Duty and Disobedience: The Conflict of Conscience and Compliance in the Trump Era

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Abstract

In the first weeks of President Trump's administration, the Acting Attorney General was fired for ordering the Justice Department not to enforce a controversial Executive Order on immigration. Police departments and corporate boardrooms prepare for deregulation and less oversight, opening the door to more aggressive police tactics and profit seeking, respectively. Military leaders wonder whether they will be ordered to torture suspected terrorists. In each of these situations, individuals must decide whether they will follow their conscience and disobey superiors, or comply with organizational and state policies.

This article examines the conflict between conscience and compliance, and draws upon lessons from military conscientious objectors to describe the behavioral pulls that influence decisions to disobey. The law of military conscientious objection is an impactful microcosm of legal and ethical noncompliance. As such, it is an effective illustration of the relationship between individual behavior and organizations or states. Applying compliance theory—the branch of social-psychological studies seeking to answer why individuals,

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organizations, or even states obey the law—this article offers prescriptive recommendations aimed at enhancing organizational efficiency and individual commitment, and balancing the legal and moral conflicts of potential objectors.

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I. INTRODUCTION

On January 20, 2017, President Trump became the forty-fifth President of the United States and inherited a deeply polarized republic.[1] Divisions in public opinion, politics, legal interpretation, and moral values appear greater than at any time in recent history.[2] The President is taking steps to make good on campaign promises related to enforcing "law and order,"[3] deregulating industry,[4] and "draining the swamp" of entrenched interests in Washington, D.C.[5] In practical terms, these priorities require resolution of conflicts between the police and the public they serve, corporate profit and regulatory compliance, and government service and ethics. In each of these fields, individuals must decide the point at which they will prioritize legal norms and individual values over potentially unlawful policies.

In the military context, several high-profile cases call into question the limits of a soldier's duty. In 2006, First Lieutenant Ehren Watada refused to deploy to Iraq because of legal and moral objections to the underlying conflict.[6] More recently, Captain Nathan Smith sued President Obama in federal court, claiming the conflict against the Islamic State terrorist organization was not properly authorized by Congress.[7] Beginning in early 2016, then-presidential candidate Donald Trump made multiple proposals to combat terrorism

1. Niall Stanage, *Trump Takes Reins of Divided Nation*, THE HILL (Jan. 20, 2017, 7:18 PM), http://thehill.com/homenews/administration/315408-trump-takes-reins-of-divided-nation.

2. *See* Gary C. Jacobson, *Polarization, Gridlock, and Presidential Campaign Politics in 2016*, 667 ANNALS AM. ACAD. POL. & SOC. SCI. 226, 227–28 (2016).

3. Nolan D. McCaskill, *Trump Promises to 'Restore Law and Order' for All Americans*, POLITICO (May 15, 2017, 1:07 PM), http://www.politico.com/story/2017/05/15/trump-fallen-police-officers-speech-238401.

4. Alan Rappeport & Matthew Goldstein, *Trump Administration Says Financial Watchdog Agency Should Be Defanged*, N.Y. TIMES (June 12, 2017), https://www.nytimes.com/2017/06/12/business/banking-regulations-consumer-financial-protection.html?mcubz=1.

5. David A. Graham, *Has Trump Kept His Campaign Promises?*, THE ATLANTIC (Apr. 28, 2017), https://www.theatlantic.com/politics/archive/2017/04/trump-promises-cheat-sheet/507347 (tracking the progress of promises Trump made during his presidential campaign); Peter Overby, *Trump's Efforts to 'Drain The Swamp' Lagging Behind His Campaign Rhetoric*, NPR (Apr. 26, 2017, 5:00 AM), http://www.npr.org/2017/04/26/525551816/trumps-efforts-to-drain-the-swamp-lagging-behind-his-campaign-rhetoric.

6. *See* Captain Robert E. Murdough, *"I Won't Participate in an Illegal War": Military Objectors, the Nuremburg Defense, and the Obligation to Refuse Illegal Orders*, ARMY LAW., July 2010, at 4.

7. *See* Smith v. Obama, 217 F. Supp. 3d 283, 285 (D.D.C. 2016).

by targeting civilians and committing torture.[8] If confronted with such orders, under what circumstances do service members have a duty to disobey?

This article examines the conflict between conscience and compliance, and draws from lessons of military conscientious objectors to describe the behavioral pulls that influence decisions to disobey. The law of military conscientious objection is an impactful microcosm of legal and ethical noncompliance.[9] Few decisions are more significant than choosing whether to kill on behalf of your nation. As such, the compliance dilemmas faced by soldiers provide a useful comparative example of the spectrum of duty and disobedience.

The relationship between individual behavior and organizations/states is examined in the context of compliance theory.[10] This branch of social-psychological studies seeks to answer why individuals, organizations, or even states obey the law.[11] Applying compliance theory to examine the relationship between state/organizational policy and individual behavior, I offer recommendations aimed at enhancing organizational efficiency and individual commitment, and balancing the legal and moral conflicts of potential objectors.[12]

Section II of this article introduces compliance theory and applies three distinct models of compliance—identification, rational choice, and internalization—to the fields of law enforcement, corporate misconduct, and civil service. Section III is devoted exclusively to the compliance problems facing conscientious objectors. I detail three distinct categories of military objectors: full conscientious objectors,[13] selective conscientious objectors,[14] and those who object to specific acts during combat.[15] These examples illustrate the various reasons for noncompliance in the military context and the state response to disobedience. Section IV discerns common themes, across multiple disciplines, that explain why individuals identify with group norms, respect legitimate rules and authority, and internalize organizational values. Section

8. *See, e.g.*, Tessa Berenson, *Donald Trump Defends Torture at Republican Debate*, TIME (Mar. 3, 2016), http://time.com/4247397/donald-trump-waterboarding-torture.
9. *See infra* note 194 and accompanying text.
10. *See infra* Section II.B.
11. *See infra* Section II.B.
12. *See infra* Section V.
13. *See infra* Section II.A.
14. *See infra* Section II.B.
15. *See infra* Section II.C.

IV then analyzes compliance from the organizational perspective, detailing the need for subordinate compliance, the impacts of compliance enforcement measures, and the counterintuitive results of select measures. Section V offers prescriptive resolutions to select compliance problems, focusing on avoiding moral harm to individual objectors, reconciling conscience and commitment by allowing dissent or alternative means of service, and offering an organizational appraisal mechanism. These recommendations are intended to increase organizational efficiency and individual compliance by adhering to applicable laws and regulations, increasing lawful dissent mechanisms, and encouraging internalization of norms.[16]

This article has broad appeal to those interested in organizational reform in the context of law enforcement, corporate culture, and government/military service. Applying compliance theory to individual behavior is important to multiple disciplines and all large organizations, and will benefit decision-makers, practitioners, and scholars.[17] The recommendations about compliance problems facing the armed forces are particularly timely because the United States seems to be engaged in perpetual armed conflict.[18]

II. COMPLIANCE THEORY AND CONFLICTS OF CONSCIENCE IN MODERN PRACTICE

The law often does not predict the outcome of moral dilemmas.[19] The conflict between conscience and compliance is evident in a variety of contexts, including police officers' aggressive questioning tactics,[20] Wells Fargo employees feeling uncertain of whether to open fake accounts in accordance

16. *See infra* Section V.B.

17. *See infra* Section VI.

18. *See infra* Section VI.

19. *See* H.L.A. HART, THE CONCEPT OF LAW 210 (Peter Crane et al. eds., 2d ed. 1994) ("[T]he certification of something as legally valid is not conclusive of the question of obedience."); Roscoe E. Hill, *Legal Validity and Legal Obligation*, 80 YALE L.J. 47, 52 (1970).

20. *See infra* Section II.B.1; *see also, e.g.*, Ray Sanchez, *Police Push Back Against Trump's Law-and-Order Speech*, CNN (July 31, 2017, 11:58 AM), http://www.cnn.com/2017/07/29/politics/trump-police-remarks-reaction/index.html (quoting several police departments who disagree with aggressive police tactics and have uniformly criticized such conduct as sending "the wrong message to law enforcement").

with corporate incentives,[21] and civil servants tasked with enforcing questionably lawful policies.[22] In each of these circumstances, there is one primary question: Why do individuals obey the law? This section discusses the framework of compliance theory, which seeks to explain individual obedience, norm development, and organizational and state behavior. From this foundation, it becomes clear that individual compliance is shaped by several behavioral factors common to many disciplines.

A. Models of Compliance and Behavioral Pulls

Compliance theory seeks to answer why individuals, organizations, and states obey the law.[23] Among four competing theories of compliance,[24] three are relevant for this discussion: identification/conformity, compliance, and

21. *See infra* Section II.B.2; Elizabeth C. Tippett, *This is How Wells Fargo Encouraged Employees to Commit Fraud*, NEW REPUBLIC (Oct. 7, 2016), https://newrepublic.com/article/137571/wells-fargo-encouraged-employees-commit-fraud (noting that even "employees who considered themselves honest participated in the fraud").

22. *See infra* Section II.B.3.

23. For further research on individual compliance, see, for example, FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (Tony Honoré & Joseph Raz eds., 1991), which explores the effects of rules on decision-making; Paul Harris, *The Moral Obligation to Obey the Law*, *in* ON POLITICAL OBLIGATION 151, 172–78 (1990), which examines possible circumstances in which individuals might or might not feel morally obligated to follow the law; Hill, *supra* note 19, at 55; M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L.J. 950, 950 (1973); and TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006), which describes the authority interest in maintaining conditions that lead to public acceptance of authority decisions and policies. For discussion of corporate behavior, see, for example, Elizabeth Chambliss & David B. Wilkins, *A New Framework for Law Firm Discipline*, 16 GEO. J. LEGAL ETHICS 335, 336–38 (2003); Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties Within Twenty-First-Century New Governance*, 77 FORDHAM L. REV. 1245, 1250 (2009), which studies the competing loyalties of corporate and government lawyers, and encourages internal reporting and regulatory mechanisms; and Note, *Government Counsel and Their Obligations*, 121 HARV. L. REV. 1409, 1415–16 (2008), which analogizes the role of the corporate lawyer as the "gatekeeper" of compliance to that of the government attorney's compliance enforcement function. For further discussion on government compliance with international legal norms, see Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2645–58 (1997), which analyzes state compliance with existing legal obligations and creates the framework now known as the "transnational legal process"; Laura A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AM. J. INT'L L. 1, 1–3 (2010); and Michael P. Scharf, *International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate*, 31 CARDOZO L. REV. 45, 76 (2009).

24. *See* Koh, *supra* note 23, at 2600 n.3.

obedience/internalization.[25]

Identification/conformity explains the behavior of individuals in relation to social groups.[26] This model of compliance "occurs when an individual accepts influence to establish or maintain a satisfying relationship."[27] Individuals modify their behavior to take on a role that conforms to group norms, and in return receive a sense of value and status from their relationship to the group.[28] The modern soldier, for example, is heavily influenced by peer groups and the bond/standing within these groups.[29] The "Band of Brothers" mentality (comradery and loyalty to fellow soldiers and the service) is a strong behavioral pull toward obedience to orders and service culture.[30]

The *compliance* model is the classic rational-choice approach.[31] It is best described as taking action in order to achieve a reward or avoid punishment.[32] Studies demonstrate that individuals are deterred little by the severity of potential punishment;[33] rather, behavior is influenced when there is a greater probability of being caught.[34] A noteworthy limitation to this model is that it

25. *See infra* notes 26–41 and accompanying text.

26. *See infra* notes 27–28 and accompanying text.

27. Charles O'Reilly III & Jennifer Chatman, *Organizational Commitment and Psychological Attachment: The Effects of Compliance, Identification, and Internalization on Prosocial Behavior*, 71 J. APPLIED PSYCHOL. 492, 493 (1986).

28. H. Tajfel & J.C. Turner, *An Integrative Theory of Intergroup Conflict*, *in* THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS 33, 40–41. (William G. Austin & Stephen Worchel eds. 1979); *see also* Herbert C. Kelman, *Compliance, Identification, and Internalization: Three Processes of Attitude Change*, 2 J. CONFLICT RESOL. 51, 53 (1958).

29. Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CAL. L. REV. 939, 1053–55 (1998); CRAIG CAMERON, AMERICAN SAMURAI 192 (1994) (concluding that the group "set and enforced group standards of behavior, and it supported and sustained the individual in stresses [the soldier] would otherwise not have been able to withstand").

30. *See* Kingsley R. Browne, *Women at War: An Evolutionary Perspective*, 49 BUFF. L. REV. 51, 117–18 (2001) (citing the bonds between members as a contributing factor to sustained commitment and good performance); Osiel, *supra* note 29, at 1053–55.

31. *See* O'Reilly & Chatman, *supra* note 27, at 493.

32. *See, e.g.*, SECURING COMPLIANCE: SEVEN CASE STUDIES (Martin L. Friedland ed., 1990) (discussing various policy approaches designed to achieve compliance via rewards and punishments); Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345, 364 (1998); Koh, *supra* note 23, at 2600 n.3; O'Reilly & Chatman, *supra* note 27, at 493.

33. Travis C. Pratt et al., *The Empirical Status of Deterrence Theory: A Meta-Analysis*, *in* TAKING STOCK: THE STATUS OF CRIMINOLOGICAL THEORY 367, 367–86 (Francis T. Cullen et al. eds., 2006).

34. Daniel S. Nagin, *Deterrence in the Twenty-First Century*, *in* CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 199, 202 (M. Tonry ed., 2013).

assumes a rational actor. As will be discussed later in the context of conscientious objectors, "[t]he formation of a conscientious belief is the result of psychosocial conditioning not always involving a clear and logical rationale."[35] Accordingly, the internalization model of compliance theory most accurately captures the objector's dilemma.[36]

The *obedience/internalization* model is rooted in a normative approach to behavior and compliance.[37] Under this model, true compliance occurs when a rule is internalized and becomes a part of a person's moral values.[38] This model and the others are not mutually exclusive; in fact, this model may be part of a sequence.[39] For example, when an individual self-identifies with a particular group and its norms (identification), the individual derives worth from these norms when he or she internalizes the group values as part of his or her own normative set (internalization).[40] The internalization model may be considered optimal compliance, since the individual is self-regulating based on personal values that align with organizational values, and is not in need of external behavioral influences (reward or punishment) to achieve compliance.[41]

When faced with a difficult decision—such as police officers deciding when to use force, corporate employees aggressively seeking new sales, and federal civil servants asked to enforce a questionably lawful policy—an individual must decide "whether to ignore her own judgment and obey her superior, or to defy authority and follow her own conscience."[42] In hierarchical

35. Noam Lubell, *Selective Conscientious Objection in International Law: Refusing to Participate in a Specific Armed Conflict*, 20 NETH. Q. HUM. RTS. 407, 414 (2002).

36. *See infra* notes 37–51 and accompanying text.

37. JOHN FINLEY SCOTT, INTERNALIZATION OF NORMS: A SOCIOLOGICAL THEORY OF MORAL COMMITMENT xiii, 1 (1971).

38. Koh, *supra* note 23, at 2600 n.3; *see also* SCOTT *supra* note 37, at 1–4 (describing and defending the theory of norm internalization); Martin L. Hoffman, *Moral Internalization: Current Theory and Research*, *in* 10 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 85, 85 (1977) ("[N]orms eventually become part of [the individual's] internal motive system and guide his behavior even in the absence of external authority.").

39. Hoffman, *supra* note 38, at 109.

40. *See* Tom R. Tyler & Steven L. Blader, *The Group Engagement Model: Procedural Justice, Social Identity, and Cooperative Behavior*, 7 PERSONALITY & SOC. PSYCHOL. REV. 349, 359 (2003).

41. *See id.* at 353.

42. Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 508 (2004).

organizations, individuals frame hard choices either by emphasizing the potential wrongfulness of the act (rational choice), or by justifying obedience in terms of their obligation as a subordinate to the organization (identification).[43]

Organizations play a significant role in shaping individual behavior.[44] Although theorists have long believed that actors rely on a strict rational choice model of compliance, modern research suggests that individuals behave in accordance with the obligations and requirements that attach to their roles within organizations.[45] As one researcher notes, "There is growing empirical evidence that institutional culture and design have a significant impact on the likelihood that individuals will engage in unlawful behavior."[46] The organization's power is in its ability to "redefine the actor's frame of reference altogether" and shape his or her conduct accordingly.[47] Organizations like governments and police departments can effectively motivate individuals based on the individuals' identification with their subordinate roles, which includes a requirement to comply with superior orders.[48]

Organizations can tailor policies—formal and informal—to enhance individual compliance with organizational norms.[49] A key component of legal and political authority is that "when authorities are viewed as legitimate they are better able to motivate people to comply with the law."[50] Individuals who view laws and policies as legitimate are more likely to obey because they are

43. *Id.*; *see also* HERBERT C. KELMAN & V. LEE HAMILTON, CRIMES OF OBEDIENCE: TOWARD A SOCIAL PSYCHOLOGY OF AUTHORITY AND RESPONSIBILITY 18, 92 (1989).

44. *See* V. Lee Hamilton & Joseph Sanders, *Responsibility and Risk in Organizational Crimes of Obedience*, 14 RES. ORG. BEHAV. 49, 49 (1992); *see also* Armacost, *supra* note 42, at 507–14; David Luban et al., *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2348, 2356–65 (1992).

45. Hamilton & Sanders, *supra* note 44, at 49; *see also* Armacost, *supra* note 42, at 508.

46. Lobel, *supra* note 23, at 1248.

47. Armacost, *supra* note 42, at 508 (emphasis omitted); *see also* Dickinson, *supra* note 23, at 3–4 (explaining that "the structure of an organization and its institutional culture will have distinct impacts on the efficacy of the organization and the likelihood that actors in it will conform to external norms of behavior"). For further analysis of the role of organizations in shaping individual behavior, see, for example, Mary Douglas, *Converging on Autonomy: Anthropology and Institutional Economics*, *in* ORGANIZATION THEORY: FROM CHESTER BARNARD TO THE PRESENT AND BEYOND 98, 102 (Oliver E. Williamson ed., 1990), which discusses how organizational culture shapes the desires of the individual; ROBERT JACKALL, MORAL MAZES: THE WORLD OF CORPORATE MANAGERS 17, 20–21 (1988); REIBHOLD NIEBUHR, MORAL MAN AND IMMORAL SOCIETY: A STUDY IN ETHICS AND POLITICS xi–xii (1932); and Luban, *supra* note 44, at 2363–65.

48. *See* Armacost, *supra* note 42, at 509.

49. *See id.* at 494, 498–99, 512.

50. Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement*, 20 PSYCHOL. PUB. POL'Y & L. 78, 78 (2014).

not doing so out of a fear of punishment for noncompliance, but rather a sense that they are conforming their behavior to appropriate rules.[51] As the next section demonstrates, the compliance models are applicable in a variety of contexts, including police conduct, corporate practices, and federal employment.[52] Later, these principles are applied to military conscientious objectors.[53]

B. Case Studies of Compliance/Noncompliance

This subsection discusses three separate areas that have given rise to acute compliance concerns in recent years. When President Trump takes action on crime prevention, corporate regulation, and the Washington, D.C. bureaucracy, the issue of obedience is unavoidable. Whether it is questionable police practices, corporate crime, or the role of federal employees, in each area there are conflicts between the ethical and legal roles of the individual, and the desired policy of the organization or government.[54] These examples illustrate how the compliance models—identification, compliance, and internalization—overlap and effectively predict individual behavior and organizational compliance.[55] These examples also demonstrate the universal nature of compliance problems faced by individuals in unrelated fields.[56]

51. *See id.* at 78–79; Nicole E. Haas et al., *Explaining Officer Compliance: The Importance of Procedural Justice and Trust Inside a Police Organization*, 15 CRIMINOLOGY & CRIM. JUST. 442, 445 (2015); Karl Roberts & Victoria Herrington, *Organisational and Procedural Justice: A Review of the Literature and Its Implications for Policing*, 8 J. POLICING, INTELLIGENCE & COUNTER TERRORISM 115, 119 (2013) (finding that, in organizational justice settings, individuals are more accepting of their subordinate roles and likely to believe "cultural norms and rules should be followed"); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 513–548 (2003) (exploring studies proposing that a society's view of legitimacy contributes to support and obedience for the police force). *See generally* Ben Bradford et al., *Why Do "The Law" Comply? Procedural Justice, Group Identification and Officer Motivation in Police Organizations*, 11 EUR. J. OF CRIMINOLOGY 110 (2014).

52. *See infra* Section II.B.

53. *See infra* Section III.

54. *See infra* Section II.B.1–3.

55. *See infra* Sections II.B.1–3.

56. *See infra* Sections II.B.1–3.

1. Police Practices

Early in his presidency, Donald Trump has moved to make good on campaign promises to instill "law and order."[57] The desire to reduce crime, however, will collide with the reality that trust between police and the public has been significantly damaged in many communities across the nation.[58] This lack of trust causes less compliance on both sides of the "thin blue line."[59] What, then, would it take to get police to cross this line and refuse to comply with overly aggressive tactics?[60]

In recent years, few topics have received as much attention as police practices.[61] High profile incidents of police misconduct have led to further investigation of police department policies in cities like New York City[62] and Los

57. David Smith et al., *Trump Vows Law and Order Crackdown to Combat "Menace" of Crime*, THE GUARDIAN (Feb. 9, 2017), http://www.theguardian.com/us-news/2017/feb/09/donald-trump-police-crime-executive-orders-taskforce-cartels. The President issued three executive orders on this issue: Presidential Executive Order on a Task Force on Crime Reduction and Public Safety (Feb. 9, 2017), http://www.whitehouse.gov/the-press-office/2017/02/09/presidential-executive-order-task-force-crime-reduction-and-public; Presidential Executive Order on Preventing Violence Against Federal, State, Tribal, and Local Law Enforcement Officers (Feb. 9, 2017), http://www.whitehouse.gov/the-press-office/2017/02/09/presidential-executive-order-preventing-violence-against-federal-state; and Presidential Executive Order on Enforcing Federal Law with Respect to Transnational Criminal Organizations and Preventing International Trafficking (Feb. 9, 2017), http://www.whitehouse.gov/the-press-office/2017/02/09/presidential-executive-order-enforcing-federal-law-respect-transnational.

58. *See, e.g.*, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., & U.S. ATTORNEY'S OFFICE, N. DIST. OF ILL., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 1 (2017) [hereinafter CHICAGO REPORT] (finding that trust between the Chicago Police Department and the people it serves "has been broken by systems that have allowed CPD officers who violate the law to escape accountability").

59. *See* Armacost, *supra* note 42, at 453–54; Timothy Roufa, *Guardians or Warriors? The Changing Role of Law Enforcement*, THE BALANCE (Nov. 9, 2016), https://www.thebalance.com/law-enforcement-changing-role-974558 (observing the police's desire for voluntary public compliance despite eroding public trust in law enforcement).

60. *See, e.g.*, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 10 (2016) [hereinafter BALTIMORE REPORT] (finding that, in Baltimore, "many officers are reluctant to report misconduct for fear that doing so is fruitless and may provoke retaliation").

61. *See* Armacost, *supra* note 42, at 464 (stating that "[o]ne need look no further than the popular press" and "recent history" for nationally publicized incidents involving large police departments and aggressive tactics).

62. MILTON MOLLEN ET AL., THE CITY OF NEW YORK, COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION & THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT, ANATOMY OF FAILURE: A PATH FOR SUCCESS (1994) [hereinafter MOLLEN COMMISSION]. *See generally* Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275 (1999).

Angeles[63] in the 1990s, and more recently in cities like Baltimore,[64] Chicago,[65] and Ferguson.[66] These investigations raise serious concerns about excessive police violence,[67] search and seizure practices,[68] and discriminatory policies.[69] In each case, a rift between the police and the citizens they are sworn to protect is revealed.[70] There is a lack of trust between the public and the police, and, in some cases, independent commissions have found that police departments systematically violate Constitutional and federal law.[71] In a nation divided, few areas are as contentious as the expression of government power through police force.[72]

It is essential for police to respect the rule of law, not only because it is the right thing to do but also because it increases the likelihood that individuals will respect law enforcement specifically and the law in general.[73] Therefore, legitimacy is central to police authority and community compliance.[74]

63. INDEP. COMM'N ON THE L.A. POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT (1991) [hereinafter CHRISTOPHER COMMISSION].

64. *See generally* BALTIMORE REPORT, *supra* note 60 (announcing, after numerous public incidents of police violence, findings of unconstitutional police practices).

65. *See generally* CHICAGO REPORT, *supra* note 58.

66. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015) [hereinafter FERGUSON REPORT].

67. *See, e.g.*, CHICAGO REPORT, *supra* note 58, at 22–38 (reporting on excessive police violence in Chicago).

68. *See, e.g.*, BALTIMORE REPORT, *supra* note 60, at 24–46 (exploring the unlawful search and seizure practices of the Baltimore police department).

69. *See, e.g.*, FERGUSON REPORT, *supra* note 66, at 62–78.

70. *See, e.g.*, MOLLEN COMMISSION, *supra* note 62, at 49–50; CHRISTOPHER COMMISSION, *supra* note 63, at 99–100; FERGUSON REPORT, *supra* note 66, at 79–89; BALTIMORE REPORT, *supra* note 60, at 156–58; CHICAGO REPORT, *supra* note 58, at 139–48.

71. *See, e.g.*, BALTIMORE REPORT, supra note 60, at 3.

72. *See generally* MOLLEN COMMISSION, *supra* note 62; CHRISTOPHER COMMISSION, *supra* note 63; FERGUSON REPORT, *supra* note 66; BALTIMORE REPORT, *supra* note 60; CHICAGO REPORT, *supra* note 58.

73. *See* BRIAN A. JACKSON, RESPECT AND LEGITIMACY—A TWO-WAY STREET: STRENGTHENING TRUST BETWEEN POLICE AND THE PUBLIC IN AN ERA OF INCREASING TRANSPARENCY 1, 5 (2015) (ebook) ("Research on what has been called *procedural justice* has shown that even though individuals may not always like a specific *outcome* . . . if they view the *processes through which decisions were made as fair and appropriate*, they are more likely to accept the outcome. . . . Work has shown that views of procedural justice affect not only individuals' views of the police during any one-on-one interactions with officers, but also their perceptions of the department as a whole."); Tyler, *supra* note 50, at 80–81.

74. JACKSON, *supra* note 73, at 4; Tyler, *supra* note 50, at 79–80.

As studies have shown:

> [W]hen police officers treat people with fairness, dignity, and respect, these individuals are more likely to view police as legitimate, are more likely to say they will help and assist officers in the future, and are less likely to report a propensity to offend. People who believe that justice institutions are rightful holders of power are more likely to be law-abiding because they internalize the moral value that it is just to obey the law, which then has an additional motivational effect on legal compliance, above and beyond the more specific value about the wrongfulness of the particular act.[75]

Research into police legitimacy reveals that "compliance with the law and willingness to cooperate with enforcement efforts are primarily shaped not by the threat of force or the fear of consequences, but rather by the strength of citizens' beliefs that law enforcement agencies are legitimate."[76]

There is a cost involved when applying more aggressive practices, including stop-and-frisk, on a large scale.[77] In the 1968 case *Terry v. Ohio*, Chief Justice Warren warned that, although lawful, temporary street stops by police are "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly."[78] When community members interact with the police, negative confrontations breed cynicism about the police and about law in general.[79] This undermines legitimacy and results in "diminished proclivity to comply with

75. Ben Bradford et al., *Obeying the Rules of the Road: Procedural Justice, Social Identity, and Normative Compliance*, 31 J. OF CONTEMP. CRIM. JUST. 171, 173 (2015) (citing TYLER, *supra* note 23; Jonathan Jackson et al., *Why do People Comply With the Law?: Legitimacy and the Influence of Legal Institution*s, 52 BRITISH J. OF CRIMINOLOGY 1051 (2012)).

76. Stephen J. Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 338 (2011); *see also* Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2435 (2017) ("A version of this dynamic has been termed the 'Ferguson effect,' a term that captures the possibility that high-visibility instances of police misconduct lead to increases in crime because of reduced confidence in police or because of increased risk-averseness on police's part.").

77. *See infra* notes 78–80 and accompanying text.

78. Terry v. Ohio, 392 U.S. 1, 17 (1968); *see also* Huq, *supra* note 76, at 2430 ("[E]ven brief stops and frisks have immediate and substantial costs.").

