CANNON FODDER, OR A SOLDIER'S RIGHT TO LIFE

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ABSTRACT

In recent years, hundreds of American service members have died in training exercises and routine non-combat operations, aboard American warships, tactical vehicles, and fighter planes. They have died in incidents that military investigations and congressional hearings and journalists deem preventable, incidents stemming from the U.S. government delaying maintenance of deteriorating equipment or staffing vessels with crews that are too small or sending soldiers and sailors and marines on missions with inadequate training. After someone dies, high-level officials sign off on investigations, declare that those lost will not be forgotten, and occasionally institute changes in training or maintenance. Meanwhile, the law and legal scholarship say nothing about the government's failures to train and equip service members, reflecting and reinforcing the notion that soldiers offer illimitable service to the state but cannot ask for even the most basic legal protections in return.

These deaths, and the government failures that precede them, have been absent from legal scholarship, but this Article surfaces them and centers them. While U.S. law offers no way to reckon with the lapses in leadership at the heart of such incidents, international human rights law has provided an architecture for understanding government accountability for failures to adequately train or equip service members. And yet, these events continue to go unnoticed.

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This Article documents the human rights community's neglect of these events and of the opportunity to give legal significance to the U.S. government's failure to protect its own service members, and it situates this neglect in the broader, long-standing conception of soldiers as mere instruments of the state. The corpus of human rights law thus provides a set of categories and doctrines to name and classify the government's conduct, and it also offers, through its recognition of the legitimacy of a soldier's claims upon their government, a necessary corrective to a culture of treating American service members as volunteering for unquestioning sacrifice.

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INTRODUCTION

The term "cannon fodder" is conventionally traced to Shakespeare's *Henry IV, Part 1*. The play depicts a process of reconciliation between father and son; King Henry IV must quell a rebellion, and Prince Hal transforms from wayward youth into a valiant fighter. Along the way, Prince Hal's friend Falstaff, technically a nobleman but penniless and disreputable, contributes to the war effort by taking bribes from "good householders, yeoman's sons" who can pay to avoid going to war, while gathering up

instead a motley crew of men "as ragged as Lazarus" to send to battle.[1] When Hal encounters this band of would-be warriors, he derides them as "pitiful rascals," but Falstaff—a comic figure who betrays both his heartlessness and his willingness to name the exploitation in which he himself participates—protests that they are fit to serve their purpose: "Tut, tut; good enough to toss; food for powder, food for powder; they'll fill a pit as well as better."[2]

Much has changed since the days of Shakespeare. The singsong "food for powder" mutated, first emerging in German as *kanonenfutter*, before jumping back to English in the current form we now know.[3] War, too, has transformed. Today, war is no longer recognized as a legitimate instrument of foreign policy.[4] Today, a robust body of law governs both the resort to armed force and the conduct of hostilities.[5] Today, the term "cannon fodder" is no longer played for laughs.[6]

And yet, the status of military service members remains murky. We might shift uncomfortably in our seats when Falstaff jokes about the disposable nature of these warriors, but what does it mean to respect the lives of soldiers?[7] In the United States, the answer to this question usually relates to how we treat service members when they return home. We offer them thanks for their service, proper medical care and mental health support, access to education and jobs.[8] On the floor of the House of Representatives, during a debate on a military appropriations bill, Representative Bob Filner embraced these practices as an American tradition, one with roots all the way back to the founding: "General Washington said over 220 years ago," declared Filner, "The single most important factor in the morale of our fighting troops is a sense of how they're going to be treated when they come

1. WILLIAM SHAKESPEARE, HENRY IV, PART 1 act 4, sc. 2, ll. 2382, 2392.

2. *Id.* ll. 2433–35.

3. CHARLES EDELMAN, SHAKESPEARE'S MILITARY LANGUAGE: A DICTIONARY 132–33 (2000).

4. *See* U.N. Charter art. 2 (prohibiting non-defensive use or threat of armed force by states); MARY ELLEN O'CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY & PRACTICE OF ENFORCEMENT 180 (2008); *see also* Saira Mohamed, *Restructuring the Debate on Unauthorized Humanitarian Intervention*, 88 N.C. L. REV. 1275, 1317–21 (2010) (discussing the nature of military force as a community instrument under the U.N. Charter system). *See generally* OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD (2017).

5. *E.g.*, Jakob Kellenberger, *Foreword to* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME 1: RULES xv, xv–xvii (2009).

6. *See* David Ellis, *Falstaff and the Problems of Comedy*, 34 CAMBRIDGE Q. 95, 99–100 (2005).

7. This Article uses "soldier" in the colloquial sense, that is, to describe a person who serves in the military. The term thus includes not only those in a state's army, but also services such as the air force or navy. *See Soldier*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2012).

8. *E.g.*, Phillip Carter, *What America Owes Its Veterans: A Better System of Care and Support*, FOREIGN AFFS., Sept./Oct. 2017, at 115.

home."[9]

We say less, however, about what happens to service members while they are serving. When they are fighting wars, yes, we "support the troops"—that much is a "fixed point[] of American politics."[10] But there is little public discourse, and hardly any legal scholarship, on the U.S. government's obligations to adequately protect soldiers—despite an urgent need for it. War is of course a dangerous business, one that—in what might be described at the same time as a deal with the devil and a simple reflection of state interests—international law has continued to allow, even with the advent of the corpus of human rights law.[11] But service members are dying and suffering severe injuries not only at the hands of the enemy on the battlefield, but also in incidents deemed "unacceptable" and "preventable" even by military leaders. In the early days of the Iraq War, for example, a secret study by the U.S. Department of Defense found that some eighty percent of marines who died from upper-body wounds could have survived if they had extra body armor—armor that was available but that the Pentagon decided not to provide.[12] These failures of prevention and protection are not limited to combat. In the last fifteen years, hundreds of American service members have died during training exercises and routine non-combat operations, aboard American warships and tactical vehicles and fighter planes.[13] They are given deteriorating equipment or crews that are too small or inadequate training. After someone dies, high-level officials sign off on investigations, declare that those lost will not be forgotten, and occasionally institute changes in training or maintenance.[14]

9. 154 Cong. Rec. 9238 (2008) (statement of Rep. Bob Filner); *see also, e.g.*, Loretta Sanchez, *What We Owe Our Troops*, HILL (May 20, 2015, 8:35 PM), https://thehill.com/special-reports/tommorrows-troops-may-21-2015/242772-what-we-owe-our-troops [https://perma.cc/PY73-FPPV].

10. Cheyney Ryan, *Democratic Duty and the Moral Dilemmas of Soldiers*, 122 ETHICS 10, 18–19 (2011).

11. *See* Karima Bennoune, *Toward a Human Rights Approach to Armed Conflict: Iraq 2003*, 11 U.C. DAVIS J. INT'L L. & POL'Y 171, 174–75 (2004); Frédéric Mégret, *What Is the Specific Evil of Aggression*, *in* THE CRIME OF AGGRESSION: A COMMENTARY 1398, 1432 (Claus Kreß & Stefan Barriga eds., 2017); Thomas W. Smith, *Can Human Rights Build a Better War?*, 9 J. HUM. RTS. 24, 24 (2010).

12. Michael Moss, *Pentagon Study Links Fatalities to Body Armor*, N.Y. TIMES (Jan. 7, 2006), https://www.nytimes.com/2006/01/07/politics/pentagon-study-links-fatalities-to-body-armor.html [https://perma.cc/JF67-55P9].

13. *See, e.g.*, NAT'L COMM'N ON MIL. AVIATION SAFETY, REPORT TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES 1 (2020) [hereinafter NCMAS REPORT]; NAT'L TRANSP. SAFETY BD., NTSB/MAR-19/01 PB2019-100970, MARINE ACCIDENT REPORT: COLLISION BETWEEN US NAVY DESTROYER *JOHN S MCCAIN* AND TANKER *ALNIC MC*, SINGAPORE STRAIT, 5 MILES NORTHEAST OF HORSBURGH LIGHTHOUSE, AUGUST 21, 2017, at 21 (2019) [hereinafter NTSB REPORT].

14. *See, e.g.*, *Hearing to Receive Testimony on the United States Indo-Pacific Command and United States Forces Korea in Review of the Defense Authorization Request for Fiscal Year 2020 and the Future Years Defense Program: Hearing Before the S. Comm. on Armed Servs.*, 116th Cong. 82 (2019) [hereinafter *Indo-Pacific Command Hearing*] (statement of Admiral Philip S. Davidson) (explaining that

Meanwhile, the law nearly completely ignores these events. When congressional hearings are convened in the aftermath of these events, their focus is on military readiness, overshadowing questions of the legal obligations of the government or the legal rights of service members.[15] Legal scholarship, despite robust engagement on crucial questions of human rights in wartime,[16] generally focuses on protections for civilians and enemy soldiers, neglecting discussion of what a government owes its service members in proper training, well-maintained equipment, or sufficiently staffed crews.[17] In the pages of U.S. law reviews, the main focus of any analysis of government accountability to service members is the *Feres* doctrine, which prevents civil suits against the government for injuries sustained incident to military service.[18] But entirely overlooked are the deaths and injuries that stem from inadequate training and shoddy equipment, from putting lives at risk in order to speed operational tempo or rush into deployment. Their absence from the literature suggests that they are seen as routine, part of the job, part of the unquestioning sacrifice for which these individuals have willingly volunteered. Soldiers are expected to give of themselves completely; because they accept the possibility of death on the battlefield on account of their military service, it seems, they must accept the possibility of death outside of it, too. Even if no longer cannon fodder, in the national socio-legal imaginary[19] they have been endowed with

he "produced a 170-page report with 58 recommendations" after the two Naval collisions of 2017 and that "the Navy has been moving out on those recommendations to provide the kind of unit personnel training, to provide advice and resources to the type commanders, the fleet commanders, the Naval Systems Command, all with recommendations to improve [the] situation").

15. *See, e.g.*, *Navy Readiness—Underlying Problems Associated with the USS* Fitzgerald *and USS* John S. McCain*: Hearing Before the Subcomm. on Readiness & Subcomm. on Seapower and Projection Forces of the H. Comm. on Armed Servs.*, 115th Cong. 21 (2017) [hereinafter *Joint Subcommittees 2017 Hearing*]; *Recent United States Navy Incidents at Sea: Hearing Before the S. Comm. on Armed Servs.*, 115th Cong. 6 (2017) [hereinafter *SASC September 2017 Hearing*]. During the Senate Armed Services Committee Hearing, Senator John McCain emphasized obligation during his opening remarks, when he noted "our sacred obligation to look after the young people who . . . serve in [our] military." *SASC September 2017 Hearing*, *supra*, at 3.

16. *See, e.g.*, INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW (Orna Ben-Naftali ed., 2011) (collecting essays on interaction between international humanitarian law and human rights law); THEORETICAL BOUNDARIES OF ARMED CONFLICT AND HUMAN RIGHTS (Jens David Ohlin ed., 2016) (same).

17. *See infra* notes 205–07 and accompanying text (discussing limited scholarship on these questions); Saira Mohamed, *Abuse by Authority: The Hidden Harm of Illegal Orders*, 107 IOWA L. REV. 2183, 2212–17 (2022) (discussing international law obligations of a state toward its own soldiers).

18. *See* Feres v. United States, 340 U.S. 135, 146 (1950); *infra* Section II.A (discussing the *Feres* doctrine).

19. *See* CHARLES TAYLOR, MODERN SOCIAL IMAGINARIES 23–26 (2003) (explaining the idea of the "social imaginary," on which the concepts of the legal imaginary and sociolegal imaginary draw, as "the ways people imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations that are normally met, and the deeper normative notions and images that underlie these expectations"); *see also* CORNELIUS CASTORIADIS, THE IMAGINARY

a different kind of inhumanity, as individuals whose service is seemingly illimitable, who give their lives but are permitted to ask almost nothing from the governments they serve.[20]

Across the Atlantic, international human rights law paints a starkly different picture. In 2013, the United Kingdom Supreme Court held in *Smith v. Ministry of Defence* that the British government has an affirmative obligation under human rights law to protect the lives of service members.[21] The suit was initiated by the families of three British soldiers who had been killed in Iraq by roadside bombs when they were traveling in Snatch Land Rovers, vehicles that the government had initially developed in the 1990s to grab suspects off the street in Northern Ireland. As dozens more soldiers died in those vehicles, the Snatch Rovers came to be known in the wars in Iraq and Afghanistan as "mobile coffins"—a far cry from the level of protection that was needed, said the soldiers, their families, and, as would be later revealed, the government itself.[22] The Court held not only that the government's obligations under the European Convention on Human Rights extends to military service members deployed overseas, but also that the government's decision to use vehicles that would not adequately protect those individuals could be a violation of its Convention obligations.[23] In the vision of human rights law, the soldier is not expected to sacrifice everything for the state. Instead, the government is expected to fulfill a duty toward the soldier, just as it is expected to protect any other person under its care.

This Article takes as its starting point the juxtaposition of these two vastly contrasting approaches—on the one hand, the expectation of complete sacrifice by a soldier, and on the other, the expectation that the government owes a duty of care to the soldier even while the soldier takes on the significant risks inevitably imposed by the position. From this foundation, it makes two contributions. First, the Article documents the absence of engagement by scholars and practitioners of human rights with the question of U.S. government failures to adequately train and equip military service members. Even though human rights instruments applicable to the United States—including the International Covenant on Civil and Political Rights

INSTITUTION OF SOCIETY 145 (Kathleen Blamey trans., 1987) (describing the social imaginary as that "which gives a specific orientation to every institutional system, . . . the source of that which presents itself in every instance as an indisputable and undisputed meaning, the basis for articulating what does matter and what does not").

20. *See infra* Section III.A.2.

21. *See* Smith v. Ministry of Defence [2013] UKSC 41.

22. James Sturcke, *SAS Commander Quits in Snatch Land Rover Row*, Guardian (Nov. 1, 2008, 5:17 AM), https://www.theguardian.com/uk/2008/nov/01/sas-commander-quits-afghanistan [https://perma.cc/5926-2JJ8]; COMM. OF PRIVY COUNS., 11 THE REPORT OF THE IRAQ INQUIRY 23–24 (2016) [hereinafter CHILCOT REPORT].

23. *See infra* Section II.B.

("ICCPR") and the American Declaration on the Rights and Duties of Man—could provide the basis for interpretations similar to *Smith* in the European system, scholars and advocates have entirely neglected any exploration of whether or how the many failures of the U.S. government leading to service member injuries and deaths may constitute violations of its human rights obligations.[24] This Article fills that gap. Second, the Article situates this neglect within the law's broader failure to recognize the soldier as an individual endowed with human rights, and it analyzes the consequences of conceiving of soldiers as rights-bearers. Debating the government's obligation to train and equip service members through the language and legal framework of rights emphasizes that soldiers are agents, not mere instruments of the state who can be disposed of however the government chooses. In so doing, recognition of the soldier's human rights can chip away at the expectations of unquestioning sacrifice that pervade social and legal treatment of service members.

This Article intervenes in a burgeoning literature on the applicability of international human rights in armed conflict and specifically on the meaning of the right to life in armed conflict. As bodies such as the International Court of Justice and the Human Rights Committee have articulated the scope and application of particular human rights in armed conflict,[25] some scholars have considered how and whether obligations of the law of war, such as the principle of distinction and the requirement of proportionality in attack, should be interpreted to incorporate the human rights protection against arbitrary deprivation of life.[26] Others, meanwhile, have argued that the criminalization of aggression should be understood as rooted in the protection of the right to life in armed conflict.[27] Overlooked in this literature, however, have been the deaths of service members described by journalists and members of Congress and official government investigations

24. *See infra* Section III.A.

25. *See, e.g.*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9); Armed Activities on the Territory of the Congo (Dem. Rep. of the Congo v. Uganda), Judgment, 2005 I.C.J. 168 (Dec. 19); Hum. Rts. Comm., General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, ¶¶ 64, 69–70, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018) [hereinafter General Comment 36].

26. *See, e.g.*, MICHAEL NEWTON & LARRY MAY, PROPORTIONALITY IN INTERNATIONAL LAW 121–54 (2014); Evan J. Criddle, *Proportionality in Counterinsurgency: Reconciling Human Rights and Humanitarian Law*, *in* COUNTERINSURGENCY LAW: NEW DIRECTIONS IN ASYMMETRIC WARFARE 24, 34 (William Banks ed., 2013).

