Standards of Engagement: Rethinking Rules of Engagement to More Effectively Fight Counterinsurgency Campaigns

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* Georgetown University Law Center, J.D. 2013; Georgetown University, B.S.F.S. 2005. © 2013, Aaron Pennekamp. My thanks to the current and former editors of The Georgetown Law Journal, especially Lala Qadir, Matthew Murrell, Matthew Levy, and Lauren Irwin—a more professional and dedicated team would be difficult to find. Thanks, also, to Lisa Lowry, my friends, and my family, who read this Note more often than they might have liked, but who always found ways to make it better. Finally, special thanks to the soldiers of 1st Platoon, Bravo Company, 1/116th Infantry Brigade Combat Team, who carried me there and back again.
INTRODUCTION

Perhaps a hypothetical is a good place to start. It is 2010, and your country has been at war in Iraq for seven years, the fighting transitioning from traditional maneuver warfare, involving tanks, artillery, and air strikes, to full-fledged counterinsurgency (COIN), with a new emphasis on dismounted patrolling and community-building projects. Imagine you are an eighteen-year-old private first class in that war, serving your first deployment to a combat zone. You have been assigned as a gunner on a gun truck with a convoy security platoon, and your job is to stand up in a turret at the top of your gun truck behind a heavy machine gun, watching for threats as a convoy of oil tankers and supply trucks moves down Route Tampa, the main north–south highway that cuts through Iraq. The latest intelligence reports suggest that the local insurgents along this particular stretch of Tampa might be building up to an attack, and—before this evening’s mission started—your platoon leader gave you and your fellow gunners a “be on the lookout” alert for a blue sedan with tinted windows. Now, in addition to traditional improvised explosive devices (IEDs), sporadic small-arms fire from insurgents along the road, and notoriously unpredictable Iraqi traffic patterns, you are worried about vehicle-borne IEDs (VBIEDs, pronounced “veebids”) that pack a powerful punch.

Your platoon leader also briefed you for the hundredth time on the brigade’s rules of engagement (ROE) and escalation of force (EOF) procedures. “You are authorized to use force in self-defense,” your platoon leader told you, “[and] [y]ou may engage individuals based on their conduct, if they are committing hostile acts [or] demonstrating hostile intent.”1 These general instructions regarding “self-defense,” “hostile acts,” and “hostile intent” seem reasonable enough, but your platoon leader further complicated matters, explaining that you should try to use EOF “[i]f time and circumstances permit,”2 which means that sometimes you should not directly engage a perceived threat but should first use a spotlight to warn off the threat when the threat is 300 meters away, then use flares when the threat is 200 meters away, then use warning shots when the threat is 100 meters away, and, if the threat continues to close on

2. Id.
your position, then and only then should you fire rounds directly at the threat. It is a lot to think about when you have been on the road for hours on end, traffic is constantly moving past the convoy on your left and right, and it is almost impossible to tell which civilian vehicles on the road are threats or potential threats.

While thinking about these problems and listening to the usual late-night radio chatter, you see headlights in the distance quickly approaching the rear of your convoy. The vehicle is coming on fast, swerving in and out of the long line of civilian vehicles that have stacked up behind your slow-moving convoy. The vehicle is getting closer, so you flip the switch on your turret’s spotlight and shine it in the vehicle’s direction, revealing that the vehicle is, indeed, blue and the windows might be tinted. The sedan comes closer, but nothing about this is incredibly unusual. Sometimes civilians are in a hurry, and it will take more than spotlights to scare them off, so you pull out a pen flare and shoot the flare into the sky, its red flame trailing off into the desert not far from the sedan, now little more than 100 meters away and still closing in. A decision has to be made. There is no time to get permission to shoot. The sedan is 100 meters away, and a VBIED can carry enough explosives to do damage even at that distance. Should I shoot?, you think. You are eighteen years old, and you are about to make a life-or-death decision. You believe you have followed the “rules” and the step-by-step threat assessment procedures from the ROE/EOF briefing, but you are still not entirely sure what the “right” decision might be. But a decision must be made. What do I do?

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Scenarios like this are not unusual in Iraq and Afghanistan, a reality that cuts to the heart of the ROE problem inherent in modern COIN campaigns. To win in COIN, leaders must adopt a new strategy that emphasizes community development, political progress, and popular support as much as finding, capturing, or killing enemy fighters. After long years of fighting, one hard-learned lesson is that this new kind of warfare demands new policies regarding how, when, and where soldiers should make the decision to use force. ROE policies have certainly changed over the years, becoming more restrictive as combat

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3. This is just one possible example of an EOF policy, but it is substantially—though not exactly—based on the EOF policy used by the 1/116th Infantry Brigade Combat Team during its 2010 deployment to Iraq in support of Operation Iraqi Freedom.

4. The hypothetical used in this introduction was drawn largely from the author’s personal experience as an infantry rifle platoon leader in Tallil, Baghdad, and Balad, Iraq from March to August 2010. The author’s platoon provided security for coalition logistics convoys, a mission that took his soldiers outside the wire on more than fifty combat patrols, many of which involved small-arms fire, IED incidents, and other insurgent attacks. See also Major Kris A. Kough & Captain Curtis A. Goller III, Share the Road: Convoy Escort, ARMY SUSTAINMENT, May–June 2010, available at http://www.army.mil/alog/issues/May-June10/share_road.html (discussing the challenges inherent to a “share the road” policy in Iraq, whereby coalition convoy escort teams must allow “civilian vehicles [to] travel with convoys and . . . [consider those vehicles] friendly until determined otherwise,” representing “a total shift in thinking on the part of coalition forces”).
leaders realize that the decision to use force—even against legitimate threats—
can do more harm than good. To better arm the boots-on-ground combat soldier
engaged in COIN operations, leaders at every step in the chain of command
must reframe their ROE policies to, first, acknowledge the need for nuanced,
flexible rules in the complex COIN environment and, second, formally acknowledg-
edge the definite preference of COIN leaders against the use of force in COIN
campaigns.

This Note proposes such a reframing, arguing that the United States military
should adopt a “standards of engagement” regime, whereby soldiers’ use-of-
force actions are governed by general, outcome-based “standards,” not specific,
prescriptive “rules.” This Note then recommends augmenting these standards of
engagement with “codes of practice,” or nonmandatory, general guidelines
designed to gently nudge the soldier’s decision-making process, constantly
reminding the soldier of the relevant “counterinsurgency paradoxes” that have
already been disseminated in the COIN doctrine adopted by the United States
Army and Marine Corps.

Explaining the rationale behind these intertwined recommendations is the
purpose of this Note. To lay the groundwork for the discussion of the typical
problems and possible solutions for modern ROE, Part I of this Note will briefly
describe what COIN is and how it differs from conventional operations. The
focus of this Part’s analysis will be on differences that significantly affect how
leaders should think about their ROE policies. Part II of this Note will take the
discussion a step further, explaining what ROE are, how they are typically
developed, and problems that commonly plague the ROE policies used in COIN
campaigns. Finally, Part III of this Note will use these COIN lessons and ROE
problems to develop recommendations for the improvement of future COIN
ROE policies, suggesting two practical ROE modifications that promise to
influence the use-of-force decision-making process for both the strategic leader
and the individual soldier enmeshed in an often ugly, always dangerous COIN
fight.

I. COUNTERINSURGENCY: AN INTRODUCTION

Counterinsurgency is a different kind of warfare. This is an obvious—yet
important—starting point for any serious discussion of ROE in Iraq, Afghan-
istan, and elsewhere. It is important because “[c]ounterinsurgency is the warfare
of the age,”5 and although COIN is certainly nothing new,6 it has become
increasingly prominent in the twenty-first century, as the United States is openly

5. Ganesh Sitaraman, Counterinsurgency, the War on Terror, and the Laws of War, 95 Va. L. Rev. 1745, 1746 (2009).
counterinsurgencies from the last hundred years in Vietnam, China, and elsewhere). “[A]n insurgency is
a protracted struggle conducted methodically, step by step, in order to attain specific intermediate ob-
jectives leading finally to the overthrow of the existing order (China, 1927–49; Greece, 1945–50;
Indochina, 1945–54; Malaya, 1948–60; Algeria, 1954–62).” Id.
engaged in long-term COIN campaigns in both Iraq and Afghanistan. It is obvious, because any viewer of the nightly news will notice that the images of war in Iraq and Afghanistan that make the editor’s cut are not the images one would expect to find in a documentary about World War I or World War II. Viewers are as likely to see footage of construction crews and medical clinics as they are to see graphic pictures of guns firing, bombs exploding, and wounded soldiers being evacuated. But what is it, specifically, that makes COIN different, and what can those differences tell us about the ROE soldiers ought to follow when fighting COIN campaigns?

Answering this first question—what makes COIN different from conventional warfare—is the object of Part I of this Note. A thorough treatment of COIN is outside this Note’s scope and has already been done with great skill and insight elsewhere,\(^7\) so this Note will focus on three major differences in COIN, namely: (A) the nature of the enemy; (B) the counterinsurgent’s population-centric approach to victory; and (C) the increased importance of small-unit leadership and individual decision making on the COIN battlefield.