79. *See generally* BALTIMORE REPORT, *supra* note 60; CHICAGO REPORT, *supra* note 58; FERGUSON REPORT, *supra* note 66 (discussing how certain police practices have eroded public trust in law enforcement).

the law or cooperate with legal authorities."[80]

In an effort to increase officer compliance, it is necessary to look at what shapes police behavior. The traditional approach—which appears to be the default in other contexts—is a rational choice model of compliance.[81] The application of civil and criminal sanctions seeks to deter bad behavior by punishing misconduct.[82] Commentators are skeptical of the rational-choice model for comprehensive police reform,[83] and highlight the obstacles inherent in this approach to securing lasting behavioral change.[84] Criminal sanctions are ineffective because they set a minimum bar of acceptable behavior, they are rarely enforced, and excessive force cases are difficult to win.[85] Civil suits alleging police brutality are similarly difficult to win because "excessive force determinations involve a fact-intensive balancing of the government's interest in crime control against the citizen's interest in safety and bodily integrity, which gives the benefit of the doubt to the governmental actors."[86]

The rational-choice approach to incentivizing police compliance tends to reinforce the few-bad-actors theory of police misconduct, meaning that when misconduct occurs, it is the result of only a few rogue police officers that do

80. Huq, *supra* note 76, at 2342; *see also* Haas et al., *supra* note 51, at 444 ("[P]eople's willingness to comply and cooperate with the police increases when they believe that the police have good intentions.").

81. *See* Armacost, *supra* note 42, at 507.

82. *See* 18 U.S.C. § 242 (2012) (authorizing criminal prosecution of government officials that deprive citizens of constitutional or statutory rights); 42 U.S.C. § 1983 (2012) (allowing for civil causes of action by citizens against government officials that have deprived them of constitutional or statutory rights).

83. *See* JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 194 (2010) (discussing how "the general conception of the courts' influence on [affecting] police activity is exaggerated"); Armacost, *supra* note 42, at 465–78 (analyzing the practical and doctrinal limitations on civil and criminal sanctions on curbing police misconduct); Bandes, *supra* note 62, at 1317–40 (analyzing the court system's tendency to view each allegation of governmental misconduct as an isolated incident, thereby avoiding reform and missing the larger picture); David Rudovsky, *Police Abuse: Can the Violence be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 480–88 (1992) (discussing the government's failure to contain police brutality).

84. *See* Armacost, *supra* note 42, at 493–509.

85. *Id.* at 466. The DOJ Reports in Chicago and Baltimore, for example, reveal that both departments failed to adequately investigate reports of police misconduct and hold offending officers accountable. *See* BALTIMORE REPORT, *supra* note 60, at 139–48; CHICAGO REPORT, *supra* note 58, at 46–92.

86. Armacost, *supra* note 42, at 467.

not follow department policy.[87] Research suggests that traditional narratives that police violence is either the result of a few bad actors or some other regrettable mistakes are flawed.[88] Instead, organizational culture is a major contributing factor to police misconduct, and reform efforts that do not take into account group behavioral factors are destined to fail.[89] Psychological studies reinforce this conclusion. While some police officers have personalities that make them more likely to use violence,[90] this does not take into account the social and organizational forces that are instrumental in shaping behavior.[91]

Courts alone, whether in the civil or criminal context, cannot be relied upon to resolve widespread police compliance problems, because their focus is too narrow. For example, in the context of the controversial practice of stop, question, and frisk—where pedestrians are stopped and administered a body search by police—the legal and economic focus has been on the individual transactions without consideration of broader organizational concerns.[92] The stop-and-frisk policy emanates from the *Terry* decision, where the Court held that officers do not violate the Fourth Amendment when they make a nonconsensual investigative stop if the officer has a reasonable, articulable suspicion that the person stopped has engaged in or is about to engage in criminal behavior.[93]

In *Floyd v. City of New York*, the only judicial decision to specifically

87. *See id.* at 493–94.

88. *See id.* at 476.

89. *Id.* at 455.

90. *See, e.g.*, JOHN J. BRODERICK, POLICE IN A TIME OF CHANGE 5–6 (2d ed., 1977) (explaining that there are four "working personalities" of police officers—enforcers, idealists, realists, and optimists—and comparing their different attributes); MICHAEL K. BROWN, WORKING THE STREET: POLICE DISCRETION AND THE DILEMMAS OF REFORM 223–38 (1981) (characterizing four "operational styles" of police officers depending on where they fall on the spectrum of aggressiveness and selectivity); WILLIAM KER MUIR, JR., POLICE: STREETCORNER POLITICIANS 26, 50–51 (1977) (using the "Professional Political Model," which classifies police officers into four categories to describe the experience of Officer Russo, who "felt morally compelled to use force when laws and departmental regulations forbade it"); Susan O. White, *A Perspective on Police Professionalism*, 7 L. & SOC. REV. 61. 70 (1972) (describing four "Police Role Types" that are characterized by particularistic or universalistic values and particularistic or universalistic application of techniques).

91. Armacost, *supra* note 42, at 463 (citing Robert W. Worden, *The Causes of Police Brutality*, *in* POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 25 (William A. Geller & Hans Toch eds., 1996)).

92. Huq, *supra* note 76, at 2401; *see also* Daryl J. Levison, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1313 (2002).

93. Terry v. Ohio, 392 U.S. 1, 21 (1968) (requiring "articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion").

address stop, question and frisk, the district court reiterated the *Terry* standard of the need for a reasonable, articulable suspicion of criminal behavior and that any racially disparate impact of the policy was at least in part intended when the policy was adopted.[94] This narrow, transactional focus fails to take into consideration a large body of scholarship that focuses on the organizational influences on police behavior, of which the stop and frisk policies have become a major part.[95] This is not a tactic that is occasionally used, either: Each year in New York City, hundreds of thousands of pedestrians are stopped and frisked.[96] The standard offered by the Court in *Terry* and *Floyd* allows significant room for police discretion due to a very low burden of proof for police action.[97]

In civil suits, courts are similarly limited in the scope of their analyses.[98] Because courts focus on individual cases and controversies, there is a reluctance to grant civil claimants injunctions against police departments that use certain controversial tactics, such as choke holds. In *Los Angeles v. Lyons*, a plaintiff brought a § 1983 suit against the Los Angeles Police Department (LAPD) to recover damages from injuries he received after being placed in a chokehold by an officer.[99] Because chokeholds are notoriously dangerous, the plaintiff sought to enjoin the LAPD from employing the tactic against future criminal suspects.[100] The court awarded damages, but held that there was no standing for an injunction against the LAPD because the plaintiff was unable to show that there was "a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any

94. Floyd v. City of New York, 959 F. Supp. 2d 540, 567 (S.D.N.Y. 2013).

95. *See, e.g.*, Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51 (2015); Huq, *supra* note 76; Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159 (2015).

96. Report of Dr. Jeffrey Fagan, Ph.D. at 18–19, Floyd v. City of New York, 813 F. Supp. 2d 417 (S.D.N.Y. 2011) (No. 08 Civ. 01034), https://ccrjustice.org/sites/default/files/assets/files/Expert_Report_JeffreyFagan.pdf.

97. *See* Fagan & Geller, *supra* note 95, at 78.

98. *See* Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 768–81 (2012) (discussing the court's limitations of scope in deciding criminal matters potentially infringing constitutional rights).

99. Los Angeles v. Lyons, 461 U.S. 95, 97–98 (1983).

100. *Id.* at 133.

provocation or resistance on his part."[101] This means that potential civil liability for police misconduct is individual- and incident-specific.[102] Judgments apply to individual officers who are expected to be incentivized by the cost-benefit analysis of a rational choice/punishment model, a model that relates only to a specific incident of misconduct without addressing broader patterns of abuse.[103] According to one commentator, "viewing police brutality as a string of unrelated incidents belies reality" and overlooks the influence of the organizational culture of police departments over individual officers.[104]

External regulation of police behavior, including citizen review panels and ombudsmen utilized by many large U.S. cities, has been shown to create more hostility and less police compliance.[105] Moreover, external regulation has been shown to bolster an "us versus them" mentality that develops between police engaged in a dangerous job and a seemingly ungrateful public, political class, and media.[106] Instead, police are influenced significantly by peer relationships. Police identify so strongly with fellow officers, and with their role as protectors of the "thin blue line,"[107] that a "brotherhood in blue" results in unquestioning loyalty to fellow officers.[108] This identification can result in ostracism of police officers that are deemed rogue cops or individual bad actors, but it can also be used to justify a "code of silence" in order to protect other police officers accused of misconduct.[109]

Although police officers have a significant amount of discretion in their day to day activities, they are nonetheless subject to "hierarchical controls and work-group pressures."[110] To the extent that individual discretion is the source of legal and moral noncompliance, organizations must find ways to influence the individual decision-making of police officers.[111] The effects of

101. *Id.* at 105.

102. *See* Anna Swanson, *Revisiting Garner with Garner: A Look at Deadly Force and the Use of Chokeholds & Neck Restraints by Law Enforcement*, 57 S. TEX. L. REV. 401, 418–20 (2016).

103. Armacost, *supra* note 42, at 476.

104. *Id.*

105. *See infra* notes 106–09 and accompanying text.

106. Armacost, *supra* note 42, at 517; *see also* CHRISTOPHER COMMISSION, *supra* note 63, at xvii (discussing the division of police and civilians into "we" and "they").

107. Armacost, *supra* note 42, at 454.

108. Armacost, *supra* note 42, at 517; *see also* ANTHONY V. BOUZA, THE POLICE MYSTIQUE: AN INSIDER'S LOOK AT COPS, CRIME, AND THE CRIMINAL JUSTICE SYSTEM 74 (1990).

109. Armacost, *supra* note 42, at 454.

110. BROWN, *supra* note 90, at 8.

111. Armacost, *supra* note 42, at 511; *see also* JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR:

noncompliance can be simple policy violations or the use of excessive force.[112] This suggests that social group conformity and legitimacy are significant—perhaps the most significant—factors that shape officer conduct.

Similar to the relationships between police and citizens, where the legitimacy of the enforcement action is a significant component to predicting compliance, police are more likely to obey orders and regulations from superiors when they feel they are treated fairly.[113] This is supported by police and non-police organizational research showing that when subordinates believe they are heard on issues affecting their performance, they are more likely to internalize organizational norms.[114] In other words, the more officers are given the opportunity to express their opinions, the more they feel they are treated fairly and are willing to comply.[115] This demonstrates the sequential effect of legitimacy, identification, and internalization discussed above.

2. Corporate Misconduct

Another priority for President Trump is limiting regulations that govern corporate conduct.[116] The intent is to reduce constraints on economic growth,

THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES (1978) (concluding that the organizational style or strategy of a police department will have the greatest influence on departmental culture, which in turn has the greatest influence over the police officers' behavior).

112. *See* Haas et al., *supra* note 51, at 443.

113. *See* Haas et al., *supra* note 51, at 445.

114. *See id.* at 446.

115. *See id.* Among the most promising aspects of the recent DOJ investigations into police departments in Baltimore, Chicago, and Ferguson is the breadth of personnel involved. *See* BALTIMORE REPORT, *supra* note 60, at 4; CHICAGO REPORT, *supra* note 58, at 2; FERGUSON REPORT, *supra* note 66, at 1. Police officers, department officials, city government officials, community representatives and civic groups, and select members of the public were all involved in assessing the reasons underlying the lack of trust between the police and the public. BALTIMORE REPORT, *supra* note 60, at 4; CHICAGO REPORT, *supra* note 58, at 2; FERGUSON REPORT, *supra* note 66, at 1. That individual police officers were able to speak openly about problems plaguing their departments is a significant step toward allowing them to view the results of organizational reform as legitimate, which will therefore encourage their acceptance and internalization of these reforms. BALTIMORE REPORT, *supra* note 60, at 4; CHICAGO REPORT, *supra* note 58, at 2; FERGUSON REPORT, *supra* note 66, at 1.

116. *See* Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs, THE WHITE HOUSE (2017), https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling; Bourree Lam, *Trump's "Two-for-One" Regulation Executive Order*, THE ATLANTIC (Jan. 30, 2017), https://www.theatlantic.com/business/archive/2017/01/trumps-regulation-eo/515007.

with an emphasis on the regulatory burdens faced by small businesses.[117] This regulatory framework, however, is in place largely as a result of high profile corporate scandals over a number of years. In the early 2000s, Enron, a corporate energy giant, was caught using unethical accounting practices to conceal billions of dollars in debt.[118] In response to this and other similar corporate scandals, Congress passed the Sarbanes-Oxley Act to protect investors from fraudulent accounting practices.[119] Following the 2007 housing market crash—which was caused by a combination of overinflated prices, predatory lending, and lack of regulatory oversight at the state and federal levels[120]—the Dodd-Frank Act was enacted to reform regulatory regimes, swaps trading, derivatives valuation, and corporate performance pay.[121] Despite these scandals and ensuing laws and regulations, in 2016 it was revealed that 5,300 Wells Fargo employees systematically created more than two million fake accounts to meet aggressive profit goals.[122] This subsection analyzes the compliance dilemmas faced by employees like those at Wells Fargo.

There is little question that Wells Fargo violated the law by opening millions of fake accounts in the names of existing customers.[123] The Consumer Financial Protection Bureau found that the bank violated the Consumer Financial Protection Act of 2010 (CFPA).[124] Between this finding and other penalties, Wells Fargo paid approximately $190 million for opening fee-generating accounts that were never requested by customers.[125] So, even though

117. *See* Lam, *supra* note 116.

118. *See* Richard A. Oppel, Jr. & Andrew Ross Sorkin, *Enron's Collapse: The Overview; Enron Collapses as Suitor Cancels Plans for Merger*, N.Y. TIMES (Nov. 29, 2001), http://www.nytimes.com/2001/11/29/business/enron-s-collapse-the-overview-enron-collapses-as-suitor-cancels-plans-for-merger.html?mcubz=0.

119. *See* Sarbanes-Oxley Act, Pub. L. 107–204, 116 Stat. 745 (2002) (codified in 15 U.S.C. § 7201).

120. *See* Dean Baker, *The Housing Crash Recession: How Did We Get Here?*, PBS (Mar. 21, 2008), http://www.pbs.org/now/shows/412/housing-recession.html.

121. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010) (codified in scattered sections of 5 U.S.C., 12 U.S.C., 15 U.S.C. & 18 U.S.C.).

122. *See* Michael Corkery & Stacy Cowley, *Wells Fargo Warned Workers Against Sham Accounts, but "They Needed a Paycheck"*, N.Y. TIMES (Sept. 16, 2016), https://www.nytimes.com/2016/09/17/business/dealbook/wells-fargo-warned-workers-against-fake-accounts-but-they-needed-a-paycheck.html?mcubz=0.

123. *See* Corkery & Cowley, *supra* note 122.

124. Consent Order at 1, *In re* Wells Fargo Bank, N.A., No. 2016 CFPB 0015 (C.F.P.B. 2016), http://files.consumerfinance.gov/f/documents/092016_cfpb_WFBconsentorder.pdf.

125. Patrick Rucker & Dan Freed, *Wells Fargo Will Pay $190 Million to Settle Customer Fraud Case*, REUTERS (Sept. 9, 2016), http://www.reuters.com/article/us-wells-fargo-settlement-idUSKCN11E2CJ.

a regulatory framework was in place, how was it that Wells Fargo employees were motivated to behave unlawfully?

The high pressure to sell and the fear of being fired caused thousands of Wells Fargo employees to break the law.[126] This may not have been part of the official policy at Wells Fargo.[127] In fact, for several years employees were trained not to open false accounts, and they were fired if they did so.[128] Nonetheless, the drive to reach sales targets, the risk of being fired, and the desire for bonuses created a compliance pull toward disregarding official policy and training, and a desire to achieve internal sales objectives.[129]

Several compliance models are at play in the corporate banking context. Employees want to please their superiors and peers and will therefore conform to corporate policy—formal and informal—in order to gain their acceptance.[130] At Wells Fargo, the rational-choice compliance model was effectively used to ensure employees went along with the unlawful business practices.[131] Employees seen as underselling or failing to achieve corporate goals (eight products per customer, for example) were either counseled, lost opportunities for bonus pay, or were terminated.[132] Ironically, the same employees that were pressured to sell faced retributive action when the scandal went public.[133] In total, more than 5,000 Wells Fargo employees were terminated as a result of the fake account practices.[134]

Workplace behavior has also been shown to be influenced significantly by the identification model of compliance, in this context referred to as the

126. Emily Glazer, *How Wells Fargo's High-Pressure Sales Culture Spiraled Out of Control*, WALL ST. J. (Sept. 16. 2016, 3:10PM), https://www.wsj.com/articles/how-wells-fargos-high-pressure-sales-culture-spiraled-out-of-control-1474053044.

127. *See* Corkery & Cowley, *supra* note 122.

128. *Id.*

129. *Id.*; Glazer *supra* note 126.

130. *See supra* notes 27–29 and accompanying text.

131. *See* Stacy Cowley, *Wells Fargo Workers Claim Retaliation for Playing by the Rules*, N.Y. TIMES (Sept. 26, 2016), https://www.nytimes.com/2016/09/27/business/dealbook/wells-fargo-workers-claim-retaliation-for-playing-by-the-rules.html.

132. *See id.*

133. *See* Corkery & Cowley, *supra* note 122; Laura J. Keller et al., *Wells Fargo's Stars Thrived While 5,000 Workers Got Fired*, BLOOMBERG (Nov. 3, 2016, 6:38 AM), https://www.bloomberg.com/news/articles/2016-11-03/wells-fargo-s-stars-climbed-while-abuses-flourished-beneath-them.

134. Keller et al., *supra* note 133.

"social exchange perspective."[135] Under this model, employees "actions [are] contingent on the rewarding reactions of others, which over time provide mutually rewarding transactions and relationships."[136] The identification components are clear—employees comply with accepted norms within the workplace social group so that they continue to receive the benefits of being associated with that group.[137] Legitimacy plays a role in the willingness of employees to identify with a particular group.[138] Just as in the police context, trust in supervisors has been found to influence worker compliance.[139]

Another body of literature describes how financial incentives may result in unethical behavior.[140] In other words, when money is involved, it depersonalizes relationships, leading to decisions that are not values-based.[141] Not unlike the "us versus them" mentality of some police officers vis-à-vis their relationships with citizens and superiors, studies demonstrate that individuals show greater moral concern to those considered part of a social "in-group" and less moral regard to members of "out-groups."[142] Therefore, where decision-making is based on an economic or business perspective, the result is at

135. Haas et al., *supra* note 51, at 445; *see also* Russell Cropanzano & Marie S. Mitchell, *Social Exchange Theory: An Interdisciplinary Review*, 31 J. MGMT. 874, 874–75 (2005).

136. Haas et al., *supra* note 51, at 445.

137. *See* Cropanzano & Mitchell, *supra* note 135, at 876; Haas et al., *supra* note 51, at 445–46.

138. *See* Cropanzano & Mitchell, *supra* note 135, at 876; Haas et al., *supra* note 51, at 447 (demonstrating how trust plays a role in officer compliance).

139. Haas et al., *supra* note 51, at 447.

140. *See, e.g.*, DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 198–204 (1st ed., 2008) (describing a study that used monetary incentives to tempt students into cheating on a multiple-choice test); BANKS MCDOWELL, ETHICS AND EXCUSES: THE CRISIS IN PROFESSIONAL RESPONSIBILITY 6–7 (2000) (describing the competitive nature of the legal market and how a drive for financial gain through excessive, unnecessary products and services affects the ethical compliance of attorneys); Dan Ariely, *The End of Rational Economics*, HARV. BUS. REV., Jul–Aug. 2009, at 78, https://hbr.org/2009/07/the-end-of-rational-economics; W. Harvey Hegarty & Henry P. Sims, Jr., *Some Determinants of Unethical Decision Behavior: An Experiment*, 63 J. APPLIED PSYCHOL. 451 (1978).

141. *See* JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 452–54 (1990) (discussing the conflicting interests of legislators); JAMES S. COLEMAN, POWER AND THE STRUCTURE OF SOCIETY 38–44 (1st ed., 1974); ANTHONY GIDDENS, THE CONSEQUENCES OF MODERNITY 21–28 (1990) (discussing the disembedding nature of money in decision-making); GEORG SIMMEL, THE PHILOSOPHY OF MONEY 287 (1978 ed., 1907); Wayne E. Baker & Jason B. Jimerson, *The Sociology of Money,* 35 AM. BEHAV. SCIENTIST 678, 682 (1992); Maryam Kouchaki et al., *Seeing Green: Mere Exposure to Money Triggers a Business Decision Frame and Unethical Outcomes*, 121 ORGANIZATIONAL BEHAV. AND HUM. DECISION PROCESSES 53, 54 (2013).

142. Kouchaki et al., *supra* note 141, at 54; *see also* Americus Reed II & Karl F. Aquino, *Moral Identity and the Expanding Circle of Moral Regard Toward Out-Groups*, 84 J. OF PERSONALITY AND SOC. PSYCHOL. 1270, 1282 (2003).

best an indifference to social bonds and at worst a weakening of social bonds, which are vital to our identification with a normative group and, therefore, moral behavior.[143]

The decision of Wells Fargo employees and informal policies to forgo the concerns of consumers and push for increased accounts and profits is not a new phenomenon. In the 1970s, Ford Motor Company had to make a fateful decision whether to recall the Ford Pinto, a car that Ford knew could explode upon impact.[144] The recall administrator in charge of the decision "perceived the decision to recall the Pinto to be a business decision, not a moral one. Based on the numbers, which indicated that in business sense the losses were within acceptable parameters, [Ford's recall team] twice voted not to recall the Pinto despite the danger to consumers."[145]

The Wells Fargo and Ford examples support scientific findings that depersonalized, business-related decision-making—with money as an environmental cue—prompts unethical behavior.[146]

Promoting the ability of employees to speak up without fear of reprisal when they see misconduct is one way to integrate personal, internal values with workplace norms.[147] Whistleblower protections and the ability to report internally to "compliance personnel" have each been cited as necessary to fostering an organizational culture of compliance.[148] Both Sarbanes-Oxley and Dodd-Frank prohibit retaliation and provide incentives for whistleblowers.[149]

143. *See* Kouchaki et al., *supra* note 141, at 55.

144. *Id. See also* Kenneth D. Butterfield et al., *Moral Awareness in Business Organizations: Influences of Issue-Related and Social Context Factors*, 53 HUM. REL. 981, 983 (2000).

145. Kouchaki et al., *supra* note 141, at 55.

146. *See id.* at 56–58; Cowley, *supra* note 131.

147. *See* Haas et al., *supra* note 51, at 448, 453.

148. *See* Dickinson, *supra* note 23, at 5, 8 (stating that reporting mechanisms and "compliance personnel" are central to achieving employee compliance); Lobel, *supra* note 23, at 1250 (arguing that internal reporting mechanisms are beneficial because an employee will face less harsh potential reprisal for whistleblowing, and that internal reports serve an appraisal function for the organization).

149. Whistleblower provisions in Sarbanes-Oxley are located at 15 U.S.C. § 78j-1(m)(4)(A) (2012); 18 U.S.C. § 1513(e) (2012) and 18 U.S.C. §1514(a)(1) (2012). For a discussion of the provisions and obligations of corporations under Sarbanes-Oxley, see ROBERT G. VAUGHN, THE SUCCESSES AND FAILURES OF WHISTLEBLOWER LAWS 152–53 (2012). Whistleblower protections in Dodd-Frank can be found in Pub. L. No. 111–203, 124 Stat. 1376 (2010) (codified in scattered sections of 5 U.S.C., 12 U.S.C., 15 U.S.C. & 18 U.S.C.). For a discussion of the provisions and shortcomings of Dodd-Frank, see Geoffrey Christopher Rapp, *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, 2012 BYU L. REV. 73, 85–87 (2012).

Nonetheless, many whistleblowers at Wells Fargo were fired when they either resisted the unlawful practices and failed to meet the aggressive sales goals,[150] or tried to report the fraudulent accounts.[151] Julie Tishkoff, an administrative assistant at Wells Fargo, was one of many Wells Fargo employees that complained internally about unlawful practices she had seen since 2005, including "employees opening sham accounts, forging customer signatures and sending out unsolicited credit cards."[152] Still, in spite of internal reports and a Wells Fargo code of conduct, mid-level management informally supported employee violations that resulted in a massive crisis of corporate ethical and legal compliance.[153]

3. Government Service

Although President Trump pledged to "drain the swamp" of special interests and money in Washington, D.C., his real challenge has proven to be the nation's civil servants.[154] Even in a politically divided culture, career civil servants are expected to put politics aside and go about the nations work.[155] When it comes to government lawyers, there can be no doubt that "any President, and any Attorney General, wants his immediate underlings to be not only competent attorneys, but to be politically and philosophically attuned to the policies of the administration."[156] In fact, civil servants of all types may

150. *See* Cowley, *supra* note 131.

151. *See id.*; Matt Egan, *I called the Wells Fargo Ethics Line and Was Fired*, CNN MONEY (Sept. 21, 2016, 1:26PM), http://money.cnn.com/2016/09/21/investing/wells-fargo-fired-workers-retaliation-fake-accounts/index.html.

152. Stacy Cowley, *At Wells Fargo, Complaints About Fraudulent Accounts Since 2005*, N.Y. TIMES (Oct. 11, 2016), https://www.nytimes.com/2016/10/12/business/dealbook/at-wells-fargo-complaints-about-fraudulent-accounts-since-2005.html.

153. *See id.* To prevent this from occurring again, the Consumer Financial Protection Bureau ordered Wells Fargo to hire an independent consultant to determine whether the bank's "policies and procedures are reasonably designed to ensure that [Wells Fargo]'s sales practices comply with all applicable Federal consumer financial laws" and "do not engage in Improper Sales Practices." Consent Order, *supra* note 124, at 10.

154. Overby, *supra* note 5; Kelly Riddell, *Trump's Real Opposition Party: Federal Civil Servants*, WASH. TIMES (Feb. 14, 2017), https://www.washingtontimes.com/news/2017/feb/14/donald-trumps-real-opposition-party-federal-civil-/.

155. *See* Peter W. Schroth, *Corporation and Accountability of the Civil Service in the United States*, 54 AM. J. COMP. L. 553, 574–75 (2006).

156. William H. Rehnquist, *The Old Order Changeth: The Department of Justice Under John Mitchell*, 12 ARIZ. L. REV. 251, 252 (1970). *See generally* Peter Margulies, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV.

frequently be asked to carry out policies they disagree with, but must nonetheless execute.[157] This requires balancing loyalty to an administrative chief or the President with the oath to support and defend the Constitution.[158]

Since Donald Trump's election victory, many have questioned whether service under his Administration is ethically viable.[159] In the first week of his

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1 (2008) (discussing the behavioral pull of ideological and political agendas on ethical legal advice during national security situations).

157. *See* Crane v. Napolitano, 920 F. Supp. 2d 724, 729, 731, 735 (N.D. Tex. 2013) (evaluating various claims brought by ten immigration and customs officers, including the contention that the Directive entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" forced them "to violate their oaths to uphold the Constitution and laws of the United States of America").

158. U.S. CONST. art. VI, cl. 3 ("[A]ll executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution."). The statutory oath for elected or appointed civil servants and uniformed officers is:

> I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

5 U.S.C. § 3331 (2012); *see also* 28 U.S.C. § 544 (2012) (requiring Department of Justice attorneys to swear an oath to faithfully execute their duties).

159. Mary Louise Kelly, *Career CIA Analyst Ned Price Quits Rather Than Serve Trump Administration*, NPR (Feb. 22, 2017, 4:27 PM), https://www.npr.org/2017/02/22/516695407/career-cia-analyst-ned-price-quits-rather-than-serve-trump-administration; *see also* Jack Goldsmith, *Libertarian Panic, Unlawful Action, and the Trump Presidency*, LAWFARE (Nov. 22, 2016, 2:28 PM), https://lawfareblog.com/libertarian-panic-unlawful-action-and-trump-presidency; Oona Hathaway, *Work for the Trump Administration? Yes, but Be Prepared*, JUST SECURITY (Nov. 14, 2016, 1:43 PM), https://www.justsecurity.org/34409/work-trump-administration-yes-prepared ("Resignation in response to an illegal or morally repugnant act is more powerful than choosing not to serve or preemptively resigning."); Rebecca Ingber, *Will the Bureaucracy Save Us from the President?*, LAWFARE (Dec. 14, 2016, 11:00 AM), https://lawfareblog.com/will-bureaucracy-save-us-president (discussing the important role all civil servants will play in opposing President Trump's actions); David Kaye, *Anticipating Trump: Should Government Lawyers Stay or Go?*, JUST SECURITY (Nov. 14, 2016, 8:30 AM), https://www.justsecurity.org/34373/anticipating-trump-government-lawyers-stay-go ("I am not writing to say leave or stay. I am writing to say there is good you can do from the inside as well as the outside. And you can count on people of conscience outside to support you, whatever your choice."); David Luban, *The Case Against Serving*, JUST SECURITY (Nov. 14, 2016, 12:01 PM), https://www.justsecurity.org/34404/case-serving-trump (discussing the moral predicament government lawyers might face when Trump takes office, and how those lawyers might be forced to choose between enforcing policies that they do not support and resigning from their positions); Benjamin Wittes, *In Defense of Trump Panic*, LAWFARE (Dec. 1, 2016, 10:13 AM), https://www.lawfareblog.com/defense-trump-panic.

