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Fair Winds and Following Seas, Shipmate

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Mike Lewis and I overlapped on the USS Independence (CV-62) and at law school in the 1990s. The Independence, fondly called the Indy, was one of the U.S. Navy's last conventionally powered aircraft carriers, based in Yokosuka, Japan. He was an RIO (Radar Intercept Officer) in one of the embarked F-14 fighter-attack squadrons. For fans of the movie *Top Gun*, Mike was Anthony Edwards' "Goose" to Tom Cruise's "Maverick." I was an occasional guest cryptologist on the staff of the admiral who was embarked on the Indy as Commander of Battle Force 70. We may have both been lieutenants, but in terms of the shipboard pecking order, jet jockeys like Mike, even back-seaters, outranked staff intel wienies.

Although we served onboard the Indy at the same time, it wasn't until law school that we actually met. An aircraft carrier is a city on water, with more than 5,000 sailors and marines onboard, and staff officers had a wardroom and berthing spaces separate from ship's company and the squadrons. Nor were Mike and I in the same law school section. We met, instead, through the student veterans' club and because of shared interests in national security and the law of war. (Interestingly, there were three of us at Harvard Law School in the late 1990s who had all served on the Indy—Tim Lynch, Class of 1998, was a surface warfare officer.)

We lost touch after law school. Mike graduated before I did and worked as a practicing lawyer and as a management consultant. I took a couple years off from law school to study for a PhD in Political Science and then clerked. I started teaching at Fordham Law School in 2002. One of the courses I taught was the Law of War. A major issue in the law of war is how to apply the concepts of proportionality, military necessity, and minimization of collateral damage to civilians in military operations. When we got to the topic in my class, I couldn't imagine a better way to bring the point home than to have Mike come in to discuss how he had seen these concepts applied first-hand during his service in the first Gulf War.

I asked permission from my Dean for funding and invited Mike up to New York in 2004 to guest lecture on aerial rules of engagement. The idea was to show my students how the principles of distinction (of civilian

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targets), military necessity, and proportionality they had learned in class were cashed out in actual bombing operations. He came into the class dressed in his flight suit and helmet with the crash visor lowered like a TIE fighter pilot from Star Wars. I'll never forget it, nor will my students.

Not long after his visit, Mike got the teaching bug, which I suspect he always had to some degree. At the time, he was at a law firm in Norfolk, Virginia and contacted me about going into law teaching. He'd published a great article in the *American Journal of International Law* on the law of war and aerial bombardment in the first Gulf War.[1] And, based on what I'd seen in my class, I thought he'd be a terrific teacher to boot. I was happy to serve as one of his recommenders when he threw his hat into the ring at the annual Association of American Law Schools faculty recruitment conference. I was not surprised when he drew interest from, among others, Ohio Northern University Law School, where he ultimately chose to go. His other recommender, incidentally, was David Kennedy at Harvard Law School. When I visited at Harvard in 2012-2013, David and I had neighboring offices for the year. He told me that he had also called on Mike to be a guest lecturer in his international law class about the law of war, and that Mike had just as striking of an effect on his own students as he had on mine.

Mike and I lost touch again as things got busy with our careers and family, but I kept up with his scholarship. More often than not, I ended up disagreeing with his scholarly positions. For instance, Mike believed that U.S. drone strikes against suspected terrorists in foreign countries that had not formally consented to the strikes and with which the United States was not at war were consistent with international law. His conclusion was premised on a self-defense theory—if a foreign country is unable or unwilling to take care of an imminent terrorist threat to the United States, then it is lawful for the United States to eliminate the threat itself.[2]

Mike's position reflected the U.S. Government's position, but, in my view, it is too malleable, and the devil is in the details. When is a threat of terrorist attack imminent? Is there an objective way to determine when a foreign government is unable or unwilling to deal with the threat itself? How are the targets vetted and selected? As a former naval intelligence officer, I have some sense of the difficulty of obtaining reliable intelligence about threats and targets. Is there any meaningful non-military, non-intelligence agency oversight process by which the intelligence information cueing a "kill order" is reviewed and verified? And, at the level of theory, I

1. Michael W. Lewis, *The Law of Aerial Bombardment in the 1991 Gulf War*, 97 AM. J. INT'L L. 481 (2003).

2. *See* Michael W. Lewis & Emily Crawford, *Drones and Distinction: How IHL Encouraged the Rise of Drones*, 44 GEO. J. INT'L L. 1127, 1164-65 (2012-2013).

am extremely uncomfortable about the "unwilling or unable" rider to self-defense, which strikes me as a textbook example of an exception that could swallow up the rule.