\section{A. THE ENEMY INSURGENT}

Perhaps the most significant differences between COIN warfare and conventional warfare are the nature of the enemy and how the enemy insurgent fights. According to United States military doctrine, an insurgency is “an organized movement aimed at the overthrow of a constituted government through the use of subversion and armed conflict.”\(^8\) COIN is therefore the “military, paramilitary, political, economic, psychological, and civic actions taken by a government to defeat insurgency.”\(^9\) This back-and-forth between insurgent and counterinsurgent seems straightforward, but two complicating factors are: (1) that although enemy insurgent goals (the overthrowing of a constituted government) might be easy to identify, the exact identification of insurgents—as opposed to innocent civilians—is a notoriously difficult task; and (2) that insurgents typically use asymmetric warfare tactics that can be difficult for conventional military forces to counter.

\subsection{1. Enemy Insurgents Are Difficult to Identify}

Although there is no doctrinal reason why this must be the case,\(^10\) insurgents tend to “not look like the soldiers and warriors of the past. They are not amassed... on the battlefield; they may not even be affiliated with a state.”\(^11\)

\begin{thebibliography}{9}
\bibitem{7} See, e.g., \textsc{Galula}, \textit{supra} note 6; \textsc{Headquarters: Dep’t of the Army, Counterinsurgency, Field Manual} 3-24 (2006) [hereinafter FM 3-24].
\bibitem{8} FM 3-24, \textit{supra} note 7, at 1-1.
\bibitem{9} \textit{Id}.
\bibitem{10} Id.
\bibitem{11} History is full of examples of insurgencies and counterinsurgencies; sometimes these take the form of the “weak” insurgent against the “strong” counterinsurgent, but this need not always be the case. \textit{See} FM 3-24, \textit{supra} note 7, at 1-2.
\bibitem{12} \textit{Sitaraman, supra} note 5, at 1746.
\end{thebibliography}
This reality stands in stark contrast to the idea of modern, conventional war, perhaps best exemplified by conflicts like World War I and II, where the fighting forces wore uniforms with insignia designating them as “enemy combatants” under the laws of war and making them legitimate targets for violent force.\(^\text{12}\) This kind of conflict, characterized by highly organized armies fighting it out on large-scale battlefields, forms the basis of most law-of-war and ROE doctrine.

However, as the United States military has learned all too well in both Iraq and Afghanistan, insurgents are much more difficult to identify than conventional military forces, which makes the application of traditional law-of-war and ROE theories to the Iraq and Afghanistan COIN campaigns significantly more challenging. As has been noted elsewhere, “[i]nsurgents in Iraq practice guerrilla warfare,”\(^\text{13}\) which, among other things, means that insurgents tend to hide among the civilian populace and avoid wearing uniforms or revealing their weapons.\(^\text{14}\) These tactics are deliberate attempts to make it difficult for United States military forces to accurately distinguish the insurgent from the innocent civilian, meaning traditional law of war and ROE concepts built on the conventional warfare model are virtually impossible to consistently apply on the COIN battlefields of Iraq and Afghanistan. The best example of how COIN changes the usual law-of-war and ROE calculus involves what some commentators call “a ‘cardinal principle’ of humanitarian law”: the principle of distinction.\(^\text{15}\)

“[T]he principle of distinction holds that armies must distinguish between combatants and civilians, military objects and civilian objects, and must not attack civilians and civilian objects.”\(^\text{16}\) As described above, following this

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12. See David Kennedy, Of War and Law 11–12 (2006) (“It is not new to observe that at the same time, the nature of warfare has itself changed. The Second World War—a ‘total’ war, in which the great powers mobilized vast armies and applied the full industrial and economic resources of their nation to the defeat and occupation of enemy states—is no longer the prototype…. Our wars are now rarely fought between roughly equivalent nations or coalitions of great industrial powers. They occur more often at the peripheries of the world system, among foes with wildly different institutional, economic, and military capacities…. It is ever less clear where the war begins and ends—or which activities are combat, which ‘peacebuilding.’ In combat, enemies are dispersed and decisive engagement is rare. Battle seems at once intensely local and global in new ways, as informal networks of fellow travelers exploit the financial and communications infrastructures of the global economy to bring force to bear here and there…. Taken as a whole, the political, cultural, and diplomatic components of warfare, both globally and within the sphere of battle, have become more salient.”).


14. See id.

15. See Sitaraman, supra note 5, at 1781 (quoting Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8)).

16. Id. at 1780; see also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 48, June 8, 1977, 1125 U.N.T.S. 3 (“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”). While the United States has signed, but never ratified, this particular protocol, the principle of distinction still serves as a guiding principle for United States ROE policies. See, e.g., MNC-I ROE Card, supra note 1 (“Only Attack Legitimate Military Targets.
bedrock principle of the laws of war becomes extremely difficult in COIN, where insurgents might be indistinguishable from the surrounding civilian populace.

2. Insurgents Use Difficult-to-Counter Tactics

Not only are insurgents more difficult to spot than conventional enemy forces, but their preferred tactics on the battlefield also tend to be different—and more difficult to counter. Rather than engage United States military forces in pitched battles, insurgents in Iraq and Afghanistan leverage their difficult-to-identify characteristics to launch surprise attacks against United States military personnel. Insurgents will plant roadside IEDs, conduct hit-and-run-style small-arms-fire attacks, and then “melt into the populace.” According to one insurgent, United States military forces are “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 have been highly effective against United States and coalition forces and have caused the majority of United States casualties in Iraq and Afghanistan.

The initial response of United States military personnel to such tactics—especially in Iraq—was to double down on the United States military’s conventional weaponry advantage to defeat the insurgents’ tactics with overwhelming force. A perfect example comes from the December 2004 strategy of then-Major General Ray Odierno, who commanded an Army division in Baghdad. Odierno ordered his troops to respond to insurgent attacks with “mass arrests of hundreds of civilians when pursuing a few insurgents . . . . He eventually gave the order to his troops to ‘increase lethality’ in their operations.” This emphasis on increased violence and mass arrests might have worked well in a conventional warfare context, but in the COIN environment these tactics mostly contributed to “enraging and embittering formerly friendly or neutral Iraqis.” Conventional responses to insurgent attacks did not work, meaning the United States military needed to develop a tailored, nuanced approach to winning on the COIN battlefield. These difficult-to-identify characteristics and difficult-to-counter tactical choices suggest that the United States military must also change

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Ensure non-combatants and civilian structures are distinguished from proper military targets.” (emphasis added).

17. See Laurie Blank & Amos Guiora, Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare, 1 HARS’Y. N. Sec. J. 45, 45 (2010) (“Gone are the days of soldiers facing each other across large battlefields, tanks shelling tanks, and fighter jets engaging in dogfights.”).


20. Id. at 836 & n.2 (“[M]ilitary and civilian casualties continue as U.S. forces engage in a ‘protracted conflict’ with insurgents.”).


22. Id.
its standard operating procedures and ROE in order to effectively fight the hidden, elusive insurgent.

B. WINNING THE POPULATION

A second major difference between conventional warfare and COIN warfare with significant repercussions for United States ROE policy is the focus not on “killing” or “capturing” the enemy force, but on “winning the population.” This population-centric approach to warfare has been preached for decades and forms the central argument of the COIN bible: David Galula’s Counterinsurgency Warfare: Theory and Practice.23 According to Galula, the insurgent, recognizing that he cannot win on the traditional, conventional warfare battlefield involving heavy armor and the latest technology:

car[ies] the fight to a different ground where he has a better chance to balance the physical odds against him.

The population represents this new ground. If the insurgent manages to dissociate the population from the counterinsurgent, to control it physically, to get its active support, he will win the war because, in the final analysis, the exercise of political power depends on the tacit or explicit agreement of the population or, at worst, on its submissiveness.

Thus the battle for the population is a major characteristic of the [insurgency].24

In this population-centric approach to warfare, the strength of a fighting force is not measured by “the number of [its] divisions, the positions [it] hold[s], [or its] industrial resources,” but by “the extent of support from the population as measured in terms of political organization at the grass roots.”25 The fight for popular support is therefore the central battle of any COIN: The insurgent wants to win support to increase his political power in order to overthrow the sitting government; the counterinsurgent wants to win the population in order to dry up support for the insurgent.

Other scholars have accepted and applied Galula’s central argument to today’s battles in Iraq and Afghanistan, noting that the United States military has begun the crucial shift from a conventional “kill-capture” strategy to a more nuanced “win-the-population” strategy.26 As one scholar writes, “[i]nstead of hunting, killing, and capturing terrorists, the conflict ‘is a prolonged irregular campaign, a violent struggle for legitimacy over the population’” that involves “‘[t]he use of force... [but this use of force is] subordinate to measures to promote local participation in government and economic programs to spur development, as well as efforts to understand and address the grievances that

23. GALULA, supra note 6.
24. Id. at 7–8 (emphasis added).
25. Id. at 79.
26. See, e.g., Sitaraman, supra note 5, at 1766.
often lie at the heart of insurgencies.”27 This new reality—that the only hope of success in COIN is to adopt a population-centric approach to warfare28—ought to have significant repercussions for the development of a United States ROE strategy. Specifically, commanders must find a way to align the COIN win-the-population strategy with the ROE promulgated to soldiers at the lowest levels.

