

Article

The Duty to Report Atrocities

Stephen Kershner
SUNY Fredonia

1. Introduction

Is a member of the military morally required to report fellow members who commit wartime atrocities such as murder, torture, rape, and assault? The Blackhearts Case, involving Pfc. Justin Watt, brings out this issue.¹ While serving in the Iraq War, Watt became aware that fellow members of his platoon on March 12, 2006 raped a fourteen-year-old and then killed her, her parents, and her younger sister. They then burned the fourteen-year-old's body. He heard about the atrocity from Sergeant Tony Yribe, who chose not to turn in the members of platoon who committed the atrocity. Watt turned them in. As a result, four members of his platoon (who had been his good friends) received harsh punishments. Specialist James Barker and Private First Class Jess Spielman are serving ninety-year prison sentences. Specialist Paul Cortez is serving a 100-year prison sentence. All three are eligible for parole. Private First Class Steven Green was given five consecutive life sentences without the possibility of parole. While imprisoned, he committed suicide. Yribe was originally charged with dereliction of duty for making false statements and for his role in covering up the rape and murders. He was granted immunity for his testimony and was given an other-than-honorable discharge from the U.S. Army. The issue this article addresses is a significant one to the extent that U.S. military personnel commit such atrocities, even if they are not always so monstrous, and fellow members of the armed services have to decide whether to turn in their fellow troops.

There is a different issue as to the soldiers' responsibility for the atrocity. This is relevant if the existence or stringency of duty to

¹ This account comes largely from Jim Frederick, *Blackhearts: One Platoon's Descent into Madness in Iraq's Triangle of Death* (New York: Broadway Paperbacks, 2010). It also comes in part from conversations with Watt.

report atrocities is affected by the moral responsibility of the perpetrators. In the above case, for long periods of time the platoon members were subject to extremely stressful conditions with few breaks. On some psychological theories, situations can make good people do horrible things. For example, this has been applied to one of the main players in Abu Ghraib.² Also, one of the soldiers had a mental disorder when he joined the army. Steven Green, who shot all four victims, was diagnosed with a pre-existing antisocial personality disorder for which he was discharged from the army. People with this diagnosis are colloquially referred to as psychopaths or sociopaths. To join the army, he had to be granted a moral waiver for his prior convictions. The army was granting such waivers at a much higher rate because of recruitment shortages.³

My view is that a soldier's responsibility for the atrocity is irrelevant to whether others have a duty to report it, although it might be relevant to the punishment the wrongdoer merits. Were there a duty to report the atrocity, the wrongdoer's fellow soldiers would owe it to the victim. Analogous to a civilian victim who is brutalized by an individual who is insane or has diminished capacity, the victim's claim would likely have some connection to the value of having the brutality properly investigated, even if the wrongdoer were eventually found not responsible for what he did. Were there such a duty and were it to depend on the moral responsibility of the wrongdoer for the atrocity, it is unclear whether soldiers in the field are the best judges of whether their brothers-in-arms are morally responsible for their actions. Such a situation would be morally complex because the duty would likely depend on facts that fellow soldiers are in a poor position to judge. While they would have first-hand knowledge of the pressures on the wrongdoer, they would likely have some bias toward him. In addition, such judgments might require expertise that soldiers lack because most

² See Philip Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil* (New York: Random House, 2008).

³ See Frederick, *Blackhearts*. See also, "Mahmudiyah Rape and Killings," *Wikipedia*, accessed online at: https://en.wikipedia.org/wiki/Mahmudiyah_rape_and_killings; and "The Massacre of Mahmudiya—The Rape and Murder of Abeer Qassim Hamsa," *The War Profiteers—War Crimes, Kidnapping & Torture*, accessed online at: http://www.expose-the-war-profiteers.org/DOD/iraq_II/mahmudiaya.htm#Background.

are not psychology-related specialists. We would then need a theory to explain what to do in the context of such moral uncertainty. I am unsure what to say about cases of moral uncertainty, so I will here sidestep this issue.

In this article, I address whether there is a duty to report fellow members of the military for wartime atrocities. Most people I speak to assert that members of the military should obviously inform an authority in these circumstances. I argue to the contrary. In particular, I try to establish the following two theses.

Thesis #1: Threshold. If reporting does not prevent a catastrophe, then a soldier does not have a strong duty to report fellow soldiers who commit atrocities.⁴

The threshold is also met if the reporting brings about an incredibly large benefit. For ease of exposition, I'll focus on the prevention of a catastrophe.

Thesis #2: Threshold Not Met. In the case of Justin Watt, there was no strong duty to report fellow soldiers who committed atrocities.

The duty here is a *prima facie* moral duty. A *prima facie* duty is one that can be overridden or undermined. For simplicity, I will use "duty" to mean "*prima facie* moral duty," except when otherwise specified. A *prima facie* duty is weak if it is overridden by duties of ordinary moral stringency. Examples of duties of ordinary moral stringency are the duties to refrain from using force, fraud, or theft as well as the duty to refrain from lying or cruelty. A duty is strong if it is not weak.⁵ In

⁴ Strictly speaking, the threshold is a consequentialist threshold that involves the bringing about of a large enough benefit or the avoidance of a large enough cost to outweigh the deontological (that is, principle-based) moral consideration. In the text, I try to avoid unnecessarily technical terminology, such as "consequentialism," "deontology," and so on.

⁵ Nothing rests on whether a *prima facie* duty is an epistemic or metaphysical property. For the epistemic account, see W. D. Ross, *The Right and the Good* (Indianapolis, IN: Hackett Publishing Company, 1988). For the metaphysical account, see John Searle, "Prima Facie Obligations," in *Practical Reasoning*, ed. Joseph Raz (New York: Oxford University Press, 1978), pp. 81-90. Depending on the account, ordinary stringency might refer to the normative force that such a duty always has (or by itself leads us to believe that it has

particular, this thesis focuses on a strong duty. Strong duties prohibit someone from performing significantly wrong acts. Examples include cruelty, force, fraud, theft, and lying, when doing so brings about seriously bad consequences.

It is helpful to clarify these notions. A strong duty is a duty that cannot be overridden by permissions or duties of ordinary moral stringency. The purpose of having such a concept is to make it clear that these are very stringent duties that are rarely overridden. On this account, significantly wrong acts, such as unjustified use of force, fraud, or theft, are significantly wrong because of the strong duties opposing them. This account is meant to capture ordinary intuitions that there are strong non-consequentialist duties against acts of unjustified violence. The notion that there are consequentialist reasons that can override stringent non-consequentialist duties also captures our ordinary intuitions. For example, even if it is wrong to torture a child in order to save five lives, it might be permissible to do so to save two million lives. This theory (“threshold deontology”) tracks the way we intuitively think about morality under extreme conditions.

An atrocity is an extremely cruel or terrible act. In this context, I am interested in atrocities committed by soldiers. A catastrophe is an event causing great suffering. The sort of events I am interested in are large-scale events (e.g., disasters, calamities, or cataclysms) that cause death, serious suffering, or harm to many people. More specifically, the sort of event I have in mind is one the prevention of which is weighty enough to warrant pushing a fat man in front of a trolley or killing a healthy person and redistributing his organs.

2. Background Intuitions

It is helpful at this point to see why people might disagree with my thesis and instead believe that there is a strong duty to report an atrocity. One reason to think that there is a strong duty to report wartime atrocities comes from the powerful intuitions suggesting there is such a duty and from the law. Consider first some powerful intuitions in relation to the Blackhearts Case:

such force) or usually has. The relevant range of cases might refer to actual or possible cases. For a parallel discussion of the strength of claims, see Judith Jarvis Thomson, “Killing, Letting Die, and the Trolley Problem” in *Rights, Restitution, and Risk*, ed. William Parent (Cambridge, MA: Harvard University Press, 1986), pp. 78-93. Because nothing rests on these issues, I sidestep them here.

