005, however, Florida—working closely with the National Rifle Association[215]—adopted a fundamental change to the concept of self-defense by amending the state's law into what is variously known as "True Man,"[216] "Make My Day," "Shoot First [Ask Questions Later]," or more commonly "Stand your Ground."[217] This new law eliminated any duty to retreat,[218] bringing it essentially in accord with RCM self-defense standards. Emulating Florida, most U.S. states have similarly amended their self-defense laws to eliminate any affirmative obligation to retreat before use of deadly force.[219] Thus, for the purposes of this article, Florida law will serve as the template to assess the scope of the individual right to self-defense applicable throughout the majority of the U.S. Florida's Stand Your Ground law is enumerated in § 776.012 of the state statutes:

> A person is justified in using or threatening to use deadly force if he or she reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony. A person who uses or threatens to use deadly

214. Sara L. Ochs, *Can Louisiana's Self-Defense Law Stand Its Ground?: Improving the Stand Your Ground Law in the Murder Capital of America*, 59 LOY. L. REV. 673, 675–84, (2013).

215. *See* Abby Goodnough, *Florida Expands Right to Use Deadly Force in Self-Defense*, N.Y. TIMES, Apr. 27, 2005, at A1.

216. Daniel Sweeney, *Standing Up to "Stand Your Ground" Laws: How the Modern NRA-Inspired Self-Defense Statutes Destroy the Principle of Necessity, Disrupt the Criminal Justice System, and Increase Overall Violence*, 64 CLEV. ST. L. REV. 715, 722–23, (2016).

217. Ochs, *supra* note 214, at 675.

218. Sweeney, *supra* note 216, at 717.

219. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 229 (7th ed. 2015).

> force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground if the person using or threatening to use the deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be.[220]

The elements necessary to successfully assert self-defense are similar to those required under the RCM. Both require that a defendant honestly (subjectively) and reasonably (objectively) believe the use or threat of deadly force is necessary to prevent serious physical harm or death.[221] Notably, neither law requires a defendant to retreat if lawfully entitled to be at the location where the threat materialized.[222] A point of apparent contrast, however, is the opportunity to retreat. Under the RCM, "[t]he availability of avenues of retreat is one factor which may be considered in addressing the reasonableness of the accused's apprehension of bodily harm and the sincerity of the accused's belief that the force used was necessary for self-protection."[223] The Florida statute fails to offer any guidance regarding the opportunity to retreat. The representative who sponsored the bill and a National Rifle Association lobbyist, however, expressed hostility towards the possibility of retreat being relevant to the use of deadly force.[224]

When enacted, the Florida Stand Your Ground law was perceived as effectively deputizing every citizen to prevent forcible felonies.[225] With everyone in Florida able to serve as *de facto* agents of the state, that begs the question: what self-defense standards apply to actual Florida law enforcement officers? Florida Statute section 776.05 details the authority of law enforcement officers to use deadly force:

> A law enforcement officer, or any person whom the officer has summoned or directed to assist him or her, need not retreat or desist from efforts to make a lawful arrest because of resistance or

220. FLA. STAT. § 776.012(2) (2016).

221. *Compare* MCM, *supra* note 192, RCM 916(e), *with* FLA. STAT. § 776.012(2) (2016).

222. *Id*. RCM 916(e)(4) discussion; FLA. STAT. § 776.012(2) (2016).

223. MCM, *supra* note 192, RCM 916(e)(4) discussion.

224. Sweeney, *supra* note 216, at 729–30 (noting Florida Representative Dennis Baxley, who sponsored the bill, believed the "duty to retreat" actually increases the risk of harm to individuals).

225. Eric Ernst, *Too Bad Gun Law Deputizes All of Us*, SARASOTA HERALD-TRIBUNE, Oct. 7, 2005, at BC1.

> threatened resistance to the arrest. The officer is justified in the use of any force:
> (1) Which he or she reasonably believes to be necessary to defend himself or herself or another from bodily harm while making the arrest. . .
> (a) The officer reasonably believes that the fleeing felon poses a threat of death or serious physical harm to the officer or others . . . .[226]

The Stand Your Ground law echoes law enforcement standards in that an officer "need not retreat or desist" prior to using any degree of force.[227] As an empowered agent of the state, however, a law enforcement officer is constrained by laws limiting excessive use of force by the government and may not rely upon the Stand Your Ground law which only applies to private citizens.[228]

Because the majority of U.S. states have adopted some variant of a Stand Your Ground law for individual self-defense, the average American citizen is now legally empowered to respond as quickly and decisively as any armed police officer or military member to an imminent existential threat. Whether such a dramatic expansion of an inherent individual right is a positive development is irrelevant for purposes of this article. Far more important is whether the scope of a private citizen's right to defend himself on the streets of Philadelphia, Pennsylvania; Des Moines, Iowa; or countless other American cities exceeds the legal right of a U.S. military member to defend himself in a foreign battlespace.

III. NORTH ATLANTIC TREATY ORGANIZATION APPLICATION OF SELF-DEFENSE

Understanding the structure of NATO and how it operates is vital to grasping the unique importance of NATO self-defense standards and their applicability to the premise of this article. NATO is a political and military alliance comprised of twenty-nine member states.[229] The

226. FLA. STAT. § 776.05(1) (2016).

227. *Id*.

228. *See generally* State v. Caamano, 105 So. 3d 18 (Fla. 2012).

229. *See What is NATO?*, NATO, http://www.nato.int/nato-welcome/index.html# (last visited Mar. 8, 2020).

North Atlantic Council ("NAC") is the foremost political deliberative and decision-making body within the Alliance.[230] The NAC is the only body created by the North Atlantic Treaty and it is expressly empowered to create subordinate bodies.[231] Since the inception of NATO, official decisions throughout all NATO bodies have been based upon consensus of the member nations.[232] The consensus process means every official NATO decision or action is an "expression of the collective will of all the sovereign states that are members of the Alliance."[233]

The NATO Military Committee ("MC") is the senior military body within the Alliance. The MC is composed of NATO member nations' defense chiefs, the International Military Staff, and the NATO military command structure (Allied Command Operations and Allied Command Transformation).[234] The MC exists to support and counsel the NAC and other subordinate NATO bodies on military subjects.