C. THE COMPANY COMMANDER’S WAR

For the purposes of this Note, the third significant difference between conventional operations and COIN campaigns is the increased importance of junior-leader initiative and decision making on the battlefield. Certainly, junior-leader initiative has always been important to success in war,29 but the importance of initiative and sound decision making has increased exponentially in the modern COIN fight due to two significant factors: (1) the modern COIN campaign tends to be a “three-block war,” requiring quick changes in the soldier’s aggressiveness, restraint, and operational tempo;30 and (2) due to the importance and volatility of support from the local population in COIN, each decision to use force, whether it involves dropping a bomb on a target or pulling the trigger on a vehicle-mounted machine gun, has larger, strategic consequences for the counterinsurgent’s prospects for victory.31

1. The “Three-Block War” Requires Decentralized Decision Making

The COIN in Iraq has been described as a “three-block war,”32 a concept that can be applied to COIN campaigns in Afghanistan and elsewhere. According to

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28. See Stephen E. Ambrose, Citizen Soldiers 67 (1997) (describing the role of junior-leader ingenuity throughout World War II, including, for example, developing tactics to deal with the “hedge-row” problem in Normandy).
29. Sepp, supra note 21, at 218.
30. See supra note 21, at 222.
31. See Matthew L. Beran, The Proportionality Balancing Test Revisited: How Counterinsurgency Changes “Military Advantage,” ARMY LAW., Aug. 2010, at 4–5 (“Consequently, civilian casualties (both civilian deaths and civilian injuries) and civilian property damage in counterinsurgency operations necessarily detract from the military advantage to be gained and may result in mission failure.”).
32. See supra note 21, at 222; cf. Kennedy, supra note 12, at 113 (“The idea of a boundary between law enforcement, limited by human rights law, and military action, limited by the laws of armed conflict, seems ever less tenable. In the same city, troops are at once engaging in conflict, stabilizing a neighborhood after conflict, and performing humanitarian, nation-building tasks.”).
this COIN characterization, “[o]n three contiguous city blocks . . . one could simultaneously find humanitarian aid being distributed, a civil disturbance being quelled, and all-out combat being fought.”33 Battalion commanders (who can be expected to control combat operations in most conventional campaigns because they can best coordinate an infantry battalion’s designated reconnaissance, artillery, and medical assets to support the battalion’s line-unit riflemen) simply cannot make decisions fast enough to control these three-block wars and must therefore rely on their junior leaders to a greater extent than ever before.34 Although the author has chosen to call this a “company commander’s war,” other commentators take this decentralization and delegation concept to an even lower level, calling modern COIN “a squad and platoon leader’s war, and often a private soldier’s war.”35

This kind of fast-changing, close-quarters, decentralized warfare necessarily requires a new kind of junior leader. Combat leaders must embrace the concept that the unit of action in COIN campaigns is the individual working closely with the population, not the massive fighting force of conventional campaigns36; they must be comfortable taking on increased responsibilities, “with authority as well as responsibility devolving to the lowest level of command.”37 Combat leaders must also be comfortable with the reality that COIN is “not a single war, but a hundred different wars, each unique to its valley, village, district or neighborhood.”38 This kind of decentralized warfare and decision making should merit decentralized ROE that give junior leaders the freedom to interpret and apply the rules to their specific location in the three-block war.

2. The Decision to Shoot Has Strategic Consequences

The importance of junior-leader decision making is increasingly important in COIN operations because tactical-level decisions to use or not use force while on patrol can have larger strategic consequences for the allied effort to win the wars in Iraq and Afghanistan.39 Based on the population-centric theory of COIN keeping. And what you’re seeing is the third block, every once in a while coming into the second, and the third block in the three-block war is what we call mid-intensity, highly lethal conflict.”). 33. Sepp, supra note 21, at 222. 34. See id. at 226 (describing one lieutenant colonel’s philosophy, which was to “delegate authority until I feel uncomfortable, and then I know I’ve got it about right”). 35. DAVID KILCULLEN, COUNTERINSURGENCY 33 (2010). 36. Sepp, supra note 21, at 226. 37. Id. 38. Id. 39. This is not to say that junior leaders in past conflicts did not bear significant responsibility on the battlefield. Rather, in modern COIN—characterized, as it is, by a population-centric approach to victory and subject, as it is, to the unprecedented level of scrutiny inherent to a twenty-four-hour news cycle—the strategic impact of junior-leader decisions is impossible to ignore. See, e.g., Interview by Lieutenant Colonel Arthur P. Brill, Jr., USMC (Ret.) with Gen. Charles C. Krulak, SEA POWER, available at http://www.navyleague.org/seapower/krulak_interview.htm (“In World War II, Korea, and Vietnam, the young Marine could be the world’s greatest hero, but he really had no strategic impact. In future wars, tremendous capability and lethality will be in the hands of the young corporal. Combine that with
warfare described above, it makes intuitive sense that unnecessary violence against civilians and non-combatants would have a detrimental effect on the larger COIN campaign, but analysts need not rely solely on intuition to support this point because the numbers bear the concept out. In a study of International Security Assistance Force (ISAF) data tracking civilian casualties and levels of insurgent violence in Afghanistan, a group of scholars found convincing proof of “a positive relationship between civilian casualties and levels of future violence in an area.” Specifically, the study found that “if the average ISAF-caused incident, which resulted in 2 civilian casualties, was eliminated, then in an average-sized district there would be 6 fewer violent incidents between ISAF and insurgents . . . over the next 6 weeks.”

The study also revealed that there are long-term, negative consequences to unintended civilian casualties in Afghanistan. In Afghanistan, the data show less of a short-run increase in violence (for instance, an IED incident immediately following a civilian casualty incident as revenge for the civilian casualty), and more of a long-run increase in future violence, which the authors of the study believe can be traced to “increased recruitment into insurgent groups after a civilian casualty incident.” In other words, any increase in civilian casualties in Afghanistan can be expected to result in the increased ability of insurgent groups to recruit new members. In even simpler terms, the risk involved every time a soldier pulls the trigger without knowing where he or she is shooting is the possibility that this unwitting soldier has just made the enemy stronger.

The strategic consequences that follow use-of-force decisions necessitate a “[f]irst do no harm” mentality among junior leaders in counterinsurgencies. This Note argues that the best means for creating this mentality among the trigger pullers is to tailor unit-level ROE policies to reflect respect-for-the-local-population principles. Each of these differences between conventional opera-

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41. Id. at 3.

42. Id.

43. Id. at 4.

44. The data in the Condra et al. study suggests similar consequences following civilian casualties in Iraq, though the consequences tend to be much more immediate, short-run increases in violence. However, the authors attribute this increase in violence not simply to revenge (which might have little strategic impact) but rather to a decreased willingness on the part of the local population to share information with counterinsurgents, which has significant implications for the ability of counterinsurgents to “win” after inflicting civilian casualties. See id.

45. See KILCULLEN, supra note 35, at 47.

46. According to the Condra et al. study, many commanders on the ground in Iraq and Afghanistan agree with this analysis regarding the need for more restrictive rules of engagement. Condra et al.,
tions and COIN—whether it is the nature of the enemy, the population-centric focus of military operations, or the increased importance of junior-leader decision making—is a crucial aspect of the calculus that ought to be used in the development of ROE policies for soldiers deployed to Iraq or Afghanistan. Counterinsurgency is different; the military’s ROE strategy therefore also should be different.

II. RULES OF ENGAGEMENT: AN INTRODUCTION

Given the significant differences between counterinsurgencies and conventional warfare, it should seem obvious that the individual soldier would receive different ROE when fighting COIN campaigns. But this is not necessarily the case. For the most part, the concepts and key terms used to develop ROE in Iraq, Afghanistan, and elsewhere have remained unchanged since the development and promulgation of the latest Chairman of the Joint Chiefs of Staff policy regarding standing ROE.47 To lay the groundwork for our discussion of a “standards of engagement” regime, this Part will: (A) define ROE; (B) examine the traditional factors used to develop ROE; and (C) highlight problems associated with the traditional ROE framework.

A. ROE DEFINED

According to United States military doctrine, ROE are “[d]irectives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered.”48 In layman’s terms, ROE are the instructions given to soldiers, marines, and other military personnel “about what, when, and where they can shoot.”49 Although this might appear to be an
eminently simple concept, the ROE used by soldiers and marines in Iraq and Afghanistan every day have been developed, interpreted, modified, and amplified at several different levels before ever reaching the troops on the ground. ROE “originate with the President and the Chairman of the Joint Chiefs of Staff,” who develop and issue a baseline ROE framework known as the standing ROE. In the absence of more specific rules, the standing ROE act as the default instructions to be followed by combatant commanders and their soldiers in military operations. As such, these standing rules are written quite broadly and only very generally define key terms like “self-defense,” “necessity,” “proportionality,” “hostile act,” “hostile intent,” and “hostile force.”