Administration, this hypothetical—forcing employees to balance their loyalties and oaths—became a high-profile case study in conscience and compliance.[160] The issue arose on January 27, 2017, when President Trump signed an executive order temporarily banning immigrants from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen from entering the United States.[161] The stated purpose of the order was to detect "individuals with terrorist ties and stop[] them from entering the United States."[162] Others believe, based on the plain language of the order, as well as prior statements from personnel in and close to the Trump Administration, that the Order was a thinly veiled attempt to prohibit Muslims from entering the country.[163] In fact, the Executive Order itself had a preference for Christian minorities entering the United States, which called into question its constitutionality under the Establishment Clause and Due Process Clause.[164] Additionally, the order had several immediate practical effects: it "stranded travelers around the world, led to protests around the country and created alarm inside the [U.S. government] bureaucracy."[165]

Within days, several district courts ordered stays against enforcing parts of the Order; this was intended to prevent deportation and allow immigrants and refugees trapped at airports to see attorneys and enter the United States.[166]

160. *See* Kelly, *supra* note 159 (providing an example of a civil servant quitting the Trump Administration because he did not agree with the President); *see also infra* notes 161–165 and accompanying text.

161. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

162. *Id.*

163. *See* David Cole, *We'll See You in Court: Why Trump's Executive Order on Refugees Violates the Establishment Clause*, JUST SECURITY (Jan. 28, 2017, 12:16 PM), https://www.justsecurity.org/36936/well-court-trumps-executive-order-refugees-violates-establishment-clause (noting that, during the presidential campaign, Trump said that the United States was "having problems with Muslims coming into the country"); Benjamin Wittes, *Malevolence Tempered by Incompetence: Trump's Horrifying Executive Order on Refugees and Visas*, LAWFARE (Jan. 28, 2017, 10:58 PM), https://www.lawfareblog.com/malevolence-tempered-incompetence-trumps-horrifying-executive-order-refugees-and-visas.

164. Paul Barrett et al., *White House Immigration Ban Promises Constitutional Showdown*, BLOOMBERG (Jan. 30, 2017, 7:28 AM), https://www.bloomberg.com/news/articles/2017-01-30/trump-s-immigration-ban-promises-constitutional-showdown; *see also* Cole, *supra* note 163 ("[O]ne religious denomination cannot be officially preferred over another." (quoting Larson v. Valente, 456 US. 228, 244 (1982)).

165. Michael D. Shear et al., *Trump Fires Acting Attorney General Who Defied Him*, N.Y. TIMES (Jan. 30, 2017), https://www.nytimes.com/2017/01/30/us/politics/trump-immigration-ban-memo.html?mcubz=0.

166. As of December 4, 2017, the Supreme Court granted the Trump Administration's request to fully enforce its third version of the travel ban. *Supreme Court Allows Full Trump Travel Ban to Take Effect*, THE HILL, (Dec. 4, 2017, 4:19 PM), http://thehill.com/regulation/court-battles/363183-s

Then-Acting Attorney General, Sally Q. Yates, issued an order to Department of Justice attorneys stating that the Department would not defend the Executive Order.[167] Specifically, she stated:

> I am responsible for ensuring that the positions we take in court remain consistent with this institution's solemn obligation to always seek justice and stand for what is right. At present, I am not convinced that the defense of the Executive Order is consistent with these responsibilities nor am I convinced that the Executive Order is lawful.[168]

Hours later she was fired by the President, and a statement was then released saying that she had "betrayed the Department of Justice" with insubordinate conduct.[169] Sally Yates followed her conscience, and she was fired for noncompliance.[170]

The Executive Order confronted by Sally Yates was ostensibly a national security measure intended to keep dangerous people out of the country.[171] The

upreme-court-allows-full-trump-travel-ban-to-take-effect. For a list of resources discussing earlier immigration litigation related to the first Executive Order, see Quinta Jurecic, *Litigation Documents & Resources Related to Trump Executive Order*, LAWFARE (Jan. 29, 2017, 1:11 PM), https://www.lawfareblog.com/litigation-documents-resources-related-trump-executive-order; Steve Vladeck, *The Airport Cases: What Happened, and What's Next?*, JUST SECURITY (Jan. 30, 2017, 12:01 AM), https://www.justsecurity.org/36960/stock-weekends-district-court-orders-immigration-eo.

167. Shear et al., *supra* note 165.

168. Carrie Johnson & Jessica Taylor, *Trump Fires Acting Attorney General for Refusing to Defend Immigration Order*, NPR (Jan. 30, 2017, 7:09 PM), https://www.npr.org/2017/01/30/512534805/justice-department-wont-defend-trumps-immigration-order.

169. *Id.*

170. *See id.* For criticism of Ms. Yates's analysis and actions, see Jack Goldsmith, *Quick Thoughts on Sally Yates' Unpersuasive Statement*, LAWFARE (Jan. 30, 2017, 9:32 PM), https://www.lawfareblog.com/quick-thoughts-sally-yates-unpersuasive-statement (opining that "the reasons that Yates gave in her carefully worded letter for not defending the EO in court are extraordinarily weak"); Benjamin Wittes, *What Yates Should Have Done*, LAWFARE (Jan. 30, 2017, 9:51 PM), http://www.lawfareblog.com/what-yates-should-have-done (agreeing with the moral and policy position of Ms. Yates, but disagreeing with the procedure by which it was carried out).

171. *See* Exec. Order No. 13,769, *supra* note 161, at 8977 (stating that the purpose of the Executive Order was "detecting individuals with terrorist ties and stopping them from entering the United States").

compliance problems facing government attorneys, analyzed at length elsewhere,[172] demonstrate the unique ethical responsibilities of those tasked with interpreting and enforcing national security laws and regulations.[173] As former legal advisor to the National Security Council wrote, "[N]ational security law is dependent on the moral integrity of those who wield its power."[174] Civil servants, and particularly attorneys in government service, must have a strong sense of self-regulation since, beyond courts or other review processes, there are few formal checks on their advice.[175] Even though there are some external regulatory mechanisms for government lawyers, they are rarely invoked, meaning the behavioral pull toward compliance is more likely based on professional advancement and reputation.[176] On the other hand, behavioral pulls away from ethical and legal compliance can be compelling, especially when civil servants believe they are working to prevent the next catastrophic terror attack.[177]

Government attorneys, however, are not the only civil servants facing compliance dilemmas.[178] Not long after the Executive Order on immigration

172. *See, e.g.*, Keith A. Petty, *Professional Responsibility Compliance and National Security Attorneys: Adopting the Normative Framework of Internalized Legal Ethics*, 2011 UTAH L. REV. 1563 (2011).

173. *See id.* at 1563 (pointing out that national security attorneys work on unique issues, such as torture).

174. JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 7 (2007). Baker notes that "scant attention is paid in the scholarly literature to the national security lawyer's responsibility to uphold and defend the Constitution as the source of ethical duty." *Id*. at 318 n.11.

175. JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 32–33 (2007); *see also* John O. McGinnis, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799, 808–10 (1992) (arguing that the Solicitor General owes a duty to the President and the Constitution, and noting that "the Constitution itself largely consists of second-order procedural principles . . . which are designed to structure the political process and safeguard the Republic from excesses of political passion"); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1304 (2000) (noting the lack of judicial review for actions taken by the executive branch); Scharf, *supra* note 23, at 46–49 (exploring the individual obligation of compliance in international law).

176. *See* David Kaye, *The Legal Bureaucracy and the Law of War*, 38 GEO. WASH. INT'L L. REV. 589, 597 (2006) ("[A]ccountability consists mainly of 'soft law' in the [government] bureaucracy.").

177. *See, e.g.*, GOLDSMITH, *supra* note 175, at 74 (describing the pressures faced by administration officials serving President George W. Bush, who were ordered to prevent future terror plots following the September 11, 2001 attacks).

178. ETHICS RES. CTR., NATIONAL GOVERNMENT ETHICS SURVEY 1 (2007) ("Nearly sixty percent . . . of government employees observed a violation of ethics standards, policy, or the law in the past

was issued, more than 1,000 State Department employees in the foreign and civil service signed a sharply critical Dissent Channel—an internal State Department communication—intended to allow employees to express disagreement with specific foreign policies without fear of reprisal.[179] Still other government employees have been voicing dissent by leaking official, and sometimes classified, information to the public—a practice that is not unique to the Trump administration, except perhaps in scope.[180] These employees, like Sally Yates, were concerned about enforcing policies or remaining silent about conduct that they saw as unlawful, unethical, or both.[181] Because these employees viewed the government action as illegitimate, they opted for non-compliance.[182]

Each of the situations discussed above—police practices, corporate misconduct, and civil servant compliance—reveal the constitutional and statutory compliance problems facing individuals in unrelated fields. Nonetheless, within these diverse contexts, common responses to behavioral influences are discernable. Compliance is more likely when there is rule legitimacy and an organizational culture that reinforces desired group norms.[183] The following sections dive deeper into these compliance dilemmas, focusing on soldiers in armed conflict. This discussion seeks to resolve when, if ever, soldiers may disobey orders and what organizational steps can be taken to increase efficiency and compliance.

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year."); *see also* Jeffrey Gettleman, *State Dept. Dissent Cable on Trump's Ban Draws 1,000 Signatures*, N.Y. TIMES (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/world/americas/state-dept-dissent-cable-trump-immigration-order.html?_r=0.

179. *See* Gettleman, *supra* note 178. A copy of the dissent channel is on file with the author.

180. *See* Susan Hennessey & Helen Klein Murillo, *The Law of Leaks*, LAWFARE (Feb. 15, 2017, 3:44 PM), https://www.lawfareblog.com/law-leaks (providing background and examples of leaks within the Trump Administration).

181. *See id.*; Lobel, *supra* note 23, at 1256–57. Government employees may be faced with one of three sub-optimal choices when confronted with unethical or unlawful policies and behavior: (a) internal disclosure, which risks retaliation, (b) public leaks or whistleblowing, or (c) remain silent and ignore the transgression. Lobel, *supra* note 23, at 1256–57.

182. *See* Hennessey & Murillo, *supra* note 180; Jack Goldsmith, *Our Non-Unitary Executive*, LAWFARE (July 30, 2017, 9:00 AM), https://www.lawfareblog.com/our-non-unitary-executive (explaining that many officials refuse, based on integrity, to comply with Trump's decisions).

183. Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 713–16 (1988).

III. CONSCIENCE AND COMPLIANCE IN ARMED CONFLICT

Compliance concerns are not unique to constitutional and statutory legal problems. There may be no greater example of the compliance dilemma than soldiers being ordered to kill on behalf of their nations.[184] In fact, scholars studying armed conflict have long concentrated on the moral and legal issues facing soldiers.[185] At what point do the facts change, and, instead of enter-

184. Marie-France Major, *Conscientious Objection and International Law: A Human Right?*, 24 CASE W. RES. J. INT'L L. 349, 351–56 (1992) (discussing violations of conscience as grounds for refusing to fight).

185. *See* MARJORIE COHN & KATHLEEN GILBERD, RULES OF DISENGAGEMENT: THE POLITICS AND HONOR OF MILITARY DISSENT 23 (2009) ("Soldiers invariably consider the morality of the wars in which they participate and the means by which those wars are carried out."); JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS 1 (David Rodin & Henry Shue, eds., 2008) (focusing on the question whether a soldier may be held responsible for fighting in illegal or unjust wars, and the resulting moral convictions of war); STEPHEN M. KOHN, JAILED FOR PEACE: THE HISTORY OF AMERICAN DRAFT LAW VIOLATORS, 1658–1985, at 5–6 (1986) (tracing the anti-draft movement throughout American history); THE NEW CONSCIENTIOUS OBJECTION: FROM SACRED TO SECULAR RESISTANCE 3 (Charles C. Moskos & John Whiteclay Chambers II eds., 1993) ("Conscientious objection is at the core of the individual's relationship to the state because it challenges what is generally seen as the most basic of civic obligations—the duty to defend one's country."); SELECTIVE CONSCIENTIOUS OBJECTION: ACCOMMODATING CONSCIENCE AND SECURITY (Michael F. Noone, Jr. ed., 1989); WHEN SOLDIERS SAY NO: SELECTIVE CONSCIENTIOUS OBJECTION IN THE MODERN MILITARY (Andrea Ellner et al. eds., 2016) (exploring selective conscientious objection through essays arguing for or against conscientious objection and implementing it in practice); Kent Greenawalt, *All or Nothing at All: The Defeat of Selective Conscientious Objection*, 1971 SUP. CT. REV. 31 (1971) (discussing Supreme Court precedent on the issue of selective conscientious objection); Captain Robert L. Larsen, Jr. & Colonel Theodore G. Hess, *Conscientious Objection in an All-Volunteer Military*, 66 ST. JOHN'S L. REV. 687, 691–701 (1992) (analyzing the judicial standards and procedures in place for conscientious objectors); Lubell, *supra* note 35; Major Joseph B. Mackey, *Reclaiming the In-Service Conscientious Objection Program: Proposals for Creating a Meaningful Limitation to the Claim of Conscientious Objection*, ARMY LAW., Aug. 2008, at 31 (arguing that modern judicial interpretation of conscientious objector regulations has exceeded their original scope, which is inappropriate for an all-volunteer military); Major, *supra* note 184 (discussing the international legal implications of conscientious objection); Barak Medina, *Political Disobedience in the IDF: The Scope of the Legal Right of Soldiers to be Excused from Taking Part in Military Activities in the Occupied Territories*, 36 ISR. L. REV., Fall 2002, at 73 ("[Conscientious objecting] may *initiate judicial review* of the relevant official activity, as an integral part of the criminal or disciplinary proceeding and thus indirectly prevent the execution of illegal activities. Alternatively, refusals may attempt to *directly prevent* the implementation of unlawful activities or of morally wrong ones as a result of the soldiers' refusal to carry out the specific mission."); Robert E. Montgomery Jr., *God, The Army, and Judicial Review: The In-Service Conscientious Objector*, 56 CAL. L. REV. 379 (1968); Murdough, *supra* note 6, at 4, 7–8 (examining whether soldiers have a legal defense when they refuse to participate in a conflict they believe

taining academic hypotheticals about military disobedience, we are confronting a national security crisis?[186] Currently, some worry that President Trump will order a military action that will cross legal and ethical boundaries, calling into question whether professional military members would or should disobey.[187] When faced with questionably lawful orders—for example, whether to take a certain action during combat or whether to deploy in support of an unlawful conflict—soldiers must resolve the same internal struggle faced by police officers, corporate employees, and civil servants.[188]

This section analyzes compliance problems within the "specialized society" of the military. More so than other state authorities or private organizations, the law of the armed forces remains "that of obedience."[189] As one court has noted, "The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection."[190] Nonetheless, individuals have long protested war, especially when required to enlist during times of conscription.[191] It is safe to

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to be unlawful); Richard B. Myers & Richard H. Kohn, *Salute and Disobey? The Civil-Military Balance, Before Iraq and After*, FOREIGN AFF., Sept.–Oct. 2007, at 147; Noya Rimalt, *Equality with a Vengeance: Female Conscientious Objectors in Pursuit of a Voice and Substantive Gender Equality*, 16 COLUM. J. GENDER & L. 97 (2007) (analyzing a case study regarding the motivations and impacts of female conscientious objectors in Israel); Robert Strassfeld, *The Vietnam War on Trial: The Court-Martial of Dr. Howard B. Levy*, 1994 WIS. L. REV. 839 (1994).

186. *See* David Wood, *Would the Military Obey Commander in Chief Trump? Probably.*, HUFFINGTON POST (Aug. 30, 2016), https://www.huffingtonpost.com/entry/trump-military-commander-in-chief_us_57c480e7e4b0cdfc5ac89475 (quoting a West Point ethics instructor who explains that "only an unethical decision that has strategic implications could justify disobeying our civilian leaders . . . because we have a moral duty to be subordinate to them. That said, . . . a deeper, more universal moral principle is our duty to obey only moral and legal orders"). If a civilian leader—like President Trump—took an unethical action with "strategic implications," then this could become an issue of great practicability. *See id.*

187. Rosa Brooks, *3 Ways to Get Rid of President Trump Before 2020*, FOREIGN POL'Y (Jan. 30, 2017, 9:26 AM), https://foreignpolicy.com/2017/01/30/3-ways-to-get-rid-of-president-trump-before-2020-impeach-25th-amendment-coup ("For the first time in my life, I can imagine plausible scenarios in which senior military officials might simply tell the president: 'No, sir. We're not doing that.'").

188. *See infra* Parts III.A–C.

189. *See* United States v. Grimley, 137 U.S. 147, 153 (1890).

190. Chappell v. Wallace, 462 U.S. 296, 300 (1983).

191. *See* Medina, *supra* note 185 (discussing conscientious objection in the context of modern democracy and mandatory conscription in Israel); KOHN, *supra* note 185.

say that conscientious objection to war is as old as war itself.[192]

The reasons for objecting vary—fear of death, political objection to a government or leader, desire for personal notoriety or fame, and moral and legal objections to the conflict.[193] The last category has given rise to the tradition of conscientious objection—"the unwillingness based on conscience to perform military service."[194] This section takes a closer look at the history and doctrine of noncompliance in armed conflict, analyzing the three types of objectors: (1) full conscientious objectors, (2) selective conscientious objectors, and (3) specific-act objectors.[195] The dilemma of conscientious objectors—an internal struggle for the soldier and a struggle for control by the state—is appropriately analyzed through the lens of compliance theory.[196] Thus, the discussion below reveals that conscientious objection serves as a lawful dissent mechanism, protects deeply held beliefs, and has evolved over time to encompass an ever-growing understanding of conscience-based noncompliance.[197]

192. *See Conscientious Objection in the U.S.*, THE CTR. ON CONSCIENCE & WAR, http://www.centeronconscience.org/words-of-conscience.html (last visited Nov. 14, 2017) ("Conscientious objection is as ancient as the book of Psalms and as current as the young man turning eighteen today who will not register for the draft.").

193. *See* Major, *supra* note 184, at 352 (explaining that some objectors view war as inherently immoral while others base their objections on "political ideals"); *see also* Andrew J. Bacevich, *Motives Matter When Judging a Candidate's Draft Dodging*, N.Y. Times (Aug. 4, 2016, 3:22 AM), https://www.nytimes.com/roomfordebate/2016/08/04/should-we-care-if-our-politicians-avoided-the-draft/motives-matter-when-judging-a-candidates-draft-dodging?mcubz=0 (discussing the difference between objections motivated by conscience and expediency).

194. U.N. Office of the High Comm'r for Human Rights, *Conscientious Objection to Military Service*, 2, U.N. Doc. HR/PUB/12/1 (2012) [hereinafter OHCHR Report]. The U.N. Human Rights Committee defines conscientious objection as "being based on the right to freedom of thought, conscience and religion [under the ICCPR] when it conflicts with the obligation to use 'lethal force.'" U.N. Human Rights Comm., *Compilation of General Comments and General Recommendations*, General Comment 22, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

195. *See infra* Parts III.A–C.

196. *See* Fred C. Lunenburg, *Compliance Theory and Organization Effectiveness*, 14 INT'L J. SCHOLARLY ACAD. INTELL. DIVERSITY 1, 4 (2012) ("According to compliance theory, organizations can be classified by the type of power they use to direct the behavior of their members and the type of involvement of the participants.").

197. *See infra* Parts III.A–C.

A. Full Conscientious Objectors

Full conscientious objectors are those who refuse to fight "based on a conceptual objection to the use of lethal force."[198] Conscientious objectors who fall into this category completely refuse to support armed conflict based on religious or other deeply held ideological grounds.[199] To full objectors the legitimacy of the particular conflict, or acts taken during combat, is not relevant.[200] This type of objection has existed throughout the history of warfare and is deeply engrained in American tradition and jurisprudence.[201]

Prior to the formation of the Union, colonists were conscripted to serve in militias in order to defend against Native American attacks.[202] Some American settlers and colonists refused to fight on pacifistic grounds.[203] Religious groups, particularly the Quakers, voiced religious objections to involuntary service and set the American precedent for exemption from service based on religious beliefs.[204]

The founders recognized the importance of permitting religious-based exemptions from service.[205] Early drafts of the Bill of Rights contained explicit language exempting conscientious objectors from conscripted service.[206]

198. *See* Medina, *supra* note 185, at 89 n.39 (citing SELECTIVE CONSCIENTIOUS OBJECTION: ACCOMMODATING CONSCIENCE AND SECURITY (Michael F. Noone ed., 1989)).

199. *Id.*

200. *Id.* at 89–90 ("'[F]ull' objection is based on a conceptual objection to the use of lethal measures, regardless of the specific context . . . .").

201. OHCHR Report, *supra* note 194, at 2–3 (citing PETER BROCK, PACIFISM IN EUROPE TO 1914, at 13 (1972)). The earliest recorded act of conscientious objection occurred in 295 C.E. when a young man, Maximilianus, refused conscription to the Roman legions because of his religious beliefs. *Id*. at 2. He refused, was executed, and subsequently canonized as Saint Maximilian. *Id.* In the 16th Century, the Mennonites, a pacifist religious group, was exempted from taking part in the Dutch wars of independence. *Id.* at 2–3. Conscientious objection became a significant issue following the French Revolution, when conscription into standing national armies became the norm in Europe. *Id*. at 3.

202. Mackey, *supra* note 185, at 31.

203. *Id.* at 31–32. For example, the Rhode Island colony provided for religious exemptions to military service in 1673. *Id*. at 32.

204. *Id.* at 31–32.

205. *Id*. at 32 (explaining that the Rhode Island legislature passed the conscientious objection exemption "because it considered conscientious objection part of the fundamental ideal of liberty of conscience"). In 1775, the Continental Congress passed a resolution exempting conscientious objectors from military service. *Id.*

206. *See, e.g.*, Larsen & Hess, *supra* note 185, at 687 n.1.

James Madison's original draft of the Second Amendment stated "[t]hat the right of the people to bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free county; *but no person religiously scrupulous of bearing arms shall be compelled to render military service in person*."[207] Although this passage was not ultimately included, the draft demonstrates that religious exemption to compliance with mandatory military service is ingrained in the American tradition.[208]

During the American Civil War, the Union allowed exemptions to service under the Enrollment Act, but only if a fee of $300 was paid or someone else was served as a substitute.[209] The 1864 Draft Act included the first federal exemption to military service for conscientious objectors.[210] Every draft law since then has included a conscientious objector exemption.[211]

Conscientious objections to World War I were a global phenomenon.[212] In 1917, the former Soviet Union permitted alternative service for religious objectors.[213] Mennonites were automatically exempted from service in Canada.[214] In the United States, the Selective Service Act of 1917 included protections for religious objectors: "Nothing contained in this chapter shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States, who, *by reason of religious training and belief, is conscientiously opposed to participation in war in any form*."[215] It is important to note that this exemption (like prior exemptions in the United

207. *Id.* (emphasis in original) (quoting 1 ANNALS OF THE CONG. 451 (Joseph Gales ed., 1834)).

208. *See* Mackey, *supra* note 185, at 32 (discussing how "the U.S. Congress began inserting military service exemptions in draft laws" after the conscientious objection clause was not included in the Bill of Rights).

209. *Id.*

210. *Id.*

211. *Id.*

212. *See* OHCHR Report, *supra* note 194, at 4 ("During the First World War, it is estimated that more than 16,000 conscientious objectors refused military service in the United Kingdom and about 4,000 in the United States.").

213. *Id.*

214. *Id.* Other notable examples include Denmark, which was the first country to pass legislation recognizing conscientious objection to conscription, and Finland, which allowed non-combat military service as an alternative to combat service. *Id.* at 4–5.

215. Selective Service Act, 50 U.S.C. § 3806(j) (2012) (emphasis added). Objectors under the 1917 Selective Service Act could still be conscripted to non-combat roles. *Id.* ("Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this chapter, be assigned to noncombatant service . . . ."); Robert S. Skinner, *The Conscientious Objector in Law*, 27 WASH. U.L.Q. 565, 568 (1942).

States) was absolute—the religious objection had to be based on opposition to "war in any form" and not to a particular act or conflict.[216]

The applicability and judicial review of conscientious objector exemptions were broadened during World War II.[217] Although the exemption was applicable only to religious objectors, the term included individuals who were not members of traditionally exempt groups (e.g., Quakers).[218] In one important case, *United States v. Kauten*, the applicant attempted, but failed, to expand exemptions to conscientious objection on social, political, and intellectual grounds.[219] The Supreme Court also ruled that judicial review was appropriate in some cases under the Selective Service Act, even though Congress intended local draft board decisions to be final.[220] In *Estep v. United States*, the Court used a standard of review described as "the narrowest known to the law," requiring only that the draft board had a "basis in fact" for its classification decision.[221]

Conscientious objectors were a significant concern during the Vietnam War.[222] The vast majority of applications for conscientious objector status

216. *See* Gillette v. United States, 401 U.S. 437, 447 (1971) ("[W]e hold that Congress intended to exempt persons who oppose participating in all war—'participation in war in any form' . . . .").

217. *See* Michael S. Satow, *Conscientious Objectors: Their Status, the Law and Its Development*, 3 GEO. MASON U.C.R.L.J. 113, 119–20 (1992) (discussing the reforms mandated by the Selective Service Act of 1940 and the expansion of exemptions beyond members of established peace churches, as well as the applicability of judicial review to local board decisions regarding military status).

218. *Id*. at 118–19.

219. *See* United States v. Kauten, 133 F.2d 703, 707–08 (2d Cir. 1943) ("In the early days of the draft, many thousands of the American people distrusted our foreign policy. If men holding such views had been ipso facto classed as conscientious objectors, the military effort might well have been seriously hampered. In granting such exemption, we think Congress intended to satisfy the consciences of the very limited class we have described and not give exemption to the great number of persons who might object to a particular war on philosophical or political grounds.").

220. *See* Estep v. United States, 327 U.S. 114, 122–23 (1946) ("The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.").

221. *See id.*; Naill v. Alexander, 631 F.2d 696, 698 (10th Cir. 1980); Bishop v. United States, 412 F.2d 1064, 1067 (9th Cir. 1969); Blalock v. United States, 247 F.2d 615, 619 (4th Cir. 1957).

222. *See* Edward F. Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement*, 48 MIL. L. REV. 91, 116–17 (1970) (discussing the "first flood of conscientious objector cases prompted by the Vietnam War draft," and the correlative statistical spike).

were denied by military review boards.[223] A significant change came, however, in the increased opportunity to seek judicial review of the military review boards.[224] If an applicant was denied conscientious objector status by the military board, then he had the opportunity to file a writ of habeas corpus to have the case reviewed in federal court.[225]

It was during this time that the Supreme Court issued the most influential, and paradigm shifting, opinions relating to military disobedience and conscientious objectors: *United States v. Seeger*,[226] *Welsh v. United States*,[227] and *Gillette v. United States*.[228] In *Seeger*, the Court considered for the first time an individual's understanding of his beliefs, rather than identification with a specific religion.[229] This meant that members of nontraditional religious affiliations could qualify for conscientious objector status, to include some of the pacifistic teachings of Judaism, Islam, and Buddhism.[230] An even broader expansion occurred in *Welsh*, where the Court held for the first time that deeply held *moral* beliefs could provide a basis for conscientious objection.[231] Welsh, the applicant, claimed historical and sociological grounds for objecting to the war.[232] Finally, in *Gillette*, the court held that in-service conscientious objectors—those who failed to file for conscientious objector status at the time of notice of conscription—were to have their applications treated the

223. *See* Scott W. Ross, *Conscientious Objection: Procedures Governing the in-Service Objector*, 37 MO. L. REV. 494, 505 n.91 (1972). From 1962 to 1968, the Army approved only 145 out of 804 conscientious objection applications. *Id.* (citing Sherman, *supra* note 222, at 117 n.131). The Navy approved somewhat more and the Air Force approved an even greater percentage. *Id.*

224. *See infra* note 225 and accompanying text.