On March 12, 2006, the soldiers (from the 502nd Infantry Regiment) at the checkpoint had been illegally drinking alcohol and discussing plans to rape Abeer. Five soldiers of the six-man unit responsible for the checkpoint left their posts for the Qasim farmhouse. . . . Of the five, four of the soldiers directly participated in the crimes, while Private First Class Howard acted as lookout, but did not otherwise participate. In broad daylight, they walked to the house (not wearing their uniforms) and separated [14-year-old Iraqi girl Abeer Qassim Hamza al-Janabi] and her family into two different rooms. Green then murdered her parents and younger sister, while two other soldiers raped Abeer. Green then emerged from the room saying, "I just killed them, all are dead." He, who later said the crime was "awesome," then raped Abeer and shot her in the head. After the rape the lower part of Abeer's body, from her stomach down to her feet, was set on fire.⁶

There is an intuitive sense that this crime calls out for justice and that, as a result, any person who is even minimally decent would report the rapists and murderers. They would do so because of what they had done to Abeer and not merely because they might do similar things in the future. One reason this might be true is because of what it means to be virtuous, honorable, or decent. Evidence for the commonality of this intuition can be seen in the fact that in December 2012, a room of officers gave PFC Justin Watt, the person who reported the assailants, a standing ovation when he was introduced to them at a conference at the U.S. Army Command and General Staff, Leavenworth, Kansas. Presumably, they gave him the ovation for being an outstanding person or soldier or for doing the right thing when it was difficult to do so.

A second reason is that international law requires commanders to report war crimes and U.S. law requires all members of the U.S. military to do so. The strong duty might come about because the law requires it or, perhaps, an important law requires it. Alternatively, one might think that the consent, fairness, or consequentialist justification for the law is strong either in general or in this context. There seems to be additional intuitive reasons to think that there is a strong duty to report an atrocity. Here is a summary of these purported justifications for a strong duty to report an atrocity:

⁶ See "Mahmudiyah Rape and Killings."

There is a strong duty to report an atrocity when:
A soldier should prevent future atrocities.
He promised to report such atrocities.
Justice requires him to report them.
A virtuous person would report them.
Friendship does not create moral options.

3. Law

In civilian law, there is no duty to turn in other members of the military. Misprison of felony is an offense that consists of the failure to report knowledge of a felony to appropriate authorities, though under U.S. federal law it requires active concealment of a known felony rather than merely failing to report it.⁷ At least some states have criminalized the misprisonment of felony.⁸ Where states have passed these laws, they are difficult to reconcile with the widespread refusal of the criminal law to impose liability on Bad Samaritans—that is, those who fail to provide reasonable assistance to those in need.⁹

A duty to rescue is a tort in which a party can be held liable for failing to rescue another party in peril. In Anglo-American countries, there is no general duty to come to the rescue of another.¹⁰ There is an exception when the person in peril is caused to be there by someone who caused the hazardous situation, even when the creator of the hazard might not have been negligent.¹¹ The same is true for those who

⁷ See *United States v. Johnson*, 546 F.2d 1225 (5th Cir. 1977), esp. p. 1227.

⁸ See, e.g., Ohio ORC 2921.22 (failure to report a crime or knowledge of a death or burn injury).

⁹ See Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (New York: Oxford University Press, 2008); and Sandra Guerra Thompson, “The White-Collar Police Force: ‘Duty to Report’ Statutes in Criminal Law Theory,” *William & Mary Bill of Rights Journal* 11 (2002), pp. 3-65.

¹⁰ See Thane Rosenbaum, *The Myth of Moral Justice* (New York: HarperCollins, 2004). For example, consider *Yania v. Bigan*, 155 A. 2d 343 (Penn. 1959).

¹¹ See Michael Bayles, *Ethical Issues in the Law of Tort* (New York: Springer-Verlag, 1983).

have a special relationship to the endangered person, for example, parents, spouses, and emergency workers.¹²

In some jurisdictions, unless a caretaker relationship (e.g., parent-child or doctor-patient) exists prior to the illness or injury or the “Good Samaritan” is responsible for the existence of the illness or injury, no person is required to give aid of any sort to the victim. Good Samaritan statutes in Minnesota and Vermont do require stranger-laypersons at the scene of an emergency to provide reasonable assistance to a person in need. Failure to do these things is lightly punished. In Minnesota, the violation of the statute is a petty misdemeanor. In Vermont, it may result in a fine of up to \$100.

Conceptually, reporting a wartime atrocity is neither a rescue nor a paradigmatic case of being a Good Samaritan. It is not an instance of rescue because reporting an atrocity is not an instance of saving someone from a dangerous or upsetting situation (e.g., the victim might be dead). It is not an instance of being a Good Samaritan because a person might not be helping others, particularly strangers, when they are in trouble.

In contrast to civilian law, military law requires reporting war crimes. This requirement is not explicitly in the Uniform Code of Military Justice (UCMJ).¹³ The UCMJ is the code that covers members of the U.S. military. Under the Law of War, commanders are legally responsible for reporting war crimes.¹⁴ A similar rule applies to other members of the military under Department of Defense Directive.¹⁵ This

¹² See *Aba Sheikh v. Choe* 128 P.3d 574 (Wash. 2006), citing *Restatement (Second) of Torts*, secs. 315 and 319; and Rosenbaum, *The Myth of Moral Justice*.

¹³ Failure to report fellow soldiers is not Misprison of Serious Offense (Article 134), Obstructing Justice (Article 134), or Accessory After the Fact (Article 78). As with civil law, prosecution focuses on concealing an offense. See M. Tully, “Ask the Lawyer: Concealing a Troop’s Wrongdoing Can Bring Trouble,” *Army Times*, March 6, 2011, accessed online at: http://www.armytimes.com/community/ask_lawyer/offduty-ask-the-lawyer-concealing-wrongdoing. In some cases, wrongdoing must be reported. For example, sailors must report non-privileged information about drug offenses by fellow sailors. See Tully, “Ask the Lawyer,” citing Article 92 and OPNAV Instruction 5350.4C.

¹⁴ See Law of War, sec. 501: Responsibility for Acts of Subordinates.

¹⁵ See Department of Defense, Department of Defense Directive, February 22,

is part of the more general requirement that members of the military comply with the law of war during all armed conflicts.¹⁶ Offenders can be charged with Dereliction of Duty.¹⁷

4. Arguments

a. Argument for Thesis #1

My argument for Thesis #1 takes the form of a modus tollens:

(P1) If soldiers have a strong duty to report fellow soldiers who commit atrocities, then the duty is based on its bringing about the best results or on a moral principle.

(P2) If the strong duty to report fellow soldiers who commit atrocities is based on its bringing about the best results, then reporting prevents a catastrophe.

(P3) If the strong duty to report fellow soldiers who commit atrocities is based on a moral principle, then it is a strong duty and the duty correlates with either a human right or another right.

(P4) There is no strong duty based on a moral principle to report fellow soldiers who commit atrocities that correlates with a human right or another right.

(C1) Hence, if soldiers have a strong duty to report fellow soldiers who commit atrocities, then reporting prevents a catastrophe. [(P1) - (P4)]

Premise (P1) is trivially true. The background idea is that whether an act is right or wrong depends on one of two features: whether it brings about the best results or whether it satisfies a moral principle. Moral

2011, esp. Number 2311.01E, sec. 4.5. As with civil law, prosecution tends to focus on concealing an offense. See Tully, "Ask the Lawyer."

¹⁶ See Department of Defense, Department of Defense Directive, February 22, 2011, esp. Number 2311.01E, sec. 4.1.

