
Article

**Entrapped: A Reconceptualization of the
Obedience to Orders Defense**

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INTRODUCTION

The obedience to orders defense has a unique place in the criminal justice system. As a military-based defense, it allows a soldier to escape liability by arguing that she was simply following orders when she committed the supposed crime.¹ The defense carries the same requirements as many civilian criminal law defenses, such as self-defense, mistake of law, or duress.² Most notably, the defendant's state of mind is subjected to some level of objective scrutiny.³ This focus on objective scrutiny, however, fails to fully appreciate the government's improper role in a crime where a soldier is simply doing what she was told.⁴ In an effort to provide a defense that better serves soldiers, this Article presents the first reconceptualization of the obedience to orders defense that is more closely aligned with the civilian defense of entrapment. Entrapment—along with its unique requirements—appropriately acknowledges the government's role in pressuring the defendant to commit the crime. Recognizing that obedience to orders also involves a type of government coercion, this Article finally reorients the defense accordingly and, in the process, creates a more narrowly

1. See, e.g., *United States v. Calley*, 48 C.M.R. 19, 26–27 (C.M.A. 1973).

2. See *infra* Part II.A.

3. See generally Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 LEWIS & CLARK L. REV. 1233 (2010); V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691 (2003).

4. See *infra* Parts I.E.1, II.A.

tailored defense that more closely comports with our moral intuitions.

The history of obedience to orders traces back to the nineteenth century.⁵ Although the scope of immunity that the defense confers has changed through time, its basic contours have not.⁶ In a criminal prosecution, the defendant can argue that she was simply following orders when she committed the criminal act.⁷ A successful application of the defense carries two requirements—one subjective, one objective.⁸ The subjective component asks whether the defendant knew the order was unlawful.⁹ If so, the defense will not be successful.¹⁰ Assuming the defendant did not know the unlawful nature of the order, the second step turns to scrutinizing this assessment.¹¹ The operative question is whether a soldier of common understanding in the defendant's situation also would not have known the order was unlawful.¹² The latter, objective step seeks to examine whether the defendant's subjective state of mind was reasonable.¹³

In analyzing this defense, scholars and courts have almost exclusively focused on interpreting the above-mentioned objective standard.¹⁴ How do you define a "person of common understanding?" Should it include the soldier's particular experiences and training? How easy is it to ascertain illegality when the act implicates broader military objectives?¹⁵ To be sure, these are important questions. But this inquiry assumes, in the first instance, that the dual model is the right model.

In one respect, the use of dual state-of-mind requirements, and the use of objective scrutiny specifically, is perhaps not surprising. Most civilian criminal law defenses also have these

5. See *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (rejecting the defense where Little had orders from the President of the United States); *infra* Part I.A.

6. James B. Insko, *Defense of Superior Orders Before Military Commissions*, 13 DUKE J. COMP. & INT'L L. 389, 399–407 (2003).

7. See *id.* at 399.

8. See *infra* Part II.A.

9. See *infra* Part II.A.

10. See *infra* Part II.A.

11. See *infra* Part II.A.

12. See *infra* Part II.A.

13. See *infra* Part II.A.

14. See *infra* Part II.A and accompanying notes.

15. See *infra* Part II.A and accompanying notes.

two elements.¹⁶ A defendant must have a good faith belief and, more importantly, this belief must pass a reasonable person standard.¹⁷ Both the “reasonable person” and the “soldier of common understanding” standards share the same purpose. They are hypothetical constructs intended to objectively scrutinize the defendant’s actions or state of mind.¹⁸ The rationale for these objective requirements is to promulgate a uniform community standard that regulates the behavior of citizens.¹⁹

Obedience to orders has been most closely associated with the civilian criminal law defenses of mistake of law and duress—both of which carry the aforementioned dual state-of-mind requirements.²⁰ Mistake of law involves a defendant who mistakenly relies on an official statement of the law that a particular act is not a crime.²¹ Based on this interpretation, the defendant carries out the relevant acts, thinking she is doing nothing illegal. This is like obedience to orders, where a defendant also mistakenly believes that, by following the orders of her commanding officer, she is not committing a crime. Duress involves a defendant who commits a crime because of threats of immediate bodily harm or death.²² The defendant is coerced into doing the act.²³ This, too, is similar to the defense of obedience to orders, where a soldier feels pressured into obeying a military order because of the threat of criminal punishment for disobedience.

But what sets obedience to orders apart from both duress and mistake of law is the presence of government coercion. Only the former involves a government soldier ordering an individual defendant to commit a crime.²⁴ In the mistake of law case, the defendant is making her own choice to rely on an official interpretation, without any pressure from the government, and in the case of duress, the defendant is pressured by a private citizen. In short, the government plays no active role in ei-

16. See *infra* Parts II.A, III.A–B.

17. See generally Elaine M. Chiu, *Culture as Justification, Not Excuse*, 43 AM. CRIM. L. REV. 1317, 1338 (2006) (“Of course, a good faith subjective belief is essential but it is only the beginning of the inquiry. Objectivity is necessary for the criminal law to function as the moral voice of the community.”).

18. See *id.*

19. See *id.*

20. See *infra* Parts III.A.2, III.B.2.

21. MODEL PENAL CODE § 2.04(3)(b) (1985).

22. *United States v. Sawyer*, 558 F.3d 705, 711 (7th Cir. 2009).

23. See *id.*

24. See *infra* Parts III.A.2, III.B.2.

ther defense. This begs the question, then, of why obedience to orders carries the same dual state-of-mind requirements as these two defenses. It turns out that the law of entrapment shares a similar element of government pressure but does not carry the dual state-of-mind requirements.²⁵ Courts and scholars alike have overlooked the inconsistent treatment of these two defenses. This Article explores this inconsistency and argues that because both share the unique feature of government involvement, obedience to orders should be restructured to more closely parallel entrapment.

The entrapment defense is a relatively recent phenomenon and applies in both military and civilian courts.²⁶ A defendant can escape criminal liability by showing that undercover government agents unlawfully pressured or otherwise persuaded her to commit the target crime.²⁷ Courts use one of two tests. The subjective test—used by a majority of jurisdictions—focuses solely on the defendant’s state of mind and whether she was otherwise predisposed to commit the crime.²⁸ Unlike mistake of law or duress, entrapment does not involve further scrutiny of the defendant’s state of mind.²⁹ A minority of jurisdictions use the objective test, which focuses solely on the nature of the government’s tactics and whether a law-abiding citizen would have succumbed to the pressure.³⁰ While this, too, is an objective standard, its role is quite different from the objective component in mistake of law or duress. There, courts objectively scrutinize the defendant’s subjective state of mind to ascertain whether a reasonable person would have also thought or done the same thing.³¹ With entrapment, the objective test does not in any way examine or otherwise analyze the defendant’s state of mind.³² Its purpose is simply to ask what a law-

25. See *infra* Part IV.A.

26. See *infra* Part IV.A.1.

27. See *Sorrells v. United States*, 287 U.S. 435, 452 (1932).

28. See *id.* at 451. Federal jurisdictions, military courts, and the majority of states use this test. See MANUAL FOR COURTS-MARTIAL R.C.M. 916(g) (2012), amended by Exec. Order 13593, 3 C.F.R. 13593 (2012) [hereinafter MANUAL FOR COURTS-MARTIAL, 2012]; John D. Lombardo, *Causation and “Objective” Entrapment: Toward a Culpability-Centered Approach*, 43 UCLA. L. REV. 209, 258 (1996) (noting thirty-nine states do not apply the objective test and even those that do are implementing more subjective measures).

29. See *infra* Part IV.A.4.

30. MODEL PENAL CODE § 2.13 (1985); Lombardo, *supra* note 28, at 231–32.

31. MODEL PENAL CODE §§ 2.04(3)(b), 2.09(1).

32. Lombardo, *supra* note 28, at 211–12.

abiding citizen would have done in the defendant's situation, regardless of what the defendant actually thought or did.³³

The rationale for this difference centers on the fact that the government plays a key role in the crime, and so there is less of a reason for promulgating a uniform community standard, as in the case of duress or mistake of law.³⁴ With the subjective standard, the government is seen as partly culpable for the crime, thus reducing the relative blameworthiness of the defendant.³⁵ This focus on culpability invokes retributive notions of justifying punishment.³⁶ The objective standard, on the other hand, finds its rationale based squarely on utilitarian grounds.³⁷ Holding the defendant not liable will deter the government from using overbearing tactics on citizens in the future.³⁸

Obedience to orders looks a lot like entrapment. Both involve the government pressuring the defendant to commit the crime.³⁹ To be clear, the type of government involvement may be different. Entrapment typically involves inducement or trickery, whereas obedience to orders involves more straightforward coercion.⁴⁰ But this does not change the common element of active government involvement, something present in neither duress nor mistake of law. If entrapment as a doctrine is valued as a legal defense and its underlying rationales importantly account for the government's role, one cannot ignore that obedience to orders also shares similar government participation in the crime but currently does not carry the same requirements. In fact, because obedience to orders implicates qualitatively greater pressure than entrapment, it stands to reason that the former should, *a fortiori*, share the same underlying rationales as the latter to support a less stringent level of scrutiny.⁴¹ Disobeying an order carries the threat of criminal

33. *See infra* Part IV.A.2, 4.

34. *See infra* Part IV.A.4.

35. Lombardo, *supra* note 28, at 214.

36. *See infra* Part IV.A.4.

37. *See infra* Part IV.A.4.

38. *See infra* Part IV.A.4.

39. *See infra* Part IV.B.

40. *See infra* Part IV.B.

41. *See infra* Part IV.B.

punishment.⁴² There is no parallel sanction if an entrapped defendant decides not to acquiesce to the government's pressure.

Using the entrapment model in lieu of the current dual model would mean applying the subjective or objective test, without the aforementioned objective scrutiny targeting the defendant's state of mind. The subjective test would ask whether a soldier was otherwise predisposed to follow the order, and with the objective test the focus would be whether a hypothetical soldier could have otherwise refused executing the order.⁴³ This Article does not necessarily take a position on which test should be adopted. Either remolding appropriately recognizes the role of the government and tracks the rationale for these respective tests.⁴⁴ Similar to the rationale of the subjective entrapment test, the soldier in the obedience to orders case would be less culpable for the crime because the military promulgated an unlawful order. From a retributive point of view, this makes sense. The government—through the authority of the superior order—is partly culpable for the crime.⁴⁵ With the objective test, the concern is not with the soldier's relative culpability but rather with how to prevent future soldiers from being placed in this compromising situation.⁴⁶ Under a utilitarian model, a successful application of the defense would incentivize the government to better train commanding soldiers so they do not issue such orders.⁴⁷

While consistency of doctrine and relevance of underlying rationale are important norms in promulgating the requirements of a criminal law defense, this Article's reconceptualization of obedience to orders is not simply an academic exercise. Realignment the defense to mirror entrapment ultimately creates a defense that is more narrowly tailored to the situation and thus one that more accurately comports with our intuitive notions of when a soldier should or should not be held liable for following an unlawful order. It is not problematic for my position that entrapment, relative to other defenses, is considered

42. See, e.g., MANUAL FOR COURTS-MARTIAL, 2012, *supra* note 28, at art. 90 (punishing a soldier for assaulting or willfully disobeying superior commissioned officer).

43. Even though soldiers are required to obey orders (unlike their civilian counterparts who are entrapped), these tests can still effectively be applied in the military context. See *infra* Part IV.B.

44. See *infra* Part IV.B.

45. See *infra* Part IV.A.4.

46. See *infra* Part IV.A.4.

47. See *infra* Part IV.A.4.

rarely successful.⁴⁸ In one respect, this is the nature of criminal law defenses. They are not supposed to be easy to satisfy.⁴⁹ More to the point, there is nothing to suggest that the basic components of the defense are overly disadvantageous to defendants. The low success rate may have more to do with its application rather than the standard itself.⁵⁰ Adopting these elements in the unique military context—with its qualitatively different level of coercion—ultimately creates an obedience to orders defense that better serves soldiers caught in a difficult situation.⁵¹

The Article is divided into four parts. Part I discusses the history of the obedience to orders defense and its modern-day codification. Part II surveys scholars' reactions to this defense and introduces why it is unique amongst most criminal law defenses. Part III explains why duress and mistake of law defenses, rather than others, have come to be associated with the obedience to orders defense and why this association is inapposite. This Part highlights the connection between the objective scrutiny test found in these defenses and the lack of government coercion in the commission of the crime. Part IV describes the contours of the entrapment defense, including the subjective and objective tests currently used, as well as the unique role of the government in the defense. This Part goes on to explain why obedience to orders should be restructured to more closely resemble entrapment. It focuses on applying the doctri-

48. See Francesca Laguardia, *Terrorists, Informants, and Buffons: The Case for Downward Departures as a Response to Entrapment*, 17 LEWIS & CLARK L. REV. 171, 205 & n.174 (2013) (finding that entrapment is rarely successful and even more rarely successful in cases involving violent crimes because the defendant must admit to having actually committed the crime, which may pose a hurdle for a jury to nonetheless acquit the defendant); Dru Stevenson, *Entrapment by Numbers*, 16 U. FLA. J.L. & PUB. POL'Y 1, 15 (2005) ("The conventional wisdom is that it is rarely raised and that it rarely succeeds."); Stephen G. Valdes, *Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations*, 153 U. PA. L. REV. 1709, 1715–16 (2005) ("[T]he entrapment defense arose in 0.08% of cases and succeeded in one-third of these cases.").

49. Cf. John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1361 (1979) ("From the vantage point of the Constitution, a change in law favorable to defendants is not necessarily good, nor is an innovation favorable to the prosecution necessarily bad. In short, determining the constitutionality of an affirmative defense according to whether it makes conviction more or less likely than under some prior regime seems to us unsound in principle, as well as unworkable in practice.").

50. See Stevenson, *supra* note 48, at 13 n.33.

51. See *infra* Part IV.B–C.

nal elements and their respective underlying rationales to the obedience to orders case. It concludes by comparing two real-world hypotheticals and illustrating how our intuitions are better served using the entrapment tests instead of the current dual state-of-mind model.

I. HISTORICAL DEVELOPMENT OF THE OBEDIENCE TO ORDERS DEFENSE

Part I examines the historical development of the obedience to orders defense.⁵² First, it traces the early use of the defense in the United States from the nineteenth century through the Civil War. Next, this Part focuses on the state of the defense from World War I through World War II and briefly discusses how the international community has defined the defense. The focus then shifts to the codification of the defense in military courts. Finally, this Part highlights modern cases that have utilized the defense, including *United States v. Calley*, the foremost comprehensive judicial analysis of obedience to orders.

A. EARLY USE: EIGHTEENTH CENTURY THROUGH THE CIVIL WAR

The earliest American cases raising the obedience to orders defense steadfastly refused to recognize it as a valid excuse.⁵³ The prevailing military code during the early parts of the Republic did not explicitly address this defense, though it prohibited, by threat of criminal punishment, disobeying any lawful order.⁵⁴ The first American case to raise the defense was in fact a civil case from the early nineteenth century,⁵⁵ *Little v. Barreme*, which arose out of the hostilities between France and the United States.⁵⁶ The defendant, a Navy captain, seized a

52. Much of this discussion draws from Aubrey Daniel's summary of the defense through United States history. See Aubrey M. Daniel, *The Defense of Superior Orders*, 7 U. RICH. L. REV. 477, 480–96 (1973).

53. See *id.* at 483.

54. See, e.g., ARTICLES OF WAR art. VII (1775) ("Any officer or soldier, who . . . shall disobey any lawful commands of his superior officer, shall suffer such punishment as shall, according to the nature of his offense, be ordered by the sentence of a general court-martial."); Bradley J. Nicholson, *Courts-Martial in the Legion Army: American Military Law in the Early Republic, 1792–1796*, 144 MIL. L. REV. 77, 80–84 (1994) (noting that the Articles of War, the early American military code similar to the British military code, simply required that soldiers not disobey lawful superior orders).

55. See *Insko*, *supra* note 6, at 399.

56. *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

Danish ship in reliance on an executive order issued by the president and was later sued for trespass by the owner of the ship.⁵⁷ Congress had passed an act that authorized Navy captains to seize ships bound for a French port.⁵⁸ However, the president issued an executive order that exceeded this grant to include any ship bound to or from a French port.⁵⁹ In good faith reliance on this illegal executive order, the Navy captain seized a ship that was not headed to a French port.⁶⁰ In a subsequent suit for damages, the captain raised the possibility of the defense to the ship owner's trespass claim.⁶¹

Writing for the Supreme Court, Chief Justice Marshall, while ultimately rejecting the defense, debated whether relief should be warranted in light of the nature of military service and the necessity of following orders:

That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them.⁶²

Nevertheless, Marshall concluded that as a matter of law, the captain's actions constituted trespass, and no instruction by a superior could legalize or otherwise change the unlawful nature of this act.⁶³

United States v. Bright was the first criminal case to apply the standard set out in *Barreme*.⁶⁴ The defendant, a Pennsylvania state militia member, was ordered by the Pennsylvania governor to interfere with the official duties of a United States marshal.⁶⁵ Like the order in *Barreme*, the governor's command exceeded his authority.⁶⁶ The defendant was criminally charged for this interference and raised obedience to orders as a de-

57. *Id.* at 177–78.

58. *Id.* at 177.

59. *Id.* at 178.

60. *Id.*

61. *Id.*

62. *Id.* at 179. During this time, the Court also affirmed that a soldier's disobedience of a lawful order warrants criminal punishment. *See Wilkes v. Dinsman*, 48 U.S. (7 How.) 88, 91–92 (1849).

63. *Barreme*, 6 U.S. at 179.

64. *See United States v. Bright*, 24 F. Cas. 1232 (C.C.D. Pa. 1809); Daniel, *supra* note 52, at 483.

65. *Bright*, 24 F. Cas. at 1233–34.

66. *Id.* at 1237–38.

fense.⁶⁷ In rejecting this defense, the Court cited *Barreme* and stated:

The argument [for an obedience to orders defense] is imposing, but very unsound. In a state of open and public war where military law prevails, and the peaceful voice of municipal law is drowned in the din of arms, great indulgences must necessarily be extended to the acts of subordinate officers done in obedience to the orders of their superiors. But even there the order of a superior officer to take the life of a citizen, or to invade the sanctity of his house and to deprive him of his property, would not shield the inferior against charge of murder or trespass, in the regular judicial tribunals of the country.⁶⁸

The circuit court nevertheless seemed to acknowledge the difficult position the defendant faced. Had he not obeyed the governor's order, the court recognized that he could have been prosecuted before a military or state court for failing to obey a superior order.⁶⁹ The court ultimately did not give this consideration much weight, as it also noted that any such prosecution would lead to an acquittal because the order itself was unlawful.⁷⁰ Other criminal cases during this period similarly acknowledged the importance of following military orders but concluded that they should not serve as a defense to an otherwise unlawful act.⁷¹

Shortly thereafter, *United States v. Jones* became the first case to suggest the circumstances under which such a defense may potentially apply.⁷² The case involved a defendant who was charged with piracy and threatening of bodily harm.⁷³ The defendant, along with other members of the crew and upon the order of his captain, boarded another vessel, looted valuables, and assaulted members of the other vessel's crew.⁷⁴ The court rejected the defendant's argument that he was merely following the orders of his captain.⁷⁵ The court began by noting that "[n]o military or civil officer can command an inferior to violate the

67. *Id.*

68. *Id.*

69. *Id.* at 1238.

70. *Id.*

71. See, e.g., *United States v. Bevans*, 24 F. Cas. 1138, 1140 (C.C.D. Mass. 1816) (recognizing the importance of following military orders but ultimately concluding that this importance does not matter when the orders "are against the express provisions of the law"); *Hyde v. Melvin*, 11 Johns 521, 523–24 (N.Y. Sup. Ct. 1814) (holding the fact that the defendant acted under the command of his colonel as no excuse for his actions).

72. See *United States v. Jones*, 26 F. Cas. 653, 657–58 (C.C.D. Pa. 1813).

73. *Id.* at 654–55.

74. *Id.*

75. *Id.* at 657–58.

laws of his country; nor will such command excuse . . . the act.”⁷⁶ Focusing on the state of mind of the defendant, the court went on to say that a defendant could not avail himself of this defense where “he knows, or ought to know” that the action ordered was illegal.⁷⁷ Here, it was possible that the defendant and the accompanying crew—regardless of any orders commanding the contrary—either knew or should have known that assault and stealing from another vessel were illegal acts.⁷⁸ This early test foreshadows modern versions of the defense and its focus on both the actual state of mind of the defendant (subjective component) and the state of mind of a reasonable person in the defendant’s circumstances (objective component).⁷⁹

The Civil War and its aftermath prompted other cases that further developed the elements of the defense and its related applicability.⁸⁰ One notable case, *Riggs v. State*, concerned a defendant who may have been given an order by his superior officer to kill another officer.⁸¹ The murder was not provoked or otherwise part of combat.⁸² The issue, however, was whether a defendant could raise the defense that he was simply obeying

76. *Id.* at 657. Other cases from this period affirmed this test: whether the defendant knew or should have known the order was unlawful. *See, e.g.*, *Despan v. Olney*, 7 F. Cas. 534, 535–36 (C.C.D. R.I. 1852) (“If [a military officer] receives an order from his superior, which, from its nature, is within the scope of his lawful authority, and nothing appears to show that that authority is not lawfully exerted in the particular case, he is bound to obey it; and if it turns out, that his superior had secretly abused or exceeded his power, the superior, who is thus guilty, must answer for it, not the inferior, who reasonably supposed he was only doing his duty.”).