MC 362/1, *NATO Rules of Engagement*, promulgates the official NATO definition and standards for individual self-defense.[235] Prepared by the MC, MC 362/1 was officially adopted by the NAC on July 22, 2003.[236] In applying the NATO consensus process, every principle within MC 362/1 can be deemed at least unopposed if not expressly supported by each Alliance member state—including the U.S.

NATO ROE perform two functions. During an armed conflict, the ROE effectively serve as a restraint upon the use of force in NATO

230. *See North Atlantic Council*, NATO, http://www.nato.int/cps/en/SID-176292AD-78ECC173/natolive/topics_49763.htm (last visited Mar. 8, 2020).

231. North Atlantic Treaty art. 9, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

232. *See Consensus Decision-Making at NATO*, NATO, http://www.nato.int/cps/en/natolive/topics_49178.htm (last visited Mar. 8, 2020) ("Consensus decision-making means that there is no voting at NATO. Consultations take place until a decision that is acceptable to all is reached. Sometimes member countries agree to disagree on an issue. In general, this negotiation process is rapid since members consult each other on a regular basis and therefore often know and understand each other's positions in advance. Facilitating the process of consultation is one of the NATO Secretary General's main tasks. The consensus principle applies throughout NATO.").

233. *Id*.

234. *See What is NATO?*, *supra* note 229.

235. *See generally* NATO ROE, *supra* note 26.

236. *Id*. at 1.

operations.[237] Short of armed conflict, however, NATO ROE provide the only authority for the lawful use of force "with the exception of self-defence."[238] Indeed, NATO ROE "do not limit the *inherent* right of self-defence."[239] Also notable is the observation within MC 362/1 that "[i]t is universally recognised that individuals and units have a right to defend themselves against attack or an imminent attack."[240]

The twenty-nine sovereign Alliance members have thus all accepted the idea that self-defense is universally recognized as an inherent right belonging to individual military personnel. Describing a right as *inherent* is indicative of a natural law origin. Simultaneously describing it as a *universally recognized* right, however, evokes the positive law concept, "general principles of law," which the International Court of Justice ("ICJ") may apply as one of four recognized sources of international law.[241] Although there is no single authoritative definition, "general principles of law" is commonly interpreted to mean principles found within the national laws of states around the world or, to a lesser extent, principles originating from natural law.[242] Of course, international law has historically been unconcerned with individual rights. Furthermore, an individual may not be party to an ICJ case; so the fact that a right to individual self-defense may be a general principle of law is of little consequence to U.S. military members.[243]

MC 362/1 also contains an important caveat that "individuals and units will act in accordance with national law" when exercising the right of self-defense.[244] Another apparent acknowledgement of positive law, this important proposition appears to contradict the surrounding natural law language by expressly recognizing the power of a sovereign to limit an inherent right. However, assigning such weight to this statement is likely unwarranted. The actual reason the limitation was included is more likely the nature of the Alliance, which is reflected in the

237. *Id*. at 2.
238. *Id*.
239. *Id*. (emphasis added).
240. *Id*. at 4.
241. Statute of the International Court of Justice, art. 38, ¶ 1.
242. MURPHY, *supra* note 36, at 86–87.
243. Statute of the International Court of Justice, art. 34, ¶ 1.
244. NATO ROE, *supra* note 26, at 4.

statement: "[b]ecause national laws differ, there will not always be consistency between the nations as to where the right to use force in self-defence ends and the use of force authorised by ROE begins."[245]

The Alliance defines self-defense as "the use of such necessary and proportional force, including deadly force, by NATO/NATO-led forces and personnel to defend themselves against attack or imminent attack."[246] Force is deemed necessary if it "is indispensable for securing self-defence," and proportional if it is both "commensurate with the perception of the level of the threat posed" and "limited to the degree, intensity, and duration necessary for self-defence and no more."[247] An attack is "the use of force against NATO/NATO-led forces and personnel," while an imminent attack means "the need to defend is manifest, instant, and overwhelming."[248] Implicit within self-defense is the concept of extended self-defense: "the right to take appropriate measures, including the use of necessary and proportional force to defend other NATO/NATO-led forces and personnel from attack or imminent attack."[249]

With the exception of nations whose domestic law includes a more expansive right (*e.g.* U.S. SROE 2000), NATO's definition of self-defense is effectively treated as the minimum scope of the right an individual may assert as justification for the use of force without ROE authorization. Indeed, certain ROE addressing hostile acts and hostile intent are precisely tailored to grant all Alliance personnel a similar ability to use force and thereby "assure the commander of a combined force that the forces under his command will respond uniformly to the actions of a potential enemy."[250]

If inconsistency exists with the manner in which self-defense and extended self-defense correlates with such ROE force authorization, the ROE are "not [to] be interpreted as limiting the right of self-defence."[251] This point is best illustrated with the tactical guidance issued by U.S. Marine Corps General John R. Allen, former commander of

245. NATO ROE, *supra* note 26, at A-1-1.
246. *Id*. at 4.
247. *Id*.
248. *Id*.
249. *Id*.
250. *Id*. at A-1-1.
251. *Id*. at 4.

International Security Assistance Force & United States Forces-Afghanistan. His guidance to all Alliance forces sought to dramatically curtail the use of force—and thus civilian casualties—by imposing more stringent criteria before use of force would be justified.[252] Of critical importance, however, is inclusion of the statement "my direction in no way compromises the *inherent right* of every *individual* and unit to employ appropriate measures in self-defense."[253] Given the way self-defense is operationally implemented by the Alliance, NATO self-defense standards can be considered to constitute the universally accepted minimum scope of the inherent right of self-defense an individual military member is entitled to assert.

IV. RECOGNIZING & RESTORING INDIVIDUAL SELF-DEFENSE

When a nation engages in armed conflict, any aspect of normally applicable law—*lex generalis*—that conflicts with the focused, situation specific law—*lex specialis*—is superseded.[254] The law of armed conflict ("LOAC") is an example of *lex specialis*. LOAC imposes an array of legal obligations upon nations that require military leaders to impose a greater risk of harm or death upon their own forces in order to minimize the risk to civilians not participating in the conflict.[255] The crux of the debate about the scope of individual self-defense for military members is how to properly allocate such increased risk based upon legal and moral obligations.

