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Note

Interpreting the Law of War: Rewriting the Rules of Engagement to Police Iraq

Karen P. Seifert*

On May 1, 2003, President Bush declared the end of major combat operations in Iraq.1 Yet military and civilian causalities continue as U.S. forces engage in a "protracted conflict" with insurgents.2 On January 10, 2007, over three years after the declared end of major combat operations, the President committed over twenty thousand additional troops to Iraq.3 The President commented that “past efforts to secure Baghdad failed for two principal reasons: [t]here were not enough Iraqi and American troops . . . , and there were too many restrictions on the troops we did have.”4 Soldiers are restricted in their conduct by the rules of engagement (ROE), which are specific

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1. Address to the Nation on Iraq from the U.S.S. Abraham Lincoln, 1 PUB. PAPERS 410, 410 (May 1, 2003).
3. Address to the Nation on the War on Terror in Iraq, 43 WEEKLY COMP. PRES. DOC. 19, 20 (Jan. 10, 2007).
4. Id.
instructions about what actions are allowed under the law of war.\(^5\)

The law of war limits military conduct during war.\(^6\) It restricts the type of weaponry that may be used and the targets that may be attacked.\(^7\) This body of law has developed over hundreds of years of customary use and more recently was codified in international treaties.\(^8\) The United States, whether as party to such treaties or under international law, must abide by the law of war in its military’s actions in Iraq.\(^9\)

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6. See Convention Between the United States and Other Powers Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter 1907 Hague Convention IV] (“The appeal to arms has been brought about by events which their care was unable to avert; [a]nimated by the desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization; [t]hinking it important, with this object, to revise the general laws and customs of war, either with a view to defining them with greater precision or to confining them within such limits as would mitigate their severity as far as possible; . . . [the contracting nations] adopted provisions intended to define and govern the usages of war on land.”); see also Phillips, supra note 5, at 4 (stating that ROE “regulate the use of force,” providing soldiers directions as to when force may be used).

7. See 1907 Hague Convention IV, supra note 6, Annex, art. 23 (listing conduct not acceptable during war, including the use of weapons that cause unnecessary harm). For a discussion of earlier attempts to define such conduct, see generally Geoffrey Best, RESTRAINTS ON WAR BY LAND BEFORE 1945, in RESTRAINTS ON WAR: STUDIES IN THE LIMITATION OF ARMED CONFLICTS 17 (Michael Howard ed., 1979).


9. See Chairman of the Joint Chiefs of Staff Instruction 5810.01C, Implementation of the DOD Law of War Program 2 (2007) [hereinafter Instruction 5810.01C]; W. Hays Parks, Special Assistant to the U.S. Army Judge Ad-
In order to communicate the law of war, the military gives soldiers discrete ROE about when force is authorized and what type of force may be used. The ROE are more than instructions to soldiers; they are a legal interpretation of congressionally enacted law, made by members of the executive branch. Like any legal interpretation, the product can vary based on the objectives of the administration.

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11. See U.S. DEP’T OF THE ARMY, supra note 8, at 7 (equating treaties with congressional statutes); Ingrid Brunk Wuerth, International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered, 106 MICH. L. REV. 61, 75 (2007). The Constitution requires that all treaties be ratified by two-thirds of the Senate, and only through congressional approval do treaties become law. U.S. CONST. art. II, § 2, cl. 2. Such treaties are considered the supreme law of the land. U.S. CONST. art. VI, cl. 2 (“[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .”); see Missouri v. Holland, 252 U.S. 416, 432–33 (1920). Once approved by the Senate, treaties are self-executing and become the internal law of the United States. See Ware v. Hylton, 3 U.S. (3 Dall.) 199, 237 (1796) (“The people of America have been pleased to declare, that . . . laws of any of the States, contrary to a treaty, shall be disregarded.”); id. at 277 (“Under this Constitution therefore, so far as a treaty constitutionally is binding, upon principles of moral obligation, it is also by the vigour of its own authority to be executed in fact.”); David M. Golove, Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power, 98 MICH. L. REV. 1075, 1081–82 (2000) (discussing the constitutional underpinnings of the treaty power); cf. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 240 (15th ed. 2004) (describing efforts by senators in the 1950s to amend the Constitution to avoid this self-execution).

12. The U.S. Constitution vests the power to develop foreign policy in the President and provides that he will also be the commander in chief of the armed forces. U.S. CONST. art. II, § 2, cl. 1 & 2. It is this directive that provides authority for standing ROE to be promulgated from within the executive branch, specifically by the Joint Chiefs of Staff. See Geoffrey Corn & Eric Talbot Jensen, The Political Balance of Power over the Military: Rethinking the Relationship Between the Armed Forces, the President, and Congress, 44 HOU.S. L. REV. 553, 573 n.80 (2007); Paul E. Jeter, What Do Special Instructions Bring to the Rules of Engagement? Chaos or Clarity, 55 A.F. L. REV. 377, 386 (2004). Even more than congressionally enacted law, the entire panoply of law is applicable to U.S. forces in armed conflict—statutory, constitutional, and international. See U.S. DEP’T OF THE ARMY, supra note 8, at 7 (stating that the U.S. military must treat treaties with the same respect as it does the Constitution and statutes).

The current ROE instruct soldiers to escalate their force when confronted with a hostile actor. These ROE are meant to ensure proportionality and necessity in the use of force, consistent with law of war principles. However, while these ROE may be useful in a situation in which the enemy's identity is clear, combatants in Iraq are often not so easily identified. Rather, soldiers, like members of a police force, are confronted with individuals of unknown identity.

Insurgent tactics make it nearly impossible for soldiers to distinguish between combatants and noncombatants until combatants are identified by engaging in violent actions. In these situations, soldiers may only have seconds—sometimes less than a second—to assess a threat and act; a mistake may mean death either to the soldiers or to a noncombatant. There is frequently insufficient time to escalate force under the current ROE, which are too restrictive for a policing environment. The current ROE overemphasize some of the principles of the law of war while de-emphasizing, even ignoring, a sol-

(2004) ("[P]olitically enforced rules of engagement will always be a handmaiden of force employment decisions to ensure that the manner in which force is applied conforms to political objectives and perceived risks." (quoting BENJAMIN S. LAMBETH, THE TRANSFORMATION OF AMERICAN AIR POWER 50 (2000) (internal quotation marks omitted)). ROE may restrict the use of force in a manner not required by the law of war in order to keep hostilities from escalating. Cf. CARL VON CLAUSEWITZ, ON WAR 87 (Michael Howard & Peter Paret eds. & trans., 1984) ("[T]he political object is the goal, war is the means of reaching it, and means can never be considered in isolation from their purpose.").

14. See, e.g., Parks, supra note 9.

15. See Paolo Tripodi, Iraq: Policing the Police, CONTEMP. REV., July 1, 2003, at 16, 18–19 (describing the responsibilities of the U.S. military after the fall of Saddam Hussein as a mixture of “constabulary and humanitarian duties” and noting the military's efforts to keep the peace); Press Release, U.S. Dep't of Defense, DOD Announces Force Adjustments (Jan. 11, 2007), available at www.defenselink.mil/pubs/word_docs/forceadjustments_011107.doc (stating that the troops deployed as part of the surge would "secure neighborhoods while protecting the local populations" and "assist in achieving stability and security"); see also Julian Borger, Pentagon Was Warned over Policing Iraq, GUARDIAN, May 28, 2003, at 11; cf. U.S. DEP'T OF DEF., MEASURING STABILITY AND SECURITY IN IRAQ 29 (2006) (discussing the need to transfer security operations from coalition troops to Iraqi forces).

16. Canestaro, supra note 2, at 80 ("The ability of guerillas to melt into the populace ... is a key component of their military strategy.").


18. See id.
dier's right to act in self-defense,\textsuperscript{19} a right protected above all else.\textsuperscript{20}

This Note argues that although the law of war appropriately limits the use of force, the current ROE are an unfaithful legal interpretation because they unnecessarily restrict troops in a manner not required by law. Part I of this Note identifies the customary law and international treaties that are the foundations of the law of war and defines ROE. Part II argues that the current ROE are an ill fit for soldiers policing Iraq and they endanger the lives of soldiers and civilians. Part III recommends that the military change the ROE for soldiers engaged in police operations in Iraq. Specifically, the Joint Chiefs of Staff should promulgate new ROE for these soldiers based on the U.S. law enforcement model and should create additional law of war training. Congress should allocate funding for this program to spur its development. Ultimately, this proposed interpretation will lead to a more faithful application of the law of war and more protection for soldiers and noncombatants.

I. THE LAW OF WAR AND ITS APPLICATION TO THE BATTLEFIELD

"The laws of war . . . all tend to mitigate the cruelties and misery produced by the scourge of war."\textsuperscript{21} Christian legal theorists first defined the notion of justice in war,\textsuperscript{22} and custom and international treaties continue to uphold that notion today.\textsuperscript{23} The law allows proportional and humane force to be used only when it is militarily necessary,\textsuperscript{24} and it distinguishes between combatants and noncombatants to mitigate unnecessary


\textsuperscript{20} See U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence . . ."); W.A. Stafford, \textit{How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE & the Rules of Deadly Force}, ARMY LAW., Nov. 2000, at 1, 5 (noting that the right to self-defense was considered "inherent" even before it was enshrined by the United Nations).

\textsuperscript{21} The Prize Cases, 67 U.S. (2 Black) 635, 667 (1862).


\textsuperscript{23} See Geneva Convention IV, supra note 8; Geneva Convention III, supra note 8; 1907 Hague Convention IV, supra note 6.

\textsuperscript{24} See A.P.V. ROGERS, LAW ON THE BATTLEFIELD 4 (2d ed. 2004) (explaining that the law of war has traditionally accounted for military necessity).
harm. The law also guarantees the right to self-defense. ROE are interpretations of the law of war for soldiers concerning the issue of how much force can be used under given circumstances—or, in terms of the soldier’s timeless question, “When can I pull the trigger?” These instructions are issued by the Joint Chiefs of Staff and further developed by commanders and Judge Advocate Generals (JAGs) in the field. The ROE link the law of war to the battlefield.