77. *Jones*, 26 F. Cas. at 658.

78. *See id.* The jury ultimately returned a verdict of “not guilty,” however. *Id.*

79. *See infra* Part I.D.

80. In 1863, President Lincoln promulgated revised rules of combat, dubbed the Lieber Code (because they were based on Professor Lieber’s instructions), which sought to supplement the Articles of War. This new Code did not address the obedience to orders defense. *See Daniel, supra* note 52, at 484–85 (discussing how Professor Lieber, assuming that the courts would control the issue, left out the obedience to orders defense from the Lieber Code); Gary D. Solis, *Obedience of Orders and the Law of War: Judicial Application in American Forums*, 15 AM. U. INT’L L. REV. 481, 491 (1999); Gideon M. Hart, Note, *Military Commissions and the Lieber Code: Toward a New Understanding of the Jurisdictional Foundations of Military Commissions*, 203 MIL. L. REV. 1, 34–35 (2010) (discussing how the Lieber Code sought to update the Articles of War).

81. *See Riggs v. State*, 43 Tenn. (3 Cold.) 85, 88–89 (Tenn. 1866). One of the issues before the Tennessee Supreme Court was whether the defendant actually heard the order. *See id.* at 90.

82. *See id.* at 89.

the orders of his superior officer.⁸³ In rejecting this excuse, the trial court distinguished a lawful superior order—which a subordinate is bound to follow and would provide a defense to a criminal charge—from an unlawful order, which cannot excuse criminal behavior.⁸⁴ In describing the latter, the court explained the objective component of the defense:

[A]n order illegal in itself, and not justified by the rules and usages of war, or in its substance being clearly illegal, so that a man of ordinary sense and understanding would know, as soon as he heard the order read or given, that such order was illegal, would afford [the defendant] no protection for a crime committed under such order⁸⁵

The jury found that under the circumstances, any man of “common mind” would have known that the order to shoot was unlawful and would have refrained from killing the officer.⁸⁶ The court did not specify from where this standard arose, but its focus on ordinary sense and common understanding is an early expression of the objective standard currently used.⁸⁷

Not all courts denied the defense based on this standard. In one notable Civil War case, *In re Fair*, two soldiers were charged with murder after shooting another soldier escaping from custody.⁸⁸ The soldiers were under orders to shoot two prisoners escaping custody if they did not stop when they ordered them to.⁸⁹ The court found the defendants not liable for the charge partially on the ground that they were following orders.⁹⁰ In reaching this conclusion, the court focused on the state of mind of the defendants as well as what a person of common understanding would have done. As to the first, the court held that the defendants should not be convicted if they “acted under such orders in good faith . . . [and] with an honest purpose to perform [their] supposed duty.”⁹¹ Turning to the objective requirement, the court reasoned: “While I do not say

83. *See id.* at 86–87.

84. *See id.*

85. *Id.*

86. *See id.* (noting that the jury convicted the defendant after receiving these instructions on the obedience to orders defense).

87. *See infra* Part I.D. On appeal, the Tennessee Supreme Court awarded the defendant a new trial due to the lack of evidence on the record. *See Riggs*, 43 Tenn. (3 Cold.) at 90–91. However, it found “no error” with the trial court’s instruction on the obedience to orders defense. *Id.* at 86–87.

88. *In re Fair*, 100 F. 149, 150 (C.C.D. Neb. 1900).

89. *Id.* The order applied to both escaping prisoners, but it appears that the defendants only found and ultimately killed the one. *See id.*

90. *See id.* at 154–58.

91. *Id.* at 155.

that the order given to [the defendants] was in all particulars a lawful order, I do say that the illegality of the order, if illegal it was, was not so much so as to be apparent and palpable to the commonest understanding.”⁹²

In articulating the objective standard, other cases from this period similarly focused on ordinary sense or common understanding as the appropriate litmus test.⁹³

B. ABSOLUTE DEFENSE: WORLD WARS I AND II

For a brief period starting just prior to World War I, the military, in sharp contrast to the prevailing standard established by civilian courts, allowed soldiers to invoke obedience to orders as a complete defense without any scrutiny of the defendant’s state of mind.⁹⁴ Under the revised military policy, soldiers would not be punished for offenses as long as they were acting under orders of their commanders.⁹⁵ There was no eval-

92. *Id.* It should be noted that, in finding the defendants not guilty, the court also emphasized the fact that the defendants shot to disable the escaping prisoner, not to kill him. *See id.* Ultimately, the court felt that it should not intervene because the escaping prisoner had been charged with a military offense, desertion, and the defendants were attempting to enforce military law. *See id.* at 156–58.

93. *See, e.g.,* *McCall v. McDowell*, 15 F. Cas. 1235, 1240 (C.C.D. Cal. 1867) (“Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the laws should excuse the military subordinate when acting in obedience to the orders of his commander.”). *But see* *Jones v. Commonwealth*, 64 Ky. (1 Bush) 34, 39–40 (Ky. 1866) (denying the defense of obedience to orders outright because the act was illegal).

94. *See* *Daniel*, *supra* note 52, at 488–89; *Solis*, *supra* note 80, at 495–96.

95. *See* OFFICE OF THE CHIEF OF STAFF, U.S. DEP’T OF WAR, RULES OF LAND WARFARE § 366 (1914) (“Individuals of the armed forces will not be punished for these offenses in case they are committed under the orders or sanction of their government or commanders.”). This army instruction served as a successor to the Lieber Code. *See* *Daniel*, *supra* note 52, at 488; *Solis*, *supra* note 80, at 491. This army instruction was not inconsistent with the contemporaneous publication, *A Manual for Courts-Martial, Courts of Inquiry, and of Other Procedure Under Military Law*, a military law manual that outlined the logistics of conducting a court-martial. *See* OFFICE OF THE JUDGE ADVOCATE GENERAL, U.S. DEP’T OF WAR, A MANUAL FOR COURTS-MARTIAL, COURTS OF INQUIRY, AND OF OTHER PROCEDURE UNDER MILITARY LAW, at xiii–xiv (1918) [hereinafter *MANUAL FOR COURTS-MARTIAL*, 1918]; *Solis*, *supra* note 80, at 496. The *Manual* explicitly provided that disobedience to a superior order was punishable unless the order was plainly illegal. *See* *MANUAL FOR COURTS-MARTIAL*, 1918, *supra*, at app. 1, art. 64. Pursuant to the Rules of Land Warfare, there was no punishment if the soldier followed this unlawful order. *Id.* And if he decided against following this unlawful order, the *Manual* explicitly exempted him from the crime of disobedience to orders. *See* *Solis*, *supra* note 80, at 495–96.

uation of what the soldier knew or a person of common understanding would have known.⁹⁶ During this period, there do not appear to be any records of courts-martial relating to the “killing or maltreatment of German soldiers” by American soldiers.⁹⁷ In the one case where the issue was raised, the soldier was found not guilty of killing a prisoner simply because he was following orders.⁹⁸

This remained the state of affairs until World War II, when the military revised its position to be comparable to the prevailing civilian standard prior to World War I.⁹⁹ Once again, the defense was not automatically an absolute bar to prosecution. The revised military code allowed obedience to orders to serve as a potential defense or mitigation for punishment but also noted that individuals who clearly violated laws and customs of war could be punished.¹⁰⁰

C. INTERNATIONAL LAW

Historically, international law has not provided a consistent approach to the availability of the obedience to orders defense.¹⁰¹ Major international treaties, by and large, have failed to address the defense.¹⁰² The Hague Convention, after World I, and the Geneva Convention, after World War II, were

96. Cf. Daniel, *supra* note 52, at 488 (“[O]bedience to orders became an absolute defense.”).

97. *Id.* at 488 & n.31.

98. *See id.*

99. *See id.* at 488–90. The 1928 edition of the *Manual for Courts-Martial*, however, did mention the availability of the obedience to orders defense. *See* MANUAL FOR COURTS-MARTIAL R.C.M. 148a, at 163 (1928), established by Exec. Order 4773 [hereinafter MANUAL FOR COURTS-MARTIAL, 1928] (citation omitted) (“The general rule is that the acts of a subordinate officer or soldier, done in good faith and without malice in compliance with his supposed duty, or of superior orders, are justifiable, unless such acts are manifestly beyond the scope of his authority, and such that a man of ordinary sense and understanding would know to be illegal.”).

100. *See* U.S. DEP’T OF WAR, FM 27-10, RULES OF LAND WARFARE § 345.1 (1944) (“Individuals . . . who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to the order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment.”).

101. *See* MARK J. OSIEL, OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE & THE LAW OF WAR 41 (1999); Insko, *supra* note 6, at 407–10.

102. Insko, *supra* note 6, at 407.

conspicuously silent on the issue.¹⁰³ Just after World War I, however, the issue was tentatively raised in connection with war crimes committed by Germans. An Allied-led war crime commission proposed international prosecutions without the benefit of an obedience to orders defense.¹⁰⁴ Dissents by the United States and Britain—who feared the precedential effect such a rule might have on their own soldiers—ultimately left the commission’s work unresolved, and the prosecutions were relegated to German national courts.¹⁰⁵ A similar commission created by the newly formed United Nations after World War II also addressed this defense in the context of war crime prosecutions.¹⁰⁶ This commission recognized that the “[t]he question of individual responsibility and punishment in cases in which offences were committed upon the orders of a . . . superior authority by a subordinate pledged by law to obey superior orders, is one of great difficulty.”¹⁰⁷ Following American courts on the issue, the United States proposed to the commission that the obedience to orders defense should be rejected “if the order was so manifestly contrary to the laws of war that a person of ordinary sense and understanding would know or should know . . . that such an order was illegal.”¹⁰⁸ Because the member states could not reach an agreement, the commission ultimately recommended that the validity of the defense be left to national courts.¹⁰⁹

It was not until the Nuremberg Charter in 1945 and the resulting Nazi war trials that the Allied-led international community had the opportunity to take a strong and unified stance on the availability of the defense.¹¹⁰ Due to the nature of

103. See *id.*; Howard S. Levie, *The Rise and Fall of an Internationally Codified Denial of the Defense of the Superior Orders*, 30 MIL. L. & L. WAR REV. 183, 199–200 (1991).

104. See Solis, *supra* note 80, at 496–97.

105. See *id.* at 497–99. It appears that the German courts allowed the German soldiers to raise the defense in what became known as the Leipzig Trials. See *id.* at 499.

106. *Id.* at 509.

107. U.N. WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 274 (1948) [hereinafter HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION]; see also Solis, *supra* note 80, at 483.

108. HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 107, at 278; see also Solis, *supra* note 80, at 510.

109. See HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 107, at 278; see also Solis, *supra* note 80, at 509–10.

110. See Solis, *supra* note 80, at 515–16.

the atrocities, the International Military Tribunal categorically rejected, as a way to avoid liability, the defense that a German soldier was simply following orders to kill innocent civilians as a way to avoid liability.¹¹¹ The pertinent provision of the Charter stated that the “fact that the defendant acted pursuant to order of his . . . superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”¹¹² The last clause simply served the function of reducing a defendant’s sentence, not absolving the individual of all liability.¹¹³

The resulting trials under the Nuremberg Charter narrowly circumscribed when a soldier could be relieved of responsibility for his actions.¹¹⁴ The Tribunal stated: “The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.”¹¹⁵ The “moral choice” test required a showing

111. See *id.* James Insko has suggested that similar considerations, along with evidentiary rule changes, may explain why the United States chose to create separate military tribunals for the attacks surrounding September 11th instead of using the established procedures under the Uniform Code of Military Justice, see *infra* Part I.D (describing the history of the Code), which would have allowed for an obedience to orders defense. See Insko, *supra* note 6, at 411–17. The rules promulgated for the tribunals make no mention of the availability of the defense. *Id.* at 412. Given the nature of the terrorist attacks, it is not clear how such a defense would be viable. See *id.* at 412–13. However, Insko argues that allowing such a defense—which would probably only apply in limited circumstances—may have the benefit of providing legitimacy to the proceedings. *Id.* at 416–17.

112. Charter of the International Military Tribunal art. 8, in 1 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 12 (1947); Daniel, *supra* note 52, at 490.

113. Cf. YORAM DINSTEIN, THE DEFENCE OF “OBEDIENCE TO SUPERIOR ORDERS” IN INTERNATIONAL LAW 115–17 (1965) (“[The Charter] precludes any possibility of taking the fact of obedience to orders into account for the purpose of relieving the defendant of responsibility in the context of any defence whatsoever . . .”).

114. See Daniel, *supra* note 52, at 490–91.

115. United States v. Ohlendorf (*The Einsatzgruppen Case*), in 4 NUERENBERG MILITARY TRIBUNALS, TRIALS OF WAR CRIMINALS BEFORE THE NUERENBERG MILITARY TRIBUNALS 471 (1947) [hereinafter *The Einsatzgruppen Case*] (quoting 1 INTERNATIONAL MILITARY TRIBUNAL, *supra* note 112, at 224) (internal quotation marks omitted), available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-IV.pdf; see also Daniel, *supra* note 52, at 490. U.S. Military Tribunal II-A tried the defendants in *The Einsatzgruppen Case* after the International Military Tribunal declared organizations of which they were members to be criminal. See *The Einsatzgruppen Case*, *supra*, at 3, 22. In deciding the case, the U.S. Military Tribunal relied

that the soldier was under duress or threat of serious bodily harm from another when he committed the act.¹¹⁶ This Article later provides greater detail on the connection between the obedience to orders and the duress defenses.¹¹⁷ For now, it is enough to say that the Nuremberg trials envisioned duress as conceptually separate from an obedience to orders defense.¹¹⁸ In other words, the accused could not rely on the inherent coercion of the superior order as a defense. Something more was required, such as threats or other coercion whereby the soldier had no real choice in the matter.¹¹⁹ Following the Tribunal's lead, the U.S. Military Tribunal trying *The Einsatzgruppen Case* reasoned in the following way: "The test to be applied is whether the subordinate acted under coercion or whether he himself approved of the principle involved in the order . . . Superior means superior in capacity and power to force a certain act. It does not mean superiority only in rank . . ." ¹²⁰ Other tribunals, including the Criminal Tribunals of Rwanda and Yugoslavia, have followed a similar path, applying the obedience to defense only for mitigation, not for exoneration.¹²¹

A noteworthy exception to the historical unavailability of the defense in international law is the Rome Statute of 1997, which established the permanent International Criminal Court.¹²² While the United States is not a party to the statute, the court allows for the defense and employs a standard similar to that used by American courts.¹²³ A defendant can take ad-

heavily on principles promulgated by the International Military Tribunal. See *id. passim* (citing the International Military Tribunal throughout the opinion).

116. See Daniel, *supra* note 52, at 491.

117. See *infra* Part III.A.

118. See Daniel, *supra* note 52, at 490–92. There is, however, some debate among scholars as to whether this "moral choice" test was a separate defense of compulsion or duress—and thus served to supplement the Charter's provision on the availability of the obedience to orders defense—or instead something intended to lessen the blanket rule established by the Charter. See DINSTEIN, *supra* note 113, at 150–54.

119. See Daniel, *supra* note 52, at 491. Justice Jackson, in his opening remarks for the prosecution, explained that while the obedience to orders defense was not available under the Charter, "we do not argue that the circumstances under which one commits an act should be disregarded in judging its legal effect." DINSTEIN, *supra* note 113, at 125–27.

120. *The Einsatzgruppen Case*, *supra* note 115, at 480; see also *supra* note 115.

121. See Insko, *supra* note 6, at 409.

122. Rome Statute of the International Criminal Court art. 1, 33, July 17, 1998, 2187 U.N.T.S. 3.

123. See *id.*; Insko, *supra* note 6, at 409 (discussing the circumstances under

vantage of the defense if he “did not know that the order was unlawful” and if “[t]he order was not manifestly unlawful.”¹²⁴

D. CODIFICATION OF THE DEFENSE: THE AMERICAN MILITARY STANDARD

It was not until after World War II that the American military finally codified the obedience to orders defense and the conditions of its application. Congress enacted the Uniform Code of Military Justice in 1950,¹²⁵ and while it did not mention the defense,¹²⁶ the revised *Manual for Courts-Martial*—an executive order outlining the procedures of court-martial proceedings—explicitly addressed the applicability of the defense.¹²⁷ It provided:

[T]he acts of a subordinate, done in good faith in compliance with his supposed duty or orders, are justifiable. This justification does not exist, however, when those acts are manifestly beyond the scope of his authority, or the order is such that a man of ordinary sense and understanding would know it to be illegal¹²⁸

The language tracks the historical focus on both the subordinate’s subjective state of mind and an objective person’s common understanding.¹²⁹ This provision is not substantially changed in the current edition of the *Manual for Courts-Martial*, which states, “It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew

which the International Criminal Court recognizes the obedience to orders defense); *infra* Part I.E (discussing the standard currently used by American courts).

124. Rome Statute of the International Criminal Court, *supra* note 122, at art. 33(1).

125. Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950) (repealed 1956). This enactment also established the military judicial system and its various levels of appellate review. *Id.*

126. *See id.*

127. The *Manual for Courts-Martial* dates back to 1890, *see* P. HENRY RAY, COMMANDING DEP’T, INSTRUCTIONS FOR COURTS-MARTIAL AND JUDGE ADVOCATES (1890), and has had numerous versions since then. *See, e.g., supra* notes 95, 99 (including some of the editions of the *Manual for Courts-Martial*). The earliest mention of obedience to orders came in the 1928 edition, which included similar language to the version of the *Manual* promulgated after Congress passed the Uniform Code of Military Justice. *See supra* note 99; *infra* note 128 and accompanying text.

128. MANUAL FOR COURTS-MARTIAL ¶ 197b (1951), *as reprinted in* Exec. Order No. 10,214, 3 C.F.R. Supp. E.O. 10,214, ¶ 197b (1949–1951) [hereinafter MANUAL FOR COURTS-MARTIAL, 1951].

129. *See supra* notes 77–98.

the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.¹³⁰

The Korean War and its aftermath allowed for the first application of the now codified defense. In *United States v. Kinder*, the defendant, who was on sentry duty, captured a Korean intruder.¹³¹ He brought the intruder to the guard-house, and his superior officer ordered the defendant to execute the individual.¹³² There was no evidence that the intruder posed any threat.¹³³ The defendant was charged with premeditated murder and raised the obedience to orders defense.¹³⁴ The court categorically rejected the defense.¹³⁵ Citing to a case discussing *Riggs v. State*, the court said that even if the defendant did not know the order was unlawful, a man of common understanding would have known that taking a life in this way was unlawful and would not have followed the order.¹³⁶

E. MODERN CASES

1. *United States v. Calley*

Numerous decisions during the Vietnam conflict reaffirmed the principle that the obedience to orders defense is not available if the order would have been manifestly illegal to a person of common understanding.¹³⁷ One notable case, *United States v. Calley*, provided the first comprehensive judicial analysis of

130. MANUAL FOR COURTS-MARTIAL, 2012, *supra* note 28, at R.C.M. 916(d). It is important to note that a successful application of this defense does not bar prosecution of the commanding officer who gave the unlawful order. See Jason Sengheiser, Note, *Command Responsibility for Omissions and Detainee Abuse in the "War on Terror"*, 30 T. JEFFERSON L. REV. 693, 713–14 (2008) (discussing command responsibility and how commanding officers can be criminally charged for orders they give).

131. *United States v. Kinder*, 14 C.M.R. 742, 753 (A.F.B.R. 1954).

132. *Id.* at 753–54.

133. *See id.* at 753–55.

134. *See id.* at 752, 763.

135. *See id.* at 774.

136. *See id.* at 771–74 (“Human life being regarded as sacred, moral, religious and civil law proscriptions against its taking existing throughout our society, we view the order as commanding an act so obviously beyond the scope of authority of the superior officer and so palpably illegal on its face as to admit of no doubt of its unlawfulness to a man of ordinary sense and understanding.”). The Army later clarified the obedience to orders defense in accordance with this standard. *See* U.S. DEP’T OF THE ARMY, FM 27-10, THE LAW OF LAND WARFARE § 509 (1956).

137. *See, e.g., United States v. Keenan*, 39 C.M.R. 108, 115–17 (C.M.A. 1969); *United States v. Griffin*, 39 C.M.R. 586, 589–90 (A.B.R. 1968).

this objective standard and how it should be applied.¹³⁸ The defendant, Lieutenant Calley, was charged and convicted by a jury for the murder of dozens of civilians in the village of My Lai in South Vietnam.¹³⁹ The defendant claimed that he was following the order of his commanding officer, who had instructed him to kill the civilians.¹⁴⁰ One of the issues before the United States Court of Military Appeals (the highest military court at the time) was the appropriate objective standard for adjudicating the obedience to orders defense.¹⁴¹

The trial judge had instructed the jury that the acts of a subordinate done in compliance with an unlawful order should impose no criminal liability unless the defendant knew the order was unlawful or a person of common understanding would have known this.¹⁴² In making a determination as to the defendant's subjective knowledge of the order's unlawfulness, the trial court advised the jury to consider all relevant matters, including the defendant's rank, age, educational background, training, and prior operational experience in the area.¹⁴³ It appears that the instruction relating to the defendant's subjective knowledge was not in dispute on appeal.¹⁴⁴ The defense simply claimed that the evidence showed Calley subjectively believed that the civilians were part of the enemy he was ordered to kill.¹⁴⁵

The issue for the appellate court focused on the objective standard of palpable or manifest illegality.¹⁴⁶ The trial judge instructed the jury that even if they found the defendant did not

138. *United States v. Calley*, 48 C.M.R. 19, 29 (C.M.A. 1973).