225. *See* Parisi v. Davidson, 405 U.S. 34, 39 (1972) ("[T]he writ of habeas corpus has long been recognized as the appropriate remedy for servicemen who claim to be unlawfully retained in the armed forces."); Davenport v. Laird, 440 F.2d 380, 381 (4th Cir. 1971) (using judicial review to examine a denial of conscientious objector status); United States *ex rel.* Brooks v. Clifford, 409 F.2d 700, 705 (4th Cir. 1969) (same).

226. 380 U.S. 163 (1965).

227. 398 U.S. 333 (1970).

228. 401 U.S. 437 (1971).

229. 380 U.S. at 187–88.

230. *See id*. at 189–93 (Douglas, J., concurring).

231. 398 U.S. at 344. In international law, the United Nations (UN) Human Rights Committee has commented that conscientious objection should be extended "to all religious beliefs and other convictions." U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Art. 40 of the Covenant*, ¶ 20, U.N. Doc. CCPR/CO/73/UKR (2001); *see* U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Art. 40 of the Covenant*, ¶ 18, U.N. Doc CCPR/CO/69/KGZ (2000) (stating that conscientious objection should also protect the "freedom of conscience of non-believers").

232. *Welsh*, 398 U.S. at 341.

same as those in the Selective Service Act process.[233]

The cessation of the draft in 1972 began the era of the all-volunteer force.[234] To some, a conscientious objection exemption to service does not make sense when no one is compelled to serve.[235] In fact, prior to entering service and during the application process, all new U.S. enlistees are required to affirm in writing that they do not foster beliefs inconsistent with military service.[236] Nonetheless, some have a legitimate change of heart after joining the military. Recognition of this is consistent with the "strong belief in individual freedom of thought and capacity for individuals to change their views over time."[237]

U.S. service members who refuse to fight may apply for conscientious objector status.[238] As discussed above, there are no constitutional provisions governing conscientious objection. Objectors are covered in the Selective Service Act, which is incorporated by Department of Defense Instruction (DODI) 1300.06.[239]

Extensive judicial review of conscientious objection cases has resulted in a three-part test, with a fourth part added by DODI 1300.06.[240] The test requires conscientious objector applicants to (1) oppose war in any form (*Gilette*), (2) base their opposition in religious training and belief (*Welsh*), (3) sincerely hold these beliefs (*Seeger*), and (4) not have formed the belief prior to service (DODI 1300.06).[241]

Initially, the conscientious objector has the burden of establishing a prima facie case by clear and convincing evidence.[242] Should the government

233. 401 U.S. at 442.

234. *See* Mackey, *supra* note 185, at 34.

235. *See generally* Mackey, *supra* note 185; Murdough, *supra* note 6; Larsen & Hess, *supra* note 185.

236. U.S. DEP'T OF DEF., DD Form 1966, Record of Military Processing 2 (Sept. 2014).

237. Mackey, *supra* note 185, at 34.

238. U.S. DEP'T OF THE ARMY, REGULATION 600–43, CONSCIENTIOUS OBJECTION (Aug. 21, 2006).

239. *See* U.S. DEP'T OF DEF. INSTRUCTION NO. 1300.06, CONSCIENTIOUS OBJECTORS § 1.2 (July 12, 2017) [hereinafter DODI 1300.06], https://www.hsdl.org/?abstract&did=802711.

240. *See* U.S. DEP'T OF DEF. INSTRUCTION NO. 1300.06, § 4.1.1 (2017); *see also* Larsen & Hess, *supra* note 185, at 691–92.

241. *See* Gillette v. United States, 401 U.S. 437, 440 (1971); Welsh v. United States, 398 U.S. 333, 345–46 (1970); United States v. Seeger, 380 U.S. 163, 185 (1965); DODI 1300.06, *supra* note 239, at § 1.2(b).

242. *See* Taylor v. Claytor, 601 F.2d 1102, 1103 (9th Cir. 1979).

choose to deny the application, there must be a rational basis for the denial.[243] Judicial review of the rational basis in fact standard is the "narrowest review known to the law."[244] Nonetheless, "[a] basis in fact will not find support in mere disbelief or surmise as to the applicant's motivation. . . . Rather, the government must show some hard, reliable, provable facts which would provide a basis for disbelieving the applicant's sincerity . . . ."[245] Government denials are limited in other ways, too: the timing of the application alone is insufficient for a basis in fact denial,[246] the conscientious objector is not required to object to all uses of force in all circumstances,[247] and the objector may believe in a spiritual war and still object to actual war.[248]

If the government chooses to accept the conscientious objection application, there are two categories of objectors.[249] Class 1-O objectors are those that object to any form of military service and will be discharged, and Class 1-A-O objectors are those that object to service as a combatant, but will remain in service and perform non-combatant duties.[250]

For comparative purposes, it is worth noting that the international legal community did not give serious consideration to a legal right to conscientious objection until the 1990s.[251] In recent years, evidence of a trend toward a right to conscientious objection has emerged.[252] Here, we examine the sources of law that support a possible legal right to conscientious objection.

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243. *See id*. at 1104 (holding that petitioner's objection to some but not all wars was a sufficient basis in fact on which to deny the application); Shaffer v. Schlesinger, 531 F.2d 124, 131 (3d Cir. 1976) (finding no basis in fact for the government's finding of insincerity); Nurnberg v. Froehlke, 489 F.2d 843, 847–48 (2d Cir. 1973) (ruling that there was a sufficient basis in fact to justify denying the application).

244. *Claytor*, 601 F.2d at 1103 (quoting Sanger v. Seamans, 507 F.2d 814, 816 (9th Cir. 1974)).

245. Smith v. Laird, 486 F.2d 307, 310 (10th Cir. 1973) (citations omitted); *see also Schlesinger*, 531 F.2d at 131 (stating that a suspicion of the applicant's sincerity is not enough).

246. *See* Goldstein v. Middendorf, 535 F.2d 1339, 1344 (1st Cir. 1976).

247. *See* United States v. Purvis, 403 F.2d 555, 563 (2d Cir. 1968). It is permissible for conscientious objector applicants to object to the use of force for wartime purposes, but believe it is okay in a law enforcement setting. *See id.* In *Purvis*, the court approved Purvis's objector status, even though he refused to fight in war but was not wholly against the use of force to "restrain an individual from doing wrong." *Id.*

248. DODI 1300.06, *supra* note 239, at § G2.

249. *Id.*

250. *Id.* For an in-depth discussion of the U.S. procedure for conscientious objectors, see Mackey, *supra* note 185, at 35–36 and Larsen & Hess, *supra* note 185, at 696.

251. *See* Larsen & Hess, *supra* note 185, at 688.

252. *See* OHCHR Report, *supra* note 194, at 7–8; Lubell, *supra* note 35, at 408.

The rights to freedom of thought, conscience, and expression are protected in numerous international agreements.[253] These are thought to include a derivative right to full conscientious objection.[254] For example, the International Covenant on Civil and Political Rights (ICCPR) provides that individuals or communities may "manifest [their] religion or belief in worship, observance, practice and teaching," and that these practices "may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[255] The rights to freedom of thought, conscience, and expression are found in varying degrees in the Universal Declaration of Human Rights,[256] the European Convention on Human Rights,[257] Charter of Fundamental Rights of the European Union,[258] the American Convention on Human Rights,[259] and African Charter on Human and Peoples' Rights.[260]

Several international and regional organizations have expressed support for a right to conscientious objection. For example, the former U.N. Commission on Human Rights, the Committee of Ministers, and the Parliamentary Assembly of the Council of Europe each endorse the right of conscientious objectors.[261] The U.N. Secretary-General issued a report endorsing the resolution of the Human Rights Commission.[262] Extending beyond the traditionally recognized conscientious objectors who refuse conscription orders, the former Human Rights Commission, the European Parliament, and the Human Rights Committee proclaimed that the right of conscientious objection applies

253. *See* OHCHR Report, *supra* note 194, at 7–8.

254. Comm. on Human Rights, Rep. on the Forty-Third Session, U.N. Doc. E/CN.4/1987/60, at 108–09 (1987). For further discussion, see Lubell, *supra* note 35, at 408.

255. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 18(1)–(3) (Dec. 16, 1966).

256. G.A. Res 217A (III), Universal Declaration of Human Rights, art. 18 (Dec. 10, 1948).

257. Eur. Ct. H.R., *European Convention on Human Rights*, art. 9 (Nov. 4, 1950).

258. Charter of Fundamental Rights of the European Union, art. 10, 2000 O.J. (C 364) (Dec. 18, 2000).

259. Organization of American States, American Convention on Human Rights, art. 12, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

260. African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 59.

261. *See* OHCHR Report, *supra* note 194, at 25–26.

262. U.N. Comm. on H.R., *The Question of Conscientious Objection to Military Service*, ¶ 50, U.N. Doc. E/CN.4/1997/99 (Jan. 16, 1997).

to those currently serving in the armed forces.[263] More recently, this was interpreted to include volunteer soldiers; the Committee of Ministers of the Council of Europe stated that "professional members of the armed forces should be able to leave the armed forces for reasons of conscience."[264]

In 2012, the U.N. Human Rights Committee, which oversees the application of the ICCPR, found that a right to conscientious objection is derived from the right to freedom of conscience and religion,[265] is applicable to all states,[266] and is limited to objections to the use of force.[267] A number of states have consistently rejected an international human right to conscientious objection,[268] meaning that this norm has reached a consensus but not universal support.[269] The general trend of support for full conscientious objection does not extend to selective conscientious objection,[270] as discussed in more detail below.[271]

B. Selective Conscientious Objectors

In contrast to full conscientious objectors—those that refuse to fight in any armed conflict—selective conscientious objectors oppose specific conflicts.[272] These objectors reject "the use of specific measures in general or in specific circumstances, or to the implementation of certain policies,"[273] making them most akin to the compliance dilemmas faced by civil servants discussed in Section II. Often for non-religious, legal, political, or moral reasons, selective objectors refuse to comply out of a sense that the underlying conflict is unlawful and/or illegitimate.[274] As an early example, troops in early French

263. *See* OHCHR Report, *supra* note 194, at 25–26.

264. Council of Eur., Recommendation CM/Rec(2010)4 of the Committee of Ministers to Member States on Human Rights of Members of the Armed Forces , ¶ 42, (Feb 24, 2010).

265. OHCHR Report, *supra* note 194, at 10.

266. *Id.* at 11.

267. *Id.* at 10.

268. *Id.* at 17 n.24 (listing the following states that persistently reject the right to conscientious objection: Bangladesh, Botswana, China, Egypt, Eritrea, Iran, Iraq, Lebanon, Myanmar, Rwanda, Singapore, the Sudan, Syria, Thailand, Tanzania, and Vietnam).

269. *See id.* at 17.

270. *See id.* at 58; Lubell, *supra* note 35, at 411; Major, *supra* note 184, at 353.

271. *See infra* Section II.B.

272. *See* Medina, *supra* note 185, at 89.

273. *Id.*

274. *See id.* at 81 ("One possible goal of objectors is to prevent what they view as morally wrong military activities.").

Revolutionary Wars were encouraged to disobey orders from generals with ties to the aristocracy who were not committed to the Revolution's ideals.[275] The objection was to the legitimate authority of those issuing the orders.[276]

Operation Desert Storm (Gulf War) marked the first time a member of the all-volunteer force sought conscientious objector status during war.[277] Captain Yolanda Huet-Vaughn was a selective objector, claiming that the war was unlawful and that she would be violating the laws of war if she participated.[278] The Court of Appeals for the Armed Forces noted that Captain Huet-Vaughn's objections were non-justiciable political questions.[279] The Court went on to hold that the "so-called 'Nuremberg defense' applies only to individual acts committed in wartime; it does not apply to the Government's decision to wage war."[280]

Following the terrorist attacks of September 11, 2001, the United States launched the "Global War on Terrorism," which included wars in Afghanistan and, more controversially, Iraq.[281] High-profile war resisters brought renewed attention to the legal limits of conscientious objection.[282] These include Jeremy Hinzman, the first Iraq war resister from the United States to flee to Canada;[283] Sergeant Matthis Chiroux, who testified before Congress in 2008 that he intended to disobey orders to deploy to the "illegal" war in Iraq;[284] and

275. Osiel, *supra* note 29, at 1034 (citing JOHN A. LYNN, THE BAYONETS OF THE REPUBLIC 100–01 (1984)).

276. *See id.*

277. Larsen & Hess, *supra* note 185, at 688; *see also* Murdough, *supra* note 6, at 6.

278. United States v. Huet-Vaughn, 43 M.J. 105, 114 (C.A.A.F. 1995).

279. *Id.* (citing Flast v. Cohen, 392 U.S. 83, 95 (1968) and Ange v. Bush, 752 F. Supp. 509, 518 n.8 (D.D.C. 1990)); *accord* Dellums v. Bush, 752 F. Supp. 1141, 1150 (D.D.C. 1990) ("If the Congress chooses not to confront the President, it is not our task to do so." (quoting Goldwater v. Carter, 444 U.S. 996, 997–98 (1979)).

280. *Huet-Vaughn*, 43 M.J. at 114.

281. *See* Daniel L. Byman, *Iraq and the Global War on Terrorism*, BROOKINGS (July 1, 2017), https://www.brookings.edu/articles/iraq-and-the-global-war-on-terrorism (discussing the United States' role in Iraq and Afghanistan, and the global war on terrorism).

282. *See, e.g.*, Alexa James, *West Point Grad Given Honorable Discharge*, TIMES HERALD-RECORD (Oct. 17, 2007, 2:00 AM), http://www.recordonline.com/article/20071017/NEWS/710170336.

283. Patty Winsa, *More U.S. Soldiers Could Be Sent Back for Court Martial on Desertion Charges*, THE STAR (Feb. 8, 2015), https://www.thestar.com/news/gta/2015/02/08/more-us-soldiers-could-be-sent-back-for-court-martial-on-desertion-charges.html.

284. Karin Zeitvogel, *US Soldier Refuses to Serve in "Illegal Iraq War,"* MIDDLE EAST ONLINE

Lieutenant Ehren Watada, discussed in more detail below, who was discharged from the Army with an "other than honorable" characterization in 2009 over his refusal to deploy to Iraq.[285]

In the context of orders to deploy in support of a questionably lawful conflict, no U.S. federal court has ever found a U.S. war to be unlawful.[286] Moreover, soldiers selectively objecting to a perceived unlawful war have little legal recourse.[287] This is not isolated to U.S. practice, as no international law clearly recognizes a right to selective conscientious objection.[288] There are criminal as well as collateral consequences to disobeying orders.[289] Some conscientious objectors, if their states do not recognize this objection as a right, may be tried and punished.[290] Once released, it may be difficult to secure certain jobs as a result of the "serious crime" of conscientious objection.[291]

There have been a few instances—insufficient in practice or acceptance to be considered customary international law—where selective objection was endorsed. This has occurred only when the conflict or policy involved is manifestly unlawful—such as apartheid, genocide, illegal occupation, gross violations of human rights, or use of certain weapons.[292] In 1978, the UN General Assembly declared that South Africans had the right to object to taking part

(May 16, 2008), http://www.middle-east-online.com/english/?id=25951.

285. Kim Murphy, *Army to Discharge Officer Who Refused to Go to Iraq*, L.A. TIMES (Sept. 29, 2009), http://articles.latimes.com/2009/sep/29/nation/na-watada-discharge29.

286. Murdough, *supra* note 6, at 6.

287. *See id.* at 14.

288. Matthew Lippman, *The Recognition of Conscientious Objection to Military Service as an International Human Right*, 21 CAL. W. INT'L L.J. 31, 37 (1990); Lubell, *supra* note 35, at 412.

289. *See* Lippman, *supra* note 288, at 39–40.

290. *See id.* at 40 (noting that "penalties range from imprisonment to capital punishment and dishonorable discharge where an objector is a member of the armed forces").

291. *See* Thlimmenos v. Greece, App. No. 34369/97, Eur. Ct. H.R. (Apr. 6, 2000) (ruling in favor of an applicant who was convicted of insubordination and then prevented from seeking government service due to that conviction). Similarly, Soldiers granted conscientious objector status in the United States still must have the right to an administrative board hearing to determine the characterization of their service. U.S. DEP'T OF THE ARMY, REGULATION 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS, ¶ 2–2. (June 6, 2006) (RAR Sept. 6, 2011). Anything below an honorable characterization can damage employment opportunities and limit available benefits. *Id.* at ¶ 3–5.

292. *See* Asbjern Eide & Chama Mubanga-Chipoya (members of the Sub-Commission), Sub-Commission on the Prevention of Discrimination and protection of Minorities, Conscientious Objection to Military Service, ¶ 19, UN Doc. E/CN.4/Sub.2/1983/Rev.1 (1985) ("Objection to military service may also be partial, related to the purposes of or means used in armed action.").

in the enforcement of apartheid, and that member states ought to "grant asylum or safe transit to another State" for those fleeing South Africa as objectors.[293] Similarly, soldiers often flee conflicts and seek refugee status in order to avoid a specific policy or practice.[294] According to the Office of the U.N. High Commissioner for Refugees, persons fearing persecution at home for objecting to a specific conflict may validly seek refugee status abroad.[295] This protection applies only when the underlying armed conflict is condemned by the international community as "contrary to basic rules of human conduct."[296] Relying on this authority, the Parliamentary Assembly of the Council of Europe offered to protect deserters refusing to take part in the conflict in the former Yugoslavia in the 1990s.[297]

Most liberal democracies "accept that even volunteers may develop objections to war during their service and permit applications for universal conscientious objection status, although in practice this is hard to achieve."[298] For example, Australia has a right of selective conscientious objection for conscripts, but not volunteer soldiers.[299] The United Kingdom and Germany do not have a formal mechanism for recognizing selective conscientious objectors.[300] However, they do allow soldiers to refuse to participate in specific operations based on articulable moral/legal grounds.[301] On a case-by-case basis, selective objectors are either retained and offered alternative service options not related to the objectionable operation, or they are discharged.[302] In

293. OHCHR Report, *supra* note 194, at 73–74.

294. OFFICE OF THE U.N. HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, ¶ 171, U.N. Doc. HCR/IP/4/Eng/REV.1 (1979) [hereinafter UNHCR Handbook]; *see* Lubell, *supra* note 35, at 411.

295. *See* UNHCR Handbook, *supra* note 294, at ¶ 171.

296. *Id.*; Lubell, *supra* note 35, at 411.

297. Resolution 1042 on Deserters and Draft Resisters from the Republics of the Former Yugoslavia, EUR. PARL. DOC. 7102 (July 1, 1994).

298. Andrea Ellner et al., *The Practice and Philosophy of Selective Conscientious Objection*, *in* WHEN SOLDIERS SAY NO: SELECTIVE CONSCIENTIOUS OBJECTION IN THE MODERN MILITARY, *supra* note 185, at 239 (providing, as leading examples, the United States, United Kingdom, Germany, Australia, and Israel).

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

Israel, judges reject selective conscientious objection out of fear that it would undermine national security by reducing troop readiness levels.[303]

In some circumstances, as discussed in the next subsection, there is a duty to disobey manifestly unlawful orders.[304] There is no corresponding duty in the *jus ad bellum*—the law governing the initiation of armed conflict.[305] In other words, even where a nation's decision to go to war violates international law, there is no recognized legal protection for soldiers who selectively object to participating in that conflict.[306] Senior officers and policy-makers, on the other hand, may be held responsible for aggressive war.[307]

The jurisprudence of the post-World War II Nuremburg International Military Tribunals, convened to prosecute leading Nazi war criminals, clarifies the distinction between a soldier's responsibilities for acts committed during war, and those in support of aggressive war.[308] As one judge noted, "Somewhere between the dictator and supreme commander of the military forces of the nation and the common soldier is the boundary between the criminal and the excusable participation in the waging of an aggressive war by an individual engaged in it."[309] The Tribunal recognized that soldiers are not required by law to disobey orders to participate in unlawful conflicts because such a standard would contradict "obligations which individuals owe to their states."[310] The law, in this case, requires obedience to the orders of the state.

Similarly, the U.S. Army Field Manual on the Law of Land Warfare provides: "Although this manual recognizes the criminal responsibility of individuals for [crimes against peace, crimes against humanity, and war crimes], members of the armed forces will normally be concerned only with those offenses constituting 'war crimes.'"[311] This passage demonstrates that lower-level soldiers and officers will not be held accountable for participating in

303. *Id*. at 240.

304. *See infra* notes 352–58 and accompanying text.

305. *See* Lubell, *supra* note 35, at 418; Murdough, *supra* note 6, at 9 (articulating the difference between objecting to, on one hand, the legality of war and, on the other, the governing conduct in war).

306. *See* Lubell, *supra* note 35, at 418; Murdough, *supra* note 6, at 9.

307. *See infra* note 350 and accompanying text.

308. *See* XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL ORDER NO. 10, at 486 (1949) [hereinafter NUERNBERG MILITARY TRIBUNALS].

309. *Id.*; *see also* Murdough, *supra* note 6, at 9 n.63.

310. NUERNBERG MILITARY TRIBUNALS, *supra* note 308, at 489;*see* Murdough, *supra* note 6, at 11.

311. DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶ 498 (July 18, 1956) [hereinafter FIELD MANUAL 27-10].

crimes of aggression either in an international or domestic court. This is consistent with the jurisdiction of the International Criminal Court, which may investigate and prosecute those most responsible for the crime of aggression when that crime is adopted by the ICC Assembly of States Parties.[312] "Those most responsible" is commonly understood to mean high-level government officials (not necessarily including military generals),[313] with the ability to plan, initiate, or manage a policy of aggression.[314] Therefore, assuming an armed conflict is in violation of international law, soldiers will not be held criminally responsible for the aggressive war, unless they were acting at the policy level.[315] This longstanding jurisdictional standard in international criminal law precludes a duty to disobey orders to participate in an unlawful conflict.[316]

312. *See* Harold Hongju Koh & Todd F. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 AM. J. INT'L L. 257, 271 (2015) (providing a detailed discussion, including a historical perspective, of the crime of aggression). The crime of aggression for the International Criminal Court will come before the Assembly of States Parties for a vote of ratification and/or adoption some time after January 1, 2017. *Id*. at 257.

313. Volker Nerlich, *The Crime of Aggression and Modes of Liability—Is There Room Only for Principals?*, 58 HARV. INT'L L.J., Spring 2017, at 44, 44–45 ("The definition of the crime of aggression . . . suggests that only a small number of government leaders, perhaps only the head of state or government of the ministers of defense or foreign affairs, could ever be held guilty of the crime of aggression."). At the Nuremburg Military Trial known as the "High Command Case," all fourteen defendants, ranging from high-ranking commanders, staff officers, and the Judge Advocate General of the OKW, were acquitted of crimes against peace because they were not considered to be at the "policy level." NUERNBERG MILITARY TRIBUNALS, *supra* note 308, at 488–89; *see also* Murdough, *supra* note 6, at 11.

314. Lubell, *supra* note 35, at 419; *see* LESLIE C. GREEN, ESSAYS ON THE MODERN LAW OF WAR 283–328 (2d ed., 1999) (focusing on war crimes, crimes against humanity, and command responsibility); Richard Falk, *Telford Taylor and the Legacy of Nuremberg*, 37 COLUM. J. TRANSNAT'L L. 693, 697 (1999) ("The [Nuremberg trials] established crucial norms of responsibility for those acting on behalf of the state in various roles and for those who serve the state as private sector actors . . . .").

315. Lubell, *supra* note 35, at 419 ("Individual responsibility for crimes against peace, and the crime of aggression, applies to the policy makers responsible for the outbreak of the conflict, i.e. those involved in the planning, initiation and management, but not to the common soldier."); NUERNBERG MILITARY TRIBUNALS, *supra* note 308, at 489 ("Anybody who is on the policy level and participates in the war policy is liable to punishment.").

316. NUERNBERG MILITARY TRIBUNALS, *supra* note 308, at 489; *see* Murdough, *supra* note 6, at 11 ("The tribunal stated that while it would have been 'eminently desirable' for the defendants to have disobeyed orders, it also recognized the 'obligations which individuals owe to their states' and observed that international law did not require military personnel to refuse to participate in aggressive wars.").

Another variation of the *jus ad bellum* selective objection is the "just authority" complaint. Just War Theory dictates that several criteria must be met in order for a war to be considered morally just.[317] Among these criteria is the just authority to wage war, meaning that only a duly authorized official may declare war or enter a nation into conflict.[318] Captain Nathan Smith, the U.S. Army intelligence officer who sued President Obama in 2016 over the military action against the Islamic State, made such a case.[319] In his filing, he argued that Congress—the only branch of government authorized to declare war under the Constitution—did not duly authorize the military action, and thus it was unlawful.[320] Captain Smith sought a declaration from the court that "the war against ISIS in Syria and Iraq violates the War Powers Resolution because the Congress has not declared war or given the President specific statutory authorization to fight the war."[321] Assuming, *arguendo*, that Captain Smith refused to deploy based on his conscience and unwillingness to participate in a putatively unlawful endeavor (he did not), it cannot be said that he had a legal duty to disobey.[322] He was not given orders that were manifestly unlawful, since the conflict itself is at least arguably justified by the President's authority under the War Powers Resolution.[323] This fails the aggressive war test and is not unlawful on its face.

Soldiers who disagree with a specific conflict might refuse to deploy. This can be done by refusing in place and facing charges of disobeying orders

317. *See* Hamner Hill, *Can Just War Theory Survive the War on Terror?*, 2010 J. INST. JUST. & INT'L STUD. 77, 78–79 (2010); *see generally* MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS (4th ed. 1977) (outlining the criteria for just war under the Just War Theory).

318. John F. Coverdale, *An Introduction to the Just War Tradition*, 16 PACE INT'L L. REV. 221, 229 (2004); *see also* Hill, *supra* note 317, at 79.

319. Smith v. Obama, 217 F. Supp. 3d 283, 285 (D.D.C. 2016) ("Plaintiff alleges that President Barack H. Obama has not sought Congress' authorization for military action . . . .").

320. Complaint for Declaratory Relief at 5, Smith v. Obama, 217 F. Supp. 3d 283 (D.D.C. 2016) (No. 1:16-cv-00843).

321. *Id.* at 13.

322. *Smith*, 217 F. Supp. 3d at 292 ("[I]t appears well-settled . . . that there is no right, let alone a duty, to disobey military orders simply because one questions the Congressional authorization of the broader military effort.").

323. *See* Jack Goldsmith, *Analysis of Lawsuit Challenging War Against ISIL*, LAWFARE (May 4, 2016, 1:03 PM), https://lawfareblog.com/analysis-lawsuit-challenging-war-against-isil; Marty Lederman, *Why Captain Smith's Suit to Enforce the War Powers Resolution Won't Be a Big Deal*, JUST SECURITY (May 9, 2016, 8:42 AM), https://www.justsecurity.org/30949/captain-smiths-suit-enforce-war-powers-resolution-big-deal.

and conduct unbecoming an officer and gentlemen,[324] or fleeing and risking arrest and prosecution for absence without leave (AWOL), and/or desertion.[325] Today, the Uniform Code of Military Justice (UCMJ) requires all soldiers to follow lawful orders;[326] there is a presumption that all orders are lawful,[327] and the only defense to disobeying is that "the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful."[328]

In 2006, First Lieutenant Ehren Watada refused to deploy to Iraq because of legal and moral objections to the underlying conflict.[329] Rather than flee and go absent without leave (AWOL), Lieutenant Watada stayed put and was prepared to face the consequences of his actions.[330] He was the first U.S. Army officer to refuse, based on legal grounds, deployment orders to Iraq.[331] His defense was that the conflict was unlawful; therefore, any command to fight in Iraq was also unlawful and he was compelled to disobey.[332] Lieutenant Watada argued that he could be held liable for any acts taken in furtherance of the illicit conflict.[333] The military judge ruled that the legality of the conflict in Iraq was a non-justiciable political question that could not be settled in a military court.[334] Ultimately, a mistrial was declared as a result of a guilty

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324. *See* 10 U.S.C. §§ 892, 933 (2012).

325. *See id.* at § 885.

326. *See id.* at § 892.

327. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 14(c)(2)(a)(i) (2012); Murdough, *supra* note 6, at 5.

328. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 916(d) (2012). A prior version of Army Field Manual 6-22 stated: "Under normal circumstances, a leader executes a superior leader's decision with energy and enthusiasm. The only exception would be illegal orders, which a leader has a duty to disobey." U.S. DEP'T OF THE ARMY, FIELD MANUAL 6-22, ARMY LEADERSHIP ¶ 4-74 (Oct. 12, 2006). The current version of FM 6-22 omits this language. U.S. DEP'T OF THE ARMY, FIELD MANUAL 6-22, LEADER DEVELOPMENT (June 30, 2015).

329. Murdough, *supra* note 6, at 4; Murphy, *supra* note 285.

330. *See* Murdough, *supra* note 6, at 4.

331. *Id.*

332. *Id.* Looking exclusively at Watada's claims, he has at least colorable arguments (and a good deal of support from commentators) that the conflict in Iraq was not in compliance with international legal standards. *See, e.g.*, *id.* at 9 (discussing the relevant UN Security Council resolutions passed prior to the 2003 invasion of Iraq and the limits of "'preemptive' self-defense").

333. *See id.* at 4 (explaining that Watada believed his "participation would make [him a] party to war crimes").

334. Watada v. Head, No. C07-5549BHS, 2008 U.S. Dist. Lexis 88489, at *8–10 (W.D. Wash. Oct.

plea that went awry, and Lieutenant Watada's resignation from active duty was later accepted by the Army.[335] He received an "Other Than Honorable" characterization of service—the worst administrative discharge characterization an officer can receive.[336]

The primary flaw in Lieutenant Watada's defense was his reliance on an inverse "Nuremberg defense"—asserting that he refused what he deemed to be unlawful superior orders—where the defense was unavailable.[337] But where an individual may refuse manifestly unlawful orders in combat (see below), there is no corresponding legal duty to disobey the government's order to go to war.[338] As for Watada's concerns about being held responsible for any acts taken during an unlawful conflict, the High Command Trial at Nuremberg and all subsequent international criminal tribunals practically eliminated the possibility that a low-level officer (someone not involved in policy) could be held responsible for aggressive acts.[339] In other words, Lieutenant Watada's noncompliance did not have a sound legal basis.[340] The next section examines the issue of compliance in the face of unlawful orders given in combat.

C. Objections to Specific Acts

While some soldiers selectively object to deploying in support of questionably lawful conflicts, others object to superior orders given in the heat of battle. For the purposes of this discussion, the latter are considered objections to specific acts. Law and custom have long recognized that certain conduct during war is prohibited. For example, in Medieval theology and canon law, knights had a duty to refuse to perform acts in war that would "endanger

21, 2008).

335. *See* Murphy, *supra* note 285.

336. *See* U.S. DEP'T OF THE ARMY, REGULATION 600-8-24, OFFICER TRANSFERS AND DISCHARGES at 6 (Sept. 13, 2011).

337. *See* United States v. Huet-Vaughn, 43 M.J. 105, 114 (C.A.A.F. 1995); Murdough, *supra* note 6, at 5.

338. *Huet-Vaughn*, 43 M.J. at 114 ("The so-called 'Nuremberg defense' applies only to individual acts committed in wartime; it does not apply to the Government's decision to wage war.").

339. *See* Murdough, *supra* note 6, at 11 (citing NUERNBERG MILITARY TRIBUNALS, *supra* note 308, at 489). For additional resources on the customary international law standards relating to individual responsibility and war crimes, see International Committee of the Red Cross (ICRC), *Customary International Humanitarian Law*, Chapter 43, Individual Responsibility, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter43.

340. *See* Murdough, *supra* note 6, at 11.

[their] soul[s]."[341] During WWI, French soldiers in the trenches rebelled when superior officers ordered them to engage in assaults that risked "near-certain death."[342] There the disobedience arose not over the concept of war, but over how it was fought.[343] The body of international humanitarian law—also known as the law of armed conflict or *jus in bello*—is now codified and in large part binding as customary international law.[344]

It is commonly understood that there is a duty to disobey orders that contradict the laws governing armed conflict.[345] This is the corollary to the "Nuremberg defense," a reference to the leaders of Nazi Germany tried at the Nuremburg International Military Tribunal, who (mostly) unsuccessfully argued they could not be held criminally responsible for heinous acts ordered by their superiors.[346] The Nuremberg Charter, in contrast, explicitly stated, "The fact

341. Osiel, *supra* note 29, at 1046 (citing FREDERICK H. RUSSELL, THE JUST WAR IN THE MIDDLE AGES 149, 229 (1975)).

342. *See id.* at 1059.

343. *Id.* at 1059–60.

344. *See, e.g.*, Convention with Respect to the Laws and Customs of War on Land (Hague, II), pmbl., July 29, 1899, 32 Stat. 1803 [hereinafter 1899 Hague Convention II]; U.S. DEP'T OF WAR, GEN. ORDER NO. 100, art. 33–37, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (1863), http://avalon.law.yale.edu/19th_century/lieber.asp (commonly referred to as the Lieber Code); Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343 [hereinafter 1899 Hague Convention III]; Convention Respecting the Laws and Customs of War on Land, pmbl., Oct. 18, 1907, 36 Stat. 2277 [hereinafter 1899 Hague Convention IV]; Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; and Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. Additionally, certain standards of humane treatment apply to the conduct of states and non-state actors alike in non-international conflicts under Article 3 common to all four Geneva Conventions. *See, e.g.*, Geneva Convention III *supra*, at art. 3. Following Vietnam and other post-colonization civil wars, Additional Protocol I & II to the Geneva Conventions were drafted to further clarify the standards governing international and non-international armed conflicts, respectively. Convention Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Convention Protocol I]; Convention Relating to the Protection of Victims of Non- International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Geneva Convention Protocol II].

345. *See e.g.*, Yoram Dinstein, *The Defense of "Obedience to Superior Orders"*, *in* INTERNATIONAL LAW 207-13 (1965).

346. *See* Osiel, *supra* note 29, at 965.

that the Defendant acted pursuant to order[s] of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."[347]

Today, international criminal tribunals and some human rights treaties reject the superior orders defense,[348] but the application of this standard is limited.[349] The tribunals, for example, were intended to prosecute and punish only senior leaders responsible for the most egregious crimes, not low-level officers and soldiers.[350] This means that if a junior soldier commits atrocity crimes based on superior orders, he will likely be tried, if at all, in a domestic court where the duty to disobey is the inverse of that seen at international tribunals.[351]

Most domestic military laws recognize the defense of obedience to superior orders.[352] There are three variants: (1) obedience to superior orders is always a defense to unlawful acts, (2) obedience to superior orders is only a defense when the soldier believed the order to be lawful, and (3) obedience to superior orders is only a defense to crimes when it would be reasonable to

347. Charter of the International Military Tribunal, art. 8, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. The prohibition of the superior orders defense is not absolute and illustrates a more nuanced history of a potential duty to disobey. *See id*. For example, some of the subsequent Nuremburg Military Tribunals permitted defendants to invoke the superior orders defense in certain circumstances. *See* Osiel, *supra* note 29, at 948 n.16. *But see* United States v. Altstoetter (The Ministries Case), *in* 3 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL NO. 10, at 3, 983-84, 1010-11 (1951) (where German lawyers and judges were held accountable for enforcing a law that was domestically legal under the Nazi regime, but internationally prohibited). Additionally, the major relevant international humanitarian law treaties (e.g., Hague and Geneva Conventions, Additional Protocols of 1977) are silent regarding a duty to disobey unlawful orders. Osiel, *supra* note 29, at 948. The same is true of treaties prohibiting genocide, torture, and crimes against humanity. *See, e.g.*, G.A. Res. 3452, Declaration on the Protection of All Persons from Being Subjected to Torture, U.N. GAOR, 13th Sess., 2433rd plen. mtg., at 91, U.N. Doc. A/10034 (1976).

348. *See* Statute of the International Criminal Tribunal for the Former Yugoslavia art. 7(4); Statute of the International Criminal Tribunal for Rwanda art. 6(4); Rome Statute of the International Criminal Court art. 33; The Inter-American Convention on the Forced Disappearance of Persons, June 9, 1994, 5 art. VIII; *see also* Osiel, *supra* note 29, at 948.

349. *See, e.g.*, Murdough, *supra* note 6, at 11 (limiting application to those who are not at the policy level, and thus have no influence to wage war).

350. *See, e.g.*, Dinstein, *supra* note 345 (focusing on the Eichmann Trial and its rejection of an obedience defense for a Nazi officer).

351. *Compare* United States v. Huet-Vaughn, 43 M.J. 105 (C.A.A.F. 1995) *and* Murdough, *supra* note 6, at 11 (prosecuting domestically the objection of certain soldiers), *with supra* notes 344–47 (enumerating international conventions, treaties, and other documents supporting certain types of objection).

352. *See* Osiel, *supra* note 29, at 950 n.21. *But see* Strassfeld, *supra* note 185, at 901–24 (exploring cases where the court rejected the Nuremberg defense).

believe the order was lawful, as in the United States and Germany.[353]

The Vietnam case of First Lieutenant Calley is often cited as the U.S. standard for the superior orders defense to war crimes. In that case, Calley followed orders and led his troops to the village of My Lai and slaughtered innocent men, women, and children.[354] The My Lai Massacre demonstrates that, in U.S. jurisprudence, obedience to superior orders is a defense, unless certain criteria are met.[355] The court stated:

> The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful.[356]

The 2012 Manual for Courts-Martial restates this standard.[357] Rule for Courts-Martial 916(d) provides: "It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful."[358]

This has been described as the "manifestly unlawful" standard and is now followed by most Western nations. According to one commentator, "Under this rule, the law presumes that the soldier obeys unlawful orders because he mistakenly believes, honestly and reasonably, in their lawfulness.[359] "This presumption is rebutted only when the acts ordered were so egregious as to carry their wrongfulness on their face."[360] The war crimes listed in the U.S.

353. Osiel, *supra* note 29, at 950.
354. United States v. Calley, 48 C.M.R. 19, 21 (1973).
355. *See id.* at 27.
356. *Id.*
357. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 916(d) (2012) [hereinafter R.C.M].
358. *Id.* The Discussion section to Rule for Courts-Martial 916(d) provides: "Ordinarily the lawfulness of an order is finally decided by the military judge." *Id.*
359. *See* Osiel, *supra* note 29, at 950.
360. *Id.* at 950–51.

Army Field Manual on the Law of Land Warfare satisfy the manifestly unlawful standard.[361] Israel's trial of Adolf Eichmann, an architect of the Nazi Holocaust, provides an early example of jurisprudence using this standard.[362] Later, in some Vietnam-era cases, the ordered acts were particularly egregious, and the jury was not even given the superior orders defense instruction.[363] In the modern U.S. application, there is no duty to disobey unlawful orders, except those that are manifestly unlawful.[364] Even then, if a soldier is charged with disobeying a lawful superior order, then the military judge will make a preliminary determination of whether the order was lawful.[365]

As these examples highlight, and as research demonstrates, the pull toward obeying superior orders is strong, particularly among individuals that identify with a subordinate role within an organization.[366] This is problematic when criminal actions are justified, like those at Nuremburg and the Calley trial, on the bases of following superior orders. Nonetheless, objecting to specific orders or policies is not uncommon in the federal government—even when those orders come from the President—as evidenced by Sally Yates at the Department of Justice and the foreign and civil service officers at the Department of State.[367]

During the early years of the Global War on Terror, senior officials in

361. *See id.* at 972 ("Such orders are illegal on their face, not only in particular circumstances. . . . The law of armed conflict unequivocally prohibits such acts under all circumstances."); *see also* FIELD MANUAL 27-10, *supra* note 311, ¶ 502(c) (listing the grave breaches of "wilful [sic] killing, torture or inhuman treatment, including biological experiments, wilfully [sic] causing great suffering or serious injury to body or health, . . . and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly").

362. Attorney-Gen. of the Gov't of Isr. v. Eichmann, 36 I.L.R. 275, 277 (Supreme Ct. of Isr. 1962). Today, in Israel, the only exception to the requirement to obey orders is article 124 of the Military Justice Act of 1955, which allows disobedience to orders when "it is clear and obvious that the order given to [them] was illegal." Israeli Military Justice Act of 1955 art. 124; *see also* Hadar Aviram, *Discourse of Disobedience: Law, Political Philosophy, and Trials of Conscientious Objectors*, 9 J.L. SOC'Y 1, 13–14 n.39 (defining a clearly and obviously illegal command as one that is "not formal, hidden or half hidden illegality . . . an illegality that stings the eye and enrages the heart, if the eye is not blind and the heart is not obtuse or corrupted").

363. *See, e.g.*, United States v. Griffen, 39 C.M.R. 586, 590 (1968).

364. *See* R.C.M., *supra* note 357, at 916(d); *see also* Murdough, *supra* note 6, at 5.

365. *See* United States v. New, 55 M.J. 95, 105 (C.A.A.F. 2001); *see also* R.C.M., *supra* note 357, at 801(e); Murdough, *supra* note 6, at 5.

366. *See* Armacost, *supra* note 42, at 509 (stating that the military and police departments are effective at instilling a sense in subordinates that "obedience to authority is obligatory"); *see also* KELMAN & HAMILTON, *supra* note 43, at 314–15 (discussing how military law is a hierarchy with "a long tradition of regulation of obedience to orders"); Hamilton & Sanders, *supra* note 44, at 71.

367. *See* Shear et al., *supra* note 165.

President George W. Bush's administration issued legal opinions and policies permitting derogations from the laws of armed conflict, including the use of torture on suspected terrorists.[368] In response, the Judge Advocate Generals of each military branch came out forcefully against these practices.[369] Eschewing the traditional deference to civilian leadership, the top military lawyers refused to fall in line and violate their commitment to the rule of law.[370] This might be viewed as "uncivil obedience"[371] or even partial compliance, under a model in which military lawyers owe deference to their civilian Executive Branch counterparts.[372]

Recent events suggest that military members must always be cognizant of the boundaries of superior orders and when noncompliance is the proper legal and moral choice. President Trump, during his campaign, publicly

368. *See, e.g.*, Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: Standards of Conduct for Interrogation Under 18 U.S. C. §§ 2340–40A (Aug. 1, 2002).

369. *See* Petty, *supra* note 172, at 1615.

370. *See id.* at 1615–16.

371. *See generally* Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809 (2015) (discussing a phenomenon called "uncivil obedience" where protests involve "extreme law-following" instead of law-breaking).

372. *See generally* Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815 (2007) (arguing that uniformed lawyers who offer advice contrary to their civilian counterparts in the Executive Branch threaten to upend the civilian–military relationship). But this argument has been widely rejected. *See, e.g.*, Geoffrey Corn & Eric Talbot Jensen, *The Political Balance of Power over the Military: Rethinking the Relationship Between the Armed Forces, the President, and Congress*, 44 HOUS. L. REV. 553, 556–58 (2007) (arguing that civilian control over the military is not limited to the Executive Branch, and that the Constitution requires military loyalty to the Legislative and Executive Branches); Dickinson, *supra* note 23, at 3 (discussing the role of organizational structure on JAG lawyers' effectiveness and arguing that fostering greater compliance with international legal rules is "a matter of subtly influencing organizational structures and cultural norms"); Victor Hansen, *Understanding the Role of Military Lawyers in the War on Terror: A Response to the Perceived Crisis in Civil-Military Relations*, 50 S. TEX. L. REV. 617, 619–22 (2009) (critically analyzing Sulmasy and Yoo's article and disagreeing from a legal and practical perspective); Michael L. Kramer & Michael N. Schmitt, *Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations*, 55 UCLA L. REV. 1407, 1409–10 (2008) (responding to Sulmasy and Yoo, and arguing that there is not a crisis in civil–military relations and that judge advocates are most qualified and even necessary to provide legal advice during combat operations); Michael A. Newton, *Modern Military Necessity: The Role & Relevance of Military Lawyers*, 12 ROGER WILLIAMS U. L. REV. 877, 877–86 (2007) (providing excellent detail on the origins of the law of war and the need for military lawyers in the context of the complex, legalized nature of modern conflict).

stated that in order to defeat terrorist threats, he would order the use of torture (e.g., waterboarding) and target civilians.[373] More recently, he claimed that torture works, but that he would defer to his Secretary of Defense on whether to utilize this tactic.[374] If given the order to torture or target civilians, how will senior military leaders respond? The duty to disobey such orders is clear, just as it was over a decade ago for the senior Judge Advocates of each service, who—while not outright disobeying orders—chose to adhere to the laws of armed conflict.[375]

Other well-known cases of disobedience involve the ever-growing field of cyber espionage. In 2013, for example, Private First Class Chelsea Manning was sentenced to thirty-five years in prison for leaking hundreds of thousands of classified documents to WikiLeaks, ostensibly out of a "love for country" and moral duty to others.[376] A similar situation occurred in 2013—although not strictly in the context of military disobedience—when defense contractor Edward Snowden leaked tens of thousands of documents from the National Security Agency.[377] Snowden, like Manning, is considered by many to be a whistleblower acting out of conscience, not a criminal.[378]

The history of disobedience in armed conflict is revealing in several ways. The three categories of conscientious objectors—full, selective, and specific-act objectors—demonstrate that the treatment of soldiers and citizens refusing to fight has evolved over time and depends upon the state interest.[379] While

373. Berenson, *supra* note 8.

374. David Nakamura, *Trump Says 'Torture' Works, But He'll Defer on Decision Over Tactics to His Defense Secretary*, WASH. POST (Jan. 27, 2017), https://www.washingtonpost.com/politics/trump-holds-meeting-with-british-prime-minister-amid-questions-about-us-leadership/2017/01/27/fe35cd14-e49f-11e6-a453-19ec4b3d09ba_story.html?utm_term=.8e492fb8ee3b.

375. *See* Major General Thomas J. Romig, *The Thirty-First Charles L. Decker Lecture in Administrative and Civil Law*, 221 MIL. L. REV. 257, 270–77 (2014); *see also* Petty, *supra* note 172, at 1614–16.

376. Julie Tate, *Bradley Manning Sentenced to 35 Years in WikiLeaks Case*, WASH. POST (Aug. 21, 2013), https://www.washingtonpost.com/world/national-security/judge-to-sentence-bradley-manning-today/2013/08/20/85bee184-09d0-11e3-b87c-476db8ac34cd_story.html?utm_term=.a0c8199ffb56.

377. Ewen MacAskill, *Edward Snowden Makes 'Moral' Case for Presidential Pardon*, THE GUARDIAN (Sept. 13, 2016), https://www.theguardian.com/us-news/2016/sep/13/edward-snowden-why-barack-obama-should-grant-me-a-pardon.

378. *See id.* ("Snowden . . . argu[ed] that the disclosure of the scale of surveillance by US and British intelligence agencies was not only morally right but had left citizens better off.").

379. *See* Medina, *supra* note 185, at 74–75 ("[T]he overriding trend in liberal democracies has clearly been toward the recognition of conscientious objectors and the provision of alternative service for those who refuse to participate in the armed forces."); *see also* Lubell, *supra* note 35, at 411–12 (discussing the history of selective conscientious objection and explaining that the United States and

full objectors are recognized by law with sufficient proof of the conviction of their beliefs, selective objectors are sometimes treated as disloyal and often punished as criminals.[380] Specific-act objectors are required to disobey when ordered to do something that is manifestly unlawful, such as the war crime of waterboarding and other forms of torture.[381] Ultimately, the varying treatment is a values-based determination upon when the state deems it acceptable to carve out exceptions to the rule of obedience.[382] As one commentator notes, "The balance between the need of a State to maintain a functioning army, and the obligation to respect the individual's freedom of conscience, is put to the test when faced with individuals objecting to military service on the grounds of conscientious objection."[383] The next section builds on the prior analysis of behavioral pulls on compliance and demonstrates how the state or organization can achieve greater compliance.

IV. INDIVIDUAL INTERESTS AND ORGANIZATIONAL CONTROL

So far this article has established the theoretical framework of compliance theory, examined relevant domestic compliance problems, and analyzed noncompliance in the context of armed conflict and conscientious objectors. We have identified the difficulty of objecting to specific acts[384]—police refusing to "stop and frisk," corporate bank employees refusing to oversell to customers, and soldiers refusing to obey unlawful orders—and the reasons for objecting to underlying policies, as in the soldier objecting to the basis of a specific armed conflict.[385] This section goes further and examines why individuals may choose to disobey and the organizational and state interests

Israel have strict standards for recognizing selective conscientious objection).

380. *See* Lubell, *supra* note 35, at 412–14 (noting that selective objectors are "more likely to be perceived as a political threat" and "pose[] a far greater challenge" because "the board is faced with the task of delving deeper into the individual's thoughts and actions, attempting to grasp what exactly is this conviction that allows him to pick and choose when to fight"); *see also* Jeremy Brecher & Brendan Smith, *Ehren Watada: Free at Last*, THE NATION (Oct. 26, 2009), https://www.thenation.com/article/ehren-watada-free-last (questioning whether Watada's conduct was disloyal to his country).

381. *See* Osiel, *supra* note 29, at 974.

382. *See* Lubell, *supra* note 35, at 412.

383. *Id.*

384. *See supra* Section III.C.

385. *See supra* Section II.B.

involved in seeking compliance.

A. The Behavioral Pulls on Individual Compliance

Individuals disobey authority for a variety of reasons. On the one hand, police aggressively seeking to prevent crime and bankers fighting to boost profits may be conforming their behavior to the informal norms of their social groups.[386] On the other hand, civil servants overriding a questionable policy, or selective conscientious objectors refusing to fight in a putatively unlawful war, have failed to internalize the values of a particular state policy.[387] This suggests that noncompliance arises for a variety of reasons. These include: (1) deterring a perceived wrongful action, (2) exercising freedom of conscience and/or expression, and (3) avoiding self-harm.[388] These justifications are not mutually exclusive and are often complementary.[389] Analyzing these reasons helps place the various types of disobedience on a compliance spectrum.[390]

The compliance problem at issue in examples like Lieutenant Watada's refusal to deploy to Iraq is essentially normative.[391] In Lieutenant Watada's case, he failed to internalize the state's justification for the use of force under those circumstances.[392] Samuel Huntington frames the issue in the following way: "For the officer this comes down to a choice between his own conscience on the one hand, and the good of the state, plus the professional virtue of obedience, upon the other."[393] This does not mean, however, that the disobedience is rooted in lawlessness or lack of morality.[394] Rather, they have adopted

386. *See supra* Section II.B.

387. *See supra* Section II.B.

388. *See* Keith Petty, *A Duty to Disobey?*, JUST SECURITY (Nov. 28, 2016, 8:40 AM), https://www.justsecurity.org/34612/duty-disobey.

389. *See id.*

390. *See supra* Section III (discussing the characteristics of, and differences between, full conscientious objectors, selective conscientious objectors, and objections to specific acts within armed conflict).

391. *See* Petty, *supra* note 388 ("[W]hen Lieutenant Watada refused to deploy to Iraq based on deeply held beliefs that the conflict was unlawful, he was relying on the same sort of values that the armed forces seek to instill in young leaders.").

392. *See id*.

393. SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS 78 (1957).

394. *See id*. (observing that the compulsion to disobey and "violate commonly accepted morality" can be in furtherance of the "political interests of the state," for example).

a different set of values, one that they believe compels refusing orders.[395] Under these circumstances, compliance for the sincere conscientious objector is not a matter of disobedience.[396] It is conforming their actions to an internalized moral framework, which, in some instances, is informed by an external body of law.[397]

Selective conscientious objectors are an example of those who refuse to follow an organization or government policy that is destructive in nature. In other words, they perceive the ordered action to be illegitimate and view their required compliance as unfair treatment.[398] Recall that the greater the legitimacy of a policy, practice, or order from higher headquarters, the more likely it is that individuals will comply.[399] But internalization of norms is not necessarily driven from the top down.[400] Behavioral theorists suggest that organizational employees—soldiers, police, corporate salespeople, civil servants—have certain obligations to countering cultures of noncompliance.[401] One commentator states that this can be done by "investigating how one's own projects interact with those of co-workers, communicating troublesome information, taking measures to prevent wrongdoing by subordinates, protecting whistleblowers, or even declining to participate in an organization with a destructive culture."[402]

Soldiers seeking to deter a perceived wrongful military action are seeking compliance with the norms associated with both the *jus in bello* and *jus ad*

395. *See id.*; Murdough, *supra* note 6, at 4 (explaining that Lieutenant Watada believed it was "the duty, the obligation of every soldier, and specifically the officers, to evaluate the legality, the truth behind every order—including the order to go to war").

396. *See* HUNTINGTON, *supra* note 393, at 78.

397. *See* Murdough, *supra* note 6, at 4 ("Often citing the International Military Tribunal (IMT) at Nuremberg as justification to refuse orders to fight, saying that soldiers bear responsibilities for 'crimes against the peace' and 'wars of aggression,' and invoking the well-established duty of soldiers to refuse to follow illegal orders, these soldiers and others like them have claimed they could not, in good conscience, participate in the Iraq war.").

398. *See* Medina, *supra* note 185, at 88–89.

399. *See* Tyler & Jackson, *supra* note 50, at 78–79.

400. *See id.*

401. *See* Armacost, *supra* note 42, at 514 ("The point is not that individual officers are not to blame for their harm-causing actions. To the contrary, their organizational affiliation might mean that they are, in some sense, *more* blameworthy."); Luban et al., *supra* note 44, at 2382–85 (suggesting that, to avoid individual responsibility for organizational wrongdoings, employees have obligations of investigation, communication, protection, prevention, and precaution).

402. Armacost, *supra* note 42, at 514.

bellum.[403] For example, soldiers refusing to torture detainees are objecting to a specific violation of the law of armed conflict and are seeking to deter the commission of a war crime.[404] Selective conscientious objectors—those objecting to specific conflicts—often seek a political or social change.[405] The higher moral purpose for the selective conscientious objector is the desire not to be associated with an unlawful enterprise, and, often times, to uphold the law.[406] As discussed above, this position has found some support in the international legal community.[407] The U.N. High Commissioner for Refugees does not base the right to refugee status for selective conscientious objectors on their fear of being ordered to participate directly in war crimes; rather, refugee status will be granted to those who are unwilling to be associated with a particular conflict or manifestly unlawful policy.[408]

Lieutenant Watada embodies the selective objector seeking to effect change. His refusal to deploy to Iraq was an effort to prevent—or at least bring awareness to—what he considered to be an unjust war.[409] While his actions were unlikely to bring about political change, he may have modeled his behavior on historical acts of disobedience, like those of Dr. Martin Luther King, Jr., seeking judicial review of the laws in question.[410] Some suggest that because courts are deferential to the political branches and often will not intervene on matters of armed conflict,[411] conscientious objection is the "only

403. *See* Murdough, *supra* note 6, at 11–12.

404. *See* Medina, *supra* note 185, at 96 (explaining that these refusals are based on the "'public' goal of preventing the implementation of arguably wrong orders").

405. *See id.* Pure "'political' refusals are often presented as courageous manifestations of social responsibility, aimed at 'saving society' by preventing the implementation of certain policies." *Id.* (citing ROBERT T. HALL, THE MORALITY OF CIVIL DISOBEDIENCE 131 (1971)).

406. Lubell, *supra* note 35, at 419–20 ("Reducing the conscientious objection to a matter of criminal responsibility also carries the implications of the objection being a matter of self-interest, ignoring the existence of a higher moral conviction. This conviction can be stated as the wider notion of not wishing to participate in an illegitimate enterprise, and consequently acting to uphold international law.").

407. *See supra* note 344 (citing support for selective conscientious objection throughout international law).

408. *See* UNHCR Handbook, *supra* note 294, at ¶ 171.

409. *See* Medina, *supra* note 185, at 81 (describing such refusals as actions to "directly prevent" the implementation of military activities the objector sees as legally and/or morally flawed).

410. *See id*. (referencing Martin Luther King, Jr.'s defiance as an effort to get judicial review of the laws he purposefully refused to obey).

411. *See* Murdough, *supra* note 6, at 6 ("In all cases, the federal judiciary has consistently avoided finding any particular military operation to be an illegal war."); *see also* Medina, *supra* note 185, at 87 n.38 (discussing the ICJ's avoidance of "issuing its opinion regarding the legality of the continuance of the occupation" in the Palestinian Territory).

feasible means to prevent the implementation of [unlawful] policies."[412]

Similarly, Sally Yates, as Acting U.S. Attorney General, refused to enforce President Trump's immigration Executive Order.[413] In this instance, she shared the values of conscientious objectors who express "an act guided and justified by political principles, that is, by the principles of justice which regulate the constitution and social institutions."[414]

Other objectors are merely exercising their freedom of conscience or expression.[415] A contributing factor to perceptions of fairness and legitimacy within an organization is the employee's ability to have a voice.[416] Perceptions of legitimacy and fair treatment have been proven to increase individual compliance.[417] From the perspective of soldier that has few other ways in which to have a voice, expression may come in the form of refusing to deploy in support of a conflict he or she disagrees with.[418]

Captain Smith's suit against President Obama is again illustrative here.[419] Although Captain Smith's suit against the President was initially unsuccessful,[420] it served an important expressive function.[421] In his filing, Captain

412. Medina, *supra* note 185, at 86.

413. Shear et al., *supra* note 165; Quinta Jurecic, *Acting Attorney General Sally Yates Refuses to Enforce Trump Refugee EO*, LAWFARE (Jan. 30, 2017, 7:18 PM), https://www.lawfareblog.com/acting-attorney-general-sally-yates-refuses-enforce-trump-refugee-eo.