A. FOUNDATIONS OF THE LAW OF WAR

The law of war exists to protect “both combatants and noncombatants from unnecessary suffering.” The first expressions of the law of war made two distinctions: jus ad bellum, describing the law governing the decision to wage war, and jus in bello, describing the rules applied to conduct in war. The jus in bello doctrine grew to require both the distinction between combatants and noncombatants in war and specific restrictions on the means of warfare to prevent unnecessary suffering and destruction. This distinction between combatants and civilians is part of the modern law of war. Customary international law and treaties form the contemporary law of war. Customary law is composed of prin-

25. Id. at 8.
26. See U.N. Charter art. 51 (stating that the right to self-defense is “inherent”).
27. ROE are the “primary means of ensuring [soldiers’] compliance with both international and domestic law.” Phillips, supra note 5, at 7.
29. See CTR. FOR LAW & MILITARY OPERATIONS [CLAMO], RULES OF ENGAGEMENT (ROE) HANDBOOK FOR JUDGE ADVOCATES 1-20 to -30 (2000) [hereinafter CLAMO HANDBOOK] (describing the Army’s ROE development process); Jeter, supra note 12, at 388 (describing the Air Force’s ROE development process).
33. Gardam, supra note 22, at 397.
34. See DETTER, supra note 32, at 135.
35. See FREDERIC DE MULINEN, HANDBOOK ON THE LAW OF WAR FOR ARMED FORCES 2 (1987); U.S. DEP’T OF THE ARMY, supra note 8, at 4; Canesta-
principles generally accepted and followed by states over time. It requires that force be used in accordance with the principles of "military necessity, humanity, distinction, and proportionality," but it acknowledges the supremacy of the right to self-defense. These principles are now enshrined in the Hague and Geneva Conventions.

Proportionality requires states to balance the goals of achieving military victory and protecting humanity. Commanders may only take action necessary to secure their military objectives. The principle of humanity "puts a brake on undertakings which might otherwise be justified by the principle of military necessity" in order to minimize unnecessary suffering. The United States Army Field Manual acknowledges that the law of war limits the power to conduct warfare without regard for humanity.

International treaties require combatants to distinguish themselves from civilians and mandate that civilian casual-

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37. ROGERS, supra note 24, at 4.
38. See U.N. Charter art. 51; Stafford, supra note 20.
40. See Geneva Convention IV, supra note 8; Geneva Convention III, supra note 8.
41. ROGERS, supra note 24, at 17; see also 1907 Hague Convention IV, supra note 6, Annex, art. 22 ("The right of belligerents to adopt means of injuring the enemy is not unlimited."); cf. Michael N. Schmitt, War and the Environment: Fault Lines in the Descriptive Landscape, in THE ENVIRONMENTAL CONSEQUENCES OF WAR: LEGAL, ECONOMIC, AND SCIENTIFIC PERSPECTIVES 87, 101 (Jay E. Austin & Carl E. Bruch eds., 2000) (noting that the principle of military necessity "forbids destructive acts unnecessary to secure a military advantage, in other words, acts of wanton destruction").
42. ROGERS, supra note 24, at 5; U.S. DEPT OF THE ARMY, supra note 8, at 3, 19–20.
43. ROGERS, supra note 24, at 7.
44. Id. at 5; Canestaro, supra note 2, at 88; see also Geneva Convention IV, supra note 8, art. 27 (entitling civilians "to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs"); 1907 Hague Convention IV, supra note 6, Annex, art. 23 (stating that it is unlawful to employ warfare that causes unnecessary suffering and that belligerents shall not seize property unless it is "demanded by the necessities of war").
46. Both the Hague and Geneva Conventions define combatants as individuals "(1) to be commanded by a person responsible for his subordinates; (2) to have a fixed distinctive emblem recognizable at a distance; (3) to carry arms openly; and (4) to conduct their operations in accordance with the laws and
ties be avoided. This does not negate all possibilities of civilian casualties; rather, "civilians working in military objectives, though not themselves legitimate targets, are at risk if those objectives are attacked." While there is grave risk to civilians in times of war, proportionality requires that states "balance the conflicting military and humanitarian interests." Proportionality forbids military action in which collateral damage outweighs military necessity. Therefore, proportionality is required on the macrolevel—commanders must consider what force is appropriate to achieve their objective.

Although the law limits the use of force in war, individuals are always authorized to use deadly force in self-defense. The U.N. Charter proclaims that nothing "impair[s] the inherent right of individual or collective self-defence." This ultimate right supersedes all other directives under the law of war; the soldier is never required by the law to forsake his life in order to uphold the law's principles.

Theoretically, the requirements of the law of war are clear. In application, however, the law is quite murky in an era of warfare in which battlelines are not drawn and combatant sta-
tus is not readily discernible because the enemy does not wear uniforms or comply with the law of war.  

B. THE LAW OF WAR IS DISSEMINATED TO THE SOLDIER THROUGH THE ROE

International law requires states to disseminate the law of war to their combatants, which is achieved in the United States through the issuance of ROE. The Joint Chiefs of Staff created uniform Standing ROE (SROE) that apply to all U.S. forces, but lower-level commanders may narrow and tailor the SROE to the individual circumstances of each military operation and mission. However, the ROE issued to the soldier must comply both with the SROE and the United States' obligations under the law of war.  

1. ROE Are Interpretations of and Instructions on the Law of War

The law of war was adopted by Congress through its ratification of the Hague and Geneva treaties. It is the responsibility of the executive branch to execute this law. The Depart-

52. Compare Canestaro, supra note 2, at 77-81 (describing ruses and tactics of guerillas and insurgents), and Marines Fire on Mosque to Repel Attacks, CNN.COM, Apr. 18, 2006, http://www.cnn.com/2006/WORLD/meast/04/17/iraq.main/index.html (describing an insurgent attack initiated from the protection of a mosque), with 1907 Hague Convention IV, supra note 6, Annex, art. 1 (requiring all belligerents to carry their arms openly), and id., Annex, art. 27 (requiring military commanders to spare religious and historical buildings unless necessary for military purposes). Protocol I, which has not been adopted by several major states, prohibits the use of the civilian population to achieve military goals. Protocol I, supra note 46, art. 51(7). The insurgent tactics described in the CNN report, and many others described herein, are direct violations of the law of war.

53. 1907 Hague Convention IV, supra note 6, art. 1.

54. Chairman of the Joint Chiefs of Staff Instruction 3121.01A: Standing Rules of Engagement for US Forces, at A-1 (2000) [hereinafter Instruction 3121.01A].

55. See CLAMO HANDBOOK, supra note 29, at 1-20 to -30; Jeter, supra note 12, at 388.

56. See 1907 Hague Convention IV, supra note 6, art. 1 (“Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations [herein] . . . .”); Instruction 3121.01A, supra note 54, at A-8 (“Except as augmented by supplemental ROE for specific operations, missions, or projects, the [SROE] established herein remain in effect until rescinded.”).

57. 1907 Hague Convention IV, supra note 6; Geneva Convention III, supra note 8.

ment of Defense (DOD), through the Joint Chiefs of Staff, interprets how the law of war applies in specific military situations. This interpretation is handed down to the rank and file in the form of the ROE.

ROE are "the closest link which the laws of war [governing the use of force] maintain with the belligerent armed forces in the field." ROE require the soldier to use force only in a necessary, proportional, and humane manner as required by the law of war. ROE can never authorize the use of force beyond the limits of the law of war, as to do so would violate the treaty obligations of the state. It is the individual combatants who wield force against each other; if they fail to understand the limitations of the law of war, its provisions will have no effect. ROE keep the laws protecting "combatants and noncombatants from unnecessary suffering" from becoming futile.

However, the ROE are more than a legal interpretation; they are also a political tool. Interpretations of the law generally allow for some policy influence. ROE may restrict or permit the use of force "to the full extent allowable under international law." In some military engagements, ROE are more restrictive than the law requires in order to prevent the escalation of hostilities. Such ROE are crafted to ensure that the military adheres to executive branch's policy for the war.

59. See Instruction 3121.01A, supra note 54, at A-1 to -3.
60. Roberts & Guelff, supra note 30, at 7.
61. Roach, supra note 10, at 51; see also U.S. DEP’T OF THE NAVY, supra note 10, § 4.3.
64. See Roach, supra note 10, at 47 ("ROE represent a measure of assurance that national policy will be followed in wartime or in sudden emergencies which do not allow time for communications between Washington and the field.").
65. DINSTEIN, supra note 62, at 4.
67. ROE serve to execute the "overarching national political purpose" by shaping the way in which "the military instrument" is applied to the conflict at hand. Richard J. Grunawalt, The JCS Standing Rules of Engagement: A Judge Advocate’s Primer, 42 A.F. L. REV. 245, 246 (1997).
ROE are also tactical. They provide soldiers guidance about "what, when, and where they can shoot."68 The famous "[d]on't ... fire until you see the whites of their eyes" instruction given at the Battle of Bunker Hill is an example of how ROE are used tactically.69 The DOD defines ROE as "[d]irectives issued by competent military authority that delineate the circumstances and limitations under which ... forces will initiate and/or continue combat engagement."70 This definition highlights the tactical aim of ROE, with which soldiers at the individual level are most concerned.71

ROE are an intersection of legal requirements and political and tactical objectives. However, it is the legal requirements that govern any political and tactical objectives. Force may only be used to the extent allowed under law.72 When ROE are developed in the field, it is the JAG, a military lawyer, who usually tells the commander how his actions are restricted by the law.73

2. The Standing ROE Are the United States' Uniform Interpretation of the Requirements of the Law of War

Despite the long history of directives regarding engagement during military conflict, ROE of general applicability are "distinctly modern."74 During the cold war, individual branches of the military first developed ROE,75 but today the SROE govern all branches.76 Created by the Joint Chiefs of Staff, the SROE are the "basic ROE documents for all U.S. forces during military attacks on the [United States] and during all military operations, contingencies, and terrorist attacks outside the territory of the [United States]."77 The SROE apply across "the

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70. DOD DICTIONARY, supra note 5, at 470.
72. See Dinstein, supra note 62, at 4; Dungan, supra note 66, at 305 ("[M]odern military missions may be constrained by specific grants of authority under United Nations or military agreements. ROE are necessary to communicate the constraints those agreements place on the use of force.").
73. Dungan, supra note 66, at 306 ("[A]ll deployed judge advocates will find themselves at the middle of every ROE issue." (citation omitted)).
74. See Martins, supra note 28, at 34.
75. Id. at 36.
76. Instruction 3121.01A, supra note 54, at A-1.
77. Jeter, supra note 12, at 386–87.
continuum of conflict," from peace operations and operations other than war to fully declared war and prolonged conflict.\(^7\)

In the interest of national security, parts of the SROE remain classified,\(^7\) although their structure and effectiveness are widely discussed in scholarly works.\(^8\)

Although the SROE recognize a soldier's right to self-defense under the law of war, they also restrict force in an effort to comply with law of war principles.\(^8\) SROE authorize the use of “all necessary means available” in self-defense, but specify that soldiers should “[a]ttempt to [d]e-[e]scalate the [s]ituation,” use proportional force, and attack only when necessary.\(^8\)

In this way, the SROE “contemplate” that soldiers will use “escalating measures,” starting with firing warning shots and shooting to wound.\(^8\) The SROE reflect the traditional concerns of the law of war in protecting combatants from unnecessary suffering and civilians from any harm. Note, however, that such a restriction on escalating the use of force is not required by the law of war when an individual’s life is threatened.\(^8\)

The SROE are consistent with the law of war but this escalation requirement is far more restrictive than the law’s requirements, because the former necessitates a use-of-force continuum.