139. *See id.* at 21. According to Calley, his commanding officer gave him an order to destroy the My Lai village, though there was conflicting evidence of such an order. *See id.* at 23–24. Calley alleged that the commanding officer gave the order, first, a day before the strike during a briefing on the mission and then again by radio during the day of the engagement. *Id.* Calley ordered his subordinates to kill the villagers, including women and children, who were at the time being guarded but posed no danger to the soldiers. *See id.* at 24. Calley claimed these villagers were, however, hindering the platoon's ability to progress. *See id.* at 33. It turned out that some of Calley's subordinates refused to follow his instruction to kill the villagers. *See id.* at 24.

140. *See id.* at 23–24.

141. *See id.* at 26–29.

142. *Id.* at 27.

143. *See id.*

144. *See id.*

145. *See id.* at 24–25. The general findings of guilt at the trial court did not specify whether the jury found that the defendant knew the order was unlawful. *Id.* at 25.

146. *See id.* at 27.

know the order was unlawful, he would still be guilty if they found that “under the circumstances, a man of ordinary sense and understanding would have known the order was unlawful.”¹⁴⁷ The instructions stated that jurors should not “focus on Lieutenant Calley and the manner in which he perceived the legality of the order found to have been given him.”¹⁴⁸ Rather, the focus should be on a person “of ordinary sense and understanding under the circumstances” and whether “in light of all the surrounding circumstances” this hypothetical construct would have known the order was unlawful.¹⁴⁹ The court thus seemed to adopt a non-individualized objective standard. The defendant claimed the standard requiring that the order be palpably illegal to a person of “common understanding” was too strict and should be changed to a person of “commonest understanding.”¹⁵⁰ The defendant argued that using the former would prejudice those soldiers at the lower end of the experience/understanding spectrum who fall below this standard.¹⁵¹ These individuals would have to face the dilemma of choosing either a criminal penalty for disobedience of an order (death, during time of war) or an equally serious penalty for following the unlawful order.¹⁵² While criminal punishment only applies to disobedience of lawful orders, a soldier who does not know the order is unlawful would not necessarily benefit from this restriction.¹⁵³

The majority opinion for the appeal took some time examining the competing interests involved. Citing to an authority discussing *Riggs*, as well as citing to cases, the court, on the one hand, noted that the “common understanding” standard has had a long history in American military jurisprudence.¹⁵⁴

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* (internal quotation marks omitted).

151. *See id.*

152. *Id.*; see also MANUAL FOR COURTS-MARTIAL, pt. IV, art. 90c(2) (1984), as reprinted in Exec. Order No. 12,473, 3 C.F.R. pts. 100–101 Exec. Order 12,473 (1984–1985) (incorporating by reference the text of the *Manual*, located at 49 Fed. Reg. 17,152 (Apr. 23, 1984)) [hereinafter MANUAL FOR COURTS-MARTIAL, 1984] (explaining what constitutes disobeying a superior officer). Disobedience of a lawful order during time of war may result in the death penalty. *See id.* at pt. IV, art. 90a.

153. *See Calley*, 48 C.M.R. 19, at 28 & n.1; MANUAL FOR COURTS-MARTIAL, 1984, *supra* note 152, at pt. IV, art. 90a (stating that any soldier who “willfully disobeys a lawful command of his superior” shall be punished).

154. *See Calley*, 48 C.M.R. 19, at 28.

However, the court also recognized that in the stress of combat, a soldier cannot be expected to make a refined legal determination as to the legality of an order.¹⁵⁵ The court did not find this to be problematic, because, except in rare instances where the order was manifestly illegal, subordinates should presumptively follow a superior's order.¹⁵⁶ As to the defendant's specific charge of error, the court ultimately concluded that there was no prejudice.¹⁵⁷ It found that "whatever conceptual difference there may be between a person of 'commonest understanding' and a person of 'common understanding,' that difference could not have had any impact on [the jury] receiving the respective wordings in instructions."¹⁵⁸ The court focused on the fact that the defendant killed unarmed women and children—acts that under any objective standard would have been manifestly illegal.¹⁵⁹

The dissent challenged the majority's conclusion that the difference in jury instructions as to the objective state-of-mind requirement would have had no meaningful impact.¹⁶⁰ The dissent argued that the current standard—and its focus on common understanding—was too stringent.¹⁶¹ The dissent claimed the standard permitted serious punishment for those whose "training and attitude incline[d] them either to be enthusiastic about compliance with orders or not to challenge the authority of their superiors."¹⁶² According to the dissent, the proposed instruction of "commonest understanding," however, "properly balance[d] punishment for the obedience of an obviously illegal order" against a soldier's duty to follow a superior's direct order.¹⁶³ The dissent went on to elaborate how best to relay this objective state-of-mind requirement to the jury.¹⁶⁴ It suggested that a jury should find the defendant guilty notwithstanding an obedience to orders defense if "almost every member of the armed forces would have immediately recognized that the order was unlawful, and . . . that the [defendant] should have recognized the order's illegality as a consequence of his age, grade,

155. *Id.* at 28–29.

156. *Id.* at 28.

157. *Id.* at 29.

158. *Id.* (internal quotation marks omitted).

159. *Id.*

160. *Id.* at 31–33 (Darden, C.J., dissenting).

161. *Id.* at 31.

162. *Id.*

163. *Id.*

164. *Id.* at 31–32.

intelligence, experience, and training.”¹⁶⁵ The dissent’s proposed standard would have provided additional protection for the defendant. For even if *almost every* member of the armed forces would find the order unlawful, the particular experiences and training of the defendant might suggest impunity. In other words, the dissent argued the defense should be successful as long as a soldier of the commonest understanding with the defendant’s training and experience similarly would not have found the order to be unlawful.¹⁶⁶

The dissent further explained that this standard could have resulted in a different verdict for Calley.¹⁶⁷ It pointed to Calley’s specific background and training, which together may have caused someone of the commonest understanding or someone in his shoes to not recognize the order to be unlawful.¹⁶⁸ Along with testimony showing that Calley’s briefing contained specific orders to kill all individuals, including women and children, the dissent also specifically pointed to Calley’s prior experience with hostile civilians in the area.¹⁶⁹ In the past, when villagers were left behind by his unit, Calley’s unit had taken sniper fire from the rear, presumably from these individuals.¹⁷⁰ In addition, Calley had apparently received faulty intelligence that the villagers were not innocent and were either enemies or enemy sympathizers.¹⁷¹ Combined, these facts, according to the dissent, suggested that a soldier of commonest understanding in the defendant’s position might not have readily realized that the order to kill the villagers was unlawful.¹⁷²

165. *Id.* at 32. Interestingly, *United States v. Kinder* seemed to employ a standard closer to the one articulated by the dissent in *Calley*. See 14 C.M.R. 742, 744 (A.F.B.R. 1954) (“In our view no rational being of the [defendant’s] age, formal education, and military experience could have, under the circumstances, considered the order lawful.”).

166. The dissent’s proposal appears to conflate two potentially distinct objective state-of-mind standards. *Calley*, 48 C.M.R. at 31–33. The first is a person of commonest understanding with no shared traits of the defendant, and the second is a person of commonest understanding with the same experience, training, etc. *Id.* It is not clear exactly what standard the dissent seeks to support or whether Calley’s decision to follow the order could be excused on the former alone. Resolution of this issue is not relevant here. The main takeaway is that the dissent’s proposed instruction would be more generous to potential defendants than the standard affirmed by the majority.

167. *Id.* at 33.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

2. Other Cases

More recent cases have followed the majority's holding in *Calley* and its reliance on common understanding as the appropriate objective state of mind standard. *United States v. Pacheco* involved a soldier who was charged with larceny after taking a weapon as a souvenir from a weapon's cache during an operation in Haiti.¹⁷³ Citing *Calley*, the court noted that any applicable obedience to orders defense would not succeed if the order was palpably illegal, which was analyzed from the perspective of a man of ordinary sense and understanding.¹⁷⁴

The issues surrounding the detainees held in Iraq provided a more recent application of the defense. In defense of maltreatment charges of a detainee during an interrogation, the defendant in *United States v. Smith* argued that he was simply following orders.¹⁷⁵ The court affirmed the trial judge's instructions that any obedience to orders defense would not excuse liability unless "the [defendant] knew that the order was unlawful or unless the order was one which a person of ordinary common sense under the circumstances would know to be unlawful."¹⁷⁶

173. *United States v. Pacheco*, 56 M.J. 1 (C.A.A.F. 2001).

174. *Id.* at 7 (Sullivan, J., dissenting). Interestingly, this case involved an alleged order that was more discretionary than imperative in nature. Part III.B more closely analyzes this issue under the rubric of mistake of law.

175. *United States v. Smith*, 68 M.J. 316 (C.A.A.F. 2010).

176. *Id.* at 321 n.7. The defendant was a military servicemember trained as a dog handler and was stationed in the confinement facility at Abu Ghraib, Iraq. *Id.* at 318–19. During an interrogation of one of the detainees, the defendant allowed his unmuzzled dog to bark in the detainee's face and to pull a sandbag off the detainee's head with its teeth. *Id.* Charged with, inter alia, maltreatment, the defendant argued that he was simply following the orders of his commanding officer. *Id.* at 319–20. The court found that no evidence had been introduced that such an order was in fact given. *Id.* at 321. Other trials relating to detainee abuse similarly raised the obedience to orders defense and questioned whether the soldier knew or should have known the order was illegal. See Kate Zernike, *Soldiers Testify on Orders to Soften Prisoners in Iraq*, N.Y. TIMES, Jan. 13, 2005, <http://www.nytimes.com/2005/01/13/national/13abuse.html> (noting that defendant unsuccessfully raised obedience to orders defense in prosecution for detainee abuse); Natalia M. Restivo, *Defense of Superior Orders in International Criminal Law as Portrayed in Three Trials: Eichmann, Calley and England* 20–25 (Sept. 12, 2006) (unpublished student paper, Cornell Law School) (same), available at http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1035&context=lps_papers.

II. THE DUAL STATE-OF-MIND REQUIREMENTS

Part II briefly explores scholarly reactions to the current two-part requirement and suggests why this standard is not the appropriate model for the obedience to orders defense. This Part begins by detailing the difficulty associated with defining the objective portion of the test. Next, it provides an explanation for why this objective requirement has mistakenly become associated with the defense and introduces the notion of government coercion as something unique to obedience to orders.

A. REACTIONS TO CURRENT MODEL

Most of the discussion surrounding the obedience to orders defense has focused on how best to interpret and apply the two requirements.¹⁷⁷ The subjective requirement is relatively straightforward and seeks to answer the question of “whether [the person] actually knew [the] orders to be unlawful.”¹⁷⁸ Here, the jury looks at the defendant’s background, including her age, education, training, and experience.¹⁷⁹ Knowledge, of course, means something akin to substantial certainty.¹⁸⁰ Simply think-

177. See, e.g., Ziv Bohrer, *The Superior Orders Defense: A Principal-Agent Analysis*, 41 GA. J. INT’L & COMP. L. 1 (2012); William George Eckhardt, *My Lai: An American Tragedy*, 68 U. MO. KAN. CITY L. REV. 671 (2000); Lieutenant Colonel Christopher T. Fredrikson, *Annual Review of Developments in Instructions*, ARMY LAW., May 2011, at 25; Leslie C. Green, *Superior Orders and Command Responsibility: Fifteenth Waldemar A. Solf Lecture in International Law*, 175 MIL. L. REV. 309, 314–15 (2003); Michael Kenneth Isenman, 88 MICH. L. REV. 1474 (1990) (reviewing HERBERT C. KELMAN & V. LEE HAMILTON, *CRIMES OF OBEDIENCE: TOWARD A SOCIAL PSYCHOLOGY OF AUTHORITY AND RESPONSIBILITY* (1989)); Martha Minow, *Living Up to Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the Superior Orders Defence*, 52 MCGILL L.J. 1 (2007).

178. *United States v. Calley*, 48 C.M.R. 19, 27 (C.M.A. 1973).

179. See *id.* Recent jury instructions support this individualized assessment. The Army model instructions, for instance, provide that in determining whether the defendant knew the order was illegal, the jury must “resolve this issue by looking at the situation subjectively, through the eyes of the [defendant]. You should consider the [defendant’s] (age) (education) (training) (rank) (background) (experience).” U.S. DEP’T OF ARMY, PAM. 27-9, *MILITARY JUDGES’ BENCHMARK* § 5-8-1 (1 Jan. 2010) [hereinafter *MILITARY JUDGES’ BENCHMARK*].

180.

A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

MODEL PENAL CODE § 2.02 (1962).

ing the order *may* be unlawful would not be sufficient to satisfy the standard.

The objective requirement turns out not to be as straightforward. On its face, it simply requires that the order be manifestly illegal to a person of common understanding.¹⁸¹ But it is not exactly clear how to define “manifestly illegal” or “person of common understanding.” As to the latter, what constitutes this hypothetical person? Should a military soldier’s individualized experience or training be included? What about a soldier’s rank or age? Currently, the answer seems to be a bare-bones hypothetical soldier with little to no individualization.¹⁸² But as evidenced by the dissent in *Calley*, there does seem to be some debate as to how much individualization should be included when constructing this objective standard.¹⁸³

Scholars, too, have taken up this issue.¹⁸⁴ Professor Mark Osiel, for instance, questions the efficacy of the prevailing non-individualized model. He recognizes that the test focuses on a person of “common conscience of elementary humanity,” such that the illegality of the act would be “universally known to everybody.”¹⁸⁵ However, he argues that such a general statement fails to take into account the individual “strengths and weaknesses” of a particular defendant.¹⁸⁶ He advocates instead for incorporating some of the defendant’s characteristics before applying the rule.¹⁸⁷ This may help ameliorate a soldier’s competing duties of obeying orders on the one hand but disobeying orders that are unlawful on the other.¹⁸⁸

This issue is not new. Courts and scholars have always struggled with how individualized objective scrutiny should be when it comes to defenses in the criminal law. For example, significant ink has been spent on how individualized the objec-

181. See *supra* Part I.D and note 128.

182. See *supra* Part I.D and note 128. Military jury instructions support this bare-bones approach. The Army model instructions, for instance, simply ask for details about the terms of the order when discussing whether a person of common understanding would have known the order to be illegal. MILITARY JUDGES’ BENCHBOOK, *supra* note 179, § 5-8-1.

183. See *supra* Part I.D.

184. See *generally supra* Part I.D.

185. Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CALIF. L. REV. 939, 975 (1998) (quoting DINSTEIN, *supra* note 93, at 15).

186. *Id.* He finds that civilian law affords greater individualization than military law. *Id.*

187. *Id.*

188. *Id.* at 1091.

tive reasonable-person standard should be when it comes to criminal defenses such as self-defense or heat of passion (e.g., to what extent gender, specific cultural beliefs, prior experience, and idiosyncratic characteristics should be included).¹⁸⁹ The more narrowly one defines the reasonable person or person of common understanding as possessing the subjective qualities of the defendant, the more likely the defendant will be successful in raising the defense.¹⁹⁰

189. See, e.g., *People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986) (discussing impact of race-based experience in making objective determination of reasonable person standard in self-defense); *Commonwealth v. Carr*, 580 A.2d 1362 (Pa. Super. Ct. 1990) (discussing whether provocation based on viewing homosexual lovemaking should be included in reasonable person standard when it comes to heat-of-passion defense for murder); Joshua Dressler, *When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726 (1995); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367 (1996) (discussing the relevance of race-based beliefs in constructing the reasonable person standard in self-defense cases); Robert L. Misner, *The Awkward Case of Harry Gibson*, 1986 ARIZ. ST. L.J. 691, 692–93 (discussing whether cultural beliefs should be included in the reasonable person standard when it comes to heat-of-passion defense for murder); Victoria Nourse, *After the Reasonable Man: Getting Over the Subjectivity/Objectivity Question*, 11 NEW CRIM. L. REV. 33 (2008) (discussing the nature of the objective standard in self-defense); Robbin S. Ogle, Daniel Maier-Katkin & Thomas J. Bernard, *A Theory of Homicidal Behavior Among Women*, 33 CRIMINOLOGY 173 (1995) (discussing how a "reasonable woman" may react differently than a "reasonable man" when in the heat of passion); Laurie J. Taylor, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679, 1679–81 (1986) (discussing the implications of using gender in the reasonable person standard for the heat-of-passion defense to murder given the finding that women tend to respond to stressful situations by feeling guilt rather than externalizing anger); see also Peter Westen, *Individualizing the Reasonable Person in Criminal Law*, 2 CRIM. L. & PHIL. 137 (2008) (discussing the extent of the individualization of the reasonable person standard in criminal cases).

190. That said, a certain level of individualization over and above the basic "reasonable person" standard could have the opposite effect. See Taylor, *supra* note 189, at 167–81 (noting that if women in stressed situations are less likely to externalize the anger through violence, a woman defendant raising a heat-of-passion defense may not be as successful if the objective standard includes gender). Similarly, with a more individualized definition of "person of common understanding," a soldier may not be successful in raising an obedience to orders defense.

Imagine an experienced and high-ranked soldier who is given an unlawful order to bomb a particular facility. Assuming she does not know it is unlawful, it may turn out that a person of common understanding, without the relevant experience or training, would not recognize the order to be unlawful. However, a more individualized hypothetical high-ranking officer may have known the order was unlawful, thus resulting in conviction.

Similar, and perhaps greater, issues arise with how to define palpable or manifest illegality. The focus is on whether a soldier would find the order illegal “at first blush.”¹⁹¹ One early court decision puts it this way: an order is manifestly illegal if it is “so palpably atrocious as well as illegal, that one must instinctively feel that it ought not to be obeyed.”¹⁹² Likewise, scholars have characterized it as a soldier’s “gut-level, *unreasoning*” and have focused on whether the order invokes “repugnance” or “moral opprobrium.”¹⁹³ The standard seems easy to apply when breaking the law has nothing to do with purported military objectives. For instance, an order by a superior officer to rape a person would obviously be manifestly illegal.¹⁹⁴ The same would be the case for an order to execute unarmed civilians.¹⁹⁵ These are easy cases for the standard, particularly because there is seemingly no military purpose for these acts.

But the analysis becomes more difficult when the act is arguably connected to military service. Osiel takes the example of a soldier shooting prisoners.¹⁹⁶ At first blush, this would seem like an unlawful act that is manifestly illegal. But other considerations may bear on whether the soldier has committed a crime. Perhaps military necessity would permit a small group of soldiers, who are vulnerable and behind enemy lines, to kill these individuals if they could not take them as prisoners of war without jeopardizing an important mission.¹⁹⁷ It is not clear how the concept of manifest illegality would handle this type of situation. Osiel finds that the principle’s bright-line rule fails to account for the situational awareness of circumstances that may make the same act unlawful in one context but not in the other.¹⁹⁸

He goes on to argue that certain acts, while manifestly illegal, may be necessary evils for achieving the greater good.¹⁹⁹ He uses the example of the Hiroshima bombing, which killed thousands of innocent civilians.²⁰⁰ Would a soldier be punished for following orders to drop the atom bomb? Under a strict reading

191. *McCall v. McDowell*, 15 F. Cas. 1235, 1240 (C.C.D. Cal. 1867).

192. *Id.* at 1241.

193. Osiel, *supra* note 185, at 995.

194. *See id.* at 1003.

195. *See* discussion of Nuremberg Charter, *supra* Part I.C.

196. *See* Osiel, *supra* note 185, at 1003–05.

197. *Id.*

198. *Id.* at 971.

199. *Id.* at 989–90.

200. *Id.*

of the manifest illegality principle, the answer seems to be yes. Surely, such an act would be, “at first blush,” clearly illegal and morally repugnant. But utilitarian principles suggest otherwise. Indeed, the conventional thinking was that such an act would end the War early and save many more lives than it took.²⁰¹ Another consideration relates to the appropriate legal perspective—international or national—from which the illegality standard should apply.²⁰² Certain acts that are blanketly illegal under international law may not be illegal under national law and vice versa.²⁰³

These are interesting issues that merit further discussion. To be sure, any account of this objective state-of-mind standard must satisfactorily define what constitutes “manifest illegality” and “person of common understanding.” However, these questions are ultimately beyond the scope of this article. The purpose here is not to debate *how* to define the prevailing model, but to question *why* it is used in the first place. In fact, if the manifest illegality principle is subject to such varying interpretations, one must ask why it is part of the defense and what role it really serves.

B. THE UNIQUE CASE OF OBEDIENCE TO ORDERS

The first place to start is the rationale for the defense itself. An obedience to orders defense serves to balance competing interests. We want to make sure soldiers do not commit crimes, but we also recognize that military life requires soldiers to obey orders. As one early case notes, “implicit obedience which military men usually pay to the orders of their superiors . . . is indispensably necessary to every military system,” but “the[se] instructions cannot . . . legalize an act which . . . would have been a plain trespass.”²⁰⁴ Scholars also recognize the balance that must be reached between these two ends. Pro-

201. *Id.* at 990. For a discussion of the justification for the bombing, see WILLIAM L. O’NEILL, *A DEMOCRACY AT WAR* 420–26 (1993) and RONALD SCHAFFER, *WINGS OF JUDGMENT* 131–38 (1985).