Because the standing ROE are written so broadly, the combatant commanders and other subordinates “modify the [standing ROE] for specific operations or contingencies by supplementing the standing [ROE] with rules tailored to the mission.” As one experienced judge advocate describes the ROE development and dissemination process:

[E]ach subordinate commander is free to issue ROE specific to his unit, provided that they are neither less restrictive nor otherwise inconsistent with the ROE from higher headquarters. The individual soldier typically learns of the ROE in a briefing from his immediate commander. Occasionally, the soldier receives mission-specific instruction on the ROE from a judge advocate or a member of the chain of command. Later, the soldier may consult a pocket-sized card that purports to summarize the most important and relevant ROE.

about what actions are allowed under the law of war.”) (emphasis added). In Seifert’s view, the rules of engagement are primarily meant to translate the laws of war into usable rules for soldiers on the ground. Id. However, as discussed in section II.B infra, the laws of war are only one factor used in the development of rules of engagement. They are important, to be sure, but they are certainly not the only factor.

51. Id.
52. See CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, supra note 47, at 1.
53. See Martins, supra note 49, at 24 (“The JCS definition of ‘rule of engagement’ is quite broad.”).
54. See CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, supra note 47, at A-4 to A-5 (defining “individual self-defense” as “[t]he inherent right to use all necessary means available and to take all appropriate actions to defend oneself and US forces in one’s vicinity from a hostile act or demonstrated hostile intent”; “necessity” as a condition that “[e]xists when a hostile act occurs or when a force or terrorist(s) exhibits hostile intent”; “proportionality” as “[f]orce used to counter a hostile act or demonstrated hostile intent [that] must be reasonable in intensity, duration, and magnitude to the perceived or demonstrated threat based on all facts known to the commander at the time”; “hostile act” as “[a]n attack or other use of force against the United States, US forces, and, in certain circumstances, US nationals, their property, US commercial assets, and/or other designated non-US forces, foreign nationals and their property”; and “hostile intent” as “[t]he threat of imminent use of force against the United States, US forces, and in certain circumstances, US nationals, their property, US commercial assets, and/or other designated non-US forces, foreign nationals and their property”).
56. Id. at 24 (emphasis added) (citation omitted).
Ideally, this “trickle-down” approach to ROE development should result in a set of coherent, digestible instructions given to the individual soldier that broadly describes “what, when, and where” he can shoot consistent with the guidance developed at the national level by the President and the Joint Chiefs of Staff. Unfortunately, as will be seen in section II.C of this Note, the reality on the ground falls far short of the ideal.

B. TRADITIONAL FACTORS USED TO DEVELOP ROE

To begin to understand where the United States’ COIN ROE strategy has gone wrong, analysts must look at the factors traditionally used to develop ROE at the national level. According to several commentators, ROE “represent the confluence of three important factors: operational requirements, national policy, and the law of war.” Each of these factors refers to one of many purposes underlying ROE. Operational requirements reflect the military purpose behind ROE (for example, “in ground operations [ROE require] that the artillery tubes organic to a unit will not fire beyond a designated fire support coordination line,” in order to ensure an efficient division of labor and protect ground troops from friendly fire). The national policy factor recognizes that political considerations sometimes trump purely operational considerations (for example, an executive order prohibiting “first use of riot control agents and herbicides without presidential approval”). The law-of-war factor ensures that soldiers following ROE are legally protected from committing war crimes (for example, the typical ROE prohibition against attacks on “hospitals, churches, shrines, schools, museums, and any other historical or cultural sites . . . except in self-defense”).

Taken individually, each of these factors provides important guidelines—for everyone from the President at the top of the chain of command to platoon leaders at the bottom—for the development of ROE. But tailoring rules to follow any one of these factors (as some commentators are wont to do) is not a satisfying answer, because it oversimplifies the complexity of warfare in general, and COIN in particular. For example, one author echoes the widespread belief that ROE already place “too many restrictions on the troops,” because the rules limit soldier behavior beyond the limitations required by the laws of war. This particular scholar latches onto the laws of war as the guiding

57. Corn & Jensen, supra note 48, at 805–06; see also Martins, supra note 49, at 24 (describing rules of engagement as serving three different purposes—policy, legal, and military—which roughly correspond to Corn’s and Jensen’s national-policy, law-of-war, and operational-requirements factors).
59. Id. at 24.
60. Id. at 25 (quoting a typical ROE card given to soldiers in the field during combat operations).
61. Seifert, supra note 13, at 836 (quoting President George W. Bush, Address to the Nation on the War on Terror in Iraq, 43 WEEKLY COMP. PRES. DOC. 19, 20 (Jan. 10, 2007)).
62. See id. at 840 (“This Note argues that although the law of war appropriately limits the use of force, the current ROE are an unfaithful interpretation because they unnecessarily restrict troops in a manner not required by law.”).
principle for United States ROE policy and points out that current ROE “unfaithfully” interpret the laws of war and “disserves” soldiers by restricting the soldiers’ inherent right to self-defense.63 While soldiers are guaranteed the right to defend themselves under the laws of war,64 the almost-singular focus on the laws of war as the guiding light behind ROE development neglects the reality that wars are not fought just so that armies can follow the laws of war. Rather, as Carl von Clausewitz tells us, wars are fought to serve political ends, which necessarily means that the United States military will occasionally impose increased restrictions on the actions of its soldiers—beyond those required by the laws of war—in order to support a larger national policy.65

The lessons of Clausewitz are particularly applicable to COIN operations, where—as has been described in this Note—the center of gravity of COIN operations is not the enemy insurgent, but the political support of the local population.66 Accordingly, the proper way to approach the development of ROE at any level in the chain of command is to carefully weigh the often competing political and military factors at play in order to reach a sensible ROE policy. This Note argues that an honest balancing of factors can lead to only one conclusion: Even though the laws of war might allow a less restrictive ROE policy, our national policy is to fight COIN campaigns, which have a different set of operational requirements than conventional conflicts, and which require extreme self-restraint on the part of the counterinsurgent regarding the use of force.

C. PROBLEMS WITH TRADITIONAL ROE

This Note has already hinted at one potential problem with the traditional method for developing ROE: rule makers tend to latch onto one of the three factors described above and use that single factor to develop a ROE strategy.67 This singular focus on one of the ROE development factors (typically, the operational requirements factor) was especially evident during the early years of the wars in Iraq and Afghanistan and led commanders on the ground to develop elaborate—and deadly—force-protection measures designed to decrease the risk

63. See id. at 840, 861.
64. See id. at 843 (“[N]othing impair[s] the inherent right of individual or collective self-defense.”) (quoting U.N. Charter art. 51).
65. See Richard J. Grunawalt, The JCS Standing Rules of Engagement: A Judge Advocate’s Primer, 42 A.F. L. REV. 245, 245–46 (quoting the military strategist Carl von Clausewitz, who said that “[w]ar is not merely an act of policy but a true political instrument, a continuation of political inter-course, carried on with other means . . . the political object is the goal, war is the means of reaching it, and means can never be considered in isolation from the purpose,” CARL VON CLAUSEWITZ, ON WAR 87 (Michael Howard & Peter Paret eds., 1984), and noting that “Clausewitz’ premise reminds us that application of the military instrument, at whatever level of intensity, is always pursuant to an overarching national political purpose”).
66. See supra section I.B (describing the importance of “winning the population” in COIN campaigns).
67. See supra section II.B (highlighting the importance of accurately balancing the multiple factors involved in ROE development, without unduly weighting one factor over the others).
to individual soldiers’ lives, even if those measures meant an increase in the risk to the local population. 68

To its great credit, the United States military has come a long way from those early days and has adopted a comprehensive COIN strategy in both Iraq and Afghanistan, 69 meaning this singular-focus problem has become less of an issue for current ROE policies. However, despite an increasingly nuanced—and proper—balancing of the three competing factors in ROE development, the ROE promulgated in Iraq and Afghanistan continue to suffer from significant problems, including: (1) the temptation among commanders to respond to the uncontrollable COIN environment by creating more and more rules to govern soldier behavior; and (2) placing specific emphasis on self-defense, without also emphasizing the unspoken rule that commanders would prefer that their soldiers not use force, if possible.

1. Commanders Are Tempted to Overregulate

Given the trickle-down nature of ROE development described in section II.A, it should come as no surprise that commanders are often tempted to overregulate their assigned soldiers. As described above, a commander is given the freedom “to issue ROE specific to his unit, provided that they are neither less restrictive nor otherwise inconsistent with the ROE from higher headquarters.” 70 According to this guidance, a commander only has the ability to tailor ROE in one direction: making them more restrictive. Therefore, in the “can-do,” proactive mindset of the American military officer, ROE naturally become more regulated and rules oriented as they move down the chain of command. As described below, what started as general standards concerning “hostile intent” and “hostile acts” in the President’s standing ROE can quickly become detailed, cumbersome EOF procedures at the platoon level, where individual soldiers must make split-second decisions regarding the use of force. 71

EOF procedures are a common—and, arguably, overused—attempt to regulate the soldier’s use of force in Iraq and Afghanistan. While the purpose of EOF procedures is a noble one (limiting the accidental use of deadly force against noncombatants), 72 the procedures are a perfect example of how restricting the use of force through increased rulemaking can become a problem. EOF

68. See supra section I.A.2 (describing the response of then-Major General Odierno to violent attacks around Baghdad, Iraq, in 2004).
69. FM 3-24, supra note 7.
70. Martins, supra note 49, at 24 (emphasis added).
71. See Seifert, supra note 13, at 839 (“There is frequently insufficient time to escalate force under the current ROE, which are too restrictive for a policing environment.”).
72. See Randall Bagwell, The Threat Assessment Process (TAP): The Evolution of Escalation of Force, 2008 ARMY LAW. 5, 5 (“The traditional role of escalation of force (EOF) is to help with the proportional application of force in self-defense situations. The basic idea is simple—to increase the magnitude of force applied to an identified threat until the threat is deterred or, if necessary, eliminated.”).
procedures typically “[s]pecify a graduated show of force that ground troops must use in ambiguous situations before resorting to deadly force. [These procedures] [i]nclude such measures as giving a verbal warning, using a riot stick, perhaps firing a warning shot, or firing a shot intended to wound.”73 Often these procedures can become very specific, prescribing the use of certain measures short of deadly force at certain distances between the individual soldier and the potential target.