Individual self-defense for both military members and civilians is a right firmly rooted in natural law, not a privilege that can be granted or revoked at the whim of a sovereign. The essence of a natural law right precludes it from being unduly curtailed by positive law enactments

252. *See generally* SAF/USFOR-A, COMISAF'S TACTICAL DIRECTIVE, Nov. 30, 2011.

253. *Id*. at 2 (emphasis added).

254. Colonel Gary P. Corn, *Should the Best Offense Ever Be a Good Defense? The Public Authority to Use Force in Military Operations: Recalibrating the Use of Force Rules in the Standing Rules of Engagement*, 49 VAND. J. TRANSNAT'L L. 1, 34 (2016).

255. *See generally* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), June 8, 1977, 1125 UNTS 3 (entered into force Dec. 7, 1979).

such as ROE. Such a contention is buttressed by comparative law considerations from the description of individual self-defense in NATO ROE. NATO protects individual self-defense on the battlefield by affirmatively acknowledging its status as an inherent right incapable of undue regulation. Finally, there is a strong moral and pragmatic case against limiting the self-defense right of individual military members. The ill-advised adoption of SROE 2005 has fostered a culture of risk aversion, pitting the personal career interests of officers higher in the chain of command against the personal survival interests of their subordinates.

Assuming for argument's sake the federal government is able to unilaterally restrict a natural law right, a key question for any federal law or regulation is whether it is properly implemented in accord with the U.S. Constitution. In the case of SROE limiting individual self-defense, the relevant constitutional authority is either Congress's ability to regulate the land and naval forces, the President's Commander in Chief authority, or a component of both.[256] Unless the SROE are exclusively an exercise of Presidential power, however, their direct conflict with the RCM's grant of an absolute legal right to individual self-defense poses a constitutional separation of powers issue, with individual military members inextricably caught in the middle.

A. Natural Law vs. Public Authority Doctrine

As an inherent natural law right, individual self-defense cannot be curtailed by the state. Reliance upon the implicitly limiting positive law doctrine of public authority as a replacement for an absolute right is improper and contrary to the essence of natural law jurisprudence. Like every American civilian throughout the country, U.S. military members retain an unabridged right to life—and thus self-defense—while serving.

Implicit within the concept of military service is a duty for military members to accept and accomplish any officially assigned duty, despite the risk of serious personal injury or death.[257] In military operations,

256. *Compare* U.S. CONST. art. I, § 8, cl. 14, *with* U.S. CONST. art. II, § 2, cl. 1.

257. *See generally* David Barno & Nora Bensahel, *The Deepest Obligation of Citizenship: Looking Beyond the Warrior Caste*, WAR ON THE ROCKS (May 15, 2018), https://warontherocks.com/2018/05/the-deepest-obligation-of-citizenship-looking-beyond-the-warrior-caste/ (noting individuals "knew that they might be called up and

however, an individual military member is not alone in the motivation to minimize the possibility of personally suffering serious injury or death while performing assigned duties. The military organization itself has an interest in minimizing the loss of trained military personnel while balancing the LOAC requirement to avoid unnecessary civilian casualties. This truism was perhaps most eloquently summarized by famed World War II General George S. Patton, Jr. "No dumb bastard," he said, "ever won a war by going out and dying for his country. He won it by making some other dumb bastard die for his country."[258]

The term Pyrrhic victory—victory obtained only through significant losses leaving the military victor in essentially the same position for the future as if it had lost—embodies the competing interests of military leaders between accomplishing missions and avoiding loss of personnel.[259] Military leaders must constantly determine which interest is more important, while individual military members understandably seek to maximize self-preservation. The inherent tension between self-preservation and acceptance of personal risk in support of mission accomplishment is both known and expected by military organizations.[260] For instance, the Medal of Honor is reserved for personnel "who distinguish themselves conspicuously by

required to serve in uniform, setting aside whatever life plans they may have had, knowing that they might return home broken, disfigured, or not at all").

258. *See No Bastard Ever Won a War by Dying for His Country*, QUOTE INVESTIGATOR, https://quoteinvestigator.com/2015/04/24/war/#note-11055-6 (last visited Mar. 8, 2020).

259. Evan Andrews, *5 Famous Pyrrhic Victories*, HISTORY (Aug. 29, 2018) https://www.history.com/news/5-famous-pyrrhic-victories.

260. Consider additional insight from General Patton: "Every man is scared in his first battle. If he says he's not he's a liar. Some men are cowards but they fight the same as the brave men or they get the hell slammed out of them watching men fight who are just as scared as they are. The real hero is the man who fights even though he is scared.

Some men get over their fright in a minute under fire. For some it takes an hour. For some it takes days. But a real man will never let his fear of death overpower his honor his sense of duty to his country and his innate manhood." *See George S. Patton, Jr.*, GOODREADS, https://www.goodreads.com/quotes/65615-every-man-is-scared-in-his-first-battle-if-he (last visited Mar. 8, 2020).

gallantry and intrepidity *at the risk of their lives* above and beyond the call of duty."[261]

The unique nature of military service and the inherent risk of military duty are both recognized within the natural law roots of individual self-defense. The scope of the natural law individual right of self-defense belonging to military personnel is narrower than the same right possessed by civilians. Although John Locke describes individual self-defense as a "fundamental law of nature,"[262] he also notes:

> the preservation of the army . . . requires an absolute obedience to the command of every superior officer, and it is justly death to disobey or dispute the most dangerous or unreasonable of them . . . because such a blind obedience is necessary to that end, for which the commander has his power . . . .[263]

Locke made this statement to demonstrate a crucial point: "the first and fundamental natural law . . . is the preservation of the society, and (as far as will consist with the public good) of every person in it."[264]

The limited scope of individual self-defense for military personnel noted by Locke is thus premised upon the greater good of society. Accordingly, entry into military service unquestionably alters the legal rights and responsibilities of individuals. The transition from civilian to military member results not in the complete loss of all individual rights, however, but rather in a selective diminution of certain rights to maximize collective discipline and duty within the force.[265] Whether the natural law right of individual self-defense is entirely curtailed by military service has remained an open question during the ongoing counterinsurgency efforts against Islamic extremism.[266]

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261. 1 Manual of Military Decorations and Awards, in Dep't of Def. Manual § 1348.33, at 31 (Nov. 23, 2010) (incorporating change July 10, 2014) (emphasis added).