### 3. Commanders and Judge Advocates Are Intended to Develop ROE Specific to Each Mission

The SROE are intended to be only the “foundation” and “starting point” for determining ROE on each mission.\(^8\) Before each mission, a JAG should meet with the commander to determine what specific rules or annexes should apply to the

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78.  Id. at 387.
79.  See Instruction 3121.01A, supra note 54, at A-2 to A-3.
80.  The amount of scholarly work on this topic makes it clear that a meaningful discussion about the subject matter is still possible without knowing specific details of the SROE themselves. See, e.g., Dungan, supra note 66; Stafford, supra note 20, at 3-9; Dale Stephens, Rules of Engagement and the Concept of Unit Self Defense, 45 NAVAL L. REV. 126, 141-47 (discussing the SROE in the context of unit self-defense).
82.  Id.
83.  Stafford, supra note 20, at 4.
84.  U.N. Charter art. 51 (stating that nothing “impair[s] the inherent right of individual or collective self-defence”).
CONSIDERATIONS FOR THE LAW OF WAR

Commanders, together with JAG lawyers, should evaluate their intelligence, their objectives, and the humanitarian risks associated with their mission to create mission-specific ROE. In theory, ROE should be unique, given this “legislative model for ROE development.” However, in practice, ROE often remain unchanged from engagement to engagement or are handed down from one unit to the next because of time constraints. Therefore, the escalation of force model is frequently communicated to troops.

In order to help explain ROE to the troops, commanders or JAGs frequently issue ROE cards that use acronyms or mnemonic devices to make the rules easier to remember and offer a tangible reminder of what the law of war and the rules of the mission require. They include the principle of proportional force and instruct soldiers to escalate their use of force along a “force continuum”—soldiers should use lesser means available.

86. Martins, supra note 28, at 29–33.
87. Id.
88. Dungan, supra note 66, at 309–10 (internal quotation marks omitted).
89. Id. at 313–14.
90. See CLAMO, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001–1 MAY 2003) 93 (2004) [hereinafter CLAMO, LEGAL LESSONS LEARNED] (stating that JAGs were “expected” to produce ROE cards); CLAMO Report: Legal Team Trends at the Combat Training Centers, ARMY LAW., Feb. 2005, at 14, 17 [hereinafter CLAMO Report: Legal Team Trends] (stating that most units bound for Iraq arrive at their combat training centers with ROE cards); CLAMO Report: National Training Center Transformation and Change—A Primer for Brigade Operational Law Teams, ARMY LAW., Aug. 2005, at 48, 49 [hereinafter CLAMO Report: National Training Center] (instructing JAGs to hand out ROE cards, but noting that this should be done in addition to ROE training).
91. See CLAMO HANDBOOK, supra note 29, at 2-4, 2-6. Note that the CLAMO Handbook, a main source of ROE guidance for JAGs, is a bit contradictory in that it states that “[a] mnemonic device may be chosen to organize and conceptualize these [law of war] principles, [sic] however the principles and concepts themselves remain of primary importance. Soldiers must know, internalize, and practice putting these principles into action.” Id. at 2-3. At the same time, the CLAMO Handbook provides a template for ROE cards. Id. at 2-4, 2-6. These cards can inhibit the “legislative model” of ROE development because they are readily available for JAGs to distribute in lieu of mission-specific ROE. See Dungan, supra note 66, at 313–14 (noting that ROE are frequently not tailored to the soldier’s specific mission and describing commanders as “derelict” in their failure to tailor ROE); Parks, supra note 19, at 35 (“By and large, ROEs produced by the most lawyer-heavy military in the world are cut-and-paste, copycat products lacking in original thought or analysis and unsuitable for current missions.”).
92. See Parks, supra note 19, at 36.
ble, such as shouting or warning shots, before applying force. The ROE cards tell soldiers to shoot to wound, even though soldiers are not trained to do so, and only to "disable or destroy" as a last resort. Figures 1–3 illustrate commonly used ROE cards. These cards are often reused without being changed to address the concerns of a specific area or mission in which the soldiers are conducting operations.

While multiple sets of ROE exist, ROE on the whole are strikingly similar, as the sample ROE cards show. Both the VEWPRIK ROE card and 5 S's ROE card have a clear force continuum model for how a soldier should respond to an actual attack or the display of hostile intent. Both require a verbal warning followed by a display of the soldier's weapon. Both also require some type of physical attack on the potential combatant and warning shots. These cards anticipate that the soldier will at least attempt to go through these steps when confronted with a hostile threat, which, as discussed below, may be impractical. None of the cards defines the soldier's right to self-defense, which a soldier is allowed to use when con-

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93. See, e.g., CLAMO HANDBOOK, supra note 29, at 2-6.
94. See Instruction 3121.01A, supra note 54, at A-13.
95. As one practitioner notes, oddly enough [s]oldiers are not trained how to shoot to wound or disable. There is no tactical shooting program that provides that training, though some ROE cards at least suggest that they should. Soldiers are trained to shoot center mass, which means at the middle of the largest part of the target that is visible. The lack of coordination between firearms training and written rules further complicates problems with ROE.
96. See Instruction 3121.01A, supra note 54, at A-13.
97. See CLAMO Report: Preparation Tips for the Deployment of a Brigade Operational Law Team, ARMY LAW., Nov. 2001, at 29, 30–31 (stating that soldiers get ROE cards that "merely restate" the SROE, but timing often makes it difficult to give soldiers the ROE annex that contains mission-specific information about the applicability of the ROE); Dungan, supra note 66, at 308 ("ROE development is all too often dropped in the lap of the judge advocate by operations staff officers with more work than time.").
98. As such, references in this Note to "current ROE" are meant to reflect issues systemic to the body of ROE governing soldiers' actions.
99. See infra figs.2 & 3; see CLAMO HANDBOOK, supra note 29, at 2-6.
100. See CLAMO HANDBOOK, supra note 29, at 2-6.
101. Figs.1, 2 & 3; see CLAMO HANDBOOK, supra note 29, at 2-4, 2-6.
fronted with deadly hostile intent. Only the Ramp ROE card mentions protecting human life with deadly force and it subordinates this point to the bottom of the card. Given that the law protects this right above all else, it seems inconsistent that the law is interpreted in this manner.

Fig. 1: RAMP ROE

Fig. 2: VEWPRIK ROE

Fig. 3: 5 S's ROE

The state is required to impart the law of war to its combatants. If such ROE cards were used only as a reinforcement tool to larger law of war training, perhaps their usage would not be criticized. However, due to insufficient training, soldiers rely heavily on ROE cards.

4. Besides ROE, Many Soldiers Have Little Practical Understanding of the Law of War

The U.S. DOD’s Law of War Program requires training for soldiers. However, it is up to the individual commanders and JAGs to plan and execute this training. On the whole, the military’s use-of-force training is not comprehensive enough to guide soldiers in making use-of-force judgments consistent with the law of war.

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102. See Instruction 3121.01A, supra note 54, at A-13 (defining when deadly force is appropriate).
103. Fig. 1; see CLAMO HANDBOOK, supra note 29, at 2-4.
104. See U.N. Charter art. 51 (stating that nothing “impair[s] the inherent right of individual or collective self-defence”).
105. CLAMO HANDBOOK, supra note 29, at 2-4.
106. Id. at 2-6.
107. Id.
108. 1907 Hague Convention IV, supra note 6, art. 1.
109. See Instruction 5810.01C, supra note 9, at 1-2.
110. Id. enclosure A, at 2.
Most soldiers receive basic law of war training at the beginning of their careers. This training is meant to provide to soldiers the “minimum knowledge required” of the law of war. For “deployable” units, training is conducted annually and prior to deployment. Commanders establish the objectives for these training sessions.

The efficacy of commander-led training is questionable. The Army wants courses to include “specific training objectives” with “a qualified instructor [who] will conduct training in a structured manner . . . and evaluate performance” of “tasks . . . under realistic conditions.” However, because each unit conducts its own training, the results can vary.

Training usually occurs in a classroom environment and is often focused on what the rules are instead of on making judgments about when those rules apply. Too often, such reviews are “perfunctory ‘check the block training events’ that provide little practical [or] tactical guidance to [soldiers] on the ultimate question, ‘When can I pull the trigger?’” For example, marines testified that they were given a PowerPoint lecture on the rules before being sent to Iraq, but at no time were they tested on their ability to follow ROE and execute the law of war.

The importance of judgment-based training has been noted by other authors, and certainly some training schemes seem...
to be on the right track. In Afghanistan, one JAG developed training scenarios based on likely interactions between soldiers and civilians, and then had small groups work to apply the law of war to these situations. The groups were then critiqued by the entire class. Another JAG conducted individual training with each soldier before his deployment to ensure that the soldiers fully understood the significance of the law. However, some of the practices are suspect; one JAG merely made a videotape of use-of-force scenarios for marines to watch on their plane trips to Kuwait.

Additionally, many of the units which conduct support operations in Iraq receive little training on how to apply ROE in crowd control and policing activities. "Not all units perform enough marksmanship and close-quarters combat training." The military does provide some simulated training, but it does not have the capabilities of advanced virtual reality training used by domestic law enforcement. The Army's virtual training exercises do not respond to the soldier's actions and are not specifically written for the use of deadly force. The Army's virtual training centers provide live simulations, but they are not focused specifically on policing or solely on law of war application.

49-50 (encouraging JAGs to perform realistic training exercises so soldiers can better apply their knowledge when at the training centers); Martins, supra note 28, at 75-77 (stressing that training is more than memorization of ROE).

121. CLAMO, LEGAL LESSONS LEARNED, supra note 90, at 94 n.51.
122. Id.
123. Id. at 95 n.52.
124. Id. at 94 n.51.
125. Borger, supra note 15, at 11 (stating that military police often receive only one day of training on how to deal with civilian crowds).
128. Id.
129. See CLAMO Report: National Training Center, supra note 90, at 48-50 (describing the extensive efforts to provide real-life situations at the training centers and noting that there are an "increased number of ROE issues that JA[G]s must address"); id. at 50-54 (noting a number of other issues addressed during the training simulations other than the law of war); Ash, supra note 116, at 44 (observing that law of war training is intended to be "integrated" into the "combat training center rotations (currently brigade-level, 20-day mission rehearsal exercises)").
Ultimately, there is a disconnect; the Center for Law and Military Operations reported that, on the whole, soldiers arrive at predeployment combat training centers with an inadequate knowledge of how to apply the law of war.¹³⁰ Soldiers generally understand the rules "but have not internalized them."¹³¹ As such, soldiers can have trouble applying the "appropriate use of force" in "difficult and realistic" live training simulations.¹³² For many soldiers, the ROE cards given to them by their command- ers or JAGs may be their best understanding of the law of war. Without appropriate practical, judgment-based ROE training that employs simulated real-world scenarios and requires sol- diers to properly apply ROE as they would while deployed, ex- ecuting the law of war is incredibly difficult.