There are at least two significant problems with this overreliance on EOF to control soldiers’ use-of-force decisions. First, while soldiers are typically briefed that the EOF procedures are not a step-by-step system that must be followed before deadly force can be used, there is the very real danger that the mere existence of these escalation steps will cause “soldiers to hesitate in their reactions, providing insurgents with more time to strike against them and the civilians the soldiers seek to protect.”74 In this sense, EOF can very easily become too restrictive, limiting the effectiveness of soldiers who might otherwise use their own judgment and reasonable decision making to choose whether or not to use force. Second, in the author’s experience—and as exemplified in this Note’s introduction—EOF procedures give soldiers the wrong idea about when, where, and how they should use force in the COIN environment. When enemy insurgents and innocent civilians are difficult to distinguish on the COIN battlefield, it does not make sense to tell soldiers that they are authorized to use force based on little more than the soldier’s distance from the potential threat and the potential threat’s response to verbal, visual, and other warnings. In this sense, EOF can also become too permissive, seemingly sanctioning violence based solely on a civilian’s (or insurgent’s) unlucky decision to cross an arbitrary line in the sand. Commanders’ use of EOF to tailor the more broadly worded ROE to their individual commands is therefore a double-edged sword: By increasing the control they can exert over soldiers’ decision making through the creation of new and more rules, commanders also increase both the risk those soldiers face when confronted with hostile forces and the risk that soldiers might make the wrong decision regarding use of force, leading to unnecessary civilian casualties.

2. ROE Emphasize Self-Defense, Without Emphasizing the Preference Against Force

An additional problem with commanders’ instructions regarding soldiers’ use-of-force decisions is the recent trend to include constant, formalized instructions in the ROE that “YOU ARE AUTHORIZED TO USE FORCE IN SELF-DEFENSE AND TO ACCOMPLISH THE MISSION AS ORDERED...”
BY YOUR COMMANDER.”75 These admonitions to use self-defense are a problem in current ROE used in Iraq and Afghanistan because they do not accurately reflect the unspoken preference on the part of commanders that soldiers not use force, if given the option to avoid it.76 An increased emphasis on self-defense is a popular rallying cry for many commentators, who correctly point out that combatants have the inherent right under the laws of war to protect themselves.77 In other words, “the soldier is never required by the law to forsake his life in order to uphold the [law-of-war] principles.”78

However, as was made clear in Part I of this Note, COIN is a different kind of warfare, requiring the unit and the individual soldier to occasionally accept more risk of bodily injury or death in order to accomplish the mission.79 Given the differences between conventional military operations and COIN operations, and given the reality that increasing numbers of commanders recognize these differences and truly believe in the necessity of accepting more risk in order to win on the COIN battlefield,80 it seems odd that commanders would choose to trumpet soldiers’ right to defend themselves (potentially increasing the possibility of violent confrontations with the local population) without also formally notifying the soldier that the commanders would strongly prefer that the soldier not use force. For the boots-on-the-ground soldiers to have any confidence in their commander’s ROE policy, they must be assured that the commander’s formalized, written words match the commander’s informal opinions on how, when, and where force can be used. The traditional ROE framework is therefore flawed and ought to be reconsidered in light of the lessons learned in more than ten years of COIN fighting. While the three major factors used to develop ROE are still sound, too few ROE thinkers have realized the increased importance of correctly balancing political considerations against the usual demand for military security and soldier safety. Moreover, many commanders have responded to the unpredictable nature of COIN operations either by overregulating their soldiers with detailed EOF procedures, or by overemphasizing the principle of

75. MNC-I ROE Card, supra note 1. These words appear at the top of the MNC-I ROE Card, in capital letters, making them the first—and potentially only—phrase a soldier reads on the ROE Card before leaving for a mission.


77. See, e.g., Seiffert, supra note 13, at 839–40 (“The current ROE overemphasize some of the principles of the law of war while de-emphasizing, even ignoring, a soldier’s right to act in self-defense, a right protected above all else.”) (citation omitted).

78. Id. at 843.

79. See, e.g., supra section I.C.2 (describing how civilian casualties can negatively affect mission accomplishment and noting that commanders increasingly recognize the need to accept more risk in order to win in COIN warfare).

80. See Condra et al., supra note 40, at 5.
self-defense—a position that does not honestly reflect the COIN leader’s true preference against the use of force.

III. STANDARDS OF ENGAGEMENT: APPLYING THE LESSONS OF COIN TO ROE POLICY

Thus far, this Note has identified several key differences between conventional military operations and COIN campaigns and has begun to discuss some of the problems with the current ROE regime that is used every day on patrol and at roadblocks in Iraq and Afghanistan. Based on these key COIN differences and the resulting problems for ROE, how should commanders charged with developing and promulgating updated ROE for newly deployed soldiers consider changing the rules in order to more effectively fight COIN campaigns? Answering this question is the object of Part III of this Note, which offers two recommendations for future ROE developers: (A) Those charged with crafting the next generation of ROE should resist the urge to create more—and more specific—“rules,” instead favoring the broadly worded, and therefore more nuanced, “standards” found in many current use-of-force governance regimes; and (B) ROE crafters should consider adding language to the standard ROE Card given to every soldier on patrol that reflects some of the “counterinsurgency paradoxes” that the United States Army and Marine Corps have already adopted as official doctrine. After laying out the broad framework for these two recommendations, this Note will (C) apply these recommendations to the COIN and ROE problems identified in Parts I and II to demonstrate how these recommendations could contribute to more effective and more successful COIN campaigns.

A. STANDARDS OF ENGAGEMENT

The first recommendation is directed at the combatant commanders and those below them who are charged with interpreting and applying the Chairman of the Joint Chiefs of Staff standing ROE to their operational environments. Rather than increasingly regulate soldier behavior with detailed, rule-like EOF requirements, these commanders should disseminate broad standards regarding the use of force. Some definitions are in order. For the purposes of this Note, the term “rule” refers to a directive that tells the soldier “precisely what measures to take and which requires little interpretation on the [soldier’s] part.”81 By contrast, a “standard” is a directive “which specifies the outcome . . . but which leaves the

81. NEIL GUNNINGHAM & RICHARD JOHNSTONE, REGULATING WORKPLACE SAFETY: SYSTEMS AND SANCTIONS 23 (1999). Using lessons learned from the realm of workplace safety might seem like an odd choice for a study of ROE in combat environments, but the author finds that this particular topic shows promise, with many interesting applications to the study of war regulations. First, the field has seen the promulgation of both rules and standards. Id. Second, the field is the subject of several informative studies that show the value of standards as opposed to rules. Id. at 23–25. Finally, in many cases, workplace safety deals with the physical security of employees, who do dangerous jobs in order to achieve a larger goal. Id. at 24–25. This situation is at least somewhat analogous to the everyday
concrete measures to achieve this end open for the [soldier] to adapt to varying local circumstances. As such . . . standards are outcome-based and the means of achieving that outcome are not prescribed."82 To illustrate the difference between rules and standards in the military conflict context, consider the example of instructions given to a soldier standing guard in a foxhole. A commander adopting a rules approach might instruct the soldier to shoot any person entering a specified zone surrounding a defensive position.83 This directive is aimed at securing the defensive position from attack, and it clearly stipulates the means the soldier must use to achieve that goal, leaving little room for the individual soldier’s interpretation or discretion. But a commander might also adopt a standards approach when instructing the soldier on guard duty: ordering the individual soldier to protect his foxhole consistent with the well-known law-of-war principle of proportionality, which “requires the [soldier] to conduct a balancing test to determine if the incidental injury, including deaths to civilians and damage to civilian objects, is excessive in relation to the concrete and direct military advantage expected to be gained.”84 Here, the outcome is stated up front (protect the foxhole), but the soldier has wide latitude to achieve that protection, as his options are only bounded by the principle of proportionality. Rules and standards are therefore different means of achieving the same ends. With rules, leaders disseminate specific instructions designed to produce a desired result; with standards, the desired result is stipulated up front, but the soldier is given freer reign in deciding how to reach that result.

