IN RETROSPECT: INTENT AND WAR CRIMES IN THE LIFE AND TIMES OF WILTON B. PERSONS

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ABSTRACT

This thesis studies the potential uses of military memoirs in the prosecution of war crimes. Drawing on the work of the political theorist Carl Schmitt, I analyze the memoirs of Wilton B. Persons, a Judge Advocate General of the US Army, who during his long career, was responsible for prosecuting war crimes. I show that Schmitt’s three forms of juristic authority—concrete order, normativist and decisionist—are a useful framework for unpacking the frequently occurring ethical concerns in this memoir. It establishes that virtue or virtuous intent in the writings of Persons and other senior army officers is located at the intersection of these three styles of juristic thought. On the other hand, vicious intent in an individual soldier, originates in the decay of the political and cultural order, or when Schmitt’s three juristic discourses were disjointed. In other words, specific criminal intent of the soldier—a term derived from the 1948 Geneva Convention on the Prevention and Punishment of the Crime of Genocide—came from the activation of latent, general intent embedded in the decaying or disjointed political culture. An analysis of Person’s memoir—the work of a man who observed and prosecuted many of the accused—provides us with glimpses of this transformative process. Such an analysis, by sketching the mindset from which specific criminal intent of war criminals emerged,
could prove useful in their prosecution. By understanding the extent and limits of soldier agency, it could guide prosecutors in their interrogation of the accused.

In addition to potentially helping prosecute war criminals, this thesis, by using the ideas of a legal theorist as an analytical grid, suggests that military memoirs have an underlying legal structure. Scholars working the field of war and memory studies, keen students of memoirs, might find this insight useful. Understanding the workings of this legal structure—consisting of Schmitt’s three juristic discourses—could help them re-formulate the meaning of myth in their field. Instead of seeing myths as lies and imaginative half-truths, they could see them as symptoms of individual pathologies and larger, political turmoil. Finally, by studying a case in which law influences politics and culture, i.e. war crimes prosecution structures the memories of Persons, this thesis argues against the general assumption in war and memory studies, that law is influenced by culture and politics. This latter causal link, by subordinating law to amorphous and timeless phenomena, is likely to reduce the agency of the accused and complicate the task of identifying specific criminal intent. Wilton B. Persons on the other hand knew the law and expected the same from the accused.
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CHAPTER 1
INTRODUCTION AND HISTORICAL CONTEXT

In browsing through the shelves of the US Army Center for Military History at Fort McNair, Washington D.C., I came across a transcript of a 1985 interview of a retired US Army General, Wilton B. Persons. He had served as Judge Advocate General of the US Army from 1975 to 1979, and narrated his life story and career in a series of interviews to colleagues from the Military History Institute, in Carlyle, Pennsylvania. The resulting transcript stretches over 600 pages. It is part of the US Army’s Oral History Program, which records the recollections and experiences of soldiers of all ranks. At first sight, the transcript may read as a long string of anecdotal ruminations and informal, personal reactions, with no new factual information. A closer look reveals that the memoirs of the highest ranking officer responsible for maintaining justice in the Army during peace and preventing crimes during war, needs a careful study.

Persons served in Vietnam, where the infamous My Lai massacre took place.¹ As an Army judge, Persons was trained in both law and combat and had a complex and nuanced view of war crimes. He never condoned or made excuses exculpating the guilty. Instead, he consistently narrated the battlefield situations and features of Army life that provided the contexts in which these crimes occurred. He explained how and why soldiers made bad choices. Persons was keen to establish that soldiers who commit war crimes are

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basically virtuous people who are sometimes overwhelmed by circumstances. They did not intend to be malicious. Persons suggests that criminal intent and context were either mutually exclusive or a zero sum game. The more complicated, demanding or unusual war time scenario implied a lower degree or level of individual capability, responsibility and hence culpability. In short, for Persons, intent was inextricably contextual.

Persons’ interest in intent, reminded me of another document where I had encountered a similar issue, the 1948 Geneva Convention on Genocide. Following this landmark legislation, trial procedures for the international prosecution of war criminals have come to rely heavily on distinguishing specific vs. general intent. It is not enough to want to kill people, but that the accused has to possess an intent embedded in a mindset to eliminate a class or group of people. Establishing intent is also a critical part of criminal prosecution in both domestic civilian and military courts. In reading though Persons’ interviews, I noticed a striking parallel between the debates around establishing specific intent in war crimes tribunals and this Army officer’s reflections and recollections. In fact, it dawned on me that the entire memoir could be read as an informal, off the record trial commentary. Legal discourses on intent, which included discussions of the Geneva Convention, had permeated Persons’ entire life. By influencing the way Persons narrated his life, the courtroom had structured this lifelong soldier’s memory.

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In this thesis, I suggest that US Army oral histories are an important and as yet, untapped source for the study of how an important institution views this global menace. Persons’ memoir is not a documentary source for historical research nor is it an example of legal scholarship. Instead, it may be considered as informal, unofficial legal commentary that provides insights into military conceptions of virtue and vice and hence, specific and general criminal intent. I also track the influence of war crimes prosecution and juristic thought on the life and memories of Wilton B. Persons, who as a senior US Army judge, spent his entire life in the two worlds of law and warfare. This analysis of his biography highlights and documents the importance of the international legislation of war crimes as a topic and an issue, in the life of a Judge Advocate General of the US Army. It is meant to be a contribution to the growing field of war and memory studies, that largely documents how political and cultural forces influence the way wars are remembered. In contrast, I use this biographical analysis as a case study, to conclude with general observations on the implications of law’s influence on politics and culture.

Methodology

Since analyzing 600 pages of Persons’ biographical ruminations needs a conceptual grid, I supplement the general insights of war and memory studies with the ideas of Carl
Schmitt. A brief overview of these ideas will establish the relevance of this thinker on this topic.