¹⁷ See UCMJ Article 92.

principles focus on things such as justice, rights, fairness, exploitation, equality, and so on. These considerations differ from the issue of whether an act brings about the best results. An act that is just, respects people's rights, is fair, etc. might also bring about the best results, but different features explain whether it does both of these things. For some moral theories, the "best results" simply are that, for example, justice is served, rights are respected, fairness is maintained, etc. This is not how I am using this notion. By "best results," I mean that an act's consequences are optimal, that is, they are better than any other set of consequences available to the agent.

Premise (P2) rests on the following assumptions:

Assumption #1: Threshold Morality. What makes an action right or wrong is ordinarily a matter of whether it satisfies the relevant moral principle, except when it can prevent a catastrophe.

Threshold morality asserts that except when a catastrophe can be prevented, the right is a function of the relevant moral principle. The prevention of a catastrophe on this account overrides moral-principle-based constraints and permissions. The idea is that under normal conditions, justice-related or moral-right-related reasons have priority over other moral considerations, act as side-constraints on them, trump them, or constitute reasons that preempt reasons related to the other considerations.¹⁸ This is independent of whether there can be a moral right to do wrong actions.¹⁹

Assumption #2: Threshold Morality to Catastrophe Threshold. If threshold morality is true, then if there is a

¹⁸ For lexical priority, see John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press: 1971). For side-constraints, see Robert Nozick, *Anarchy, State, and Utopia* (New York: Basis Books, 1974). For trumps, see Ronald Dworkin, "Is There a Right to Pornography?" *Oxford Journal of Legal Studies* 1 (1981), pp. 177-212. For reasons with peremptory force, see Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1986).

¹⁹ For a notion that there can in general be a right to do wrong and not just in the context of overriding moral principles, see Jeremy Waldron, "A Right to Do Wrong," *Ethics* 92 (1981), pp. 21-39.

moral duty not based on a moral principle, then it is based on the prevention of a catastrophe.

Premise (P3) rests on an account of non-consequentialism. The account is that a moral principle just is a non-consequentialist moral consideration and that, under non-consequentialism, an act is wrong just in case the agent infringes a duty he owes someone.

Premise (P4) rests on the following assumptions:

Assumption #3: Duty to Claim. If there is a moral-principle-based duty, then there is a correlative claim.

One person has a claim against a second just in case the second owes the first a duty. The idea here is that moral-principle-based duties are owed to others. That is, there are no open-ended duties, that is, duties not owed to anyone. Because imperfect duties are open-ended, this assumption requires that we reject that there are such duties.

This rejection rests on the intuitive oddity of someone having a non-consequentialist duty that is not owed to anyone and that might be filled in different ways. Even if there are imperfect duties, the intuition that there is a duty to report an atrocity is that it is a perfect duty. This can be seen in that it requires a particular act, failing to do it wrongs someone, and so on. Also, assuming that open-ended duties exist (e.g., a duty of charity), reporting an atrocity would merely be one way to satisfy the duty. A member of the military could, instead, feed the starving, give money to the poor, minister to the dying, or build houses for the homeless. Assuming that reporting an atrocity is an act of charity, it is not the only way to act charitably. As a result, there would be no strong duty based on a moral principle to report fellow soldiers who commit atrocities rather than to do something else for the starving, poor, or sick.

Assumption #4: No Correlative Claim. No one has a correlative claim.

In the case of murder, such as the Justin Watt case above, the victim no longer exists. One might think that it is impossible to owe a duty at a time to an individual who does not exist at that time. The idea is that these duties are relations that hold at specific times and between specific individuals.

One might reject this assumption because he holds that individuals exist even after they die. This might be true because a person is a body and bodies can persist even after they are no longer alive. A concern with this is that at some point in time the body will so degrade as to no longer exist. On another account, a person is an immaterial soul and a soul can persist after death and thus be owed duties.

One might also reject this notion because non-consequentialist duties do not require that both individuals exist at the time the duty is to be satisfied. Rather, the duty is created and stays in place even if the individual to whom it is owed ceases to exist. This allows for duties to dead people. However, if such duties (and the correlative claims) are justified by interests or autonomy and if dead people no longer have interests or are autonomous, then dead people cannot be owed duties.

The notion that dead people are owed duties aligns with widespread intuitions, such as the following: people have a duty to keep promises made to loved ones on their deathbed, the living should follow the terms of a will (and not just because the law requires it), and it wrongs the dead to desecrate their bodies. Here we should adopt the following notion: If duties can be owed to dead people, then there can be a correlative claim in dead people. Let us stay neutral about whether the living owe duties to the dead (that is, whether the latter have claims against the former).

Another objection is that some duties based on moral principle do not correlate with a claim. That is, there are some moral-principle-based duties that are not owed to anyone. The objector continues that this can be seen when we consider the retributive duty. This is the duty to punish those who deserve it. The objector continues that this duty is based on a moral principle, but it is not owed to anyone. The objector argues that we know the duty is not owed to someone (specifically, not to the person who deserves punishment, his victim, or a third party) because no one is in a position to waive it.

A problem with this objection is that it is odd for there to be moral-principle-based duties owed to no one. Some feature of the individual toward whom others act explains the relevant moral principle and associated duty.²⁰ What explains why there are

²⁰ This is also true for theories that explain moral-principle-based duties in terms of a feature of the agent. Such a theory still needs to explain why he should treat some objects (e.g., people) different from other objects (e.g., rocks).

restrictions on what an agent may do to an individual is that the individual is autonomous, rational, has interests, or has some other relevant feature. This same feature explains not only why a restriction exists, but also why an individual with that feature has a claim that constitutes (or, perhaps, merely correlates with) the restriction. It is mysterious how such a feature can explain why there is such a duty, but not why it is owed to the individual who has the feature.

Another problem with the objection is that the objector's example of a moral-principle-based duty not owed to anyone is unconvincing. Even if there is a retributive duty to punish culpable wrongdoers, and I do not think there is, it is likely owed to the victim.²¹ The notion that it is owed to the victim explains why in the state of nature it intuitively seems that a victim may punish the wrongdoer, authorize another to do so, or waive her claim to punishment (perhaps in return for compensation). The state then gains a legal right to punish because it has or may exercise individuals' claims to punishment. The state may do so because individuals transfer to the state their claim to punishment or give permission for the state to act on their behalf. This is similar to other principal-agent contracts. They do this by whatever legitimates the state. This might be actual consent, hypothetical consent, duty of fair play, gratitude, or something else, depending on what turns out to be the correct theory of state legitimacy. This transfer might create a state monopoly in the right to punish and might account for why the victim loses her right to waive punishment.

Above I argue that there are some moral-principle-based duties that are not owed to anyone. An objector might argue that there is a good reason for thinking that one ought to report atrocities, namely, that in the future, perpetrators of such harms are threats to others. This, the objector continues, is especially true in the case of harm from willful, deliberate, and premeditated rape, murder, and battery. The objector might continue that the duty is owed to the rest of us who now have unreported monsters in our midst. Thus, the duty is owed to all people who are endangered.²²

The duty to prevent future violence through helping to incapacitate, deter, or reform bad guys is an imperfect duty or a

²¹ I defend the notion that retributive duties are owed to the victims of culpable wrongdoing; see Stephen Kershnar, *Desert, Retribution, and Torture* (Lanham, MD: Maryland University Press, 2001).

²² I owe this objection to an anonymous referee.

consequentialist duty. It is an imperfect duty because potential victims do not have a natural right against a potential helper nor a right derived from it, for example, via promise. In the vast majority of cases, they do not stand in a special relation to the potential helper, for example, they are not the family members of the member of the U.S. military. As argued above, it is unclear whether imperfect duties exist. If they do, and I doubt it, there are other ways they can be satisfied.