202. Osiel, *supra* note 185, at 981–85; see DINSTEIN, *supra* note 113, at 32–33 (noting that the uncertainty relating to international law pushes against the effectiveness of a manifest illegality principle).

203. Osiel gives the example of attacking or bombing a medical facility. Osiel, *supra* note 185, at 986–87. Under applicable international law, such destroying a legitimate medical facility is forbidden, but utilitarian considerations of military necessity may trump the international law and render such destruction acceptable as collateral damage. *Id.*

204. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804).

fessor Yoram Dinstein describes a soldier's dilemma in this way: by submitting to an illegal order, the soldier "commits a crime [and] violat[es] the prescriptions of criminal law," but should the soldier "def[y] the order and abstain[] from commission of the crime," he would violate the "dictates of military law."²⁰⁵ The manifest illegality principle seeks to assuage these opposing concerns. James Insko describes this principle as a "compromise that balances these competing aims by promoting discipline in the military while not entirely subverting the supremacy of the law."²⁰⁶ For this reason, the manifest illegality principle presumptively favors obeying the order. The language requires obedience *unless* the order is manifestly illegal.²⁰⁷ In this way, "[t]he doctrine demands that the subordinate share responsibility with his superior only for the clearest, most obvious crimes."²⁰⁸

But it is not clear why the standard requires subjective good faith (whether the defendant knew the order was unlawful) along with objective scrutiny of this assessment (whether a person of common understanding would have known the order was unlawful). The early cases do not explain where the objective component comes from and why both requirements appropriately balance the competing interests of promoting discipline, on the one hand, and making sure no crime is committed, on the other. Therefore, Osiel favors an objective standard that is less bright-line-based than the manifest illegality principle.²⁰⁹ He proposes a standard that is more context-based and focuses on whether the particular soldier in the given circumstances made a reasonable mistake in obeying an unlawful order.²¹⁰

205. DINSTEIN, *supra* note 113, at 6–7.

206. Insko, *supra* note 6, at 393. Because of this, Insko describes the defense as "a sort of golden mean." *Id.* Courts take a similar approach to the justification of the objective standard. *See* United States v. Calley, 48 C.M.R. 19, 32 (C.M.A. 1973) ("Casting the defense of obedience to orders solely in subjective terms of mens rea would operate practically to abrogate those objective restraints which are essential to functioning rules of war." (quoting United States v. Calley, 46 C.M.R. 1131, 1184 (C.M.A. 1973))).

207. *See* OSIEL, *supra* note 101 at 54–55; *supra* Part I.E.1 and note 128.

208. Osiel, *supra* note 185, at 963.

209. *Id.* at 1091–92.

210. *Id.* This approach begins with the stringent rule that all orders should be obeyed. *Id.* This bright line would be qualified by an exception concerning the soldier's reasonable mistake as to the lawfulness of the order based on the "factual configuration confronted by the errant soldier." *Id.* Presumably, in assessing whether the error was reasonable, a court would also look at the soldier's particular experience, training, and rank. *Id.* at 975 n.121.

Dinstein, on the other hand, suggests that a subjective standard standing alone would satisfy the competing concerns of preventing crimes while fostering military obedience.²¹¹ Arguing that subjective knowledge is the key consideration here, he finds that the objective standard's role is simply that of a "technical contrivance of the law of evidence, designed to ease the burden of proof lying on the prosecution."²¹² He finds that the uncertainty of the provisions of international law further frustrates the use of the objective standard.²¹³ For this reason, he advocates for a model that simply focuses on whether the defendant knew the order was unlawful.²¹⁴ The Model Penal Code also supports a purely subjective model.²¹⁵

Interestingly, none of these accounts ground their proposed framework on existing criminal law principles that support rejection of the dual state-of-mind requirements.²¹⁶ Rather, they simply argue that their respective approaches balance the competing interests involved, while avoiding the problems associated with the manifestly illegality standard.²¹⁷ This Article goes further by relying on the framework of an established de-

211. DINSTEIN, *supra* note 113. This type of model would be not unlike other parts of the criminal law where a jury would infer a subjective state of mind from external evidence. *See id.* at 27–29. This type of model would alleviate the issues surrounding the individualization of a "person of ordinary understanding" and the definition of "manifestly illegal." *Id.* at 27.

212. *See id.* at 29. Dinstein's criticism of the manifest illegality principle appears to echo that of *Calley's* dissent. Dinstein too finds that this principle may be overinclusive and may result in the improper conviction of a soldier based on his particular situation. *Id.* at 27–29. He cites to a soldier with a subnormal IQ who may not realize an order is unlawful even though a person of common understanding would recognize it as such. *Id.* at 27.

213. *See supra* note 202.

214. DINSTEIN, *supra* note 113, at 30–32. Deemed the "personal knowledge principle," Dinstein finds that manifest illegality may still play an ancillary role in his model in that if an order was manifestly illegal, the defendant is presumed to have been aware of the illegality. *Id.*

215. *See* MODEL PENAL CODE § 2.10 (1962) ("It is an affirmative defense that the actor, in engaging in the conduct charged to constitute an offense, does no more than execute an order of his superior in the armed services that he does not know to be unlawful."). The rationale behind this subjective approach relates to soldiers being prosecuted in civilian jurisdictions where it is not realistic for juries to understand what a soldier of common understanding would have known. *See id.* § 2.10 cmt. 1, at 392.

216. Some scholars rely on the tort principle of respondeat superior in arguing that the superior officer alone should be held solely responsible for the subordinate's crime. *See* Nico Keijzer, *A Plea for the Defence of Superior Orders*, 8 ISR. Y.B. ON HUM. RTS. 78, 80–84 (1978).

217. *See supra* notes 212–15.

fense—the entrapment defense—to support rejection of the current model.

The basic problem is that courts and scholars alike have failed to accurately analogize obedience to orders to a comparable civilian criminal law defense. Most civilian criminal law defenses—e.g. self-defense, heat of passion, duress, necessity, and mistake of law or fact—carry similar dual state-of-mind requirements.²¹⁸ This may explain why these requirements also found their way into the obedience to orders defense. The dissent in *Calley*, for instance, in arguing for a specific objective standard for obedience to orders, noted that objectively scrutinizing the defendant’s state of mind is commonly performed in other areas of criminal law, citing specifically to the heat of passion defense and the mistake of fact defense.²¹⁹

The obedience to orders defense has been specifically associated with the civilian defenses of duress and mistake of law.²²⁰ These two more than others have come to be seen as sharing similar properties with the obedience to orders defense. But this association is inapposite. Obedience to orders involves a type of government coercion that is not present with either duress or mistake of law. The unique nature of the government’s

218. See, e.g., *United States v. Peterson*, 483 F.2d 1222, 1230 (D.C. Cir. 1973) (noting that self-defense exonerates defendant only if she acted in good faith and her belief was “objectively reasonable in light of the surrounding circumstances”); *Nelson v. State*, 597 P.2d 977, 979 (Alaska 1979) (finding that necessity requires subjective belief in preventing the greater evil and that the belief was reasonable to a person in the defendant’s situation); *People v. Navarro*, 99 Cal. App. 3d Supp. 1, 11 (Cal. App. Dep’t Super. Ct. 1979) (finding that mistake of fact in general intent crimes require subjective good faith and objective reasonableness); *Girouard v. State*, 583 A.2d 718, 722 (Md. 1991) (noting that the heat-of-passion defense requires that the defendant committed homicide in sudden heat of passion and provocation was “calculated to inflame the passion of a reasonable man” (citation omitted) (internal quotation marks omitted)); *infra* Parts III.A.1 (duress requirements), III.B.1 (mistake of law requirements). It is important to note that with obedience to orders, unlike the bulk of these defenses, the ultimate burden of persuasion still rests with the government. See *United States v. New*, 55 M.J. 95, 113–14 (C.A.A.F. 2001) (noting the prosecution has the burden of proving beyond a reasonable doubt that the defense of obedience to orders did not exist); MILITARY JUDGES’ BENCHBOOK, *supra* note 179, § 5-8-1; MANUAL FOR COURTS-MARTIAL, 2012, *supra* note 28, at R.C.M. 916(b)(1).

219. See *United States v. Calley*, 48 C.M.R. 19, 31–32 (C.M.A. 1973) (Darden, C.J., dissenting). The dissent agrees that while objective scrutiny is necessary, much like in other parts of criminal law, the standard must be more relaxed than the prevailing standard of common understanding. See *supra* Part I.E.1 (providing an extensive overview of the dissent in *Calley*).

220. See *infra* Parts III.A–B.

role in obedience to orders undercuts the rationale that supports the use of a dual state-of-mind requirement for these other defenses. The following sections expand on this argument in order to show why these two defenses should not serve as the relevant civilian analogs to obedience to orders.

III. COMPARING OBEDIENCE TO ORDERS WITH DURESS AND MISTAKE OF LAW: THE LACK OF GOVERNMENT COERCION

Part III explains why duress and mistake of law should not serve as the relevant civilian analogs. It focuses on the fact that both these defenses lack the kind of government coercion present in the obedience to orders defense. This Part explores the duress defense and contrasts the private coercion present there with the public coercion found in obedience to orders. Next, it discusses mistake of law and highlights how this defense, unlike obedience to orders, does not implicate any government influence or pressure.

A. DURESS

1. The Role of Objective Scrutiny

The early cases of duress primarily involved claims of coercion in contractual disputes.²²¹ In one notable case, the Supreme Court defined duress as “that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient, in severity or in apprehension, to overcome the mind and will of a person of ordinary firmness.”²²² In another, it defined the term as “moral compulsion, such as that produced by threats to take life or inflict great bodily harm.”²²³

These early cases foreshadowed the dual state-of-mind requirements for the use of duress to excuse criminal conduct based on specific threats. The typical definition of duress requires the following elements: “(1) an immediate threat of death or serious bodily injury, (2) a well-grounded fear that the threat will be carried out, and (3) lack of a reasonable oppor-

221. See, e.g., *Hartsville Oil Mill v. United States*, 271 U.S. 43, 44 (1926); *Baker v. Morton*, 79 U.S. (12 Wall.) 150, 151–52 (1870); *Brown v. Pierce*, 74 U.S. (7 Wall.) 205, 214 (1868).

222. *Brown*, 74 U.S. at 214.

223. *Morton*, 79 U.S. at 158.

tunity to escape the threatened harm.”²²⁴ Successful application of the duress defense to a crime requires both a subjective state of mind and some level of objective scrutiny. The defendant must in good faith believe he is being threatened to commit the crime, and a reasonable person in the defendant’s situation also must have been similarly coerced.²²⁵ It is important to note that the defendant typically satisfies the mens rea of the crime and thus knows what he is doing is unlawful.²²⁶ However, the defendant is not criminally responsible assuming the threats sufficiently overpower him. The Model Penal Code and the states that follow it talk about this in the context of a defendant being “coerced in circumstances under which a person of reasonable firmness in [the] situation would likewise have been unable to resist.”²²⁷ As another court states, “[a] defendant’s [subjective] fear of death or serious bodily injury is generally insufficient. Rather, ‘[t]here must be evidence that the threatened harm was present, immediate, or impending.’”²²⁸ Jury instructions follow this two-part test, requiring that “[t]he defendant engaged in the criminal conduct because he was coerced to do so” and that “the degree of force used or the degree of threatened use of force, was such that a person of reasonable firmness in the defendant’s situation would not have been able to resist it.”²²⁹ The

224. *United States v. Vasquez-Landaver*, 527 F.3d 798, 802 (9th Cir. 2008); see also *United States v. Sawyer*, 558 F.3d 705, 711 (7th Cir. 2009). The Model Penal Code requires similar elements:

It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.

MODEL PENAL CODE § 2.09(1) (1985). Many states follow the Model Penal Code definition and thus require that a reasonable person in the defendant’s shoes would have also not resisted. See *id.* § 2.09 cmt. 4, at 384 n.60 (collecting state statutes).

225. A defendant would not satisfy the subjective portion if, for instance, she committed the crime after receiving threats that she knew were baseless or otherwise not coercive. Perhaps, she wanted to commit the crime for other reasons but waited until receiving such veiled threats. Here, she was not *actually* coerced.

226. See generally WAYNE R. LAFAVE, *CRIMINAL LAW* 492 (4th ed. 2003); Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1359–60 (1989).

227. See MODEL PENAL CODE § 2.09 explanatory note at 367.

228. *Sawyer*, 558 F.3d at 711; PATTERN JURY INSTRUCTIONS, 7TH CIRCUIT § 6.08 committee cmt. (2013).

229. 5 CONNECTICUT PRACTICE SERIES: CRIMINAL JURY INSTRUCTIONS § 6.5 (4th ed. 2007).

military defense of duress tracks the same requirements as the civilian version, including objectively scrutinizing the defendant's actions.²³⁰

Both courts and scholars have found that the purpose of this objective scrutiny is to set uniform standards for all citizens. The Model Penal Code commentary justifies it along the following lines:

The crucial reason [for rejecting a wholly subjective approach to duress] is the same as that which elsewhere leads to an unwillingness to vary legal norms with the individual's capacity to meet the standards they prescribe To make liability depend upon the fortitude of any given actor would be no less impractical or otherwise impolitic than to permit it to depend upon such other variables as intelligence or clarity of judgment, suggestibility or moral insight.²³¹

The point here is that all individuals should be held to a certain societal norm notwithstanding a person's idiosyncratic traits.²³² The Code mentions the situation of a defendant who is easily intimidated and therefore cannot control her conduct.²³³ In rejecting the duress defense here, the Code finds that "legal norms and sanctions operate not only at the moment of climactic choice, but also in the fashioning of values and of character."²³⁴ Courts similarly have focused on the promotion of community standards as a reason to continue employing objective scrutiny.²³⁵

Scholars, too, have recognized the importance of holding everyone to the same standard. Professor Laurie Doré finds that "the normative component of duress excuses only those actors who demonstrate the level of fortitude that society can fair-

230. MANUAL FOR COURTS-MARTIAL, 2012, *supra* note 28, at R.C.M. 916(h) ("It is a defense to any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act. The apprehension must reasonably continue throughout the commission of the act.").

231. MODEL PENAL CODE § 2.09 cmt. 2, at 374.

232. The Code, however, does take into account the defendant's physical characteristics: "Stark, tangible factors that differentiate the actor from another, like his size, strength, age, or health, would be considered in making the exculpatory judgment. [However,] [m]atters of temperament would not." *Id.* § 2.09 cmt. 3, at 375.

233. *Id.* § 2.09 cmt. 2, at 374–75.

234. *Id.* The Code explicitly allows consideration of a "mental disease or defect" that is "both gross and verifiable." *Id.*

235. See, e.g., *State v. Heinemann*, 920 A.2d 278, 287–89 (Conn. 2007); *State v. B.H.*, 870 A.2d 273, 286 (N.J. 2005).

ly expect of its morally responsible members . . . regardless of [their] own capacities or constitutional weaknesses.”²³⁶ Professor Joshua Dressler takes a softer approach. While he recognizes that a defendant under duress may not be infallible, he nevertheless concludes that it is acceptable for society to “set reasonable, minimal standards of personal responsibility (standards to which, lest we forget, we are willing to be held ourselves), codify them in our criminal codes, and punish those who fail to live up to them.”²³⁷

2. Obedience to Orders as a Defense of Duress

Obedience to orders and duress share similar qualities. Both defenses involve a third party exerting pressure or coercion on a defendant to commit a crime. The level of pressure obviously is different. In one, the coercion takes the form of imminent bodily harm or injury. In the other, the threat is implied and takes the form of criminal punishment. If a soldier fails to obey a superior order, she can be criminally prosecuted.²³⁸ It may be an obvious point, but superior officers typically do not explicitly convey the threat of prosecution. Rather, soldiers are indoctrinated to obey orders as part of their military training.²³⁹ Evidence in fact suggests that soldiers get very little instruction on the obedience to orders defense and the standard

236. Laurie Kratky Doré, *Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders*, 56 OHIO ST. L.J. 665, 748 (1995). Similar reasoning applies to other defenses where objective scrutiny is required. See, e.g., Kevin Jon Heller, *Beyond the Reasonable Man? A Sympathetic But Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 AM. J. CRIM. L. 1, 4–5 (1998) (noting that the reasonable person standard in self-defense and heat-of-passion cases is intended to hold all citizens to the same standard).

237. Dressler, *supra* note 226, at 1370.

238. See MANUAL FOR COURTS-MARTIAL, 2012, *supra* note 28, at art. 90(2) (“[A] [soldier who] willfully disobeys a lawful command of his superior commissioned officer; shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.”). This type of coercion would still be different than traditional duress since the threat of death is not “imminent.” See *supra* note 224 and accompanying text.

239. See Jeanne L. Bakker, *The Defense of Obedience to Superior Orders: The Mens Rea Requirement*, 17 AM. J. CRIM. L. 55, 61 (1989) (“[A] soldier’s training will very largely consist of a process designed to inculcate within him habits of obedience to command.” (internal quotation marks omitted)).

that courts use to judge their actions.²⁴⁰ The end result is a system where soldiers are generally expected to obey all orders.²⁴¹

For this reason, courts naturally seem to characterize obedience to orders as a type of coercion. They talk about the “implicit obedience” or “general duty” associated with superior orders.²⁴² For instance, one court explained that “[t]he first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in an army.”²⁴³ Pointing out the value of reflexive obedience, the court stated that “[i]f every subordinate . . . soldier were at liberty to question the legality of the orders of the commander, and obey them or not as they may consider them valid or invalid . . . the precious moment for action would be wasted in wordy conflicts between the advocates of conflicting opinions.”²⁴⁴

Scholars have also come to associate obedience to orders with a type of duress. *Insko* finds that “the defense of superior orders . . . embodies the principles underlying the defense[] of compulsion.”²⁴⁵ Much like a case of duress, the “soldier must make a choice of evils, deciding whether to follow an order, which if illegal will subject him to liability, or to defy the order, which if legal will subject the soldier to liability for insubordination.”²⁴⁶ *Dinstein* explains that the “factor of compulsion” in

240. *Osiel* notes that:

It may also be possible to induce disobedience to a still wider range of unlawful orders by not informing the soldier that reasonable belief in their legality will excuse his compliance. Training material issued to American soldiers during Operation Desert Storm did just this, describing their legal duties as more demanding than they actually were. The superior orders defense went unmentioned, as if it did not exist; and soldiers were expressly instructed: “Orders Are Not a Defense.”

Osiel, *supra* note 185, at 1096.

241. *See, e.g.*, *DINSTEIN*, *supra* note 113, at 51 (“Military discipline is very strict, and it threatens insubordination with inexorable sanctions, so that the soldier has practically no alternative (especially, though not necessarily, in times of war) . . .”). *But see* *Bakker*, *supra* note 239, at 62 (“Officials are expected to ask questions of their superiors, and to be morally and legally responsible for their own actions.” (internal quotation marks omitted)).

242. *See* *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804) (“[I]mplicit obedience which military men usually pay to the orders of their superiors . . . is indispensably necessary to every military system . . .”); *see also* *United States v. Calley*, 48 C.M.R. 19, 28 (C.M.A. 1973).

243. *Calley*, 48 C.M.R. at 28 (quoting *McCall v. McDowell*, 15 F. Cas. 1235, 1240 (C.C.D. Cal. 1867)).

244. *Id.*

245. *Insko*, *supra* note 6, at 396.

246. *Id.* at 396. *But see* *Bakker*, *supra* note 239, at 62 (“[T]he fact that or-

an obedience to orders defense can be analogized to the compulsion in a defense of duress.²⁴⁷ Others have made similar comparisons.²⁴⁸

This may explain the reason why obedience to orders also carries an objective requirement similar to its duress counterpart.²⁴⁹ Nevertheless, there is a critical difference between the two that goes beyond simply the nature of the coercion involved—i.e., physical threats or threat of criminal sanction. The source of the coercion is uniquely different. The government plays a key role in pressuring a soldier to obey an unlawful order, whereas in the duress scenario, it generally plays no such role in pressuring a defendant to accede to an individual's threats.

The interaction in the duress case is completely between private citizens. There is no government control or interest.²⁵⁰ As far as the government is concerned, a citizen remains free to disregard the threat and not commit the crime. Doing so will not result in any criminal sanction or be otherwise deleterious to a government objective. Of course, the individual may be harmed as a result, but this does not implicate the government in the same way. The government no doubt has a general interest in citizens being safe from harm, but a case of duress does not implicate specific or targeted government interests as in the military situation, where the government is the source of the coercion. Objectively scrutinizing the defendant's state of mind on the back end makes sense in a duress case. As discussed above, the point of this objective test is that citizens

ders are sometimes attended with compulsion does not mean that every case of obedience to orders is invariably accompanied by compulsion.”).

247. See DINSTEIN, *supra* note 113, at 77.

248. See, e.g., Valerie Epps, *The Soldier's Obligation to Die When Ordered to Shoot Civilians or Face Death Himself*, 37 NEW ENG. L. REV. 987 (2003) (analyzing the similarities between a soldier's duty to obey orders and duress); Green, *supra* note 177, at 330–31, 340.

249. The level of objective scrutiny is different. Duress takes the perspective of a “reasonable person,” whereas obedience to orders relies on the lower standard of “a man of ordinary sense and understanding.” *Compare Calley*, 48 C.M.R. at 27–28, with *supra* notes 224–29, 231–37 and accompanying text. This may be explained by the countervailing concern that soldiers typically should obey orders. Having a higher standard here, like that of a “reasonable person,” could lead to greater liability for soldiers who are on the lower end of the scale or create less respect for obeying orders. Cf. *Calley*, 48 C.M.R. at 28 (quoting *McCall v. McDowell*, 15 F. Cas. 1235, 1240 (C.C.D. Cal. 1867)).