In 1934, Schmitt, provided a useful and historically informed taxonomy of juristic thought. He divided the products of legal thinking into three kinds: concrete order, decisionist and normative. Concrete order thinking, which was prevalent in the pre-modern, feudal world refers to laws derived not from individuals but from institutions and associations, or orders. The differing norms and behavior of aristocrats, clerics, peasants and artisans, when codified as law, were the sources of concrete orders. For example, disputes among regional, landed gentry could be settled through a duel. The invocation, procedure and outcome of a duel did not necessitate state intervention. It had the validity of law. In Schmitt’s words, “Members of a family, like soldiers in an army or clergy in a church, constitute a natural organic unit.”

With the advent of the modern age, which for Schmitt is the centralization of governmental control over the regional gentry, we witness the development of the second kind of juristic thought called decisionism. This is Schmitt’s term for Hobbesian thought. The modern state of the 17th and 18th

3. Carl Schmitt, On the Three Types of Juristic Thought, Translated by Joseph Bendersky (Westport, Conn.: Praeger, 2004), 1-31. Joseph Bendersky, in his introduction to this work, summarizes scholars who have argued that Schmitt’s association with German fascism was out of opportunism not conviction, and that his conservatism had its roots in his Catholic upbringing. Some have argued that his work was part of a larger European conservative thinking on law and institutions. His ideas, and specifically this work, have influenced the rise of communitarian movements. Some have even called him the godfather of contemporary American conservatism. Schmitt’s critiques of liberalism mirror Persons’ view of civilian society and therefore make him an appropriate theorist for this thesis.

4. Ibid., 1-39.

5. Ibid., 20.
century is the Leviathan. This new entity replaces the will of the central monarch for the norms and practices of the regions. In the process, it whittled away or overshadowed the concrete orders of the middle ages. The final product in the development of legal thinking, normativism is a characteristic feature of the 19th century. This rubric of legal thinking is the positivistic attempt to turn law into a science. Advocates and partisans of this school believe that the law is an abstract entity that exists above humans. It can be understood and developed like geology, independent of political and institutional-cultural context.

Schmitt believed that these three forms of law seldom existed in isolation. Twentieth century legal thinking often drew from all three traditions. This tri-partite development is not water-tight. Furthermore, scholars and judges within any given tradition traced the history of their own school and hence of their work with a necessary and unavoidable bias. Hence, in addition to providing us with three rubrics, Schmitt states that the arrangement of these in any combination or amalgam will entail a differing historical self-understanding within a legal tradition. In short, legal scholars produced not only their own histories, but their historiographies.

Scholars state:

The three kinds of legal thinking Schmitt identified were characterized by the manner in which each conceives of the foundation and essence of the law, in other words, whether law is viewed in terms of concrete orders, decisions, or norms. While every legal theory does contain elements of all three types, the determining factor is which concept of law is the fundamental one from all the others are
derived and therefore which concept of law uses the others as instruments in its own actualization.⁶

Extrapolating from Schmitt’s ideas, an orderly polity consists of institutions that represent these three forms of juristic thought and practice and is able to integrate them peacefully. Law abiding individuals in this polity possess, what for the purposes of this thesis, I call virtuous intent. The source of virtue may lie exclusively in the concrete, normative or decisionist spheres or it may be an amalgam of the three. In other words, I maintain that the historiography referred to in Schmitt’s words cited above, which is the jurist’s way of combination of the three discourses, is simultaneously virtuous intent. Vicious intent, or in terms of the Geneva Convention, specific and general intent to commit war crimes, stems from either a corrupting breakdown in the sources, or in their dis-integration. In this thesis, I analyze Persons’ memoirs by identifying the institutions and ideas that represent or are analogous to Schmitt’s three legal rubrics and showing how he combines them to define virtuous intent. Further, how does he trace the specific and general intent to commit a war crime to the breakdown in these three orders or their dis-integration? Which tradition does Persons belong to? In this thesis, Persons’ subjective narrative of events and views of institutions is the micro-cosmic analog to the more abstract, objective, macro-cosmic analysis presented by legal scholars. Unpacking Persons’ configuration of memory, by establishing where he thought virtue and vice lie, is the object of this project.

⁶. Ibid., 20.
Wilton B. Persons’ 600 page memoir is, as expected, a fascinating amalgam of the three legal traditions, which confirm the intellectual durability and relevance of Schmitt’s work. The concrete order in this memoir is frequently represented by the US Army. Here, Army training and culture, is a source for normative behavior. It provides the fondest and most important memories and hence the main context in which a soldier’s actions are understood. Martial law codes, written under the constraints of military necessity, are a part of the concrete order. Decisionism is, not surprisingly, represented by that very product of the Protestant Reformation, the US Constitution, that kept Hobbes busy for years. In Persons’ biography, it is represented by the civilian world. The prosecution of war crimes is possible due to the US being a signatory to the Geneva Convention of 1948, which represents the extension of the Leviathan into the international realm. Normativism is not encountered in the biography as positivistic legal discourse as Schmitt defined it, but indirectly as the scientific-technical side of Army and civilian life. The reader ought to keep this last distinction in mind. Normativism in the biography, is the thought, represented by technology, that law could be scientific. In summary, Persons’ memoir, written in the act of retrospection, configures his memories so as to embed a soldier’s intent within a political context composed of elements drawn from the concrete, normativist an decisionist orders.
The Historical Context: Intent in Cold War Army Memoirs

I start this thesis by contextualizing Wilton B. Persons’ life and times within the larger spectrum of US Army biographies written during the Cold War. The remainder of this chapter places a distinguished flag officer in the ranks of other influential Cold War era military officers. In spanning the entire Cold War, I establish that Persons, while insightful in his own ways, was not exceptional and that memoirs are an important genre for the study of intent in war and military life in general.