262. LOCKE, supra note 109, at 14.

263. *Id*. at 74.

264. *Id*. at 69.

265. Parker v. Levy, 417 U.S. 733, 743–44 (1974).

266. *Compare* Corn, *supra* note 254, *with* Major David Bolgiano, et al., *Defining the Right of Self-Defense: Working Toward the Use of a Deadly Force Appendix to the Standing Rules of Engagement for the Department of Defense*, 31 U. BALT. L. REV. 157 (2002).

One commentator, U.S. Army Colonel Gary P. Corn, contends that the legal nature of self-defense for military personnel and law enforcement officers performing official duties is entirely distinct from civilians.[267] According to Colonel Corn, military members cease to be individuals and instead transform solely into state agents while performing their duties.[268] The purported result of this transformation is that the nature of self-defense changes from an individual right to a collective right belonging to the state under the "public authority doctrine."[269] Thus, military members are not entitled to defend their lives without advance authorization from their unit commander.

Such a contention warrants a more detailed exploration of the public authority doctrine. Public authority provides a legal justification for otherwise illegal acts, such as homicide. Unlike individual self-defense, which is always available to everyone, only a limited group specifically empowered to advance a legitimate governmental interest can assert public authority as a bar to personal criminal liability.[270] In warfare, the *de facto* immunity from prosecution enjoyed by lawful combatants for any homicides committed to advance the state's war effort exemplifies the public authority doctrine.[271] Similarly, a civilian law enforcement officer relies upon public authority for the use of force to accomplish a lawful arrest.[272]

The MCM defines "justification" as a specific defense to criminal liability for a "death, injury, or other act caused or done in the proper performance of a legal duty."[273] The scope and rationale of justification is effectively identical to the public authority doctrine. For example, use of force by law enforcement officers to apprehend a suspect or kill an enemy combatant in battle is protected under the MCM.[274] It is reasonable, therefore, to consider justification and the public authority doctrine as one in the same. Particularly worth noting is the fact that,

267. *See generally* Corn, *supra* note 254.

268. *Id*. at 25–27.

269. *Id*. at 27–31.

270. Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 215–16 (1982).

271. Corn, *supra* note 254, at 28.

272. *Id*. at 30.

273. MCM, *supra* note 192, RCM 916(c).

274. *Id*. at RCM 916(c) discussion.

like self-defense, a military judge has a *sua sponte* obligation to instruct a fact-finder regarding justification when the issue has been raised by the evidence, even when not initially asserted by the defense.[275] The practical consequence of this independent judicial obligation is that a military member could conceivably be eligible to assert both justification and individual self-defense. Such a possibility undermines the contention that public authority (justification) entirely displaces individual self-defense.

Justification is easily applied to official acts not involving individual self-defense. Self-defense situations, however, are unique in that only the continued existence of the individual, not the state, is in jeopardy. If there is disparity between use of force under the public authority doctrine and the right of individual self-defense, whether public authority does or should entirely displace the individual right is both a legal and moral question. In any case, by separately enumerating individual self-defense as a special defense for homicide, assault involving deadly force, or battery involving deadly force,[276] the MCM indicates military members do not automatically lose the right of individual self-defense. This interpretation is consistent with the longstanding American idea that individuals have certain inalienable rights, including the right to life.[277]

According to Colonel Corn, the state alone controls the public authority right to use force.[278] Consequently, "[the state] is free to impose a threat trigger and conditions on the authority of its agents to respond."[279] Imposition of a requirement to obtain permission from a unit commander before using force in self-defense is consistent with the public authority concept only if individuals truly lose an independent right to life while in military service. Yet, it seems counterintuitive to argue that U.S. military members do not have an independent, defensible right to life because the state that placed them in a foreign

275. MILITARY JUDGES' BENCHBOOK, *supra* note 193, at para. 5-20.

276. *Compare* MCM, *supra* note 192, RCM 916(c), *with* MCM, *supra* note 192, RCM 916(e).

277. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("among these are Life").

278. Corn, *supra* note 254, at 31.

279. *Id*.

battlespace has a more important obligation to prevent potential incidental harm to foreign civilians.

Recall that justification is a defense to criminal liability for "death, injury, or other act caused or done in the proper performance of a legal duty." [280] The state unquestionably has exclusive control over every military member's legal duty to act. The definition of ROE as "[d]irectives 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"[281] makes that clear. In essence, ROE define the existence and scope of a military member's legal duty to act and use force within a battlespace. They function as a positive grant of authority to use force on behalf of the state in specified situations where an individual would not otherwise be legally entitled to act or use such force.

For decades prior to the adoption of U.S. SROE 2005, the "*inherent* right to use all necessary means available and to take appropriate actions to defend oneself and U.S. forces in one's vicinity"[282] was explicitly recognized and incorporated as a legal right tied to a military member's legal duty to act and use force within a battlespace. Individual self-defense was in synergistic alignment with the public authority doctrine. The longstanding presence of an individual right was not perceived as a legal or moral problem until the nature of modern counterinsurgency warfare rendered it a potential strategic liability.[283]

Since 2005, public authority has effectively displaced individual self-defense as the rationale for use of force within the ROE. Although the 2005 change was disguised as a seemingly innocuous textual modification, the practical outcome is the legal and moral quandary faced by Sgt. Meyer and all other U.S. military members in combat. Military members who violate the ROE to defend themselves and their peers from attack face two main possibilities for criminal prosecution. Those who face court-martial charges of homicide, assault involving deadly force, battery involving deadly force, or assault with a dangerous

280. MCM, *supra* note 192, RCM 916(c).

281. JOINT CHIEFS OF STAFF, JOINT PUB. 1-04, LEGAL SUPPORT TO MILITARY OPERATIONS GL-3 (Aug. 2, 2016).

282. U.S. SROE 2000, *supra* note 15, at enclosure A, para. 5(e).

283. FM 3-24, *supra* note 13, at para. 1-150.

weapon still benefit from individual self-defense under RCM 916(e).[284] In contrast, the more likely charge of failure to obey orders[285] now entirely precludes assertion of individual self-defense due to the 2005 amendments.