Also, as assumed above, consequentialist duties become all-things-considered duties only when necessary to prevent a catastrophe. A catastrophe involves the loss of a significant number of lives or an equivalent amount of suffering. The significant number explains why we don't have a duty to cut up a healthy patient to save five people who need organs, push a fat man in front of a trolley to prevent five other people from being crushed by it, and so on. It also explains why we are free to pursue our projects (e.g., spending money on an expensive private school education for our children) rather than spending it on saving the lives of starving people (e.g., by giving it to Oxfam).

The main argument for the second assumption is that there is no ground for the correlative claim. There is no natural claim owed to the victim. A claim is natural if it is owed in virtue of an individual's being a person, autonomous, a human being, sentient, or something along these lines. In ordinary English, a natural claim, or something like it, owed to a human being is often referred to as a "human right."

If there is a natural non-consequentialist duty to report atrocities, then it is owed to someone. That is, someone has a correlative claim against the soldier, but no one has such a claim. In virtue of being a person, autonomous, etc., an individual does not have a claim against a second individual that the second act to bring about punishment of someone who victimized the first. This is because refraining to do so is a refusal to benefit. People do not have a general right to be benefitted by others. By analogy, if one person knows that a second person is being harmed by a third party's breach of contract, the first's refraining from reporting it does not infringe on the second's claim. This is true even if the injustice harms the second.

I also assume here that there is no duty to rescue. In any case, reporting an atrocity is not a rescue unless it prevents future attacks. Even if there were a duty to rescue, it would be an imperfect duty. Members of the military could thus satisfy it by rescuing others beside the wartime-atrocity victims. Arguably, they do so regularly by disabling or killing aggressors.

There are four reasons to reject a duty to rescue. First, if there were such a duty, then it intuitively seems that it would be owed to people no matter how far away they are. Thus, the duty would be equally strong with regard to donating money to Sudanese children as it would be to save a child drowning in front of me in a shallow puddle. Such a strong duty to people halfway across the world is counterintuitive.

Above I argue that if there were such a duty, then it would be owed to people no matter how far away and that the duty would be equally stringent regardless of distance. This is because, intuitively, distance simpliciter is morally irrelevant in the same way that race, ethnicity, sex, and time simpliciter are morally irrelevant. For example, it is as wrong and bad to shoot someone who, due to his distance away, will be hit a minute later as it is to shoot someone who will be hit a second later. Similarly, it is as wrong and bad to shoot someone a kilometer away as it is to shoot someone a meter away. Time and distance are also irrelevant to the morality of refraining to provide help. Again, the absence of a right to be benefitted by people who are very far away applies equally to nearby people. Similarly, the absence of a right to save people from starvation a mile away applies equally to nearby people who need saving.

Second, were there such a duty, then there would be a principled threshold as to how much one is required to give to Sudanese children and there is no such threshold. Third, if there were such a duty, then a group would have a claim against the potential rescuer. Given that the group has no connection to the rescuer and does not own her body or labor, they do not have such a claim.

If members of the military do not owe such a duty to the victim, then the same reasons support the notion that they do not owe such a duty to the victim's family. The reasoning here is the same. The duty is not owed to the American government. Were soldiers to wrong someone by not reporting, it intuitively seems to be the victim or her family. I assume here that there is no strong moral duty to obey orders. Even if there were such a strong duty, it would account for whom we think is wronged by the failure to report. The intuition is that if anyone is wronged, it is the victim or her family. This intuition does not fit with the notion that the duty is owed to the American people. Similar reasoning applies to the notion that the duty is owed to God.

An objector might claim that this reasoning seems to sidestep another justification for the duty to report. Members of the military are expected to behave a certain way. Specifically, they are expected to

uphold honorable practices and virtues. The issue is not specific orders and commands. Rather, the issue focuses on norms and expectations for those who are representatives of the government and the people. After all, members of the military are acting as agents for these groups. Committing atrocities violates these expectations. A duty to report might be based on a similar duty to uphold certain norms in one's self and unit. Such a duty is distinct from duties owed to the victim or the victim's family.²³

The problem with this objection is that the wrongness in failing to report an atrocity (e.g., a rape-murder) intuitively seems to wrong the victim, not American citizens. This intuition can be seen in that if the citizens were to waive their claim to have the atrocity reported, it would still intuitively seem almost (if not) as wrong. Another way to see this is that this would make the duty to report an atrocity as distinct from human rights in the sense that the duty would not itself correlate with a human right. Proponents of this duty likely do not have this view of it.

A second problem with this objection is that American citizens might, and probably do, want members of the military to treat brothers-in-arms as if they were real brothers. Insofar as they think that brothers do not have a duty to report each other, they do not think that members of the military have such a duty. Consider, for example, a society in which a man has to fear that his brother will turn him in for a crime. Such a society intuitively seems distasteful to me and others with whom I have talked.

Here is a chart summarizing the analysis thus far:

Candidate Claim-Holder	Claim?	Reason
Victim	No	No personhood-based claim because 1. Punishing wrongdoer is a benefit (not harm). 2. No personhood-based right to benefit.
Victim's Family	No	Same as above.
American Government	No	Were someone wronged, it would be the victim or her family.
American People	No	Same as above.

²³ I owe this objection to Shawn Klein.

In the context of non-natural claims (i.e., rights that are not human rights), the analysis is similar. If there is a non-natural moral-principle-based duty to report atrocities, then it is owed to someone. That is, someone has a correlative claim against the member of the military. Again, there is an issue of whether an atrocity-murder victim exists after death and, if she does not, whether she can still be owed duties. Let us set aside these issues and canvass possible grounds for the non-natural duty.

The non-natural duty is not promise-based. Members of the military need not, and usually do not, make promises to civilians, including potential victims. This is an empirical claim.

The non-natural duty is not fairness-based. Members of the military are not always part of a cooperative project involving potential civilian victims in war zones. On the duty-of-fair-play theory, a fairness-duty rests on cooperation in a joint project.²⁴ One might think that the justificatory work of such projects flows from a promise to support it rather than mere participation in it and acceptance of its benefits. That is, this theory is merely a covert promise-based justification. Also, a potential victim can, and often is, unconnected to such a project. For instance, she might be opposed to the military's project and might even have acted or voted to disrupt it.

The non-natural duty is not harm-based. Harm by itself does not ground a claim. Consider, for example, the non-compensable nature of economic harm that happens when one store outperforms another, thereby causing the second to go out of business.

The most plausible versions of non-consequentialism, including ones that focus on harms, presuppose rights. Consider the harm principle. The harm principle states that, other things being equal, it is worse to harm someone than not to harm her. This theory presupposes rights. Here a right is a claim. One person has a claim against a second just in case the second owes the first a duty. This is because rights set the boundaries of the agent's legitimate interest.

²⁴ See H. L. A. Hart, "Are There Any Natural Rights?" *Philosophical Review* 64 (1955), pp. 185-91; H. L. A. Hart, "Legal and Moral Obligation," in *Essays in Moral Philosophy*, ed. A. Melden (Seattle, WA: University of Washington Press, 1958); and John Rawls, "Legal Obligation and the Duty of Fair Play," in *Law and Philosophy*, ed. Sidney Hook (New York: New York University Press, 1964), pp. 3-18.

On the harm principle, not all harms are wrongs. A harm wrongs someone, other things being equal, only if it sets back a legitimate interest. Again, a person has a legitimate interest in something only if he has a moral right to it. For example, a property owner who locks up his belongings so that a thief cannot steal them does not harm the thief in a wrong-making way even if the former sets back the latter's interest by preventing him from gaining those goods. This is because the thief does not have a legitimate interest in them. Similarly, at Wimbledon, when the best tennis player in the world beats the second best and thereby sets back the second's interest in winning the tournament, the first does not harm the second in a wrong-making way because the second did not have a legitimate interest (one capable of making its setback wrong) in winning the tournament.

