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CONSCIENCE AND COERCION: JUSTICE AND THE *DEFENCE ACT*

'Salus populi suprema lex esto.'[1]

I Introduction

Speaking to the need for coercive powers to be treated with caution in a liberal democracy, this article argues against the requirement in s 8(2) of the *Defence Act 1903* (Cth) that 'the Chief of the Defence Force … *must* comply with *any* directions of the Minister'. Accepting, by and large, that generals should comply with the lawful wishes of civilian government, and that nothing must compromise national security, this article argues that the law should allow generals discretionary space so that they might resist the unconscionable directions of politics. If we are going to take the moral claims of military service seriously, and if we are going to expect our generals to act at anything except a modest administrative level of responsibility, then we must reform the law.

As we recognise that some wars are unconscionable, we must question the morality of commanding such a war. Illustrating this claim, the philosopher Jeff McMahan asks us to consider a soldier:

> fighting in a war that is intended to achieve only aims that are unjust. Suppose that he is not under threat, so that his purpose in firing his weapon is not self-defence but only to contribute to winning the war. He is therefore killing soldiers on the opposing side, who have done nothing wrong, as a means of achieving unjust aims. His reason for killing them is only that they are attempting to defend themselves and others from unjust aggression — that is, he is killing them as a

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1 Cicero, *On the Republic. On the Laws*, tr Clinton W Keyes (Harvard University Press, 1928) bk 3, 466 [trans of: *De Legibus*]. 'The welfare of the people shall be their highest law.' Cicero talks about the praetors, judges and consuls. 'In the field', says Cicero, '[these people] shall hold the supreme military power'.

> means of preventing them from justifiably preventing the achievement of unjust aims. It is difficult to see how that could be morally permissible.[2]

In fact, it is easy to see how a soldier might reasonably fight in wars as McMahan describes. Soldiers are often young, they are trained (sometimes very forcibly) to obedience, and very often they lack the capacity to determine the justice or injustice of war. We might understand — even if we might not accept — as Augustine has it, that the soldier 'bound to service under orders, [is merely] a sword … the [blameless] tool of him who employs it'.[3] However, this is not the case with generals. Very senior, widely experienced, and inhabiting the marchlands of politics, generals are well placed to resist the misdeeds of politics. But they are frustrated by the legislation.

Section 8(2) of the *Defence Act 1903* (Cth) stipulates that 'the Chief of the Defence Force … *must* comply with *any* directions of the Minister'. It follows that the executive sends soldiers to war,[4] and the general is powerless to contest injustice or folly.

This article seeks reform to the law. Reform sought would recognise that generals, and also admirals and air chief marshals who serve as Chief of the Defence Force, have a moral obligation to refuse an exercise of executive power that, in their judgement, is unconscionable.

Even if generals bear a positional and legal obligation to comply with ministerial direction, this obligation does not depend on the justice of the cause.[5] In other words, following RM Hare, legal duty does not entail moral duty.[6] This means when generals recognise ministerial direction as unconscionable, the moral obligation to refuse — so as to not do an unconscionable thing — overrides the legal duty to obey.

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2 Jeff McMahan, 'Foreword' in Andrea Ellner, Paul Robinson and David Whetham (eds), *When Soldiers Say No: Selective Conscientious Objection in the Modern Military* (Ashgate, 2014) xi.

3 Ibid xii, quoting Augustine, *Augustine: City of God*, tr George McCracken (Harvard University Press, 1957) vol 1 bk 1–3, 95.

4 Phil Larkin and John Uhr, 'Bipartisanship, partisanship and bicameralism in 'Australia's 'War on Terror': Forcing limits on the extension of executive power' in John E. Owens and Riccardo Pelizzo (eds), *The 'War on Terror' and the Growth of Executive Power* (Routledge, 2010) 142. See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 2003, 12505–6 (John Howard). The then Prime Minister, Mr Howard, announces to the House that Australian troops have been deployed to the Gulf in the campaign against Iraq.

5 Massimo Renzo, 'Political Authority and Unjust Wars' [2018] *Philosophy and Phenomenological Research* (advance).

6 RM Hare, *Essays on Political Morality* (Clarendon Press, 1998) 9.

II Unconscionability

In the *Crito*, Socrates sets down a standard that one ought to try to avoid wrong and try to do right.[7] Taking this cue, the term 'unconscionable' connotes the most morally urgent expectation people have of themselves. Bernard Williams describes it as 'the [moral] incapacity to do a certain thing knowingly'.[8] This is 'the kind of incapacity that is in question when we say of someone, usually in commendation of him, that he could not act or was not capable of acting in certain ways'.[9] Moral incapacity is 'expressive of, or grounded in, the agent's character or personal dispositions'[10] and 'moral deliberations'.[11] For some people, no matter the acuteness of a crisis or the demands of an emergency, certain things will be morally impossible.[12] This is the implication of the *Defence Act 1903* (Cth), which states in s 4(3) that a conscientious belief

> involves a fundamental conviction of what is morally right and morally wrong, whether or not based on religious considerations … [which] is so compelling in character for that person that he or she is duty bound to espouse it ...

III For All of Us as One of Us

The demands of national security and the practical stringencies of military service make the infringement of individual liberties inevitable. However, there are limits. Locke makes this point:

> the serjeant [cannot] command a soldier to march up to the mouth of a cannon, or stand in a breach where he is almost sure to perish, [or] that the soldier give him one penny of his money; nor the general that can condemn him to death for deserting his post, or for not obeying the most desperate orders, can yet with all his absolute power of life and death, dispose of one farthing of that soldier's estate, or seize one jot of his goods; whom yet he can command any thing, and hang for the least disobedience.[13]

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7 Plato, 'Crito' in John M Cooper (ed), Plato: Complete Works (Hackett Publishing Company, 1997) 37, 49 [45d]. At [49b], Plato says 'one must never in any way do wrong willingly'. At [54b] he says: 'Do not value either your children, or your life, or anything else more than goodness, in order that when you arrive in Hades you may have all of this as your defence'.