If public authority applies equally to military members and law enforcement officers, it is reasonable to compare the self-defense standards of one group to the other. Such a comparison demonstrates the absurdity of the lack of trust in individual military members embraced by U.S. SROE 2005. The legal parameters for use of deadly force by law enforcement are such that it must effectively be either self-defense or defense of others.[286] Law enforcement officers in the U.S. killed 963 people in 2016, 987 in 2017, and 998 in 2018.[287] During that period, the social and political movement Black Lives Matter actively questioned police legitimacy arising out of "violence inflicted on Black communities by the state."[288] Thus, erroneous use of self-defense by law enforcement officers created the same type of negative strategic outcomes feared by military leaders engaged in counterinsurgency warfare.

The prospect of declaring U.S. police officers incapable of properly assessing the consequences of their actions and instead requiring them to individually contact the chief-of-police for permission to defend themselves or others is an idea so extreme that it would never even be considered. It is also worth noting that erroneous victims of a law enforcement officer's unrestricted individual self-defense right are Americans with full constitutional rights, while potential erroneous victims of a military member's self-defense right are not. Again, arguing that foreign citizens in a battlespace deserve greater protections

284. MCM, *supra* note 192, RCM 916(e).

285. Arts. 90 and 92, UCMJ, 10 U.S.C. §§ 890, 892.

286. *See generally* Tennessee v. Garner, 471 U.S. 1 (1985); Graham v. Connor, 490 U.S. 386 (1989).

287. *2019 Police Shootings Database*, WASH. POST, https://www.washingtonpost.com/graphics/2019/national/police-shootings-2019/?utm_term=.761b29923dc1 (last visited Mar. 8, 2020).

288. *About*, BLACK LIVES MATTER, https://blacklivesmatter.com/about/ (last visited Mar. 8, 2020); Ryan W. Miller, *Black Lives Matter: A Primer on What It Is and What It Stands For*, USA TODAY (July 11, 2016), https://www.usatoday.com/story/news/nation/2016/07/11/black-lives-matter-what-what-stands/86963292/.

from the use of force by U.S. military members than U.S. citizens in an American city is hardly credible. Even if accepting the public authority doctrine as exclusively controlling, the inherent right of self-defense can and must still exist for individual military members.

B. Military Theory – Morality & Pragmatism

Apart from the legal issues, there exists a question about the moral obligation citizens of a democratic republic have towards their defenders. Taken together, active and reserve military members comprise approximately 0.4% of the U.S. population, with veterans accounting for an additional 7%.[289] The vast majority of U.S. citizens will never spend a day in uniform nor encounter a situation where the scope of their individual self-defense right is relevant. Should these civilians care that the small fraction of fellow Americans who serve are sent to face death in foreign lands without the same robust self-defense right enjoyed by those who stay home?

The issue of self-defense is simply one aspect of a larger moral problem currently facing military and civilian leaders. LOAC obligations require states to avoid military actions that cause excessive death or injury to civilians in the battlespace.[290] In the context of counterinsurgency warfare in populated areas, this obligation drives states to choose between maximizing protection of their own combatants and maximizing protection of foreign civilians.[291] The modification of self-defense in U.S. SROE 2005 suggests U.S. military leaders have chosen to prioritize protection of foreign civilians. Does the morality of such a momentous decision warrant an informed public debate by our civilian leaders?

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289. Mona Chalabi, *What Percentage of Americans Have Served in the Military?*, FIVETHIRTYEIGHT (Mar. 19, 2015), https://fivethirtyeight.com/features/what-percentage-of-americans-have-served-in-the-military/.

290. *See* Art. 51, Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to
the Protection of Victims of International Armed Conflicts, June 8, 1977.

291. *See generally* Ziv Bohrer & Mark Osiel, *Proportionality in Military Force at War's Multiple Levels: Averting Civilian Casualties vs. Safeguarding Soldiers*, 46 VAND. J. TRANSNAT'L L. 747 (2013).

Tight control over the use of force by individual military members is an extension of counterinsurgency principles urging commanders to "calculate carefully the type and amount of force to be applied and who wields it for any operation. An operation that kills five insurgents is counterproductive if collateral damage leads to the recruitment of fifty more insurgents."[292] Thus, ROE that vest commanders with sole discretion for individual self-defense by subordinate personnel require the commander to balance the prospect of authorizing force—a potential career-ending mistake—against the continued safety and survival of subordinates. Sgt. Meyer experienced the unfortunate outcome of that situation when his requests to act were denied a total of four times.[293] The officers who steadfastly denied his requests were ultimately administratively disciplined with letters of reprimand, but that does not signify the ROE system that created such a situation is fixed.[294]

The strategic reasons for vesting commanders with the authority to control all uses of force by their subordinates are rightly understandable. Nevertheless, a *de facto* ROE system that pits the personal promotion and career interests of unit commanders, often at a distant headquarters, against the self-defense interest of subordinates is fundamentally flawed. The truth of the matter is that dead subordinates are the result of enemy action while dead civilians resulting from self-defense are the result of the commander who authorized force. Which decision is the safest legal choice for a commander? Likewise, which decision is the safest moral choice for a commander? If the answer to these two questions is not the same, there is a definite problem with the system.

The U.S. Army's mission command doctrine has drawn criticism for its flawed understanding and improper implementation of *Auftragstaktik*.[295] Thus, it is worth exploring *Auftragstaktik* in greater detail. *Auftragstaktik* dictates that decisions regarding use of force in

292. FM 3-24, *supra* note 13, at para. 1-141.

293. The Obama Whitehouse, *supra* note 2.

294. Larry Shaughnessy, *In Medal of Honor Battle, Senior Officers Failed*, CNN (Sept. 16, 2011), http://security.blogs.cnn.com/2011/09/16/in-medal-of-honor-battle-senior-officers-failed/

295. *See generally* Matzenbacher, *supra* note 28, at 62.