All of these other biographies do not explicitly discuss war crimes, which involve specific and general *criminal* intent. Instead, they deal with a wide array of subjects spanning the entire Cold War and provide us with examples of officers commenting on general soldier intent, while sharing with the reader a context in which that intent is seen to operate. These commentaries are largely moral and ethical in nature. I have therefore labelled this general intent, virtuous intent. It is the diametrical, polar opposite of general criminal intent. In other words, these memoirs contain a commander’s ideals of individual and collective, political life. When corrupted or disrupted during intense warfare or major political upheavals, these ideals give way to or are mutated into general criminal intent. Understanding the changing meanings and understandings of general virtuous intent during the Cold War, is therefore a crucial backdrop to understanding Persons’ more focused analysis of how general criminal intent turns into specific criminal intent. In other words, how does a soldier trained to protect civilians turn his weapons on them? With this in mind, I turn to a narrative analysis of select, representative memoirs.
1948, Dwight D. Eisenhower and his *Crusade in Europe*

Dwight Eisenhower’s *Crusade in Europe*, first published in 1948, starts with the memory of the German Colonel General Alfred Jodl, who was tried at Nuremberg and sentenced to death by hanging, signing the surrender papers that ended the war. Here, it is telling that Eisenhower would start with an individual, in this case, an enemy individual. Specific criminal intent shows up early in this biography as an impetus for the General to move into establishing the parameters of general virtuous intent.

After discussing at length the formidable armor deployed by the US army and its allies, Eisenhower turns to the question of troop morale and points out that there is something missing in the training of soldiers. The commanders fail to look at the inner, emotional world of the combat soldier. His choice of words and description set up the technical proficiency of the army and its discipline as core components of the normative dimension of military concrete orders. In these early stages of the memoir, the General searches for the ingredients and pre-requisites for virtuous intent, which he identifies as residing within the aspirations and inner beliefs of a person:

Commanders are habitually diffident where they are called upon to deal with subjects that touch the human soul—aspirations, ideals, inner beliefs, affection, hatreds. No matter how earnestly commanders may attempt to influence a soldier’s habits, his training, his conduct, or extol the virtues of gallantry and fortitude, they shyly stop short of going into matters which they fear may be interpreted as

“preaching.”

Eisenhower proceeds to preach, or define and identify virtuous intent. What follows in the biography and is excerpted below, is the necessary transformation and secularization of religious discourse. Eisenhower goes on to discuss is Post Traumatic Stress Disorder and points to the necessity of a kind or encouraging word to get people out of this condition. He points to medical reports that describe some of these men as having self-inflicted wounds. The recasting of religious discourse into army morale is a key step for Eisenhower to state his views on the centrality of the individual, a word that is, in the text, placed in italics. In the following quote, he contrasts very sharply, the lack of attention paid to the inner aspirations and sources of virtuous intent with the emphasis on technologically driven, machine discipline or normativistic concrete order thinking:

In war, time is vital. There is much to be done. Visible evidences of efficiency, noted in perfection of techniques and deportment, are so easy to observe that officers of all grades cannot or do not give sufficient attention to the individual. Yet, attention to the individual is key to success, particularly because American manpower is not only our most precious commodity—it will, in any global war, always be in short supply.

This is a prelude to a very troubling conclusion that Eisenhower arrives at, that what World War II had ushered in was a new era of warfare in which nuclear weapons posed unique, Armageddon like threats. “Maybe it was only wishful thinking to believe that fear, might possibly succeed where statesmanship and religion had not yet won

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8. Ibid., 455.

9. Ibid., 456.
success.” \(^{10}\) This profound observation neatly summarizes the shifting balance in Eisenhower’s thinking, between the three forms of juristic thought. Fear induced by the recently developed nuclear warfare, represents the unwelcome triumph of normativist thinking over decisionist statesmanship and concrete-order religion. Paradoxically, after lamenting the focus on normativist military discipline, General Eisenhower reluctantly and grudgingly admits that fear might work to stop warfare. Why is normativist legalism undesirable at the individual level and yet, perversely necessary at the international level? Neither I nor Eisenhower have an answer. Perhaps, there is none. In this early epoch of the Cold War under consideration, I have identified a tension and irreconcilability between forms of legal thought.

The concluding chapter in Eisenhower’s biography is a lengthy discussion of US-Soviet/Russian relations. What is telling about this chapter, is that the title is “Russia” and throughout the term is used instead of the Soviet Union. The narrative clearly suggests that Eisenhower sees the revolution of 1917 as an aberration in the natural progression of an ethnic group’s history. In contrast to the United States that was committed to individual liberty and human dignity, Russia had a dictatorship of the proletariat. \(^{11}\) Throughout the biography, the idea of the free individual, the central hero of Cold War liberalism, is the bearer of virtuous intent. This free individual will contend with the communist, who has criminal intent.

\(^{10}\) Ibid., 458.

\(^{11}\) Ibid., 474.
Yet, Eisenhower extricates the Russian people from responsibility for this crime, illustrating a universalist moment in the memoir. The issue here is not an American General’s view’s about other ethnicities, but the re-individualization of peoples by finding common traits. At moments like these, the reader can guess that following the intense conflict of WWII, war had assumed, for Eisenhower, an over-arching, transcendental aura. Eisenhower marvels at what he has accomplished, but is also ambivalent. He is aghast at the carnage. Eisenhower’s unit of analysis and frame of reference is a human being and he is interested in human instinct. As the Soviets are at heart really Russians and will always remain thus, he and his audience can expect the concrete order thinking represented by instinct and ethnicity to help overcome the ideological differences between liberalism and socialism, which is a battle over the content of decisionism. Eisenhower’s interest in instinct, coming at the end of long deliberations over the horrors of technologically driven warfare, is his search for a sign of hope. Amidst all the change wrought by modern technology, or normativism, instinct, a presumably unchanging constant from the pre-modern concrete order of Russian ethnic identity, provides the anchor point for hope and virtuous intent. How did nomativism—represented by the fear of nuclear warfare—change from a sign of hope to dread? Why does Eisenhower turn to the concrete order instincts of the Russians? As the final quote of this section will show, Eisenhower sees in Russian ethnic instinct, similarities with the average American. Decisionism, or a respect for the individual, will, it is hoped, be restored through the concrete order of ethnic instinct. It is only through this elaborate
move between rubrics of legalism that Eisenhower is able to recover hope for the future of US-Soviet relations and end his biography.