If one compares the ROE cards against law of war re- quirements, the steps prescribed on the cards are not contrary but they are also not necessarily helpful in a practical manner to soldiers on the ground. Naval Admiral James A. Lyons Jr. noted, "These ROEs might sound fine to academics gathering at some esoteric seminar on how to avoid civilian casualties in a war zone. But they do absolutely nothing to protect our combat troops who have to respond in an instant to a life or death situ- ation."¹³³ It is when these ROE are applied by soldiers policing Iraq in the real world of instantaneous life and death decision making that problems arise, because the current ROE overem- phasize other law of war principles while de-emphasizing the right to self-defense.

II. THE CURRENT ROE ARE AN ILL FIT FOR POLICE OPERATIONS IN IRAQ AND THEY ENDANGER SOLDIERS AND CIVILIANS

The current ROE interpret the law of war in a manner that is unnecessarily restrictive for soldiers policing Iraq's streets. The tactics employed by insurgents in Iraq make it difficult for U.S. soldiers to distinguish between civilians and comba- tants.¹³⁴ This ambiguity is especially problematic for soldiers involved in police-type operations and activities, due to their

¹³⁰. See CLAMO Report, Legal Team Trends, supra note 90, at 17.
¹³¹. Id.
¹³². Id.
¹³³. Lyons, supra note 17.
¹³⁴. See, e.g., Parks, supra note 9.
increased interaction with civilians. These deficiencies place both soldiers and noncombatants at unnecessary risk. This results in a misapplication of the law of war and provides an incentive for insurgents to continue to violate the law.

A. INSURGENT TACTICS COMPLICATE THE LAW OF WAR FOR SOLDIERS POLICING IRAQ

Insurgents in Iraq practice guerilla warfare. "A key component" of the guerillas' strategy is their ability to "melt into the populace." Hiding amidst the noncombatant civilian population provides the element of surprise integral to the guerillas' success. Guerilla warfare creates a problem of distinction; when guerillas mix with civilian noncombatants, it is extremely difficult for soldiers to determine an individual's status.

These tactics are prevalent in Iraq, where the greatest resistance to U.S. forces are private militias that "purposely conceal[] their combatant status, conceal[] their weapons, [and] wear[] no part of a uniform . . . in order to engage in acts of treachery or perfidy." Insurgent tactics of roadside bombs,
Improvised Explosive Devices (IEDs), and small arms fire—all of which require concealment for success—account for the bulk of U.S. casualties. Insurgents have admitted to the press that the United States “is not fighting an army . . . . We hit and move. We’re more like groups of gangs that can’t be pinned down and can’t be stamped out.”

These tactics are particularly problematic for soldiers engaged in “stability and support operations.” Such operations are similar to police work; both include patrolling streets, providing building security, and maintaining checkpoints. These duties entail numerous interactions with the civilian population, requiring soldiers to constantly evaluate every encounter. For instance, because cell phones can be used to detonate roadside bombs, every Iraqi on a roadside with a cell phone becomes a potential threat. A soldier confronted with this situation must make an instantaneous judgment as to whether an actual threat exists. Because the soldier does not know whether the individual is an insurgent or a noncombatant civilian, the sol-
dier cannot be sure if reasonable force requires a verbal warning, a warning shot, or deadly force. Failure to appropriately determine the individual’s status could result in either the death of an innocent civilian or the death of the soldier.148

B. THE CURRENT ROE ARE INAPPROPRIATE FOR POLICING IN IRAQ AND RESULT IN HARM TO SOLDIERS AND CIVILIANS

As discussed above, the current ROE practically require an escalation of the use of force.149 This requirement is not easily applied to policing activities in a hectic and confusing real-world Iraq.150 Escalation of force causes soldiers to hesitate in their reactions, providing insurgents with more time to strike against them and the civilians the soldiers seek to protect.151 The current ROE overemphasize the principles of proportionality and humanity while restricting the soldier’s right to self-defense in a manner not required by the law. This eventually results in a misapplication of the law of war on the streets of Baghdad.

1. Soldiers Receive ROE that Interpret the Law of War in an Unclear and Overly Restrictive Manner for Policing in Iraq

ROE cards attempt to impart the law of war to soldiers, but legal concepts are difficult to effectuate on the ground. “Proportionality” and “necessity” become complicated when a soldier cannot distinguish between combatant and civilian, as is the case with soldiers involved in policing. Although the SROE define “proportionality” and “necessity,”152 the versions of ROE soldiers receive seldom define these terms.153 Even when defined, terms “that confound even seasoned scholars of

148. See, e.g., Lyons, supra note 17.
149. See, e.g., CLAMO HANDBOOK, supra note 29, at 2-4 to -9 (describing escalation-of-force training methods).
150. See Lyons, supra note 17 (observing that ROE “might sound fine to academics gathering at some esoteric seminar” but do “nothing to protect our combat troops who have to respond in an instant to a life or death situation”).
151. See, e.g., Perry, supra note 119, at 1.
152. See Instruction 3121.01A, supra note 54, at A-11.
153. E.g., CLAMO HANDBOOK, supra note 29, at 2-4 (describing the techniques used to train soldiers and providing an example of materials distributed to soldiers); see also Dungan, supra note 66, at 312–13 (noting that soldiers receive training materials introducing the “cryptic elements” of “necessity” and “proportionality,” which are unlike the typical “bright-line rules that soldiers are accustomed to receiving and trained to follow”).
international law" are difficult for a twenty-year-old soldier with limited armed combat experience to understand and apply in an instant. The ROE provide rules but not the training to understand how the law applies.

The ROE interpret the law of war's mandate for proportionality by instructing soldiers to apply force based on a continuum, as discussed above. The model encourages the soldier to wait to respond in hopes that the "aggressors will abruptly change their minds." Admiral Lyons notes that some soldiers are instructed to use force only after satisfying a seven-step process:

1. You must feel a direct threat to you or your team.
2. You must clearly see a threat.
3. That threat must be identified.
4. The team leader must concur that there is an identified threat.
5. The team leader must feel that the situation is one of life or death.
6. There must be minimal or no collateral risk.
7. Only then can the team leader clear the engagement.

This ROE model ingrains orderly checklists in the soldier's mind in the hope that he will go through each step when presented with a potential threat. This approach is not effective in close-quarters combat because the delays caused by these models are both impractical and dangerous in insurgent warfare, where mere seconds make the difference between life and death. "If our soldiers or Marines see someone about to level an AK-47 in their direction or start to receive hostile fire from a rooftop or mosque, there is no time to go through a seven-point checklist before reacting." The soldier must react correctly, immediately.

Following a checklist increases a soldier's response time, consequently endangering his life. The use of mnemonic de-
vices or acronyms, while "purport[ing] to make it easy to re-
member the steps of the continuum[,]... result[s] in guaran-
teeed hesitation in the face of a threat." Furthermore, by de-
laying a soldier's reactions, ROE checklists inhibit a soldier's
ability to defend himself. By practically requiring checklists, 
the ROE overemphasize proportionality while diminishing the
right to self-defense.

Additionally, many of the ROE cards and models fail to
specifically instruct the soldier about his legal right to self-
defense. The SROE are clear that nothing limits a soldier's
"inherent right of self-defense." However, none of the sample
ROE cards clearly state when a soldier is entitled to use deadly
force.

Furthermore, some of the authorized steps on the force
continuum, such as "Injure with Bayonet" and use "Rifle
Buttstroke," are outdated and impractical in counter-
insurgent warfare. For instance, whether soldiers even use
their bayonets while on patrol, which itself is somewhat unlikely, it is unreasonable to assume that stabbing someone with a bayonet is somehow not using deadly force. While this is not true for "use Rifle Buttstroke," both of these steps assume that the soldier will be in hand-to-hand combat. If a threatening individual has displayed hostile intent and is close enough to be injured with a soldier's bayonet or rifle butt, that individual is a deadly hostile threat.

161. Petrowski, supra note 155, at 29 (noting that the officer will be forced to "eliminate all less intrusive force options").
162. See Lyons, supra note 17.
163. See Dungan, supra note 66, at 312-13 (describing how "boilerplate language" used to inform soldiers of their right to self-defense is criticized by military practitioners as "unhelpful").
164. See Instruction 3121.01A, supra note 54, at A-10.
165. See supra figs.1, 2 & 3.
166. See supra fig.2.
167. See Last Charge for the Bayonet—A Victim of Modern Warfare, SUNDAY TELEGRAPH (London), Sept. 15, 2002, at 9 (describing bayonets as "redundant" and weapons of last resort reserved for close quarters combat). Arguably, soldiers carrying weapons with bayonets may also make Iraqis fearful, undermining the ability of U.S. troops to succeed in their mission.
168. In every fight involving a soldier (or a police officer), there is at least one weapon—the soldier's. If a suspect is close enough to the soldier to present a threat, there is a possibility that the suspect will overcome the soldier and use the soldier's weapon against him. Cf. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED
These steps act as a restriction on the soldier's right to use force; their effect is to limit the soldier's ability to immediately react to displays of deadly hostile intent. They ask the soldier to use lesser means first, but the soldier has a right under the law to use self-defense by whatever means necessary. The ROE are a poor interpretation of the law of war.

2. The Current ROE Endanger Soldiers and the Civilians They Protect in a Way Unanticipated by the Law of War

Unclear and overly restrictive ROE have proven a life and death problem. Soldiers will follow the ROE to a fault. ROE are orders that are not taken lightly by the soldier; failure to follow the ROE can result in a court-martial for insubordination. As early as Vietnam, critics challenged ROE as overly restrictive. Numerous incidents have emerged in which soldiers followed ROE to the detriment of themselves and the civilians they were trying to protect.

Formulaic ROE disable soldiers from using their judgment. After Vietnam, Senator Barry Goldwater stated that he was "ashamed of [his] country for . . . allow[ing] such restrictions to
have been placed upon men who were trained to fight, men who were trained to make decisions . . . , and men who were risking their lives." 174

In 1983, a marine failed to fire at a truck driver who barreled through a secured area, detonating a truck bomb, and causing the deaths of 241 marines and sailors at the Beirut Airport barracks. 175 The DOD Commission that investigated the incident determined that restrictive ROE "contributed to a mind-set that detracted from the readiness" of the marine. 176 Over twenty years later, soldiers are facing the same situation. In 2005, Al Qaeda commander Abu Musab al-Zarqawi drove a speeding car through two clearly marked checkpoints in Iraq. 177 The soldiers held their fire because they could not make a positive identification of al-Zarqawi. 178 In both of these instances, the speeding cars should have been considered imminent threats, particularly given the use of car bombs. 179 Under the law of war, the soldiers then would have been justified in their use of deadly force. 180

ROE have failed to adequately provide functional guidance and have restricted the legal right to self-defense. In Bosnia, Serbs with nail-tipped clubs attacked four U.S. soldiers who did not defend themselves with deadly force because the senior soldier present had ordered them not to use their weapons. 181 Two of the soldiers' injuries were so severe that they were medically discharged; the senior soldier was awarded a medal for exercising restraint and following his ROE. 182 But under the law of war, this was a situation in which the use of deadly force in self-defense would have been justified.