250. The same would apply to other civilian affirmative defenses mentioned earlier (e.g. self-defense and heat-of-passion). The external pressure in all of these situations is coming from a private citizen.

should all be placed on equal footing if they end up succumbing to a private threat of duress and committing a crime. The government cannot realistically keep people from threatening others. Uniformity during the trial stage, then, at least prevents the government from unfairly discriminating in favor of certain individuals because of their specific, idiosyncratic traits. In addition to providing consistent criminal verdicts, the objective standard also serves an important socializing function intended to regulate the outer limits of citizens' behavior.

This rationale of promoting a uniform standard among soldiers—and thus the requirement of objective scrutiny—appears problematic in the obedience to orders case. We are not talking about behavior among private citizens, where all we can hope for is some uniformity after the fact. The government created the military command structure in which the subordinate finds herself, as well as the criminal sanctions for disobedience to an order.²⁵¹ Thus, through the actions of a commanding officer, the government is responsible for the pressure that leads a soldier to follow an unlawful order and commit a crime.²⁵² To be sure, without the threat of criminal sanction, the order would not have the same coercive effect. Why, then, should a soldier be subject to additional objective scrutiny targeting her state of mind—and an objective requirement which she may not be able to satisfy—when the same government prosecuting her is also responsible for the coercion? She should not. After all, the soldier is performing a vital function for the government by serving in its military. The role of government pressure in the crime and the resultant standard by which a defendant should be judged will be explained more fully in Part IV, discussing entrapment. For now, it is enough to say that where the pressure stems from the inherent authority of the order, any objective consideration should take into account and focus on the government's responsibility in this criminal act, not on what a person of common understanding would or would not have known.

One may push back at this and say that the current objective requirement, as in the duress case, serves an important

251. See generally *supra* Parts I.A, I.D and accompanying notes.

252. Cf. *United States v. Bailey*, 444 U.S. 394, 423 (1980) (Blackmun, J., dissenting) (noting that in the civil context, acts of government employees may violate the Eighth Amendment or the government's duty not to impose cruel and unusual punishments); *supra* Part I.E (overviewing modern obedience to order cases).

normalizing function in the military. Holding soldiers to a uniform standard helps foster the correct behavior when a subordinate is ultimately confronted with an unlawful order. This may be true, but if the duress-based rationale for objective scrutiny should apply in the military context, it follows that the specific objective requirement itself should also track its duress counterpart. It currently does not. Duress focuses on whether a reasonable person would have been unable to resist the threat, whereas the law of obedience to orders focuses on whether a soldier of common understanding would have known the order was unlawful.²⁵³ These are two very different questions. The first relates to how an individual is expected to behave, whereas the second relates to what a soldier is expected to know. In fact, a successful application of duress is consistent with a defendant knowing that her action constitutes a crime. The point of promulgating uniform behavior in this context is to make sure individuals *act* reasonably when confronted with similar coercive situations, even if they would *know* the act is wrongful.

Those that liken duress to obedience to orders focus on the coercive nature of the threat or order.²⁵⁴ But if this defense indeed is the natural civilian analog, then the operative question in the obedience to order case must be changed to address the nature of the coercion and a soldier's ability to resist, not whether a soldier should have known about the unlawfulness of the order. Otherwise, what is the relevance of the pressure being placed on the soldier? Knowledge of the lawfulness of an order seems disconnected from the coercive nature of the order.²⁵⁵ The basic problem in extending the same inquiry is that

253. The Model Penal Code and the states that follow it clearly ask whether a reasonable person would have also succumbed to the pressure. *See supra* notes 224, 227. The aforementioned federal version and military versions essentially makes the same inquiry, albeit indirectly. The federal rule asks whether the belief that the threat would be carried out was reasonable and a reasonable person could have escaped or otherwise thwarted the threat. *See supra* Part III.A.1 and accompanying notes. Similarly, the military rule asks whether the defendant's act was caused by a reasonable belief that the threat was real. *See supra* note 230. When the elements of these respective defenses are combined, the relevant inquiry becomes whether a reasonable person would also have succumbed to the threats or, put slightly differently, whether the defendant otherwise acted reasonably. Either way, the focus is on the defendant's actions, not her knowledge of the criminal nature of the act.

254. *See supra* Part II.B.

255. Perhaps the thinking here is that if a soldier knows the order is unlawful, she will not follow it. First, this does not necessarily follow given a military setting, but, more importantly, any inquiry into knowledge of an order

soldiers typically have to follow orders, whereas duress defendants are not obligated to succumb to threats. The reason for the difference of course centers on the fact that the government promulgates the order in the first situation but not the threats in the second. This only underscores the conclusion that the government's role must be accounted for when fashioning the obedience to orders defense. Interestingly, the entrapment-based objective test more appropriately focuses on what a defendant would have done, not what the defendant should have known. In its current form, obedience to orders cannot be accurately analogized to the doctrine of duress and its underlying rationale.²⁵⁶

None of this changes how we would analyze the defense of duress in the military. Take the case of a soldier who threatens a subordinate with bodily harm or death unless the individual commits a criminal act. Here, the coercion comes from the private threat of bodily harm instead of the inherent pressure of a superior order (promulgated by the government).²⁵⁷ Because there is no government-sanctioned pressure, the defendant would simply rely on the conventional duress defense. This would look very similar to the civilian analysis described earlier. A successful application of duress in this instance would require some level of objective scrutiny as to the legitimacy of the

fails to account for the coercion experienced by the soldier, the very factor that underlies an application of duress.

256. One might argue that obedience to orders should thus be changed to more closely resemble duress, as an alternative to this Article's realignment to entrapment. However, this option would require further changes to the obedience to orders defense. To mirror duress's subjective element, the subjective portion of the obedience to orders defense would have to be changed to ask whether a soldier in good faith followed the order, instead of asking whether the soldier knew the order was unlawful. Compare *supra* Part III.A.1, with *supra* note 225. This may be problematic in execution, because unlike the coercion facing a duress defendant, soldiers must obey orders. This means the soldier would almost always satisfy the subjective or good faith portion of the defense.

More generally, if we have decided to go ahead and change the obedience to orders defense, it behooves us to ask if there is a better civilian analog that more closely parallels this military defense. This Article argues that entrapment should stand as the civilian equivalent. Because even if as a practical matter the revised objective portion of the defense would be similar to either duress or entrapment, using the latter fully appreciates the government's role in the crime. See *infra* Part IV.B.

257. See, e.g., MILITARY JUDGES' BENCHBOOK, *supra* note 179 (noting that the obedience to orders defense does not exist if the jury finds beyond reasonable doubt that the defendant "was not acting under orders" when committing the crime).

threat. We do not want a different standard by which some soldiers are absolved from liability based on such private threats.

B. MISTAKE OF LAW

1. The Role of Objective Scrutiny

Mistake of law historically has not served as a defense to criminal conduct.²⁵⁸ Individuals are presumed to know the criminal law, and so ignorance of the specific law is no excuse.²⁵⁹ The rationale is primarily utilitarian and pragmatic. Not allowing this type of defense deters criminal conduct, fosters orderly administration, and preserves the primacy of the rule of law.²⁶⁰ This absolute prohibition has weakened over time, particularly as a result of the proliferation of criminal statutes.²⁶¹ Today, courts allow a mistake of law defense in limited circumstances. The Model Penal Code, for instance, provides a typical formulation:

A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when . . . [the accused] acts in reasonable reliance [on] an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision . . . ; (iii) an administrative order . . . ; or (iv) an official interpre-

258. See, e.g., *United States v. Tobin*, 480 F.3d 53, 59 (1st Cir. 2007); *United States v. Dean*, 487 F.3d 840, 850 (11th Cir. 2007); *Howell v. State*, 618 So. 2d 134, 142 (Ala. Crim. App. 1992); *Kipp v. State*, 704 A.2d 839, 842 (Del. 1998); *United States v. Marrero*, 507 N.E.2d 1068, 1068 (N.Y. 1987); Bruce R. Grace, *Ignorance of the Law as an Excuse*, 86 COLUM. L. REV. 1392, 1395 (1986) (“The refusal to allow mistakes of criminal law as a defense is due to a strong common law presumption that every person knows the criminal law.”).

259. See Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 738 (2012) (“The first and oldest justification is that ignorance or mistake of the law cannot be an excuse since every person is presumed to know the law.”).

260. *Marrero*, 507 N.E.2d at 1080; Meese, *supra* note 259, at 749 (discussing the rationales for this rule to include the effective administration of justice as well as the promotion of deterrence).

261. See *Marrero*, 507 N.E.2d at 1074 (“Today there is widespread criticism of the common-law rule mandating categorical preclusion of the mistake of law defense.” (citing scholars and cases)); Grace, *supra* note 258, at 1395–96 (noting that the presumption of knowledge of criminal law made sense in the past when the “common law of crimes closely tracked a relatively homogeneous community’s moral sensibility,” but in light of the increase of regulatory crimes, this presumption is “largely fictional”); Meese, *supra* note 259, at 729–37 (finding that because of today’s criminal structure, including relevant procedures and substantive crimes, the rationale for no mistake of law defense has been significantly reduced).

tation [by the] . . . body charged by law with responsibility for the interpretation²⁶²

Courts have adopted similar requirements.²⁶³ In a paradigmatic case, a defendant, for instance, could make out a mistake of law defense to a crime if she relied on an official statement issued by a state Attorney General interpreting a relevant criminal provision.²⁶⁴ The defense requires both subjective and objective scrutiny, similar to the requirements of duress. The defendant must have actually relied on the information in good faith, and the reliance must have been “reasonable.”²⁶⁵ Reasonableness typically means that “a person sincerely desirous of obeying the law would have accepted the

262. MODEL PENAL CODE § 2.04(3)(b) (1985). The Code also allows the defense where the particular statute is not known to the actor or otherwise not reasonably made available. *See id.* § 2.04(3)(a). A mistake of law defense is also known as estoppel by entrapment, not to be confused with traditional entrapment as discussed in Part IV. *See Commonwealth v. Twitchell*, 617 N.E.2d 609, 619 (Mass. 1993) (reasonable reliance on a statute or official statement creates a defense known as “entrapment by estoppel”); John T. Parry, *Culpability, Mistake, and Official Interpretations of Law*, 25 AM. J. CRIM. L. 1, 3 (1997) (noting that “entrapment by estoppel” signifies reasonable reliance on official interpretation of law). A typical rationale for this defense centers on the defendant’s reduced culpability because of her reliance on a government’s erroneous interpretation of the law. *See SueAnn D. Billimack, Reliance on an Official Interpretation of the Law: The Defense’s Appropriate Dimensions*, 1993 U. ILL. L. REV. 565, 577.

263. *See United States v. Duggan*, 743 F.2d 59, 83 (2d Cir. 1984); *United States v. Barker*, 546 F.2d 940, 947–48 (D.C. Cir. 1976); *Clark v. State*, 739 P.2d 777, 779 (Alaska App. 1987); *Gallegos v. State*, 828 S.W.2d 577, 579 (Tex. App. 1992). The military has a similar mistake of law defense in limited circumstances. *See MANUAL FOR COURTS-MARTIAL*, 2012, *supra* note 28, at R.C.M. 916(l), Discussion (“[M]istake of law may be a defense when the mistake results from reliance on the decision or pronouncement of an authorized public official or agency. For example, if an accused, acting on the advice of an official responsible for administering benefits that the accused is entitled to those benefits, applies for and receives those benefits, the accused may have a defense even though the accused was not legally eligible for the benefits.”).

264. *See, e.g., Twitchell*, 617 N.E.2d at 612–13 (finding that in a prosecution for involuntary manslaughter for improper care of a child on account of spiritual healing, parents could rely on attorney general opinion interpreting relevant criminal law).

265. *See, e.g., United States v. West Indies Transp., Inc.*, 127 F.3d 299, 313 (3d Cir. 1997); *United States v. Bressler*, 772 F.2d 287, 290 (7th Cir. 1985) (noting that a good-faith misunderstanding of law as a defense depends on objective reasonableness); *Marrero*, 507 N.E.2d at 1080–81; *State v. Patten*, 353 N.W.2d 30, 33 (N.D. 1984) (holding that even if defendant subjectively relied on sheriff’s office and a county state’s attorney statement, the defendant’s alleged reliance on such official statements, for the purposes of asserting a mistake-of-law defense, was clearly unreasonable).

information as true, and would not have been put on notice to make further inquiries.”²⁶⁶

Scholars and courts provide two interconnected reasons for this reasonableness standard or objective verification. First, it is important that there be some objective boundaries so that the defense is not dependent on mistaken beliefs of specific individuals. As Professor Miriam Gur-Arye puts it, “The boundaries ought to be defined by statute and to be interpreted by a body empowered to interpret the law . . . [and] should not be influenced by the mistaken views of each and every individual as to the scope of the prohibition.”²⁶⁷ This rationale is similar to the rationale for the objective standard in duress. There, too, the point is to prevent idiosyncratic verdicts while promoting a single community standard. The second justification encourages knowledge of the law and accurate readings of the statute. “Granting a defense to a person who relies on a mistaken opinion of an official body . . . helps to promote knowledge of the criminal law”²⁶⁸ It motivates a person to seek guidance on verification of the law.²⁶⁹ Bruce Grace makes the same point, but in the negative. If subjective belief alone were relevant, “[t]his could create an incentive for a potential defendant to

266. *United States v. Lansing*, 424 F.2d 225, 227 (9th Cir. 1970); *see also* *United States v. Abcasis*, 45 F.3d 39, 43 (2d Cir. 1995); *United States v. Nichols*, 21 F.3d 1016, 1018 (10th Cir. 1994) (stating that a belief must be reasonable “in light of the identity of the agent, the point of law misrepresented, and the substance of the misrepresentation”).

267. Miriam Gur-Arye, *Reliance on a Lawyer’s Mistaken Advice—Should it be an Excuse From Criminal Liability?*, 29 AM. J. CRIM. L. 455, 458 (2002); JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 394, 382–83 (2d ed. 1960) (“If that plea [mistake of law] were valid, the consequence would be: whenever a defendant in a criminal case thought the law was thus and so, he is to be treated as though the law were thus and so, *i.e.* the law actually is thus and so. But such a doctrine would contradict the essential requisites of a legal system.”); *see also* *Bressler*, 772 F.2d at 291 n.2 (providing an objective reasonableness instruction helps jury to distinguish good-faith belief from disagreement); Francis Funaro, *Tax Law—Assessing Willfulness in Criminal Tax Cases: Supreme Court Rejects Objective Reasonableness Standard*—*Cheek v. United States*, 111 S. Ct. 604 (1991), 25 SUFFOLK U. L. REV. 904, 908 (1991).

268. Gur-Arye, *supra* note 267, at 461; *United States v. Buckner*, 830 F.2d 102, 103 (7th Cir. 1987) (limiting the defense to objectively reasonable beliefs encourages individual to learn law); *cf. Marrero*, 507 N.E.2d at 1069 (finding that the reason for denying mistake of law defense was the Holmesian utility of knowledge principle where individuals should be encouraged to obey the law).

269. Gur-Arye, *supra* note 267, at 461.

turn a blind eye to the probability of regulation in order to perfect a mistake of law defense.”²⁷⁰

2. Obedience to Orders as Mistake of Law Defense

Mistake of law and obedience to orders both deal with reliance on an authoritative interpretation of the law authored by the government. In the one, it may take the form of a judicial opinion, administrative order, or law enforcement decision. In the other, it takes the form of a military order—a pronouncement cloaked with the authority of the government. Much like the civilian who trusts the determination of the state attorney general, the subordinate soldier trusts the determination of a commanding officer. Both these individuals derive their authority to give such statements from the government. This is why courts may excuse certain criminal conduct under these circumstances.²⁷¹ The defendant is relying on the same government that is doing the prosecuting.

For this reason, scholars have come to view obedience to orders as a version of a mistake of law defense. As *Insko* writes, “Within the framework of an obedience to orders defense, a soldier probably should be able to take refuge in the principles of a mistake of law claim”²⁷² He gives the example of a commanding officer who gives an illegal order to fire on a museum. A subordinate soldier following this order accepts (albeit incorrectly) the commanding officer’s assessment that this is a lawful target.²⁷³ Arguably, the reliance here is no different than a mistaken reliance on a state attorney general’s official interpretation. Put another way, by asserting an obedience to orders defense, a soldier asserts that “he carried out an illegal order while mistaken as to the law involved.”²⁷⁴ Other scholars have made similar comparisons.²⁷⁵

270. Grace, *supra* note 258, at 1416.

271. It is important to note that, however, similar to civilian courts, military law finds that ignorance of the law is typically not an excuse. MANUAL FOR COURTS-MARTIAL, 2012, *supra* note 28, at R.C.M. 916(l).

272. See *Insko*, *supra* note 6, at 395.

273. *Id.* Of course, under the obedience to orders defense, the soldier will not escape liability if the unlawfulness of the order to burn the museum was manifestly illegal.

274. See Solis, *supra* note 80, at 522.

275. See, e.g., DINSTEIN, *supra* note 113, at 76–77; Hiromi Sato, *Mistake of Law Within and Outside the International Criminal Court*, 15 *TOURO INT’L L. REV.* 138, 158 (2012). Dinstein also explicitly points out how obedience to orders shares qualities of both duress and mistake of law. See DINSTEIN, *supra* note 113, at 56–57.

There is indeed a natural nexus between obedience to orders and mistake of law. The element of government authority found in both cases is something not present in the duress defense. There, the relevant players are private citizens with no connection to the government. For this reason, one might even more closely associate obedience to orders with mistake of law than with duress.²⁷⁶ But here, too, there is a critical difference. There is no coercion in mistake of law cases. A defendant simply relies on an official interpretation and decides on her own to take the relevant course of conduct.²⁷⁷ The action is entirely discretionary. A defendant, for instance, may seek an interpretation from the attorney general's office in connection with performance of some potentially illegal activity. But the defendant is not required by the government to take the action.²⁷⁸

Objective scrutiny makes sense in the mistake of law context. As discussed above, it promotes uniformity of standards. As in the case of duress, the successful application of the mistake of law defense should not depend on the idiosyncratic, mistaken beliefs of citizens. It is important to promulgate a consistent community standard with respect to reliance on a government agency's recommendation. The same goes for promoting knowledge of the law. With an objective requirement, citizens are encouraged to make sure they properly investigate

276. The relevant inquiry in mistake of law also more closely tracks the inquiry in obedience to orders. Both mistake of law and obedience to orders focus on the defendant's state of mind and the reasonableness of the belief, whereas duress focuses on the defendant's actions and whether these actions are reasonable.

277. This type of reliance on official authority was central in the Oliver North case. *See* *United States v. North*, 910 F.2d 843, 885 (D.C. Cir. 1990); OSIEL, *supra* note 101, at 301 n.19 ("Oliver North defended his conduct on the basis of a Model Penal Code provision applicable to civilians who reasonably rely on statements of their legal duties by official authorities.").

278. Another area that has prompted discussions of the mistake of law defense involves actions by non-military government officials in connection with the detention and interrogation of terror suspects. *See generally* John Sifton, *United States Military and Central Intelligence Agency Personnel Abroad: Plugging the Prosecutorial Gaps*, 43 HARV. J. ON LEGIS. 487 (2006). While no such non-military government agent has been prosecuted, they could argue that they reasonably relied on the Office of Legal Counsel's memos on the subject. *See id.* at 513–14. It is not clear to what extent the arguments in this Article would apply here. These agents presumably would not have been ordered to use these alleged torture techniques with threat of criminal sanction as in the obedience to orders case. That said, perhaps these individuals would have been threatened by demotion or termination, suggesting a reworking similar to the instant analysis.

and read the official interpretation before acting in accordance with it.

Objective scrutiny, however, does not make sense in the obedience to orders case. A soldier does not *merely* rely, at her own discretion, on an official interpretation of the law issued by her commanding officer. The soldier is required to obey the command. This government-sanctioned coercion has to be accounted for when holding a soldier liable for committing a crime under these circumstances. The basic point here tracks the earlier discussion of duress and obedience to orders.²⁷⁹ Soldiers should not be held to a uniform standard when the very government doing the prosecuting is the one coercing them to commit the crime.²⁸⁰

The promotion of knowledge of the law as a separate justification for the requirement of objective scrutiny also does not make sense in the military context. The very nature of military structure and necessity requires obedience, not investigation.²⁸¹ To be sure, a culture where soldiers routinely question the lawfulness of superior orders would be deleterious to military effectiveness. This is not to suggest that soldiers are merely robots following orders blindly.²⁸² Asking for advice and clarification has its place. But the role of questioning is obviously more limited and circumscribed, and understandably so, in the military context than in civilian life.

279. See *supra* Part III.A.2.

280. Dinstein appears to discount the coercion that distinguishes mistake of law from obedience to orders. DINSTEIN, *supra* note 113, at 34–36. He finds no real difference between a soldier receiving an order from a commanding officer and one receiving advice from a military lawyer. Both, according to him, fall within the rubric of mistake of law. *Id.* at 35. While the association between the two cannot be denied, there is a difference between being ordered to do something as opposed to simply relying on advice at one's discretion. Part IV will more closely address the relevance of objective considerations when confronted with government pressure.