8 Bernard Williams, 'Moral Incapacity' (1993) 93 *Proceedings of the Aristotelian Society* 59, 62.

9 Ibid 59.

10 Ibid 60.

11 Ibid 66.

12 Bernard Williams, *Moral Luck* (Cambridge University Press, 1999) 127.

13 John Locke, 'On the Extent of the legislative Power' in Ian Shapiro (ed), *Two Treatises of Government: And a Letter Concerning Toleration* (Yale University Press, 2003) 158, 162.

The same point was made in the Australian Senate in 1983, where in the course of debate concerning conscience and military service, Senator Tate said

> that as legislators we ought to be reinforcing the individual conscience – an activity which culturally marks us as a free society where the common good cannot be relentlessly pursued by means which destroy the individual's personality.[14]

Similarly, the Senate Standing Committee on Constitutional and Legal Affairs' 1985 report on *Conscientious Objection to Military Service* recorded the following:

> Australia, as a democracy, even when engaged in armed conflict [should recognise] conscientious belief in order to protect the integrity of the individual against the coercive power of the State.[15]

Paraphrasing Prime Minister Keating, speaking at the interment of the Unknown Soldier at the Australian War Memorial on 11 November 1993, the generals serve all of us as 'one of us'.[16] Generals are also citizens who share the 'perfect freedom' and 'the equality of men by nature'.[17] To treat generals differently by denying them the elemental rights of their citizenship is unmerited. This claim was deep seated in *Liversidge v Anderson*,[18] when Lord Atkin said laws must speak the same language in war as in peace, being the language of justice, and not the language of political repression.[19]

Besides the fact that generals are citizens, with a claim to the rights of citizens, they bear positional onuses that call for conscientious independent deliberation. The work of generals is not ordinary. Generals are not city workers, and their business is very far from the daily to-and-fro.

To go to war, observes David Kennedy, is distinctively and momentously far-reaching. He states that '[w]hen we call what we are doing, "war", we mean to stress its discontinuity from the normal routines of peacetime'.[20] War is a world apart. Lives are at stake and cultures face extinction. Generals must be conscientious, not merely compliant.

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14 Commonwealth, Parliamentary Debates, Senate, 31 May 1983, 1027 (Michael Tate).

15 Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Conscientious Objection to Conscripted Military Service* (Report, 28 May 1985) 30.

16 Paul Keating, 'Remembrance Day 1993: commemorative address' (Speech, Australian War Memorial, 11 November 1993) <https://www.awm.gov.au/commemoration/speeches/keating-remembrance-day-1993>.

17 Locke (n 13) 101.

18 [1942] AC 206.

19 Ibid 244.

20 David Kennedy, *Of War and Law* (Princeton University Press, 2006) 2.

IV Generals not Postmen

War is a deliberate, devastating, shocking circumstance, for which politics is the origin, but for which the generals bear a special responsibility. By and large generals should obey the Minister. But, generals should not do what they believe to be unconscionable, and the law should not force them to infringe the call of their conscience.

Being a general is different to being a soldier. Generals are expected to be generals, not postmen transmitting orders without responsibility.[21] Isolated from politics and immersed in the functioning of the military instrument, the soldier can do little about political injustice and executive overreach.[22] The general, however, links the executive to the military. It is the general who turns political direction into military command.

Generals are not flunkies in the bureaucratic mobocracy, which Dennis F Thompson criticised when he spoke of the problem of many hands. Thompson said that

> [b]ecause many different officials contribute in many different ways to decisions and policies of government, it is difficult even in principle to identify who is morally responsible for political outcomes. Even if we can decide that a policy is morally wrong, we may not be able to locate anyone who made it.[23]

On the path to war, the general is a single, significant figure. Individual responsibility is not dissolved or made obscure by the collective. The general acts distinctively alone. The entire spread-out chain of command is unified in the general. It is the general who offers the only connection between the military and politics. Only the general, serving as Chief of the Defence Force, might turn political direction into military command and thus instigate the undertaking of war. As the philosopher Robert Nozick says, 'some bucks stop with each of us',[24] and since we 'reject the morally elitist view that [ordinary] soldiers cannot be expected to think for themselves',[25] we must expect generals to think independently and to act conscientiously.

Generals are expected to be more than docile; doing as the minister tells them to do. Generals are expected to be generals. They are expected to act – as Bernard Williams

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21 Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (Skyhorse, 2013) 493; William Shirer, *The Rise and Fall of the Third* Reich (Simon & Schuster, 2011) 867, citing Colonel General Halder, who was concerned Hitler had turned generals into postmen purveying orders based on Hitler's singular conception of strategy.

22 Dan Zupan, 'A Presumption of the Moral Equality of Combatants' in David Rodin and Henry Shue (eds), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (Oxford University Press, 2013) 214, 218.

23 Dennis F Thompson, *Political Ethics and Public Office* (Harvard University Press, 1987) 40.

24 Robert Nozick, *Anarchy, State and Utopia* (Basic Books, 2013) 100.

25 Ibid.

would have it — morally, which means 'autonomously, not as the result of social pressure'.[26] Especially since the Nuremberg trials, generals are relied on to be more than gofers who merely pass on government direction. Generals are expected to lead.