174. Id. (statement of Sen. Goldwater).
175. See Martins, supra note 28, at 3, 10–12.
178. Id.
179. Id. (noting that under traditional rules, a vehicle speeding through a checkpoint is ordinarily considered deadly force).
180. See U.N. Charter art. 51; Instruction 3121.01A, supra note 54, at A-8 ("U[S.] forces always retain the right to use necessary and proportional force for unit and individual self-defense in response to a hostile act or demonstrated hostile intent.").
181. See Parks, supra note 19, at 33.
182. Id.
This problem persists in Iraq, where more than one-third of soldiers surveyed stated that they had been in threatening situations where they were “unable to respond” because of restrictive ROE. Soldiers reported that insurgents would throw burning gasoline-filled bottles at their vehicles, but the soldiers were unable to respond due to restrictive ROE. Other soldiers stated they were not allowed to respond with force when insurgents dropped large chunks of concrete from the tops of buildings and overpasses onto their vehicles. This restriction on the soldiers’ right to fight back not only miscommunicates the law, which protects the soldiers’ right to self-defense, but also diserves the soldiers who risk their lives for the sake of their country.

In Iraq, insurgents take advantage of the restrictive ROE in order to achieve results. In Kirkuk, insurgents often pretended to have car problems so that they could pull up next to watchtowers and scout U.S. forces. Insurgents know that soldiers will not fire when unarmed civilians may be harmed, and they use this knowledge to their advantage. In Ramadi, marines received fire from snipers who had prestaged weapons and then ran back and forth across the street without the weapons to make the marines believe they were unarmed civilians. This is the “waking nightmare” of U.S. troops in Iraq: being “thrust into a battlefield—but purposely hamstrung by absurd restrictions.”

Ultimately, what has occurred is a problem of legal interpretation. The law of war requires justice in war but it also allows for self-defense. Both are important. The United States’
interpretation weighs one more heavily than the other. The resulting application of the law of war rewards the insurgent for violating the law and failing to distinguish himself from non-combatant civilians. The ROE create a perverse incentive for an insurgent not to follow the law of war, because in violating the law he is more successful at defeating his enemies who are hampered by the law. And yet these individuals have no "regard for human life . . . . [Their] victims are looked upon as expendable: cannon fodder in order to achieve their objectives." Such unfairness only frustrates those soldiers who follow the law and is inconsistent with the law's intent.

III. SOLDIERS CONDUCTING POLICE OPERATIONS NEED NEW ROE AND INCREASED TRAINING, SIMILAR TO THAT OF U.S. LAW ENFORCEMENT OFFICERS

The Joint Chiefs should rewrite the ROE for soldiers engaged in police-type operations, using the model of U.S. law enforcement as a guide. Congress should call attention to this issue and provide additional funding to the military for the development of new ROE and training. The U.S. federal law enforcement policy provides a clear and simplified model for the new ROE and is a legal interpretation consistent with the law of war. Although simplified rules may decrease the emphasis on proportionality and necessity, increased situational judgment-based training will help instill these values in soldiers. While this solution would be an institutional change for the military, it will ultimately result in more accurate and effective execution of the law of war.

A. CONGRESS SHOULD PUSH FORWARD THE DEBATE TO ENCOURAGE THE EXECUTIVE BRANCH TO DEVELOP NEW ROE

A key issue in crafting the solution to this legal misinterpretation is how it will be enacted. The very people who created the ROE have the power to solve this problem: the executive branch. For the courts or legislature to tell the military how to instruct its own subordinates would be a violation of the se-

190. See Lyons, supra note 17.
191. The U.S. Constitution grants the President, as the commander in chief of the armed forces, power to develop foreign policy. See U.S. CONST. art. II, § 2, cls. 1 & 2.
paration of powers. However, Congress should push for reform in this area and encourage change through monetary incentives.

1. Congressional Action Should Encourage the Development of New ROE

While Congress cannot control the execution of the law, it can draw attention to the issue, change the law, and allot money for the issue. Congress should raise awareness about this issue through floor debates or through congressional hearings. Congress previously discussed this issue after the Vietnam War. Just as members of Congress argued that the Vietnam ROE were overly restrictive in a manner not required by the law of war, Congress today should renew the debate on the use of ROE in the Iraq war. Additionally, Congress should call attention to the issue through congressional hearings. Hearings are a powerful tool for reviewing the actions of the executive branch and the military. These actions would shed light on the issues soldiers face in adhering to the

192. Congress retains the constitutional power to “make Rules for the Government and Regulation of the land and naval Forces,” as well as the power to provide for and maintain the armed forces. U.S. CONST. art. I, § 8, cl. 12-14. This potentially conflicts with the President’s power to command the armed forces. See U.S. CONST. art. II, § 2.

193. Because ROE are legal interpretations of treaties that are congressionally enacted law, the executive branch has the exclusive power to execute the law in the manner it deems fit. See U.S. CONST. art. II, § 2.


195. See id. (statement of Sen. Goldwater) (“It is absolutely unbelievable that any Secretary of Defense would ever place such restrictions on our forces.”).


197. See Stephen G. Dormer, The Not-So Independent Counsel: How Congressional Investigations Undermine Accountability Under the Independent Counsel Act, 86 GEO. L.J. 2391, 2397 (1998) (“Congress has broad powers at its disposal to fulfill the role of accountability provided by the Constitution. These powers allow inquiry into almost any matter and give Congress the authority to conduct hearings contemporaneously with criminal prosecutions. Moreover, Congress is endowed with tools that enable it to compel evidence and testimony in furtherance of its broad investigatory power.”).
ROE and may push the debate towards change. While advocating for change in this area is permissible, Congress should not go so far as to dictate new ROE. 198

Congress holds the power of the purse, 199 which can be very effective in eliciting change. The DOD budget is discussed for weeks in both the House and Senate chambers, and the war budget is already divided among the specific needs of the military. 200 For this solution to have real effect, Congress should earmark additional funds for this issue. It is unlikely that a development of new ROE would progress far without the resources necessary to make it a reality.

Congress could pass additional legal requirements that would force the creation of new ROE. In 2005, Congress passed a new law governing the rules for interrogating prisoners of war (POWs), which had an impact on how the military adheres to the Geneva Conventions. 201 This action did not specifically change the law, but rather was an addendum to the law that already governed the military’s treatment of POWs. 202 Similarly, Congress could write a bill that upheld the United States’ current treaty obligations under the Hague and Geneva Conventions but perhaps required the military to distribute information regarding the right to self-defense as part of any ROE handout. However, this action may tread on the President’s powers as commander in chief and executor of the law under Article II of the Constitution.

198. Such action would be a violation of the separation of powers guaranteed by the Constitution. Compare U.S. CONST. art. II, § 2, cl. 2 (establishing that the President is the commander in chief of the armed forces with authority to appoint executive officers), with U.S. CONST. art. I, § 1, cl. 1 (vesting all legislative powers in Congress).

199. See U.S. CONST. art. I, § 8, cls. 1 & 12 (“The Congress shall have the power . . . To raise and support Armies . . .”).


202. See 151 CONG. REC. S12, 381 (daily ed. Nov. 4, 2005) (statement of Sen. McCain) (noting that a prohibition against cruel, inhumane, and degrading treatment has been a longstanding principle in both law and policy in the United States).
Congress must step carefully because the ROE are also directives from the military leadership to their subordinates.\textsuperscript{203} The change should ultimately arise from the executive branch itself.

2. The Executive Should Mandate the Development of New ROE

The President, as commander in chief, has the power to change the ROE.\textsuperscript{204} With attention brought to the issue by Congress, the President should push for change in this area. An executive mandate or the creation of an advisory committee to suggest changes on the subject may be extremely effective.\textsuperscript{205} However, this solution stands to alienate the military commanders who themselves developed the current ROE. Furthermore, presidents are likely to defer to military commanders on such issues that ultimately affect the way in which the military institution operates.\textsuperscript{206}

The best solution would be for the President to quietly suggest such a change at the uppermost level, the Joint Chiefs of Staff. The Joint Chiefs must follow the President’s orders and, as the senior military advisors to the President and Secretary of Defense,\textsuperscript{207} they are best equipped to execute such a solution.

\textsuperscript{203} See DOD DICTIONARY, supra note 5, at 470 (stating that ROE are directives).

\textsuperscript{204} U.S. CONST. art. II, § 2, cl. 1 (establishing that the President is commander in chief of the armed forces); see also Michael Stokes Paulsen, The Emancipation Proclamation and the Commander in Chief Power, 40 GA. L. REV. 807, 825 (2006) ("[T]he President of the United States, by virtue of the Commander in Chief Clause, possesses the full military and executive power of the nation with respect to . . . matters of military strategy and tactics; specific and general military objectives; [and] the rules of engagement with the enemy . . . .").

\textsuperscript{205} See, e.g., Exec. Order No. 12,961, 60 Fed. Reg. 28,507 (May 31, 1995) (creating an advisory committee on Gulf War Veterans’ Illnesses which advised both the President and the Secretary of Defense).

\textsuperscript{206} See Remarks Following a Meeting with Military Leaders and an Exchange with Reporters, 43 WEEKLY COMP. PRES. DOC. 509 (Apr. 23, 2007) ("I believe strongly that politicians in Washington shouldn’t be telling generals how to do their job . . . ."); see also Glenn Sulmasy & John Yoo, Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror, 54 UCLA L. REV. 1815, 1827 ("Civilians will want to delegate authority in war policy to take advantage of the specialization of the military . . . .").

\textsuperscript{207} See Goldwater-Nichols Department of Defense Reorganization Act of 1986, 10 U.S.C. § 151(b)(1) (Supp. IV 2006) ("The Chairman of the Joint Chiefs of Staff is the principal military adviser to the President, the National Security Council, the Homeland Security Council, and the Secretary of Defense.").
There may, however, be some resistance from the Joint Chiefs on this issue. The ROE have become an increasingly hot topic in the press and within the military.\textsuperscript{208} High-level officers have advocated changing the ROE, but the current military administration has yet to publicly consider any reform.\textsuperscript{209} The Joint Chiefs themselves developed the SROE\textsuperscript{210} and may not be open to reconsidering their own policy. Yet, the Joint Chiefs may be more willing to consider a change given the persistent state of war in Iraq and the mounting casualties, both civilian and military.\textsuperscript{211} Political pressure and discussion on this issue will help move the debate forward.