27. *See* TOM DANNENBAUM, THE CRIME OF AGGRESSION, HUMANITY, AND THE SOLDIER 13 (2018); Mégret, *supra* note 11, at 1428, 1440–44; *see also* Eliav Lieblich, *The Humanization of Jus ad Bellum: Prospects and Perils*, 32 EUR. J. INT'L L. 579, 581 (2021).

as "preventable"[28]: deaths that are traced to failures to properly maintain ships and aircraft and land vehicles and their treads and navigation systems and propellor blades; deaths that stem from failures to adequately train service members to use the equipment they are responsible for;[29] deaths that—like those of Phillip Hewett and Lance Ellis, the British soldiers whose deaths gave rise to *Smith*—can be traced to decisions on the part of the state to underequip soldiers for combat.[30]

It is these deaths that the *Smith* case and its underlying principles speak to but that human rights law and scholarship have not yet adequately considered. And it is these deaths to which this Article turns its attention, not only explaining the relevance of human rights law in identifying the U.S. government's responsibility for training and equipping its service members, but also offering a normative argument for why rendering these deaths a matter of human rights law should form a part of the larger human rights project of subjecting war to its regulation.[31] In short, this Article hopes to do these soldiers justice.

28. *E.g.*, *Update on Navy and Marine Corps Readiness in the Pacific in the Aftermath of Recent Mishaps, Hearing Before the Subcomm. on Seapower and Projection Forces & the Subcomm. on Readiness of the H. Comm. on Armed Serv.*, 116th Cong. 2 (2020) (statement of Hon. Robert J. Wittman, Ranking Member, Subcomm. on Seapower and Projection Forces) (describing "loss of life associated with Navy surface forces and Marine Corps aviation forces" as "preventable"); *id.* at 4 (statement of Hon. John Garamendi, Chair, Subcomm. on Readiness) (describing sailors and marines' deaths in surface ship and aviation incidents as "preventable"); U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-361, MILITARY VEHICLES: ARMY AND MARINE CORPS SHOULD TAKE ADDITIONAL ACTIONS TO MITIGATE AND PREVENT TRAINING ACCIDENTS 26 (2021); *see also* U.S. Dep't of the Navy, Report on the Collision Between USS *Fitzgerald* (DDG 62) and Motor Vessel *ACX Crystal* and Report on the Collision Between USS *John S. McCain* (DDG 56) and Motor Vessel *ALNIC MC* 20, 59 (2017), https://s3.document cloud.org/documents/4165320/USS-Fitzgerald-and-USS-John-S-McCain-Collision.pdf [https://perma. cc/5D5U-L52T] [hereinafter Navy Reports on *Fitzgerald* and *McCain*] (describing collisions as "avoidable"); Alex Horton & Gina Harkins, *Military's Effort to Reduce Deadly Vehicle Accidents Deemed Inadequate,* WASH. POST (July 14, 2021, 4:55 PM), https://www.washingtonpost.com/national-security/2021/07/14/military-rollover-deaths-gao-report [https://perma.cc/NWT9-9DWG] (discussing findings of a Government Accountability Office report on noncombat tactical vehicle accidents that the "military didn't take sufficient action to reduce . . . grievous, preventable incidents" causing the deaths of more than 120 service members in a decade).

29. *See infra* Part I.

30. *See* 11 CHILCOT REPORT, *supra* note 22, at 23–24.

31. This Article focuses on the U.S. military, but these concerns are not unique to the United States. The *Smith* case of course deals with the United Kingdom's involvement in Iraq, but the same concerns have been raised with respect to its military actions in Afghanistan, and the Italian government, too, has been accused of not adequately equipping its soldiers. Cecilia Åse, Monica Quirico & Maria Wendt, *Gendered Grief: Mourners Politicisation of Military Death*, *in* GENDERING MILITARY SACRIFICE: A FEMINIST COMPARATIVE ANALYSIS 145, 155 (Cecilia Åse & Maria Wendt eds., 2019). Similar questions could be raised regarding the lack of proper training and equipment of Israeli soldiers in the 2006 Lebanon War. *See* Press Release, PM Received the Final Winograd Report (Jan. 30, 2008), https://www. gov.il/en/Departments/news/spokewinog300108 [https://perma.cc/S443-6R8C]; *see also* ANTHONY H. CORDESMAN WITH GEORGE SULLIVAN & WILLIAM D. SULLIVAN, CTR. FOR STRATEGIC & INT'L STUD., LESSONS OF THE 2006 ISRAELI-HEZBOLLAH WAR 57–59, 92, 95–98 (2007).

This Article proceeds in three parts. To situate the arguments of this Article in recent events, Part I presents an account of two collisions of Navy destroyers that caused the deaths of seventeen sailors in 2017. The goal of this Part is primarily descriptive, as these are events that have clear parallels with the facts underlying *Smith* and that have clear legal implications, and despite that, they have received no dedicated attention in legal scholarship.[32] These collisions, replete with high-level leaders' preventable errors and even negligence, offer representative examples that ground Part II, which explains the legal characterizations that are available to describe these deaths under the frameworks available both in U.S. law and in international human rights law. Part III documents how and analyzes why situations like these collisions remain overlooked. It first explains how the human rights approach discussed in Part II could be used to seek accountability for the U.S. government's failures with respect to incidents like the *McCain* and *Fitzgerald* collisions, and so many more. It then turns to detailing and explaining the absence of any such efforts in human rights law and to analyzing the significance of a human rights framing of situations like the Navy collisions. Bringing human rights law to bear on the U.S. government's failures to adequately equip and train its troops not only makes clear that war is no longer off-limits to human rights as a general matter, but it also declares with the authority of law that soldiers are not to be sacrificed unquestioningly to the cause of war. By bringing service members' lives more squarely into its realm, human rights law rejects the notion that soldiers are mere cannon fodder to be disposed of however the state pleases.

I. AVOIDABLE ACCIDENTS AND LEADERSHIP LAPSES

"*Dulce et decorum est pro patria mori*"—"How sweet and fitting it is to die for one's country," wrote the Roman poet Horace, a line Wilfred Owen

32. As of July 2021, these events appear in a total of five articles in Westlaw's Law Reviews and Periodicals database, and in those five, their mention is limited to a few lines at most and is ancillary to arguments unrelated to government obligations to protect soldiers. *See* Michael C.M. Louis, *Dixie Mission II: The Legality of a Proposed U.S. Military Observer Group to Taiwan*, 22 ASIAN-PAC. L. & POL'Y J. 75, 112 (2021) (using the crashes as examples of the customary international law principle that "any foreign vessel in distress has a right of entry to any port"); Tod Duncan, Air & Liquid Systems Corporation v. DeVries*: Barely Afloat*, 97 DENV. L. REV. 621, 638 (2020) (noting a brief, in discussion of the doctrine of "special solicitude" afforded to sailors, that mentions the collisions as evidence for the assertion that "today's maritime work is precarious"); Justin (Gus) Hurwitz, *Designing a Pattern, Darkly*, 22 N.C. J.L. & TECH. 57, 79 (2020) (using the *McCain*'s touch-screen failures as "example[s] of the complexity and stakes of design decisions"); Arctic L. & Pol'y Inst., *Arctic Law & Policy Year in Review: 2017*, 8 WASH. J. ENV'T. L. & POL'Y 106, 220 (2018) (listing collisions in section on marine casualties and noting that they and other collisions "provide new insight into the risks posed by vessel traffic in the Arctic"); Erich D. Grome, *Spectres of the Sea: The United States Navy's Autonomous Ghost Fleet, Its Capabilities and Impacts, and the Legal Ethical Issues That Surround*, 49 J. MAR. L. & COM. 31, 43–44 (2018) (mentioning the *McCain* and *Fitzgerald* collisions to support an argument in favor of a "ghost fleet" that could avoid dangers posed to ships in the South China Sea region).

reconfigured in his searing condemnation of the horrors and meaninglessness of war.[33] A soldier's death has long been touted as the most honorable sacrifice, an offering tendered nobly in defense of one's country in a battle for the nation's survival, whether that means vanquishing an aggressive enemy or expanding territory or quelling an insurrectionist uprising. At the same time, a soldier's death has long been recognized as a devastating demonstration of the state's brute reliance on the powerless, its exploitation of those it treats as disposable. Whether valiant or tragic or both, death is an ever-present possibility for a service member.[34]

Still, the fact that death—or injury, for that matter—may be an inevitable consequence of military service does not mean that every death of a service member is inevitable. In the United States, even despite two ongoing wars, non-combat deaths have vastly outnumbered combat deaths, and recent years have seen the deaths of hundreds of service members in preventable incidents during routine training exercises.[35] Moreover, deaths during combat or other operations occur not only at the hands of the enemy, but also when equipment is not properly maintained, or when service members have not been trained to use the equipment for which they are responsible, or when insufficient staffing results in skimping on safety checks or training or even sleep. In the last few years, numerous American soldiers, sailors, and marines have died in incidents described by lawmakers and policymakers as "accidents" and lamented by the same actors as "preventable."[36] From "rollovers"—when a military vehicle flips upside-

33. WILFRED OWEN, Dulce et Decorum Est, *in* THE POEMS OF WILFRED OWEN 60, 60 (1994); *see* ELIZABETH VANDIVER, STAND IN THE TRENCH, ACHILLES: CLASSICAL RECEPTIONS IN BRITISH POETRY OF THE GREAT WAR 4, 107–08 (2010).

34. MARGARET MACMILLAN, WAR: HOW CONFLICT SHAPED US 152 (2020) (noting "[t]he ever-present possibility of death" as a unifying feature of war across "the cacophony of voices from so many times and so many places"); KARL MARLANTES, WHAT IT IS LIKE TO GO TO WAR 17 (2011) (commenting that in war, "death is just around the corner"); Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 115, 132 (2010) ("[T]he terms of engagement, as far as the soldiers are concerned, are that death on the battlefield is not only an occupational hazard, but also something the government has agreed to in advance as lawful and legitimate. . . . Not only do they undertake risk, in effect, they are expected to forfeit their right to life.").

35. CONGRESSIONAL RESEARCH SERVICE, TRENDS IN ACTIVE-DUTY MILITARY DEATHS SINCE 2006 (2021), https://fas.org/sgp/crs/natsec/IF10899.pdf [https://perma.cc/K3ZH-KNJV]; *see* Matthew Cox, *Lawmaker Calls for Public Hearing on "Disturbing Rise" in Deadly Military Training Accidents*, MILITARY.COM (Aug. 20, 2020), https://www.military.com/daily-news/2020/08/20/lawmaker-calls-public-hearing-disturbing-rise-deadly-military-training-accidents.html [https://perma.cc/HAJ2-AEDJ].

36. *E.g.*, *The AAV Mishap Investigation: How to Build a Culture of Safety to Avoid Preventable Training Accidents: Hearing Before the Subcomm. on Readiness of the H. Comm. on Armed Servs.*, 117th Cong. (2021); *see also* Memorandum from Commander, U.S. Marine Corps Forces, Pac. Command Investigation into the Facts and Circumstances Surrounding the 15th Marine Expeditionary Unit Assault Amphibious Vehicle Mishap That Occurred on 30 July 2020, at 13 (Feb. 25, 2021), https://s3.documentcloud.org/documents/20530547/aav_mishapfoia.pdf [https://perma.cc/TGY6-VXG5] [hereinafter Marine AAV Report]; Navy Reports on *Fitzgerald* and *McCain*, *supra* note 28, at 20, 59; *supra* note 28 (listing additional sources).

down or on its side—to crashes of fighter jets and destroyer ships and cargo planes, investigations have concluded that these deaths—along with the physical and psychological injuries sustained by so many others involved—stem from leaders' failures to maintain equipment, to train service members, to secure adequate staffing, and to refuse to take on missions for which equipment or individuals are not sufficiently ready.[37] Meanwhile, leaders identify lower-level individuals as most responsible, while they promise to do better next time.

This Part offers an account of such a series of developments—the collisions of two Navy warships, just a few weeks apart, in the summer of 2017—in order to situate the arguments of this Article in contemporary events. This Article does not claim that government negligence in equipping military service members is uniform. It is clear—and, indeed, fitting, given that service members are valuable resources to the government[38]—that in many contexts and in many ways military leadership takes seriously the lives of soldiers. Still, the government's conduct in the context of twenty-first century military operations reveals instances of carelessness, of willful neglect, of an acceptance of risk that amounts to a failure to protect.[39] A complete accounting is beyond the scope of this Article, and a complete accounting is not the point of this Article, for human rights protections do not pivot on the numerosity of violations.[40] Instead, in a system founded on

37. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 28, at 25; NCMAS REPORT, *supra* note 13, at 18–19; Memorandum from Fourth Marine Aircraft Wing, U.S. Marine Corps Reserve, Command Investigation into the Class A Aviation Mishap within Marine Aerial Refueler Transport Squadron 452 on 10 July 2017, at 21–58 (Aug. 20, 2018), https://www.jag.navy.mil/library/investigations/KC-130TJAGMANInvestigation31Aug2018(Redacted).pdf [https://perma.cc/FZ5B-L5QP] [hereinafter Mississippi Marine Investigation].

38. *See, e.g.*, U.S. ARMY, THE ARMY PEOPLE STRATEGY 3 (2019), https://www.army.mil/e2/downloads/rv7/the_army_people_strategy_2019_10_11_signed_final.pdf [https://perma.cc/D88V-JC3Z] (describing "our people" as "the Army's greatest strength and most important weapon system").

39. This Article focuses on recent events, but this is not a new problem. *See, e.g.*, U.S. GEN. ACCOUNTING OFF., GAO/NSAID-94-82, MILITARY TRAINING DEATHS: NEED TO ENSURE THAT SAFETY LESSONS ARE LEARNED AND IMPLEMENTED 2 (1994) ("The military is not doing enough to ensure that safety lessons from training-related deaths are learned and implemented."); NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH (NIOSH), CTRS. FOR DISEASE CONTROL & PREVENTION, DHHS (NIOSH) Publication Number 96-103, NATIONAL MORTALITY PROFILE OF ACTIVE DUTY PERSONNEL IN THE U.S. ARMED FORCES: 1980–1993 (1997), https://www.cdc.gov/niosh/docs/96-103/pdfs/96-103.pdf?id=10.26616/NIOSHPUB96103 [https://perma.cc/Y2XE-KF98]; Daniel Kutzler & Donna Kutzler, *The Army's Silence On Accidental Death*, N.Y. TIMES, Feb. 9, 1990, at A31 (asking, in light of Defense Department's estimate that more than 15,000 service members were killed in peacetime training accidents from 1979 to 1989, "Is the military accountable to anyone? Why is it allowed to keep making the same mistakes? How many more lives must be lost to senseless accidents?").

40. Indeed, during a Senate Armed Services Committee hearing, Admiral Philip Davidson, who in 2017 was Commander of U.S. Fleet Forces, emphasized that "we can't forget one other thing. . . . the fact of the matter is 280-odd other ships weren't having collisions." The comment was met by Senator Angus King, who had asked a question about the Navy's efforts to improve its practices, with seeming disbelief:

the dignity of individuals, any single violation suffices to merit attention. Accordingly, this Part lays out the facts of these two collisions, representing them for what they are: one site among many that has not—but should—trigger an inquiry about the failure of the U.S. government to fulfill its legal obligations to protect the human rights of service members.

A. THE CRASHES OF THE USS *FITZGERALD* AND THE USS *MCCAIN*

In June 2017, seven U.S. Navy sailors died when their ship, the USS *Fitzgerald*, collided with the *ACX Crystal*, a 29,000-ton cargo ship, off the coast of Japan.[41] The *Fitzgerald*, a 9,000-ton guided-missile destroyer, was conducting a secret mission in the South China Sea, doing its part in efforts to challenge China's expansive claims in the area.[42] The crash tore a massive hole in the starboard side of the ship, and it began to take on tens of thousands of gallons of water. It was the Navy's deadliest crash in four decades.[43]

The collision held that awful record until only nine weeks later, when the USS *McCain*, another guided-missile destroyer, crashed into a merchant ship in the narrow, congested Straits of Malacca on the way to Singapore.[44] Ten sailors died. Beyond the deaths that were caused by both collisions were additional physical harms—broken bones and chemical burns and lacerations and traumatic brain injuries.[45] Scores have reported suffering emotional distress and post-traumatic stress disorder in the years since the collisions.[46]

In the weeks after the crashes, the Navy relieved several leaders of their positions. After the *Fitzgerald* collision, the first individuals the government identified as responsible were the ship's "command triad"—the captain,

"Are you saying that there were no failures that led to these collisions because there were 280 ships that didn't have collisions? Isn't that the standard, no collisions?" *Indo-Pacific Command Hearing*, *supra* note 14, at 80–81.