281. See OSIEL, *supra* note 101, at 289; *supra* Part III.A.2 and related notes.

282. See *United States v. Calley*, 48 C.M.R. 19, 26 (C.M.A.1973) (“[T]he obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent, obliged to respond, not as a machine, but as a person.”); Osiel, *supra* note 185, at 1070 (“Informed by military sociology, sophisticated military managers increasingly prefer the initiative of the self-starter to the blind obedience of the automaton.”).

IV. REALIGNING OBEDIENCE TO ORDERS WITH ENTRAPMENT

Part IV explores the similarities between entrapment and obedience to orders and argues that both should share the same requirements. This Part first details the history of entrapment and the contours of the subjective and objective tests, along with scholars' reactions to them. It next highlights the similarities between the two defenses and explains what a reoriented obedience to orders defense would look like. Finally, it provides a real-world hypothetical military scenario that applies the reconceptualized defense.

A. CONTOURS OF THE ENTRAPMENT DEFENSE

The history of the entrapment defense represents two competing interests: making sure the government has the ability to ferret out criminal activity and preventing the government from coercing or unlawfully pressuring otherwise innocent citizens to commit crimes.²⁸³ The early American cases did not recognize any defense based on police inducement.²⁸⁴ If a citizen committed a crime, regardless of the role of government, she was guilty of the crime.²⁸⁵ Shortly after the turn of the century, courts became increasingly frustrated with government-induced crimes committed by citizens.²⁸⁶ They criticized government agents, albeit in dicta, for their overreaching tactics and encouragements.²⁸⁷

Federal courts similarly began to emphasize the unfairness of punishing government-induced crimes.²⁸⁸ *Woo Wai v. United*

283. See MODEL PENAL CODE § 2.13 cmt. 2, at 408 (1985) (“Particularly in the enforcement of laws against vice, such as liquor and narcotics laws, it is all but impossible to obtain evidence for prosecution save by the use of decoys.”); Lombardo, *supra* note 28, at 210–11; cf. *Lewis v. United States*, 385 U.S. 206, 210 & n.6 (1966) (acknowledging the importance of decoys in ferreting out covert criminal dealings).

284. See Lombardo, *supra* note 28, at 218–19 and accompanying notes for cases rejecting the defense.

285. See, e.g., *Bd. of Comm’rs v. Backus*, 29 How. Pr. 33, 42 (N.Y. Sup. Ct. 1864) (finding that the plea of entrapment “has never since availed to shield crime or give indemnity to the culprit, and it is safe to say that under any code of civilized, not to say christian [sic] ethics, it never will.”).

286. See Lombardo, *supra* note 28, at 219 and accompanying notes.

287. See *id.* at 220–21 and accompanying notes for cited cases; Scott C. Paton, “*The Government Made Me Do It: A Proposed Approach to Entrapment Under Jacobson v. United States*,” 79 CORNELL L. REV. 995, 997 (1994).

288. See Lombardo, *supra* note 28, at 220–21 and accompanying notes for cited cases.

States became the first case to allow entrapment as a complete defense to the commission of a crime.²⁸⁹ The defendants were charged with conspiring to unlawfully bring certain foreign nationals into the country.²⁹⁰ The Ninth Circuit overturned their convictions, finding that the evidence adduced at trial involved significant government encouragement or inducement to commit the crime.²⁹¹ Specifically, the court noted that undercover agents prodded defendants on numerous occasions over a two-year period before the defendants finally assented to the criminal scheme.²⁹²

In reaching its conclusion, the court focused on the mental state of the defendants. It found that prior to the government involvement, the defendants had never engaged in this type of illegal importation or “thought of committing any offense against immigration laws.”²⁹³ Rather, with “the case at bar, the suggestion of the criminal act came from the officers of the government.”²⁹⁴ Obtaining a conviction under these circumstances, according to the court, was against public policy.²⁹⁵ This decision led to a number of other federal cases involving claims of entrapment.²⁹⁶

It was not until *Sorrells v. United States*, almost twenty years later, that the Supreme Court issued an authoritative statement on the entrapment defense.²⁹⁷ The case involved a defendant who was convicted of selling whisky in violation of the National Prohibition Act.²⁹⁸ The Court overturned the verdict because the trial court failed to allow the defendant to

289. See *Woo Wai v. United States*, 223 F. 412 (9th Cir. 1915); Lombardo, *supra* note 28, at 221.

290. *Woo Wai*, 223 F. at 412.

291. *Id.* at 413.

292. *Id.* at 414.

293. *Id.*

294. *Id.* at 415.

295. *Id.* (“We are of the opinion that it is against public policy to sustain a conviction obtained in the manner which is disclosed by the evidence in this case, taking the testimony of the defendants to be true, and that a sound public policy can be upheld only by denying the criminality of those who are thus induced to commit acts which infringe the letter of the criminal statutes.”).

296. See generally Annotation, *Entrapment to Commit Crime with View to Punishment Therefor*, 86 A.L.R. 263 (1933).

297. *Sorrells v. United States*, 287 U.S. 435, 452–53 (1932).

298. *Id.* at 438. The Act was later repealed by the Twenty-First Amendment to the United States Constitution. See U.S. CONST. amend. XXI; see also Benjamin Grubb, Note, *Exorcising the Ghosts of the Past: An Exploration of Alcoholic Beverage Regulation in Oklahoma*, 37 OKLA. CITY U. L. REV. 289, 296–97 (2012) (explaining the adoption of the Twenty-First Amendment).

raise an entrapment defense.²⁹⁹ The Court specifically noted that the federal agents twice asked the defendant to buy the whisky, and twice he refused.³⁰⁰ It was only after the undercover agent appealed to the defendant's nostalgia for his old World War I division, in which both men served, that the defendant finally acquiesced and bought the whisky.³⁰¹ The majority reasoned:

It is clear that the evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had no previous disposition to commit it but was an industrious, law-abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War.³⁰²

The majority, in line with *Woo Wai*, focused on the state of mind of the defendant and the fact that the defendant was otherwise innocent or not predisposed to commit the crime.³⁰³ This became what is now known as the subjective test used by federal courts, the military, and the majority of states.³⁰⁴

The concurrence questioned the majority's focus on the defendant's subjective intent, finding an internal inconsistency with the majority's reasoning.³⁰⁵ On the one hand, the defendant had fulfilled the intent required for the crime, but, on the other hand, the defendant was not really guilty because of

299. *Sorrells*, 287 U.S. at 459.

300. *Id.* at 439.

301. *Id.* at 440–41; see also Lombardo, *supra* note 28, at 222 (discussing the scenario in which the undercover agent coerced the defendant in *Sorrells*).

302. *Sorrells*, 287 U.S. at 441.

303. *Id.* at 443.

304. See *United States v. Vanzandt*, 14 M.J. 332 (C.M.A. 1982) (detailing the history of entrapment in the military and the establishment of the subjective test); MANUAL FOR COURTS-MARTIAL, 2012, *supra* note 28, at R.C.M. 916(g) (“*Entrapment*. It is a defense that the criminal design or suggestion to commit the offense originated in the Government and the accused had no predisposition to commit the offense.”); Lombardo, *supra* note 28, at 221–24 (noting that the majority of states and federal authorities use subjective entrapment test); Wadie E. Said, *The Terrorist Informant*, 85 WASH. L. REV. 687, 693 (2010). The typical entrapment situation in the military would involve police trying to persuade a soldier to commit a crime. See, e.g., *United States v. Kemp*, 42 M.J. 839 (N-M. Ct. Crim. App. 1995) (finding that defendant was not entrapped by undercover Naval Criminal Investigative Service agent). The Court's most recent decision on the subject affirmed the subjective test. See *Jacobson v. United States*, 503 U.S. 540, 550 (1992) (finding that prosecution did not show predisposition in context of multiple year sting operation).

305. See *Sorrells*, 287 U.S. at 453–58.

someone else's conduct.³⁰⁶ To avoid this conceptual difficulty, the concurrence instead focused on the role of the government in persuading the defendant to commit the crime.³⁰⁷ It suggested that the entrapment defense embodies a public policy principle against crimes "instigated by the government's own agents."³⁰⁸ This focus on government practices, in lieu of the defendant's state of mind, would eventually become the objective test used in a minority of state jurisdictions.³⁰⁹ The following sections expand on these two respective tests.³¹⁰

306. *Id.* at 455–56, 459.

307. *Id.* at 459.

308. *Id.* at 458–59. The term "government agents" includes federal, state, or local law enforcement personnel. *See, e.g.*, *United States v. Perl*, 584 F.2d 1316, 1321 n.3 (4th Cir. 1978) (explaining that government involvement includes "federal, state, or local law enforcement officials or their agents"). But the term also includes individuals who may not have official enforcement status. *See* MODEL PENAL CODE § 2.13 cmt. 7, at 418 (1985) ("The defense of entrapment does not arise . . . if the inducement comes from a private person with no official [government] connection. However, the required connection is stated to include many others beside policemen and prosecuting officials."). The basic principle of agency establishes whether a person is acting as a government agent. *See, e.g.*, *State v. Ogden*, 640 A.2d 6, 11 (Vt. 1993) (explaining that a government agent relationship is established within the typical rules of agency). This would include informants and other government agents who may not have official duties as officers. *See* MODEL PENAL CODE § 2.13 cmt. 7, at 418–19. The military uses a similar definition. *See* MANUAL FOR COURTS-MARTIAL, 2012, *supra* note 28, at R.C.M. 916(g), Discussion ("The 'Government' includes agents of the Government and persons cooperating with them (for example, informants).").

309. *See* Lombardo, *supra* note 28, at 231–32 (noting that a minority of state jurisdictions follow the objective test). The Model Penal Code also endorses the objective entrapment test. *See* MODEL PENAL CODE § 2.13; *see also* Lombardo, *supra* note 28, at 232 (discussing the Model Penal Code approach).

310. Some states follow a hybrid approach incorporating both tests. *See, e.g.*, *State v. Florez*, 636 A.2d 1040, 1047 (N.J. 1994) (explaining that the "statutory defense [of entrapment] has both subjective and objective elements"); *England v. State*, 887 S.W.2d 902, 910 (Tex. Crim. App. 1994) (holding that a mixed subjective and objective test is most appropriate in light of the entrapment defense statute and caselaw construing it). It is worth noting that these tests are different from a constitutional argument against conviction, which would require egregious or overreaching behavior that contravenes a person's due process rights. *See, e.g.*, *United States v. Russell*, 411 U.S. 423, 429–30 (1973); *Sorrells*, 287 U.S. at 452. However, this type of constitutional violation has a high burden that is rarely successful. *See* *Hampton v. United States*, 425 U.S. 484, 490–91 (1976); PAUL MARCUS, *THE ENTRAPMENT DEFENSE* § 7.01–.08 (4th ed. 2009).

1. Subjective Test

The subjective test for entrapment traditionally carries two conceptually distinct factors: inducement and predisposition.³¹¹ The government must have induced the defendant to commit the crime, and the defendant must not have been predisposed to commit the crime.³¹² As a threshold requirement, the inducement component is typically easy to satisfy and simply requires a showing that the government in some way encouraged or actively participated in the crime.³¹³

The main focus of the subjective test turns on the predisposition of the defendant, or, whether the defendant would have committed the crime without government encouragement.³¹⁴ Here, the inquiry is squarely centered on the defendant's state of mind.³¹⁵ It is important to note that this inquiry does not address the defendant's criminal intent.³¹⁶ This is assumed, because the entrapped defendant has presumptively satisfied the specific mens rea requirements for the criminal act.³¹⁷ Nevertheless, the defendant argues she is not culpable because of the

311. See *United States v. Whittle*, 34 M.J. 206, 208 (C.M.A. 1992) (“The first element is generally referred to as the inducement element and the second as the predisposition element.”); Paton, *supra* note 287, at 1000–01.

312. See, e.g., *United States v. Larson*, 64 M.J. 559 (A.F. Ct. Crim. App. 2006); *Hardin v. State*, 358 N.E.2d 134, 136 (Ind. 1976). The defendant traditionally has the burden of production in showing some evidence of inducement, at which point the burden of persuasion rests on the government to show that the defendant was predisposed to commit the crime. See, e.g., *United States v. Theagene*, 565 F.3d 911, 918 (5th Cir. 2009); *United States v. Brisbane*, 729 F. Supp. 2d 99, 113 (D.D.C. 2010); *Whittle*, 34 M.J. at 208 (noting that the initial burden of production is on the defendant but ultimate burden of persuasion of showing predisposition rests with the government). The ultimate question of whether the defendant was entrapped also typically falls on the jury. PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 6.04 (2012 ed.); see MARCUS, *supra* note 310, § 6.04.

313. See *United States v. Wolffs*, 594 F.2d 77, 80 (5th Cir. 1979) (requiring evidence which amounts to “more than a scintilla”); Paton, *supra* note 287, at 1001.

314. See, e.g., *United States v. Ortiz*, 804 F.2d 1161, 1165 (10th Cir. 1986) (“[E]ntrapment raises the issue of whether the criminal intent originated with the defendant or with government agents.”); *United States v. Clark*, 28 M.J. 401 (C.M.A. 1989).

315. See, e.g., *People v. Sprouse*, 983 P.2d 771, 776 (Colo. 1999).

316. See Katrice L. Bridges, Note, *The Forgotten Constitutional Right to Present a Defense and Its Impact on the Acceptance of Responsibility-Entrapment Debate*, 103 MICH. L. REV. 367, 374–76 (2004).

317. See *id.*

lack of predisposition.³¹⁸ In making this determination, courts look at a variety of factors, including the character and reputation of the defendant, the defendant's prior criminal record, whether the government first suggested the criminal activity, whether the defendant engaged in the crime for profit, whether the defendant demonstrated a reluctance to commit the offense, and the nature of the inducement or persuasion offered by the government.³¹⁹ Probably the most important consideration in showing lack of predisposition is the extent to which the defendant was reluctant to commit the crime in the face of government inducement.³²⁰ Inducement here includes "excessive pressure, threats, or the exploitation of an unfair advantage," but would not include "simple solicitation [or] [e]mpty promises that a crime, once committed, will produce no adverse repercussions."³²¹ This means police "are not precluded from utilizing artifice and stealth" as long as "they merely afford opportunities or facilities for the commission of the offense by one predisposed or ready to commit it."³²² Predisposition here may be evidenced by the defendant's enthusiastic participation in the crime.³²³

318. *Mathews v. United States*, 485 U.S. 58, 62 (1988) ("When a defendant pleads entrapment, he is asserting that, although he had criminal intent, it was 'the Government's deception [that implanted] the criminal design in the mind of the defendant.'" (quoting *United States v. Russell*, 411 U.S. 423, 436 (1973))); *Bridges*, *supra* note 316, at 373–76 (noting that entrapment does not dispute factual guilt). A defendant who claimed she did not know she was committing a crime would more appropriately assert a mistake of law defense. *See supra* Part III.B.1.

319. *United States v. Higham*, 98 F.3d 285, 290 (7th Cir. 1996); *People v. Kulwin*, 593 N.E.2d 717, 719 (Ill. App. Ct. 1992).

320. *See, e.g., Higham*, 98 F.3d at 291; *United States v. Garza-Juarez*, 992 F.2d 896, 908 (9th Cir. 1993). *But see United States v. Meyers*, 21 M.J. 1007, 1014 (A.C.M.R. 1986) (declining to "treat any one factor as on its face being more important than any other").

321. *United States v. Ramos-Paulino*, 488 F.3d 459, 462 (1st Cir. 2007); *see also Sherman v. United States*, 356 U.S. 369, 376–78 (1958) (finding that defendant was entrapped by informant pretending to be recovering addict in great suffering to persuade defendant to obtain illegal narcotics for him); *United States v. Myers*, 575 F.3d 801, 806 (8th Cir. 2009).

322. *See United States v. Davis*, 15 F.3d 902, 909 (9th Cir. 1994).

323. *United States v. Rodriguez*, 43 F.3d 117, 126–27 (5th Cir. 1995). It is important to note that defendant's knowledge of the criminality of the act is not relevant. It stands to reason that the defendant probably knew what she was doing was unlawful, but this knowledge (or lack thereof) is more relevant in the mistake of law context. *See supra* Part III.B.1.

2. Objective Test

The objective test centers on the conduct of the government agents instead of the specific state of mind of the defendant.³²⁴ The crucial question under this test is whether the government practices were so extreme that they created a substantial risk that a law-abiding person would commit the crime.³²⁵ It is worth noting that “some tactics employing misrepresentation and persuasion are necessary to successful police work and ought not to be forbidden.”³²⁶ For instance, the government can set up sting operations where police pose as potential victims or co-conspirators.³²⁷ The prototypical case would involve government agents posing as drug buyers in order to ferret out drug suppliers.³²⁸ However, these activities cross the line into entrapment when the government agents go beyond simply providing an opportunity to commit the crime and instead engage in “overbearing conduct such as badgering, cajoling, [or] importuning.”³²⁹ For instance, repeated invitations and pressuring by government agents to commit a certain crime would most likely constitute entrapment.³³⁰ Making false representations that induce someone to believe that the conduct is not criminal would also qualify.³³¹ In making this determination, “the propensities of the particular defendant are irrelevant.”³³²

324. See *Russell*, 411 U.S. at 445–50 (Stewart, J., dissenting) (“[W]hen the agents’ involvement in criminal activities goes beyond the mere offering of such an opportunity and when their conduct is of a kind that could induce or instigate the commission of a crime by one not ready and willing to commit it, then regardless of the character or propensities of the particular person induced [entrapment] has occurred.”).

325. *Grossman v. State*, 457 P.2d 226, 229 (Alaska 1969); *Commonwealth v. Jones*, 363 A.2d 1281, 1285 (Pa. 1976); *State v. Martinez*, 848 P.2d 702, 706 (Utah Ct. App. 1993). The defendant typically has the burden of persuasion to show that a hypothetical law-abiding citizen would have also committed the crime. See MODEL PENAL CODE § 2.13 cmt. 5, at 415 (1985); MARCUS, *supra* note 310, § 6.01, .05. The judge, not jury, also typically but not always decides whether the defendant was entrapped under this formulation. See *Russell*, 411 U.S. at 441 (Stewart, J., dissenting) (“Under [the objective approach], the determination of the lawfulness of the Government’s conduct must be made . . . by the trial judge, not the jury.”); MODEL PENAL CODE § 6.09.

326. MODEL PENAL CODE § 2.13 cmt. 2, at 408.

327. See, e.g., *State v. James*, 484 N.W.2d 799, 800–01 (Minn. Ct. App. 1992).

328. *Jacobson v. United States*, 503 U.S. 540, 549–50 (1992).

329. *People v. Barraza*, 591 P.2d 947, 955 (Cal. 1979).

330. See, e.g., *Sorrells v. United States*, 287 U.S. 435, 439–41 (1932); *Woo Wai v. United States*, 223 F. 412, 412–14 (9th Cir. 1996).

331. MODEL PENAL CODE § 2.13(1)(a).

332. *Id.* § 2.13 cmt. 3, at 411.

The inquiry focuses on the effect of the government's conduct on a normal, law-abiding person in the defendant's situation.³³³ If the practices would cause this hypothetical person to commit the crime, the defendant would be successful in raising an entrapment defense.

As previously mentioned, this objective standard may be likened to the objective scrutiny inquiry in the duress defense in the sense that both ask about what a reasonable person would do in the situation.³³⁴ However, with duress, this element functions as a secondary requirement such that the defendant must also in good faith be coerced. With entrapment, in a jurisdiction that has adopted the objective test, there is no subjective requirement. The focus is entirely on the hypothetical person and whether government tactics would have convinced him to commit the crime.

3. Scholars' Reactions

Scholars have pointed out advantages and disadvantages to both the subjective and objective tests. A key advantage of the subjective test is that it keeps the focus on the defendant.³³⁵ As a result, it punishes only those who would have committed the crime regardless of the government's action.³³⁶ Yet some have noted that in its attempt to assess the defendant's guilt, the subjective test also inappropriately focuses on a defendant's prior history as relevant to the instant determination.³³⁷ This may unfairly prejudice the defendant based on her prior conduct.³³⁸ Professor Louis Michael Seidman has also questioned whether the subjective test really provides a practically distinct

333. *People v. Lee*, 219 Cal. App. 3d 829 (Cal. Ct. App. 1990); *People v. Alford*, 251 N.W.2d 314 (Mich. Ct. App. 1977), *aff'd*, 275 N.W.2d 484 (Mich. 1979). This contextual analysis would naturally include the interaction of the defendant with the government agent and the defendant's response to the agent's inducements. *See, e.g.*, *Grossman v. State*, 457 P.2d 226 (Alaska 1969); *Barraza*, 591 P.2d at 955.

334. *See supra* Part III.A.1.

335. Paton, *supra* note 287, at 1029.

336. *Id.*

337. *See* Damon D. Camp, *Out of the Quagmire After Jacobson v. United States: Towards a More Balanced Entrapment Standard*, 83 J. CRIM. L. & CRIMINOLOGY 1055, 1066–68 (1993); Andrew H. Costinett, Note, "In a Puff of Smoke": *Drug Crime and the Perils of Subjective Entrapment*, 48 AM. CRIM. L. REV. 1757, 1766–70 (2011).