B. THE ROE SHOULD BE REWRITTEN BASED ON THE DOMESTIC LAW ENFORCEMENT STANDARD FOR SOLDIERS INVOLVED IN POLICE OPERATIONS

With the funds allotted by Congress, the Joint Chiefs of Staff should develop new ROE for soldiers engaged in police operations, using the U.S. federal law enforcement standard as a guide. A two-pronged solution should address both the creation of new ROE and judgment-based training to ingrain this new standard, which would only apply to soldiers involved in policing activities. Creating new ROE based on the law enforcement model is unrealistic unless supplemented with additional law of war training. Training is the safeguard to ensure that a soldier's use-of-force decisions comply with the law of war requirements.

Although others advocate different changes to ROE formulation or training,\textsuperscript{212} this solution advocates adoption of a domestic law enforcement model for military policing. Also, it is

> \textsuperscript{208} Compare Lyons, supra note 17 (stating that ROE bind the hands of soldiers), with Caldwell, supra note 111 (arguing that the current ROE are adequate).

> \textsuperscript{209} See, e.g., Caldwell, supra note 111 (discussing ROE, but as Spokesman from the Multi-National Force for Iraq, refraining from considering reforms).

> \textsuperscript{210} See Instruction 3121.01A, supra note 54, at A-1.

> \textsuperscript{211} See, e.g., Arwa Damon et al., \textit{Iraqi Officials: Truck Bombings Killed at least 500}, CNN.COM, Aug. 15, 2007, http://www.cnn.com/2007/WORLD/meast/08/15/iraq.main (detailing the death toll for a day in Iraq in which over three hundred civilians were also injured).

> \textsuperscript{212} See, e.g., Dungan, supra note 66, at 318–20 (advocating for a more "elaborative language," additional emphasis on status identification, more appropriate tailoring, and better training); Martins, supra note 28, at 76–85 (arguing for revisions that "refine terms and distinctions" currently employed, while acknowledging historical trends and implementing new training models).
novel in that it is tailored to soldiers involved in a particular function—police operations. It does not overreach by trying to change the ROE or training for the entire military in every operational situation. To do so would be to admit that the current ROE are inapplicable in all military situations, which is untrue. Rather, this solution acknowledges that the current ROE are useful in some traditional combat situations but do not fit military policing in Iraq.

1. New ROE Should Be Created Only for Soldiers Engaged in Police Operations

The current ROE have a place in modern day warfare. They can be used when nation states engage in combat operations where troops prepare to take or defend an objective that is protected by another uniformed armed force. In those situations, the problem of distinguishing civilians from combatants and insurgents is eliminated, or at least lessened.\textsuperscript{213} Commanders have information at their fingertips about the identity of their targets and have time to make reasoned judgments about the use of force.\textsuperscript{214} However, the ROE should differ when soldiers are engaged in police-type operations. These situations are intrinsically different from combat where the enemy’s identity is obvious. Soldiers policing streets are confronted with and must respond to immediate, unknown threats in a manner similar to what police officers do domestically on a daily basis.\textsuperscript{215}

Issuing different ROE for soldiers performing a policing function would be an institutional change. The Joint Chiefs created the SROE because they wanted a uniform model for all instances.\textsuperscript{216} Commanders may be concerned that issuing sepa-

\begin{enumerate}
\item \textbf{See CLAMO HANDBOOK, supra note 29, at 1-7, 1-23 to -24 (describing the commander’s process of mission analysis, including “relocating civilians on the battlefield”).}
\item \textbf{See id. at 1-22 to -24 (detailing the mission analysis process).}
\item \textbf{See JOES, supra note 138, at 12–13 (describing insurgents’ surprise tactics); Ware, supra note 143, at 35 (relaying comments by insurgents about their tactics); cf. PETER SCHARF & ARNOLD BINDER, THE BADGE AND THE BULLET 71 (1983) (describing police encounters in which officers must instantly react to armed confrontation).}
\item \textbf{See Instruction 3121.01A, supra note 54, at A-9 (“Purpose and Scope: [T]he SROE establish fundamental policies and procedures governing the actions to be taken by [U.S.] force commanders ... during all military operations, contingencies, terrorist attacks, or prolonged conflicts outside the territorial jurisdiction of the United States .... To provide uniform training and planning capabilities, this document is authorized for distribution to commanders at all levels and is to be used as fundamental guidance for training}
rate ROE for soldiers in policing functions would restrict the command-
er's ability to change ROE as necessary. However, the Joint Chiefs could
prescribe new ROE for police operations and still give commanders au-
thority to adjust ROE as necessary. A "one size fits all" model is not al-
tways the answer. But if the Joint Chiefs defined different ROE for police operations, it
would provide commanders with a starting point, a baseline
from which to operate, similar to what the SROE already pro-
vide.217

The Joint Chiefs would need to define specifically what
types of activities qualify as police operations. This definition
may be similar to that of stability and support operations, as
previously discussed.218 If it is less inclusive, it should at a min-
imum include patrols and security duties, because these are the
instances in which a soldier is most likely to be caught off-
guard, like a police officer. These situations are best suited for
the new ROE because the soldier must exercise his judgment.

2. The Domestic Law Enforcement Model Can Be a Guide to
Interpret the Law of War for Soldiers Engaged in Police-Type
Operations

The ROE for soldiers conducting police operations in Iraq
should be developed based on the law enforcement model. The
law enforcement model is better suited for policing than the
current ROE. Despite some dissimilarity, the law enforcement
model can be applied to police operations in Iraq. The domestic
law underlying the law enforcement model is consistent with
the law of war and would uphold the principles of necessity,
humanity, proportionality, and self-defense. A use-of-force
model that is acceptable in the U.S. domestic constitutional en-
vironment will meet international standards under the law of
war.

217. See Jeter, supra note 12, at 388 (stating that the SROE are only a
"starting point" for developing mission-specific ROE).

RULES OF ENGAGEMENT

a. The Law Enforcement Model Provides a Clear Standard that Respects and Relies on the Officer's Judgment

The FBI's policy for use of force provides a simple and clear standard, instructing officers that they may (1) use deadly force in the "presence of an imminent danger" that they reasonably believe will cause death or serious physical injury to themselves or others and (2) use deadly force against a fleeing attacker who is reasonably believed to be a continued threat. The new ROE, based on this model, should be clear that if the soldier does not believe the threat is deadly, he should resort to lesser uses of force such as verbal threats or physical force.

The law enforcement model has been developed through case law. Under Graham v. Connor, police officers' use of force must be "objectively reasonable in light of the facts and circumstances confronting them." The Supreme Court flatly refused to apply a "20/20 hindsight" policy, showing the Court's insistence upon respecting an officer's judgment. In Tennessee v. Garner, the Supreme Court held that deadly force could be used against a fleeing suspect if there is "probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." The Supreme Court's holding gives credence to the officer's judgment.

Both federal agencies and state legislatures have developed similar rules under this guidance. The FBI's straightforward standard "anticipates an immediate threat" to human life and reserves the use of force for those instances. Deadly force is authorized against a fleeing suspect who has committed a felony by means of deadly force or whose escape would result in an imminent threat to the community. States have codified the use-of-force standard for law enforcement in statutes that nearly mirror this standard. For instance, Minnesota justifies the use of force "only when necessary" to "protect the . . . officer or another from apparent death or great bodily harm," to stop a person who "has committed or attempted to commit a felony in-

221. Id. at 397 (citations omitted).
222. See id. at 396–97.
volving the use or threatened use of deadly force,” or to capture a person who has committed a felony and who will be a lethal threat to others if not captured. Nationwide, state standards are quite similar.

The law enforcement model is by no means perfect. It anticipates use of force when the officer has a “reasonable belief” that such force is “necessary.” This is a subjective standard that can be interpreted differently by officers and courts. Some might argue that these words make the policy just as vague as that imparted in the RAMP ROE card, discussed above. Additionally, even the clearest use-of-force policy may be difficult to apply given the “physiological effects of stress in survival situations.” In recognition of this difficulty, the law enforcement model advocates intensive dynamic training. If training is increased, it will no longer be necessary to tell soldiers to use different levels of force, because they will be able to apply force correctly without going through each step of the force continuum.

New ROE based on the law enforcement model would give more deference to the soldier’s judgment. In normal combat operations, restricting the soldier’s judgment may be a legitimate goal so that the commander may wield force as desired. But in police operations, where a soldier does not have a battle plan or know what threats may occur, such micromanaging restrictions only cause the soldier to hesitate instead of react. Hesitation

228. See Office of Investigative Agency Policies, supra note 227, ¶ 1.
229. See supra fig.1.
231. Id. at 5–8 (stating that such training focuses on simulating and dealing with the stress of life and death situations).
does have utility—it can prevent soldiers from making judgment errors. Unfortunately, it also allows insurgents to capitalize on their mission planning and execution, resulting in unnecessary civilian and military casualties. The new ROE must be coupled with additional training in threat assessment to ensure the soldier’s judgment is sound. Such training should be based on the effective law enforcement training model, as discussed below.

b. For Policing, the Law Enforcement Model Is Superior to the Current ROE

Several notable differences exist between the current ROE and the law enforcement model for use of force. A prime example is the force continuum principle. The current ROE use “last resort’ language,” which encourages soldiers to use deadly force only if no other means are available. Force continuum models were previously used by law enforcement starting in the 1960s, but they are not required by U.S. law. More recently, law enforcement models have moved away from force continua, recognizing that requiring “escalating and de-escalating according to a progressive scale limits the spontaneity and flexibility of officers in the field to protect themselves and the public.” Law enforcement agencies recognize that force continua are impractical. Many departmental rules note that “shooting to wound” is unrealistic given the miss rates of even highly trained officers. Not aiming for the target’s “center mass” in-

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234. See Martins, supra note 28, at 10–12 (describing the casualties that resulted from hesitation in Beirut). Compare JOES, supra note 138, at 12–13 (noting that guerrillas rely on surprise), with Parks, supra note 19, at 36 (describing how checklists increase soldiers’ reaction time).

235. See Bolgiano, supra note 127, at 80.

236. See Williams, supra note 233, at 14.

237. See Plakas v. Drinski, 19 F.3d 1143, 1148 (7th Cir. 1994) (“There is no precedent in this Circuit (or any other) which says that the Constitution requires law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can justifiably be used.”).