The Russians are generous. They like to give presents and parties, as almost every American who has served with them can testify. In his generous instincts, in his love of laughter, in his devotion to a comrade, and in his healthy, direct outlook on the affairs of workaday life, the ordinary Russian seems to me to bear a marked similarity to what we call an average American.  

1964, Douglas Macarthur and His Reminiscences

The memory of Nuremberg begins to fade and is replaced by new concerns. The search for defining and locating virtuous intent, however, is ever present. A representative memoir from this period is Douglas Macarthur’s Reminiscences, in which the author rails at the growth of the welfare state under Eisenhower and Kennedy. Published in 1964, a year after he died, his concluding comments are prefaced under the title Soldier’s Return, 1951-64. This builds on Macarthur’s repeated use of the song lyrics, A Old Soldier Never Dies, Only Fades Away. The use of the term soldier is not simply a literary convention. In using this generic designation, he levels out the distinctions of rank, having spent a lifetime climbing the army’s ladder to becoming a five star general. The soldier as a symbol performs the same function in Macarthur’s memoir that Jodl and the hearty Russian do in Eisenhower’s. In explaining the future of the American army, Macarthur, like his former boss Eisenhower, uses a generic soldier as his template. This intellectual analog to the tomb of the unknown soldier, will

\textsuperscript{12} Ibid., 414.
represent virtuous, individualistic intent through to the end of the commentary. In a
graphic and moving portrait of Macarthur’s reconstruction of the concrete order that is
made of these simple people, he notes that the American men and women that fought in
WWII and Korea these citizen soldiers and not professional soldiers. Here, Macarthur
replaces the concrete-order of the mechanized modern army with one based on
participant citizenry. He finds virtuous intent in a libertarian notion of citizen soldier.
Once again, his motivation, like that of Eisenhower, was the search for virtuous intent
residing outside of the technical advancements of the modern age. He is concerned that
material and technological progress has not been accompanied with a corresponding
growth in the inner self, a recurring theme of these memoirs that represents the search for
virtuous intent. Normativist legal discourse of material, modern improvements has failed
to guarantee virtue or make us better people.

Great changes have taken place in our military establishment, some good, some not
so good. Materially, the improvement has been spectacular, psychologically yet to be proven. The men in their ranks are largely citizen soldiers, sailors or airmen—men from the farm, the city, from school, from the college campus—men not
dedicated to the profession of arms; men not primarily skilled in the art of war; men
most amazingly like the men you know and see and meet each day of your life…. These men will fight, and, perchance die, for one reason only—for their country—for America. No complex philosophies of world intrigue and conspiracy dominate
their thoughts. No exploitation or extravagance of propaganda dims their
sensibilities. Just the pure fact, their country called.13

Macarthur then embeds this new concrete order within the narrative of American history
by reminding the reader that the great advances in American industrial growth stem from

American will and determination. The implication is startling. It is not the investment decisions of the Rockefellers and the technologically driven growth of the Carnegie holdings, but the average man that comes out as the hero. “This free enterprise based upon the right to work and the right to possess the fruits of that work has created an economic freedom which is the basis of all other freedoms.”

Macarthur then discusses Marx’s opposition to capitalism and as this discussion is coming at the end of a battle against North Korean communists, it forms a forceful conclusion. While innate common sense led men everywhere to reject these ideas, force was used by the Bolshevik (in the singular) to transform Russia. America was now on the verge of capitulating to this vice, the instrument being confiscatory taxes dating back to the Federal Income Tax Law of 1914. The innate common sense in Macarthur’s writings is doing the same work as Eisenhower’s instinct. Both cite unpretentious simplicity as bedrocks of freedom. The anti-intellectualism in this argument is a rejection of both Keynesian and socialist thought, and of thought in general. In short, virtuous intent resides not in decisionism of the courtroom or that of an economic planning commission, but within the concrete order of rustic simplicity.

Towards the end of his political discourse, Macarthur paradoxically urges citizen-soldiers to ignore politics. This call does not sound practical. Perhaps, he meant it rhetorically. Even as a rhetorical strategy, the quote below illustrates Macarthur’s complete disdain for the argumentative nature of deliberative democracy. In short, court-

room decisionism is not were virtuous intent resides. To save Americans and humans from the ravaging effects of modern, material dislocations, political life for Macarthur has to be re-constituted in the concrete order of the decentralized militia, of the sort that fought in the war of independence.

For a century and a half, you have protected and guarded [the country’s] hallowed tradition of liberty and freedom, right and justice. Let civilian voices argue the merits or demits of our processes of government; whether our strength is being sapped by deficit financing, indulged in too long; by federal paternalism grown too mighty; by power groups grown too arrogant; by politics grown too corrupt; by crime grown too rampant; by morals grown too low; by taxes grown too high; by extremists grown too violent; whether our personal liberties are as thorough and complete as they should be. The great national problems are not for your professional participation or military solution. Your guideposts stand out like a tenfold beacon in the night—Duty-Honor-Country.15

1979, General Collins and His Lightening

*Lightening Joe, An Autobiography*, published in 1979 by General J. Lawton Collins, anticipates both the salience of corporate America in the Regan era and the compassionate conservatism of President George W. Bush’s presidency.16

In our survey, Collins represents a transitional figure, one who serves in two major wars, WWII and Vietnam and whose writings therefore draw on two registers of memory. Douglas Macarthur, whom we encountered in the last section, also served in two wars, WWII and Korea, but his experience on the second war confirmed and re-enforced the lessons learnt in the first. In the case of General Collins, his experience of

15. Ibid., 425.

Vietnam seems to have attenuated and modified the lessons of WWII. In other words, he does not simply have a different resume and biography, but that his juristic historiography is different. As the following biographical overview and analysis will show, General Collins’ retrospective integrates the very trying experiences of the Vietnam War in interesting ways that enables him to establish and maintain a coherent world view. The retrospective also heralds and symbolizes the pragmatically corporate exuberance of the Regan era.