41. Eric Schmitt, *Top Two Officers on Navy Ship in Deadly Collision Off Japan Are Relieved of Duties*, N.Y. TIMES (Aug. 17, 2017), https://www.nytimes.com/2017/08/17/world/asia/fitzgerald-collision-investigation.html [https://perma.cc/8BYT-5FCX].

42. *See* Jane Perlez, *Tribunal Rejects Beijing's Claims in South China Sea*, N.Y. TIMES (July 12, 2016), https://www.nytimes.com/2016/07/13/world/asia/south-china-sea-hague-ruling-philippines.html [https://perma.cc/L438-C6W3].

43. Robert Faturechi, Megan Rose & T. Christian Miller, *Years of Warnings, Then Death and Disaster*, PROPUBLICA (Feb. 7, 2019), https://features.propublica.org/navy-accidents/us-navy-crashes-japan-cause-mccain [https://perma.cc/PNH4-2ZLX].

44. *In re* Energetic Tank, Inc., No. 1:18-cv-01359-PAC, 2020 WL 114517, at *2–3 (S.D.N.Y. Jan. 10, 2020) (granting motion for application of foreign law).

45. Navy Reports on *Fitzgerald* and *McCain*, *supra* note 28, at 17, 20, 56.

46. Megan Rose, Kengo Tsutsumi & T. Christian Miller, *Warship Accidents Left Sailors Traumatized. The Navy Struggled to Treat Them.*, PROPUBLICA (Feb. 12, 2020, 1:12 PM), https://www.propublica.org/article/warship-accidents-left-sailors-traumatized-the-navy-struggled-to-treat-them [https://perma.cc/VF86-8XBW].

Bryce Benson, executive officer, Sean Babbitt, and command master chief, Brice Baldwin—as well as several more-junior officers.[47] A few days later, by which point the *McCain* had also crashed, Navy leadership removed Joseph Aucoin, the commander of the Seventh Fleet, which covers the Western Pacific Ocean and the Indian Ocean.[48] Next came the dismissal of the *McCain*'s top leadership, commanding officer Alfredo J. Sanchez and executive officer Jessie L. Sanchez.[49] In explaining these decisions, Navy leaders cited these individuals' "poor leadership,"[50] "poor seamanship," and "flawed teamwork."[51]

Later in 2017, the Navy released reports on each collision, determining that the incidents were "avoidable."[52] Both reports found that "[m]any of the decisions made that led to this incident were the result of poor judgment and decision making of the Commanding Officer" and that "[t]he crew was unprepared for the situation in which they found themselves through a lack of preparation, ineffective command and control, and deficiencies in training and preparations for navigation."[53] The reports, and Navy leadership, focused their attention in particular on the individuals on board the ships. In January 2018, the Navy announced that it would prosecute the two ships' commanding officers, Benson and Sanchez, as well as three more-junior officers, for negligent homicide—a charge experts described as "unprecedented."[54] Professional consequences were to be expected after events like these, but seeking criminal responsibility for the deaths was unheard of.

47. Robert Burns, *Warship Captain in Collision that Killed 7 to Lose Command*, AP NEWS (Aug. 17, 2017), https://apnews.com/article/japan-ap-top-news-international-news-navy-asia-pacific-42275f9372b74fba871da0a9553e6788 [https://perma.cc/9KKR-X28J].

48. Faturechi et al., *supra* note 43.

49. Eric Schmitt, *2 Top Officers of Navy Ship* John S. McCain *Are Removed*, N.Y. TIMES (Oct. 10, 2017), https://www.nytimes.com/2017/10/10/us/politics/navy-ship-john-s-mccain-officers-removed.html [https://perma.cc/SHH6-WBTC].

50. *Id*.

51. Burns, *supra* note 47.

52. Memorandum from the Department of the Navy, Office of the Chief of Naval Operations, *in* Navy Reports on *Fitzgerald* and *McCain*, *supra* note 28.

53. *Id.* at 20 (reporting on *Fitzgerald*); *see also id.* at 59 (reaching the same findings on *McCain*).

54. Megan Rose, *Blame Over Justice: The Human Toll of the Navy's Relentless Push to Punish One of Its Own*, PROPUBLICA (Nov. 20, 2019, 5:00 AM), https://www.propublica.org/article/blame-over-justice-the-human-toll-of-the-navy-relentless-push-to-punish-one-of-its-own [https://perma.cc/MK3M-G87D]; *see* Lolita C. Baldor, *Navy Ship Collisions Prompt Rare Criminal Charges*, AP NEWS (Jan. 17, 2018), https://apnews.com/article/014c45097ac04147ad967a55b8b7c2c5 [https://perma.cc/Q7JC-FJK6]; Thomas Gibbons-Neff, *Navy Seeks to Prosecute Top Officers for Crashes,* N.Y. TIMES (Jan. 16, 2018), https://www.nytimes.com/2018/01/16/us/politics/navy-discipline-destroyer-collisions.html [https://perma.cc/Q875-B829]; Sam LaGrone, *USS* Fitzgerald *Combat Team Unaware of Approaching Merchant Ship Until Seconds Before Fatal Collision*, USNI NEWS (May 10, 2018, 9:59 PM), https://news.usni.org/2018/05/10/uss-fitzgerald-combat-team-unaware-approaching-merchant-ship-seconds-fatal-collision [https://perma.cc/CL6J-ZXEU].

B. LEADERSHIP FAILURES

While the Navy was pursuing accountability for crew members whom it identified as responsible for the crashes, reporting by journalists at *ProPublica* revealed that Navy and Pentagon leaders had been warned for years that the crews were undertrained and overworked and that the American fleet of warships desperately needed crucial technology upgrades and repairs. As early as 2013, for example, Admiral Thomas Copeman, who had responsibility for ensuring ships' readiness for combat, had been telling superiors that crews lacked sufficient training and experience, but he received no response. He even stated publicly, during a keynote address at the annual conference of the Surface Navy Association, that the Navy needed to invest in fixing its existing fleet and training its sailors, not solely in building new, "hugely expensive" ships.[55] Copeman was reprimanded for not supporting the "shipbuilding agenda" of the Secretary of the Navy and the Chief of Naval Operations.[56] Joseph Aucoin, the commander of the Seventh Fleet who was dismissed from his position soon after the *Fitzgerald* and *McCain* collisions, had started to warn his superiors about the dangers facing the Navy in 2015, as soon as he took the post. Aucion noted that

> [t]he fleet was short of sailors, and those it had were often poorly trained and worked to exhaustion. Its warships were falling apart, and a bruising, ceaseless pace of operations meant there was little chance to get necessary repairs done. The very top of the Navy was consumed with buying new, more sophisticated ships, even as its sailors struggled to master and hold together those they had. The Pentagon, half a world away, was signing off on requests for ships to carry out more and more missions.[57]

Aucoin made his concerns known in memos detailing data on the ships, the sailors, and the missions, but he received no response.[58]

It was not only individuals within the Navy who were identifying massive shortfalls and communicating concerns about equipment and training to government leadership. The Government Accountability Office ("GAO"), too, warned in 2015 that because of the high operational tempo for ships based overseas, the Navy was skimping on training for the sailors on those vessels, and as a result crews did not have the required certifications—the routine checks on a crew's proficiency in anything from

55. Sandra I. Erwin, *Admiral Warns Combat Ship Readiness in Downward Spiral*, NAT'L DEF. (Jan. 15, 2013), https://www.nationaldefensemagazine.org/articles/2013/1/15/admiral-warns-combat-ship-readiness-in-downward-spiral [https://perma.cc/P2XH-QS59].

56. Faturechi et al., *supra* note 43.

57. *Id*.

58. *Id*.

driving the ship to air warfare.[59] The GAO learned in the course of its study leading to that report that Navy officials had developed what it called a "train on the margins" approach—a term that John Pendleton, the GAO lead for issues of force structure and readiness, testified before Congress he had never heard before,[60] and that refers to a policy of squeezing in trainings between operations because there was "little to no dedicated training time set aside."[61] In addition, the Navy was "consistently deferr[ing] maintenance" on ships, resulting in their "long-term degraded material condition."[62] After the GAO reported its findings, the Defense Department sent a written response that said the Navy was "well aware of the risk" and that "[t]he decision to accept these risks was ultimately based on the operational decision to provide increased presence to meet combatant commander requirements" and accepted them as the cost of increasing its presence in the region.[63] In other words, leadership believed the risks associated with ramping up the pace of operations in the Pacific was worthwhile.[64] At the same time, Navy leaders also said they would shift the deployment schedule so that overseas ships' crews would have dedicated time for training. In 2017, after the collisions, Pendleton reported that that still had not happened. The number of expired certifications, meanwhile, had ballooned to more than five times the 2015 level.[65]

The *ProPublica* investigation, which earned the journalists a Pulitzer Prize,[66] demonstrated not only that military leaders had been aware of the risks to Navy personnel for years, but also that these problems of sailors' lack of experience, lack of training, and lack of sleep, and the ships' and equipment's lack of maintenance and safety checks, played a direct role in the crashes of the *McCain* and the *Fitzgerald*. On the *Fitzgerald*, for example, the radars were not properly functioning, a problem that had been known since 2012. The crew was too small and was not sufficiently trained.

59. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-329, NAVY FORCE STRUCTURE: SUSTAINABLE PLAN AND COMPREHENSIVE ASSESSMENT NEEDED TO MITIGATE LONG-TERM RISKS TO SHIPS ASSIGNED TO OVERSEAS HOMEPORTS 14–15, 24–25 (2015) [hereinafter GAO 2015 REPORT].

60. *Joint Subcommittees 2017 Hearing*, *supra* note 15, at 9 (statement of John H. Pendleton, Director, Defense Force Structure and Readiness, U.S. Government Accountability Office).

61. GAO 2015 REPORT, *supra* note 59, at 24.

62. *Id.* at 29.

63. *Joint Subcommittees 2017 Hearing*, *supra* note 15, at 9 (statement of John H. Pendleton, Director, Defense Force Structure and Readiness, U.S. Government Accountability Office) (quoting Defense Department response); *see also* Faturechi et al., *supra* note 43 (discussing exchange between GAO and Defense Department).

64. Pendleton called this decision a "bad gamble" during his Senate testimony in September 2017. *Joint Subcommittees 2017 Hearing*, *supra* note 15, at 9.

65. *Id.*; *see also* Faturechi et al., *supra* note 43 (discussing post-collision certifications).

66. *The 2020 Pulitzer Prize Winner in National Reporting*, PULITZER PRIZES, https://www.pulitzer.org/winners/t-christian-miller-megan-rose-and-robert-faturechi-propublica [https://perma.cc/9LLF-TMWS].

Maintenance operations that had been planned for the spring of 2017 were curtailed or in some cases cancelled because the Navy, struggling to respond to what it judged to be urgent threats in the region, repeatedly ordered the ship to undertake new missions.[67]

On the *McCain*, meanwhile, the crew was understaffed. The officer who was supposed to teach the sailors the steering system hardly knew how to do it themselves. A survey of the sailors the year before found that many reported that they were "doing maintenance without fully understanding what they were doing" and that the maintenance being provided for the ship was like "putting a Band-Aid on equipment to make senior leadership happy."[68] And no one knew how to use the ship's new touchscreen navigation system, the design of which the National Transportation Safety Board found "increased the likelihood of the operator errors that led to the collision."[69] The Navy's Comprehensive Review of the collisions found that the crew of the *McCain* "did not have the training or knowledge" on how to use the steering controls of the new navigation system.[70] The report further found that the navigation system's "known vulnerabilities . . . ha[d] not been clearly communicated" to the individuals responsible for operating it.[71]

Because the military system requires adherence to all lawful superior orders, the demands from leadership to press forward with missions despite urgent safety concerns were bound to be fulfilled. Refusal to comply with an order can be the basis for a court martial and dishonorable discharge.[72] No one could refuse a mission because of lack of training or shoddy maintenance. If the order from a superior was to carry out an operation, there was simply no opportunity to refuse it. Indeed, in startling public remarks a few months after the collisions, U.S. Commander of Fleet Forces Philip Davidson—the individual responsible for ensuring the fleet was "properly trained and equipped"[73]—made that much clear. When Davidson received a

67. Faturechi et al., *supra* note 43.

68. *Id*.

69. NTSB REPORT, *supra* note 13, at 33, *quoted in* T. Christian Miller, Megan Rose, Robert Faturechi & Agnes Chang, *Collision Course*, PROPUBLICA (Dec. 20, 2019), https://features.propublica.org/navy-uss-mccain-crash/navy-installed-touch-screen-steering-ten-sailors-paid-with-their-lives [https://perma.cc/M2XU-KDVZ].

70. U.S. DEP'T OF THE NAVY, U.S. FLEET FORCES COMMAND, COMPREHENSIVE REVIEW OF RECENT SURFACE FORCE INCIDENTS 39 (2017).

71. *Id.*; *see also* Miller et al., *supra* note 69.

72. 10 U.S.C. §§ 890–892 (setting forth criminal penalties for an individual covered by the Uniform Code of Military Justice who "willfully disobeys," "violates," or "fails to obey" lawful orders); *see also* YORAM DINSTEIN, THE DEFENCE OF 'OBEDIENCE TO SUPERIOR ORDERS' IN INTERNATIONAL LAW 27 (Oxford Univ. Press ed. 2012) (1965).

73. Ben Werner, *Lawmakers Press NORTHCOM, PACOM Nominees on Strategies for Handling China*, USNI NEWS (Apr. 17, 2018, 4:24 PM), https://news.usni.org/2018/04/17/lawmakers-press-northcom-pacom-nominees-on-strategies-for-handling-china [https://perma.cc/M45D-DX28].

question during a talk to Naval commanders and officers about whether they could "actually push back on orders to sail" if they believed a ship was not ready, Davidson responded: "If you can't take your ships to sea and accomplish the mission with the resources you have . . . then we'll find someone who will."[74] The message was clear: you're in, or you're out.

In the months after the collisions, as the Navy and other investigatory bodies recommended system-wide changes to avoid a repeat of the events in the future, Bryce Benson—the *Fitzgerald*'s commander—continued to fight the homicide charges the Navy had announced against him. Alfredo Sanchez, as well as the other officers who had been charged with negligent homicide, pleaded guilty in the meantime to other, lesser charges.[75] The Navy eventually dropped the charges against Benson, explaining the decision only as one made "in the best interests of the Navy."[76] Military investigations, congressional inquiries, and *ProPublica*'s reporting established that responsibility for the crashes lay not solely in the hands of those who had made decisions and took action in the moments immediately leading up to and during the collisions, but also with the top U.S. military leadership—a fact seemingly confirmed by the Navy's promises that it would change staffing and training practices, ensure that sailors get more sleep, keep up ships' maintenance, and prioritize repairs and manageable, functioning equipment over new ships and new missions.[77]

* * *

This account is only one of many. In 2017 alone, before the collisions of the *McCain* and the *Fitzgerald*, the guided missile cruiser USS *Lake Champlain* lost track on its radar of a South Korean fishing boat in the Sea

74. Robert Faturechi & T. Christian Miller, *Navy Promised Changes After Deadly Accidents, but Many Within Doubt It's Delivering on Them*, PROPUBLICA (Feb. 26, 2019, 4:00 AM), https://www.propublica.org/article/navy-accident-changes-fitzgerald-mccain-davidson [https://perma.cc/WK9G-MKG4].

75. Sam LaGrone, *Former USS* Fitzgerald *CO Benson to Retire as Commander Next Month*, USNI NEWS (Nov. 20, 2019, 5:37 PM), https://news.usni.org/2019/11/20/former-uss-fitzgerald-co-benson-to-retire-as-commander-next-month [https://perma.cc/6VB6-VUL9]; Sam LaGrone, *Navy Drops Homicide Charges Against USS* Fitzgerald *Commander, Junior Officers*, USNI NEWS (June 19, 2018, 3:09 PM), https://news.usni.org/2018/06/19/navy-drops-homicide-charges-uss-fitzgerald-commander-junior-officers [https://perma.cc/MB7F-88EX]; Sam LaGrone, *Former USS* Fitzgerald *Officer Pleads Guilty to Negligence Charge for Role in Collision*, USNI NEWS (May 9, 2018, 6:35 AM), https://news.usni.org/2018/05/08/former-uss-fitzgerald-officer-pleads-guilty [https://perma.cc/GT5J-QJ4W].