In addition, refraining from reporting the atrocity is a refusal to benefit, not a harming. This is because the omission, at least in this context, does not set back the atrocity-victim's interest. It merely avoids preventing others from setting it back. Whether this is due to a difference between causing and not causing (in my view, the relevant distinction), doing and allowing, intending and merely foreseeing, or including another in one's project or not is not an issue we have to decide here. The refraining passes muster on any of these tests of a harming versus refusing to benefit.

The non-natural duty is not based on desert. The victim does not have a claim against the member of the military based on desert. First, it is not clear that desert by itself can ground a claim. People can, and often do, deserve something (e.g., to be happy) without having a corresponding claim against another and vice versa. One reason for this is desert is a property of the good rather than the right.²⁵

²⁵ For the notion that desert is a property of the good, see Fred Feldman, *Utilitarianism, Hedonism, and Desert: Essays in Moral Philosophy* (Cambridge, MA: Cambridge University Press, 2012); Fred Feldman, "Adjusting Utility for Justice: A Consequentialist Reply to the Objection from Justice," *Philosophy and Phenomenological Research* 55 (1995), pp. 567-85; Shelly Kagan, *The Geometry of Desert* (New York: Oxford University Press, 2012); Thomas Hurka, "The Common Structure of Virtue and Desert," *Ethics* 112 (2001), pp. 6-31; Thomas Hurka, *Virtue, Value, and Vice* (New York: Oxford University Press, 2001); and Neil Feit and Stephen Kershnar, "Explaining the Geometry of Desert," *Public Affairs Quarterly* 18 (2004), pp. 273-98.

Also, on some accounts, virtue grounds desert.²⁶ On one theory, it is the sole ground of it.²⁷ Virtue is at most indirectly related to atrocity. It is possible that a victim is vicious and the war criminal virtuous. This is particularly true where the situation, rather than stable personality traits, explains the war criminal's action.²⁸ If this is correct, then again desert will not fit a pattern that would allow it to ground a claim to report war crimes.

Also, virtue does not ground duties. The fact that an act is virtuous (e.g., giving money to Oxfam) does not make it morally required. Similarly, the fact that an act is vicious (e.g., spending money on and enjoying degrading pornography) does not make it wrong. This is because virtue is a property of what one thinks (specifically, one's attitudes) and what one thinks is distinct from what one does to others.²⁹ It is true that what a person thinks often affects how he treats other people, but this causal connection is not enough to show that what a person thinks is what makes his action right or wrong. Along these lines, one person's right (or claim) against a second focuses on

²⁶ For the notion that virtue grounds desert, see Hurka, "The Common Structure of Virtue and Desert"; Hurka, *Virtue, Value, and Vice*; and Stephen Kershnar, *Desert and Virtue: A Theory of Intrinsic Value* (Lanham, MD: Lexington Books, 2010).

²⁷ See Kershnar, *Desert and Virtue: A Theory of Intrinsic Value*.

²⁸ For the classic experiment illustrating situationism, the notion that the situation at least in part explains what someone does, consider obedience to authority; see Stanley Milgram, "Behavioral Study of Obedience," *Journal of Abnormal and Social Psychology* 67 (1963), pp. 371-78. For Milgram's more in-depth discussion of the effect, see Stanley Milgram, *Obedience to Authority: An Experimental View* (New York: Harper Collins, 1974). The effect holds across different cultures. See Thomas Blass, "Understanding Behavior in the Milgram Obedience Experience: The Role of Personality, Situations, and Their Interactions," *Journal of Personality and Social Psychology* 60 (1991), pp. 398-413. For a discussion of the prison experiment and its application to Iraq, see Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil*.

²⁹ I am assuming here that individual attitudes or the lack of them can be virtuous or vicious. For arguments for this position, see Thomas Hurka, "Virtuous Acts, Virtuous Dispositions," *Analysis* 66 (2006), pp. 69-76; and Kershnar, *Desert and Virtue: A Theory of Intrinsic Value*.

what the second does (or does not do) to the first, rather than how the second thinks of the first.

Here is a chart summarizing these arguments:

Purported Ground	Claim grounded by	Problem
Promise	Promise	No such promise was made.
Fairness	Cooperative project that is just and mutually beneficial	<ol style="list-style-type: none"> 1. Such a project by itself does not ground a claim. 2. No such project.
Harm	Harm or unjust harm	<ol style="list-style-type: none"> 1. Harm by itself does not ground a claim. 2. No harm, rather refusal to benefit.
Desert	Desert-ground (virtue- or action-based)	<ol style="list-style-type: none"> 1. Desert by itself does not ground a claim. 2. Virtue grounds desert and it is indirectly related to atrocity.
Virtue	Virtue	Claims focus on what people do to others, not how they think about them.

b. Argument for Thesis #2

Thesis #2 states that in the case of Justin Watt, there was no strong duty to report fellow soldiers who committed atrocities. Here is the argument for it:

(C1) Hence, if soldiers have a strong duty to report fellow soldiers who commit atrocities, then reporting prevents a catastrophe. [(P1) - (P4)]

(P5) In Justin Watt's situation, reporting did not prevent a catastrophe.

(C2) Hence, in the case of Justin Watt, there was no strong duty to report fellow soldiers who committed atrocities. [(C1), (P5)]

An objector might state that (P5) is dubious. He might deny that we know that this is true. In the Watt case, the four war criminals were given harsh prison sentences. This, the objector continues, could have prevented them from doing similar or worse things.

The reason that we know this is that a catastrophe (at least in the sense that it is being used here) involves the death of many innocent people or the equivalent amount of suffering or harm. The idea is that only such a loss overrides the non-consequentialist duties that ordinarily prohibit or permit various actions. If the net gain of four lives does not permit killing a healthy person and distributing his organs to save five or even ten people who need organs, the consequentialist override must be quite strong. It is unlikely that the four would have killed so many innocent people. This is because they feared being caught, they likely would have been out of Iraq before they were in many more situations in which they were motivated to commit further murders, and they did not seem interested in mass slaughter by itself.

Premise (P5) rests on intuitions such as those brought out by the following cases:

Case #1: Brothers. Al's brother commits an atrocity. Al decides not to turn him in to prevent a just multi-decade punishment.

My notion here rests on my and others' intuition that Al's action is not wrong. This rests on an argument from analogy based on the notion that, in some cases, fellow soldiers are morally similar to brothers.

A similar moral notion likely underlies the spousal-privilege doctrine in law. This prevents the state from making one spouse disclose confidential communications with the other or from testifying against the other. Some states apply this to both criminal and civil law.

Consider, also, the following case:

Case #2: Punishment. Captain Baker is the only one who can punish several of his enlisted men for raping a twenty-year-old prostitute because he is the commanding officer in a lawless territory. If he does not act to punish them now, he will be unable to do so in the future because the witnesses will refuse to cooperate and will likely move elsewhere (the brothel is located in the newest war zone). Also, the evidence will likely disappear. He omits to punish them because doing so will

jeopardize the mission (he needs every soldier) and because he is close to his men.

If Baker did not act wrongly when he refrains from punishing the men, then Watt does not act wrongly when he refrained from reporting them. In Watt's case, his refraining from bringing about the punishment via failure to report is more indirect than in Baker's case. Also, Watt is less responsible because another could still report the crime (e.g., Sergeant Yribe). This is not so with regard to punishment.