After retiring as Commander in Chief from the Army, General Collins did volunteer work, and deciding that this did not add much to the family finances, joined Pfizer & Company. In a striking passage, he draws parallels between Pfizer and the Army. The art of warfare was readily transformed into the art of commerce. Each country had a regional manager, comparable to a division commander in the army. The international budget was consolidated with the domestic company budget for review and approval by the board of directors, much as it was done by the secretary of defense.17

General Collins’ positive view of corporate America, represents a change in the genre of memoir writing. The experience and understanding of a military ethic and vocation that was related to, but distinct from corporate life—a theme we encountered in Eisenhower and Macarthur’s works—was reworked by General Collins. In solving the company’s various international problems, Collins finds out on a number of occasions,

from corporate subordinates, that the US embassy was not helping and the US Ambassador did not want to meet with them. The former Chief of Staff made sure that things would change.\textsuperscript{18} Pfizer was, according to Collins, helping America in its balance of payments. The language of this memoir is highly practical and instrumentalist, focusing on how to make institutions work. There is a much less of an emphasis on conjuring the individual as a symbol of freedom. His concluding comments, cited below, are reflective of the deeply humanitarian, somber and social work spirit that the domestic upheaval of the Vietnam era had evoked. In keeping with the tenor of Army biographies, Collins ends with an individual, yet this character is not larger than life, or detached from civilian life.

Collins did not just change careers, he integrated mind sets. The technologically driven growth provided by corporate America, establish in Collins’ work—and for the first time in our readings—the acceptance of normativist juristic thought. Collins’s view that Pfizer was helping the US in its balance of payments, grounds the decisionist legalism of economic contracts in foreign trade and domestic prosperity in technological normativism. In order to facilitate this transition, Collins draws on different institutions of the American concrete order, namely the clergy and teaching. While Macarthur found virtuous intent in innate common sense of the militia, and Eisenhower in folk instincts, Collins locates it in a nuanced notion of integrity, similar to compassionate conservatism. Here we have a General who, in helping re-habilitate drug addicts, has defined integrity

\textsuperscript{18} Ibid., 444.
as showing an empathic understanding of human weakness. By pointing to the clergy as an exemplary institution comparable to the army, he is suggesting that sinners need to be reformed, not castigated. In other words, Collins’ idea of integrity is the use of martial virtue to overcome vice. Differences in world views will have an important bearing on how virtuous intent is defined in the US Army. As we shall see in the life of Wilton B. Persons, if virtue and vice are seen as latent potentialities within a soldier, the contextualizing of war crimes will entail looking at the battlefield situation more carefully. A pre-view of this is seen in Collins’ insistence that authority and responsibility, in both corporate America and the Army should be decentralized but never separated. The call for balancing of these two concepts in the institutional worlds of commerce and the Army, is an extension of the clerical calling of balancing the authority of virtue with the responsibilities of compassion. In closing:

The American people rightly look to their military leaders not only to be skilled in the technical aspects of the profession of arms, but to be men of integrity who have a deep understanding of the human strengths and weaknesses, that motivate soldiers under the ultimate test of War. As I look back on my military service, which comprised the major part of my life, it is this feature of the military profession that has had the greatest appeal to me and remains the chief source of satisfaction. Only the clergy and the teaching profession offer comparable opportunities and responsibilities as I have had to assist in such activities as the re-habilitation of drug addicts from the Waterfront of Brooklyn; the development of the natural qualities of leadership of a Sergeant Woodward; share the drama of heroic action of a Charlie Davis on Guadalcanal; feel the deep sadness of heavy casualties of our men in the Hurtgen Forest and the Korean War.19

19. Ibid., 422.
The tone and focus of the army memoir, *Into the Storm: A Study in Command*, follows the trends and patterns seen in General Collins work. It is highly functionalist and instrumental. The legacy of Vietnam has long ago been re-worked, and perhaps forgotten. The idea of the individual that emerges in this work is closer to that of a social worker. With nation-building and policing roles that the US Army would play in Haiti, Somalia and the Balkans, we hardly notice elements of post-World War II heroism. The army hero is a composite figure, who reflects the accumulated traditions of America’s Cold War memories. Flexibility of Army roles turns into flexibility of personality types. This amorphously heroic personality is, I suspect, impossible to produce and sustain in real life. Yet, General Fred Franks, a division commander from Operation Desert Storm, collaborates with best selling author Thomas Clancy to produce a co-authored memoir. He introduces the General as having taught poetry in college. The General not surprisingly, had been in charge of re-forming the US army at the end of the Cold War. Citing Alfred Thayer Mahan, noted military strategist of the 19th century, Tom Clancy and General Franks point to the need to change conservative army cultures to suit a changing world.20

Reflecting the adventurous, fictional Hollywood world of Tom Clancy, the focus of these two men is on imagination. Here, General Franks, who like Collins, served in

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Vietnam, has gone further in embracing the entertainment sub-section of it. Like Collins, the Clancy-Franks duo understand imperfection, yet, their focus on cinematic imagination is reflected in the complete transformation of the role of the soldier. Now, he needs to know where not to be bold. Eisenhower, Macarthur and maybe even Collins would find this unthinkable. In the quote cited below, the dominance of the normative juristic tradition shows itself in the primacy and prevalence of visual technological metaphors. In the end, they suggest that Generals should smile. The institution of the media, the concrete order these two draw on, has replaced the content of decisionist thought, with the pre-requisites for decisionism. In other words, under the influence of Tom Clancy, General Franks does not make any specific policy recommendations. In suggesting that generals can do a lot of good for individuals everyday, virtuous intent, while it exists, is not defined or prescribed before hand. Its content is to be determined according to context. Towards the end, Clancy turns the mike over to Franks, to usher in the Janus faced human being:

Generals must have an imagination that lets them visualize what needs to be done. They must synthesize and create a whole, when others cannot see, and then communicate that whole with so much clarity and so much conviction that others will see it, too, and follow it. That is command. That is leadership at the senior level. Generals decide where to be bold and where not to be bold. They must be strong and decisive, yet they must also keep their ego from clouding their judgments. Instead, they must use that ego to stick to doing what is right, even in the face of adversity. Generals decide where to intervene and where not to intervene. They decide where to tolerate imperfection and where not to tolerate imperfection. They must be intensely competitive. They must hate to lose. They can do a lot of good for individuals every day. If they can, they should rest easy in
the saddle and have a sense of humor. Smile once in a while.\textsuperscript{21}