At first glance, rules seem preferable to standards because they give precise instructions to the individual soldier and leave the guesswork out of following the commander’s orders, but that first glance is deceptive. In order to formulate rules—be they ROE or workplace safety rules—leaders must make “advance

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82. Id. at 23.
83. See Sepp, supra note 21, at 220 (“[A reporter] witnessed an American soldier manning a heavy machine gun shoot and kill an unarmed Iraqi man because he walked into an ‘exclusion zone’—which the troops called a ‘kill zone’ . . . . As the Iraqi lay dying . . . he pointed at a little building in front of him and said . . . ‘This is my house.’ He had simply been walking home.”). This is a graphic—and tragic—example of ROE gone wrong. While the soldier cannot be absolved of his responsibility for deciding to use force, surely some blame for this tragedy must fall on the ROE adopted by the soldier’s commanders. Rather than establish a standards regime that would allow the soldier some discretion in the use of force, the leaders involved in this tragedy appear to have opted for a bright-line rule, establishing an “exclusion zone” through which no person would be allowed to cross, regardless of the circumstances surrounding the crossing.
84. Beran, supra note 31, at 4 (quoting Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) annex I, June 8, 1977, 1125 U.N.T.S. 3, arts. 51(5)(b), 57(2)(a)(ii)). A standards instruction like this might be a mouthful—and the legal jargon might be inappropriate on the battlefield—but the commander need not use these exact words when instructing his soldiers in their duties. For example, a commander might simply tell his soldier, “I want you to protect this position, but use only the force necessary to do so—and remember your training on proportionality.” Again, the soldier’s goal is to protect the foxhole, but the soldier has not been given any mandatory “rules” for achieving that goal.
determinations of the law’s content by pre-identifying the range of possible situations and developing precise instructions for how to deal with those situations. But in COIN campaigns, determining such precise factors and predicting the full range of possible scenarios in any given situation is nearly impossible, making ex ante rules creation an unrealistic pipe dream. Not only should effective rules creation be considered impossible, it might not even be desirable, because—as has been discovered in the context of workplace safety rules development—

[t]here are . . . serious disadvantages to the use of [rules] across the board. Inevitably, they must be extremely detailed . . . . Such an approach tends to result in a mass of intricate, detailed law, difficult to comprehend or keep up to date. Moreover . . . they do not allow [individuals] to seek least cost and/or innovative solutions and accordingly are unlikely to be cost-effective in the majority of circumstances.

This “mass of intricate, detailed law” is exactly the problem discussed in section II.C.1. The goal is to give the soldier concrete guidance on what he can and cannot do, but the result is a confusing mix of specific directives that are not flexible enough to respond to a rapidly changing combat environment. An additional problem with the creation of detailed, specific rules regimes is that they encourage soldiers to rely too heavily on the rule, instead of focusing on personal responsibility, nuanced thinking, and individual initiative—all of which are crucial to success in a COIN environment.

Standards are not without their own problems—their vagueness requires more interpretation by the individual soldier, and the standards will lack a clear meaning until they have been interpreted ex post by some governing body, which will weigh the decision made by the soldier on the ground and announce a finding as to the soundness of that decision. One might even conclude that ex post interpretation of standards of engagement presents as many complications as ex ante rules development, as soldiers’ decisions to use force become subjected to trial-like proceedings before United States or international tribunals. However, a full-fledged adversarial proceeding is not the only means for giving substance to a standards regime, as military units can use their own, informal after-action review processes or more formal administrative investiga-

86. See id. at 599–600 (“It would appear that some legal commands cannot plausibly be formulated as rules . . . . because we cannot foresee all potential hazards . . . .”).
87. GUNNINGHAM & JOHNSTONE, supra note 81, at 25.
88. See id.
89. See supra sections I.C.1 and I.C.2 (describing the importance of junior-leader initiative and decision making in COIN campaigns).
90. See Kaplow, supra note 85, at 577–79 (discussing the consequences of precedent creation—or noncreation—following initial enforcement actions under a standards regime).
tions to analyze soldier behavior and report their findings. Reviews like these are a regular, accepted part of the modern battlefield, and, after years of war and the creation of countless instances of “precedent” regarding soldier actions in use-of-force scenarios, the advantages of using a standards regime far outweigh the disadvantages. As has been noted in the context of workplace safety, standards “have the capacity to address new hazards as they emerge, to enable new information to be taken account of, and to allow new technologies to be adopted at an early stage.” A standard’s inherent flexibility to address new, evolving hazards is absolutely essential in a COIN environment, where the situation on the ground can change from block to block, as soldiers find themselves providing security for a medical clinic in a peaceful city square one moment and kicking in the door of a suspected insurgent stronghold in the next.

91. For example, the United States Army regularly conducts Army Regulation (AR) 15–6 administrative investigations to review a range of situations that require detailed fact-finding before taking more formal adversarial steps. According to the manual governing such investigations:

The primary function of any investigation...is to ascertain facts and to report them to the appointing authority. It is the duty of the investigating officer or board to ascertain and consider the evidence on all sides of each issue, thoroughly and impartially, and to make findings and recommendations that are warranted by the facts and that comply with the instructions of the appointing authority.

HEADQUARTERS, DEPARTMENT OF THE ARMY, ARMY REGULATION 15–6, Procedures for Investigating Officers and Boards of Officers (Oct. 2, 2006) at 1–2, available at http://www.apd.army.mil/pdffiles/r15_6.pdf. In an AR 15–6 investigation, the commanding officer—or appointing authority—places a commissioned officer in charge of gathering the facts surrounding an incident, interviewing witnesses, and preparing a final report with the officer’s findings and recommendations. See id. at 2–3, 13–15. Additionally, the Army has even less formal procedures that could be used to collect and disseminate information concerning a soldier’s decision to use force, including the use of after-action reviews, which are non-adversarial “professional discussion[s] of an event, focused on performance standards, that enable[] soldiers to discover for themselves what happened, why it happened, and how to sustain strengths and improve on weaknesses.” HEADQUARTERS, DEPARTMENT OF THE ARMY, TRAINING CIRCULAR (TC) 25-20, A Leader’s Guide to After-Action Reviews (September 1993) at 1, available at http://www.au.af.mil/au/awc/awcgate/army/tc_25-20/tc25-20.pdf; see also id. at ii (“Modern combat is complex and demanding. To fight and win, we must train our soldiers during peacetime to successfully execute their wartime missions. We must use every training opportunity to improve soldier, leader, and unit task performance. To improve their individual and collective-task performances to meet or exceed the Army standard, soldiers and leaders must know and understand what happened or did not happen during every training event.”).

The combined effect of formal administrative investigations and informal after-action reviews might be sufficient to give commanders and soldiers a clear, real-life-experience-based understanding of what the otherwise vague standards of engagement involve. For example, before, during, and after deployments, soldiers can refer to reports discussing whether the “hostile intent” standard was met in a given situation. Soldiers can then use this “precedent” to help inform their future use-of-force decisions. On its face, the “hostile intent” standard remains just as vague as when it was first written, but the countless precedential reports applying that standard to real-world incidents give the standard a substantive backbone that can inform soldier decision making. Rather than navigate a confusing web of specific rules developed in response to an ever-changing combat environment, the soldier’s decision making remains guided by a general standard—but it is a general standard given meaning by reference to countless ex post judgments on the propriety of the use of force.

92. GUNNINGHAM, supra note 81, at 26.

93. See supra section I.C.1 (describing the three-block-war concept).
There are already excellent examples of standards being used as the crux of a commander’s ROE policy, and those standards should continue to be used under this Note’s proposed standards of engagement regime. The Multinational Corps–Iraq Rules of Engagement Card issued to soldiers entering the Operation Iraqi Freedom theater of operations in 2010 included several standard-like directives that allowed room for interpretation and individual decision making at the soldier level. For example, rather than clearly stipulating the exact kind of targets soldiers are allowed to engage (for example, “you may only fire on individuals who are pointing their weapons in your direction and have pulled the triggers”), the ROE Card says that “[y]ou may engage individuals based on their conduct, if they are: [c]ommitting hostile acts [or] [d]emonstrating hostile intent.”94 The ROE Card goes on to say that “Positive Identification . . . is required prior to any engagement. You must be reasonably certain that your target is the source of the threat.”95 Both of these directives put the decision regarding when to use force squarely in the hands of the individual soldier, who must make a determination whether: (1) the potential target has committed a hostile act (for example, firing rounds in his direction); or (2) the potential target has demonstrated hostile intent (for example, pointing a weapon in his direction); and (3) the soldier has gotten a close enough look at the situation to be reasonably certain that the individual the soldier is about to engage is the actual source of hostility. Moreover, modern ROE cards also explicitly refer soldiers to key law-of-war provisions, thus ensuring that even the vague, standards-oriented regime does not run afoul of the United States’ international law obligations.96 All of this might seem like a lot for a soldier to handle—especially in rapidly escalating situations where there is very little time to make a decision one way or the other—and it is a lot. But given the unique challenges of a COIN environment, commanders have no choice but to trust their soldiers to engage in this “thinking [s]oldier’s war.”97

Of course, these standards are only as effective as the soldiers trusted with their implementation, which means the United States military needs to ramp up its ROE training, such that soldiers can understand and implement the “hostile act,” “hostile intent,” and “positive identification” standards of engagement. Other commentators have noted the necessity for increased training in ROE, writing that “[o]ne of the difficulties in a COIN operation is the additional training necessary to prepare a conventional military force for a type of mission that is not necessarily congruent with the normal instincts and general approach

94. MNC-I ROE Card, supra note 1.
95. Id.
96. Id. The MNC-I ROE Card included admonitions like the following: “Use of Force. Must be necessary and proportional [in accordance with] the [law of armed conflict]; “Only Attack Legitimate Military Targets. Ensure non-combatants and civilian structures are distinguished from proper military targets.” Id.
97. Bagwell, supra note 72, at 15.
that is required to achieve victory in a conventional conflict.” In short, commanders cannot afford to allow ROE training and classroom instruction on the laws of war to take a back seat to the usual pre-deployment training set involving shooting ranges, explosives instruction, and land navigation skills—the COIN environment demands more.