combat are best left to individuals actually in the battlespace.[296] Initially conceived by Frederick the Great, *Auftragstaktik* was not fully developed and implemented by the German military until the mid-nineteenth century.[297] This concept is credited for many of the military successes enjoyed by Prussia and the newly unified Germany.[298] General Patton is again an eloquent source for this fundamental military concept with his admonition: "[d]on't tell people how to do things, tell them what to do and let them surprise you with their results."[299] Despite its obvious success within the German military and a handful of insightful U.S. military leaders, *Auftragstaktik* did not formally make its way into U.S. military doctrine until the 1980s when the Army adopted it as the philosophy of mission command.[300]

Auftragstaktik is comprised of four component parts: (1) the commander's stated objective, (2) confidence in subordinates' proficiencies, (3) his and subordinates' appreciation of their respective responsibilities, and (4) subordinates' freedom to act.[301] In essence, this entire concept depends upon a shared understanding and mutual trust between the commander and subordinates.[302] U.S. SROE 2005 effectively eliminated mutual trust by removing individual military members' freedom to act in self-defense. Although commanders can always grant permission, U.S. SROE 2005 establishes the default that no junior personnel—even senior non-commissioned officers—can be trusted to make the correct decision on individual self-defense due to the potential risk of error. All of this begs the question of why the state is sending masses of inherently untrusted agents to act on its behalf. Individuals who cannot be trusted to know when use of force is

296. Thomas E. Ricks, *An Elusive Command Philosophy And A Different Command Culture*, FOREIGN POLICY (Sept. 9, 2011), https://foreignpolicy.com/2011/09/09/an-elusive-command-philosophy-and-a-different-command-culture/.

297. *Id*.

298. Widder, *supra* note 29, at 4.

299. *George S. Patton, Jr. Quotes*, GOODREADS, https://www.goodreads.com/author/quotes/370054.George_S_Patton_Jr (last visited Mar. 8, 2020).

300. Matzenbacher, *supra* note 28, at 62.

301. Widder, *supra* note 29, at 9.

302. Matzenbacher, *supra* note 28, at 70.

necessary in self-defense should likewise not be trusted to know when use of force is necessary in any situation.

C. Constitutional Concerns

The U.S. Constitution splits authority to control and regulate U.S. military forces between the executive and legislative branches. Congress has exclusive power "[t]o make Rules for the Government and Regulation of the land and naval Forces,"[303] while the President is "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."[304] The nature and scope of Congressional authority is relatively clear, but the same cannot be said of Presidential authority.[305]

Although the U.S. Supreme Court has not directly addressed the question, it has implied SROE would fall under the purview of both branches. In *Hamdan v. Rumsfeld*, the Court stated:

> The Constitution makes the President the "Commander in Chief" of the Armed Forces, Art. II, §2, cl. 1, but vests in Congress the powers to "declare War . . . and make Rules concerning Captures on Land and Water," Art. I, §8, cl. 11, to "raise and support Armies," id., cl. 12, to "define and punish . . . Offences against the Law of Nations," id., cl. 10, and "To make Rules for the Government and Regulation of the land and naval Forces," id., cl. 14. The interplay between these powers was described by Chief Justice Chase in the seminal case of Ex parte Milligan . . . .[306]

Cited favorably in *Hamdan*, Chief Justice Chase's concurring opinion in *Ex Parte Milligan* contains a more specific articulation of the separation of powers:

303. U.S. CONST. art. I, § 8, cl. 14.

304. U.S. CONST. art. II, § 2, cl. 1.

305. In Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), the U.S. Supreme Court identified a limit to President Truman's assertion of commander in chief power. *See also* Gregory E. Maggs, *Judicial Review of the Manual for Courts-Martial*, 160 MIL. L. REV. 96, 134 (1999) ("The scope of the President's power to create rules without UCMJ authority remains contested.").

306. Hamdan v. Rumsfeld, 548 U.S. 557, 591 (2006).

> Congress has the power not only to raise and support and govern armies, but to declare war. It has therefore the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature and by the principles of our institutions.
> *The power to make the necessary laws is in Congress* [emphasis added], the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But *neither can the President, in war more than in peace, intrude upon the proper authority of Congress* [emphasis added], nor Congress upon the proper authority of the President. . . Congress cannot direct the conduct of campaigns, *nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians* [emphasis added], unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.[307]

Recall the executive branch—the Department of Defense—controls and administers the SROE, which are promulgated as a Chairman Of The Joint Chiefs Of Staff Instruction.[308] Whether the Chairman is acting under a statutory grant of authority from Congress,[309] the President's implicit authority as commander in chief, or both, is an unsettled question. In contrast, the RCM are promulgated by the President as an executive order within the MCM,[310] under an explicit legislative grant of authority found in Article 36 of the UCMJ, which also imposes some important conditions:

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial . . . may be prescribed by the President by regulations which shall, so far as

307. *Ex Parte* Milligan, 71 U.S. 2, 139–40 (1866).
308. U.S. SROE 2005, *supra* note 14.
309. *See generally* 10 U.S.C. § 153 (2018).
310. Maggs, *supra* note 305, at 96.

> he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
> (b) All rules and regulations made under this article shall be uniform insofar as practicable.[311]

In establishing the operational legal framework of courts-martial the President is thus expected to adhere to the maximum extent possible to the principles and rules of federal courts. Moreover, uniformity (absence of conflicts or disparities) is to be maximized.

That Congress has historically granted the President wide-ranging discretion to articulate the rules for military trials has not escaped the notice of the U.S. Supreme Court. In 1957, the Court expressed apprehension about the constitutional validity of such an open-ended delegation:

> If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers.[312]

To the extent that the self-defense limitations imposed in U.S. SROE 2005 function as a standard of substantive criminal law, they pose a separation of powers concern.

Nevertheless, as commander in chief, the President possesses some amount of inherent authority to create the SROE and RCM,[313] so the three-prong test articulated in Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*[314] is also worth considering. First, if the President "acts pursuant to an express or implied authorization of Congress, his authority is at its maximum."[315] The RCM seem to fall squarely in this category. Second, if the President

311. Art. 36, UCMJ, 10 U.S.C. § 836 (2006).
312. Reid v. Covert, 354 U.S. 1, 38–39 (1957).
313. *See* Loving v. United States, 517 U.S. 748, 770 (1996).
314. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
315. *Id*. at 635.

"acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."[316] The status of the SROE is difficult to conclusively identify, but it likely falls under this category. Finally, if the President "takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."[317] Given the expansive nature of the relevant legislative and executive constitutional powers, a separation of powers issue would likely need to fall within this category.