238. Williams, supra note 233, at 15 (“[O]fficers who hesitate during use-of-force incidents often are injured or even killed, demonstrating the grave consequences of adhering too closely to force continuum policies.”); see also Petrowski, supra note 155, at 29 (“While virtually every force continuum provides that such progressing through force options may not be appropriate in all use-of-force situations, the seed of hesitation is inescapably planted.”).

239. See Williams, supra note 233, at 14–16.

creases the “likelihood . . . that bullets will miss their mark,” leaving the officer open to additional attack.\textsuperscript{241} Warning shots and shooting to wound are “non-lethal responses to an immediate threat of deadly force,”\textsuperscript{242} and such a “detached” response is not expected or demanded when the officer reasonably fears for his life.\textsuperscript{243}

In fact, escalatory actions, such as warning shots or shooting to wound, are sometimes flatly banned by departmental rules because they may cause injury to bystanders and diminish an officer’s strategic use of surprise.\textsuperscript{244} ROE that require escalatory actions have also failed in this manner.\textsuperscript{245} In Somalia, a soldier fired warning shots to halt a group of civilians and accidentally killed a civilian.\textsuperscript{246} When sentencing the soldier, the court-martial panel noted that “the use of warning shots . . . was contrary to standards of due care.”\textsuperscript{247} As discussed below, instead of adhering to a force continuum, law enforcement officers receive judgment-based training that requires them to analyze situations so that their initial use of force is correct and adequate.\textsuperscript{248}

A force continuum may be a useful tool in reining in soldiers’ use of force. By listing less aggressive options, the force continuum ensures that soldiers only use deadly force when necessary in order to uphold the law of war principles.\textsuperscript{249} Additionally, Lieutenant Colonel Mark S. Martins, U.S. Army, argues that the ROE do not actually require the soldier to follow the steps exclusively, but the soldier can use deadly force immediately.\textsuperscript{250} However, placing deadly force as last in a sequence cannot help but send an implicit message that deadly force should only be used as a last resort, regardless of comments to the contrary from JAGs who provide ROE briefings to
soldiers. The issue is both how the ROE interpret the law of war and how soldiers use the ROE to apply the law of war. If the ROE are written in such a way in which soldiers believe they must go through a force continuum, which many have stated they do, then the ROE are not faithful legal interpretations of the law of war.

c. The Law Enforcement Model Is Applicable to Soldiers Policing Iraq

At first glance the law enforcement model seems to be an ill fit, as there appears to be little similarity between U.S. law enforcement and the U.S. military engaged in Iraq. United States law enforcement officers seldom deal with snipers and roadside bombs. Soldiers do not experience commonplace police interactions, such as traffic violations, domestic disturbances, or public fighting. Annual law enforcement deaths rarely rise above seventy-five officers nationally compared with the over three thousand troops lost due to hostile fire in Iraq since March 2003. But the reality is that soldiers are placed in “police type situations where a more discriminating use of force is required.”

When comparing the perspective of a soldier and that of a police officer, the mindset and feelings of each are quite similar. Soldiers in Iraq have difficulty distinguishing between combatants and noncombatants. This problem is analogous to the problem faced by police officers throughout the United States. Criminals do not wear uniforms and are often difficult to distinguish from innocent bystanders until they manifest their status through hostile action. A soldier confronted with a suspicious individual who may set off a roadside bomb asks the same questions as a police officer who encounters a potential suspect

251. A Soldier’s Task: Use Force Appropriately, CTR. FOR ARMY LESSONS LEARNED [CALL] NEWSL. (U.S. Army Training & Doctrine Command, Ft. Leavenworth, Kan.), May 1996, at B-1, B-5; see also Martins, supra note 126, at 7 (noting that it is “easy to concur” that this creates a last-resort mentality).

252. See Perry, supra note 119 (summarizing the testimony of marines that they are required to go through three force-escalating actions before unleashing deadly fire).


255. Bolgiano, supra note 127, at 79.

256. See Canestaro, supra note 2, at 83.
on the street. In either case, the soldier or officer does not know the suspect’s intent and capabilities and must make a split-second determination about the threat. The soldier’s feelings of anxiety when the individual attempts to place a call on his cell phone are similar to those the officer feels when a suspect reaches behind his back, perhaps for a weapon. In either case, the soldier or officer knows that the failure to correctly judge this threat may cost him his life. The issue is not what stimuli to which the officer or soldier must respond but how the officer or soldier chooses to respond to those stimuli.

It is true that soldiers are not police officers. They are not part of the community, they do not have the language skills to communicate with civilians, and they do not necessarily command the same respect as police officers. But the new ROE would not seek to transform soldiers into police officers. Soldiers would continue to identify themselves as part of the military and operate according to international law. Rather, the new ROE would allow better communication between the state and the soldier about the law of war and when it applies. While the streets of Baghdad are certainly different from the streets of New York City, how the soldiers and officers are trained in applying force can be consistent.

Law enforcement use-of-force directives and training have proven successful for national and local police forces. Law enforcement officers face an annual average of almost eleven

257. Compare Williams, supra note 233, at 15–16 (describing police officers’ feelings of physical anxiety and stress when encountering situations of unknown danger and how such feelings limit their ability to react), and Office of Cmty. Oriented Policing Servs., U.S. Dep’t of Justice, Use of Force, http://www.cops.usdoj.gov/Default.asp?Item=1374 (last visited Dec. 4, 2007) (discussing police reactions), with MHAT REPORT, supra note 183, at 14–15 (surveying soldiers who served in Iraq and finding that many felt “intense fear, helplessness, and horror” during events in their deployments, such as “[s]niper fire without obvious so[u]rce” and “[a]mbush on patrol”), and id. at 21 (finding that acute stress and anxiety resulted from many deployment experiences).

258. See Olson, supra note 230, at 3 (“[V]isual narrowing, auditory exclusion, decreased fine motor skills, and other symptoms . . . affect officers in life-threatening situations . . . .”); Williams, supra note 233, at 14–16.

thousand assaults with a dangerous weapon, and yet in only three percent of those situations did the officer kill the suspect. This statistic illuminates the success of police officers in use-of-force objectives and training. The law enforcement use-of-force model has helped train officers to discriminate about the proper use of force, and, more importantly in keeping with one of the stated goals of the military, would train soldiers to show the type of restraint that some see as necessary for success in Iraq.

**d. The Law Enforcement Standards Comply with the Law of War**

New ROE based on the law enforcement model would still comply with the law of war. *Graham* authorizes deadly force if the law enforcement officer reasonably believes it is necessary to defend himself or others. Such action is likewise permitted under the law of war, as the right to self-defense is “inherent” and defense of others falls under the right to “collective self-defense.”

Under *Garner*, deadly force may be used to prevent escape if the suspect commits a crime using deadly force or if the suspect threatens others. Similarly, the law of war allows at-

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260. *See* Petrowski, *supra* note 155, at 28 (citations omitted); *see also* Office of Cmty. Oriented Policing Servs., *supra* note 257 (“[L]ess than half of 1 percent of an estimated 44 million people who had face-to-face contact with a police officer were threatened with or actually experienced force.”). While a comparison to soldiers in Iraq would be useful, such information is not available given the state of affairs in war. Although the military does track when soldiers use their weapons, it is impractical for the military to track all civilian encounters. See *Skepticism, Hope Greet ’Surge’ Strategy*, USA TODAY, Jan. 13, 2007, at 11A (quoting a marine’s comments about the military’s practice of investigating escalation of force); David “Bo” Bolgiano & Jim Patterson, *Investigating Our Soldiers to Death*, WORLDNETDAILY, Nov. 9, 2007, http://worldnetdaily.com/news/article.asp?ARTICLE_ID=58583 (discussing investigations of shooting incidents in Iraq).


263. *See* U.N. Charter art. 51; *see also* Instruction 3121.01A, *supra* note 54, at A-8 (“[U.S.] forces always retain the right to use necessary and proportional force for unit and individual self-defense in response to a hostile act or demonstrated hostile intent.”); id. at A-11 (“Collective Self-Defense[] The act of defending designated non-U[.]S[.] forces . . . and/or designated foreign nationals and their property from a hostile act or demonstrated hostile intent.”).

tacks against retreating belligerents because they may continue to be dangerous in the future.\textsuperscript{265} However, U.S. law limits the use of deadly force to those fleeing who remain an immediate threat to the community.\textsuperscript{266} This limitation ensures that deadly force is used only when necessary to achieve the objective of stability. Thus, a change in the format of ROE that mirrors the U.S. law enforcement model would still comply with the law of war.

Furthermore, new ROE based on the law enforcement model would continue to uphold the underlying principles of the law of war. The new ROE would still support the principle of necessity,\textsuperscript{267} because the use of deadly force would be restricted to instances in which there is a threat of death or serious physical injury. The new ROE would uphold proportionality\textsuperscript{268} by restricting the use of deadly force to situations where it is necessary to combat a threat to human life or achieve a military objective. The new ROE do run the risk of increasing the loss of innocent lives, because they enable soldiers to react faster, making increased training on threat assessment absolutely necessary. The new ROE would focus more on the soldier's inherent right to self-defense, which has been left out or diminished in many versions of the ROE that soldiers receive. The law enforcement model places the right to self-defense up front, instructing soldiers that they have the right to use deadly force in the presence of an imminent danger. The new ROE would give this right of the soldier the preeminence it deserves under the law of war.

3. New ROE Should Be Supplemented with Dynamic Judgment-Based Training to Teach the Law of War

If the military creates new ROE for troops conducting police-type operations, increased training would also be necessary. The law enforcement model provides judgment-based training on the use of force, which is important given increased deference to the officer's judgment under this model. Unlike most traditional military training, which is rules-based, new training must depart from the traditional military training and

\begin{footnotesize}
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\item[266.] See Garner, 471 U.S. at 11.
\item[267.] See ROGERS, supra note 24, at 3–7.
\item[268.] See id. at 19.
\end{enumerate}
\end{footnotesize}
teach soldiers how to think and evaluate combat situations and scenarios. It must provide individual feedback so soldiers learn from their mistakes. Although increased training may not be feasible or necessary for all troops given budget and time constraints, the military can focus this training on troops who most need the resource.\(^{269}\) Training is crucial to the proper execution of the law of war.

a. The Law Enforcement Model Emphasizes Judgment-Based Training

The training of federal law enforcement officers is tailored to the use of deadly force. Law enforcement training was formerly “conducted in the static, nonthreatening, low-stress environment of the gun range, gymnasium, or classroom,” which effectively constituted “motor skill training.”\(^{270}\) However, because this type of training “does not adequately prepare . . . officers to make effective deadly force decisions,” the law enforcement model now uses dynamic training in use of force that requires officers to apply their judgment skills in real-life situations.\(^{271}\)

FBI use of force training focuses on threat assessment: determining the suspect’s “hostile intent and indicators of capability.”\(^{272}\) Since the intent of a suspect is often difficult to determine, officers must look to situational factors.\(^{273}\) Such factors include the suspect’s communication or lack thereof and the suspect’s compliance or noncompliance with directions.\(^{274}\) In determining capability, the officer must also assess the suspect’s physical abilities, size, and access to weapons.\(^{275}\)

The FBI uses a “multistage approach” to train its officers in threat assessment.\(^{276}\) This approach begins with classroom instruction on the Justice Department’s use-of-force policy and subsequently uses written scenarios that show how the law

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269. While I advocate for a different ROE and training model for these troops, the details of how such a training model would be implemented in this time of war is highly operational and beyond the scope of this Note.
270. Olson, supra note 230, at 3.
271. See id. at 5 (noting that Zuchel v. City of Denver, 997 F.2d 730 (10th Cir. 1993), found that the death of a bystander was in part caused by a lack of adequate use-of-force training).
272. See Petrowski, supra note 232, at 25.
273. See id.
274. Id.
275. Id.
276. See Hall, supra note 219, at 27.
should be applied in varying situations. These scenarios include instances in which deadly force both is and is not permitted. Then officers test their knowledge with both "interactive video simulation" and role-playing exercises. Video-based simulation provides "fast-paced" scenarios that are "in varying degrees of illumination, often innocuous, and always subject to change." FBI video training is especially helpful because the program responds to the officer's actions and allows training staff to critique the officer's use of force, giving the officer an individual needs assessment. This deadly force training is repeated every year.