Conclusion

This overview of American Army memoirs is more that a panoramic view of Cold War history. Seen through the lens of our Schmittian analytical grid, it shows us how different institutions within the American concrete order such as the militia or Hollywood, are accessed by Generals to provide the ideas and norms with which to understand and interpret the decisionist Constitution. In the process, a normativist-positivism, the third of Schmitt’s traditions, while not explicitly articulated as scientific jurisprudence, is nevertheless represented by the role of science and technology. The three juristic narratives play varying roles in helping the Generals articulate virtuous intent and simultaneously create a vision of the bearer of this intent, the individual soldier. This interplay of intent and context constitutes the structure of any given biography. We notice a changing pattern in this trek through the Cold War. Eisenhower first sounded the alarm that normativism was either lacking or partially useful in its ability to avert nuclear warfare. He placed stock in rustic simplicity of people, or their ethnos. Macarthur, identified similar problems with normativism yet, brought the fight against totalitarianism home. His citizen army harked back to earlier years of the Republic. Collins had more in common with Eisenhower in voicing deep concern over the need to supplement the normative with the empathic, and he gave religion a greater

\textsuperscript{21} Ibid., 514.
role. He sets the stage for General Franks by introducing corporate America as a source of great normativist, technical strength. The trend has therefore been the shift to normativist sources of legitimation. What bearing does this have for our thesis? As this work is a historical study, I seek to analyze and document a particular moment or snapshot in this development, or the work of Wilton B. Persons. I will not be making predictions about what the trend towards normativism entails in our day. Such work will require empirical research into the incidence and prosecution of war crimes accompanied by survey research on military attitudes towards war crimes. These are beyond the purview and scope of this thesis.22 Having provided a panorama of Cold War history and of the trajectories of the three forms of juridical discourse, I now turn to a more detailed analysis of the life and times of one General, whose ideas and ruminations on what I have termed virtuous intent, were crafted specifically around the issue of war crimes.

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22. Zygmunt Bauman, Modernity and the Holocaust (Ithaca: Cornell University Press, 1989), a work that sees the Holocaust as a product of modernity, is a well known example of this kind of a project.
CHAPTER 2

THE LIFE AND TIMES OF WILTON B. PERSONS

Wilton B. Persons shares with Eisenhower, a concern for individual, inner, moral strength that prevent men from turning into war criminals. With Douglas Macarthur, he shares a disdain for civilian, democratic processes. However, he is far from interested in a citizen army. In fact, he has great pride in the US Army as an institution and has a very low opinion of civilians in general. He therefore does not have General Collins’ interest in commerce or General Franks’ taste for Hollywood. In analyzing Persons’ retrospective narration of his biographical development, I show the reader how the General first reconstructs the ethical norms embedded in the concrete order of the US Army. In other words, how does Persons’ understand virtuous intent? Further, I sketch out how Persons’ gradually deploys this virtuous intent in facing up to the demands of the decisionist legal challenges posed by the constitutionally grounded Civil Rights movement of the 1960’s, as he and his Army colleagues are given the unsavory task of restoring order to the cities through military policing. Finally, his ideas on virtuous intent would help him transition from the decisionist Constitution—that constrained the use of force within the parameters of non-military, civilian law at home—to the US commitment to the Geneva Convention on the Prevention of Genocide, which performed the same function in the international sphere. Persons’ training in the barracks and at the urban barricades would provide the various contexts in which virtuous intent would be deployed and defined. They provided the backdrop against which to contrast the conditions in which vicious criminal intent
would corrupt the soldier. In short, the trek though the life and times of Wilton B.

Persons re-visits the moral underpinnings of the classic problem of law and order: the need to balance the use of force in the service of concrete order military necessity, within the restraints placed by decisionist civilian law, domestic and international.

While many of the quotidian details discussed and analyzed in this chapter may seem mundane and trite to some readers, I request the reader to be patient. The US Army records these details with great care and therefore, merit a closer look. They are narrated and recorded in the first place to situate Persons in his milieu and establish his credentials as a stalwart member of the institution. For our purposes, these details are valuable in gauging how embedded this soldier is in the concrete order of the Army. Further, it is in these mundane details that we see the interactions of concrete order, decisionist and normativist discourses of law. Soldier intent after all is embedded in everyday life. I now turn to a detailed examination and analysis of his life. The rest of the chapter is divided according the events discussed in the narrative, in the sequence that they occur. There is redundancy and that is also brought out in the narrative. I have avoided summarization that would highlight only major milestones. Seemingly trivial details are important as they provide the cement or glue for transitioning to more important ones. In association with larger ones, they frequently reveal the author’s preferences. Also, re-iterations of an event signify the importance it held in Persons’ memory and in re-telling, the event is recast in new ways. In short, I re-construct Persons’ Army concrete order within the parameters set by the interview, which reflect his preferences and world view.
The Concrete-Order of the Family, Education and Early Life

Person’s biography begins with a discussion of the conservative values embedded in his high school education.¹ Born in 1923 in Tacoma, Washington, his father, who was in the US Army, decided to send the son to high school in his hometown of Montgomery, Alabama. The fourteen-year-old boy was subjected to the same rigorous pedagogy that the father had been thirty years earlier. An old man named Mr. Starke ran the school with strict discipline. He used corporal punishment for a wide variety of disciplinary infractions. The discipline came with a solid education that gave the young Persons a strong grounding in the sciences for later work in college at West Point. Detailed and somewhat amusing accounts of the techniques used by Mr. Starke to punish students are important details. Throughout the early part of the biography, Persons maps the infractions students committed to the particular punishments. The disciplinary outfit of the school stands in stark contrast to that of a concentration camp. Here, corporal punishment cultivates virtuous intent. The sparse and austere functionality of the school, stripped of frivolous refinements that will come to symbolize for Persons, the world of civilians, is the concrete order which prevents the corruption of virtuous intent into specific criminal intent. Embedded in this narrative is a view of human nature, of the sort

¹Major General Wilton B. Persons, interview by Colonel Herbert J. Green and Colonel Thomas M. Crean, 1985, Project 85-4, transcript, Senior Officers Oral History Program, Military History Institute, United States Army Heritage and Education Center, Carlyle Barracks, PA, 1-7.
identified and mused over by Eisenhower, as containing instincts that if left undisciplined, could lead to criminal behavior.