76. Eric Litke, *Navy Drops Charges, Levels Blame Against Wis. Commander over USS* Fitzgerald *Deaths*, MILWAUKEE J. SENTINEL (Apr. 12, 2019, 3:18 PM), https://www.jsonline.com/story/news/2019/04/12/court-martial-against-navy-commander-wisconsin-took-unusual-turn-week-when-military-judge-disqualifi/3449808002 [https://perma.cc/Y5CK-PW33].

77. *E.g.*, *Indo-Pacific Command Hearing*, *supra* note 14; *see also* Faturechi & Miller, *supra* note 74.

of Japan and collided into it;[78] and the USS *Antietam*, part of the same class of warships, ran aground in Tokyo Bay earlier that year.[79] Those lapses did not cause any injuries. But in other services, and in other events, service members were injured and killed in incidents that demonstrate systemic lack of attention to safety and a broader pattern of government negligence. In the summer of 2020, for example, eight marines and one sailor—all between the ages of eighteen and twenty-two—died when the thirty-six-year-old amphibious assault vehicle ("AAV") that they were navigating sunk off the coast of San Clemente Island during a training mission.[80] The "mishap"—the official term used to describe an "unplanned event that results in personal injury or property damage"[81]—"was preventable," wrote Lieutenant General Steven Rudder, the commander of the Marine Corps Forces Pacific.[82] The subsequent Navy investigation cited a number of causes. Some were about the particular choices of the individuals involved, such as the "repeated failure to follow standard operating procedure during the exercise."[83] Others represented the decisions by top leaders, such as "the choice to use previously deadlined vehicles" and failures to maintain the vehicles.[84] When the crew tried to escape the sinking AAV through a rear hatch, they at first could not open it because the handle was broken.[85] In the most perverse way, it seemed a stroke of luck that only one AAV went down. By the end of the mission, four of the thirteen AAVs of the Fifteenth Marine Expeditionary Unit had broken down; before the mission, they had been set to receive well-

78. Dan Lamothe, *Navy Releases New Details About Ship Collision Off South Korea's Coastline*, WASH. POST (Nov. 30, 2017), https://www.washingtonpost.com/news/checkpoint/wp/2017/11/30/navy-releases-new-details-about-ship-collision-off-south-koreas-coastline [https://perma.cc/N5DK-KCMB].

79. Zachary Cohen, *USS* Antietam *Guided-Missile Cruiser Runs Aground, Leaks Oil*, CNN (Feb. 1, 2017, 6:15 PM), https://www.cnn.com/2017/02/01/politics/uss-antietam-damaged-japan/index.html [https://perma.cc/6FWU-4WG5].

80. Philip Athey, *What Caused the Marine Amphibious Assault Vehicle Sinking Tragedy?*, MARINE CORPS TIMES (Apr. 15, 2021), https://www.marinecorpstimes.com/news/your-marine-corps/2021/04/15/what-caused-the-marine-amphibious-assault-sinking-tragedy [https://perma.cc/PM4U-93C6].

81. *Mishap Reporting*, NAVAL POSTGRADUATE SCH., https://nps.edu/web/safety/mishap-reporting [https://perma.cc/UWP9-RFUE].

82. Athey, *supra* note 80.

83. *Id.*

84. *Id.*

85. Philip Athey, *'It's Your Date of Death, Just Finish This Mission': Heartbroken Families of Fallen Marines, Sailor React to Failures Exposed in Tragic AAV Sinking Investigation*, MARINE CORPS TIMES (Mar. 31, 2021), https://www.marinecorpstimes.com/news/your-marine-corps/2021/03/31/its-your-date-of-death-just-finish-this-mission-families-of-fallen-marines-sailor-react-to-investigation-of-tragic-aav-sinking [https://perma.cc/EJ8P-RZAV]; Marine AAV Report, *supra* note 36, at 48, 52–58. The families have brought suit against the manufacturer of the AAV, BAE Systems. Rafael Avitabile & Allison Ash, *Attorney for Families of 9 Servicemen Killed in Sunken AAV Blames Tragedy on Critical Design Flaws*, NBC SAN DIEGO (Mar. 25, 2021, 5:55 PM), https://www.nbcsandiego.com/news/local/human-mechanical-errors-led-to-deaths-of-9-service-members-in-sunken-aav-usmc/2560439 [https://perma.cc/RV33-GBTK].

maintained AAVs, but they ultimately were sent vehicles that were not.[86]

Another example, this time in the air: in 2018, six marines were killed during a routine refueling training exercise. The subsequent investigation revealed errors by the crew as well as systemic causes—disregarding safety concerns and pushing on no matter the cost.[87] And another: the prior year, fifteen marines and one Navy sailor died when their military transport plane came apart midair and crashed in Mississippi. The cause was a corroded propellor blade, which was supposed to have been fixed in 2011. Instead, it festered and cracked and lanced the side of the plane in the middle of a routine transport operation.[88]

And on land, more than 120 service members died between 2010 and 2019 in rollovers and other accidents in noncombat tactical vehicles.[89] A recent GAO report called for changes to avoid more of these deaths and injuries, including systemic, high-level reforms like ensuring that training programs adequately evaluate an individual's readiness to operate these vehicles.[90] Maintenance of equipment, too, appeared to be a problem; in November 2019 Army Specialist Nicholas Panipinto was killed in a rollover during a road test of a fifteen-ton Bradley Fighting Vehicle, after the heavy tread on the right side of the Bradley fell off. Panipinto had received six hours of training on the vehicle.[91] Panipinto's mother noted, "Even with sufficient training, he wouldn't have been able to handle that . . . . It would

86. Athey, *supra* note 80.

87. Robert Faturechi, Megan Rose & T. Christian Miller, *Faulty Equipment, Lapsed Training, Repeated Warnings: How a Preventable Disaster Killed Six Marines*, PROPUBLICA (Dec. 30, 2019, 5:00 AM), https://www.propublica.org/article/marines-hornet-squadron-242-crash-pacific-resilard [https://perma.cc/DN39-LZ6Q].

88. Mississippi Marine Investigation, *supra* note 37, at 29, 59; Dan Lamothe, *Families of Service Members Killed in Mississippi Disaster Want More Answers*, WASH. POST (Dec. 8, 2018), https://www.washingtonpost.com/national-security/2018/12/08/families-service-members-killed-mississippi-disaster-want-more-answers [https://perma.cc/9UF7-AJX4]; Valerie Insinna & Geoff Ziezulewicz, *Investigation Blames Air Force and Navy for Systemic Failures in Fatal Marine Corps C-130 Crash That Killed 16*, MIL. TIMES (Dec. 5, 2018), https://www.militarytimes.com/2018/12/05/investigation-blames-air-force-and-navy-for-systemic-failures-in-fatal-marine-corps-c-130-crash-that-killed-16 [https://perma.cc/96UC-ZGEP].

89. Alex Horton & Gina Harkins, *Military's Effort to Reduce Deadly Vehicle Accidents Deemed Inadequate*, WASH. POST (July 14, 2021, 4:55 PM), https://www.washingtonpost.com/national-security/2021/07/14/military-rollover-deaths-gao-report [https://perma.cc/8VBS-R2M3].

90. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 28, at 62–66.

91. Carlos R. Munoz, *Military Training Reform Bill Spurred by Bradenton Soldier's Death Becomes Law*, SARASOTA HERALD-TRIBUNE (Jan. 7, 2021, 5:21 PM), https://www.heraldtribune.com/story/news/military/2021/01/06/military-reform-bill-spurred-bradenton-soldiers-death-becomes-law/6551058002 [https://perma.cc/C49R-B8KL]. After Panipinto's death, member of Congress Vern Buchanan proposed an amendment to the National Defense Authorization Act that required a review of safety measures at military bases. The measure was approved, following a congressional override of the President's veto (which was unrelated to the safety measure). *Id.*

have rolled over regardless. How many other vehicles are the same way?"[92]

Of course, to note that the 2017 Navy collisions stand among many does not mean these are representative events.[93] The point of these examples is not to suggest that they are constant or that they are the norm. Their significance does not hinge on pervasiveness. These deaths and injuries and lapses in leadership can have meaning without being the norm, and the purpose of identifying them here is to make them known—to bring them into the scholarly literature, to expose the limits of how they have heretofore been seen, to open them to modes of analysis and accounts of legal obligation to which they have not yet been subjected. Part II turns to that work, laying out the divergent approaches U.S. law and international human rights law take to characterizing service member deaths.

II. TWO VISIONS OF ACCOUNTABILITY

When incidents like these take place—when a piece of equipment falls apart, when the mission eclipses the training, when leaders send vehicles or armor that they know offer only inadequate protection,[94] and they do it anyway, and service members die—what does the law have to say? This Part contrasts two visions of accountability in the aftermath of these kinds of events. It begins with a portrait of the *Feres* doctrine, the name given to the broad prohibition against suits against the government for injuries incident to military service.[95] It then turns to the United Kingdom Supreme Court's decision in *Smith v. Ministry of Defence*, which held that the deaths of British service members killed by roadside bombs in Iraq could constitute a violation of the British government's human rights obligations to protect the right to life.[96] Comparing the two presents wildly divergent visions of government obligation to service members, one focused on the expectation

92. Horton & Harkins, *supra* note 89.

93. Descriptions of additional incidents not discussed in this Article are available in Ellen Mitchell, *Report on Military Aviation Crashes Faults Lack of Training, 'Chronic Fatigue*,' HILL (Dec. 3, 2020, 6:15 PM), https://thehill.com/policy/defense/528689-report-on-military-aviation-crashes-faults-lack-of-training-chronic-fatigue?rl=1 [https://perma.cc/78XQ-KL9V].

94. *See* Moss, *supra* note 12 (detailing finding of secret Pentagon study that "as many as 80 percent of the marines who have been killed in Iraq from wounds to the upper body could have survived if they had had extra body armor" and reporting that "[s]uch armor has been available since 2003, but until recently the Pentagon has largely declined to supply it to troops despite calls from the field for additional protection, according to military officials"); Michael Moss, *Many Missteps Tied to Delay in Armor for Troops in Iraq*, N.Y. TIMES (Mar. 7, 2005), https://www.nytimes.com/2005/03/07/world/middleeast/many-missteps-tied-to-delay-in-armor-for-troops-in-iraq.html [https://perma.cc/5N95-Q8K8] (detailing U.S. government delays in supplying bulletproof vests and armored vehicles to troops in Iraq); U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-662R, DEFENSE LOGISTICS: ARMY AND MARINE CORPS'S INDIVIDUAL BODY ARMOR SYSTEM ISSUES 1 (2007).

95. *See* Feres v. United States, 340 U.S. 135 (1950); *infra* Section II.A.

96. Smith v. Ministry of Defence [2013] UKSC 41, [27]; *infra* Section II.B.

that service members will sacrifice everything for their government, and the other articulating a government commitment to protect those who serve it, even though their position necessarily involves exposure to danger and even death.

A. THE U.S. LAW OF SERVICE AND SACRIFICE

In the wake of the collisions, the families of those killed and injured on the *Fitzgerald* and the *McCain* sought answers and accountability. Journalists from the *Baltimore Sun* reported that family members found the Navy's official report on the incidents "put[] too much blame on the ship's crew while glossing over" longstanding "problems with training, manpower[,] and maintenance."[97] Darrold Martin, the father of Xavier Martin, a sailor who died aboard the *Fitzgerald*, noted that days before the collision, Xavier had called to tell him the ship had lost power and had to return to its base in Yokosuka, Japan. Darrold Martin also learned that there had been a problem with one of the ship's radars. He expressed concern that the Navy investigation mentioned neither the power outage nor the radars. "How dare you blame the crew?" asked Martin.[98] Thomas Bushell, whose son Kevin Bushell died on the *McCain*, echoed the concerns about the Navy's operational tempo that the GAO had voiced,[99] noting that the Navy "put training aside to do missions . . . . They were compromising the training . . . because they had to be out on patrol."[100] To Bushell, "the cause of the *McCain* crash was a failure of leadership"[101]—those who pursued a relentless pace of operations and skimped on training and maintenance, instead of prioritizing the safety of those serving.

Even though many saw the government as a responsible actor, those who suffered injuries and who lost family members have brought suit against several private parties: the crew and owners of the *ACX Crystal*, the other ship involved in the *Fitzgerald* collision; NYK Line, the shipping company that chartered the *ACX Crystal*; and Energetic Tank, the company that owns the tanker into which the *McCain* collided.[102] They are prevented from

97. Christina Tkacik & John Fritze, *'This Is Not Closure': Navy Families Want Answers on* McCain*,* Fitzgerald *Deaths,* BALT. SUN (Dec. 19, 2017, 6:00 AM), https://www.baltimoresun.com/maryland/baltimore-county/bs-md-naval-families-react-20171211-story.html [https://web.archive.org/web/20220616061433/https://www.baltimoresun.com/maryland/baltimore-county/bs-md-naval-families-react-20171211-story.html].

98. *Id.*

99. *See supra* notes 59–65 and accompanying text.

100. Tkacik & Fritze, *supra* note 97.

101. *Id.*

102. *See In re* Energetic Tank, Inc., No. 1:18-cv-01359-PAC, 2020 WL 114517, at *2–3 (S.D.N.Y. Jan. 10, 2020) (granting motion for application of foreign law); Douglass v. Nippon Yusen Kabushiki

bringing an action against the government by the *Feres* doctrine, which constrains service members' capacity to sue the government for injuries arising out of military service.[103] The doctrine takes its name from the Supreme Court's 1950 decision in *Feres v. United States*, which established that tort claims against the United States that "arise out of or are in the course of activity incident to service" cannot be brought under the Federal Tort Claims Act (FTCA).[104] *Feres*, which was decided just a few months after the United States entered the Korean War, involved three consolidated cases. The first arose after the death of Rudolph Feres, a 31-year-old lieutenant in the Army who had parachuted onto the beaches of Normandy on D-Day and had fought in the Battle of the Bulge. Feres died in 1947 in a fire at a barracks at Pine Camp, New York; he had served twelve years in the military.[105] After his death, his widow brought suit under the FTCA, claiming that the government had negligently caused the death by "quartering him in a barracks known or which should have been known to be unsafe because of a defective heating plant."[106] The second case involved medical malpractice; the FTCA suit alleged that a military surgeon had negligently left a towel inside the abdomen of Arthur Jefferson during an operation at an Army hospital in Maryland. When Jefferson had to have another surgery a few months later, doctors found the nearly four-square-foot towel. Jefferson received a lump-sum compensation of $3,645 at the time and sued the government.[107] In the third case, Dudley Griggs's widow alleged that Griggs, a lieutenant colonel in the Army, had died because of negligent medical treatment during brain surgery at Scott Air Base in Illinois.[108] In each, the

Kaisha, 996 F.3d 289, 291 (5th Cir. 2021), *reh'g en banc granted, opinion vacated sub nom.* Douglas v. Kaisha, 2 F.4th 525 (5th Cir. 2021); *Fifth Circuit Grants CCL Petition for Rehearing En Banc in Important Personal Jurisdiction Case*, CTR. FOR CONST. LITIG. (July 2, 2021), http://www.cclfirm.com/blog/42174 [https://perma.cc/5HY4-UJLF]; *USS* Fitzgerald *Lawsuits Aim to Hold NYK Line Accountable for Negligence*, HOFMANN & SCHWEITZER, https://www.hofmannlawfirm.com/blog/maritime-injury-lawsuits-say-nyk-line-was-negligent.cfm [https://perma.cc/2VWN-5A5M] (outlining goals of suit against NYK Line, including securing compensation and ensuring that NYK is incentivized to take future action, including properly training its crews, to avoid future incidents).

103. Athey, *supra* note 85. Athey quotes a statement from Peter Vienna, the stepfather of one of the individuals killed in the AAV sinking, describing the *Feres* doctrine as "part of the systemic problem in the military . . . that keeps [the Marine Corps] from being accountable." Vienna continues, "It's very unfortunate but sometimes money speaks louder than lives." *Id.*

104. Feres v. United States, 340 U.S. 135, 146 (1950).

105. SUSAN ENSCORE, ADAM SMITH, ELLEN HARTMAN & CHRIS COCHRAN, U.S. ARMY CORPS OF ENG'RS, ERDC/CERL B-11-1, 1947 BARRACKS FIRE: PINE CAMP (FORT DRUM), NY, 4–5 (2011), https://erdc-library.erdc.dren.mil/jspui/bitstream/11681/13751/1/CERL-B-11-1.pdf [https://perma.cc/B6JG-M6GY].