Prosecuting a military member for personally deciding to use force in violation of the ROE by exercising the absolute, inherent right to self-defense Congress indirectly and the President directly provided in RCM 916 raises several important questions. Does the existence of such a legislative and executive granted self-defense right interfere with the President's command of the forces and conduct of campaigns?[318] Is the executive branch acting *ultra vires* (beyond or in excess of its powers)[319] and intruding upon the exclusive law-making authority of Congress by curtailing the longstanding SROE right of individual self-defense?

It is difficult to argue the robust individual self-defense right under RCM 916 interferes with executive branch's command of military forces and conduct of campaigns. There was no possibility of interference prior to 2005 because the nature and scope of individual self-defense was effectively the same under the SROE and RCM 916.[320] Any conflict between them is purely a product of executive inconsistency because the President has substantial legislative authority over both the RCM and SROE. The only point of potential interference now is with the unit commander permission requirement, since the removal of individual discretion in U.S. SROE 2005 did not prohibit use of force for individual self-defense. In a clear demonstration that application of the traditional self-defense right reflected in RCM 916 does not interfere with military campaigns, President Obama personally

316. *Id*. at 637.
317. *Id*.
318. *Ex Parte* Milligan, 71 U.S. 2 (1866).
319. *See Ultra Vires*, BLACK'S LAW DICTIONARY (6th ed. 1990).
320. *Compare* U.S. SROE 2000, *supra* note 15, *with* MCM, *supra* note 192, RCM 916(e).

awarded Sgt. Meyer the nation's highest military honor—for actions directly violating the permission requirement.[321]

A more salient question is whether imposition of the requirement for unit commander permission before engaging in individual self-defense—and the resulting criminalization of actions taken without permission—amounts to the executive branch usurping Congress' sole authority to make law. The President lacks the ability to redefine substantive elements of UCMJ offenses in RCM provisions,[322] yet a U.S. military member acting in self-defense without the unit commander's permission would be an essential element of either an Article 90 or 92 UCMJ violation.

Congress established the crime of failure to obey orders in Article 92 of the UCMJ.[323] A similar offense, willfully disobeying a superior commissioned officer, is found in Article 90 of the UCMJ.[324] While Article 90 criminalizes willful violation of a lawful order, Article 92 does not require willfulness or even knowledge of the order in some situations.[325] Because any order can serve as a key element of the offense, Congress specified that the order must be lawful, meaning "[t]he order must not conflict with the statutory or constitutional rights of the person receiving the order."[326] The constitutional status of the SROE self-defense permission requirement is thus connected to the separate question of whether it is a lawful order.

While the UCMJ is a statute, RCM 916 is promulgated by the President acting under a statutory grant of authority.[327] RCM 916 establishes clear, objective criteria for an individual right to use force in self-defense, but does not include the SROE permission requirement.[328] When a unit commander refuses subordinates permission to defend themselves, it is the equivalent of an order not to use force contrary to RCM 916's inherent right to do so. Nevertheless, such a refusal is unlikely to be considered an illegal order because the self-defense right in RCM 916 issued by the President is not *per se* a

321. *See* The Obama Whitehouse, *supra* note 2.
322. *See* Maggs, *supra* note 305, at 129.
323. Art. 92, UCMJ, 10 U.S.C. § 892.
324. Art. 90, UCMJ, 10 U.S.C. § 890.
325. *Compare id.*, *with* Art. 92, UCMJ, 10 U.S.C. § 892.
326. MCM, *supra* note 192, Art. 90(c)(2)(a)(v); MCM Art. 92(c)(1)(c).
327. Art. 36, UCMJ, 10 U.S.C. § 836 (2006).
328. MCM, *supra* note 192, RCM 916(e).

statutory right, even though it was created with legislative authority. Accordingly, the executive branch is not usurping legislative authority to create a substantive crime, and thus there is no constitutional separation of powers issue.

CONCLUSION

Advocating for restoration of an ancient, previously recognized natural law right is intrinsically illogical because such rights are absolute under natural law jurisprudence, and thus impossible to restrict or revoke. Nevertheless, it is time to restore the unabridged right to individual self-defense for U.S. military members serving in a foreign battlespace. The limitations upon individual self-defense imposed by U.S. SROE 2005 must be removed and replaced with a return to the inherent individual self-defense standards espoused in U.S. SROE 2000.

An active battlespace imposes numerous limitations not typically encountered in the U.S. One limitation is the ability to collect evidence in accord with requisite forensic standards.[329] This procedural limitation makes UCMJ charges of failure to obey orders[330] much more likely than homicide, assault, or battery. In such a case, the lack of a recognized individual self-defense right in U.S. SROE 2005 renders self-defense inapplicable if the unit commander did not grant permission in advance.[331] As a result of the conflict between the self-defense standards in U.S. SROE 2005 and RCM 916, the same use of force in self-defense that applies to preclude liability for offenses carrying the possibility of death or life imprisonment[332] is rendered criminal. Notably, no such problem exists in the U.S. for civilians, law enforcement officers, or even U.S. military members outside of a battlespace. It is a cruel irony that this unjust double standard applies only in foreign battlespaces where U.S. military members face the greatest threat to life.

U.S. law enforcement officers who seriously injure or kill a U.S. citizen while performing their duties are subject to criminal charges

329. *See, e.g.*, U.N. OFFICE ON DRUGS AND CRIME, CRIME SCENE AND PHYSICAL EVIDENCE AWARENESS FOR NON-FORENSIC PERSONNEL (2009).

330. Arts. 90 and 92, UCMJ, 10 U.S.C. §§ 890, 892.

331. U.S. SROE 2005, *supra* note 14.

332. Art. 118, UCMJ, 10 U.S.C. § 918 (2019).

under state or federal law, and remain entitled to assert the right of individual self-defense to preclude conviction.[333] Although officers act under the public authority doctrine, they retain an unrestricted right to individual self-defense. Similarly, U.S. military members who seriously injure or kill a foreign citizen in a foreign battlespace while performing their duties can be charged with a crime under the UCMJ, and are entitled to assert self-defense as provided by RCM 916. U.S. military members may continue to use force in self-defense secure in the knowledge that military criminal law continues to recognize self-defense as an inherent right, but only in the context of homicide, assault involving deadly force, or battery involving deadly force.[334] Unlike law enforcement officers, however, U.S. military members may be charged and convicted of failure to obey an order not to use force in self-defense if they did so without unit commander permission.[335] Thus military members like Sgt. Meyer, who decide to defend themselves and their comrades, face greater legal risk if they do not kill a foreign civilian than if they do. Only returning to the self-defense standards of U.S. SROE 2000 will correct this perverse incentive.