Another issue on which we had divergent opinions was how strictly the international law principles of proportionality, distinction, and military necessity should be framed and applied to military operations. Mike was generally favorable to the way that sophisticated militaries like the United States, the United Kingdom, and Israel applied the principles, more often than not against asymmetric foes that did not themselves adhere to the law of war. I agreed with him that strict observance of the standards set forth in the Additional Protocols to the Geneva Convention[3] (which the United States did not ratify) went too far in the other direction. We need to protect civilians, but militaries have jobs to do. And it is too much to ask them to handcuff themselves entirely when they are fighting unconventional enemies. With specific respect to drones, Mike pointed out their relative superiority as compared to the older options of aerial bombardment or artillery fire in terms of minimizing collateral damage.[4]

But at the same time, I am more troubled than Mike was at the absence of external, institutional law-of-war constraints on military operations. The internal checks, in my view, are well-meaning but insufficient. U.S. military lawyers are wonderful, dedicated people. But they are devoted above all to our warfighters and to the safety of their brothers and sisters in arms and their friends and family at home. What the various proportionality, distinction, and military necessity rules boil down to is a single means-ends calculation very common in public law (*e.g.*, strict scrutiny in U.S. constitutional law) about ensuring that government behaves reasonably in taking action that destroys or injures people's lives and property. It is too much to expect that the U.S. military can be objective enough in performing this crucial check when asked to do so against enemies with whom it has little in common and who do not seem to fight fair.

For this reason, the reasonable military commander, in my view, should imagine, and be checked, under an over-corrective heuristic in which she or he acts *as if* conducting military operations within his or her own homeland. Would the United States have ordained the same rules of engagement for drone strikes, bombardment, or civilian safety if attacking Washington

3. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 115 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

4. *See* Michael W. Lewis, *Battlefield Perspectives on the Laws of War*, *in* THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE 237, 244-54 (Geoffrey S. Corn et al. eds., 2015).

D.C., not Benghazi or Baghdad? Would the Israeli military have acted the same if operating in Tel Aviv not Gaza? At the very least, how would we as Americans want a sophisticated foreign military force to behave if it was our own cities and fields that were the battle zones?

Mike, I know, thought that my *as if* heuristic on the reasonable military commander rule was going too far. But we did agree that the absence of a published corpus of reports or legal opinions makes proportionality in the law of war somewhat amoebic and anemic, as compared, say, to proportionality analysis in U.S. Supreme Court equal protection jurisprudence. And so he would probably have agreed with me in calling for inculcating a norm of greater transparency in after-action reports regarding drone strikes and bombings, more scrutiny by non-military institutions like the courts of law-of-war issues (such as in Israel), and, at the broadest level, more attention paid to remedying the sad fact that the military constitutes a tiny fraction of the United States population at large. Because most Americans have little experience or direct knowledge of the military, they seem content to express thanks to our servicepersons without knowing what this service entailed and to support policies to grow it mindlessly given present dangers. It is particularly distressing that our elites who populate the White House, Congress, the Courts, and our state governments have less military experience than ever in the history of the Republic, even as the threats it faces are becoming more complex and diffuse (terrorism, the economic might of China, Russian nationalism).

At the deepest level, our disagreement reflected a fundamental difference of opinion on whether the United States' current conduct of military operations was good policy and consistent with international law. I believe, for instance, that drone strikes in foreign countries with which the United States is formally at peace are highly problematic under international law because they expand doctrines of self-defense and consent (by reckless inaction) to meaninglessness. From a policy perspective, drone strikes enervate and sabotage American interests because they mask the real damage and deaths the United States is causing, which in turn strategically creates more enemies, and because they make the causing of such damage and deaths costless from a political perspective because the President who orders them does not risk the lives of American servicemen and women. Mike, on the other hand, approved of drone strikes outside of battle zones, thought they were good policy given the lack of other options, and believed them consistent with international law. At the same time, he would have agreed with me, I think, in asserting the need for new law-of-war rules to govern today's warfare technologies and unconventional contexts, and pushing for cooperation between governments and their militaries and international human-rights organizations in their formulation.

Despite real and enduring divergences of opinions, I had, and have, great respect for Mike's opinions because he had a rare credibility to hold them based on his military experience. And he never let the disagreements affect our personal relationship. One hour after a very heated exchange of dueling opinions in my seminar, we were laughing and swapping sea stories over dinner.

The last time I saw Mike Lewis was at the Association of American Law Schools hiring conference in Washington, D.C., in October 2014. We were both members of our respective faculty appointments committees. He was heading out to meet some colleagues and I was meeting some high-school friends. He looked healthy—as always boyish and young for his age. By coincidence, he was wearing a t-shirt from military duty in Korea, where we also both served although at different times and in different units. We exchanged pleasantries and idly resolved to get together sometime soon. I don't think he knew he was sick with cancer. At the time, I didn't know that I also had cancer. I was diagnosed with stage 4 non-Hodgkin lymphoma in February 2015, received chemotherapy, and have been in remission since June 2015, when Mike died.

I was stunned when I learned that Mike had passed. Shaken to the core. I deeply regret that we didn't get the chance to have one last good talk. The world and all of us are diminished. Fair winds and following seas, shipmate.