414. JOHN RAWLS, A THEORY OF JUSTICE 321 (rev. ed., 1999).

415. *See, e.g.*, Murdough, *supra* note 6, at 4 (explaining that Lieutenant Watada refused to participate in a war he believed to be against his moral and ethical values).

416. *See supra* Section II.

417. *See* Tyler & Jackson, *supra* note 50, at 81 ("In studies of the general population, people are similarly found to regard the police as legitimate if they believe that the police exercise their authority through fair and impartial means.").

418. *See supra* note 329 and accompanying text.

419. *See* Smith v. Obama, 217 F. Supp. 3d 283 (D.D.C. 2016).

420. *Id.* at 304 (dismissing Captain Smith's complaint because he "has not alleged an injury in fact sufficient for Article III standing, and his claims present non-justiciable political questions"); *see also* Marty Lederman, *Judge Kollar-Kotelly Dismisses Captain Smith's Suit*, JUST SECURITY (Nov. 22, 2016, 8:05 AM), https://www.justsecurity.org/34778/judge-kollar-kotelly-dismisses-captain-smiths-suit (arguing that Judge Kollar-Kotelly was correct that Captain Smith was not "injured" for standing purposes, but incorrect that Smith raised "nonjusticiable political questions"). Smith's case, retitled *Smith v. Trump*, is pending a decision by the D.C. Circuit Court of Appeals following oral argument on October 27, 2017. Bruce Ackerman, *Smith v. Trump In the D.C. Circuit: A Guided Tour of the Oral Argument*, LAWFARE (Nov. 1, 2007), https://www.lawfareblog.com/smith-v-trump-dc-circuit-guided-tour-oral-argument.

421. *See* Charlie Savage, *Suit Calling War on ISIS Illegal is Rejected*, N.Y. TIMES (Nov. 21, 2016),

Smith asserted, "My conscience bothered me."[422] It was not that he disagreed with the fight against the Islamic State organization.[423] Rather, he was uncomfortable operating in a conflict that was not authorized in accordance with Article I of the U.S. Constitution and the War Powers Resolution.[424] From this perspective, the expression of an individual's personal values and beliefs supersede potential repercussions for disobedience.[425] The lawfulness of the act of disobedience under these circumstances is less important than the ability to exercise a right to express one's sincerely held moral beliefs.[426]

The third reason individuals might disobey is to prevent harm to themselves.[427] There are two distinct subsets to this category of objector. The first, mostly relevant in the military context, is those who are fearful of fighting/death or are attempting to shirk their responsibilities.[428] It has been observed that two inferences arise if a conscientious objector joins the military even though he or she intends not to fight.[429] Either that individual is deceiving the government by joining the armed forces with no intent to fulfill the inherent obligations of doing so, or the professed conscientious beliefs are not sincere.[430] In the latter case, those individuals are comfortable swearing to the oath of service, signing a contract, and accepting military pay and benefits while putting their beliefs aside.[431] Yet, when the call comes to deploy, they

https://www.nytimes.com/2016/11/21/us/politics/judge-lawsuit-war-isis.html (articulating Captain Smith's concern with continuing in a conflict unauthorized by Congress).

422. Complaint for Declaratory Relief at ¶ 7, Smith v. Obama, 217 F. Supp. 3d 283 (D.D.C. 2016) (No. 1:16-cv-00843).

423. Savage, *supra* note 421.

424. *Id.*; *see also* U.S. CONST. art. I, § 8, cl. 11.; Joint Resolution Concerning the War Powers of Congress and the President Pub. L. No. 93-148, 87 Stat. 555, (1973). For a detailed discussion of the War Powers Resolution, see Murdough, *supra* note 6, at 5–7. For a discussion of the War Powers Resolution in the context of Smith v. Obama, see Goldsmith, *supra* note 323 and Lederman, *supra* note 323.

425. *See* Medina, *supra* note 185, at 88–89.

426. *See id.*

427. *See* Petty, *supra* note 388.

428. *See* Timothy Stewart-Winter, *Not A Soldier, Not A Slacker: Conscientious Objectors and Male Citizenship in the United States During the Second World War*, 19 J. GENDER & HIST. 519, 520 (2007) (distinguishing between a sincere objector and a slacker—someone too afraid, lazy, unpatriotic, and selfish to make the sacrifice of military service for his or her country).

429. Larsen & Hess, *supra* note 185, at 692.

430. *Id.*

431. *Id.*

suddenly find religious, moral, or legal grounds for refusing.[432] In these circumstances, the rational choice model pulls individuals toward noncompliance for fear of personal harm.[433]

It may be argued that soldiers who disobey orders that are manifestly unlawful or those who refuse to deploy because the cause of the conflict is unlawful or unjust are conforming to the compliance model because they do not wish to face prosecution for war crimes or for participating in an aggressive war.[434] Objections based on fear of future prosecution are necessarily made out of self-interest, which undermines the argument that the disobedience is based on a moral duty.[435]

A rational actor might choose to comply in order to avoid being scorned by the actor's social group.[436] In the Israeli Defense Force (IDF), for example, the application of the compliance model is well documented among conscientious objectors.[437] Soldiers in the IDF who disobey are shamed, and even treated as a danger to society or unpatriotic.[438] This provides a strong incentive for soldiers to follow orders—so as to avoid the scorn of peers, the IDF, and society, and to be seen as loyal patriots.[439]

Conversely, in the context of policing and banking, noncompliance may occur when individuals identify closely with a particular group, where derogations from lawful conduct are the norm.[440] This includes police who remain faithful to the "thin blue line" even when a department may be pursuing overly aggressive and at times discriminatory and violent practices.[441] In order to

432. *See* Stewart-Winter, *supra* note 428, at 520–21.

433. *See supra* notes 31–32 and accompanying text.

434. *See* Lubell, *supra* note 35, at 419–20.

435. *Id.*

436. *See* Cropanzano & Mitchell, *supra* note 135, at 876; Haas et al., *supra* note 51, at 445–46; *see also supra* notes 51, 135–36 and accompanying text.

437. Aviram, *supra* note 362, at 13 (noting that the threat of disobedience in the IDF is seen as particularly significant because the IDF has historically been seen not only as a defense institution but also as one that unifies an immigrant nation).

438. *See id.* at 12.

439. *See id.*

440. *See* Armacost, *supra* note 42, at 490 ("One common feature of systemic wrongdoing is that it tends to occur because the norms and practices of informal culture tolerate or even demand the very conduct that official policy declarations prohibit.").

441. *See id.* at 453–54.

avoid the self-harm of condemnation from peers, they will follow the potentially unlawful policy.[442] Similarly, rational choice dictates that individuals are driven to avoid punishment or seek reward.[443] Bankers at Wells Fargo, as noted, were willing to open fake accounts to avoid being fired or to receive bonuses.[444]

The second type of noncompliance in order to avoid self-harm is embodied by the person seeking to avoid lasting psychological or emotional damage from acting in a manner that is contrary to deeply held beliefs.[445] This is a key distinction between the objector seeking change and the objector attempting to save himself or herself from moral harm.[446] Joseph Raz describes the former as political disobedience (seeking policy change through dissent), and the latter as conscientious objection (seeking to protect oneself from committing a moral wrong).[447] Whether an objector fully or selectively objects, sincere beliefs drive objectors trying to save themselves from moral harm.[448]

The disparate treatment of the various forms of noncompliance is worth noting. For example, conscientious objectors, whether full or selective, have been described as courageous for their noncompliance with legal authority.[449] This is in no small part due to the consequences of disobedience.[450] These consequences include: stigma from peers, the military chain of command, and

442. *See id.* at 454 ("As a result of their organizational cohesiveness, officers are quick to ostracize colleagues who let them down, but they . . . view successful or heroic interventions as collective achievements.").

443. *See* Haas et al., *supra* note 51, at 445–46 ("[S]ocial exchange comprises actions contingent on the rewarding reactions of others, which over time provide mutually rewarding transactions and relationships.").

444. Glazer, *supra* note 126.

445. Petty, *supra* note 388.

446. *See* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 277 (1979).

447. *Id.*; Lubell, *supra* note 35, at 410. Ronald Dworkin stated that objection to participating in Vietnam was "integrity-based civil disobedience" while violating law while demonstrating was "justice-based civil disobedience." RONALD DWORKIN, A MATTER OF PRINCIPLE 107–09 (1985).

448. *See* Lubell, *supra* note 35, at 410.

449. *See* Osiel, *supra* note 29, at 956; *see also* SIR COMPTON MACKENZIE, *Refusing to Obey in World War*, *in* CERTAIN ASPECTS OF MORAL COURAGE 139–63 (1962); Richard Goldstein, *Hugh Thompson, 62, Who Saved Civilians at My Lai, Dies*, N.Y. TIMES (Jan. 7, 2006), http://www.nytimes.com/2006/01/07/us/hugh-thompson-62-who-saved-civilians-at-my-lai-dies.html (describing how the late Thompson received the Soldier's Medal in 1998—thirty years after the My Lai massacre—for landing his helicopter "in the line of fire between American ground troops and fleeing Vietnamese civilians to prevent their murder").

450. *See, e.g.*, MACKENZIE, *supra* note 449, at 146 (describing the case of Douglas Home, a man who was sentenced to prison and seen as morally courageous because he knew he might have been shot for his conscientious objections).

society;[451] a lengthy administrative process to determine whether the soldier should be characterized as a conscientious objector by probing the authenticity of the soldier's beliefs;[452] administrative separation;[453] and prosecution and punishment.[454] But the soldier following a moral obligation to disobey is ready to face these consequences.[455] What then should the state do to enforce compliance? The following subsection discusses these issues.

B. The Organizational Perspective: Compliance vs. Commitment

The state has a need to balance the long history of respecting valid objections to war, while also regulating an armed force ready to ensure the national security.[456] Organizations have a need to maximize employee performance and productivity.[457] Compliance theory comes into play here as governments, police departments, and corporate headquarters seek commitment to organizational values (internalization).[458] Sometimes, though, it is enough to gain compliance with orders.[459] As we will learn, perhaps surprisingly, true commitment to organizational values may also entail the courage to disobey unlawful policies and orders.[460]

451. *See* Lippman, *supra* note 288, at 35.

452. *See Conscientious Objection Fact Sheet*, GI RTS. HOTLINE, http://girightshotline.org/en/military-knowledge-base/topic/conscientious-objection-discharge (last visited Nov. 19, 2017); Mackey, *supra* note 185, at 40.

453. *Conscientious Objection Marines*, GI RTS. HOTLINE, http://girightshotline.org/en/military-knowledge-base/regulation/conscientious-objection-discharge/marines (last visited Nov. 19, 2017).

454. *See* 10 U.S.C. § 890 (2012).

455. *See* MACKENZIE, *supra* note 449, at 146.

456. *See* Lubell, *supra* note 35, at 412.

457. *See* Victor Lipman, *7 Management Practices That Can Improve Employee Productivity*, FORBES (June 17, 2013, 6:23 PM), https://www.forbes.com/sites/victorlipman/2013/06/17/7-management-practices-that-can-improve-employee-productivity/#71fb7641484c.

458. *See supra* notes 37–43 and accompanying text.

459. *See* Armacost, *supra* note 42, at 508–09.

460. *See* Osiel, *supra* note 29, at 956.

1. The Importance of Compliance

Organizations and states have a desire to enforce compliance. As one commentator notes, "The kind of accountability that we normally associate with authority-subject relations is a formal-institutional one, whereby the issuing of a legitimate authoritative directive is taken to entail some additional rights of the authority to safeguard compliance."[461] It follows that noncompliance can be interpreted as a threat to the state or organizational hierarchy.[462] It is a direct challenge not only to the law (soldiers must obey lawful orders, and employees must follow corporate regulations), but also to the policies and authority of the state or organization.[463] For example, a soldier's act of disobeying orders to deploy could be imitated by others, supported by public institutions, and result in wider popular support—all of which could undermine important military and national strategic objectives.[464] But the net positive effects of subordinate compliance, beyond limiting a possible threat to organizational control, are real and have been demonstrated in studies.

In the law enforcement context, the benefits of police compliance with laws and regulations include increased public obedience.[465] For citizens confronting law enforcement, fear of punishment—the rational choice model of compliance—has less to do with behavioral compliance than the fairness of the process and institutions.[466] In other words, when the government is seen to be exercising legitimate authority through fair dealing and just processes, individuals are more likely to internalize the desired social norms and obey the law.[467] This suggests that normative factors are a greater indicator of compliance than are threats of punishment.[468]

The identification model also plays a role in citizen compliance with law

461. Andrei Marmor, *An Institutional Conception of Authority* 22 (U.S.C. Legal Studies Working Paper Series, Working Paper No. 76, 2011).

462. *See, e.g.*, Aviram, *supra* note 362, at 13.

463. *See id.* at 34–35 ("[N]ot only do they disobey the law, they renounce its compulsory power." (internal citations omitted)); *see also* Lubell, *supra* note 35, at 412–13.

464. Aviram, *supra* note 362, at 35 (internal citations omitted).

465. *See* Bradford et al., *supra* note 75, at 173 (linking the fairness of officer conduct to the public's perception of police legitimacy).

466. *See id.*; Tyler & Jackson, *supra* note 50, at 89.

467. Bradford et al., *supra* note 75, at 173.

468. *See id.* at 174.

enforcement.[469] According to one study, "[L]egal compliance may be encouraged by police activity that strengthens people's identification with the social group the police represent, and which activates forms of self-regulation associated with the importance of being—and being seen to be—a group member in good standing."[470] In contrast, police misconduct and unfair practices cause individuals to push back on the norms the police seek to enforce, due to a perceived lack of legitimacy of police action.[471] The ripple effect is disassociation from the group represented by the police—whether community, state, or nation—and a lack of identification with that group and its associated norms.[472]

Identification and legitimacy also play a major role in military compliance.[473] Order and discipline is the bedrock of the military formation.[474] But what exactly does this mean? Good order and discipline, derived from the *Manual for Courts-Martial*, can be described as any regular and proper act by a soldier that contributes to the unit and mission success.[475] This standard is, in part, why the military is considered a "specialized society."[476] The disciplined and specialized nature of the armed forces not only allows it to develop a unique cultural identification, it also cultivates values such as courage.[477] Disobedience, then, is the antithesis to good order and discipline.

From the government's perspective, a permissive approach to objection

469. *See* Tyler & Jackson, *supra* note 50, at 79 (discussing a sense of normative alignment causing the community to believe an authority is justified and identify with the authority, and thus cooperate with the authority).

470. Bradford et al., *supra* note 75, at 174.

471. *See id*. at 185 ("[U]nfair policing promotes not just division between police and community but also division *within* the community . . . .").

472. *Id.*

473. *See, e.g.*, United States v. Huet-Vaughn, 43 M.J. 105, 114 (C.A.A.F. 1995); Smith v. Obama, 217 F. Supp. 3d 283, 285 (D.D.C. 2016); Zeitvogel, *supra* note 284 (providing examples of military servicemen who refused to obey orders from superiors they believed to be illegitimate).

474. *See* Osiel, *supra* note 29, at 967 ("Unjustified disobedience to a superior can be catastrophic for the safety of fellow soldiers in combat. It can also cause mission failure.").

475. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, art. 134, ¶ 60 (2016) (stating that "all disorders and neglects to the prejudice of good order and discipline . . . shall be taken cognizance of . . . and shall be punished at the discretion of [the] court").

476. *See* Parker v. Levy, 417 U.S. 733, 743 (1974).

477. *See* Osiel, *supra* note 29, at 956 (arguing that this "courage" may include disobeying unlawful orders).

is dangerous because it could disrupt "the kind of teamwork, cohesiveness, and effectiveness" required of an effective fighting force.[478] When objectors are permitted to remain in the force during a lengthy processing time of a conscientious objector claim, the impact on unit morale—some suggest—is real.[479] On the one hand, some argue that legitimizing conscientious objectors unequivocally increases their numbers.[480] Others agree about objectors spreading "like a disease," but instead argue that this is a good reason to keep available some type of in-service objection—in order to root out dissenters so that unit morale is minimally impacted.[481]

Still, there is growing concern about the changing nature of armed conflict and under what circumstances the military may be used in the near future.[482] This supports increased flexibility with regard to those who have moral and legal objections to specific conflicts. According to one commentator, "Social, political, and technological contexts that once lent relatively clear meaning to the notion of manifest illegality in war . . . may have largely dissolved."[483] Some suggest the United States is engaged in a "forever war"—where the boundaries of war and peace are blurred, and the military is tasked beyond its core capabilities.[484] In this context, it becomes increasingly difficult to train our forces to "develop habits of deliberation and skills of discernment that lead officers to do the right thing, not from fear of prosecution but from their disposition to behave honorably, i.e., to display the virtues valued by their profession, virtues imminent in its conscientious practice."[485]

Thus, even though the objector has little leverage over strategic national security decision-making, the state should, nonetheless, pay attention to the moral and legal concerns of the selective objector.[486] Specifically, if the state seeks greater compliance and, optimally, commitment from its service members, then it will ensure that the conflicts it engages in are consistent with the

478. Larsen & Hess, *supra* note 185, at 703;*see also* Lubell, *supra* note 35, at 413 (discussing a number of factors for rejecting a right to selective conscientious objection).

479. *See* Mackey, *supra* note 185, at 40–42.

480. *See* Medina, *supra* note 185, at 98–99.

481. *See* Mackey, *supra* note 185, at 42.

482. *See* Osiel, *supra* note 29, at 978–79.

483. Osiel, *supra* note 29, at 944–45.

484. *See* ROSA BROOKS, HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING: TALES FROM THE PENTAGON (2016); Elizabeth L. Hillman, *Mission Creep in Military Lawyering*, 43 CASE W. RES. J. INT'L L. 565, 568 (2011).

485. Osiel, *supra* note 29, at 1113.

486. *See* Gregory Foster, *Selective Conscientious Objection*, 46 SOCIETY 390, 390 (2009).

laws of armed conflict.[487] This is the same application of the legitimacy principle that encourages greater community compliance with law enforcement.[488] Applying fair process as well as organizational and governmental adherence to the law appeals to national values while providing a sense of pride, legitimacy, and moral safety for soldiers who have volunteered to serve and vowed to protect and defend the Constitution.[489]

2. The Effectiveness of Responses to Noncompliance

The go-to option for enforcing compliance seems to be a rational choice model.[490] In the military context, this model predicts that soldiers will obey orders if there is a strong disincentive, including prosecution under the UCMJ, or a lengthy, difficult administrative process to secure conscientious objector status.[491] The current approach is meant to deter other would-be objectors, and it serves a retributive function of punishing transgressions from state authority.[492] But even if this is the preferred approach for the state, it does not seem to strike the appropriate balance of the historical trend of respecting religious- and moral-based objections.[493] For "even genuine military objectors, who may be otherwise honorable and loyal soldiers yet feel they cannot in good conscience participate in a particular war, have no defense in the military justice system."[494]

Enforcing officer compliance in the law enforcement setting is also dealt

487. *See id.* at 391.

488. *See* Bradford et al., *supra* note 75, at 174 (describing how legitimacy in authorities coincides with greater community legal compliance); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why do People Help the Police Fight Crime in Their Communities?*, 6 OHIO STATE J. CRIM. L. 231, 234–35 (2008) (explaining that people "obey the law because they view it as legitimate and because it "expresses moral and social norms that are widely held").

489. *See* Tyler & Jackson, *supra* note 50, at 81–82.

490. *See* Armacost, *supra* note 42, at 507–08 (explaining that individual objectors are generally analyzed using a classical model of rational choice).

491. *See* Lippman, *supra* note 288, at 39–40.

492. *See* Aviram, *supra* note 362, at 47; Medina, *supra* note 185, at 95.

493. *See* Mackey, *supra* note 185, at 31–32; H. Patrick Sweeney, *Selective Conscientious Objection: The Practical Moral Alternative to Killing*, 1 LOY. L.A. L. REV. 113, 114 (1968) ("Historically, the recognized ground for exemption from compulsory military service in this country was that of religious belief.").

494. Murdough, *supra* note 6, at 5.

with most frequently through a rational choice model.[495] But, as discussed above,[496] civil and criminal cases against individual police misconduct are narrow in scope, difficult to win, and set a minimum bar for compliant behavior.[497] Many have suggested that impartial outside agencies, such as an ombudsman or citizen review panel, would resolve the conflicts of interest inherent in many internal affairs departments.[498] This would lead to more thorough investigations and the ability to pierce the "code of silence" officers might employ to protect their peers.[499] But ombudsman and citizen review panels, which are now prevalent in a large majority of police departments in major U.S. cities, have not been well received by police suspicious of their motives and disciplinary intent.[500] Additionally, because these review panels often look into specific instances of misconduct, they fail to address systemic, organizational issues in need of reform.[501] Rather than promote "healthy organizational norms," internal and external review mechanisms consistently look at police misconduct from a punitive perspective.[502] They have experienced limited success because they do not take a reformative approach.[503]

Recall that in the corporate context, high profile accounting and investing scandals resulted in the enactment of the Sarbanes-Oxley Act and the Dodd-Frank Act.[504] These were intended to prevent aggressive, unethical corporate practices.[505] Still, these external regulatory mechanisms were insufficient to prevent the Wells Fargo scandal, where employees pushed to create over two million fake accounts in order to boost profits.[506]

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495. *See* Armacost, *supra* note 42, at 507.

496. *See supra* notes 90–104 and accompanying text.

497. *See* Armacost, *supra* note 42, at 466.

498. *See* SKOLNICK & FYFE, supra note 83, at 220–24; Armacost, *supra* note 42, at 538.

499. *See* Armacost, *supra* note 42, at 454.

500. *See id.* at 538–40.

501. *See id.* at 540 ("Partly due to their incident-specific origins, many civilian review boards fail to take the additional steps of analyzing the policies that may have led to the incidents, identifying patterns of similar conduct, and asking what could be done to prevent such incidents in the future.").

502. *See id.* at 541.

503. *See id.* ("One of the primary impediments to their effectiveness is that these mechanisms have a 'fundamentally punitive orientation,' rather than a reformative one." (footnote omitted)).

504. *See supra* notes 119–22 and accompanying text.

505. *See* John C. Coates IV, *The Goals and Promise of the Sarbanes-Oxley Act*, 21 J. ECON. PERSP. 91, 91 (2007).

506. *See supra* notes 122–29 and accompanying text.

Internal oversight has been met with mixed reviews as well.[507] Most police departments incorporate some form of internal review of police misconduct.[508] Internal affairs departments, however, have no external oversight, and are criticized for "real or perceived conflicts of interest" with the police department they are charged with investigating.[509]

Ultimately, organizational reform is key to adjusting individual behavior.[510] This begins with examining the organizational culture, which is shaped by such factors as "societal culture, technologies, markets, competition, personality of founders, and personality of leaders."[511] Formal and informal culture must be addressed in order to mitigate misconduct.[512] This requires strong leadership that sets standards and clearly articulates norms that allow for behavioral change.[513] If ranking members of an organization do not act to change noncompliant behavior, they are, in effect, signaling their approval of that behavior.[514]

At least one study concludes that a "procedural justice approach," where officers accept the legitimacy of department policies, "may be a successful route for police managers and supervisors to increase officer compliance in general and to enhance officers' obedience to the rules on the use of force."[515] These principles can be applied in each of the illustrative settings in this arti-

507. *See* Armacost, *supra* note 42, at 536–39.

508. *Id.* at 536.

509. *Id.* at 537; *see also* JOHN L. BURRIS & CATHERINE WHITNEY, BLUE VS. BLACK: LET'S END THE CONFLICT BETWEEN COPS AND MINORITIES 63 (2000) ("The vast majority of civil complaint review boards can write as many reports and make as many recommendations as they wish . . . —it won't matter. Their influence is often hollow because they are not the final decision-makers.").

510. *See* Robert E. Worden, *The Causes of Police Brutality: Theory and Evidence on Police Use of Force*, *in* CRIMINAL JUSTICE THEORY: EXPLAINING THE NATURE AND BEHAVIOR OF CRIMINAL JUSTICE 155 (Edward R. Maguire & David E. Duffee eds., 2015) ("A theory that highlights organizational properties as influences on police behavior would seem to hold the greatest potential as a guide for police reform . . . .").

511. Gregory S. McNeal, *Organizational Culture, Professional Ethics and Guantanamo*, 42 CASE W. RES. J. INT'L L. 125, 127 (2009); *see also* JAY M. SHAFRITZ ET AL., CLASSICS OF ORGANIZATION THEORY 353 (6th ed., 2005) (listing, as reasons for why organizational cultures differ, basic assumptions, societal culture, technologies, markets, competition, and the personality of leadership).

512. *See* Armacost, *supra* note 42, at 521.

513. *See id.*

514. *See id. at* 521–22.

515. Haas et al., *supra* note 51, at 444.

cle. Imagine if the leaders at Wells Fargo had enforced a policy of non-retaliation for whistleblowers and internal reporting of misconduct, or recognized the harm caused by the aggressive sales tactics to customers and lower-level employees. Perhaps they would not now be settling lawsuits and paying nearly $200 million in penalties and fees.

The investigation into the Los Angeles Police Department following the 1991 televised beating of an intoxicated motorist, Rodney King, exposed a police culture that was unnecessarily aggressive.[516] In situations like these, even if an extreme policing style is not part of written department policy (formal norms), there may be informal pulls toward misconduct when bad behavior is "encouraged, rewarded, or tolerated by the organization."[517] This conclusion is not new. Nearly twenty years ago, Human Rights Watch conducted a study of police departments across the nation, including interviews from a wide range of government representatives and civil rights experts.[518] They concluded that individual police compliance with constitutional and statutory norms was less important than the cultural norms within police departments that allow this rogue behavior to persist.[519]

A positive organizational culture—one that enforces laws and values—will enhance group identity and legitimacy.[520] This will, in turn, encourage individuals to internalize organizational norms.[521] As one expert notes,

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516. *See* CHRISTOPHER COMMISSION, *supra* note 63, at i–ii, xiv; Armacost, *supra* note 42, at 495.

517. *See* Armacost, *supra* note 42, at 506.

518. *See* HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 1 (1998).

519. *See id.* at 5 ("There is no substitute for police leadership to make clear to new as well as veteran officers that human rights violations are not acceptable. . . . The current, longstanding and pervasive tolerance of abuse within police forces, . . . remains a crucial impediment to reducing police brutality.").

520. *See* Armacost, *supra* note 42, at 507 ("[O]rganizational behavior scholars and police scholars strongly corroborate the conclusion that police brutality in many departments is a systemic problem. Both agree that organizational culture changes the way individuals make decisions and that prescriptions for reform will ultimately fail unless police departments take these organizational factors into account."); Bradford et al., *supra* note 51, at 175 ("[P]rocedural justice generates legitimacy" and "g 'a just, fair, and valid basis of legal authority' but also identification with the group that the authority represents." (citation omitted)); Tom R. Tyler, *Promoting Employee Policy Adherence and Rule Following in Work Settings: The Value of Self-Regulatory Approaches*, 70 BROOK. L. REV. 1287, 1303 (2005) ("[A]n organizational environment characterized by fair procedures will activate strong employee organizational identification, thus leading employees to engage in desirable workplace behaviors and to hold positive attitudes towards their work organizations.").

521. *See* Bradford et al., *supra* note 51, at 175; Tyler, *supra* note 520, at 1305 ("When organizational procedures are regarded as fair, employees feel that they can safely identify with the work organization and thus become engaged in it. This approach is based on the idea that people are influenced by the

> People who identify more strongly with a social group will place greater weight on the outcomes for the group as a whole, and one implication here may be that to act lawfully is not only to act in line with one's own moral values but also to demonstrate and develop a sense of status and self-worth attached to the roles and responsibilities that define shared group membership.[522]

This suggests that if the group's members are treated fairly by the organization, then other members will want to obey the organizational norms and adopt its value set.[523] This is where individuals apply the internalization model of compliance theory.[524] As Frederick Schauer found, "Internalization—determining whether, the extent to which, and the way in which a rule provides a reason for action—is located initially and primarily within individual decision-makers."[525] The following subsection sheds light on how internalization might best be achieved.