V The Obligation of Leadership

Robert McNamara, Secretary of Defense to US Presidents Kennedy and Johnson during the Vietnam War, described the onerous burden of leadership: 'leaders are supposed to lead, to resist pressures or forces … to understand more fully than others, the range of options and [the] implications of choosing such options'.[27] In McNamara's view, generals are not expected to be speechless in the face of political injustice or guile. McNamara would understand that the law does not limit the general's responsibilities. The law might be silent, or might apply to work an injustice in the circumstances. The general must decide. The general must act. The citizens and soldiers expect generals to think independently, to act rightly, and to be a check on unjust conflict and executive overreach.

Yet, recalling Thoreau, law overstates the primacy of the civil power and puts generals 'on a level with wood and earth and stones'.[28]

VI The Duty to Obey

In *Commonwealth v Quince*,[29] Williams J, in his dissenting judgment, described obedience as the 'first, second and third duty of a soldier at all times'.[30] Samuel Huntington said, similarly, '[w]hen the military man receives a legal order from an authorised superior, he does not argue, he does not hesitate, he does not substitute his own view; he obeys instantly'.[31]

Likewise, Peter Feaver stated that 'civilian principals are to be obeyed even when they are wrong about what is needed for national security'.[32] By the lights of the present article, these claims go too far. Even if we accept Feaver's claim that generals should be bound by executive directions that are 'dumb', it is unreasonable to accept

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26 Bernard Williams, *Ethics and the Limits of Philosophy* (Harvard University Press, 1985) 7.

27 Robert S McNamara, James G Blight and Robert K Brigham, *Argument Without End: In Search of Answers to the Vietnam Tragedy* (Public Affairs, 1999) 7.

28 Henry David Thoreau, *Civil Disobedience* (Black and White, 2014) 5.

29 (1944) 68 CLR 227.

30 Ibid 254.

31 Samuel P Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations* (Harvard University Press, 1981) 73.

32 Peter D Feaver, *Armed Servants: Agency, Oversight, and Civil-Military Relations* (Harvard University Press, 2003) 298.

his claim that generals should also be bound by foolhardy executive direction.[33] Foolhardy is a word we would apply to the sort of reckless or thoughtlessly venturesome direction which would imperil the nation's security, occasion unjust war, expand an extant war in unjust ways, waste lives in a needless squander, or lead to some other grievously bad outcome. Such foolhardiness seems unconscionable, and it is irrational to suggest generals do the right thing when they obey utterly or obviously senseless direction without question.

In asking for generals to have the right to refuse executive directions they find unconscionable, this article recalls Brigadier SLA Marshall who, in his book, *Men Against Fire*, said that generals should never be put under the necessity of humouring the 'lunatic fringe', even those elected to Congress.[34] However, this article does not ask that generals be allowed a free rein to do whatever they might like to do.

This article does not dispute that the military must be subordinate to the civil power and obedient to government direction. Mark Osiel is correct in stating that 'obedience to command … must still remain the rock upon which states are built'.[35] However, it is unreasonable to suggest generals bear an obligation to observe legal direction when the effects are unconscionable, flagrantly heinous, and appalling beyond description. And it is not sensible to tolerate laws that pin generals between a rock and a hard place, denying them the right to refuse, and thus forcing them to comply or resign.

The onus on generals exceeds the obligation of obedience. Generals bear an obligation to safeguard the principles of justice and common interest. These principles found their first formal outline in the Lieber Code, a field manual drafted in 1863, on the command of President Abraham Lincoln as *General Order 100 for the Government of United States Armies in the Field*. The Lieber Code speaks *inter alia* of 'principles of justice, honor and humanity — virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms'.[36] Offering a sharpened emphasis to the paramount obligations of people, the Lieber Code reverberates in the Martens Clause.[37] Part of the law of armed conflict since its statement in the preamble to the Hague Convention (II) of 1899 concerning the laws and customs

33 Ibid.

34 SLA Marshall, *Men Against Fire: The Problem of Battle Command* (University of Oklahoma Press, 2000) 165.

35 Mark J Osiel, *Obeying Orders: Atrocity, Military Discipline and the Law of War* (Transaction Publishers, 2002) 98.

36 US War Department, *Instructions for the Government of Armies of the United States in the Field by Order of the Secretary of War*, General Orders No 100 (24 April 1863), as produced by Francis Lieber (D van Nostrand, 1863) 4 [4].

37 Daniel C Gilman, 'Francis Lieber' (1901) 7(10) *Yale Law Journal* 271, 274. F F de Martens acknowledged the influence of the Lieber forms.

of war on land,[38] the Martens Clause asks parties in conflict to respect 'the laws of humanity and the dictates of the public conscience'.[39]

The significance of the Martens Clause is in abstraction and universal principle. The Martens Clause is expressive and important because it is not specific. Laws and dictates of public conscience are not itemised. The Clause avoids the use of precise legal terms to evoke a common-sense appreciation of circumstantial reasonableness and moral obligation. Asking generals to act conscientiously, with a common sense mind for good in the circumstances, the Martens Clause illuminates the abyss between the duty of obedience to politics, and the onus to act rightly.

VII The Larger Duty to Act Rightly

In an address to the Massachusetts legislature in July 1951, General Douglas MacArthur gestured to the contesting obligations to act obediently and rightly when he said:

> I find in existence a new and heretofore unknown and dangerous concept that the members of the armed forces owe their primary allegiance and loyalty to those who temporarily exercise the authority of the executive branch of the Government, rather than to the country and the Constitution they are sworn to defend. No proposition could be more dangerous.[40]

Similarly, former Chief of the German General Staff, General Ludwig Beck, saw 'limits … to one's allegiance to the Supreme Commander where conscience, knowledge and responsibility forbade carrying out an order'.[41]

This idea defined proceedings at Nuremberg, where the United States chief prosecutor, Justice Jackson, saw 'the fundamental question of the trial was that of individual moral responsibility'.[42] Jackson dismissed the notion that only states could be held responsible before international law, stating that '[m]en who exercise great power cannot be allowed to shift their responsibility on to the fictional being, the State'.[43]

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38 *Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land,* opened for signature 29 July 1899, 187 CTS 429 (entered into force 4 September 1900) preamble.