To properly prepare the young private first class from the hypothetical at the beginning of this Note for COIN operations, deploying military units might consider adopting the “judgment-based” training model used by law enforcement agencies like the Federal Bureau of Investigation. According to this model, “use of force training focuses on threat assessment . . . [forcing] officers . . . [to] look to situational factors,” including the actions and communications of the potential threat, the physical characteristics of the potential threat, and the threat’s access to weapons. Use of this judgment-based, threat-assessment model is reinforced through multiple stages of training, including classroom instruction, written examinations, video simulations, and role-playing exercises. The military has the resources, the training areas, and the subject-matter experts to conduct its own, full-blown, judgment-based ROE training—it is simply a matter of finding the will to invest in this kind of training prior to and during deployments.

B. COIN PARADOXES AS CODES OF PRACTICE

The second recommendation—to formally incorporate some of the counterinsurgency paradoxes from the Counterinsurgency Field Manual into the United States military’s ROE policies in Iraq and Afghanistan—follows from the first. As has been noted elsewhere, “the choice is not as stark as one between vague . . . general [standards] on the one hand and [rules] on the other. Rather . . . [standards] are complemented in many instances by performance-based codes of practice.” In the realm of workplace safety, these “[c]odes of practice” offer “non-mandatory guidance as to how to meet . . . the general [standards].” Taking a page from the workplace safety playbook, ROE developers should augment the standards already described in most ROE policies with COIN-specific codes of practice. This need not be a daunting task, and—thanks to the work of COIN visionaries like General David Petraeus and his list of

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100. See id. at 877–88.
101. See Sepp, supra note 21, at 229 (“Serious steps are being taken to educate the officers and troops deploying to Iraq about how to fight this kind of small war against an unconventional enemy. At the National Training Center in Death Valley in Southern California, tank battle scenarios have been set aside to provide simulations of day-to-day activities in Iraqi towns, with over 299 Iraqi Americans (hired through the Screen Actors Guild) playing roles of sheikhs, mayors, businessmen, criminals and terrorists.”).
102. GUNNINGHAM & JOHNSTONE, supra note 81, at 29.
103. Id. at 27.
easy-to-understand counterinsurgency paradoxes—the work has already been done.

The counterinsurgency paradoxes are a set of principles described in the United States Army and Marine Corps Counterinsurgency Field Manual that highlight the “different mindset required” to effectively conduct COIN operations.\(^\text{104}\) They are, in essence, formal recognition by senior military leaders that COIN is a different kind of warfare, requiring a different way of thinking. Of the nine total paradoxes described in the manual, six of the paradoxes are ROE-specific, including: “Sometimes, the More You Protect Your Force, the Less Secure You May Be”; “Sometimes, the More Force Is Used, the Less Effective It Is”; “The More Successful the Counterinsurgency Is, the Less Force Can Be Used and the More Risk Must Be Accepted”; “Sometimes Doing Nothing Is the Best Reaction”; and “Some of the Best Weapons for Counterinsurgents Do Not Shoot.”\(^\text{105}\) Of course, these principles cannot be considered incontrovertible gospel—they do not apply to all COIN situations at all times. However, they do represent the different mindset required of military leaders and individual soldiers on the COIN battlefield, and, as such, these COIN codes of practice ought to be communicated to soldiers as often as possible.

Not only are these paradoxes an accurate reflection of what it can take to win in COIN, they could also be easily incorporated into the ROE cards distributed to each and every soldier in Iraq and Afghanistan. As briefly described in section II.A, ROE cards are pocket-sized informational sheets that provide basic instructions regarding the use of force in the relevant theater of operations.\(^\text{106}\) In the past, commentators have called for additions to these cards, including an explicit description of the individual soldier’s inherent right to self-defense.\(^\text{107}\) In light of the extreme importance of the thoughtful, careful application of the use of force in COIN environments, it seems a logical step to take principles that have already been accepted as Army and Marine Corps doctrine by senior military leaders and communicate those principles in a meaningful way to the boots-on-the-ground soldiers asked to carry out the senior leaders’ COIN strategy on a day-to-day basis. In the words of the Counterinsurgency Field Manual, “[t]hese paradoxes are meant to stimulate thinking, not to limit it.”\(^\text{108}\) Giving these paradoxes to the soldier to think about and consider before, during, and after combat patrols will only contribute to the kind of mindset that can—like

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\(^{104}\) FM 3-24, supra note 7, at 1-26.  
\(^{105}\) Id. at 1-27.  
\(^{106}\) See, e.g., MNC-I ROE Card, supra note 1.  
\(^{107}\) See, e.g., Seifert, supra note 13, at 849–50 (criticizing commonly used ROE cards because “[n]one of the cards defines the soldier’s right to self-defense, which a soldier is allowed to use when confronted with deadly hostile intent”) (citation omitted). It should be noted that a reminder of the right to self-defense has since been added to every ROE card reviewed by the author during his deployment to Iraq in 2010. See, e.g., supra section II.B.2 (highlighting the announcement at the top of the MNC-I ROE Card regarding the right to self-defense).  
\(^{108}\) FM 3-24, supra note 7, at 1-26.
workplace safety codes of practice—offer nonmandatory guidance for how to apply the COIN standards of engagement.

C. THE STANDARDS OF ENGAGEMENT FRAMEWORK SOLVES THE COIN-ROE PROBLEMS

This two-pronged approach to ROE development—adopting a standards of engagement regime that avoids overregulation by rules and EOF procedures, and augmenting that regime with codes of practice in the form of counter-insurgency paradoxes—begins to respond to the unique characteristics of COIN operations. To more fully explain just how this standards of engagement recommendation can contribute to victory on the COIN battlefield, this section will consider the possible positive and negative effects of these proposed modifications on the three significant COIN “differences” described in Part I, namely: (1) the United States military’s ability to respond to elusive enemy insurgents; (2) the United States military’s ability to win over the local population; and (3) the willingness of brigade, battalion, and other military leaders to empower junior leaders in what has become a company commander’s war.

1. Standards and the Enemy Insurgent

As described in Part I, the insurgent is a difficult-to-identify enemy that uses difficult-to-counter tactics. ROE policies that offer specific guidance (for example, EOF procedures that mandate different kinds of force at various distances between the friendly and enemy combatants) are ill-equipped to handle this kind of elusive enemy. Soldiers operating under a rules regime will all too often begin to rely on the rule, allowing their individual judgment and decision-making skills to deteriorate.\(^{109}\) The standards of engagement regime, by contrast, is an open-ended, judgment-based system that not only allows but also demands that soldiers think before acting—and if the soldier has read his assigned ROE Card before going out on a mission, his thinking will likely be informed by a counterinsurgency paradox that encourages him to consider using as little force as possible when interacting with the local population. A soldier following a “rules” regime might feel justified shooting an unarmed civilian who inadvertently crosses an invisible line in the sand separating the safe zone from the kill zone.\(^{110}\) But a soldier following the standards of engagement framework cannot hide under the cloak of “I was only following the rules,” as he must justify his use-of-force decisions according to standards of reasonableness and individual responsibility. And, as has been discussed,\(^ {111}\) the reasonableness of the soldier’s decision is not immune from review—the military has investigatory tools running the gamut of procedural formality, from informal after-action reviews, where soldiers can learn from their successes and failures.

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109. See supra section II.C.1 (describing how EOF can cause soldiers to make bad decisions, using force when they should not, or not using force when they should).
110. See supra note 83 and accompanying text.
111. See supra note 91 and accompanying text.
in applying the standards regime, to more formal, command-driven investigations, where independent fact-finders can interview witnesses and produce recommendations for further disciplinary action.\footnote{Id.}

2. Standards and Winning the Population

The standards of engagement framework also better reflects the population-centric nature of COIN operations. “In COIN operations, the civil component weighs more heavily than in other forms of warfare because the objective is to gain the support of the civilian populace.”\footnote{Id.} The standards of engagement framework proposed in this Note encourages this kind of population-friendly mindset, as a soldier armed with standards of engagement and informed by the counterinsurgency paradoxes is mentally prepared to look at the local population in a new way. He will carefully consider the situation before deciding to pull the trigger, and he will only engage targets he knows to be hostile and only when he knows that eliminating the target will do more good than harm in the larger COIN strategy. Even to the lay reader, this kind of supreme caution seems counterintuitive. But because it is imperative that the counterinsurgent win the population, the counterinsurgent must, at times, go to extreme measures to guard against inflicting civilian casualties or unnecessary damage to civilian property. The standards of engagement framework proposed in this Note reflects that mentality and is a better fit for the COIN fight.