106. *Feres*, 340 U.S. at 137.

107. James L. Kilpatrick, *A Soldier's Botched Surgery*, WASH. POST (Aug. 5, 1987), https://www.washingtonpost.com/archive/opinions/1987/08/05/a-soldiers-botched-surgery/50d3f896-4e26-460f-94e0-9550057ee552 [https://perma.cc/D9A4-UPGS]; *see also Feres*, 340 U.S. at 137.

108. Griggs v. United States, 178 F.2d 1, 1–3 (10th Cir. 1949); *see also Feres*, 340 U.S. at 137–38.

Supreme Court found that the suit was barred by the FTCA.

The *Feres* Court cited two rationales for its decision, which extended government immunity beyond the text of the FTCA's express prohibition of suits for injuries incurred in combat in foreign countries.[109] First, because the relationship between the government and service members is "distinctively federal in character," it would "make[] no sense" to allow claims under the FTCA—which allows for suits against the government based on state law—for service members, who have no say in where they are stationed.[110] Second, the Court noted that the military already had established "not negligible" compensation systems for injuries or death of individuals in the armed services.[111]

In subsequent decisions, the Court reaffirmed and expanded the *Feres* doctrine,[112] and it also expanded the rationales for preserving the prohibition against FTCA suits for injuries incident to service. In *United States v. Brown*, which allowed the respondent to sue the government after he sustained permanent leg damage during treatment at a Veterans Administration hospital when he was no longer an active-duty service member, the Court announced what it saw as the rationale for *Feres*: "[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty."[113] In *Stencel Aero Engineering Corp. v. United States*,[114] the Court offered further texture to this "third factor" underlying *Feres*:[115] "The trial would . . . involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions."[116] Moreover, allowing suits against the government for injuries sustained incident to service might "involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness."[117] The *Feres* doctrine thus protected the government not only because of the incongruity of applying various state laws to service members' suits against the government and the availability of a compensation system, but also because

109. 28 U.S.C. § 2680(j); *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 712–13 (8th ed. 2021).
110. *Feres*, 340 U.S. at 143 (internal citation omitted).
111. *Id.* at 144–45.
112. *See, e.g.*, United States v. Johnson, 481 U.S. 681, 686–88, 692 (1987).
113. United States v. Brown, 348 U.S. 110, 112 (1954).
114. Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666 (1977).
115. *Id.* at 671–72.
116. *Id*. at 673.
117. *Johnson*, 481 U.S. at 690 (internal citation omitted).

of the instrumental consideration that suits against the government could fracture the vital system of military obedience and loyalty.

The Court's decisions have interpreted "military discipline in the broadest sense of the word."[118] Even when the alleged injury was perpetrated by civilian actors, the Court has found that *Feres* bars suit, because the activity overall was the product of orders. In *United States v. Johnson*, the deceased, Lieutenant Commander Horton Johnson, was in the midst of a Coast Guard rescue mission, and the negligence alleged was on the part of the Federal Aviation Administration, a civilian agency. But because "Johnson went on the rescue mission specifically because of his military status" and "was acting pursuant to standard operating procedures of the Coast Guard" when he died, the Court held that "the potential that this suit could implicate military discipline is substantial."[119]

The *Feres* doctrine has barred suits even when the government actors involved were violating government policies. In *Doe v. Hagenbeck*, a West Point cadet sought to sue Lieutenant General Franklin Lee Hagenbeck and Brigadier General William E. Rapp, the school's superintendent and commandant of cadets, respectively, alleging that they failed their obligations when she was raped by a fellow cadet and subjected to a pattern of discrimination and harassment. The Second Circuit dismissed the suit, and the Supreme Court denied certiorari.[120] The majority in the Second Circuit reasoned that "[a]djudicating such a money damages claim would require a civilian court to engage in searching fact-finding about Lieutenant General Hagenbeck and Brigadier General Rapp's 'basic choices about the discipline, supervision, and control' of the cadets that they were responsible for training as future officers."[121] Meanwhile, Judge Chin, in dissent, questioned how "[t]he concern identified in *Feres* and its progeny that courts not interfere with military discipline and structure" could be relevant "when the military is violating its own rules and regulations."[122]

The *Doe* decision prompted the latest in a long tradition of criticisms of *Feres* by scholars, practitioners, legislators, and judges.[123] But the doctrine

118. *Id*. at 691.

119. *Id.* at 691–92.

120. Doe v. Hagenbeck, 870 F.3d 36 (2d Cir. 2017), *cert. denied sub nom.* Doe v. United States, 141 S. Ct. 1498 (2021); *see also Doe*, 141 S. Ct. at 1498, 1499–1500 (Thomas, J., dissenting from denial of certiorari).

121. *Hagenbeck*, 870 F.3d at 46 (internal citation omitted).

122. *Id.* at 60 (Chin, J., dissenting) (internal citation omitted).

123. *See, e.g.*, *Johnson*, 481 U.S. at 700–01 (Scalia, J., dissenting) (commenting that *Feres* "heartily deserves the 'widespread, almost universal criticism' it has received") (quoting *In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 1242, 1246 (E.D.N.Y. 1984)); Brief of Federal Courts and Constitutional

persists. Decades of hearings have produced only a small recent change; in the 2020 National Defense Authorization Act, Congress created a pathway for service members to file claims against the government for medical malpractice in a Defense Department-run administrative claims process—but not through the federal courts.[124]

The *Feres* doctrine is not simply a story of an odd but stubborn judicial interpretation of statutory text. Inability to seek government accountability under U.S. law for active-duty service members' injuries forms a part of the fabric of sacrifice that undergirds expectations about the military—even within the military itself. When Vietnam veterans began to see a connection between the herbicide Agent Orange, with which the United States had blanketed the jungles of Vietnam, and the diseases and impairments they were suffering after they returned home, they sued manufacturers—not the United States—in part because they knew a civil action against the government would hit the *Feres* dead end.[125] But, as Peter Schuck explains in his *Agent Orange on Trial*, the veterans' sense of patriotism also

Law Professors as Amici Curiae in Support of Petitioner, *Doe*, 141 S. Ct. 1498 (No. 20-559); Steve Vladeck, *Congress Should End a 'Harsh and Unfair' Rule That Blocks Troops from Court*, N.Y. TIMES (May 21, 2019), https://www.nytimes.com/2019/05/21/opinion/supreme-court-congress-military.html [https://perma.cc/EZ57-WM6X] ("For almost as long as it has been on the books, the *Feres* decision has been controversial."); *Feres Doctrine—A Policy in Need of Reform?: Hearing Before the Subcomm. on Military Personnel of the H. Comm. on Armed Servs.*, 116th Cong. (2019); *Testimony on Sexual Assaults in the Military: Hearing Before the Subcomm. on Personnel of the S. Comm. on Armed Servs.*, 113th Cong. (2013); *Carmelo Rodriguez Military Medical Accountability Act of 2009: Hearing on H.R. 1478 Before the Subcomm. on Com. & Admin. L. of the H. Comm. on the Judiciary*, 111th Cong., 1st Sess. (2009); *The* Feres *Doctrine: An Examination of the Military Exception to the Federal Tort Claims Act: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2002); *Equitable Treatment for the Families of American Personnel Killed in the April 14, 1994 Blackhawk Shootdown: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 105th Cong. (1998); *Sexual Harassment of Military Women and Improving the Military Complaint System: Hearing Before the H. Comm. on Armed Servs.*, 103rd Cong. (1994); *Claims for Negligent Medical Care Provided Members of the Armed Forces: Hearing on H.R. 3407 Before the Subcomm. on Admin. L. & Gov't al Rels. of the H. Comm. on the Judiciary*, 102d Cong. (1991); *Federal Tort Claims Act: Hearing Before the Subcomm. on Admin. L. & Gov't al Rels. of the H. Comm. on the Judiciary*, 101st Cong. (1990); *Medical Malpractice Suits for Armed Services Personnel: Hearing on S. 2490 and H.R. 1054 Before the Subcomm. on Cts. & Admin. Prac. of the S. Comm. on the Judiciary*, 100th Cong. (1988); *Military Malpractice and Liability for Injuries Resulting from the Atomic Weapons Testing Program: Hearing on H.R. 1054 and H.R. 1341 Before the Subcomm. on Admin. L. & Gov't al Rels. Of the H. Comm. on the Judiciary*, 100th Cong., 1st Sess. (1987); *The* Feres *Doctrine and Military Malpractice: Hearing on S. 489 and H.R. 3174 Before the Subcomm. on Admin. Prac. & Proc. of the S. Comm. on the Judiciary*, 99th Cong. (1986); *Military Medical Malpractice: Hearings on H.R. 1161 Before the Subcomm. on Admin. L. & Gov't al Rels. of the H. Comm. on the Judiciary*, 99th Cong. (1985); *Medical Malpractice Claims by Armed Forces Personnel: Hearing on H.R. 1942 Before the Subcomm. on Admin. L. & Gov't al Rels. of the H. Comm. on the Judiciary*, 98th Cong. (1983); *The* Feres *Doctrine as It Relates to Private Claims: Hearing Before the Subcomm. on Agency Admin. of the S. Comm. on the Judiciary*, 97th Cong. (1982). For a defense of *Feres*, see Paul Figley, *In Defense of* Feres*: An Unfairly Maligned Opinion*, 60 AMER. U.L. REV. 393 (2010).

124. *See* 10 U.S.C. § 2733(a).

125. *See* PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 59 (1987).

engendered a reluctance to accuse the government of wrongdoing.[126] In their minds, refusing to make claims on the government was a component of service to country.

Even those who oppose *Feres* see it as sacrifice. Justice Scalia, in an oft-quoted passage of his dissent in *Johnson*, lamented that Horton Johnson's widow, Frieda Joyce Johnson, could not recover because of a decision by the Court, rather than Congress, to extend the exemption from the FTCA. "If our imposition of that sacrifice bore the legitimacy of having been prescribed by the people's elected representatives," he wrote, "it would . . . be just. But it has not been, and it is not."[127] His reference to the loss of a civil damages action against the government as a "sacrifice" is telling, an exposure of the pervasive notion that when members of the military are forced to give something up, it is presumed to be a sacrifice—not a theft, not even just a raw deal, but instead a surrender endowed with the legitimacy of the holy.[128]

B. THE INTERNATIONAL HUMAN RIGHTS OF SOLDIERS

From the European human rights system, meanwhile, a vastly different vision of the relationship between government and soldier has emerged in the United Kingdom Supreme Court decision *Smith v. Ministry of Defence*.[129] *Smith* concerned the deaths of two service members deployed in Iraq, Phillip Hewett and Lee Ellis, who were both killed, in separate incidents, by improvised explosive devices ("IEDs") when they were traveling in Snatch Land Rovers.[130] Hewett and Ellis were two of thirty-seven British service members who died in Afghanistan and Iraq in the vehicles, which came to be known in the armed services as "mobile coffins."[131] Family members of Hewett and Ellis brought suit against the British government, alleging that by deploying the vehicles despite the government's knowledge that they would not provide adequate protection against IEDs, the Ministry of Defence had failed its obligations to protect the right to life under the European Convention of Human Rights.[132] The

126. *Id.* at 59–60.

127. United States v. Johnson, 481 U.S. 681, 703 (Scalia, J., dissenting).

128. *See* MOSHE HALBERTAL, ON SACRIFICE 47 (2012) (discussing the association of sacrifice and goodness); *infra* Section III.B.2.

129. Smith v. Ministry of Defence [2013] UKSC 41.

130. The litigation also concerned two additional sets of claims arising out of deaths and injuries in the Iraq War, but those claims were brought in negligence. *Id.* at [9]–[10].

131. Sturcke, supra note 22. Commentators decried the government's failure to properly equip the soldiers. S*ee* Thomas Harding, *SAS Chief Says MoD Has 'Blood on Its Hands*,*'* TELEGRAPH (Mar. 7, 2009, 7:00 AM), https://www.telegraph.co.uk/news/4951560/SAS-chief-says-MoD-has-blood-on-its-hands.html [https://perma.cc/Q2XD-XWZX].

132. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

Ministry of Defence put forward two arguments. First, it contended that at the time of their deaths, Hewett and Ellis were not under the jurisdiction of the United Kingdom for purposes of the Convention. Second, it maintained that even if they were under the government's jurisdiction, the allegations could not constitute a breach of the Convention, whether a substantive violation of the right to life or a procedural violation.[133]

The Court of Appeal had taken the government's position on the jurisdictional question, dismissing the human rights claims on the grounds that Hewett and Ellis were not under the jurisdiction of the European Convention at the time of their deaths. The court viewed the Convention's approach to jurisdiction as primarily territorial and held that the Convention requires "special justification" to depart from that.[134] The analysis of the jurisdictional question revolved around the European Court of Human Rights decision in *Al-Skeini v. Iraq*, which concerned the responsibility of the United Kingdom for failing to adequately investigate the deaths of six Iraqi civilians at the hands of British military personnel in southern Iraq.[135] Although the European Court held in *Al-Skeini* that the applicants were under the jurisdiction of the United Kingdom for purposes of the Convention, that case was distinct from *Smith*, maintained the Court of Appeal, for it involved "state agents us[ing] force to bring individuals under the control of the state's authorities."[136] Whereas the Iraqi civilians at issue in *Al-Skeini* were brought under the jurisdiction of the European Convention by British soldiers acting as agents of the state, the Court of Appeals saw no analogue for "the soldiers who killed them"—the words it used to describe the soldiers killed as a result of the government's failure to provide adequately protective vehicles whose deaths were at issue in *Smith*.[137] The Court of Appeal thus read *Al-Skeini* as viewing soldiers only as human rights violators for the purpose of extending European Convention jurisdiction beyond the state's territory— not as rights holders.[138]

133. Smith v. Ministry of Defence [2011] EWHC (QB) 1676, [26]; *Smith*, [2013] UKSC 41 at [13]; *see also* Eva Brems, *Procedural Protection: An Examination of Procedural Safeguards Read into Substantive Convention Rights*, *in* SHAPING RIGHTS IN THE ECHR: THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN DETERMINING THE SCOPE OF HUMAN RIGHTS 137, 138–44 (Eva Brems & Janneke Gerard eds., 2013) (discussing nature of substantive versus procedural violations of Convention rights).

134. Smith v. Ministry of Defence [2012] EWCA (Civ) 1365, [19]. For additional discussion of the case, see Pauline Collins, *The Civil Courts' Challenge to Military Justice and Its Impact on the Civil-Military Relationship*, *in* MILITARY JUSTICE IN THE MODERN AGE 57, 66–68 (Alison Duxbury & Matthew Groves eds., 2016).

135. Al-Skeini v. United Kingdom, App. No. 55721/07, ¶¶ 130–50 (2011), https://hudoc.echr.coe.int/fre?i=001-105606 [https://perma.cc/ENH8-66VW].

136. *Smith*, [2012] EWCA (Civ) 1365 at [24].

137. *Id.* at [27].

138. *See infra* Section III.B (discussing broader resistance to soldiers as rights holders).

The Supreme Court's opinion, by contrast, squarely envisioned soldiers as endowed with human rights that required protection by the government. The Supreme Court first disagreed with the Court of Appeals and held unanimously that at the time of their deaths, Hewett and Ellis were within the jurisdiction of the United Kingdom for purposes of the European Convention. The court conceded that *Al-Skeini* did not directly address the jurisdictional question at issue in *Smith*, but it reasoned that the European Court's holding that "extra-territorial jurisdiction can exist whenever a state through its agents exercises authority and control over an individual" applied to the facts at issue in *Smith*.[139] The pertinent question in determining jurisdiction for purposes of the Convention, explained the court, was not effective control of territory, but rather whether an individual is under "state agent authority and control."[140] Whereas the civilians in *Al-Skeini* came under state agent authority and control through British soldiers on the ground in Iraq, the soldiers whose deaths were at issue in *Smith* came under state agent authority and control through the actions of the government actors responsible for deploying them.