39 Rupert Ticehurst, 'The Martens Clause and the Laws of Armed Conflict', International Committee of the Red Cross (Web Page) <https://www.icrc.org/en/doc/resources/documents/article/other/57jnhy.htm>

40 Douglas MacArthur, 'Address to the Massachusetts Legislature, July 25, 1951' in Edward T Imperato (ed), *General MacArthur Speeches and Reports 1908 – 1964* (Turner Publishing, 2000) 181.

41 William L Shirer, *The Rise and Fall of the Third Reich: A History of Nazi Germany* (Simon & Schuster, 2011) 368.

42 Ann Tusa and John Tusa, *The Nuremberg Trial* (Skyhorse Publishing, 2010) 155.

43 Ibid.

The United States prosecutor, Telford Taylor, was pithy: '[T]he man who commits crimes cannot plead as a defence that he committed them in uniform'.[44] A statement of similar effect was made by Starke J in the 1940 Australian High Court decision of *Shaw Savill & Albion Co Ltd v Commonwealth*,[45] where his Honour stated that 'a public officer cannot defend himself by alleging generally that he has acted from necessity in the public interest and for the defence of the realm, whether he has or has not the express or implied command of the Crown'.[46] Restating Taylor, generals are not a race apart, above and beyond the moral requirements that apply to others, and incapable of exercising moral judgement.[47] The philosopher A J Simmons sums up this point when he stated that we feel no sympathy for the Nazi generals since we see it is absurd to claim a legal duty to commit heinous crimes.[48]

VIII By and Large Generals Should Comply

On the account offered up by Joseph Raz,'[t]here is a sense in which if one accepts the legitimacy of an authority one is committed to following it blindly'.[49] Raz claims that 'the fact that an authority requires performance of an action is a reason for its performance'.[50] For Raz, the claims of legitimate authority pre-empt all other relevant reasons an agent might consider, when assessing what to do, even excluding and taking the place of some of them. So far as Raz might explain things, the general would be morally justified in following ministerial direction without question — and should follow direction without question — since, for the most part, practical benefits — perhaps in the form of safety, security, efficiency, or fairness — follows from obedience.[51] Raz offers an analogy:

> We all know the benefits from allowing traffic lights to regulate one's action rather than acting on one's own judgement. We tend to forget that a significant part of the benefit is that we give up attempting to form a judgement of our own. When I arrive at a red traffic light I stop without trying to calculate whether there

44 Ibid 436; Taylor (n 21) 249.

45 (1940) 66 CLR 344. On 3 September 1940, MV Coptic was steaming from Brisbane to Newcastle. The warship, HMAS Adelaide, was on the reciprocal course. There was a collision. Shaw, Savill & Albion sued the Commonwealth for damages. The Court found, though the warship was on operations in wartime, the officers were not relieved of the obligation to keep a proper lookout, or the obligation to abide by the conventions of navigation at sea.

46 Ibid 355, citing *Mackenzie-Kennedy v Air Council* (1927) 2 KB 517, 532 and *Raleigh v Goschen* [1898] 1 Ch 73, 77.

47 Taylor (n 21) 252–53; Tusa and Tusa (n 39) 438.

48 A John Simmons, *Moral Principles and Political Obligations* (Princeton University Press, 1979) 10.

49 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 2nd ed, 1979) 24.

50 Joseph Raz, *The Morality of Freedom* (Oxford University Press, 2009) 46.

51 Ibid 53.

> is, in the circumstances, any reason to stop … [T]he question does not arise since the answer (there is no reason) is plain.[52]

Traffic laws, like other laws ordering the routines of daily life, function because people comply without question. There is no call for people to discover a reason to stop when they come upon a red light. People know, in advance of meeting red lights, the advantage obtained from unhesitating compliance with the law. So far as it goes, the traffic lights analogy illuminates conventional opinion. But the analogy goes no further.

By and large, generals should comply with politics. But not automatically, not blindly in the way Raz would have generals behave, since automatic conformability entails significant peril. As Stanley Milgram explains,

> [i]t has been reliably established that from 1933 to 1945 millions of innocent people were systematically slaughtered on command. Gas chambers were built, death camps were guarded, daily quotas of corpses were produced with the same efficiency as the manufacture of appliances. These inhumane policies may have originated in the mind of a single person, but they could only have been carried out on a massive scale if a very large number of people obeyed orders.[53]

IX Law should make space for conscience

Milgram does not make particular mention of generals. He should have, and he should have considered their circumstances. Thomas Scanlon explains that

> [t]he blameworthiness of an action depends, in ways that wrongness generally does not, on the reasons for which a person acted and the conditions under which he or she did so. So it can be appropriate to say things such as, 'Yes, what she did was certainly wrong, but you shouldn't blame her. She was acting under great stress'.[54]

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52 Raz (n 50) 25.