There are certainly significant downsides to what might appear to be a much more restrictive use-of-force policy under the standards of engagement plus codes of practice framework. The same imperative to avoid civilian casualties described in the previous paragraph also necessarily means accepting more risk to United States military personnel.\footnote{Id.} Moreover, one extremely influential Army judge advocate has described the very real danger that overly restrictive ROE can contribute to a mindset that detracts from the readiness of soldiers to respond to real threats.\footnote{Id.} According to this judge advocate, one of the dangers of restrictive ROE is that “troops will respond tentatively to an attack, thereby permitting harm to themselves, to fellow soldiers, or to some mission essential facility.”\footnote{Id.}

These are legitimate concerns, but they are not completely damning to the standards of engagement framework for two reasons. First, standards of engagement—especially when informed by the preference-against-force counter-
insurgency paradoxes—might seem like little more than additional restrictions on use-of-force decisions, but this is not the case. This Note has not advocated removing the admonition on standard-issue ROE cards to soldiers that they have the inherent right to defend themselves, and this Note has not embraced specific, mandatory rules telling soldiers not to use force under any circumstances. Instead, the standards of engagement framework, when properly executed, trusts the individual soldier to make a decision regarding the use of force. Any decision to restrict the use of force is therefore one the soldier makes himself, based on the circumstances he sees on the ground. Second, the author has approached the ROE problem from the basic assumption that the goal for the United States in Iraq, Afghanistan, and other COIN environments is to win. As has been noted by other scholars, it has become increasingly clear in recent years that a “shift in war-fighting philosophy, away from ‘seeking and destroying’ foes to an embrace of the population as the critical objective in modern conflict . . . is the only approach military forces can take with any reasonable hope of success.”117 Assuming that the wars in Iraq and Afghanistan are worth fighting, and assuming that this country’s goal in Iraq and Afghanistan is to defeat the insurgencies in those countries, surely accepting some increased level of risk is acceptable—even necessary.

3. Standards and the Company Commander’s War

Finally, the standards of engagement framework best recognizes the importance of junior-leader decision making in COIN operations, empowering the individual soldier to make use-of-force decisions based on the infinite number of factors that only he can see from the ground level. As discussed in sections I.C and II.C.1, senior military leaders cannot directly control the COIN battlefield—it is far too complex and unpredictable—and any attempt to do so through the promulgation of specific rules is bound to fail.118 Moreover, standards provide the flexibility necessary for soldiers to respond to the rapidly changing environment inherent to the COIN three-block war. In the rules-versus-

117. Sepp, supra note 21, at 218.
118. See, e.g., Gunningham & Johnstone, supra note 81, at 25 (describing the disturbing concept of a “mass of intricate detailed law” that can appear when leadership resorts to specific rules-based regimes in the realm of workplace safety). Other sources underscore this point, arguing that standards tend to be more appropriate in cases where a variety of (typically) unpredictable factors affect the desirability of certain behaviors. See Kaplow, supra note 85, at 599–600 (“It would appear that some legal commands cannot plausibly be formulated as rules. For example, it may not be possible to . . . specify in advance proper disposal techniques for all hazardous substances because we cannot foresee all potential hazards—whereas some hazards, and how best to address them, may become apparent when they arise. Because of such factors, rules may seem not only to be inferior to standards, but an entirely infeasible option.”); Russell B. Korobkin, Behavioral Analysis and Legal Form: Rules vs. Standards Revisited, 79 Or. L. Rev. 23, 33 (2000) (“Standards will likewise tend to be more desirable in resolving classes of disputes in which a wide variety of facts and combinations of facts are relevant to the legal pronouncement. In such circumstances, the appropriate resolution of the range of disputes, however defined, would require many different rules, whereas a single standard might give adjudicators the tools necessary to reach the various appropriate resolutions.”).
standards scholarly debate, among the “virtues” on the standards side of the ledger are such qualities as “flexibility, individualization, open-endedness, and dynamism.”119 all characteristics that translate well to the ever-changing needs of the modern counterinsurgent, who conducts a friendly presence patrol one moment, engages in a firefight the next, and returns to the same location the next day to set up a medical clinic.

Critics will point out that placing responsibility for life or death decisions in the hands of young leaders and individual soldiers is a bad idea—there must be more control over soldier behavior on the battlefield,120 the critics will argue, and a standards regime will not sufficiently limit civilian casualties. But whether the soldier operates under a strict rules regime or under a more broadly defined standards framework, the individual soldier is still the only person capable of making the decision whether to pull the trigger. The best that any use-of-force management system can hope to achieve is to find ways to meaningfully affect the critical thinking, reasoning, and rationalizing process the soldier uses to make that use-of-force decision. Whereas some of the rules versus standards literature suggests that standards can be associated with increases in individual initiative and individual responsibility,121 other scholars persuasively argue that standards are inferior to rules in affecting “social norms.”122 “Specifically, rules, because of their ex ante clarity, are more likely to affect social norms than are more ambiguous standards,” because even individuals who want to follow the standard are uncertain about how to change their behavior to meet the standard.123

However, the standards framework proposed in this Note is not nearly as ambiguous as the scholars fear. Here, the standards of engagement are coupled with the counterinsurgency paradox “codes of practice,” which leave little doubt

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119. Pierre Schlag, Rules and Standards, 33 UCLA L. Rev. 379, 400 (1985–1986). Though Professor Schlag argues that much of the rules-versus-standards debate is familiar to the point of stereotype—and that the familiar conceptions of legal regimes formed by rules and standards are insufficient—he also admits that much of the discourse in the debate regarding the virtues and vices of rules and standards is “in some sense correct.” Id. at 380. And Professor Schlag is not alone in this analysis of the “virtues” of standards. See, e.g., Gunningham & Johnstone, supra note 81, at 26 (noting that standards “have the capacity to address new hazards as they emerge, to enable new information to be taken account of, and to allow new technologies to be adopted at an early stage”); Korobkin, supra note 118, at 33.

120. See, e.g., Paul C. Warnke et al., Implementing the Rules of War: Training, Command and Enforcement, 66 Am. Soc’y Int’l L. Proc. 183, 194 (1972) (describing the My Lai Massacre in Vietnam, a particularly egregious example of what can happen when leadership exercises insufficient control over the actions of soldiers in the field engaged in counterinsurgency operations). One of the participants in the discussion noted that the laws of war are most effectively enforced by “strong leadership [sic] and convincing conduct on the part of those in command that the laws of war are of urgent importance and that strict adherence to them is the expectation of those in the chain of command.” Id. at 194.

121. See Gunningham & Johnstone, supra note 81, at 44–45 (“Rather than simply following prescriptive government regulations, management [under a standards regime] is encouraged to take the initiative and responsibility for deciding how to satisfy regulatory requirements.”).

122. See Korobkin, supra note 118, at 55–56.

123. See id. at 55.
about the norms the United States wants to promote; indeed, as argued in section III.B of this Note, these codes of practice reflect the United States military’s definite preference that soldiers not use force in COIN scenarios. It therefore seems logical to conclude that a standards regime like that suggested here—though requiring more trust in the judgment of the individual soldier than might be required under a rules framework—can still positively influence the soldier’s use-of-force decision-making process. In sum, the standards of engagement framework presented in this Note, involving increased reliance on standards that are supplemented by doctrinaire guiding principles known as counterinsurgency paradoxes, better responds to the unique nature of COIN operations. The standards of engagement framework will better equip the counterinsurgent to fight an elusive, difficult-to-identify enemy, better complement the population-centric nature of COIN warfare, and better appreciate the necessity for junior leaders and individual soldiers to make decisions that have broad, strategic consequences for the COIN fight.

CONCLUSION

The hypothetical situation proposed at the start of this Note is a serious affair. The decision to shoot or not shoot comes with consequences that reverberate from the personal to the strategic, affecting not just the individual soldier and his target but also the ultimate success or failure of the United States’ COIN mission. Given the paramount importance of use-of-force decisions in COIN operations, leaders at every level in the chain of command owe their soldiers an honest, clear ROE policy. This Note proposes two improvements to current ROE regimes. One recommendation is to embrace the “standards of engagement” concept, resisting the urge to overregulate combat, and keeping the guidelines used by soldiers to determine what, when, and where to shoot broadly written, with ample room for the soldier to analyze the situation on the ground before deciding on the use of force. In order to assist the soldier in his decision, the second recommendation is to provide “codes of practice” that honestly communicate the COIN commander’s preference against the use of force in most situations. The best means for this communication is to include select “counterinsurgency paradoxes” from the new Army and Marine Corps Counterinsurgency Field Manual on the ROE cards issued to every soldier in a combat zone. These two recommendations are merely a start, but they will go a long way toward encouraging United States military personnel to actively engage in the thinking soldier’s war. Under this new framework, the eighteen-year-old private first class will recognize that his leaders trust him to make a decision based on hundreds of unpredictable factors, he will understand that what it takes to win in a COIN environment might sometimes mean exercising extreme restraint and patience with the local population, and he will become confident that—when faced with that agonizingly difficult, life-or-death use-of-force decision—he is ready.