Once the Supreme Court determined that Hewett and Ellis were under the jurisdiction of the United Kingdom at the time of their deaths, it analyzed the question of the government's obligations to soldiers in combat under Article 2 of the European Convention, which protects the right to life.[141] The Court ultimately held that the allegations could potentially constitute a violation of the Convention, and it demanded a full factual inquiry in the trial court to determine whether the government had indeed violated its obligations.[142] The decision was novel in envisioning that the obligation to protect the right to life requires the government to adequately equip soldiers, a vast transformation from the vision of the service member that dominated the analysis in the Court of Appeals. At the same time, the Supreme Court's reasoning was not without precedent. The initial decision in *Smith*, before the High Court of Justice, had found there was no jurisdiction, but despite that, the High Court also analyzed in an exploratory posture what government obligations might be if there were jurisdiction. The High Court ultimately found that it could not "properly conclude" that the government did not have a positive duty to supply soldiers with better armored vehicles.[143] It based that decision on prior cases addressing government responsibility for service member deaths, which were also later cited by the

139. Smith v. Ministry of Defence [2013] UKSC 41, [49].
140. *Id.* at [46].
141. ECHR, *supra* note 132, art. 2, ¶ 1 ("Everyone's right to life shall be protected by law.").
142. *Smith*, [2013] UKSC 41 at [78].
143. Smith v. Ministry of Defence [2011] EWHC (QB) 1676, [79].

Supreme Court's decision.[144]

The analysis by Lord Hope in the Supreme Court's decision in *Smith* began by recalling his own writing from an earlier decision, *Gentle*, that had found there was no European Convention jurisdiction over two service members who had been killed in Iraq.[145] In that decision, rejecting the service members' families' argument that the deaths were a human rights violation because the decision to go to war in Iraq violated international law, Lord Hope emphasized that death in combat was not a human rights violation on its own:

> The guarantee in the first sentence of [A]rticle 2(1) is not violated simply by deploying servicemen and women on active service overseas as part of an organised military force which is properly equipped and capable of defending itself, even though the risk of their being killed is inherent in what they are being asked to do.[146]

But that fact, his opinion in *Smith* noted, does not mean that the death of a service member *cannot* be a human rights violation. Lord Hope then recalled the opinion of Lord Mance in a 2010 Supreme Court decision concerning a human rights claim brought by Catherine Smith, the mother of a British soldier who died of heatstroke while serving in Iraq, which maintained that "there is nothing that makes the Convention impossible or inappropriate of application to the relationship between the state and its armed forces as it exists in relation to overseas operations in matters such as, for example, the adequacy of equipment, planning or training."[147] In that same case, Lord Rodger's opinion noted that the death of a service member in combat "usually" would not require a consideration by the coroner of a violation of Article 2—language that, to both the Supreme Court and the High Court in *Smith*,

144. *Id.*; see also *Smith*, [2013] UKSC 41 at [62]–[63].

145. *Smith*, [2013] UKSC 41 at [62] (citing R (on the Application of Gentle) v. Prime Minister [2008] AC 1356, [19]).

146. *Id.*; *see also Smith*, [2011] EWHC (QB) 1676 at [79] (finding that Lord Hope's language in *Gentle* implied "that Article 2(i) could be violated by deploying servicemen or women on active service overseas as part of an organised military force which was not properly equipped"); Larry May, *Conflicting Responsibilities to Protect Human Rights*, *in* HUMAN RIGHTS: THE HARD QUESTIONS 347, 354 (Cindy Holder & David Reidy eds., 2013) ("[I]f one voluntarily joins a military unit knowing that one's life or liberty will be threatened, and one's life or liberty is jeopardized, this is not necessarily a human rights curtailment.").

147. *Smith*, [2013] UKSC 41 at [63] (paraphrasing R (on the Application of Smith) v. Oxfordshire Assistant Deputy Coroner [2010] UKSC 29, [195]). Lord Phillips's opinion in *Smith v. Oxfordshire* similarly explained that nothing in the law excluded the possibility of government responsibility under human rights law for inadequately protecting soldiers, whether at home or overseas. As long as there was jurisdiction, he wrote, whether the government's obligations under Article 2 of the European Convention "extend to the adequacy of the equipment with which the forces are provided" or "to the planning and execution of military manoeuvres" are questions that "are not easy to address, but an affirmative answer certainly cannot be excluded." *Smith*, [2011] EWHC (QB) 1676 at [70] (quoting Smith v. Oxfordshire [2010] UKSC 29 at [79]–[80]).

indicated an admission that the death of a service member could sometimes constitute an Article 2 violation.[148] And as Lord Hope himself acknowledged in the 2010 decision concerning Catherine Smith's claims, "[T]here have been many cases where the death of service personnel indicates a systemic or operational failure on the part of the state, ranging from a failure to provide them with the equipment that was needed to protect life . . . to mistakes in the way they are deployed due to bad planning or inadequate appreciation of the risks that had to be faced."[149]

To be sure, the Supreme Court's 2013 decision in *Smith* has clear limits. It continues the court's prior holdings that death of a service member on its own does not constitute a violation of the government's obligations to protect the right to life.[150] Moreover, the decision noted the European Court's emphasis on the "wide" margin of appreciation[151]—the term that body uses to describe "the latitude a government enjoys in evaluating factual situations and in applying the provisions enumerated" in the European Convention on Human Rights[152]—in cases involving military life. Further, the court emphasized that the courts may only examine claims about inadequate protection for service members that fall into a "middle ground"—the space between high-level decisions that are "closely linked to the exercise of political judgment and issues of policy" and on-the-ground decisions by commanders engaged in combat.[153]

Nonetheless, the decision is monumental for its central holding that in some situations "it would be reasonable to expect [a service member] to be afforded the protection" of the right to life.[154] *Smith* envisions the soldier neither as a mere rights violator, as did the Court of Appeals decision and as do so many legal accounts of war,[155] nor as a person who has unconditionally signed themselves over to be used by the government, who can be ignored as long as we label what they have done a sacrifice. Instead, it sees that person as a rights holder: a person who can legitimately seek protection from their government; a person whose life merits safeguarding; a person not

148. *See Smith*, [2013] UKSC 41 at [63] (discussing *Smith v. Oxfordshire* decision); *Smith*, [2011] EWHC (QB) 1676 at [79] (same).

149. *Smith*, [2013] UKSC 41 at [63] (paraphrasing Smith v. Oxfordshire [2010] UKSC 29 at [105]).

150. *Id.* at [62].

151. *Id.* at [71], [76], [81].

152. YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR 2 (2002); *see also* ANGELIKA NUSSBERGER, THE EUROPEAN COURT OF HUMAN RIGHTS 88–95 (2020).

153. Smith, [2013] UKSC 41 at [76].

154. *Id.*

155. *See* Rosa Brooks, *Heroes, Villains, and Victims*, FOREIGN POL'Y (July 25, 2013, 12:00 AM), https://foreignpolicy.com/2013/07/25/heroes-villains-and-victims [https://perma.cc/S363-SVGZ] (discussing "soldier as villain" myth).

expected to be, and not permitted to be, cannon fodder.

III. RESISTING AND REIMAGINING SOLDIERS' HUMAN RIGHTS

Smith has been described as a "landmark" ruling.[156] To be sure, the precise scope of a state's Article 2 obligations with respect to its service members remains unresolved, as the British government ultimately settled the claims in *Smith*;[157] but the litigation has had clear impact. It led, for example, to a decision by the Chilcot Inquiry—the massive public investigation into the UK government's role in the Iraq War—to address the question of the government's failures to adequately equip the troops. And this, in turn, resulted in a finding that the government knew that the Snatch Land Rovers would not protect soldiers and deployed them until 2010 nonetheless,[158] as well as a determination that soldiers were not provided sufficient body armor.[159] *Smith* has impacted other litigation, too. Soon after the Supreme Court's decision, the United Kingdom settled another case, which had been pending for years before the European Court of Human Rights, alleging human rights violations arising from a soldier's death in Iraq.[160] Outside of the courts, legal scholars have recognized *Smith* as an "important precedent"[161] and a demonstration that "warfare is increasingly subject to the disciplines of international law,"[162] and that courts have now recognized "[t]he rights of soldiers in battle."[163] Critics, meanwhile, have

156. *See, e.g.*, Clive Coleman, *Mother Wins MoD Apology over "Snatch" Land Rover Death*, BBC (Aug. 18, 2017), https://www.bbc.com/news/uk-40958686 [https://perma.cc/4V89-DSFF].

157. *Id.* In another case before the British courts, in which the family of a service member sought a more rigorous investigation into the death of their relative, who was killed by a mob in Iraq and did not have a satellite phone with him at the time, the courts affirmed that there was Convention jurisdiction and that the case fell into the "middle ground" of *Smith*, but determined that the government had already provided an adequate investigation. R (on the Application of Long) v. Secretary of State for Defence [2015] EWCA Civ 770, [25].

158. 11 CHILCOT REPORT, *supra* note 22, at 23–24.

159. 6 CHILCOT REPORT, *supra* note 22, at 80–83, 100–06.

160. Pritchard v. United Kingdom, App. No. 1573/11, ¶ 4 (2014), https://hudoc.echr.coe.int/eng?i=001-142446 [https://perma.cc/Y97B-XWMK] (confirming friendly settlement and striking out application); *see also* RICHARD EKINS, JONATHAN MORGAN & TOM TUGENDHAT, POLY' EXCH., CLEARING THE FOG OF LAW: SAVING OUR ARMED FORCES FROM DEFEAT BY JUDICIAL DIKTAT 16 (2015) (describing *Pritchard* settlement as "worrying" because it "seems to concede that the Supreme Court's further extension of extraterritorial jurisdiction in *Smith* . . . should not now be challenged in Strasbourg").

161. Alexia Solomou, Smith v. Ministry of Defence*,* Ellis v. Ministry of Defence *&* Allbutt v. Ministry of Defence, *[2013] W.L.R. 239, Supreme Court of the United Kingdom, June 19, 2013*, 108 AM. J. INT'L L. 79, 83 (2014).

162. Duncan Fairgrieve, *Suing the Military: The Justiciability of Damages Claims Against the Armed Forces*, 73 CAMBRIDGE L.J. 18, 21 (2014).

163. DANNENBAUM, *supra* note 27, at 51; *see also* Lieblich, *supra* note 27, at 607–09 (discussing limited applicability of *Smith* to questions of *jus ad bellum*).

attacked the decision as a "deplorable"[164] victory for "judicial imperialism" that will endanger the national security of the United Kingdom.[165]

The global impact of the holding, however, has been muted. One might imagine, in the years after the decision, transformational reappraisals throughout the world of a government's obligations to its service members and articulations of real constraints on the risks that governments are permitted to impose on their own troops. As the history of human rights law makes evident, decisions travel: a holding on a substantive right in one court will lead to an embrace of the same interpretation of an analogous right in another, which will precipitate the further development of the concept underlying those interpretations in a statement put forward by a treaty body or a special rapporteur soon after.[166] But examinations of the restrictions human rights law might place on governments' freedom to risk soldiers' lives or the rights service members may have to adequate protection, whether in combat or outside of it, simply have not manifested—despite, as noted in Part I, so many incidents in which American service members have been killed in circumstances that involve government negligence in the years since *Smith*.[167]

This Part documents human rights scholars' and practitioners' neglect with respect to the U.S. government's obligations to train and equip its own soldiers, and it situates it within the law's broader failure to reckon with the soldier as an individual endowed with human rights. This Part then considers the significance of asserting the rights of service members against their governments. Whereas the few analyses of *Smith* treat it as a potential constraint on warmaking,[168] this Article contends that it should be

164. Jonathan Morgan, *Military Negligence: Reforming Tort Liability After* Smith v. Ministry of Defence, *in* HOUSE OF COMMONS DEFENCE COMMITTEE, UK ARMED FORCES PERSONNEL AND THE LEGAL FRAMEWORK FOR FUTURE OPERATIONS, 2013-4, HC 931, at Ev 31.

165. EKINS ET AL., *supra* note 160, at 7–9. In addition, some scholars have taken *Smith* as an unobjectionable reality of human rights law. *See, e.g.*, Ozlem Ulgen, *"World Community Interest" Approach to Interim Measures on "Robot Weapons": Revisiting the Nuclear Test Cases,* 14 N.Z. Y.B. INT'L L. 3, 7 (2018) ("[A]part from cases of state negligence in training, preparing, and equipping military personnel, combatant casualties are expected and unavoidable. They do not constitute an 'unnecessary risk.' ").

166. *E.g.*, ILIAS BANTEKAS & LUTZ OETTE, INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE 523–26 (3d ed. 2020) (discussing the development of the due diligence concept in Inter-American Court of Human Rights and its extension to domestic violence by European Court of Human Rights, Committee on the Elimination of All Forms of Discrimination Against Women, and Special Rapporteur on Special Rapporteur on Violence Against Women); Dinah Shelton & Ariel Gould, *Positive and Negative Obligations*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 562, 581 (Dinah Shelton ed., 2013) (same).

167. *See supra* Part I.

168. *E.g.*, DANNENBAUM, *supra* note 27, at 200 (noting *Smith* "took the first step in articulating an international law limit on the state's prerogative to sacrifice its troops, potentially laying the foundation for a broader curtailment of that purportedly fundamental sovereign authority").

understood beyond that for its humanization of the soldier—for taking military service members out of the realm of the sacrificial and affirming their status as individuals, rather than instruments. Soldiers are conceived in the public imagination as volunteering for illimitable sacrifice, but human rights law, by contrast, can see them as individuals who serve the government in dangerous settings but nonetheless may expect the government to serve them, too. Subjecting the U.S. government to scrutiny under human rights law in this regard may not directly impact its decisions to resort to war; but it may shift—even if only subtly—the predominant conception of the military in the United States, so that service is no longer assumed to be an abdication of all rights and claims on the government.

A. HUMAN RIGHTS LAW'S NEGLECT OF HARMS TO SERVICE MEMBERS

1. U.S. Human Rights Obligations Concerning a Soldier's Right to Life

The United Kingdom Supreme Court's decision in *Smith* concerns the British government's obligations under the European Convention of Human Rights, but its principles and reasoning are by no means exclusive to the European human rights system or its incorporation into domestic British law. The same decision could be replicated under any number of human rights instruments—including the International Covenant on Civil and Political Rights ("ICCPR"),[169] the multilateral human rights treaty to which the United States has been a party since 1992,[170] and the American Declaration of the Rights and Duties of Man,[171] to which the United States is a signatory by virtue of its membership in the Organization of American States since 1948.[172]

As a preliminary matter, the *Smith* Court's approach to extraterritorial application of human rights obligations aligns with prevailing interpretations of both the ICCPR and the American Declaration. Thus, the location of some of the relevant incidents, such as the *McCain* and *Fitzgerald* collisions, beyond the borders of the United States need not pose an obstacle to identifying them as human rights violations on the part of the United States. The ICCPR states in Article 2 that States Parties must "ensure to all

169. International Covenant on Civil and Political Rights, art. 2, ¶ 1, Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171, 173 [hereinafter ICCPR].

170. U.S. DEP'T OF STATE, TREATIES IN FORCE 2020, at 21 (2020), https://www.state.gov/wp-content/uploads/2020/08/TIF-2020-Full-website-view.pdf [https://perma.cc/H8QR-KWXF].

171. American Declaration of the Rights and Duties of Man, May 2, 1948, *reprinted in* SECRETARIAT OF THE INTER-AM. CT. OF HUM. RTS., BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 19, 19 (2012) [hereinafter American Declaration].

172. *See* Inter-Am. Comm'n H.R., Res. 23/81, ¶¶ 15–16, (Mar. 6, 1981), https://www.cidh.oas.org/annualrep/80.81eng/USA2141.htm [https://perma.cc/SW29-EYFV].

individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."[173] Although the United States has insisted since 1995 that the Covenant imposes obligations only with respect to individuals who are *both* in the territory and subject to the jurisdiction of the United States,[174] the Human Rights Committee—which monitors implementation of the ICCPR—has roundly rejected that interpretation. In General Comment 31, the Committee's elaboration of the scope of obligations imposed on states under the Covenant, the Committee explained that a party to the ICCPR "must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."[175] This conclusion rests not only on its interpretation of the text and examination of the negotiating history of the Covenant, but also on a teleological approach to interpretation.[176] As the Committee explained in its 1978 decision in *López Burgos v. Uruguay*, "[I]t would be unconscionable to so interpret the responsibility under [A]rticle 2 of the Covenant as to permit a State [P]arty to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."[177]

The Inter-American Commission on Human Rights, which oversees implementation and enforcement of the American Declaration, has taken the position that the human rights commitments imposed by the Declaration apply extraterritorially. In *Coard v. United States*—which addressed allegations of mistreatment of individuals in Grenada by U.S. forces in 1983—the parties did not raise the issue of extraterritoriality.[178] But the Commission addressed it sua sponte at the beginning of its analysis, noting that "under certain circumstances, the exercise of . . . jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by

173. ICCPR, *supra* note 169, art. 2, at 173.

174. *See* Hum. Rts. Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Fourth Periodic Report: United States of America, ¶ 505, U.N. Doc. CCPR/C/USA/4 (May 22, 2012) [hereinafter U.S. Fourth Periodic Report to HRC); Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119, 122–27 (2005); *see also* Beth Van Schaack, *The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now Is the Time for Change*, 90 INT'L L. STUD. 20 (2014).