One objection to the Brothers case is that many do not have the same intuitions as me. To take a real-life example, the objector notes, consider the Unabomber's brother who turned him in. The objector claims that many people consider this a duty. The objector continues that had the brother not turned him in, we might have understood his failure and even regarded it as excusable, given the emotional bond between brothers. Still, we would have regarded his failure to do so as wrong. I do not have the intuition that refraining from turning in one's brother is wrong. Others I speak to also lack it. Still, some people report having it. What explains the intuition in the Unabomber case is in part that Ted Kaczynski would likely continue to attack innocent people and in part because he was mentally ill in some sense and needed treatment. Were he done attacking and not mentally ill, it is unclear to me whether these intuitions would remain. These intuitions are strengthened by the notion that the best-results reason for turning in the Unabomber is weak if he were done attacking people. Here, I am assuming that refraining from turning him in does not significantly undermine society's ability to deter third parties from engaging in similar crimes.

Another objector might concede that a person does not have a duty to turn in his brother for an atrocity, but argue that soldiers are not like brothers. They are not like brothers, she asserts, because they lack blood ties, a long, intertwined history, or interlocking interests. An interlocking interest occurs when how well one person's life goes depends on how another's life goes.³⁰ As a result, the objector continues, there's a significant difference of degree (if not kind) between brothers and soldiers. Even if they were brother-like, she

³⁰ There is reason to doubt whether interlocking interests exist or are even possible. It is implausible that one person's life goes better merely because her beloved's life goes well if the former is unaware of it. This is true whether one holds a hedonist, desire-fulfillment, or objective-list theory of self-interest.

continues, soldiers also relate to each other as occupants of a role, namely, that of a soldier, with the various additional duties and permissions that involves. Brothers are likely best understood in terms of people who love each other in a non-romantic way. This explains why people can love adopted brothers. This love does not require blood ties, a long, intertwined history, or interlocking interests. Such features might ordinarily cause and accompany love, but they are not necessary, whether in theory or practice. This is why one can love a recently adopted child. Role-based explanations of the purported duty fail because people who think there is such a duty do not think it depends on whether someone is a member of the military.

An objector might argue that the duty under question is the duty of the soldier to report. Hence, he concludes, it depends on the soldier being a member of the military. Even if, he notes, those who think there is a duty think it extends beyond soldiers, that doesn't mean the duty of a soldier *qua* soldier fails.³¹

The problem with this is that if the duty is the same in content and strength regardless of whether the person in question is a soldier, then it is likely not justified by a soldier's role. The notion that the duty is soldier-specific is odd. As argued above, if one brother is not required to report another's wrongdoing or crime and if soldiers in a combat unit are like brothers, then there is no such duty. Even if there were such a duty, it is implausible that it applies only to soldiers or applies differently to soldiers from how it applies to police officers, judges, members of Congress, physicians, and so on.

In addition, given how infrequently atrocities were reported in the past and how difficult it is to get soldiers to do so now, there is little reason to believe that such a duty is part of the role. A proponent of such a duty might claim that this doesn't follow. He might argue that there could be other reasons explaining why soldiers are so reluctant to report atrocities even in the face of the recognition of the duty to do so. Consider, for example, fear of being a rat, reprisals, guilt about not having prevented the atrocity, unit survival, and concerns about the unit's or military's morale or image.³² Perhaps this is correct. Still, it is an odd notion that in the last century people in a particular type of job have had a strong moral duty to do something and not only have almost never done it, but also, as far as I can tell, have not felt

³¹ I owe this objection to Shawn Klein.

³² I owe this objection to Shawn Klein.

that bad about not having done it. Insofar as such a duty and the stringency were intuitively clear, it is plausible that we would have seen different attitudes and actions in the past regarding reporting atrocities.

Yet another objector might claim that a crucial feature of punishment is that the captain's punishing his men will jeopardize the mission. The objector notes that this need not be a feature of other reporting cases and was not a feature in Watt's case. Yet if it is taken out, he continues, the captain's only reason for not punishing the men is that he is close to them. This is not, he concludes, a good reason to let an atrocity go unpunished. Again, we have a conflict of intuitions. Also, if the captain is a brother as well as a captain to some of his men (e.g., his three younger brothers serve in his company), then the case is a stronger variant on the Brother case. If he does not have brothers in his company, then the objector has to explain why the ties between a captain and his men cannot be similar to that between brothers or, perhaps, between a father and his sons, even if it is not quite as strong. It is unclear what the explanation would look like.

c. Objections

Most objections to my argument focus on premise (P4): There is no strong duty based on a moral principle to report fellow soldiers who commit atrocities that correlates with a human right or another right. They attempt to show that there is a moral-principle-based duty to report fellow members of the military who perform wartime atrocities.

One Kantian objection is that a member of the military should report the atrocity as a way of respecting the victim's personhood, that is, to treat her as an end. One person treats a second as an end just in case he respects the second's moral autonomy. He respects her moral autonomy just in case he does not block her projects or, perhaps, rational projects.

The problem with this objection is that the member who fails to report the atrocity does not block either the victim's projects or her rational projects. True, he does not promote them, but this refusal to promote them is a refusal to benefit rather than a harming. This is not a failure to respect her moral autonomy. In fact, our focusing on our own matters often uses time and resources that could be used to promote others' projects. This is particularly true with regard to the impoverished Third World.

A second objection is that a member of the military should report the atrocity because it is virtuous to do so. Not doing so is a vicious act, reflects a vicious character, makes one more vicious than he otherwise would be, or has some other connection to vice. Even if the refusal were vicious, this would not show that it is wrong. One can do an act that is wrong and virtuous because it is done for a good reason. For example, consider the following case:

Case #3: Friendly Fire. Specialist Smith sees what looks to him to be an enemy soldier (the suspicious guy is of Middle Eastern descent) in Smith's camp. The latter is out of uniform and pointing a powerful M249 light machine gun dangerously near members of Smith's platoon. In fact, the person is Ahmad Bahar, a newly arrived soldier of Middle Eastern descent who has just arrived from Detroit to join Smith's badly undermanned unit. The supply sergeant told the newly arrived soldier to change out of his uniform and practice loading, unloading, and aiming the weapon as he will be required to carry and use it in the days ahead. Smith shoots and kills Bahar. He does so because he loves his brothers-in-arms and fears for their lives.

Smith acts wrongly, but virtuously. It is also possible to do a right action for a vicious reason. Some theorists have a different theory of virtue. On their account, the soldier may have acted based on a good, well-meaning reason, but that's not sufficient to claim that it is virtuous. If this is correct, then the hypothetical can be changed to Smith having the relevant dispositions in addition to acting on a good, well-meaning reason. In such a case, he would be virtuous but do the wrong thing.

In any case, refusing to turn in one's fellow soldiers is not always vicious. On one account of vice, it need not involve love of evil or hatred of the good.³³ On a second account, it need not involve an act on the basis of an attitude or emotion that conflicts with the Aristotelian golden mean or an act based on an inappropriate reason.³⁴

³³ For this account of virtuous acts and attitudes, see Hurka, *Virtue, Value, and Vice*; Hurka, "The Common Structure of Virtue and Desert"; and Hurka, "Virtuous Acts, Virtuous Dispositions."

³⁴ The idea for this account of virtue comes from Aristotle, *Nicomachean Ethics*, 2nd ed., trans. Terence Irwin (Indianapolis, IN: Hackett Publishing Co.,

A third objection is that a member of the military should report the atrocity because the universalization version of Immanuel Kant's Categorical Imperative requires it. Alternatively, the objection might be that the Golden Rule requires the atrocity to be reported. There is a concern over whether this version of the Categorical Imperative is the correct test for a right action, especially if not supplemented by the requirement that persons be treated as ends-in-themselves. Even if this is not the case, refraining from reporting fellow members is universalizable. Consider the following maxim: "If a member of the military knows that his fellow soldiers and close friends performed a wartime atrocity, his failure to report them would result in their getting away with it, and they won't do it again, then he does not report them." This maxim can be universalized. By analogy, consider this family-related maxim: "If a mother knows that her son committed an atrocity, her failure to report him would result in his getting away with it, and he will not do it again, then she does not report him." This maxim can also be universalized.