3. Counterintuitive Reactions to Compliance Enforcement Measures

The reactions to enforcement measures may seem counterintuitive. In the police context, a punitive approach to officer misconduct often solidifies an "us versus them" mentality due to a sense that the individual officers are being treated unfairly.[526] In armed conflict, there is little evidence that soldiers who are allowed to object to specific armed conflicts cause a significant disruption in morale or day-to-day operations of the organization.[527] Similarly, allowing protected internal reporting of corporate misconduct would, in the long run,

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nature of the organizational environment in which they work so that the 'fit' between the practices of the organization and a person's impression of themselves (including their ethical values) is important.").

522. Bradford et al., *supra* note 51, at 177.

523. *See id.* at 175; Tyler, *supra* note 520, at 1305; Tyler & Blader, *supra* note 40, at 358 ("[T]o the degree that people feel that the group makes decisions via fair procedures, they are more likely to feel that their identity can be safely and securely merged with that of the group.").

524. *See* Bradford et al., *supra* note 51, at 175 (finding that once people conform to group values, they "abid[e] by the norms and values attached to . . . relationships within" that group because people begin to internalize the group's values).

525. SCHAUER, *supra* note 23, at 128.

526. *See* Armacost, *supra* note 42, at 517.

527. *See supra* Section III.C.

save shareholders millions of dollars and the reputational cost of a scandal.[528] This demonstrates that lenient laws can sometimes generate less criminality.[529] The reason for this is a behavioral one—when subordinates are treated fairly and have a voice, they view organizational actions as legitimate, which encourages overall commitment to the organization and internalization of shared values.[530]

What at first seems like a logical conclusion with regard to punishment and compliance often does not withstand closer scrutiny. For example, in the context of selective conscientious objectors, arguments that objectors undermine good order and discipline and could detrimentally impact strategic objectives simply do not withstand scrutiny.[531] For one thing, suggestions that disobedience will spread "like a disease" among the troops and impact readiness are not supported by empirical evidence.[532] In fact, the contrary may be true.[533] John Rawls noted that conscientious objection "no more challenges the state's authority than the celibacy of priests challenges the sanctity of marriage."[534] Furthermore, there is no evidence suggesting that the military will be unable to fill its billets if there is a permissive approach to selective conscientious objection.[535] A Just War theorist, Michael Walzer, framed the issue by stating, "The state can always find other servants."[536]

528. *See* Richard Moberly, *Protecting Whistleblowers by Contract*, 79 U. COLO. L. REV. 975, 980–81 (2008) (discussing the societal benefits of whistleblowers and arguing for increased protection of whistleblowers); Kate Kenny, *We Need to Protect the Whistleblowers Who Save Our Skins but Pay the Price*, THE CONVERSATION (May 12, 2015, 7:27 AM), http://theconversation.com/we-need-to-protect-the-whistleblowers-who-save-our-skins-but-pay-the-price-41635 ("[W]histleblowers can also save companies and organisations [sic] some serious cash.").

529. *See* Emanuela Carbonara et al., *Unjust Laws and Illegal Norms*, 32 INT'L REV. L. & ECON. 285, 297 (2012) (concluding that more lenient laws reduce protest, shifting the social norm "towards one less supportive of violators," and that, if this shift "is sufficiently high," it may reduce violations of the law).

530. *See* Bradford et al., *supra* note 51, at 175–76 ("When citizens recognize the legitimacy of an institution, they believe that the institution has the right to prescribe and enforce appropriate behavior and they feel a corresponding duty to bring their behavior in line with that which is expected.").

531. *See infra* notes 532–62 and accompanying text.

532. *See, e.g.*, Larsen & Hess, *supra* note 185, at 708 (providing no supporting data or empirical evidence); Mackey, *supra* note 185, at 40 n.106 (citing a Government Accountability Office report finding "that between 2002 and 2006 there were only 425 applications submitted from approximately 2.3 million servicemembers in the entire U.S. Armed Forces").

533. *See* Mackey, *supra* note 185, at 41; *infra* notes 537-48 and accompanying text.

534. RAWLS, *supra* note 414, at 335.

535. *See* Mackey, *supra* note 185, at 40.

536. MICHAEL WALZER, OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP 136 (1970).

Although religious- and moral-based disobedience serves as a potent symbol, there has never been so much as to cause a real threat to the readiness of armed forces.[537] Even in the context of strong public opposition to World War I, conscientious objectors made up only .0023% of all men required to register for military service.[538] In World War II, just .0029% of all men required to register were conscientious objectors.[539] This pattern—relatively few objectors compared to the number of draftees and service members—persisted throughout American conflicts in the twentieth and twenty-first centuries, with a notable spike during Vietnam.[540] In the year including Operation Desert Shield/Desert Storm—the first major U.S. conflict with an all-volunteer military force—more applications were approved than disapproved.[541] "[O]ut of 473 applications received, 270 were approved and 203 were disapproved."[542] From 2002 through 2006, during the height of the Global War on Terror, the armed services processed 425 applications for conscientious objector status.[543] That number is statistically insignificant compared to the 2.3 million members of the armed forces at the time.[544]

There is possibly little to no impact on either the unit or morale when

537. *See* Mackey, *supra* note 185, at 40 (noting the argument, in favor of conscientious objection, that "objectors have little impact on military operations because there are so few applicants").

538. Michael S. Neiberg, *Conscientious Objectors*, DICTIONARY OF AM. HIST., http://www.encyclopedia.com/social-sciences-and-law/political-science-and-government/political-science-terms-and-concepts-84 (last visited Oct. 28, 2017).

539. *Id*.

540. *See* KOHN, *supra* note 185, at 93 (stating that, in 1972, more conscientious objection exemptions were granted than individuals were inducted in to the military).

541. Larsen & Hess, *supra* note 185, at 701; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, CONSCIENTIOUS OBJECTORS: NUMBER OF APPLICATIONS REMAINED SMALL DURING THE PERSIAN GULF WAR (Nov. 9, 1993).

542. Larsen & Hess, *supra* note 185, at 701.

543. U.S. GOV'T ACCOUNTABILITY OFFICE, MILITARY PERSONNEL: NUMBER OF FORMALLY REPORTED APPLICATIONS FOR CONSCIENTIOUS OBJECTORS IS SMALL 3 (Sept. 28, 2007) [hereinafter GAO MILITARY PERSONNEL REPORT]; Mackey, *supra* note 185, at 40 n.106; James, *supra* note 282.

544. GAO MILITARY PERSONNEL REPORT, *supra* note 543, at 3–4 ("[T]his number is small relative to the Armed Force's total force of approximately 2.3 million servicemembers.").

objectors are allowed to go.[545] However, there is potential concern when objectors are required to stay.[546] According to one commentator, "[S]incere conscientious objectors serving in the military [could degrade] combat effectiveness during military operations."[547] Additionally, they cause the government the headache of devoting resources to administrative or even criminal procedures for those who refuse to train or fight.[548]

The United Kingdom has taken a novel approach to this dilemma for decades.[549] Among liberal democratic states, it is the closest to recognizing selective conscientious objection for volunteer forces, albeit indirectly.[550] The British Army has two primary reasons for this.[551] The first is to avoid getting drawn into litigating someone's conscience[552]—a difficult, resource-draining task.[553] The second is to spare the government undue embarrassment and/or harm to military readiness.[554] If the state seeks greater compliance from its soldiers (or more volunteers for its military force),[555] being seen as acting in a fair manner would help increase the legitimacy of the government's actions.[556] Fair treatment from the civil perspective includes allowing alternative forms of service, or a discharge for soldiers who have moral or legal objections to specific conflicts.[557]

There is also no evidence from a strategic perspective that noncompliance

545. *See* Osiel, *supra* note 29, at 1096 (observing that the traditionalists' argument that allowing conscientious objection "would necessarily lead to a breakdown of good order and discipline, and a resulting parade of horrors" is seriously weakened by the fact that it has never happened).

546. *See* Mackey, *supra* note 185, at 41 ("[F]orcing a conscientious objector to continue performing military service can have dire consequences not only for the individual, but for his entire military unit.").

547. *Id.*

548. *Id.*

549. *See* J. Carl Ficarrotta, *Selective Conscientious Objection: Some Guidelines for Implementation*, *in* WHEN SOLDIERS SAY NO: SELECTIVE CONSCIENTIOUS OBJECTION IN THE MODERN MILITARY, *supra* note 185, at 240.

550. *Id.* at 242.

551. *Id.*

552. *Id.* at 240.

553. *Id.* at 242.

554. *Id.* at 240.

555. *See* Kevin Knodell, *The British Army Can't Find Enough Soldiers*, WAR IS BORING (Jan. 29, 2017), https://warisboring.com/the-british-army-cant-find-enough-soldiers.

556. *See* Ficarrotta, *supra* note 549, at 198–99 ("[W]e want to give soldiers an out when they cannot participate in good conscience, not discourage them from so deciding or punishing them if they do.").

557. *See id.*

has substantially deterred military activities—lawful or otherwise.[558] Moreover, there are no signs that when soldiers disobey unlawful orders, there is a correlating increase in other soldiers willing to disobey lawful orders.[559] In fact the opposite is true.[560] Soldiers have been, and in the author's experience still are, trained that they have a duty to disobey unlawful orders.[561] The fact that this has not led to more widespread disobedience undermines the argument that a flexible approach to objectors will harm the national security.[562] The following section discusses the implementation of a more flexible approach to compliance.

V. SEEKING MIDDLE GROUND: ORGANIZATIONAL DESIGN AND COMPLIANCE

Behavioral pulls in the armed forces, like in the other areas discussed in this article, are strong.[563] It is remarkable that anyone decides to conscientiously object—whether selectively or in the traditional sense. Factors weighing on a soldier's decision to object include: "Patriotism, group solidarity, self-justification mechanisms of various sorts, fear of being branded a coward, strong desire to continue serving in other capacities (and to continue one's career), thoughts that one's own refusal would not make any difference in whether the war is fought, and many other influences . . . ."[564] For those that choose to follow their conscience, there must be a deep moral conviction involved.[565] Similarly, a police officer willing to cross the "thin blue line," a

558. *See* Medina, *supra* note 185, at 82–83. This is particularly true in the Israeli Defense Force, where the public encourages soldiers to object to participating in manifestly illegal activities. *See id*. at 83–84.

559. *See* Osiel, *supra* note 29, at 1096.

560. *See id.* at 1096–97.

561. *See id.* at 1096 (citing DEP'T OF THE ARMY, FIELD MANUAL 27-2, YOUR CONDUCT IN COMBAT UNDER THE LAW OF WAR, 26 (1984)).

562. *See id.* at 1096.

563. *See* Ficarrotta, *supra* note 549, at 199; *see also* HART, *supra* note 19, at 55–57 (discussing the difference between mere group habits and social rules that are enforced by pressure to conform, as well as absolute definitions of right and wrong, clarifying that the military's structure is such that its norms are rules and not group habits).

564. *Id.*

565. *See* Yossi Nehushtan, *Selective Conscientious Objection: Philosophical and Conceptual Doubts in Light of Israeli Case Law*, *in* WHEN SOLDIERS SAY NO: SELECTIVE CONSCIENTIOUS

corporate employee unafraid to break with cultural norms and informal sales policies, or a public servant refusing to follow an order issued by the President, all demonstrate a values-based approach to service and obedience.[566] This section discusses the application of a normative approach to compliance and prescribes dissent mechanisms that protect the individual from moral self-harm and also enhance organizational efficiency.

A. Commitment and Internalization of Norms

In the armed forces, current training seeks to develop leaders committed to the values of the service.[567] In other words, soldiers are encouraged to internalize the norms of their profession.[568] There have been two rival schools of thought in terms of how military leaders should be developed.[569] First, a deontological perspective suggests that military success depends on soldiers' strict adherence to orders.[570] Developments in research on leadership and military ethics demonstrate another way: the military should seek to cultivate flexible, agile, and adaptive leaders through positive incentives, rather than coercion.[571] This is supported by the social sciences and military doctrine, and it can be implemented across professional disciplines.[572]

In fact, Army Doctrine Reference Publication (ADRP) 6-22 provides that an essential foundation for Army leaders is character, "comprised of a person's moral and ethical qualities, [which] helps determine what is right and

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OBJECTION IN THE MODERN MILITARY, *supra* note 185, at 138.

566. *See supra* Section II.B.

567. *See* DEP'T OF THE ARMY, ARMY DOCTRINE REFERENCE PUBLICATION 1, THE ARMY PROFESSION ¶ 1-22 (June 14, 2015) [hereinafter ADRP 1].

568. *See id.* at ¶ 2-5.

569. *See* Osiel, supra note 29, at 1026.

570. *See id.* (explaining that this perspective "yield[s] two conclusions: (1) orders to subordinates should be cast as bright-line rules, allowing minimal scope for discretion; and (2) military law should authorize subordinates to question or disobey the orders of superiors only in the very narrowest of circumstances, if at all").

571. *See id.* at 1026–27 ("The new learning is that: (1) military effectiveness depends greatly on ground-level ingenuity and improvisation by field officers and combat groups; and (2) the army's organizational structure should therefore be informal enough within combat groups and sufficiently egalitarian among the ranks to foster strong personal loyalties, both vertically and horizontally.").

572. *Id.* Army Doctrine Reference Publication 1 defines the Army Ethic as an evolving set of laws, values, and beliefs, embedded within the Army culture of trust that motivates and guides the conduct of Army professionals bound together in a common moral purpose. ADRP 1, *supra* note 567, at ¶ 2-2.

gives a leader motivation to do what is appropriate, regardless of the circumstances or consequences."[573] This begins to sound very similar to the values-based approach of selective conscientious objectors—reliance upon an internal value set that guides proper action, regardless of negative consequences to themselves.[574] So when Lieutenant Watada refused to deploy to Iraq based on deeply held beliefs that the conflict was unlawful, he was relying on the same sort of values that the armed forces seek to instill in young leaders.[575]

The very nature of these beliefs—deeply held, internal, and sincere—is not something that is easily changed, or something that the armed services should expend a great deal of energy attempting to change.[576] Because a range of commitment occurs—from mere compliance (just do what I have to) to true commitment (internalization of norms and values)—there may be little hope for those who fall outside of this spectrum.[577] For soldiers, there is an administrative separation process for failing to adapt to the military environment.[578] Failure to adapt in this sense describes someone who is unable to do his or her job.[579] In the compliance context, failure to adapt could have more significant consequences.[580] Take Private Manning, for example, who felt isolated, alone, and not a part of the team or mission.[581] She lashed out in an unpredictable and unlawful manner by leaking large amounts of highly classified information.[582] By some accounts, her failure to adapt was recognized much earlier, but no action was taken.[583] Requiring continued service from those

573. DEP'T OF THE ARMY, ARMY DOCTRINE REFERENCE PUBLICATION 6-22, ARMY LEADERSHIP ¶ 3-1 (Aug. 1, 2012) [hereinafter ADRP 6-22].

574. *See* Lubell, *supra* note 35, at 410; Medina, *supra* note 185, at 88–89.

575. Petty, *supra* note 388.

576. Nehushtan, *supra* note 565, at 140 ("An individual cannot simply will to change their conscience, beliefs, and views.").

577. *See* ADRP 6-22*, supra* note 573, at ¶ 6-2 .

578. *See* U.S. DEP'T OF THE ARMY, REGULATION 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS ¶ 11-2 (Dec. 19, 2016).

579. *See id.*

580. *See, e.g.*, Steve Fishman, *Bradley Manning's Army of One*, N.Y. MAG. (July 3, 2011), http://nymag.com/news/features/bradley-manning-2011-7.

581. *See id.*

582. *See id.*

583. *See id.*

who object to a particular conflict—who will likely never internalize the mission objectives or values—could have similar results.[584]

Today's conflicts are more complex than ever before, requiring the highest levels of creativity and performance from agile, adaptive leaders.[585] As a result, the organizational benefits of trusting soldiers to rely upon their core values is clear.[586] For example, "Where troops are committed to the war effort and are loyal to national leadership, they can more often be trusted with the discretion to disobey unlawful orders."[587] The converse is likely also true—that committed soldiers can be trusted to perform effectively and honorably in support of the mission.[588]

Therefore, leaders seeking the most from subordinates, and highly effective organizations in general, will attempt to align the mission with values.[589] Neuroscience explains that the more an individual feels safe—either physically safe or, in this case, morally safe (acting within one's value set)—then the individual can "[i]nvok[e] the brain's higher capacity for social engagement, innovation, creativity, and ambition."[590] When an individual is required to act outside of a deeply held internal belief system, as in the case of selective objectors or dissenting civil servants, then the individual's performance level diminishes.[591]

584. *See id.*

585. *See* Osiel, *supra* note 29, at 1034 (providing the example of troops from the French Revolutionary war, whose "[s]uperiors could authorize unregulated fire where opportunity might present itself, rather than only on command").

586. *See id.*

587. *Id.*

588. *See id.* at 1027 ("[S]tudies of U.S. officers conducted by the military itself conclude that ethical behavior and technical competence are highly correlated, sometimes even inextricable.").

589. *See* Sunnie Giles, *The Most Important Leadership Competencies, According to Leaders Around the World*, HARV. BUS. REV. (March 15, 2016), https://hbr.org/2016/03/the-most-important-leadership-competencies-according-to-leaders-around-the-world ("From a neuroscience perspective, making sure that people feel safe on a deep level should be a #1 job for leaders. . . . This competency is all about behaving in a way that is consistent with your values.").

590. *Id.*

591. *See id.* (noting that when subordinates do not feel safe, they "lose access to the social engagement system of the limbic brain and the executive function of the prefrontal cortex, inhibiting creativity and the drive for excellence").

1. Avoiding Moral Harm

Were the state to provide some mechanism supporting selective conscientious objection, there would be several immediately cognizable benefits.[592] First, it aligns strategic priorities with national values.[593] As discussed above, "[t]he United States was built on the foundation of religious freedom and independent thought."[594] This is demonstrated by inclusion of conscientious objector exemptions in the earliest conscription laws of the Union, which have only expanded in scope over time.[595] "[T]he existence of conscientious objectors serves society by reminding [Americans] of the importance of holding [strong] moral and social convictions."[596]

Second, and along similar lines, allowing selective objection limits the demands that conflict with an individual's conscience.[597] For specific objectors, this averts the potential for moral harm—engaging in conduct they deem to be morally offensive or manifestly unlawful.[598] More broadly, allowing for disobedience in this context limits the alienation of citizens.[599] When dissenters are required to go through an arduous process—whether by trial or administrative action—the government runs the risk of making them martyrs and generating greater opposition to the underlying conflict.[600] This was certainly

592. *See* Lubell, *supra* note 35, at 413 (noting the arguments of support for recognition of conscientious objection, including "the importance of limiting the demands that conflict with the individual's conscience; not to create bitter and alienated citizens; conscientious objectors would make bad soldiers and disturb morale of forces; it is more economically productive to divert objectors to alternative service than to place them in prison; the existence of conscientious objectors serves society by reminding of the importance of holding moral and social convictions").

593. *See id.*; *see also* Parisi v. Davidson, 405 U.S. 34, 45 (1972) (noting the "historic respect in this Nation for valid conscientious objection to military service").

594. Mackey, *supra* note 185, at 42.

595. *Id.* at 32; *see supra* note 209–10 and accompanying text.

596. Lubell, *supra* note 35, at 413.

597. *Id.*; *see* HUNTINGTON, *supra* note 393, at 78 (discussing a soldier's choice between his conscience and the good of the state and virtue of obedience in the military).

598. *See* Mackey, *supra* note 185, at 41 ("Forcing sincere conscientious objectors to remain in the military compels them to choose either to follow their beliefs or to pick up a weapon and fight.").

599. *See* Lubell, *supra* note 35, at 413.

600. *See, e.g.*, Mark Tran, *The Iraq War on Trial*, THE GUARDIAN (Jan. 4, 2007, 8:48 EST), https://www.theguardian.com/world/2007/jan/04/iraq.usa (tracking public support of Lieutenant Watada, despite the administrative measures being taken in response to his disobedience).

the case with Lieutenant Watada, who garnered an abundance of public support.[601]

Finally, from a practical perspective, the government does not want soldiers in the ranks who are not even marginally committed to the mission.[602] Objectors who are forced to fight will likely make bad soldiers and ultimately hurt unit and individual soldier morale.[603] It is not their acts of disobedience that spread among the troops; it is their toxic attitudes when they are forced to deploy to a conflict they deem unlawful.[604] There is far more value in diverting conscientious objectors to alternative service than there is in spending the time and resources to prosecute and jail them.[605]

B. Reconciling Conscience and Commitment

Organizations should spend more energy developing committed members than punishing dissenters. The benefits of commitment to organizational values are clear: norm internalization that increases police effectiveness, corporate productivity, civil service, and the readiness of the military.[606] But how can such commitment to organizational values and the rule of law be realized when there are significant behavioral pulls away from compliance? The behavioral studies research suggests that individuals are more likely to identify with an organizational group and internalize the group norms when there are indicia of fairness and legitimacy.[607] These include: protected dissent mechanisms, an option for alternative service, and a demonstrable appraisal process of organizational conduct.[608]

601. *See id.*
602. *See* Mackey, *supra* note 185, at 41 ("[F]orcing a conscientious objector to continue performing military service can have dire consequences not only for the individual, but for his entire military unit.").
603. *Id.*
604. *See id*. at 42.
605. *See infra* Section V.B.2.
606. Tyler & Blader, *supra* note 40, at 353, 359; *see* Armacost *supra* note 42, at 508.
607. *See* Bradford et al., *supra* note 51, at 175; Tyler, *supra* note 520, at 1302–03.
608. *See infra* Section V.B.1–3.

1. Dissent Mechanisms

Organizational employees are more likely to comply with policies they view as legitimate.[609] Included in the perception of fair treatment is the opportunity to be heard.[610] Dissent mechanisms provide this opportunity and, as a result, are likely to contribute to organizational legitimacy and individual compliance.[611]

Military officers, as opposed to their civilian counterparts, are not as likely to shift moral responsibility for their actions to the person giving the orders.[612] Instead, "military officers see themselves as the person responsible for issuing orders and are trained to resist orders which they believe are unlawful and to do so without equivocation."[613] But how can organizations mitigate disobedience that is both internally and publicly disruptive?

Soldiers, for example, can and must be able to think for themselves, not only when it comes to ingenuity in battlefield tactics but also in evaluating the legal/ethical nature of superior orders—including orders to deploy.[614] In this sense, then, the effectiveness of the armed forces will not suffer if service members are afforded greater opportunity to question superior orders.[615] They might even benefit from allowing a mechanism for disobedience, such as allowing objectors to be either heard or more easily released from their service obligations.[616]

Internal dissent mechanisms should be the natural first step to reporting misconduct or expressing disagreement with organizational policy.[617] Internal affairs, investigator generals, and other reporting channels exist in many or-

609. *See* Tyler, *supra* note 520, at 1290–91 ("[P]eople are motivated to align their behavior with the rules of organizations or groups they belong to when they view those groups as being legitimate and consistent with their own sense of right and wrong."); Tyler & Jackson, *supra* note 50, at 78.

610. *See* Haas et al., *supra* note 51, at 443;Tyler, *supra* note 520, at 1304.

611. *See* Tyler, *supra* note 520, at 1304, 1310.

612. *See* McNeal, *supra* note 511, at 147.

613. *Id*.

614. *See* Osiel, *supra* note 29, at 1095–96.

615. *See id.* at 1096.

616. *See id.*

617. *See* Armacost, *supra* note 42, at 536–37 (explaining the potential of internal review mechanisms to improve police conduct).

ganizations in order to handle in-house complaints, thereby allowing the organization to address employee concerns.[618] As mentioned in Section II, the U.S. Department of State utilizes a unique tool known as the "Dissent Channel."[619] Dissent Channels are private communications that allow employees to express constructive dissent and "alternative views on substantive foreign policy issues" without fear of penalty.[620] The intent is to stimulate innovation and creativity within the Department and, likely, also to reduce negative public dissent.[621] As discussed above, over one thousand State Department employees signed a recent dissent channel stating:

> We are writing to register our dissent to the State Department's implementation of President Trump's Friday, January 27, 2017 Executive Order on "Protecting the Nation From Foreign Terrorist Entry Into The United States," which, among other things, blocks the Department of State from issuing immigrant and nonimmigrant visas to citizens of Syria, Iraq, Iran, Libya, Somalia, Sudan, and Yemen for a minimum 90 day period with an unclear timeline for when issuance would resume.[622]

Some argue that dissent channels may not actually alleviate all negative culture problems within an organization and might even cause informal reprisal actions.[623] Nonetheless, this criticism is one of execution and enforce-

618. *See id.*; Nelson O. Jr. Webber, *The Role of Internal Affairs in Police Training*, 61 FBI L. ENFORCEMENT BULL. 6, 6–7 (1992) (explaining the role of internal affairs investigations in police departments and how they could promote efficiency).

619. *See supra* note 179 and accompanying text.

620. DEP'T OF STATE, 2 FOREIGN AFFAIRS MANUAL § 071.1(b) (Sept. 28, 2011) [hereinafter FAM], https://fam.state.gov/fam/02fam/02fam0070.html.

621. *See id.* (explaining that "[t]he State Department has a strong interest in facilitating open, creative, and uncensored dialogue on substantive foreign policy issues . . . and a responsibility to foster an atmosphere supportive of such dialogue"); *see also* Gettleman, *supra* note 178.

622. *Dissent Channel: Alternatives to Closing Doors in Order to Secure Our Borders*, U.S. DEP'T OF STATE (Jan. 2017), https://assets.documentcloud.org/documents/3438487/Dissent-Memo.pdf; *see also* Josh Rogin, *State Department Dissent Memo: 'We are better than this ban'*, WASH. POST (Jan. 30, 2017), https://www.washingtonpost.com/news/josh-rogin/wp/2017/01/30/state-department-dissent-memo-we-are-better-than-this-ban/?utm_term=.b5d84eaeeb18.

623. *See* Michael P. Scharf & Colin T. McLaughlin, *On Terrorism and Whistleblowing*, 38 CASE W. RES. J. INT'L L. 567, 576 (2007).

ment of the dissent channel program, and not a critique of the program's intended effect.[624] Dissent mechanisms are yet another way that employees, soldiers, police, and civil servants can have a voice.[625]

Following internal mechanisms, external reporting is another option. For example, the Whistleblower Protection Act of 1989 was intended to protect federal government employees from retaliation when they voluntarily disclosed information relating to dishonest or illegal government practices.[626] Some argue that stronger whistleblower protections may have prevented the unlawful disclosures of Edward Snowden, a civilian defense contractor for the NSA not covered by the Whistleblower Protection Act.[627] In the private sector, the Dodd-Frank Act adopted a whistleblower program, allowing employees to alert authorities of financial wrongdoing, in part because the Securities and Exchange Commission was unable to effectively monitor the complex industry on its own.[628]

External regulation, as discussed in Section II, can have negative impacts within an organization.[629] In the police context, it may be seen as intrusive,

624. *See id.* (explaining that studies show the burden of proof required by the Merit Systems Protection Board leave whistleblowers vulnerable to reprisals, rather than protecting them).

625. *See* FAM, *supra* note 620, at § 071.1(b).

626. *See* Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified as amended in 5 U.S.C. § 1201 *et seq*.).

627. *See* Joe Davidson, *No Whistleblower Protections for Intelligence Contractors*, WASH. POST (June 19, 2013), https://www.washingtonpost.com/politics/federal_government/no-whistleblower-protections-for-intelligence-contractors/2013/06/19/dc3e1798-d8fa-11e2-a9f2-42ee3912ae0e_story.html. For further expert analysis on Edward Snowden's noncompliance, see, for example, Timothy Edgar, *Why Obama Should Pardon Edward Snowden*, LAWFARE (Sept. 14, 2016, 2:44 PM), https://www.lawfareblog.com/why-obama-should-pardon-edward-snowden; Michael J. Glennon, *Is Snowden Obliged to Accept Punishment?*, JUST SECURITY (June 3, 2014, 9:00 AM), https://www.justsecurity.org/11068/guest-post-snowden-obliged-accept-punishment; Jack Goldsmith, *Why President Obama Won't, and Shouldn't, Pardon Snowden*, LAWFARE (Sept. 16, 2016, 6:50 AM), https://www.lawfareblog.com/why-president-obama-wont-and-shouldnt-pardon-snowden; Rahul Sagar, *Is Edward Snowden Engaged in Civil Disobedience? —A Response to Glennon*, JUST SECURITY (June 5, 2014, 10:22 AM), https://www.justsecurity.org/11267/edward-snowden-engaged-civil-disobedience-a-response-glennon.