53 Stanley Milgram, *Obedience to Authority* (HarperPerennial, 2009) 1: Milgram explains the failure or inability of most people to resist unjust, unreasonable or irrational authority, and to follow their conscience. See also Philip Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil* (Random House, 2007). The predilection to obey authority, which Milgram revealed and explained, was illuminated powerfully by Zimbardo. In the influential 1971 Stanford Prison Experiment, Zimbardo revealed the power of situations, explaining how organisational systems can overcome autonomous individual choice. Zimbardo demonstrates how the military culture amplifies human susceptibility toward obedience. Whilst the Zimbardo and Milgram experiments were ethically flawed, the results remain compelling: see, eg, Timothy Recuber 'From obedience to contagion: Discourses of power in Milgram, Zimbardo, and the Facebook experiment' (2015) 12(1) *Research Ethics* 44.

54 Thomas M Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Harvard University Press, 2008) 124–5.

The intentions of people and the influence of background conditions, such as laws and conventions arising from the laws, can be relevant to blame even when they are not relevant to the rightness or wrongness of what the person did. Scanlon appreciates the generative influence of laws and conventions that obtain. He appreciates that individual wrongs can have their foundation in larger, shaping social contexts, and he motions to the claim of this article: laws, which make it difficult for generals to act upon the calls of conscience, should be reformed.

War is more than a purely legal or an entirely political enterprise. War is defined most richly by moral ideas. In Western culture, our understanding of war is obtained from a culturally ingrained, 'consensually shaped' moral tradition.[55] The moral character of war entails that generals bear larger duties than that of wholesale obedience to the executive. The law should make allowance for these obligations.

X Reform

Generals bear a duty to obey laws, which protect important moral values and make our lives possible. Yet, generals also have a duty to refuse when a direction is unconscionable. The philosopher Massimo Renzo offers the example of the nurse and the doctor. Doctors place nurses under a limited duty to follow direction. The doctor cannot get the nurse to do *anything*, as some things fall outside the doctor's authority. For example, doctors cannot ask nurses to sing. Equally, if the doctor asks the nurse to do something that is medically inattentive or unconscionable, the nurse bears an obligation to refuse so as to safeguard the interests of the patient.[56]

This article recognises the overarching nature of moral obligation, and asks for a decrement of the law's hard-line. The reform sought is amendment that offers space in law for human virtue.

Arguing for human virtue and individual judgement, this article is against Raz, who claims '[t]here is no point in having authorities unless their determinations are binding even if mistaken … The whole point and purpose of authorities … is to pre-empt individual judgement on the merits of a case'.[57] On the account of this article, laws are miscast when they are shaped in Hobbesian proportions, and presumed 'just' no matter how iniquitous.[58] Reform needs to redress the misconstruction of law as a determining reason and over-riding justification for action.

Recognising what Lon Fuller called 'a morality external to law, which makes law possible',[59] this article contests the claim that legal authority might be followed

55 James T Johnson, *Can Modern War be Just* (Yale University Press, 1984) 1–3.

56 Renzo (n 5) 9–10.

57 Raz (n 50) 47–8.

58 Thomas Hobbes, *Leviathan,* ed CB Macpherson (Penguin Books, 1985) 232.

59 Lon Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71(4) *Harvard Law Review* 630, 645.

without question. Raz is right: 'if every time a directive is mistaken … it were open to challenge as mistaken, the advantage gained by accepting the authority as a more reliable and successful guide … would disappear'.[60] But, says Renzo, 'accepting this claim does not commit us to the conclusion that we should never challenge the authority when its directives are mistaken',[61] or refuse the authority when directives are unconscionable.

The special value of generals lies in their moral agency and deliberative independence, in conscience, knowledge and responsibility. This special value ought to be admitted and confirmed in law. This asking is not unusual. For example, the *Law Officer's Act 1964* (Cth) s 12(b) operates to guarantee the autonomous agency of the Solicitor General.

Like generals who serve as Chief of the Defence Force, the Solicitor General is 'positioned at the intersection of law, politics and the public interest' and is *central* to the regulation of public power.[62] Like generals, who bear the burden of political coercion, the Solicitor General faces pressure to meet political objectives, which may compromise the public interest or integrity of the law. For example, government lawyers in the United States seemed to face political pressure in the notorious matter of the 2002 'torture memos'.[63] And, in the United Kingdom, the Foreign Secretary would seem to have exerted pressure on the Attorney General to declare the Iraq War a 'legal' war.[64]

In Australia, the Solicitor General is insulated from the improper exercise of executive power by a statutory appointment, which places the officeholder outside politics and beyond pressures arising from appointment to the salaried civil service.[65]

This is significant in promoting ideas of independence and impartiality. The Solicitor General is offered the type of appointment that enables objectivity and disinterest, since independent thinking and conscientious decision-making are recognised as crucial features of the office. In this way, the office of the Solicitor General provides a general example for reform of the *Defence Act 1903* (Cth).

To be clear, the *Law Officer's Act 1964* (Cth) does not offer the right answer. The Act creates for the Solicitor General a form of statutory independence which might not reasonably be applied to the Chief of the Defence Force. But the Act puts moral agency and public responsibility on centre stage.

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60 Raz (n 50) 61 cited by Renzo (n 5) 14.

61 Renzo (n 5) 14.

62 Gabrielle Appleby, *The Role of the Solicitor General: Negotiating Law, Politics and Public Interest* (Hart Publishing, 2016) 7, 18, 107, 151.