175. Hum. Rts. Comm., General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add. 1326 (May 29, 2004) [hereinafter General Comment 31].

176. For discussion of these approaches to interpretation in the European Court, see Shai Dothan, *The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights*, 42 FORDHAM INT'L L.J. 765, 766 (2019).

177. López Burgos v. Uruguay, Comm. no. 12/52, Report of the Human Rights Committee, U.N. GAOR, 36th Sess., Supp. No. 40, at 176, 183, U.N. Doc. A/36/40 (1981).

178. Coard v. United States, Case 10.951, Inter-Am. Comm'n H.R. Rep. No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. ¶ 37 (1999).

the norms which pertain."[179] The Commission emphasized that "individual rights inhere simply by virtue of a person's humanity"; accordingly, a state's obligations to protect human rights extends to all those subject to its jurisdiction.[180] "While this most commonly refers to persons within a state's territory," conceded the Commission, "it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state . . . ."[181] Ultimately, the Commission concluded that "[i]n principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control."[182]

The decisions and comments referenced here are those that scholars and other decision-making bodies routinely cite to support the extraterritorial scope of a state's human rights obligations under these instruments, but there is, simply, no shortage of opinions reiterating the same points.[183] Indeed, the extraterritorial nature of a state's human rights obligations is so well founded in international human rights law at this point that it would be untenable to assert the location of, say, the deaths on the *Fitzgerald* or *McCain* as an explanation for why they could not constitute human rights violations by the U.S. government. The challenge is thus not doctrinal but rather, as discussed below, conceptual and cultural, a resistance to the idea that service members are owed anything by their governments.[184]

We might similarly classify as a red herring any argument that holding the U.S. government responsible for training and equipment failures would be difficult because of questions about the applicability of human rights law in situations of armed conflict (even putting aside the fact that service member deaths arising from government negligence occur not only in the midst of armed conflict, but also well beyond the time and space of the battlefield). On the question of whether human rights obligations persist in

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*; *see also* Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 229 (2010) ("Regional human rights tribunals, the U.N. treaty bodies, and the . . . ICJ . . . all have recognized that human rights obligations travel with a state when a state or its agents place persons or territories under the state's 'effective control.' ").

183. For an extensive treatment of extraterritoriality and human rights obligations, see generally MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY (2011).

184. *See infra* Section III.B; *see also supra* notes 137–38 and accompanying text (discussing United Kingdom Court of Appeals decision in *Smith* finding that European Convention jurisdiction can be based on soldiers overseas perpetrating human rights violations but not on soldiers being subjected to them).

wartime, just as the European Court of Human Rights has held that the European Convention imposes human rights obligations on States Parties in the context of armed conflict, the monitoring and implementation bodies responsible for the ICCPR and the American Declaration have held that these instruments unquestionably apply to situations of armed conflict. In General Comment 31, the Human Rights Committee rejected the theory that international humanitarian law displaces human rights law, stating that "both spheres of law are complementary, not mutually exclusive," even if "in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights."[185] And in General Comment 36, its 2018 interpretation of the right to life under Article 6 of the ICCPR, the Committee addressed the specific question of the scope of the right to life in armed conflict[186] and offered an approach that is consistent with its prior interpretations of state obligations under the Covenant more broadly:

> [A] State [P]arty has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner.[187]

The Inter-American Commission, too, has consistently held that human rights obligations apply in armed conflict. In its first decision arising out of the so-called War on Terror, concerning the violation of the rights of Djamel Ameziane, an Algerian national whom the U.S. government detained in Guantánamo Bay from 2002 to 2013, the Commission held that in "situations of armed conflict . . . , international human rights law is in no way displaced by the law of armed conflict or any other regime of international law. Rather, human rights law continues to apply except to the extent that it may properly be made the subject of derogations . . . ."[188] Again, across international human rights law there is no question that human rights obligations and protections continue during armed conflict[189]—a principle that even the

185. General Comment 31, *supra* note 175, ¶ 11.

186. General Comment 36, *supra* note 25, ¶ 1.

187. *Id.* ¶ 63.

188. Ameziane v. United States, Case 12.865, Inter-Am. Comm'n H.R., Rep. No. 29/20, OEA/Ser.L/V/II, doc. 39, ¶ 115 (2020).

189. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168 (Dec. 19).

United States no longer rejects.[190]

Finally, there is no reason to think that the content of the right to life itself would significantly differ from the European Convention to the American Declaration or the ICCPR. It is now commonplace across these instruments that human rights obligations consist not only of "negative" duties—the state's obligation to refrain from undertaking conduct that would violate the rights of those subject to its control—but also "positive" obligations—requirements for the state to undertake affirmative steps to realize rights. Therefore, to fulfill its obligation to protect the right to life,[191] a state must refrain from arbitrarily depriving individuals of life through its own agents, and it also must take positive measures to protect against such arbitrary deprivations where there is a reasonable opportunity to do so.[192] To be sure, the boundaries of a state's obligations with respect to protecting the right to life are not precisely delineated. But it is well settled that states have some obligation to protect against unnecessary deaths when they are or should be aware of those risks.[193]

2. Neglecting Soldiers' Rights

Ultimately, then, there is an easy case to be made that the same arguments underlying *Smith*—(1) that a state's human rights obligations extend not only to its territory, but also apply extraterritorially where the state exercises control over the person who experiences the violation, even if that person is a military service member; and (2) those human rights obligations include a requirement that the state take affirmative steps to protect the lives of those subject to its control—can be made with respect to human rights instruments binding the United States. And accordingly, there is at least a colorable claim to be made that the American service-member deaths resulting from the U.S. government's systemic, repeated failures to maintain its military equipment and to require proper training constitute human rights violations.

Despite the plausibility of this argument, human rights advocates have

190. *See* U.S. Fourth Periodic Report to HRC, *supra* note 174, ¶ 506.

191. *See* ICCPR, *supra* note 169, art. 6; American Declaration, *supra* note 171, art. 1.

192. *See* General Comment 31, *supra* note 175, ¶¶ 6, 8; Christian Tomuschat, *The Right to Life—Legal and Political Foundations*, *in* THE RIGHT TO LIFE 3, 10 (Christian Tomuschat, Evelyne Lagrange & Stefan Oeter eds., 2010).

193. Some commentators have argued in the COVID-19 era that the obligation to protect the right to life "likely does mean that States at least have a duty to not knowingly contribute to the spread of the virus—for instance, States should ensure first responders and health care workers have access to necessary personal protective equipment (especially masks) to protect themselves and those they serve." Oona Hathaway, Preston Lim & Mark Stevens, *COVID-19 and International Law Series: Human Rights Law—Right to Life*, JUST SEC. (Nov. 18, 2020), https://www.justsecurity.org/73426/covid-19-and-international-law-series-human-rights-law-right-to-life [https://perma.cc/X5MX-8FDF].

neglected these deaths of service members. No one affected by any of the many incidents of U.S. lapses in training and equipment has filed an application in the Inter-American Commission alleging the United States is responsible for a violation of the right to life.[194] In its three cycles of the Universal Periodic Review—the comprehensive assessment of every United Nations member state's human rights record[195]—the United States received no questions or comments about its human rights obligations with respect to properly training and equipping service members.[196] This cannot be attributed to any reluctance to address extraterritorial conduct; state delegations raised numerous questions and voiced significant concern about a range of violations perpetrated overseas, from the U.S. torture and rendition program, to the lack of adequate trial guarantees for individuals detained at Guantánamo, to targeted killings in American counterterrorism operations.[197] With respect to the ICCPR, the periodic reviews of the United States before the Human Rights Committee reflect the same dynamics.[198] The only interventions related to the rights of service members concerned the inadequacy of measures to prevent and establish accountability for sexual

194. For discussion of the jurisdiction of the Commission, see JAMES L. CAVALLARO, CLARET VARGAS, CLARA SANDOVAL, BERNARD DUHAIME, WITH CAROLINE BETTINGER-LOPEZ, STEPHANIE ERIN BREWER, DIANA GUZMÁN & CECILIA NADDEO, DOCTRINE, PRACTICE, AND ADVOCACY IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM 22 (2019).

195. U.N. Hum. Rts. Council, *Basic Facts About the UPR*, https://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx [https://perma.cc/B9UU-PHLE]; Hilary Charlesworth & Emma Larking, *Introduction: The Regulatory Power of the Universal Periodic Review*, *in* HUMAN RIGHTS AND THE UNIVERSAL PERIODIC REVIEW: RITUALS AND RITUALISM 1, 1 (Hilary Charlesworth & Emma Larking eds., 2014).

196. *See* U.N. Hum. Rts. Council, *Universal Periodic Review—United States of America*, https://www.ohchr.org/EN/HRBodies/UPR/Pages/USindex.aspx [https://perma.cc/N63K-GLJ5] (collecting all reporting and correspondence for three UPR cycles). Every document was reviewed for any reference to service members' rights or government obligations related to military training or equipment. Indeed, even in the United Kingdom's UPR process, there was no mention of soldiers' right to adequate equipment, even though the *Smith* case was proceeding through the courts for years, and the Chilcot inquiry revealed government officials' disregard for the risks posed by deploying the Snatch Land Rovers. *See* U.N. Hum. Rts. Council, *Universal Periodic Review—United Kingdom of Great Britain and Northern Ireland*, https://www.ohchr.org/EN/HRBodies/UPR/Pages/gbindex.aspx [https://perma.cc/XUX9-RHRM].

197. *See, e.g.*, Hum. Rts. Council, Report of the Working Group on the Universal Periodic Review: United States of America, at 15, 19, U.N. Doc. A/HRC/46/15 (2020); Hum. Rts. Council, Report of the Working Group on the Universal Periodic Review: United States of America, at 26, 28, U.N. Doc. A/HRC/30/12 (2015); Hum. Rts. Council, Report of the Working Group on the Universal Periodic Review: United States of America, at 5, 8, 23, U.N. Doc. A/HRC/16/11 (2011).

198. *See, e.g.*, Hum. Rts. Comm., Concluding Observations on the Fourth Periodic Report of the United States of America, ¶¶ 5, 9, 21, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014) (addressing accountability for torture, targeted killings, and Guantánamo detainees). Civil society organizations also did not raise these issues. All documents submitted in connection to the U.S. ICCPR periodic reviews since 2017, collected at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=En&CountryID=187 [https://perma.cc/YXV5-VG74], were studied to reach the conclusion.

violence in the military.[199]

Readers might wonder whether the human rights community's neglect of service members' human rights outside of the realm of sexual violence can be traced to an assumption that human rights have no place in the context of war; after all, *inter arma silent leges*, the saying goes.[200] But this theory misses the mark on three grounds. First, the incidents of government negligence addressed in this Article often take place outside of conflict, during non-combat operations.[201] Second, as discussed above, there is no question that human rights law applies even during armed conflict.[202] The debates on the question have moved from theories of how the law of war entirely displaces human rights law in armed conflict to near-universal agreement that governments continue to have human rights obligations even in the context of armed conflict, with disagreement now centering primarily on how those obligations are precisely defined in particular contexts.[203] As a doctrinal matter, accordingly, the question of the application of human rights law in armed conflict does not explain why discussion of soldiers' deaths because of inadequate equipment or training in combat would be absent from human rights forums, and it certainly does not explain why discussion of soldiers' deaths because of inadequate equipment or training outside of combat would be absent from human rights forums. Third, human rights advocates themselves have shown no reluctance in drawing attention to human rights violations in the context of war. From the Inter-American Commission to the Human Rights Committee to the Universal Periodic Review, the advocates and other actors involved raised numerous questions and voiced significant concern about a range of violations perpetrated during or related to war, which, over the course of the past twenty years, has been

199. *See, e.g.*, Hum. Rts. Council, Report of the Working Group on the Universal Periodic Review: United States of America, at 15, U.N. Doc. A/HRC/46/15 (2020); *see also* CORNELL L. SCH.'S GENDER JUST. CLINIC, SEXUAL VIOLENCE IN THE U.S. MILITARY: SUBMISSION TO THE UNITED NATIONS UNIVERSAL PERIODIC REVIEW OF THE UNITED STATES OF AMERICA (THIRD CYCLE) (Sept. 2019), https://www.lawschool.cornell.edu/wp-content/uploads/2020/12/UPR-Submission-Sexual-Violence-in-the-US-Military.pdf [https://perma.cc/Q8SL-AYJM].

200. *See, e.g.*, MARY L. DUDZIAK, WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES 16, 165 n.11 (2012).

201. *See supra* Part I.

202. *See supra* notes 185–90 and accompanying text.

203. Another possible argument concerns the extraterritorial nature of these incidents, but rights advocates have readily addressed extraterritorial conduct in these forums. Questions, comments, and recommendations routinely cover both extraterritorial conduct and armed conflict. *See, e.g.*, Hum. Rts. Comm., Concluding Observations on the Fourth Periodic Report of the United States of America, ¶¶ 5, 9, 21, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014) (addressing overseas conduct by the United States).

the basis of so much of the American presence overseas.[204]

Indeed, human rights advocates have shown no reluctance not merely in addressing human rights violations in the context of war; they have shown no reluctance in addressing human rights violations *perpetrated* by members of the military. To the human rights community, then, service members are not always invisible. In the context of sexual assault, they are victims; and in the context of human rights abuses, they are perpetrators. Meanwhile, the absence of any mention in the human rights community of the *Fitzgerald* or *McCain* or rollovers or plane crashes establishes that these deaths are not envisioned as human rights abuses, and that soldiers are not seen as meriting human rights protections in their more routine parts of military service—despite the easy path *Smith* has marked to make that argument.

Advocates and state delegations undoubtedly choose how to spend their political capital and resources and must make selections in how to allocate their attention and time in the complaints, periodic review, and UPR processes. But still, the willingness to see soldiers as perpetrators of rights violations, and the failure to see their deaths and injuries as human rights violations, reflect a broader pattern in human rights law, and they expose a broader failure to acknowledge the human rights of soldiers. As Gabriella Blum has written, "The human rights community, advocates and scholars alike, has remained fairly silent in discussions of the right to life of a country's own military forces."[205] Scholars such as Blum have devoted attention in recent years to the question of whether soldiers have legal or

204. *See, e.g.*, Ameziane v. United States, Case 12.865, Inter-Am. Comm'n H.R., Rep. No. 29/20, OEA/Ser.L/V/II, doc. 39, ¶ 115 (2020); Hum. Rts. Council, Report of the Working Group on the Universal Periodic Review: United States of America, at 15, 19, U.N. Doc. A/HRC/46/15 (2020); Hum. Rts. Council, Report of the Working Group on the Universal Periodic Review: United States of America, at 26, 28, U.N. Doc. A/HRC/30/12 (2015); Hum. Rts. Council, Report of the Working Group on the Universal Periodic Review: United States of America, at 5, 8, 23, U.N. Doc. A/HRC/16/11 (2011); Hum. Rts. Comm., Concluding Observations on the Fourth Periodic Report of the United States of America, ¶¶ 5, 9, 21, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014) (addressing accountability for torture, targeted killings, and treatment of Guantánamo detainees).

205. Blum, *supra* note 34, at 132; *accord* Larry May, *Humanity, Necessity, and the Rights of Soldiers*, *in* WEIGHING LIVES IN WAR 77, 78 (Jens David Ohlin, Larry May & Claire Finkelstein eds., 2017) ("In both morality and law, it is still common to say that soldiers' lives do not count for very much in assessments of whether or not a particular war or armed conflict is justifiably initiated and conducted."); Mohamed, *supra* note 17, at 2212 ("The traditional account of the law of war declares that this body of law generally does not address a state's treatment of its own soldiers, apart from exceptional situations."); Rain Liivoja & Alison Duxbury, *Human Rights of Service Personnel*, 28 HUM. RTS. DEF. 13, 13 (2019) ("When discussing the application of international human rights law to service personnel, commentary has tended to focus on the role of service members as duty bearers."); Ross McGarry, Gabe Mythen & Sandra Walklate, *The Soldier, Human Rights and the Military Covenant: A Permissible State of Exception?*, *in* NEW DIRECTIONS IN THE SOCIOLOGY OF HUMAN RIGHTS 61, 66 (Patricia Hynes, Michele Lamb, Damien Short & Matthew Waites eds., 2014) ("The human rights of military service personnel have historically been seen as atypical.").

moral rights against being killed in combat. These studies have proposed that soldiers' lives be given greater weight in determinations of proportionality and distinction[206] and even that soldiers' rights should restrain states from engaging in aggressive war.[207] But these are few and far between; and they are limited to the question of death in combat. The very fact that the question taken up in this Article—a government's obligation to protect a soldier, and a soldier's right to expect protection from their government—has yet to be explored itself sheds light on the broader landscape in which soldiers are situated, and it exposes their status as instruments more than agents (at least when they are outside of the role of perpetrator of violations). Indeed, even in some of the writings that feature and advocate for greater protection of soldiers' right to life, the service member continues to be something of an object rather than a subject, a mechanism operating to propel forward the argument that human rights law may constrain the state's freedom to resort to war. But the service members themselves hardly figure in their own right as claimants of rights—as human.