Other law enforcement models use visualization techniques in which officers imagine possible deadly force scenarios and "mentally discard[] ineffective responses," reducing the officer's reaction time. Additionally, teaching "tactical breathing" allows officers to control their heart rate so they are less affected by "survival stress symptoms." Some training models require officers to explain how their body will react to the stress of a use of deadly force incident and how they can overcome those limitations.

b. The Military Should Invest in Increased Training Based on the Law Enforcement Model

If the new ROE are employed, they must be coupled with robust training. Using force is first and foremost making a judgment, not merely applying a rule in rote fashion or engaging in the skillful use of firearms. This is particularly true when the number of threats on the street quickly outstrips the limited number of rules a person can be trained to follow.

277. See id.
278. See id. at 29–32.
279. See id. at 27.
280. Bolgiano, supra note 127, at 81.
281. Cf. Olson, supra note 230, at 6 (discussing the use of needs assessment in live role-playing scenarios). Such individual evaluations about the execution of the law of war are not required in the military. See Perry, supra note 119 (describing training as a lecture and pocket cards).
282. See Hall, supra note 219, at 3.
283. See Olson, supra note 230, at 7.
284. See id. at 8.
The law enforcement training model would teach execution of the law of war. Unlike much of current military training described above, it would provide individual feedback and assessment.\textsuperscript{286} Additionally, it would require additional training cycles that would ensure that soldiers continue to improve upon their understanding and application of the law.\textsuperscript{287} While some of the current military training is on point, the best solution would be for the Joint Chiefs to require a judgment-based training course as opposed to allowing commanders to determine implementation.

While the law enforcement training model may result in better application of the law of war, it also requires investment of capital and time by the military. Live simulations are expensive, as the military must transport units to training grounds and hire actors to run the simulations.\textsuperscript{288} Additionally, virtual training requires investment in the necessary hardware and software.\textsuperscript{289} With limited resources, the military should focus additional training on the troops that need it the most.

Several methods of training would benefit soldiers. At the very least, JAGs and commanders could work together to develop classroom training, like that used by the FBI.\textsuperscript{290} Soldiers should individually answer and then discuss hypothetical use-of-force situations, receiving personalized feedback on how they responded. These scenarios should be based on situations most frequently experienced by soldiers policing in Iraq: IEDs, sniper fire, and ruses of war, where combatants pretend to be civilians.\textsuperscript{291} Additionally, commanders can plan law of war role-playing exercises within their units, at minimal cost. Where cost permits, training should also include virtual simulation software similar to the Firearms Training System of the FBI.\textsuperscript{292} Such a system should be tailored to use-of-force situations that occur in Iraq, and JAGs and commanders should evaluate the soldier's individual responses. Finally, where time and cost

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\item \textsuperscript{286} See, e.g., Bolgiano, \textit{supra} note 127, at 81; Olson, \textit{supra} note 230, at 8.
\item \textsuperscript{287} Cf. Hall, \textit{supra} note 219, at 27 (noting that FBI agents receive situational training on a yearly basis).
\item \textsuperscript{288} See Martins, \textit{supra} note 126, at 4 (stating the cost of simulated training at the Army's Joint Readiness Training Center).
\item \textsuperscript{289} See Bolgiano, \textit{supra} note 127, at 81 (describing the tools needed for such training).
\item \textsuperscript{290} See Hall, \textit{supra} note 219, at 27 (describing classroom training).
\item \textsuperscript{291} See ROGERS, \textit{supra} note 24, at 39; Iraq Coalition Casualty Count, \textit{supra} note 142 (detailing the causes of death for U.S. soldiers in Iraq).
\item \textsuperscript{292} See Bolgiano, \textit{supra} note 127, at 81.
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permit, units should undergo live training exercises that are focused wholly on policing and law of war application. Without training to back up the new ROE, they will be just as ineffective in imparting the law of war as the current model.

C. CREATING NEW ROE BASED ON THE LAW ENFORCEMENT MODEL FOR SOLDIERS ENGAGED IN POLICE OPERATIONS WILL RESULT IN BETTER EXECUTION OF THE LAW OF WAR IN IRAQ

Some have argued that the current ROE are an appropriate interpretation of the law of war, because insurgents mix with civilians and "success in Iraq depends on our ability to treat the civilian population with humanity." However, the rules must be a bit tighter in order to successfully achieve the political goal of the mission: winning the hearts and minds of the Iraqi people. This is an important goal and a necessary objective for success in Iraq; however, it is far from clear that the current ROE adequately achieve this goal.

The multiple reports of soldiers using excessive force against civilians would tend to show that the current ROE are not adequate at reining in soldiers' use of force. In Haditha in 2005, marines killed twenty-four Iraqi civilians after their colleague was killed by a roadside bomb. Marines testified that they were issued a 4 S's ROE card and were required to positively identify their target and shoot only when hostile intent and hostile action were shown. At trial, the defense asserted that the marines followed the ROE while the prosecution argued that the marines violated the rules. The marines and their superiors testified that the meanings of positive identifi-

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293. See, e.g., Hall, supra note 219, at 3 (discussing FBI role-playing exercises).
294. See Caldwell, supra note 111.
295. See W. Hays Parks, Teaching the Law of War, ARMY LAW., June 1987, at 4, 5 ("[V]iolations of the law of war frequently lead to a loss of public support (domestic and international) for the war effort; and violations of the law of war may arouse an enemy to greater resistance, leading to increased friendly casualties.").
296. Showdown: Iraq—Voices of Dissent—Part 3 (CNN News television broadcast Feb. 15, 2003) (confirming with Brigadier General David Grange that, even before the war was declared, the goal was "to win the hearts and minds" of the Iraqis); cf. Caldwell, supra note 111 (stating that self-defense in terms of necessity and proportionality is crucial in a counterinsurgent environment).
297. Perry, supra note 119.
298. Id.
299. Id.
cation, hostile intent, and hostile action “change from one area to the next” and that there was a “continuing conflict” between the marines on the ground and upper-level officers as to the proper definitions.300 This confusion could have contributed to the excessive use of force.

Additionally, the law of war, as interpreted through the ROE, may not make sense to many soldiers. Whenever an American soldier discharges his weapon, there is an investigation as to why escalation of force was necessary, which keeps American soldiers faithful to the ROE.301 However, soldiers have stated that they prefer to patrol with the Iraqis because the Iraqi ROE are less restrictive.302 Furthermore, a JAG testified during the trial of marines for the killings at Haditha that the current ROE allow soldiers to fire upon individuals, even those unarmed, fleeing the site of a roadside bomb attack.303 But, she added, the same ROE do not necessarily permit a soldier to shoot an individual pointing a gun at him.304 The current ROE are more restrictive than the common law305 and in execution may seem absurd to soldiers.

The mounting frustration with the current ROE may actually create an incentive not to follow the law and prompt soldiers to take matters into their own hands.306 In Hamandiya in 2006, marines carried out a plot to kidnap and kill a suspected insurgent leader and planted evidence on the body to make it look like the man had a bomb, in order to set an example for the community.307 The platoon leader testified that the marines were frustrated by the ROE and looked to a movie plot that advocated morally justified killing for a “tactical solution,” even though they knew it was illegal.308 The defense team argued that the ROE bound the hands of the marines, who felt that people were laughing at them.309 Marines and soldiers wonder why they have to follow the rules when the enemy does not,

300. See id.
301. See Bolgiano & Patterson, supra note 250; The Captain’s Journal, supra note 186.
302. Id.
303. See Perry, supra note 119 (citing Captain Kathryn Navin).
304. See id.
305. See id.
306. See generally id.
307. See id.
308. See id.
309. See id.
particularly when following the rules rewards the enemy and harms themselves.310

Although the new ROE may increase the soldier's ability to protect his life and the lives of others, some may argue that they will increase the possibility that force will be used incorrectly. If soldiers are not "ramping up" their use of force and rather are responding as they see fit, there are more likely going to be errors in judgment. However, errors in judgment already occur under the current ROE. The solution proposed is not intended to allow indiscriminate firing, but rather to promote increased training so that the first response of a soldier is correct and legally compliant. A soldier's ability to use deadly force under the law should be the same whether he is policing the streets of New York City or Baghdad. The answer to these issues is not loosening the rules, but interpreting the law correctly so that the use of force better complies with the law of war. Despite some concerns, reforming current ROE remains necessary and, in fact, will improve the application of the law of war on the streets of Iraq.

CONCLUSION

The law of war never intended for war to be harmless; it only strives to mitigate unnecessary cruelty. The law has never diminished the right to self-defense. The current ROE, in interpreting the principles of the law of war, overemphasize proportionality while largely ignoring and thereby inhibiting the soldier's right to self-defense. They encourage insurgents to continue to ignore the law and frustrate the soldiers who are trained to follow the law. These ROE are dangerous for soldiers policing the streets of Iraq.

New ROE, mirroring U.S. law enforcement's use-of-force model, will better communicate to soldiers when force is allowed while policing Iraq. If written correctly, they will still comport with the requirements of the law of war. But the new ROE cannot exist in a vacuum. They must be accompanied by adequate training for soldiers so their judgments as to when force is authorized under the law are worthy of deference. The military should only adopt new ROE based on this model if it is prepared to make the investment in training as well. Only then can the law of war be properly applied in policing Iraq.

310. Cf. Rotunda, supra note 177 (describing a failure to fire on a terrorist leader due to a lack of positive identification).