The U.S. military conducts many foreign operations in conjunction with the forces of an allied nation.[336] Coalition operations are easier if there exists a common self-defense standard to apply.[337] Recognizing this benefit, NATO ROE include an explicit recognition of self-defense[338] as an inherent right of individual military members, just as it was in U.S. SROE 2000. NATO self-defense standards serve as a commonly accepted minimum scope of the right to individual self-defense to which a military member is entitled. A return to that common baseline would decrease disparity between U.S. military members and NATO allies when responding to hostile acts.

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333. *See generally* Mitch Smith, *Jurors Believed Their Eyes, Not Officer's Words*, N.Y. TIMES, Oct. 7, 2018, at A17.

334. MCM, *supra* note 192, RCM 916(e)

335. *See* Arts. 90 and 92, UCMJ, 10 U.S.C. §§ 890, 892.

336. The International Security Assistance Force in Afghanistan involved personnel from fifty NATO and partner nations. *NATO and Afghanistan*, NATO (Mar. 2, 2020), https://www.nato.int/cps/en/natohq/topics_8189.htm. The Multi-National Force in Iraq involved personnel from thirty-seven allied nations. STEPHEN A. CARNEY, ALLIED PARTICIPATION IN OPERATION IRAQI FREEDOM 1 (2011).

337. SAN REMO HANDBOOK, *supra* note 30, at 2.

338. NATO ROE, *supra* note 26.

Military pragmatism and joint doctrine support a robust individual right of self-defense. The U.S. military concept of mission command, derived from the German *Auftragstaktik* doctrine,[339] advocates that "[c]ommanders delegate decisions to subordinates wherever possible, which minimizes detailed control and empowers subordinates' initiative to make decisions based on the commander's guidance rather than constant communications."[340] The concept of decentralized mission execution renders loss of communication with the commander less disruptive to achieving the mission objective.[341] A key requirement of mission command, however, is that subordinate personnel are entrusted to "exercise disciplined initiative and act aggressively and independently to accomplish the mission."[342] Eliminating the inherent right of individual self-defense demonstrates a lack of trust in subordinates, and is premised upon a presumed collective lack of the disciplined initiative necessary for mission success.

Sgt. Meyer's experience highlights the moral issue raised by imposing a permission requirement for individual self-defense. The current ROE structure now pits the personal promotion and career prospects of unit commanders against the self-defense interests of subordinates. For a military professional, the career risk of dead subordinates resulting from enemy action is often less than the risk of dead foreign civilians resulting from the action of U.S. military members. This implicit conflict of interest is not something any unit commander should ever have to consider. Restoring the inherent right of individual self-defense would entirely eliminate the concern.

Congress and the President share some degree of concurrent authority over the SROE and RCM, but only the President is directly responsible for the substantive content of both sources. Inasmuch as there is a conflict between the individual self-defense right articulated by RCM 916 and U.S. SROE 2005, it is an issue for the executive branch to resolve. A relevant question is thus which standard should control. The President issued RCM 916 "pursuant to an express

339. Matzenbacher, *supra* note 28, at 62.

340. JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS II-2 (Jan. 17, 2017) [hereinafter JP 3-0].

341. *Id*.

342. *Id*.

authorization of Congress,"[343] so it has maximum constitutional authority. In contrast, the Chairman of the Joint Chiefs relied on the President's inherent power as commander in chief, implied statutory authorization,[344] or both, when issuing U.S. SROE 2005. Consequently, U.S. SROE 2005 falls within the "zone of twilight in which he [the President] and Congress may have concurrent authority, or in which its distribution is uncertain."[345] U.S. SROE 2005 therefore has less constitutional authority relative to RCM 916. Although there is no separation of powers issue, as a general matter of policy, it is unfair to maintain and apply conflicting self-defense standards to U.S. military members.

Finally, embracing the counterinsurgency principle that "Sometimes Doing Nothing is the Best Reaction,"[346] the goal of the unit commander permission requirement implemented by U.S. SROE 2005 was to limit potential foreign civilian casualties. Although a worthy goal, curtailing the right of individual self-defense impedes mission command, and is contrary to the most sacrosanct tenet of U.S. military service: leave no one behind.[347] The best method of enabling military members to "exercise disciplined initiative and act aggressively and independently to accomplish the mission"[348] is robust training on the prerequisites for individual self-defense, namely necessity, proportionality, and de-escalation.[349]

The obligation to never abandon a comrade represented by the leave no one behind mantra is directly undermined by the unit commander permission requirement. Although Sgt. Meyer ultimately received the Medal of Honor for his actions in support of his fallen comrades, the fact that he was forced to commit a crime to fulfill the obligation demonstrates the absurd unfairness of the standard. The U.S.

343. Youngstown Sheet & Tube Co., 343 U.S. 579, 635 (1952). Article 36 of the UCMJ grants the President authority to issue such rules.

344. 10 U.S.C. § 153 (2018).

345. Youngstown Sheet & Tube Co., 343 U.S. at 637.

346. FM 3-24, *supra* note 13, at 1-27.

347. The obligation is included in the Soldier's Creed ("I will never leave a fallen comrade") and the Airman's Creed ("I will never leave an Airman behind"). *See Soldier's Creed*, ARMY.MIL, https://www.army.mil/values/soldiers.html (last visited Mar. 8, 2020); *Vision*, U.S. AIR FORCE, https://www.airforce.com/mission/vision (last visited Mar. 8, 2020).

348. JP 3-0, *supra* note 340, at II-2.

349. U.S. SROE 2000, *supra* note 15, at enclosure A, para 5(f).

asks a great deal of its military personnel, the least it can do is grant them the legal and moral protections they deserve while serving in harm's way.