628. *See* S. REP. NO. 111-176, at 43 (2010) ("The SEC would have more help in identifying securities law violations through a new, robust whistleblower program designed to motivate people who know of securities law violations to tell the SEC."); *see also* Christina Parajon Skinner, *Whistleblowers and Financial Innovation*, 94 N.C.L. REV. 861, 879–82 (2016) (arguing that the whistleblower program is valuable not only as means to enforce compliance but also to encourage innovation).

629. *See supra* notes 105–09 and accompanying text.

re-emphasize an "us versus them" mentality between police and outsiders, and ostracize whistleblowers.[630] In the private sector, some have criticized the Dodd-Frank whistleblower provisions as going "too far by incentiviz[ing] [whistleblowers] to go outside the structure of the company and significantly reduc[ing] the effectiveness of internal due process."[631] This can cause disruption to internal compliance procedures, raise the risk of frivolous complaints, and impose internal social costs by creating "disloyal" whistleblowers.[632] Still, like the criticisms of internal dissent mechanisms, the potential costs of external whistleblowing is more a matter of execution than of value.[633] There is real value in "efficiency gains, more robust market discipline, and potential improvement in business conduct" that whistleblowing may produce.[634] On the government side, some see external whistleblower protections as necessary when internal reporting falls on deaf ears.[635]

2. Alternative Service

Other industries can learn from the fact that the military makes alternative service for conscientious objectors available. Instead of choosing immediate punishment, objectors may be given the opportunity to serve with dignity in another, non-objectionable capacity.[636] In order to show increased fairness, this opportunity should be extended to selective conscientious objectors as

630. *See* Armacost, *supra* note 42, at 517; CHRISTOPHER COMMISSION, *supra* note 63, at xvii.

631. Skinner, *supra* note 628, at 904 (quoting B. Nathaniel Garrett, Comment, *Dodd-Frank's Whistleblower Provision Fails to Go Far Enough: Making the Case for a Qui Tarn Provision in a Revised Foreign Corrupt Practices Act*, 81 U. Cin. L. Rev. 765, 766 (2012).

632. *See* Skinner, *supra* note 628, at 903–10.

633. *See id.* at 918.

634. *Id.* at 917.

635. *See* Peter Eisler & Susan Page, *3 NSA Veterans Speak Out on Whistle-Blower: We Told You So*, USA TODAY (June 16, 2013, 8:03 PM) https://www.usatoday.com/story/news/politics/2013/06/16/snowden-whistleblower-nsa-officials-roundtable/2428809 (interviewing NSA agents who explained that they "tried to stay for the better part of seven years inside the government trying to get the government to recognize the unconstitutional, illegal activity that they were doing" but could not get anyone in Congress or the Department of Justice to "pay any attention to it").

636. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-623, NATIONAL SECURITY: DOD SHOULD REEVALUATE REQUIREMENTS FOR THE SELECTIVE SERVICE SYSTEM 8 (2012) [hereinafter GAO NATIONAL SECURITY REPORT] ("If a draft occurred, the Selective Service System is also required to manage a 2-year program of alternative civilian service for conscientious objectors."); Mackey, *supra* note 185, at 33 ("After being granted conscientious objector status, the individual must then either serve in the military as a non-combatant or serve in a non-military civilian work program.").

well.[637]

In the United States, the concept of alternative service is as old as the first federal conscription law of 1863.[638] Today, the first alternative is non-combatant service as defined by Department of Defense Instruction (DODI) 1300.06.[639] Following non-combatant service is service in the civilian sector.[640] The Selective Service Act provides for alternative civilian service in the event of a draft.[641] This is done via agreements with civilian organizations, which supply jobs (e.g., health care, educational services, social services, community services, and agricultural services) to objectors who refuse to take even non-combatant roles in the military.[642] These programs are not designed as punishment.[643]

The objector receives several notable benefits through alternative service.[644] First and foremost, the soldier is able to avoid the moral harm of fighting in a war contrary to his or her deeply held moral beliefs.[645] Selective

637. *See* George Clifford, *Legalizing Selective Conscientious Objection*, 3(1) PUBLIC REASON 22–23 (2011) (distinguishing between a conscientious objector and a selective conscientious objector); Mackey, *supra* note 185, at 45 (explaining that alternative service "serves the goal of fairness by showing other servicemembers that a discharged conscientious objector is following through on his commitment to serve the United States").

638. *See* Mackey, *supra* note 185, at 46 n.159. Then, soldiers could opt out of military service if they (1) provided a substitute, (2) paid a fee, and (3) engaged in hospital or other charitable work. *Id.*

639. *See* 50 U.S.C. § 3806(j) (2012) ("Any person claiming exemption from combatant training and service because of such conscientious objections . . . shall . . . be assigned to noncombatant service . . . ."); DODI 1300.06, *supra* note 239, at § G.2 (defining non-combatant service as: (1) "[s]ervice in any unit of the Military Services that is unarmed at all times," (2) "[a]ny other assignment, the primary function of which, does not require the use of arms in combat provided that such other assignment is acceptable to the individual concerned and does not require him or her to bear arms or to be trained in their use," or (3) "[s]ervice aboard an armed ship or aircraft or in a combat zone . . . unless the individual concerned is personally and directly involved in the operation of weapons").

640. *See* 50 U.S.C. § 3806(j) (2012) (stating that if an objector is also opposed to participation in non-combatant service, he may serve in "civilian work contributing to the maintenance of the national health, safety, or interest"); GAO NATIONAL SECURITY REPORT, *supra* note 636, at 8–9.

641. GAO NATIONAL SECURITY REPORT, *supra* note 636, at 8–9 ("The Selective Service System maintains no-cost agreements with civilian organizations that, in the event of a draft, have agreed to supply jobs to conscientious objectors who oppose any form of military service, even in a noncombat capacity.").

642. *Id.*; SELECTIVE SERVICE SYSTEM, Alternative Service Employer Network, https://www.sss.gov/About/Alternative-Service/Alternative-Service-Employer-Network (last visited Nov. 20, 2017).

643. *See* 50 U.S.C. § 3806(j).

644. *See* Mackey, *supra* note 185, at 45.

645. *See id*.

objectors are also allowed the satisfaction of contributing skilled labor to societal programs in need.[646]

There is no legal requirement to offer alternative service, although it has been recommended at the international level.[647] The U.N. Human Rights Committee understood the practicality of alternative service in *Yoon et al. v. Republic of Korea*.[648] The Committee stated:

> [R]espect on the part of the State for conscientious beliefs and manifestations thereof is itself an important factor in ensuring cohesive and stable pluralism in society. . . . [I]t is in principle possible, and in practice common, to conceive of alternatives to compulsory military service that do not erode the basis of the principle of universal conscription but render equivalent social good and make equivalent demands on the individual, eliminating unfair disparities between those engaged in compulsory military service and those in alternative service.[649]

While this statement focuses on alternatives to compulsory service, there is no reason why this could not be applied in an all-volunteer force.[650] The former Human Rights Commission set out recommended criteria for alternative service.[651] They are that (1) conscientious objectors be provided an alternative to military service, (2) the alternative must be compatible with the reasons for objecting, (3) the service must be of a non-combatant or civilian character, and (4) it must be in the public interest and not punitive in nature.[652]

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646. *See id.* ("For example, a physician who still owes a service obligation and is granted a conscientious objection discharge could serve in an impoverished community that has trouble recruiting doctors.").

647. OHCHR Report, *supra* note 194, at 37–38.

648. *See id.* at 10–11.

649. *Id.* at 11.

650. *See* Mackey, *supra* note 185, at 41 (stating that the value of freedom of individual belief "holds true even in an all-volunteer military because people's beliefs can change"). The United States provides opportunities for conscientious objectors who obtain 1-A-O classification to perform alternative "military service in a non-combatant status." *See id.* at 43–44. Additionally, 1-O classification permits conscientious objectors to opt out of any "participation in military service of any kind in war in any form." *See id.* at 35. It has been argued that elimination of the 1-O classification, thus requiring some sort of alternative service, "minimize[s] other servicemembers' feelings of unfairness by requiring continued service." *Id.* at 43.

651. U.N. Human Rights Comm'n, *Conscientious Objection to Military Service*, ¶ 4, U.N. Doc. E/CN.4/RES/1998/77 (1998).

652. *Id.*; OHCHR Report, *supra* note 194, at 38–39.

Allowing selective conscientious objectors to continue in alternative service is a preferred approach for both the state and the individual.[653] From the state's perspective, continued service of some kind deters insincere conscientious objector applications,[654] preventing them from entering immediately into employment in the private sector.[655] Furthermore, alternative service is a more equitable resolution because it shows the remaining soldiers in the unit that the objector is following through on his or her service commitment.[656]

3. Appraising Dissent: Resignations, Discharges, and Exit Interviews

The hierarchy of preferences then, from an organizational perspective, is internal reporting, alternative service, and—if other options fail—resignation with dignity.[657] Civil servants have the difficult task of balancing loyalty to their agencies, and possibly the President, and their oath to support and defend the Constitution.[658] If they are given orders that are incompatible with that oath, they may be forced to resign.[659] As a former legal advisor at the State Department said, "To be an effective Legal Advisor . . . , one must recognize that the exit door must always be open. When there is a very important matter and the government refuses to follow advice that you consider to be essential, you are suppose[d] to resign."[660] Acting Attorney General Sally Yates faced a similar decision, but rather than resign, she issued an order to the Justice

653. *See infra* notes 654–56 and accompanying text.

654. Mackey, *supra* note 185, at 43.

655. *Id.* at 45. Mackey discusses how the only current disincentive for insincere selective objectors is the "requirement to repay any unearned bonuses, specialty, or education funds at time of discharge." *Id.* (citing 37 U.S.C.S. § 303a (2008)). At the time of discharge, most receive an honorable discharge—the highest characterization outgoing soldiers may receive—which qualifies them for full veteran benefits. *Id.* Between 2002 and 2006, 224 discharged conscientious objectors received honorable discharges, while 14 received general discharges. *Id.* at 45 n.146; GAO MILITARY PERSONNEL REPORT, *supra* note 543, at 23.

656. Mackey, *supra* note 185, at 45.

657. *See supra* note 148 and accompanying text (discussing the necessity of internal reporting for compliance within an organization); *supra* Section V.B.2 (suggesting alternative service requirements); *infra* notes 660, 665–66 (providing examples where resignation and elimination is a necessary last resort).

658. *See supra* notes 156–58 and accompanying text.

659. *See* Hathaway, *supra* note 159.

660. Scharf, *supra* note 23, at 73.

Department in direct contravention to the President's Executive Order on immigration.[661]

This principle does not apply as neatly in the military context.[662] Depending on officers' service obligations, resignation may not be a possibility unless they are at the end of their terms of service.[663] Enlisted soldiers are required to serve until the end of their service agreements.[664] If soldiers are conscientiously opposed to a specific conflict and refuse all other alternatives, the government has provided them with all available means of accommodating sincerely held beliefs.[665] The only remaining options are to eliminate the soldier from the service administratively, or seek prosecution and punishment.[666]

Punishing selective objectors at this point serves little function, other than retribution (or, at the very least, the appearance thereof).[667] As discussed above, punishing soldiers who refuse to support certain conflicts has little deterrent effect on others and is a significant drain on resources.[668] There is also little evidence to suggest that allowing selective objectors will have a detrimental impact on morale or mission effectiveness.[669] It is unlikely that a noncompliant soldier will be an effective fighter, and, even worse, she could act out in an unlawful way.[670] Further, in keeping with the U.S. tradition of respecting the individual religious and moral beliefs of conscientious objectors, there is a historical argument to be made for respecting the internal values of the few selective objectors who come forward.[671]

Nonetheless, it hardly seems just to allow someone to virtually opt out of

661. *See supra* notes 167–68 and accompanying text.

662. *See infra* notes 663–66 and accompanying text.

663. *See* Stew Smith, *How Can I Get Out of the Military?: Resigning from the Military*, THE BALANCE (Oct. 27, 2016), https://www.thebalance.com/how-can-i-get-out-of-the-military-3357000.

664. *See id.*

665. *See supra* notes 639–43 and accompanying text (describing the alternative service provision, which allows for non-combatant service or civilian work).

666. *See* Stew Smith, *Military Justice 101-Discharges*, THE BALANCE (Nov. 9, 2016), https://www.thebalance.com/military-justice-101-part-iii-4056918; Rod Powers, *Getting Out of the Military: Early Separation From Active Duty Military Service is Rare*, THE BALANCE (Feb. 3, 2017), https://www.thebalance.com/getting-kicked-out-of-the-military-involuntary-discharges-3356962.

667. *See* Aviram, *supra* note 362, at 47; Medina, *supra* note 185, at 95.

668. Ellner et al., *supra* note 298, at 242; *see supra* note 33 and accompanying text.

669. *See supra* Section IV.B.3.

670. *See* Mackey, *supra* note 185, at 41 (stating that the negative consequences of retraining sincere conscientious objectors include "degraded combat effectiveness during military operations and increased criminal and administrative procedures for servicemembers who refuse to train or fight").

671. *See supra* Section III.A.

a dangerous conflict, while others—who also believe they are making a moral decision—deploy to a combat zone.[672] Under these circumstances, it is only fair that a soldier who has refused all other forms of service be discharged (if an enlisted soldier) or eliminated (if an officer) with a general characterization of service.[673] There is a social stigma attached to any characterization of service besides an honorable discharge.[674] Also, a general characterization of service limits the type of entitlements available to veterans.[675] A general characterization of service, then, prevents insincere objectors from unjust enrichment through an honorable characterization of service and its accompanying post-service benefits.[676]

A final thought on the treatment of selective objectors is worth mentioning, and is readily applicable to objectors in other disciplines. In the current system for traditional conscientious objectors, there is a screening process.[677] In order to test the veracity of the objector's beliefs, the soldier must be interviewed by a chaplain and a behavioral health specialist.[678] These interviews are summarized in reports, which become a part of the conscientious objection packet and are used to determine whether the soldier qualifies for the status.[679] For the selective objector who refuses all forms of alternative service, this process should continue.

The exit screening interviews conducted by a chaplain and a behavioral health specialist—or other industry-relevant personnel—will serve several

672. *See* Mackey, *supra* note 185, at 43 (discussing the unfairness of requiring some servicemembers to continue service while conscientious objectors are discharged).

673. *See supra* notes 665–66 and accompanying text; *see also infra* notes 674–76 and accompanying text.

674. *See* Rod Powers, *What is an Entry Level Separation (ELS) in the Military?: A Look at the Basic Military Discharge Characterizations*, THE BALANCE (Nov. 9, 2016), https://www.thebalance.com/entry-level-separations-what-is-an-els-3356960 (explaining that a general discharge "indicates that the person screwed up and got kicked out of the military").

675. *See* 38 C.F.R. § 21.9520 (2009) (stating that honorable discharge is among the basic eligibility requirements for educational assistance, for example); U.S. DEP'T OF THE ARMY, REGULATION 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS, ¶ 3–6 (Dec. 19, 2016); Powers, *supra* note 674 (stating that "[t]hose who receive a 'general' discharge are eligible for most veteran benefits, except those benefits that require an honorable discharge").

676. *See* 38 C.F.R. § 21.9520.

677. *See* DODI 1300.06, *supra* note 239, at §§ 4.2–4.4.

678. *Id.* at § 4.2.

679. *Id.* at §§ 4.2, 4.4

important appraisal functions. First, it might reveal that there are other issues at play other than objection to a particular conflict.[680] It could be that the soldier is being hazed or bullied and is seeking a way out.[681] The unit leadership might be toxic and the soldier may feel there is no other way to leave the unit other than to file for conscientious objector status.[682] Issues such as these will require additional investigation, and, if handled properly, might give the would-be objector the confidence to continue to serve in some capacity.[683]

Second, in the modern armed forces, with their high operational tempos and multiple deployments, it could be that the soldier is struggling with Post Traumatic Stress Disorder (PTSD), anxiety, or depression.[684] In the case of Private Manning, there is evidence that she was experiencing significant behavioral health issues that were not effectively diagnosed and treated.[685] Exit

680. *Cf.* Susan M. Heathfield, *How to Conduct an Effective Exit Interview: Conduct an Effective Exit Interview to Understand Why Your Employees Leave*, THE BALANCE (Sept. 15, 2016), https://www.thebalance.com/exit-interview-1918121.

681. *See* Stephen M. Hernandez, *A Better Understanding of Bullying and Hazing in the Military*, 223 MIL. L. REV. 415, 422 (2015) ("While the prevalence of hazing in the U.S. Military is unknown, and no studies to date have been conducted amongst the military population, studies done on similar populations suggest that the prevalence could be high.").

682. *See* Craig Whitlock, *Pentagon Investigations Point to Military System That Promotes Abusive Leaders*, WASH. POST (Jan. 28, 2014), https://www.washingtonpost.com/world/national-security/pentagon-investigations-point-to-military-system-that-promotes-abusive-leaders/2014/01/28/3e1be1f0-8799-11e3-916e-e01534b1e132_story.html?utm_term=.e67cdbf8139d.

683. *Cf.* Everett Spain & Boris Groysberg, *Making Exit Interviews Count*, HARV. BUS. REV. (Apr. 2016), https://hbr.org/2016/04/making-exit-interviews-count (finding similar positive outcomes in the employer/employee context). "If done well, an [exit interview] . . . can catalyze leaders' listening skills, reveal what does or doesn't work inside the organization, [and] highlight hidden challenges and opportunities . . . . It can promote engagement and enhance retention by signaling to employees that their views matter. And it can turn departing employees into corporate ambassadors for years to come." *Id*.

684. Meghan Doane & Natalie Rivera, *Exit Interviews' Impact on Veterans' Reintegration From Combat to Civilian Life: A Social Workers Call to Action*, 521 ELEC. THESES, PROJECTS, AND DISSERTATIONS—CAL. ST. U. SAN BERNADINO 11–12 (June 2017), http://scholarworks.lib.csusb.edu/cgi/viewcontent.cgi?article=1557&context=etd (finding that 18.5% of U.S. service members returning from Afghanistan and Iraq suffer from PTSD or depression, and that the statistic only counts those veterans who have sought such services).

685. *Bradley Manning Had Long Been Plagued by Mental Health Issues*, N.P.R. (July 31, 2013, 4:52 PM), http://www.npr.org/templates/story/story.php?storyId=207458025 ("[T]he Army was well aware of [Manning's] disciplinary problems, of violent acting out, of mental instability over a period of time. At one point, he had the bolt removed from his weapon because there was fear that he would harm himself or others. . . . There was a very vigorous debate about whether he was qualified—that is, mentally stable enough—to serve overseas.").

interviews with an objecting soldier might just reveal behavioral health concerns that are in need of further treatment.[686]

Finally, exit interviews of conscientious objectors serve as a historical record and should be required reading for senior military leaders and civilian policymakers.[687] There is value at the strategic level in understanding how policy is impacting the moral well-being of the soldiers and, by extension, society.[688] While the actions of Lieutenant Watada were never going to influence the President to withdraw troops from Iraq, his complaints—and those of many others across the country—could have provided valuable information regarding domestic support for the war effort, as well as lessons learned for future conflicts.[689]

It is fitting, too, that Chaplains are a part of the exit interview process. After all, conscientious objection began as a religious objection to all war.[690] While the selective conscientious objector does not protest all military service, decades of jurisprudence confirm that objections based on strongly held moral, political, and legal beliefs are just as valid today as objections based on religious beliefs were at the formation of the Union.[691]

686. *See* Doane & Rivera, *supra* note 684, at 35 ("Given the limited opportunities for veterans to process their experiences while on deployment and the ease with which they can manipulate their self-assessments, it is important to take a look at how exit interviews can be more beneficial to their essential needs."). Exit interviews in person may increase the chances of behavioral concerns being revealed. *See* U.S. DEP'T OF ARMY, REGULATION 600-43, CONSCIENTIOUS OBJECTION, ¶ 2–2 (Aug. 6, 2006) (requiring an interview with an applicant for conscientious objection with a military chaplain and a psychiatrist).

687. There is no indication that the United States will conduct anything similar to the United Kingdom's Chilcot Report regarding the Iraq War, so the historical record of critical analysis of the conflict—and others like it—must be maintained through objectors' exit interviews. *See* COMM. OF PRIVY COUNSELLORS, THE REPORT OF THE IRAQ INQUIRY (2016) [hereinafter the CHILCOT REPORT] (creating a historical record of the United Kingdom's inquiry into the Iraq War).

688. *Cf.* Sandra Laville, *Government Risked Mental Health of Troops, Chilcot Report Reveals*, THE GUARDIAN (July 7, 2016, 2:00 PM), https://www.theguardian.com/uk-news/2016/jul/07/chilcot-report-government-overstretched-military-iraq-war-inquiry (providing a critical review of military wellbeing after the United Kingdom's decision to assist in the invasion of Iraq).

689. *See* Jeremy Brecher & Brendan Smith, *Will the Watada Mistrial Spark an End to the War?*, THE NATION (Feb. 9, 2007), https://www.thenation.com/article/will-watada-mistrial-spark-end-war; Murphy, *supra* note 285.

690. *See* Mackey, *supra* note 185, at 31–32.

691. *See, e.g.*, Lubell, *supra* note 35, at 407–09; Murdough, *supra* note 6, at 5–7.

VI. CONCLUSION

Decades ago, military historian John Keegan wrote of a growing distaste for war evident in laws allowing for dissenters and conscientious objectors.[692] More recently, a headline about the trial of Lieutenant Watada read, "Will the Watada Mistrial Spark an End to the War?"[693] Arguably, it had very little impact.[694] Today, conflict exists on the periphery of civil society. Retired General Peter Chiarelli once noted that while American troops were overseas fighting, there was a lack of "true national commitment."[695] This may be so because "the current state of the law allows a President to initiate a war easily and [domestically] legally."[696] The banality of modern conflict often does not make headline news.

In contrast, conflicts of conscience and compliance have dominated news reports during President Trump's first weeks in office.[697] The President is in the process of implementing major changes to law enforcement, corporate regulation, government bureaucracy, and the national security.[698] As this article has shown, there will be situations in which individuals must choose whether to obey policy and legal directives or their conscience.[699] At a time when high profile controversies arise with frequency in each of these areas, it

692. JOHN KEEGAN, THE FACE OF BATTLE 325 (1976) ("[T]he climate of family, school and cultural life, . . . has in the aftermath of two world wars become suffused with a deep antipathy to violence and conflict. The abolition of capital punishment in almost all Western countries is but the most striking example of this distaste; with it belongs . . . the right to conscientious objection now conceded even by those states, like France, which have always castigated it as unsocial . . . .").

693. Brecher & Smith, *supra* note 689.

694. *See* Murdough, *supra* note 6, at 6 (explaining that despite challenges by Watada and other military officers, "the War Powers Act has been invoked to authorize military action" in multiple countries). *See generally* Medina, *supra* note 185 (analyzing the impact, at the strategic level, of conscientious objectors in Israel).

695. Roger Cohen, *A U.S. General's Disquiet*, N.Y. TIMES (Sept. 10, 2007), http://www.nytimes.com/2007/09/10/opinion/10cohen.html.

696. *See* Murdough, *supra* note 6, at 7 n.44. This was also an underlying concern of Captain Smith in his suit against the President. *See* Smith v. Obama, 217 F. Supp. 3d 283, 285 (D.D.C. 2016) ("[Smith] acknowledges that whether military action has been duly authorized is generally a question 'Congress is supposed to answer,' but complains that Congress is 'AWOL.'")

697. *See supra* notes 161–70 and accompanying text.

698. *See* Eli Watkins & Joyce Tseng, *Trump's Policies and How They'll Change America—In Charts*, CNN (Mar. 15, 2017, 7:21 PM), http://www.cnn.com/2017/03/14/politics/donald-trump-policy-numbers-impact/index.html; Avalon Zoppo et al., *Here's the Full List of Donald Trump's Executive Orders*, NBC NEWS (Oct. 17, 2017, 11:58 AM), https://www.nbcnews.com/politics/white-house/here-s-full-list-donald-trump-s-executive-orders-n720796.

699. *See supra* Section II.B.

is necessary to consider the impact of new policies and regulations on ethical and legal compliance.

Leaders, who are best situated to direct organizational culture and reform, must ask whether their directives encourage internalization of desired norms (e.g., respect for the law), or whether they increase the conflict between conscience and compliance. In the police context, does an emphasis on "law and order" send a signal that police should continue to use aggressive policies at the expense of the public and constitutionally protected rights? Does deregulation of industry promote ethical business practices or does it encourage profit maximization no matter the moral cost? Does singling out civil servants for expressing dissenting views help or hurt the interagency decision-making process? And how will decisions to enter future conflicts impact the desire of the current volunteer armed force to remain committed to the fight, or the ability to enlist new recruits? Answering these questions is necessary to resolve modern compliance dilemmas.[700]

Providing a release valve for organizational dissent will alleviate some of the pressure from these situations.[701] In the military context, providing flexibility to soldiers that do not internalize the military values or mission priorities will increase organizational readiness.[702] It will allow for soldiers to enter alternative service—either in non-combatant roles or in the civilian sector—which provides a beneficial public service.[703] For those that must be eliminated from the service, it avoids moral harm to the individual and roots out soldiers that could become toxic to unit morale.[704] The military does not have the resources to compel internalization of values that are contrary to the individual's internal belief system—if that is possible at all.[705] Compliance theory suggests it is not.[706]

Soldiers like Lieutenant Watada and Captain Smith, who voice moral and legal objections to the underlying conflict, may sincerely believe they will

700. *See supra* Section IV.B.
701. *See supra* Section V.B.1.
702. *See supra* Section V.B.2.
703. *See supra* Section V.B.2.
704. *See supra* Section V.A.1.
705. *See supra* Section III.
706. *See supra* Section II.A.

undermine their values and those of the nation if they participate in an unlawful war.[707] Assuming these concerns are sincere, they are worthy of the attention of the military and civilian leadership. They raise significant concerns about the moral pulse of the nation and the strategic direction of U.S. national security. Nevertheless, they are not protected under the law.[708] There is no duty to disobey orders to deploy in support of an unlawful conflict, unlike the duty to disobey manifestly unlawful orders in combat.[709]

Organizational culture is more influential on individual behavior than are outside measures and regulations.[710] The behavioral pull toward following the norms of the social group is strong.[711] This is equally as true in the armed forces as it is in other social groups—such as police, corporate, and civil servants.[712] Therefore, if the organizational culture is one that rejects immoral or unlawful practices, then it is likely that the individual—who self identifies with that group—will comply with the law.[713] In contrast, if the group culture, whether formal or informal, is one that condones aggressive policies such as an aggressive approach to using force by the police, then it is likely that this behavior will be tolerated and will continue.[714]

As the United States continues in an era of complex and uncertain global threats, and faces increasing uncertainty at home, the moment is right to reexamine the definition of duty and the values inherent in obedience. Politicians and their supporters making casual references to the use of torture or targeting civilians during combat are not aberrations that can simply be shrugged off. In the not-so-distant past, American military generals were asked to accept and carry out policies like these.[715] Thankfully, many refused.[716] Then, as

707. *See supra* Section III.B.
708. *See supra* Section III.B.
709. *See supra* Section III.B.
710. *See supra* Section IV.A.
711. *See supra* Section IV.A.
712. *See supra* Section IV.A.
713. *See supra* Section IV.B.1.
714. *See supra* Section IV.A.
715. *See, e.g.*, Rosa Brooks, *The Military Wouldn't Save Us from President Trump's Illegal Orders*, WASH. POST (Mar. 4, 2016), https://www.washingtonpost.com/opinions/the-military-wouldnt-save-us-from-president-trumps-illegal-orders/2016/03/04/9ef8fd44-e0ea-11e5-846c-10191d1fc4ec_story.html?utm_term=.c39b156222e1 ("[B]y January 2002, the [Justice Department's] office of legal counsel was instructing the Defense Department that Geneva Convention protections did not apply to Taliban or al-Quada fighters.").
716. *See, e.g.*, *id.* ("Colin Powell, the George W. Bush administration's secretary of state and former chairman of the Joint Chiefs of staff, objected immediately, as did several top active-duty military

now, the limits of duty and disobedience were tested.

officials.").