63 Eg Jeffrey Rosen, 'The Struggle Over the Torture Memos' *New York Times* (New York, 15 August 2004).

64 Appleby (n 62) 42–3.

65 Ibid 90, 254.

If reform does not lie in statutory independence, the solution may lie in legal drafting, to recognise generals as decision-makers who bear a responsibility to decide conscientiously with reference to the Martens Clause. Such a solution would be informed by the standard Mason J applied in *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth*.[66] In this case, Mason J said that

> [t]he Regulations vest … discretion in the Secretary of the Department [the decision-maker]; they therefore contemplate a decision by him. If in truth he is bound as a matter of law to accept a direction from his Minister it cannot be said that the decision is his decision; it then becomes the decision of the Minister.[67]

His Honour acknowledged that, having regard to government policy, the Secretary must nevertheless

> decid[e] for himself whether the existence of the policy is decisive of the application. Whether it is so decisive will depend upon the nature and terms of the policy and the circumstances of the particular case. But I cannot think that this means that the Secretary is entitled to abdicate his responsibility for making a decision by merely acting on a direction given to him by the Minister.[68]

But independently conscientious choice does not mean decision-makers are absolutely sovereign. Asking for discretionary moral space in law is not asking for freewheeling decision-making powers. In *Minister for Immigration and Citizenship v Li,*[69] French CJ found proper, independent decisions to be

> exercised according to the rules of reason and justice, not according to private opinion; according to law, and not humour, and within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself.[70]

French CJ found that 'reasonable minds may reach different conclusions about the correct or preferable decision',[71] but reasonableness 'cannot be construed as … arbitrary or capricious or to abandon common sense'.[72] Reasonableness 'reflects a limitation imputed to the legislature on the basis of which courts can say that Parliament never intended to authorise that kind of decision'.[73] Similarly, Hayne,

66 (1977) 139 CLR 54.

67 Ibid 83 (Mason J).

68 Ibid.

69 (2013) 249 CLR 332.

70 Ibid 189 (Kitto J).

71 Ibid 350–1 (French CJ).

72 Ibid.

73 Ibid 350 (French CJ).

Kiefel and Bell JJ found that an unreasonable exercise of a discretion would be 'arbitrary, vague and fanciful', and lacking of an evident intelligible justification.[74]

These ideas hint to the way law might offer generals discretionary space for responsible, independent decision-making, thus reforming relations between the general and the executive. The asking is not for freedom from legal control. As Dixon J said in *Shrimpton v Commonwealth*,[75]

> [c]omplete freedom from legal control is a quality which cannot … be given under our Constitution to a discretion [since such a discretion would be] capable of being exercised for purposes, or given an operation, which would or might go outside the power from which the law or regulation conferring the discretion derives its force.[76]

The asking is for discretionary space in the law, so as generals might act with reasonable independence, conscientiously, and with a mind to principles which find the best expression in the Martens Clause.

This asking gives rise to concern that the military instrument will come to be ill-disciplined and reluctant. Such a concern is ill-founded. Asking for discretionary space is not asking to compromise ideas of military discipline, which are foundational to national security.

XI Nothing Must Compromise National Security

Nothing must prejudice national security. For this reason, military discipline must not be compromised, since an ill-disciplined military would be powerless to safeguard the state.

Military discipline finds clear expression in the machine coordination of soldiers on parade, and in the skilled effecting of immediate-action drills. An immediate action drill is a procedure such as soldiers undertake when a weapon stops firing. For example, when the FN L1A1 self-loading rifle stops, the immediate action drill goes something like: pull back the cocking handle; lock the cocking handle; look in (confirm the magazine is empty); remove the magazine; attach a new magazine; release the cocking handle; regain a sight picture; and resume firing. Typically, this drill would be abbreviated to a rote slogan like 'cock, lock, look, load, aim, fire.'

Since a foul-up can have dire consequences, drills like this must be well learned. But the importance of systematic drills can be over-inflated and when this happens other, more important ideas, come to be overlooked.

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74 Ibid 363, 367 (Hayne, Kiefel and Bell JJ).

75 (1945) 69 CLR 613

76 Ibid 629–30 (Dixon J).

XII Overstated and Futile

In his book, *On the Psychology of Military Incompetence*, Norman Dixon speaks about the unconstructive exaggeration of military drill and inessential compliance. Dixon says

> the case against [military drill] is strong. It is time wasting, excruciatingly boring for those with more than the most mediocre intellect, and a poor substitute for thought. Since it aims to govern behaviour by a set of rules and defines a rigid programme for different occasions, it cannot meet the unanticipated event. This may have fatal consequences, such as the possibility of admirals standing stiffly to attention, hands at the salute, while their battleships sink slowly under them.[77]

Dixon's point is that the fixation with routine and the fetish for orders and obedience that goes with it soaks the fabric of the military institution to usurp time and energy, which might be devoted to more constructive endeavours. For example, the Brigade of Guards persisted with inefficient battlefield routines, *because* these practices accorded with ceremonial drills.[78] The Royal Navy was equally obtuse. Remembering that one of the chief purposes of a navy is to sink the adversary's ships, and that this is very often achieved by gunfire:

> It might be supposed that much time would have been spent on practising gunnery. But in the [Royal] Navy in the years before the First World War, ship commanders were actively discouraged from gunnery practice because the smoke might mark the paintwork and soil the gleaming decks.[79]

In a nutshell: drill, good order, and categorical wait-for-orders obedience have a place. But properly effective militaries work against machine automatism. This claim — rejected routinely by diehard conservatives — is not new. For example, the 1902 British Army doctrine, *Combined Training*, emphasised the need for tactical flexibility, noting that

> [s]uccess in war cannot be expected unless all ranks have been trained in peace to use their wits. Generals and commanding officers are, therefore, not only to encourage their subordinates in doing so by affording them constant opportunities of acting on their own responsibility but, they will also check all practices which interfere with the free exercise of their judgement, and will break down by every means in their power, the paralysing habit of an unreasoning and mechanical adherence to the letter of orders and routine, when acting under service conditions.[80]

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77 Norman Dixon, *On the Psychology of Military Incompetence* (Pimlico, 1994) 178.