338. Costinett, *supra* note 337, at 1766–70 (noting the unfair prejudice that may arise by examining a defendant's prior criminal record or bad acts).

analysis from the objective standard.³³⁹ He argues that because predisposition means readiness to commit a crime, the only way for courts to ascertain this level of intent is to posit a minimum level of inducement by which even an innocent person would respond.³⁴⁰ Distinguishing a defendant who is worthy of punishment from one who is not will ultimately turn on the government's conduct—the central feature of the objective standard.³⁴¹

Similarly, the objective test garners both positive and negative reactions. Scholars seem to praise the idea that this test eschews any discussion of a defendant's prior acts and instead focuses solely on the government's action in this particular case.³⁴² With its emphasis on government inducement, this test also serves to guard against government misconduct in the future.³⁴³ One major drawback according to some is that the test places too much emphasis on what a hypothetical reasonable person would do in the defendant's situation.³⁴⁴ As Scott Paton writes, "The concern is that the objective analysis takes place in a vacuum of abstractness [sic] where intangibles battle each other."³⁴⁵

The purpose of this Article is not to debate the merits of these two tests. The important takeaway for my argument is that neither test carries the dual objective and subjective state-of-mind requirements found in duress or mistake of law. The subjective entrapment defense has a single test that focuses solely on what the defendant thought.³⁴⁶ There is no additional

339. See Louis Michael Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 SUP. CT. REV. 111, 118–19 (1981).

340. See *id.*; see also Rebecca Roiphe, *The Serpent Beguiled Me: A History of the Entrapment Defense*, 33 SETON HALL L. REV. 257, 294–95 (2003) (discussing Seidman's argument).

341. Seidman, *supra* note 339, at 118–19; Andrew Carlon, Note, *Entrapment, Punishment, and the Sadistic State*, 93 VA. L. REV. 1081, 1093–95 (2007). Perhaps, for this reason, some scholars favor a hybrid approach that incorporates features of both tests. See, e.g., Paton, *supra* note 287, at 1032–34; Jeffrey N. Klar, Note, *The Need for a Dual Approach to Entrapment*, 59 WASH. U. L.Q. 199, 200 n.10 (1981).

342. See Paton, *supra* note 287, at 1030–31.

343. See Klar, *supra* note 341, at 211–12; Paton, *supra* note 287, at 1030–31.

344. See Roger Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 216–24 (1976); Klar, *supra* note 341, at 218.

345. See Paton, *supra* note 287, at 1031.

346. See, e.g., Lombardo, *supra* note 28, at 221–24 (outlining the fundamentals of the subjective entrapment defense and tracking its evolution).

element of objective scrutiny.³⁴⁷ The objective entrapment test also asks only one question—whether the government’s conduct was so extreme as to induce a law-abiding person to commit the crime. There is no additional analysis or scrutiny of the defendant’s state of mind.³⁴⁸ Whether she is guilty or otherwise predisposed is not relevant.³⁴⁹ While the objective test does incorporate a reasonable person standard, the purpose is to evaluate the government’s conduct and its effect on this hypothetical person, not scrutinize the defendant’s state of mind, as in cases of duress or mistake of law.³⁵⁰

4. The Role of Government Pressure in the Crime

The entrapment defense does not share the same dual state-of-mind requirements found in the mistake of law or duress defenses.³⁵¹ This appears to be more than just historical coincidence. When the defense was being codified at the turn of the last century, the reasonable person standard was already being used.³⁵² So courts could have easily incorporated this objective scrutiny requirement targeting the defendant’s state of mind, but chose not to do so. The explanation seems to center on the unique role of the government in the entrapment case.³⁵³ Unlike with other criminal law defenses, which typically involve conduct amongst private citizens,³⁵⁴ in the entrapment

347. See Paton, *supra* note 287, at 1000–02 (emphasizing the fact that individual predisposition underlies the subjective entrapment analysis).

348. See, e.g., Carlon, *supra* note 341, at 1090.

349. See Lombardo, *supra* note 28, at 229–30.

350. See, e.g., Carlon, *supra* note 341, at 1091 (speaking to the evaluation of the hypothetical individual).

351. See, e.g., Paton, *supra* note 287, at 1029–32 (comparing the objective and subjective approaches to entrapment and illustrating a lack of dual state-of-mind requirements in the traditional tests).

352. See Roiphe, *supra* note 340, at 258–59.

353. See, e.g., Carlon, *supra* note 341, at 1099–1102 (suggesting that one of entrapment’s traditional underpinnings has been a desire to check state conduct).

354. Necessity comes to mind as a criminal defense that does not necessarily involve conduct amongst private citizens. Typically a defendant commits a crime in order to avert a greater harm caused by natural forces. See, e.g., *United States v. Bailey*, 444 U.S. 394, 410 (1980) (noting that necessity involves a “situation where physical forces beyond the actor’s control rendered illegal conduct the lesser of two evils”); MODEL PENAL CODE § 3.02 (1985). Even here, though, courts use a reasonable person standard, which makes sense since the government also plays no active role in this crime. See Monu Bedi, *Excusing Behavior: Reclassifying the Federal Common Law Defenses of Duress and Necessity Relying on the Victim’s Role*, 101 J. CRIM. L. & CRIMINOLOGY 575, 584 (2011) [hereinafter Bedi, *Excusing Behavior*].

scenario the government is uniquely responsible for causing the crime.³⁵⁵

Take the subjective test. The focus is on the defendant's culpability and whether she would have committed the crime but for the government's actions.³⁵⁶ A defendant pressured by the government to commit a crime is not as blameworthy as someone who was not coerced in any way.³⁵⁷ The reasoning is retributive in nature.³⁵⁸ The defendant who is not predisposed is not deserving of punishment, whereas one who is predisposed should be found guilty.³⁵⁹ Even though the entrapped defendant knew what he was doing was unlawful, it was only the government's conduct that made the former commit the crime.³⁶⁰ In this way, the government can be seen as partly culpable for the crime based on its tactics.³⁶¹ As has been noted:

The government or its officials do not suddenly become guilty of the crime. This analysis is not rooted in criminal liability but rather intuitive notions of culpability. Because the government caused the defendant to commit the crime, the blame for the offense appropriately shifts to the government, and the defendant is found not guilty.³⁶²

355. See, e.g., Carlon, *supra* note 341 at 1083–85 (delineating between “private entrapment”—which does not provide a defense—and entrapment by state actors).

356. Jonathan Carlson, *The Act Requirement and the Foundation of the Entrapment Defense*, 73 VA. L. REV. 1011, 1037 (1987) (“[T]he supporters of the culpability rationale assert that, if the offender was predisposed before the inducement, he is culpable despite the encouragement and should therefore be punished. Thus the defense relates to the defendant’s ‘normative culpability,’ and resembles other defenses of excuse in the criminal law.”).

357. See *United States v. Russell*, 411 U.S. 423, 429 (1973) (“[T]o determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal.” (quoting *Sherman v. United States*, 356 U.S. 369, 372 (1958))); *Sherman*, 356 U.S. at 376 (arguing that the purpose of entrapment is to prevent government from taking advantage of the “weaknesses of an innocent party” and trick him or her into “committing crimes which he [or she] otherwise would not have attempted”); *Sorrells v. United States*, 287 U.S. 435, 448 (1932) (noting the availability of the entrapment defense to “persons otherwise innocent” who are lured by the government to commit the crime).

358. Anthony Dillof, *Unraveling Unlawful Entrapment*, 94 J. CRIM. L. & CRIMINOLOGY 827, 845 (2004).

359. See Park, *supra* note 344, at 240 (“Since [the entrapped defendants] are less blameworthy, they are less deserving of retributive punishment . . .”).

360. See Lombardo, *supra* note 28, at 234–54 for an extended discussion of causation as it relates to government conduct in the entrapment context.

361. See, e.g., *Sherman*, 356 U.S. at 376 (noting that in entrapment cases the government “beguiles” the defendant into committing the crime).

362. Monu Bedi, *Blame It on the Government: A Justification for the Disparate Treatment of Departures Based on Cultural Ties*, 38 CAP. U. L. REV.

To hold otherwise would be unfair to the defendant.

Some scholars have argued against this principal of reduced culpability. The primary thrust here is that “if government encouragement truly diminishes individual culpability for criminal conduct, then private encouragement should diminish culpability as well. But no one argues that the entrapment defense is proper in the case of private encouragement”³⁶³ There is nothing problematic about this divergent result. Again, the difference here is private versus public coercion. When the very entity prosecuting the individual causes the commission of the crime, a different standard should apply. This does not mean that the privately coerced defendant is not sympathetic or is otherwise equally as culpable as someone who commits the crime without any external threats. To be sure, this is what allows this coerced defendant to escape liability under a duress defense.³⁶⁴ The point here is that we should not subject the entrapped defendant to the same reasonable person standard that applies to the duress defendant. This gives the government too much advantage given that it is partly culpable in pressuring the defendant to commit the crime. One could analogize the reasoning here to the doctrine of unjust enrichment in the civilian context. This tort requires a person to make another whole if the former unfairly receives a benefit at the expense of the latter.³⁶⁵ In the entrapment case, by imposing a reasonable person standard on the defendant, the government would be unfairly enriched because it would receive the benefit of increasing the chance of a obtaining a conviction (by requiring the defendant’s state of mind be reasonable) even though it caused the defendant to commit the crime. The same considerations are not present with private coercion because the actor doing the coercion has no stake in the subsequent duress trial.

The objective standard is also grounded in the government’s improper role in facilitating the crime, except that this time, the focus is on the actions of the government rather than the relative culpability of the defendant.³⁶⁶ The point here is to

789, 818 (2010) [hereinafter Bedi, *Blame It on the Government*].

363. Carlson, *supra* note 356, at 1038; *see also* United States v. Russell, 411 U.S. 423, 442 (1973) (Stewart, J., dissenting); Dillof, *supra* note 358, at 845–52.

364. *See, e.g.*, Bedi, *Blame It on the Government*, *supra* note 362, at 816.

365. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (Discussion Draft 2000).

366. *See* Carlson, *supra* note 356, at 1044–45.

deter extreme tactics and strategies by the government, not make sure an innocent defendant is exonerated.³⁶⁷ The rationale is thus utilitarian in nature, not retributive.³⁶⁸ Allowing a defendant to escape liability in this circumstance helps deter improper government overreach and police instigation.³⁶⁹ To foreclose the possibility of an objectivity-based defense would thus encourage the continued use of this type of unwanted government coercion. Such behavior also detracts from the government's proper task of apprehending offenders without any encouragement.³⁷⁰ Moreover, "[s]uch tactics spread suspicion in the community and can . . . injur[e] . . . the reputation of law enforcement institutions"³⁷¹

While the objective entrapment test also invokes a reasonable person construct,³⁷² the perspective and underlying rationale of this element are quite different than in duress or mistake of law. There, the purpose is to promulgate a uniform community standard among citizens.³⁷³ This is why the objective test for those defenses asks whether a reasonable person would have similarly succumbed to the threats or whether a reasonable person would have relied on the interpretation of the law.³⁷⁴ On the other hand, the focus in entrapment is on the government's behavior and whether its tactics would have caused the hypothetical person to succumb to the pressure.³⁷⁵ In turn, the justification centers on deterring inappropriate government tactics so future citizens are not placed in this type of compromising situation.³⁷⁶ Establishing uniform societal norms is not relevant, unless the norm relates to promoting certain behavior by government actors.³⁷⁷ This difference makes sense because the source of the pressure in the entrapment situation

367. *See id.*

368. *See* Dillof, *supra* note 358, at 860–61 (noting that objective tests act “as prophylactic devices to inhibit future police conduct”).

369. *See* MODEL PENAL CODE § 2.13 cmt. 1, at 406–07 (1985).

370. *See id.*

371. *Id.*

372. *See, e.g.,* Park, *supra* note 344, at 165–66.

373. *See, e.g.,* Parry, *supra* note 262, at 13–14, 23–24.

374. *See, e.g.,* Liparota v. United States, 471 U.S. 419, 433 (1985) (dealing with mistake of law); MODEL PENAL CODE § 2.09 (duress).

375. *See, e.g.,* Roiphe, *supra* note 340, at 258–59 (tracking the development of the reasonable person standard as it relates to entrapment).

376. *See* MODEL PENAL CODE § 2.13 cmt. 1, at 406–07.

377. Lombardo, *supra* note 28, at 241–43 (examining the tension that is sometimes created as a result of the objective test's singular focus on government misconduct).

is the government instead of a private citizen, as in mistake of law or duress.³⁷⁸ If the point is to prevent these crimes from being committed, the government no doubt has more control over its own agents' conduct than it has over private citizens with no affiliation with the government.

B. THE ENTRAPPED SOLDIER: OBEDIENCE TO ORDERS
RECONCEPTUALIZED

The obedience to orders defense looks a lot like a case of entrapment. Both involve a defendant being coerced or otherwise pressured by government agents to commit a crime.³⁷⁹ In the entrapment situation, the government takes the form of undercover police, and the pressure takes the form of inducement through manipulation or cajoling.³⁸⁰ In the military context, the government agent takes the form of a commanding soldier, and the coercion takes the form of a military order.³⁸¹ This shared direct government involvement sets these defenses apart from both mistake of law and duress. In fact, the government pressure is qualitatively greater in the military than the civilian context. Not acquiescing to a police officer's cajoling does not carry any adverse consequences, while disobeying a military order carries the threat of criminal punishment.³⁸² This suggests that the rationales and underlying justification behind the entrapment model apply with even greater force in the obedience to orders context.

For instance, both situations are tied up with important government objectives. In the entrapment context, police are supposed to ferret out criminal activity.³⁸³ They are expected to employ sting operations that entice defendants to commit

378. See, e.g., Carlon, *supra* note 341, at 1083–84 (noting the essential nature of government action in entrapment and the unavailability of a “private entrapment” defense).

379. Compare *supra* Part I, with MODEL PENAL CODE § 2.13.

380. See Richard McAdams, *The Political Economy of Entrapment*, 96 J. CRIM. L. & CRIMINOLOGY 107, 110–11 (2005) (discussing the types of undercover police operations which might give rise to entrapment scenarios).

381. Commanding soldiers would squarely fall under the definition of government agents. See *supra* note 308.

382. Absent fulfillment of a criminal act, no crime has been committed. See Lombardo, *supra* note 28, at 219–24 for a discussion of the development of causation analysis—including the fundamental act requirement—in the entrapment context. See *supra* Part II.B.

383. See *Lewis v. United States*, 385 U.S. 206, 210 (1966) (recognizing the state's legitimate role in interdicting criminal activity through undercover means).

crimes.³⁸⁴ But the police cross the line when they engage in extreme tactics and pressure.³⁸⁵ Similarly, lawful orders are part and parcel of an effective military regime.³⁸⁶ Subordinates are fully expected to follow lawful orders issued by their superiors.³⁸⁷ But this activity crosses the line when soldiers give unlawful orders, pressuring subordinates to commit crimes.³⁸⁸ Both defenses serve to regulate these competing concerns.

Accordingly, for both doctrinal and policy-related reasons, it seems inconsistent for military courts to apply the dual state-of-mind requirements in obedience to orders cases, in line with mistake of law and duress, while the same courts apply a separate test for entrapment. Given the similarities in form and function as well as the underlying rationales, the contours of the obedience to orders defense should more closely resemble those of entrapment.³⁸⁹

This Article does not necessarily take a position on which test—objective or subjective—should be used in the obedience to orders case. It stands to reason that the subjective probably would be the favored test, as the military version of entrapment uses a subjective test.³⁹⁰ Either test provides a narrowly tai-

384. See *Jacobson v. United States*, 503 U.S. 540, 549–50 (1992) (reaffirming the government’s ability to conduct sting operations).

385. See, e.g., MODEL PENAL CODE § 2.13 cmt. 1, at 406 (1985).

386. See generally *supra* Part III.A.2.

387. See, e.g., Uniform Code of Military Justice art. 92, 10 U.S.C. § 892 (2012).

388. The Uniform Code of Military Justice provides that subordinates are obligated to follow the *lawful* orders of their superiors. *Id.*

389. One might also draw a parallel between obedience to orders and the relatively obscure civilian defense of assisting an unlawful arrest. Under this defense, a private citizen can defend against assault or related charges when this person “is summoned by a peace officer to assist in effecting an unlawful arrest” MODEL PENAL CODE § 3.07(4). Courts typically require that the individual believe the arrest is lawful, or at minimum not believe that the arrest is unlawful, before this defense applies. See *id.* cmt. 5 & n.40, at 127 (collecting statutes focusing on the subjective belief of the private citizen from various jurisdictions). Because this defense only applies when a crime is committed in the unique context of assisting a police officer in an arrest (i.e., the crime committed is collateral to the assistance given to the officer) the focus here has been to use entrapment, which, like obedience to orders, broadly applies to any situation involving government coercion where a defendant is directly pressured to commit the target crime. For further discussion of this little-used defense and its relation to entrapment, see generally Craig Hemmens & Daniel Levin, *Not a Law at All: A Call for a Return to the Common Law Right to Resist Unlawful Arrest*, 29 SW. U. L. REV. 1 (1999). Nevertheless, it is worth noting that this defense, like entrapment, also does not carry an objective scrutiny requirement—further bolstering the instant argument.

390. It stands to reason that that the subjective test would be the favored

lored defense that appropriately recognizes the government's role in the crime and accounts for its behavior.³⁹¹ This reconceptualization also serves to balance the competing concerns of fostering military discipline, on the one hand, and upholding the supremacy of the law, on the other.

The subjective test would focus on a soldier's state of mind and ask whether the soldier was otherwise predisposed to commit the act. This inquiry assumes that the soldier satisfies the mens rea of the crime, but because of the government's role, the soldier is nevertheless not culpable.³⁹² The operative question of predisposition is a little tricky in the military context. The point here is to ask whether the defendant would likely have committed the crime but for the government coercion. But in the military context, the subordinate would most likely have done nothing if the order had not been given.³⁹³ Soldiers are not supposed to take action on their own accord.³⁹⁴ Military structure—contrary to civilian life—fosters obedience, not independence.³⁹⁵ However, predisposition can still work as a viable standard.³⁹⁶ Courts could look at a variety of factors: the eager-

method, as the military version of entrapment uses a subjective test. *See* MANUAL FOR COURTS-MARTIAL, 2012, *supra* note 28, at R.C.M. 916(h).

391. The current procedural requirements regarding burden of persuasion and jury question should remain the same. The subjective test poses no problem. It, too, puts the burden of persuasion on the government and requires that the jury find that the defendant was otherwise predisposed to commit the crime. *See supra* note 312. However, with the objective test, the burden is typically on the defendant, and the judge makes a determination as to the success of the defense. *See supra* note 325. Keeping the current procedural posture where the government bears the burden does not take away from my argument. My focus is on adopting the substantive elements of the entrapment defense, not its procedural idiosyncrasies.

392. Typically, crimes under the Uniform Code of Military Justice include an element that the offense was committed unlawfully or wrongfully, which would contemplate a soldier raising the obedience to orders defense. *See, e.g.*, MANUAL FOR COURTS-MARTIAL, 2012, *supra* note 28, at arts. 118(b), (c)(1) (murder), 121(b)(1), (d) (larceny). I use the term mens rea to identify the specific mental state relevant to the crime (e.g., "intends to kill," "takes, obtains, withholds . . . from the possession of the owner") not the overall lawfulness or unlawfulness of the act. *See id.* at arts. 118(a), 121(a).

393. Causation being, of course, of central importance to entrapment. *See generally* Lombardo, *supra* note 28.

394. The fundamental nature of this precept was demonstrated by criticism of the United States Army's relatively short-lived "An Army of One" advertising slogan. *See, e.g.*, E. KELLY TAYLOR, AMERICA'S ARMY AND THE LANGUAGE OF GRUNTS 23 (2010).

395. *See generally supra* Part III.A.2.

396. It may turn out that knowledge of the unlawful order remains easier to assess. Keeping the current subjective element—i.e., whether the soldier

ness or reluctance of the soldier to obey the order, the soldier's prior history of taking this type of action, and whether the soldier at any point suggested taking the action. Combined, these factors can point to a soldier who was otherwise inclined to take the unlawful action.³⁹⁷

This formulation also tracks the subjective entrapment test's emphasis on relative or reduced culpability. The defendant is not guilty, because the government—this time, through the acts of its military soldiers—is partly culpable for the commission of the crime. It created the situation and circumstances under which the subordinate soldier followed the unlawful order. As in the entrapment case, the focus is on retributive notions of punishment. Because the soldier was not wholly responsible for the act on account of her following orders, she should not be responsible. The aforementioned unjust enrichment argument, in fact, applies with even greater force in the obedience to orders context.³⁹⁸ Unlike in the civilian context—where prosecutorial discretion does not reside with the government agents who have entrapped the defendant—prosecutorial discretion in the military resides with the very command structure from which the unlawful order promulgates.³⁹⁹ Furthermore, it seems particularly unfair to allow

knew the order was unlawful—is not necessarily problematic for my argument. As long as the inquiry is focused on the defendant's state of mind—and there is no secondary objective scrutiny assessment—the spirit of the subjective entrapment test remains intact, and it can still serve as the appropriate civilian analog. Given the unique nature of military orders versus government inducement, this slight difference may be necessary.

397. It stands to reason that the further disconnected the criminal act is from a purported military objective, the easier it will be to show predisposition. For instance, if a soldier commits rape based on a superior order, it is hard to imagine how this would not satisfy the subjective test since there would be absolutely no possible military reason for committing this act. On the other hand, killing unarmed individuals may seemingly serve a military objective (even if it turns out not be) and so close analysis of the soldier's response to the order and her prior experience would be required before determining whether she was otherwise predisposed. *See infra* Section IV.C. Any lingering issues with using the subjective entrapment test in the military context is not fatal to my argument but simply means that the objective entrapment test probably should be the favored test when employing my reconceptualized obedience to orders defense.