Persons’ description of his high school education illustrates the interplay of the concrete order of his principal with that of small town tradition. So closely intertwined was the school with Mr. Starke that on his death in 1941, the school also practically died out. While the facilities were minimal, even run down, students had to work everyday. Students accomplished results by diligent hard work and poor facilities were not a drawback. Mr. Starke gave the students a spelling test every day and according to Persons, “…he didn’t have any patience with this school of thought that says that brilliant people misspell and can’t write.” Implicit in these comments is a defense of 19th century pedagogical tradition and a critique of what appears to be Persons’ mocking paraphrase of more modern and for him, controversial educational philosophies. For Persons, an imagination left untutored, or inspired agency unchecked by the constraints of structure is a very dangerous thing. Later in the memoir, we encounter the case of the Green Berets, in which war crimes were committed by people who spent long periods in isolation and developed unstructured ideas about warfare. Persons’ reconstruction of his early life dating back to the 1930’s, carried out in this 1985 interview, is therefore a retrospective

2. Ibid., 4.
3. Ibid., 6.
4. Ibid., 6.
recollection that is refracted though the experience of WWII, Vietnam and of what passed for virtue and vice in each of these wars.

In 1941, Persons enrolled in Auburn University, his father and uncles’ alma mater. He then moved on to West Point. This institution served to transition Persons from southern military tradition into the mainstream of US defense policy and strategy. His father had not attended West Point and Persons tells us that although the father did not think it made a difference, Persons thought that it had been useful in making contacts. Persons’ description of the value of attending West Point therefore highlights the central role of the concrete order of the US Army in the formation of not just a future, successful army personality, but of networking. Years later, in 1958, as he joins the 8th Infantry Division, he discovered that most of the commanders in the division were his classmates. Having class fellows in high places helped him “break the ice,” or helped him get paper work through the bureaucracy faster. Yet, the tone and format of the discussion in the interview shows that Persons never breaks with his father’s tradition by disagreeing with him. He does not discuss and compare the quality of the training he received at West Point with his father’s army academy. He talks past the issue by referring to networking and

5. Ibid., 11. His father, an army officer who would go on to be an advisor to President Eisenhower was, in both education and career tracks, another charismatic role model.

6. Ibid., 12.

7. Ibid., 12.
contacts. This obedience to his father’s tradition further embeds him in this multi-generational Army family.  

The issue of contacts not only illustrates the fact that networking is an important part of establishing and re-generating a concrete order. It represents a preference for getting things done by talking to real life people, who are embedded in institutional contexts. Contacts are the sinews of trust. Contacts embed the working soldier in a context. And trust is an important virtue. Embedded in this narrative is the deep distrust of the concept of ideology, of abstract forces that claimed to drive history and drove people in Europe to ruin. Once again, the isolation that produced war criminals in Vietnam informs the narrative reconstruction of memory.

How does one interpret this? I suggest that the two titanic explosions of WWII and Vietnam, being traced back to civilian ideologies of fascism and communism, had so discredited the intellectual world of liberal society, that Persons came to the end of his life with an enduring hatred for these tendencies. Like the icon of his generation Eisenhower, who stripped the Soviets of their communist facade and showed us Russian peasants who were instinctively amicable, Persons stripped civilian society of conceptual trappings and showed us what mattered, contacts.

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8. It noticing Persons’ deference to his father, it is worth noting here, that the narrative we are unpacking shows, the use of Schmitt’s notion of a concrete order is more useful than social science rubrics like the personal and the public or civil and the military. It cuts across these boundaries. A concrete order includes familial and work spaces. Schmitt’s three rubrics distinguish legal narrative through their contents and not their institutionalization in social and political space.
At West Point, Persons learned more than drill and military strategy. He saw the workings of the Honor Code. Here, the cadet understood not just the need to work and live by the rules that were enforced, but he was also exposed to the disciplining that instilled in him the institutional logic and cultural ethos behind these rules. Hence, a cadet could be asked a trivial question, as to whether he had cleaned his shoes on any given morning. If he did not give a straight answer, he was severely scolded. While this may seem like routine military culture the world over, Persons’ explanation of the logic behind these tactics is important:

The reason why you did not lie, cheat or steal was not just because it was immoral in an abstract way, but because you were taking advantage of your classmates, you were getting an unfair advantage in terms of grades, and I suppose later on it would be a promotion or whatever. More important that that it was drummed into your head that people’s lives would depend on your being absolutely truthful, and it just had to be that way, and that you were going to be entrusted with men’s lives and with security of the country.9

The distinction made between morality in an abstract sense on the one hand and careerism and practical military necessity on the other, reflects an important choice: the clear decision to prefer concrete order rationalizations, based on considerations of the survival of the combat unit at hand, over decisionism. While soldiers, Persons included, may in the US Army not lie and cheat for both reasons, that it was immoral and that immorality had disciplinary consequences, it is Persons’ clear rejection of decisionist virtue for concrete order virtue that is worth highlighting here. The preference for concrete order considerations is likely to widen the margin of mitigating circumstances.