A proponent of this objection might respond as follows:

I think the use and understanding of Kant's categorical imperative is slightly mistaken, because the maxims constructed by this author contain so many hypotheticals that they would not fit the form of the categorical imperative, as it is perceived and used by Kant. One may of course argue with Kant that this is a weakness of the way in which he formulates the imperative, but I do think that most Kantians would find this a most specious way of using it, and that must be noted.³⁵

Perhaps the above response misinterprets the notion of a maxim as it relates to the universalization version of the Categorical Imperative; when properly interpreted, the failure to report an atrocity cannot be universalized. I am not sure, though, how else to interpret the notion of a maxim other than as a specification of an action in a particular situation. Perhaps this is a place where my argument fails, but I don't think so.

Let me explain why. First, the universalization of the Categorical Imperative is designed to ensure that the rule by which one

1999).

³⁵ This objection comes from an anonymous reviewer.

acts is such that everyone could act that way. This in turn is justified by the equal intrinsic value of people. The equal value prevents an agent from acting according to rules that could not be acted on by others. This justification allows for maxims (descriptions of situation-action pairings) that have a nested structure. Second, Kant himself uses a nested hypothetical in illustrating how the universalization version of the Categorical Imperative is supposed to work.³⁶ Thus, the above categorical imperative is consistent with both the justification of the Categorical Imperative and how its author conceived of it.

A fourth objection is that the member of the military ought to condemn the atrocity. Turning the perpetrators in is a way to do this. Condemnation shows that neither he nor his group endorses the activity.³⁷ This is particularly true for someone like Watt who joined the military in order to be part of the 101st Airborne Division, both identifying with and taking pride in it.³⁸

One problem with this is that the duty to condemn is mysterious in general: To whom is it owed? It becomes even more so among those who are free of blame. The second problem is that turning in fellow members is not necessary for condemnation. Innocent members of the unit could publicly condemn such acts, similar to what they would do were the perpetrators from another unit, and such condemnation would be legitimate.

A variant of the fourth objection is that that the members are collectively responsible for the atrocity because they allowed the conditions to develop that led to the atrocity. Turning in the perpetrators is an appropriate way for the unit to respond to an evil for which it is responsible. The unit might be the regiment, company, platoon, or squad. If one rejects collective responsibility, and I do, then this objection does not get off the ground. Even if one accepts collective responsibility, one takes responsibility by severely punishing a few people and letting everyone else go. Other responses might

³⁶ See Immanuel Kant, *Grounding for the Metaphysics of Morals*, trans. James Ellington (Indianapolis, IN: Hackett Publishing Company, 1981). In particular, consider his discussion on p. 30 (sec. 422) of a person deciding whether to commit suicide.

³⁷ I owe this objection to Andrew Cullison.

³⁸ See Justin Watt, personal communication, Leavenworth, Kansas, December 3, 2012.

involve trying to make sure it does not happen again, helping out victims' families, and punishing every member of the unit. By analogy, even if a mother and father are partly responsible for their son's atrocity because they drank too much, fought too much, and were periodically absent from the home, it is not clear that they should take responsibility by turning in their son rather than choosing something that more directly relates to what they did.

A fifth objection is that the member owes it to his country to report the atrocity. The atrocity harms the United States' ability to achieve its war-related goals. This was certainly true in Watt's case. One problem with this objection is that it makes the duty to report owed to one's country rather than to the victims. For those who think there is such a duty, this doesn't seem right. In addition, it is counterintuitive that were Pfc. Watt to refrain from reporting the atrocity, he has wronged U.S. citizens rather than the victims, the victims' surviving family members, or his military unit.

A second problem is that even if one has a duty to help his country's war effort, the innocent members who learn of the atrocity might, and often are, doing plenty to promote the war effort. When they are already going above and beyond the call of duty, it is not clear that they incur still other duties. This is especially true when the further duties relate to things entirely outside their control and for which they are not the least bit responsible.

A sixth objection is that the best rule mandates such reporting.³⁹ The idea here is that the best-rule theory asserts that a right action is one that is consistent with the best rule. The best rule is one that brings about the best results. This differs from the theory of rightness present in the first main argument above because the focus is on the *rule* that brings about the best results rather than the *act* that brings about the best results. The two differ in that an act might be wrong under the former, but not the latter. For example, lying might be

³⁹ I owe this objection to Richard Schoonhoven. For a classic statement of it, see Richard Brandt, *Ethical Theory* (Englewood Cliffs, NJ: Prentice Hall, 1959); J. O. Urmson, "The Interpretation of the Moral Philosophy of J. S. Mill," *Philosophical Quarterly* 10 (1953), pp. 144-52; and Stephen Toulmin, *The Place of Reason in Ethics* (Cambridge, UK: Cambridge University Press, 1950). For more recent accounts, see Brad Hooker, *Ideal Code, Real World: A Rule-Consequentialist Theory of Morality* (Oxford: Oxford University Press, 2000); and Tim Mulgan, *The Demands of Consequentialism* (Oxford: Oxford University Press, 2001).

prohibited by the best rule while still bringing about the best results in a particular situation.

The best-rule theory thus asserts that persons have a duty to act in accord with rules that brings about the best results. The rule is one that is part of a set of rules that if a population in general conformed to them or accepted them, then doing so would bring about better results than were they to conform to any other set of rules. The theory here is a theory about what makes an act right, not about the best rule-of-thumb to bring about the best results.⁴⁰

One problem with this is that this permits overriding a moral principle rather than offering a moral-principle-based requirement. A second problem arises if one rejects the best-rule theory. Critics have argued that such a theory collapses into one that focuses on whether an act brings about the best results or is irrational in that it prevents an individual from doing an act that he knows will bring about the best results.⁴¹ The theory also has to provide a way to frame the rules and a principled level of rule-conformity or -acceptance. It is unclear whether it has the resources to do so. There is also an issue as to whether rule-consequentialism can handle conflicts of rules.⁴²

Even if the best-rule theory survives these criticisms, it is unclear whether the best rule requires one to report on those close to him when they do wrong. If this were widely done, it might wreak havoc on many people's willingness to be involved in honest and open relationships. The rule might be narrowed to reporting wartime atrocities, but this would need justification. If such a narrowing is justified, perhaps it might be narrowed still further in cases in which the atrocity is committed by those very close to the potential reporter, the victims are dead, and there is little chance of further atrocities. In such a case, it is unclear whether such a rule would bring about the best results.

A proponent of this objection might respond as follows:

⁴⁰ See J. J. Smart, "Extreme and Restricted Utilitarianism," *The Philosophical Quarterly* 6 (1956), pp. 344-54.

⁴¹ See *ibid.*

⁴² See Ben Eggleston, "Conflicts of Rules in Hooker's Rule-Consequentialism," *Canadian Journal of Philosophy* 37 (1997), pp. 329-50.

If it is established as a general rule that war crimes are normally not to be reported by fellow soldiers, then the incentive to avoid such war crimes in order to avoid being reported would fall sharply. In essence, the lesson to soldiers would be that we protect each other whatever happens. The fact that we look after each other within a unit, and that we ensure that the rule of law is upheld, is part of what creates common standards and common goals. This is useful *as a rule* (cf. rule utilitarianism). The parallels to mothers or siblings who would be morally excused for not turning in their children or close family members leads one down a slippery-slope to communal shielding of atrocities that at least to me seems morally questionable.⁴³

The problem with this interpretation of the best-rule theory is that the same considerations that make it unclear whether people should report their family members' crimes to authorities also arise with regard to brothers-in-arms. Societies such as those in the Soviet Bloc that encouraged and required family members and neighbors to report on one another produced an allegedly isolating-and-distrustful environment. I do not know how we might assess whether these effects would be larger or smaller than the one the proponent mentions above, but the fact that civilian law does not require people to inform on one another and sharply protects a spouse from having to testify against his or her spouse is some evidence, albeit weak, that the best rule does not require such reporting. In any case, as argued above, there is good reason to doubt the best-rule theory.