398. *See supra* Part IV.A.4.

399. *See* Uniform Code of Military Justice art. 15, 18–20 (codified at 18 U.S.C. §§ 815, 818–20 (2012)); MANUAL FOR COURTS-MARTIAL, 2012, *supra* note 28, at R.C.M. 306; Richard Cole, *Prosecutorial Discretion in the Military Justice System: Is It Time for a Change?*, 19 Am. Crim. L. 395 (1992) (discussing how military commanders hold prosecutorial discretion unlike in the civilian context where prosecutors decide what charges to bring).

prosecution in this situation given that the soldier—unlike her entrapped counterpart—is performing a vital service for the government.

The alternative would be to use the objective test. This would involve examining the circumstances under which the order was given. The operative question would be whether the government's tactics would have caused a law-abiding hypothetical soldier to follow the order.⁴⁰⁰ This hypothetical soldier could be similar to a person of common understanding.⁴⁰¹ The basic point here is to postulate a general objective standard that is not tied to the defendant's particular experiences and training. Unlike the current objective scrutiny, however, the inquiry here focuses on the government's actions and their effect on a soldier of common understanding rather than the defendant's state of mind and whether her understanding of the law comports with that of a person of "common understanding."

In the military context, the government's actions would revolve around the situation in which the soldier finds herself, including the nature of the order, the way in which it was given, the amount of time given to execute it, etc. All of these factors come into play when deciding if a hypothetical soldier would have followed the order or could have resisted the command. For instance, the soldier could have received the order on the battlefield, where there was no time to question or clarify the order. This would suggest a successful application of the objective test. On the other hand, it may turn out that the order was given in a strategic meeting where there was plenty of time to question or otherwise challenge the order without any immediate consequences. These factors may militate in favor of conviction. None of this takes away from the fact that, unlike in the civilian context, the subordinate is obligated to follow the order. Still, there are circumstances that would make it easier (or less difficult) for the soldier not to obey the order. The greater this likelihood, the less successful the obedience to orders defense would be under this test.

400. Like with the current obedience to orders defense, presumption would favor the defendant. *See* *United States v. Calley*, 48 C.M.R. 19, 28 (C.M.A. 1973) (starting presumption with an obedience to orders defense is that orders under question were lawful). The government would have to show that a hypothetical soldier of common understanding would have been able to refuse the order.

401. The aforementioned issues of how to define a person of common understanding remain. *See supra* Part II.A. But this does not undercut the instant analysis on the basic contours of the defense.

It is important to understand the different role the “soldier of common understanding” plays in an entrapment-based objective test as opposed to the current dual state-of-mind model. With an entrapment model, the focus is on the effect of the order on a person of common understanding,⁴⁰² whereas under the current objective element of the obedience to orders defense, the focus is on what a person of common understanding would have known.⁴⁰³ In other words, the proposed objective test would use this hypothetical person to scrutinize the circumstances surrounding the order and ask whether a soldier would have *done* the same thing instead of using it as a check on the defendant’s state of mind and asking whether the soldier would have *known* the same thing.⁴⁰⁴

Using the entrapment-based framework also tracks the rationale of the objective test and its focus on utilitarian principles.⁴⁰⁵ Exonerating the soldier will help encourage the government to better train commanding officers so that future soldiers are not placed in such compromising situations. Again, we are not dealing with interactions among private citizens. Because the government has better control over commanding officers than civilians with no connection to the government, it makes sense that the objective scrutiny and its underlying rationale are aimed at regulating government behavior rather than the subordinate’s behavior.⁴⁰⁶

One may argue, however, that regulating the behavior of soldiers caught in this situation is just as important as regulating the behavior of commanding officers who promulgate the

402. See *supra* Part IV.A.

403. See *supra* Part I.D.

404. Exactly how this objective test would be administered in a court-martial setting probably needs further development. This Article, however, is less concerned with the intricacies of how this test would be applied (though this is definitely an important enterprise) and more interested in constructing a framework that would justify its use in the first place.

405. See, e.g., Dillof, *supra* note 358, 860–61 (discussing the theoretical underpinnings of the objective test).

406. It does not matter that the soldier, in promulgating an unlawful order, is not necessarily seeking to convict the subordinate soldier, unlike the police officer who is trying to get the civilian to commit the crime. The overall aim of deterring improper or unwanted government behavior still applies in both scenarios. In the civilian context, this takes the form of deterring overzealous or otherwise extreme tactics by the police so they do not get a conviction at any cost. See MODEL PENAL CODE § 2.13 cmt. 1, at 406 (1985). In the military context, it takes the form of deterring commanding officers from issuing unlawful orders to fulfill the mission at any costs or to satisfy other improper motives.

order.⁴⁰⁷ The same can be said of entrapment. Regulating behavior of entrapped citizens is just as important as regulating the behavior of undercover police officers. This is a valid point, yet in the entrapment context, courts have not tailored the defense's elements accordingly.⁴⁰⁸ The focus squarely falls on the government's actions.⁴⁰⁹ It is for a different day to argue whether entrapment should be changed. This Article takes the defense and its underlying rationale at face value. If this doctrine serves its purpose and its underlying rationales appropriately account for the government role in the crime, then for the reasons described herein, obedience to orders should be realigned in the same way.

The possibility that a commanding officer may not know the order is unlawful does not change the foregoing analysis. It is true that with civilian entrapment, police officers know that the targeted act is a crime and intentionally try to pressure citizens to commit it.⁴¹⁰ Commanding soldiers may not necessarily share the same specific intent. This person, too, may simply be following orders from a higher-ranked individual. However, from the perspective of the subordinate, nothing has changed. She, like her civilian counterpart, is being pressured to commit a crime. Indeed, even under the current obedience to orders standard, the commanding officer's knowledge (or lack of knowledge) of the unlawful nature of the order is not relevant to the analysis.⁴¹¹

Another concern may be the types of crimes to which the entrapment defense traditionally applies. The defense is typically restricted to victimless crimes such as drug offenses or gun sales, and does not apply to crimes involving bodily injury.⁴¹² However, with obedience to orders cases, the crimes can range from inhuman treatment, to theft, to homicide.⁴¹³

407. See *supra* Part III.A.2 (discussing regulation of subordinate soldier behavior through the extant obedience to orders defense, and touching on the limits of the defense in shielding subordinate behavior).

408. See *supra* Part IV.A.

409. See, e.g., MODEL PENAL CODE § 2.13.

410. See *Sorrells v. United States*, 287 U.S. 435, 442 (1932) (noting that entrapment occurs "when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission").

411. To the extent the commanding officer was aware of the unlawful nature of the order, this individual could be prosecuted directly for giving the order. See *supra* note 130.

412. See MODEL PENAL CODE § 2.13(3) ("The defense [of entrapment] is unavailable when causing or threatening bodily injury is an element of the of-

A few things can be said here. First, military courts do not appear to restrict entrapment to a specific set of crimes.⁴¹⁴ Second, there is no logical reason why this defense should not extend to any crime as long as the elements are met, even assault-related crimes. The rationales for either test would seem to apply regardless of the nature of the crime. But even if entrapment should be restricted to certain crimes, it does not follow that such restrictions should apply in the obedience to orders context. The government coercion is qualitatively greater in the military setting. Instead of trickery, instigation, or other enticements, a military order comes with the threat of criminal punishment.⁴¹⁵ It stands to reason that the greater the government coercion, the more expansively the entrapment doctrine should apply to serious crimes.⁴¹⁶ Furthermore, acts of violence are looked upon differently in a military context because often the job of a soldier is to kill, assault, etc.

fense charged"); Keith N. Hylton & Vikramaditya Khanna, *A Public Choice Theory of Criminal Procedure*, 15 SUP. CT. ECON. REV. 61, 107 (2007); Lombardo, *supra* note 28, at 210; Troy A. Wolf, *Persistence Pays: Enforcement Efforts to Solicit Illegal Activity—United States v. Hinton*, 908 F.2d 355 (8th Cir. 1990), 17 WM. MITCHELL L. REV. 913, 913 n.2 (1991).

413. See *supra* Part I.

414. See, e.g., *United States v. Clark*, 28 M.J. 401, 407 (C.M.A. 1989); MANUAL FOR COURTS-MARTIAL, 2012, *supra* note 28, at R.C.M. 916(g); MILITARY JUDGES' BENCHBOOK, *supra* note 179, § 5-6.

415. Uniform Code of Military Justice art. 92, 10 U.S.C. § 892 (2012).

416. This realigning also tracks the classification of these defenses as excuses rather than justifications. These quasi-legal concepts seek to capture the overall nature of the act. A justification defense exculpates otherwise criminal conduct because the conduct was considered the right thing to do. See, e.g., Donald L. Horowitz, *Justification and Excuse in the Program of the Criminal Law*, LAW & CONTEMP. PROBS., Summer 1986, at 109 (seeking to further explicate the difference between excuse and justification). An excuse defense also exculpates otherwise criminal conduct, only this time the conduct is deemed wrongful, but the defendant is not blameworthy because of the specific circumstances surrounding the offense. *Id.* Focusing on the victim's role or lack of it, both obedience to orders and entrapment would be classified as excuse defenses. See Bedi, *Excusing Behavior*, *supra* note 354, at 620 (arguing that where victim played no active role in crime, criminal defense should be labeled as excuse); Eugene R. Milhizer, *The Divestiture Defense and United States v. Collier*, ARMY LAW., Mar. 1990, at 3, 10 (noting that obedience to unlawful orders functions as an excuse, not a justification); Dru Stevenson, *Entrapment and Terrorism*, 49 B.C. L. REV. 125, 135 n.39 (2008) (noting that entrapment is considered an excuse rather than a justification).

C. DISTINCTION WITH A DIFFERENCE: TWO REAL WORLD
HYPOTHETICALS

The primary purpose of this Article is to provide a framework for the obedience to orders defense that is conceptually more sound than the current model. Using the structure of entrapment appropriately recognizes the government's role in the crime. But this is not simply an academic exercise. This reconceptualization creates a defense that is more narrowly tailored and, in turn, more accurately tracks our intuitive notions of when liability should be imposed.

It is true that entrapment, relative to other civilian criminal law defenses, is rarely successful.⁴¹⁷ This should not cause any concerns with the instant analysis. There is no reason to think that the basic structure of the defense is inherently overly disadvantageous to defendants. Its limited success may simply be due to its application in the police-inducement cases. Since the pressure typically stems from inducement or trickery, a jury may assume that the defendant is otherwise predisposed to commit the crime, or that the hypothetical person should presumptively be able to resist the government tactics. This may explain why defendants typically don't succeed in raising this defense. But in the military, the pressure is qualitatively greater, and soldiers are generally expected to obey orders.⁴¹⁸ In short, there is a presumption of obedience that is simply not present in the civilian context. This can explain why the entrapment model could serve soldiers better than their civilian counterparts.

The following two situations illustrate how the entrapment model more accurately comports with our intuitive notions of punishment. First, take the *Calley* case, detailed earlier.⁴¹⁹ Calley claimed that he was ordered to fire upon what appeared to be villagers who posed no threat to him or other soldiers.⁴²⁰ Even though he had prior experience with villagers fighting for the enemy, in this particular situation there was no indication that the villagers posed a threat or were otherwise fighting for the enemy.⁴²¹ According to Calley, the initial order to kill the villagers came a day before, when the entire platoon was being briefed on the mission by Calley's commanding officer, and

417. See *supra* note 48.

418. See *supra* Part II.B.

419. See *supra* Part I.E.1.

420. See *United States v. Calley*, 48 C.M.R. 19, 24 (C.M.A. 1973).

421. *Id.* at 24, 33.

twice again during the day of the shootings.⁴²² For our purposes, let us assume that such an order was in fact given, though the testimony on this issue was disputed in the case.⁴²³ It is worth noting that Calley also ordered his subordinates to shoot on the villagers (again in compliance with his commanding officer's order), though some subordinates refused to carry out the order.⁴²⁴ As previously discussed, the jury found Calley guilty of murder, and the court reasoned that a soldier of common understanding in the same situation would have known the order was unlawful.⁴²⁵ This result follows our intuitions that Calley should be held responsible for his actions.

Contrast this scenario with the following hypothetical. A soldier in a combat situation overseas is ordered to shoot at a local hospital and kill what appear to be doctors and nurses. These individuals are taking care of wounded enemy soldiers and, by all accounts, appear to be non-combatant medical professionals. Assume that this soldier has had significant training and experience in similar combat situations and has been deployed on a number of life-threatening missions. As it turns out, she has been involved in numerous prior engagements where local hospitals have served as fronts for enemy installations. Enemy soldiers were dressed as doctors and nurses to camouflage their appearance. This soldier had a number of encounters where she fired on these enemy soldiers. On the instant mission, the soldier and her commanding officer are behind enemy lines taking fire from enemy soldiers. The soldier sees what appear to be doctors and nurses but, based on her prior experience with similar facilities, strongly suspects that they are likely enemy targets who are camouflaging their true identities. Nevertheless, because she is not sure, the soldier inquires further from her superior, who immediately cuts her off and again orders her to shoot on the hospital personnel. She ends up killing a number of individuals. It turns out that these were actual healthcare workers, not enemy soldiers. She is later prosecuted for murder and raises the obedience to orders defense.

Using the current dual requirement model, my hypothetical soldier would have the same fate as Calley and also be found guilty of murder. She will likely survive the subjective

422. *Id.* at 23–24.

423. *Id.* at 23.

424. *Id.* at 24.

425. *See supra* Part I.E.1.

prong of the defense. It does not appear that she knew the order was unlawful and that she was firing on innocent individuals. Again, the focus here is on the soldier's state of mind and her related prior experience and training. She had previously seen hospitals that were used as fronts for enemy installations. This prior experience made her susceptible to thinking that the hospital personnel in the instant situation also posed a threat.

However, she will most likely fail the objective scrutiny element. Would a person of common understanding have known the order to be manifestly illegal? Probably. Again, this hypothetical soldier does not carry any of the personal experience or training of the defendant. Similar to Calley's prior experience with villagers serving as enemy soldiers, this soldier's prior experience with hospitals serving as enemy fronts is not relevant. The inquiry centers on a gut reaction of the order standing alone. The fact that the defendant was taking fire is also not relevant to assessing this knowledge requirement. What matters is what a soldier would have perceived in the defendant's situation. Here, the defendant was asked to attack what appeared to be doctors and nurses. These individuals were behind enemy lines treating wounded soldiers and gave no indication that they were combatants. A jury could easily find that a person of common understanding would have known the order was unlawful at first blush and thus convict the defendant of murder.

This result seems counterintuitive, particularly when the soldier tried to question the order, even amidst enemy fire. None of these mitigating factors were present in Calley's situation,⁴²⁶ which may explain why our intuitions differ in the instant case. Yet, under the current model, my hypothetical soldier and Calley stand together. The hesitation and urgency of the situation are not important, because the operative question under this test focuses on whether a soldier of common understanding would have *known* the order was unlawful, not whether such a soldier of common understanding would have *followed* the order.

Employing the entrapment model instead better serves our intuitions in distinguishing these two cases. Using the subjective test, the analysis centers solely on the defendant's state of mind.⁴²⁷ Was my hypothetical soldier predisposed to commit the

426. See *Calley*, 48 C.M.R. at 23–24.

427. See *supra* Part IV.A.1.

crime? A jury would look at a variety of factors, including the soldier's prior history of this type of conduct, the eagerness or reluctance to obey the order, and whether the soldier suggested taking the action. My hypothetical soldier had no history of firing on innocent medical personnel. In her prior deployments, the soldier only encountered and fired upon hospitals that served as enemy fronts. She also tried to question the order, showing that she was reluctant to shoot the individuals. Finally, the soldier did not suggest taking the action. Combined, these facts point to someone who was not predisposed to commit the crime. This tracks our intuitions that the hypothetical soldier should not be responsible.

The facts relating to Calley would suggest a different conclusion under the subjective test, and rightfully so. While the evidence indicated Calley did not have a history of firing on innocent villagers,⁴²⁸ the other considerations would militate in favor of predisposition. There was no evidence that he questioned the commanding officer's order or otherwise showed any reluctance in following it.⁴²⁹ He was presumably first given the order at a briefing the day before but did not show any hesitation at that time, or any time thereafter.⁴³⁰ Furthermore, he commanded his subordinates to carry out the killings.⁴³¹ While some refused, Calley followed through on shooting the civilians.⁴³² Together, these facts point to someone who seemed eager or otherwise inclined to carry out the act. This conclusion tracks our intuitions that Calley, but not my hypothetical soldier, should be held responsible for the killings.

The objective test, and its focus on the nature of the order and the surrounding circumstances, also preserves our intuitions regarding these two cases. Here, a court would ask whether a soldier of common understanding in the same position realistically would have been able to resist or otherwise refuse the order.⁴³³ Take again my hypothetical soldier. Here, it seems that the circumstances would not have allowed a soldier to refuse or otherwise effectively question the order. Timing was of the essence, as they were taking fire from another direction. The defendant in fact tried to question the order, which

428. *See Calley*, 48 C.M.R. at 23–25.

429. *Id.* at 23–24.

430. *Id.*

431. *Id.* at 24.

432. *Id.*

433. *See supra* Part IV.A.2.

her commanding officer quickly repeated. The collective circumstances suggest that no soldier of common understanding would have been able to effectively refuse the order.

Calley's case comes out differently under this objective test. There is no evidence suggesting Calley was required to take immediate action.⁴³⁴ A soldier of common understanding in his shoes could have refused the order or otherwise waited before ordering his subordinates to kill the villagers. Indeed, the first order came at a briefing the day before, which would have given Calley plenty of time to raise concerns or other questions.⁴³⁵ Moreover, during the actual engagement, Calley was not taking enemy fire or otherwise pressured by the circumstances to immediately follow through on the order.⁴³⁶ It appears that the villagers were safely guarded, and time was not necessarily of the essence.⁴³⁷ Perhaps most damning was the fact that other soldiers refused to obey Calley's order to kill the villagers,⁴³⁸ bolstering the claim that a soldier in Calley's position surely could have refused.

The reason the entrapment-based model more closely tracks our intuitions has a lot to do with the contextual specificity with which it is applied compared with the abstract generality with which the current dual state-of-mind requirement is employed. Both entrapment tests keep the focus on the situation at hand—analyzing either the soldier's state of mind or the circumstances surrounding the feasibility of refusing the order. The current objective standard, however, takes the focus too much away from the particulars of the situation and instead asks what an abstract soldier knows who is not otherwise embedded in what may be a precarious and volatile situation. Keeping the perspective on the individual situation thus provides a more narrowly tailored defense that better comports with our intuitions on how these two cases should be resolved.⁴³⁹

434. *See Calley*, 48 C.M.R. at 23–24.

435. *Id.* at 23.

436. *See id.* at 24.

437. *See id.*

438. *Id.*

439. One may take issue with my hypothetical and accuse me of constructing a scenario that quite conveniently passes both entrapment tests. Suppose that my hypothetical soldier did not question the order, or that she was not taking enemy fire. Would these differences potentially change the results under the subjective and objective entrapment tests? Yes. But there is nothing problematic with this result. The purpose here was to present a scenario

CONCLUSION

One of the primary aims of criminal law is for the government to regulate behavior among its citizens. For this reason, criminal law statutes, by and large, apply uniformly to all citizens. Logically, it makes sense that criminal law defenses should also aim to regulate behavior and establish a uniform standard. This is why almost all these defenses (e.g., self-defense, duress, and mistake of law) require the court to engage in some level of objective scrutiny. To allow otherwise would frustrate the aim of establishing a uniform code of criminal conduct. Idiosyncratic beliefs and characteristics would ultimately create inconsistent verdicts among defendants.

But the considerations are different when the same government prosecuting the case is also pressuring the defendant. While regulating behavior remains important, the focus shifts from the behavior of private citizens to the behavior of the government. Indeed, this seems to be the crux of the entrapment defense and its unique requirements. This focus on the government holds with greater force in the military context. Soldiers perform a valuable service for the government—a service that requires obedience to orders. We must be mindful of this consideration when constructing the contours of an obedience to orders defense should they commit a crime in connection with their service. To be sure, soldiers face a striking dilemma when confronted with an order that turns out to be unlawful. Disobeying the command carries the threat of criminal punishment, but following the order may also lead to criminal punishment. To some extent, this situation cannot be fully prevented, nor should it be. We do not want soldiers to blindly follow their superiors if this means committing a crime. However, reconceptualization of the obedience to orders defense along the lines of entrapment satisfies this concern without unduly prejudicing the defendant or placing future soldiers in similar compromising situations. The inquiry appropriately keeps the focus on the specific situation and in turn preserves our intuitions of when liability should be imposed. The end result is a defense that is more narrowly tailored than the cur-

where our intuitions clearly differ from the *Calley* case. Revising my scenario along the aforementioned lines only means that our intuitions may not be clear and that reasonable jurors could disagree whether my soldier should be found guilty. I welcome this conclusion. This Article's realignment of obedience to orders does not seek to create a foolproof defense, but rather one that is more narrowly tailored to the situation and in turn better tracks our intuitions (to the extent there is agreement) than the current model.

rent defense, and one that better serves soldiers caught in this difficult situation.