78 Ibid 179.

79 Ibid.

80 Spencer Jones, *From Boer War to World War: Tactical Reform of the British Army, 1902-1914* (University of Oklahoma Press, 2013) 44.

The need for soldiers to decide for themselves is most powerfully expressed in the German *Auftragstaktik*.[81]

XIII Soldiers Must Decide

Perceived and realised in the Napoleonic Wars, the *Auftragstaktik* has its most fabled provenance in the German Armies of the First and Second Wars.[82] Deeply thought through, the doctrine finds forceful and famous expression in the 1933 *Truppenfuhrung* — the German Army manual for troop command. The *Truppenfuhrung* underlines the value of individual soldiers amidst the confusion of conflict, arguing 'the emptiness of the battlefield … requires soldiers who can think and act independently, who can make calculated decisions and daring use of every situation'.[83] Written largely by Generals Beck, von Fritsch and von Stülpnagel, the *Truppenfuhrung* recalls von Seeckt.[84] It argues that 'the principal thing now is to increase the responsibilities of the individual man, particularly his independence of action, and thereby to increase the efficiency of the entire army'.[85]

The sense of independent tactical nous resonant throughout the *Truppenfuhrung* summons up General Charles Krulak, Commandant of the United States Marine Corps, who coined the phrase 'the Strategic Corporal' to conjure the actuality of military service.[86]

Krulak understood that efficient soldiers must think, improvise, and make calculated decisions. Soldiers must decide what the circumstances demand. And soldiers must decide right from wrong — if this were not the case, why would so many of the world's militaries invest in military ethics education? Generals must be expected — and allowed — to think for themselves, and to refuse.

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81 A military command method which prioritises the outcome of a mission over its means. See, eg, Chuck Oliviero, 'Auftragstaktik and Disorder in Battle: Learning to "see the Battlefield" Differently' (2001) 4(2) *Army Doctrine and Training Bulletin* 57.

82 Jim Storr, 'A Command Philosophy for the Information Age: The Continuing Relevance of Mission Command' (2003) 3(3) *Defence Studies* 119, 121–2.

83 *Truppenfuhrung* [Military Manual] (Germany) 1933, Part 1 [tr Bruce Condell and David Zabecki]; Bruce Condell and David Zabecki, *On the German Art of War: Truppenfuhrung — The German Army Manual for Unit Command in World War II* (Stackpole Books, 2011) 18.

84 Generals Beck, von Fritsch and von Stulpnagel were three Nazi officers who opposed Hitler: Ibid.

85 Ibid 4.

86 Charles C Krulak, 'The Strategic Corporal: Leadership in the Three Block War' (1999) 83(1) *The Marine Corps Gazette* 21.

XIV The Obligation to Refuse

More harm is likely to ensue when generals are — or feel they are — coerced by the law. Aggressive war was waged, gas chambers were built, death camps were guarded, and daily murder was possible on a massive scale only because people obeyed orders.[87]

The general operates in the sort of environment where reflexive obedience is not valuable; an environment where argument and questioning are practical, possible, and constructive. The general is not a 'combatant' who must do as ordinary soldiers do. The general must resist injustice and political folly. If the word 'must', needs justification, then the First World War offers up the paradigm case.

There is no case in history where forcing a general made a state more secure. Such cases would be notorious. But there are no such actual cases, and neither are there fictive accounts that demonstrate how a general, by refusing unconscionable executive direction, might imperil the nation. The reform proposed in this article would offer generals a choice. The proposal does not jeopardise the state, and neither does the proposal promise the riddance of evil doings. Bad things will happen. But bad things will not happen *because* generals find the right in law to refuse unconscionable executive direction.

XV Should Law Offer a Choice?

For the realist, there is no reason for law to offer generals a choice. So long as the nation is secure, the realist is unconcerned that generals pay a disproportionate price. Unprepared, in a phrase from Williams, to pick up the world's 'moral luggage',[88] the realist is hostage to utilitarian notions of public advantage and blind to the liberal idea that rights might be circumscribed, only when their exercise is incompatible with justice.[89]

For the realist it would be irrational squeamishness to let moral concern get in the way of functional value. The trivialising implication of queasiness is dismaying. The implication is that moral preferences frustrate real-world considerations. But we cannot, says Williams, regard our moral feelings as merely elements of the utilitarian calculus. Williams says that

> [b]ecause our moral relation to the world is partly given by such feelings, and by a sense of what we can or cannot 'live with,' to come to regard those feelings from a purely utilitarian point of view, that is to say, as happening outside one's moral self, is to lose a sense of one's moral identity; to lose, in the most literal

87 Milgram (n 53).

88 Bernard Williams, 'A Critique of Utilitarianism' in JCC Smart and Bernard Williams (eds), *Utilitarianism: For and Against* (Cambridge University Press, 2008) 136, 137.

89 John Rawls, 'Justice as Fairness' (1958) 67(2) *The Philosophical Review* 164, 167.

> way, one's integrity. At this point utilitarianism alienates one from one's moral feelings. [90]

We think intuitively along realist, utilitarian lines, and for the most part it would be undesirable to think any other way.[91] But intuitive rules of thumb offer a poor justification for laws that are unresponsive to the imperatives of individual conscience.

XVI The Liberalism of Fear

The realist accounts imperfectly for intrinsic value: the worth of everything is instrumental. The value of action is in outcomes. The realist finds it implausible that a general might find some actions so morally repellent, despite favourable consequences, that they should not be done — or even contemplated. In her essay, *The Liberalism of Fear*, Judith Shklar asks us to be disquieted.