An objector might argue that the Soviet Bloc example is problematic. Arguing that a duty to report in that context created a bad living environment ignores the fact that Soviet Bloc countries had a deeply unjust political system. Of course, she continues, there would be no moral duty to report violations of unjust laws in such contexts, but this is irrelevant to the case at hand.

The problem with this objection is that the issue is the best rule under rule-utilitarianism. The rule at issue is one that most, or perhaps all, people could accept or to which they could conform. This applies to just and unjust political systems as well as to a wide array of relationships between people. Thus, the above example is not

⁴³ This objection comes from an anonymous reviewer.

problematic in that this is one of the systems to which it must apply, especially since it was a system that included a lot of people.

A seventh objection is that a duty to report is basic common sense:

[T]here is a basic common-sense argument that most people would make for there being a duty to report, which is not clearly enough spelled out by the author, I find. This would be the duty (even if it is a *prima facie* duty)—to oneself, to one's military organization, to the profession, and to society at large—to take a clear stand against atrocities and blatant rule-breaking. Arguably, a generally recognized moral permission not to report even horrific acts such as the one reported here, weakens that duty. This is admittedly a mixture of [result-focused and moral-principle-focused] reasoning, but I think it is one that most people, upon reflection, would come back to.⁴⁴

The problem with this objection is that when the two aspects of it are examined, neither succeeds. In general, there is no strong duty, whether *prima facie* or *ultima facie*, to take a stand against atrocities and wrongdoing. For example, a Nebraska farmer does not act in a wrong manner if she fails to take a stand against atrocities in the Congo.

The notion that the duty is owed to oneself, military organization, profession, and society is problematic because it intuitively seems that the victim is the person wronged by a failure to report, if anyone is. The other parties are wronged only insofar as the soldier who fails to report the atrocity fails to live up to his promise to obey the military's rules. The wrongness of not reporting would then be explained in terms of the failure to follow orders, which fails to capture the intuitively strong, distinct, and oath-independent nature of the wrongdoing.

An objector might respond that this objection is more about failure to follow the expected norms, not merely orders. This, he continues, brings back some of the intuitively strong nature of wrongdoing. There was a serious, horrible wrong done. To do nothing about it or actively keep it hidden (absent some overriding reason not to do something), he notes, seems intuitively wrong. The problem with this claim is that this again raises the failure to report as intuitively

⁴⁴ This objection comes from an anonymous reviewer.

wronging the victim or her family and yet the duty backing the norm (or, perhaps, order) is owed to oneself, the military organization, profession, or society. Also, as argued above, the purported intuition does not seem to apply to one brother reporting on another.

It is worth noting here that it is false to think that every instance of failing to report an atrocity will produce a catastrophe. In at least some cases, a failure to report might aid a just war effort and avoid cycles of tit-for-tat atrocities. In the cases where reporting prevents a catastrophe, the moral threshold is reached and there is a strong duty to report the atrocity.

An eighth objection arises from views such as Mark Osiel's, which defends an approach to obeying orders that emphasizes virtue ethics.⁴⁵ On one interpretation of his work, he does so instrumentally. That is, an emphasis on virtue ethics is justified because it makes military law more effective at preventing wartime atrocities. A different approach might focus on virtue ethics as the basis for ethics and, thus, directly support reporting of wartime atrocities. The problem with such an approach is that virtue ethics do not directly tell people what they ought to do. Virtues such as beneficence, courage, loyalty, or generosity do not tell people whether they should turn in their brothers for committing crimes. Even if an individual virtue were to tell a person what he ought to do, possible conflict between virtues (e.g., loyalty and beneficence in reporting atrocities) means that act-related principles are still needed.

An instrumental virtue-based theory does not support a strong duty always to turn in those who commit wartime atrocities for a couple of reasons. First, in some cases, turning them in makes the world a worse place (e.g., the perpetrator is disabled and unable to commit further atrocities). Second, there are competing goods (e.g., unit loyalty and love between brothers-in-arms) that are likely weakened by a willingness of members of the military to inform on each other. This is particularly true given that the likely virtue is one that supports informing on any crime committed by members of one's unit rather than focusing just on wartime atrocities.

Some theorists, such as Aryeh Neier, argue that justice demands prosecution, and presumably reporting, of war crimes.⁴⁶

⁴⁵ See Mark Osiel, *Obeying Orders: Atrocity, Military Discipline & the Law of War* (New Brunswick, NJ: Transaction Publishers, 1999).

⁴⁶ See Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* (New York: Times Books, 1998).

Other theorists, such as Gerry Simpson, tie the criminalization of wartime atrocities to a series of moral and political considerations, including the value of law, role of politics, individual responsibility, and so on.⁴⁷ The problem with such arguments is that if the above arguments succeed, then justice, individual responsibility, or collective guilt do not establish a strong positive moral duty to report wartime atrocities. Neier and Simpson do not argue, but merely assume, that they do. The problem with the law-based argument for reporting atrocities is that because obeying the law is justified by promises (I will just assume this here) and there is only one promise to obey the law, the promise-based duty to obey different laws is the same no matter how serious the activity required or prohibited by the law.⁴⁸ Because the promise-based duty to obey some laws (e.g., jaywalking) is weak, the promise-based duty to obey all other laws is as well. There might be strong moral reasons to obey the law (e.g., murder), but they are not promise-based. These other moral reasons return us to the above arguments.

5. Conclusion

I argued that if soldiers have a strong duty to report fellow soldiers who commit atrocities, then reporting prevents a catastrophe. The conclusion is based on the notion that if soldiers have a strong duty to report fellow soldiers, then the duty is either based on its bringing about the best results or based on a moral principle. If it is the former, then reporting prevents a catastrophe. If it is the latter, then the duty correlates with either a human right or another right. There is no such correlative duty. I then concluded that Justin Watt did not have a strong duty to report his fellow soldiers. I argued that his reporting did not prevent a catastrophe. This argument rests on an analogy between his case and two other cases when the threshold is not met. These arguments do not show that reporting is wrong. They do not show that military law shouldn't require reporting. They merely establish that in some cases, such as Watt's, there is no moral duty to report. Given the

⁴⁷ See Gerry Simpson, *Law, War, & Crime: War Crimes, Trials and the Reinvention of International Law* (Oxford: Polity, 2008).

⁴⁸ For an in-depth defense of this notion, see Stephen Kershner, *Gratitude Toward Veterans: A Philosophical Explanation of Why Americans Should Not Be Very Grateful to Veterans* (Lanham, MD: Lexington Books, 2014).

horrific nature of the 101st's atrocities, if reporting is not required in Watt's case, it is likely not required in many cases that members of the military face during wartime.⁴⁹

⁴⁹ I am grateful for the extremely helpful comments and criticisms of Maj. Chris Case, Maj. Danny Cazier, Randy Dipert, Neil Feit, David Hershenov, Eric Kershner, LTC Chris Mayer, Lewis Powell, George Schedler, Richard Schoonhoven, Ken Shockley, the philosophy department and department of law at the United States Military Academy at West Point, and the department of philosophy at the University of Buffalo. I am also very grateful to Pfc. Justin Watt for his help and for getting me interested in the topic.