B. FROM HERO TO HUMAN

The above discussion establishes that the deaths and injuries of service members do not resonate in the human rights community, or the wider public, as rights violations; but what then, are they? They represent, above all, another version of the sacrifice that military service members are expected to endure. In its narrowest form, meanwhile, the decision in *Smith* articulates that a soldier's right to life requires the government to adequately protect that soldier from death, even overseas, even in the context of an activity like war that necessarily poses a risk of death. This Section argues that this approach to the rights of soldiers, however, should be understood as much more.

Given the risk of death and injury that war necessarily poses, the association of military service with sacrifice may seem unremarkable. The characterization of the losses suffered by service members as sacrifices, however, is not inevitable, and beyond that, it reveals the predominant cultural conception of soldiers. The military's association with sacrifice

206. *See* DANNENBAUM, *supra* note 27; JEFF MCMAHAN, KILLING IN WAR 51–65 (2009); Blum, *supra* note 34, at 117, 122, 127–32; May, *supra* note 205, at 78; Jeff McMahan, *On the Moral Equality of Combatants*, 14 J. POL. PHIL. 377, 380–84 (2006); Asa Kasher & Amos Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, 4 J. MIL. ETHICS 3, 15, 17 (2005); *see also* May, supra note 146, at 354 ("[E]ven if soldiers' lives have value, and can be the subject of human rights abridgement, the lives of soldiers are less significant than are the lives of innocent civilians. Indeed, the principle of discrimination or distinction in the Just War tradition as well as in international law calls for the favoring of civilian lives over those of soldiers.").

207. *See generally* DANNENBAUM, *supra* note 27.

certainly signifies an association with esteem and honor. Serving in the military "has taken on an exalted status" in the United States, in the words of writer Daniel Bergner.[208] In 2012, for example, President Barack Obama opened his State of the Union with a litany of acclamations for the extraordinary "courage, selflessness and teamwork" of the military: "At a time when too many of our institutions have let us down, they exceed all expectations. They're not consumed with personal ambition. They don't obsess over their differences. They focus on the mission at hand. They work together."[209] This was Obama's first State of the Union after the killing of Osama bin Laden by American service members, a time of particular adulation of the military; but his sentiments are not unique to that particular time and place. Indeed, historian Margaret MacMillan, exploring the "fascination" with and "admiration" for war across cultures and across time, notes that "[w]e find in war qualities which we don't always find in civilian life. We find people prepared to sacrifice themselves, prepared to die for ideals or prepared to die for others."[210] As MacMillan explains, the sacrifice itself is the quality that is admired. As mechanized warfare diminished the possibility of showing one's skill on the battlefield, the soldier instead became known for "willingness to sacrifice himself, rather than his skill as a courageous aggressor."[211]

The culture of admiration for sacrifice is reinforced by military leadership, which cultivates the idea that military service is not a job, but a calling. Quoting Sir John Hackett's famous comparison of military service to the priesthood,[212] the Department of Defense publication *The Armed Forces Officer* proclaims, "[T]he profession of arms is a vocation, a higher calling, to serve others, to sacrifice self, to be about something larger than one's own ambitions and desires, something grander than one's own

208. Daniel Bergner, *The Other Army*, N.Y. TIMES MAG. (Aug. 14, 2005), https://www.nytimes.com/2005/08/014/magazine/the-other-army.html [https://perma.cc/6HRW-VFPW]; *see also* BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 144 (rev. ed. 2006) ("Dying for one's county . . . assumes a moral grandeur which dying for the Labour Party, the American Medical Association, or even Amnesty International can not rival.").

209. President Barack Obama, Remarks by the President in State of the Union Address (Jan. 24, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/01/24/remarks-president-state-union-address [https://perma.cc/NC5V-HMEG].

210. Margaret MacMillan, *War and Humanity*, THE REITH LECTURES, at 7:23 (June 26, 2018), https://www.bbc.co.uk/sounds/play/b0b7f390 [https://perma.cc/6QFL-7RMP]; *see also* EVELYN COBLEY, REPRESENTING WAR: FORM AND IDEOLOGY IN FIRST WORLD WAR NARRATIVES 122 (1993) (analyzing the popularity in war writing of the *Bildungsroman* paradigm as representing association of war with "the virtues of honor, courage, acceptance of risk and self-sacrifice").

211. Evelyn Cobley, *Violence and Sacrifice in Modern War Narratives*, 23 SUBSTANCE 75, 78 (1994).

212. *See* JOHN WINTHROP HACKETT, THE PROFESSION OF ARMS 3 (Center of Military History 1986).

contributions and even one's own life."[213] The same is true, write political scientists Ronald Krebs and Robert Ralston, even beyond military leadership; "[p]oliticians, government officials, pundits, and others rarely, if ever, speak of service members as well-trained employees doing a dangerous job for which they are appropriately compensated."[214] Instead, they are "model citizens and patriots . . . making the greatest of sacrifices for the common good."[215]

Treating suffering or death as a sacrifice gives it public meaning, marks it as proud.[216] And this vision of soldiering as priesthood is true to the motivations of many American service members. But it does not represent the multivalent experience of so many military personnel in the United States, who serve not only because of patriotism or a sense of duty to country, but also because of what they will gain—educational opportunities, career skills, the chance to lead, to travel, to leave behind what feels like a dead-end town or a dead-end job.[217] Nonetheless, many Americans cling to the

213. RICHARD M. SWAIN & ALBERT C. PIERCE, THE ARMED FORCES OFFICER 17 (2017). The exaltation of military service as a "higher calling" accords with the military sacrifice as a political project. As Paul Kahn writes, "One knows that the popular sovereign is present not by counting the numbers in the crowds but by witnessing acts of sacrifice." PAUL W. KAHN, SACRED VIOLENCE: TORTURE, TERROR, AND SOVEREIGNTY 137 (2008); *see also* Bergner, *supra* note 208 (noting that in the soldier's death, injury, and self-abnegation, "we see the value of our society reflected back to us" and "feel our special worth"). For a similar conclusion in a different context, see ANDREW BICKFORD, FALLEN ELITES: THE MILITARY OTHER IN POST-UNIFICATION GERMANY 27 (2011) ("Soldiers make the state visible through their personification of the state and identification with the 'positive' virtues of the state.").

214. Ronald R. Krebs & Robert Ralston, *Patriotism or Paychecks: Who Believes What About Why Soldiers Serve*, 48 ARMED FORCES & SOC'Y 25, 30 (2022).

215. Krebs & Ralston, *supra* note 214; *see also* Ronald R. Krebs, *The Citizen-Soldier Tradition in the United States: Has Its Demise Been Greatly Exaggerated?*, 36 ARMED FORCES & SOC. 153, 162–65 (2009). Ned Dobos has explored the shifting understanding of military service as employment and the notion that "[i]f employees have rights at work, and soldiers are employees, too, then soldiers have rights at work, even in the inherently dangerous workplace that is war." Ned Dobos, *War as a Workplace: Ethical Implications of the Occupational Shift*, 18 J. MIL. ETHICS 248, 250–51 (2019). Dobos explores whether those rights could "constrain the war-making prerogatives of the state." *Id.* at 249. He finds that recognizing workplace rights of soldiers both "would reinforce already acknowledged moral limitations on the state's freedom to wage war" and "may impose supplementary ethical requirements on the state, particularly in relation to its armed humanitarian operations," and in some cases might impose "conflicting ethical imperatives" on the state. *Id.* at 256.

216. HALBERTAL, *supra* note 128, at 69 ("[S]ince it is the mark of the good that it deserves sacrifice, the reverse must be true too—namely, that sacrifice makes something into a good."); Kirk Savage, *Trauma, Healing, and the Therapeutic Monument*, *in* TERROR, CULTURE, POLITICS: RETHINKING 9/11, at 103, 110 (Daniel J. Sherman & Terry Nardin eds., 2006) ("[T]he invocation of sacrifice . . . is a time-honored way of fixing the collective significance of violent death . . . .").

217. Krebs & Ralston, *supra* note 214, at 28–29; Todd Woodruff, Ryan Kelty & David R. Segal, *Propensity to Serve and Motivation to Enlist Among American Combat Soldiers*, 32 ARMED FORCES & SOC'Y 353, 360 (2006); Melissa Murray, *When War Is Work: The G.I. Bill, Citizenship, and the Civic Generation*, 96 CALIF. L. REV. 967, 995–96 (2008); Michael Massing, *The Volunteer Army: Who Fights and Why?*, N.Y. REV. BOOKS (Apr. 3, 2008), https://www-nybooks-com.libproxy.berkeley.edu/articles/2008/04/03/the-volunteer-army-who-fights-and-why [https://perma.cc/UQM5-LVMS]. For

idea that individuals join the military because they are driven by a higher purpose.[218] Even when they are, the fantasy of sacrifice occludes the fact that service members are not otherworldly; they are just people. Valorizing death and suffering may allow a society to avoid scrutinizing them, may inure a society to them, make it numb to them. And this valorization might be treated as enough of a reward, enough recognition, that any protection or reparation beyond that is deemed unnecessary—or even incompatible with the esteem that has been bestowed.

Human rights law, by contrast, constructs a vision of each person as a legitimate claimant upon their government. Treating events like the collisions of the *McCain* and the *Fitzgerald*, or the deployment of Snatch Land Rovers instead of properly armored vehicles, or the failure to properly maintain the equipment being relied upon in training, as possible human rights violations by the government not only operates to constrain the government's actions with respect to military conduct. It also changes the status of the military service members—it takes them out of the realm of the sacred and brings them down to the ground. It humanizes those who died and were injured by recognizing that the government owed them something, just as the government owes a duty to every individual subject to its authority and control. And for those still serving, it legitimizes the notion that they can make claims on their government, and it recognizes them as separate from the state that they serve and as deserving of protection from that state. The constructs of human rights law articulate soldiers' status as agents, not mere tools.[219] They are neither fodder to be fed to the cannons nor oblations to be offered to the cause of patriotism or the nation's survival.

discussion of the military's shift to "occupation," see Charles C. Moskos, *From Institution to Occupation: Trends in Military Organization*, 4 ARMED FORCES & SOC'Y 41 (1977) (arguing, after the end of the draft, that the military had entered an "occupational" stage—a system "legitimated in terms of the marketplace, i.e., prevailing monetary rewards for equivalent competencies"—as opposed to being driven by the "institutional"—"a purpose transcending individual self-interest in favor of a presumed high good"); MORRIS JANOWITZ, THE PROFESSIONAL SOLDIER: A SOCIAL AND POLITICAL PORTRAIT 117 (1960) (finding in a study of over one hundred service members that "[t]hose who see the military profession as a calling or a unique profession are outnumbered by a greater concentration of individuals for whom the military is just another job"); *see also* Cathy J. Downes, *To Be or Not to Be a Profession: The Military Case*, 1 DEF. ANALYSIS 147 (1985).

218. Krebs & Ralston, *supra* note 214, at 34 (discussing survey results finding that 47% of respondents believe individuals join the military because of patriotism or sense of duty).

219. For a related argument, made in a different register, see Cara Hoffman, *Stop Calling Soldiers "Heroes": It Stops Us from Seeing Them as Human—And Dismisses Their Experience*, SALON (July 20, 2014, 4:30 PM), https://www.salon.com/2014/07/20/stop_calling_soldiers_heroes_it_stops_us_from_seeing_them_as_human_and_dismisses_their_experience [https://perma.cc/7RUQ-RA6W]. Similar arguments have been made in the context of "essential workers" during the COVID-19 pandemic. *See, e.g.*, Sujatha Gidla, *We Are Not Essential. We Are Sacrificial.,* N.Y. TIMES (May 5, 2020), https://www.nytimes.com/2020/05/05/opinion/coronavirus-nyc-subway.html [https://perma.cc/EP33-JH7Q]; Dahlia Lithwick, *America's Heroism Trap*, SLATE (Apr. 20, 2020, 6:44 PM), https://slate.com/news-and-politics/2020/04/coronavirus-humans-vs-heroes.html [https://perma.cc/TNQ3-PLAS].

To be sure, a declaration by a human rights treaty body—or even a court, for that matter—will not immediately transform the predominant sociolegal conception of soldiers. The social and cultural norms against treating soldiers as human are pervasive and longstanding.[220] As such, they will not shift simply through a holding that soldiers have rights against the governments they serve. But such a holding can help to unsettle these norms and begin to create different ones, can tell a new story about who has rights and whose unnecessary deaths merit reckoning, can tell a new story about the limits of a government's power to objectify a person.[221]

Moreover, the arguments of this Article do not intend to suggest that the individuals affected by the events described here must find satisfaction in such a declaration from a human rights body. A determination by the Inter-American Commission or the Human Rights Committee that the United States violated its obligation to protect the right to life would not result in compensation paid, and it would not constitute a finding by an official U.S. judicial body of the responsibility of the United States. But the acknowledgement might mean something to the families who saw failures of leadership at the root of the incidents that led to the deaths of their loved ones. The experience of Jessica Lenahan might open our eyes to the power of such a finding. In 1999, Lenahan's three children were killed by her previous husband, the children's father. Lenahan had a restraining order against him, but the local police department repeatedly refused to enforce it, rolling their eyes at what they viewed as her overblown demands. After the death of her children, Lenahan sought to bring suit against the police department for its failure to enforce the restraining order, but the Supreme Court held that the police had no obligation to enforce the order. Lenahan then filed an action in the Inter-American Commission, which found that the United States had breached its human rights obligations in failing to protect Lenahan and her three children.[222] At the hearing, Lenahan opened her statement by expressing her "grat[itude]" to the Commission "for allowing [her] . . . to tell [her] story. It is a courtesy," she noted, that she "was not granted by the judicial system of [her] home country . . . ."[223]

220. *See* Brooks, *supra* note 155; TADD SHOLTIS, MILITARY STRATEGY AS PUBLIC DISCOURSE 135 (2013).

221. *See generally* SUSAN MARKS & ANDREW CLAPHAM, INTERNATIONAL HUMAN RIGHTS LEXICON 394 (2005) (discussing how "human rights can play a part in shaping cultural norms and practices, even as those norms and practices shape what is possible by way of universal human rights").

222. Lenahan v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 199 (2011).

223. *Jessica Gonzales' Statement Before the IACHR*, ACLU (Oct. 27, 2014), https://www.aclu.org/other/jessica-gonzales-statement-iachr [https://perma.cc/7GV2-6TPZ].

CONCLUSION

In some respects, the days of cannon fodder may be long in the past—especially in light of the many decisions the U.S. military makes to prioritize the physical safety of its troops, such as waging war from fifteen thousand feet or relying on drones instead of ground troops.[224] But service members continue to be subjected to risks beyond those that human rights law deems permissible for a government to impose. And by doing so, human rights law can do more than simply impose constraints on the state's powers over its military forces; it also can affirm the basic human dignity of those who serve, limiting the nature of their sacrifice and legitimating their act of making claims upon the government they serve. Recognizing the human rights of service members—their rights to be protected by their governments, even despite the risks inherent in their jobs—should be embraced for what it is: a path toward humanizing actors too often deemed instruments rather than agents, a crucial next step in subjecting war to law.

224. *See* Oren Gross, *The New Way of War: Is There a Duty to Use Drones?*, 67 FLA. L. REV. 1, 46, 50 (2015). Though drones offer physical protection, they are also understood to impose psychological injuries on those who operate them. *See* Eyal Press, *The Wounds of the Drone Warrior*, N.Y. TIMES MAG. (June 13, 2018), https://www.nytimes.com/2018/06/13/magazine/veterans-ptsd-drone-warrior-wounds.html [https://perma.cc/D49H-YSX5].