Shklar recognises that an undiscriminating focus on utilitarian outcomes opens the door to the misuse of executive power.[92] Shklar accepts the state's power must be used to uphold law and good order. But if there are no constraints, the solution becomes the problem. As Williams says, the problem of good order requires a solution *all the time*. It is not a matter of arriving at a solution to the problem of good order in the state of nature and then going on to the rest of the agenda. The problem of good order requires constant attention, and solving it constantly is elemental to liberalism.[93]

On Shklar's account, liberalism is jeopardised by 'a *summum malum,* which all of us know and would avoid if only we could. That evil is cruelty and the fear it inspires'.[94] Liberalism, says Shklar, will fail unless the political order acts deliberately to prevent 'cruelty', by which she means the abuse of public power. Deliberate, and inflicted upon the weak by the strong in order to achieve some end,[95] 'cruelty is an absolute evil'.[96] It is not occasional. Rather, cruelty obtains from coercive means built into the bureaucratic systems of government.[97] Observing the history of the world since 1914, Williams follows Shklar to say the following:

> In Europe and North America, torture had gradually been eliminated from the practices of government, and there was hope that it might eventually disappear

90 Williams (n 83) 103–4.

91 Hare (n 6) 97–8.

92 Judith Shklar, 'The Liberalism of Fear' in Nancy Rosenblum (ed) *Liberalism and the Moral Life* (Harvard University Press, 1989) 21, 29.

93 Bernard Williams, 'Realism and Moralism in Political Theory' in Geoffrey Hawthorn (ed) *In the Beginning was the Deed* (Princeton University Press, 2005) 1, 3.

94 Shklar (n 92).

95 Ibid.

96 Ibid 23.

97 Ibid 29.

> everywhere. With the intelligence and loyalty requirements of the national warfare that states quickly developed at the outbreak of hostilities, torture returned and has flourished on a colossal scale ever since. We say 'never again,' but somewhere someone is being tortured right now, and acute fear has again become a common form of social control.[98]

The point is, utilitarian presumptions of *raison d'état* are cited artfully to justify anything. Shklar says that

> [g]iven the inevitability of the inequality of military, police and persuasive power which is called government, there is evidently always much to be afraid of. And one may, thus, be less inclined to celebrate the blessings of liberty than to consider the dangers of tyranny and war that threaten it. For … liberalism the basic units of political life are not discursive and reflecting persons, nor friends and enemies, nor patriotic soldier-citizens, nor energetic litigants, but the weak and the powerful. And the freedom it wishes to secure is freedom from the abuse of power and intimidation of the defenceless that this difference invites.[99]

This is not to ignore the categorical practical importance of security and political good order, which depend upon reasonable force. Law, social stability, civil cooperation, and the like depend upon the coercion and constraint of individuals. But the state ought not be ignorant of, or disinterested in, human rights and dignities. We do not need to specify what we mean, Williams says:

> We have a good idea of what human rights are. The most important problem is not that of identifying them but that of getting them enforced. The denial of human rights means the maintenance of power by torture and execution; surveillance of the population; political censorship; the denial of religious expression; and other such things. For the most gross of such violations, at least, it is obvious what is involved.[100]

The short of it is, governments must operate to safeguard the state, and they must use legal powers to do this. But governments will use coercive power unduly, in trivial or in momentous ways, unless they are prevented.[101] A liberal order will establish legislative protections for rights. A liberal state that fails to restrict public cruelty and safeguard elemental rights, fails a basic criterion of legitimacy.[102]

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98 Bernard Williams, 'The Liberalism of Fear' in Geoffrey Hawthorn (ed) *In the Beginning was the Deed* (Princeton University Press, 2005) 52, 55.

99 Shklar (n 92) 27.

100 Bernard Williams, 'Human Rights and Relativism' in Geoffrey Hawthorn (ed) *In the Beginning was the Deed* (Princeton University Press, 2005) 62, 62.

101 Shklar (n 92) 27–8.

102 Williams 'Realism and Moralism in Political Theory' (n 93) 4, 7, 10.

XVII Conclusion

'Now and around here', says Williams, legitimate politics 'permit only a liberal solution: other forms of answer are unacceptable. In part, this is for the Enlightenment reason that other supposed legitimations are now seen to be false and in particular ideological'.[103] This is not to say that we regard non-liberal states as illegitimate. But an illiberal state would be illegitimate *for us*.[104]

The point is: we must take liberalism seriously.

Liberalism will fail, if we merely look on devising theories to fit the real-world; for example, offering up slogans and catchwords about security and military efficiency to justify the coercion of generals.

This is not to say that practice should not inform ideas. But things must make sense beyond the level of custom, or circumstantial convenience. Things must make sense in theory *and* in practice. The strict coercion of the generals makes little sense, either at the level of practice, or in theory.

There will be moments when generals *must* comply with ministerial direction. Hard-edged political realities will oblige and constrain individual choice. But the occasional real-life moment does not justify legislation's emphatic and utter proscription of conscience. General George Marshall captured this implication. Serving as the United States Secretary of State in 1948, Marshall observed that

> [g]overnments, which systematically disregarded the rights of their own people, were not likely to respect the rights of other nations and other people and were likely to seek their objectives by coercion and force in the international field.[105]

Marshall gestures to an essential liberal broadmindedness. He speaks for freedom of thought, expression and conscience, and he calls attention to the state's almost unlimited capacity for violence. For Marshall, political rationalisations offer insufficient reason for war. He would agree — law should allow generals discretionary space, so they might resist political foolhardiness.

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103 Ibid 8.

104 Ibid 15–16.

105 UN GAOR, 3rd sess, 139th plen mtg, UN Doc A/PV.139 (23 September 1948) [36]–[37].