9. Ibid., 20.
The even balancing of concrete and decisionist logic is likely to prevent war crimes from being committed.

In reading through the oral history closely, the reader encounters interesting tensions in the workings of the Honor Code on the one hand, and Persons’ perception of it. Persons categorically states that: “I can remember that when I got out in real life you found that the army wasn’t a hotbed of corruption, but in real life, people can’t operate at that high level.”\(^{10}\) He makes this observation when noting that in light of certain recent scandals at the Academy, he completely disagreed with the observation that the Academy, in disciplining or expelling students, is holding them up to unreasonably high standards. “I say that’s pure hogwash. I don’t have any patience with it; at least in my time everybody knew what the rules were.”\(^{11}\) Army tradition is therefore superior to that of civilians, and that the army should not succumb to social and political pressures from the outside. On closer observation, one notices that while he thinks that the army does have higher standards than the civil world, he does not want frivolous civilians telling him that. This is a theme the reader will encounter at a number of occasions in the text. To interpret this, we need to work back to Persons’ childhood. We see here a continuation of Mr. Starke’s legacy. Crimes if unpunished, lead to solitary decadence. In a military context, the point behind ensuring obedience to arbitrary rules was precisely to keep new recruits from waiting for the reasoning to dawn on them, before a rationalist

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10. Ibid., 21.

11. Ibid.
obedience could be tendered. Military necessity frequently dictates that the reasoning has to be left to men higher up in command, or the officer corps. If new recruits exercised their own judgment on which orders to follow, chaos would ensue and the chain of command would break. Persons seemingly desultory and off handed comments therefore conceal centuries of military history that need unpacking. The men that broke the Honor code pose a specific sort of a serious problem for the Army. They found allies in the civilian world, who, not knowing what a chain of command is, are accomplices in the infringement of the Honor Code. The severity of Persons’ judgment and reaction are a retrospective interpretation of these events. As we will see in chapter III, the Green Berets case attracted the attention of the media, that defended war criminals as innocents. It is in that later episode, involving war crimes, that Persons learnt first hand, how military combat necessity and media politics were at odds. When asked about a crucial issue as the Honor Code at West Point, Persons therefore exploded as he recalled yet another episode of civilians posturing as great defenders of soldier civil rights. Once again, war crimes structures Persons recollection of domestic politics.

Persons and the interviewer conclude that the honor system at West Point worked and that it formed the foundation for Persons’ future work in implementing, reforming, and strengthening the US Army’s justice system. However, something in the tone of the discussion suggests to Persons that he needed to say more. He notes that the youth in 1985, when the interview was being conducted, are different. Persons does not specify

12. Ibid., 24.
how, but the reader may reasonably assume that the impact of the 1960s is being referred to. Persons then asserts the need to get the youth into the Academy when they are malleable, between the ages of seventeen and nineteen, and instill in them the needed idealism. Persons does not want un-malleable, older men. Implicit in these statements is the frequent assertion of the uniqueness of Army life, with its higher moral standards. But more significantly, it is a very telling blend or culmination of various episodes discussed so far. Persons is tracing the breaches of the honor code to un-malleability of new recruits. New recruits are now too civilian. The training that Persons want to impart is that of Mr. Starke, one of frequent corporal punishments. Just like Mr. Starke had little patience for new civilian pedagogies that values content over form, Persons does not want quibbling recruits who form allies in the decisionist civilian world and bicker over the content of the Honor Code. In summation, the experience and reflection on war crimes committed by the Green Berets, which are for Persons, not a product of poor but of self-styled discipline, informs his discourse of the Honor Code at West Point. As a result, Persons draws on memories going as far back as high school to make his point, thereby re-structuring his entire life under the rubric of war crime prosecution.

The reader is left wondering, why is this army distinct from and even superior to a civilian world that pays for it and whose values the Army defends? In other words, why is maintaining order and standards in the army any different from a corporation or a country club? This question would not raise doubts about Persons’ competence or

13. Ibid., 25.
judgment. Rather, it would point to the fact that concrete order thinking, centered around the disciplinary and combat functions of Army training, is for Persons playing the role of decisionist logic. The emphasis on the intensity of Army training and close camaraderie that we are encountering, is revealing this conflation or the merging together of concrete order and decisionist thinking. While in the four biographies analyzed in chapter one, we saw these juristic boundaries as fluid and responsive to pressures from the civilian world, this focus on Persons’ biography shows how his reflections on war crimes engender the opposite processes.

While trekking through Persons’ West Point experiences, the interviewer once again, returns to the importance of networks and contacts made at West Point. Here, one sees an ambivalent reversal in Persons’ tone. Having told us earlier that his contacts had been helpful throughout his career in ‘breaking the ice’, Persons shies away with a “Well, yes, but not as much. I don’t know…”14 He then narrates a series of career moves he makes and concludes that while it did not hurt to have attended West Point, he hopes it gave him the opportunity to “… demonstrate what I could do, and that I didn’t get any preferential treatment because I was a West Pointer.”15 Persons then tells us an account of how a superior officer gave him low ratings as he was held up to higher standards reserved for West Pointers.16 He then gives us a long account of how this same officer was responsible for sending him to an undesirable posting in the Army, the Judge Advocate

14. Ibid., 27.
15. Ibid., 28.
16. Ibid., 29.
General’s School in Charlottesville, Virginia and how he was able to persuade his immediate superior that a replacement he had in mind was a much better candidate for the job as he had “…all kinds of contacts.”\textsuperscript{17} Persons does not really resolve the issue of the importance of contacts, and the interview moves on to other topics.

Contacts is understandably an embarrassing topic. The stray comments above are worth a closer look. Contacts, by no means limited to the Army, reflect the workings of the concrete order. Persons’ vacillation over this issue suggests that he is sensing a critique, that networking trumps competence. The latter is an expression of contractual decisionism, or normativism: what and not who one knows should be rewarded. Persons’ vacillation and desire to come back to the issue reflects the relative weight of concrete order vs. decisionist thinking. Once again, the aversion to the abstract decisionism, has its roots in the reflections on war crimes. Persons prefers person to person contact over a human that incorporates ideas in books. This is a sure safe way of avoiding the isolationist decent into morbidity.

In his ambivalent vacillations over the issue of contacts, which as I have shown, stem from his need to distinguish networking from nepotism, Persons establishes the fact that he thinks they are an important issue, even if he is not sure exactly how and why. He therefore re-casts and reformulates the issue of contacts, by showing them to be expressions of a deeper empathy and reflections of human inter-dependence. The venue for this expression for empathy is his first job in the Army.

\textsuperscript{17} Ibid., 38.
Early Career

Persons’ recollection of his years spent in overhauling the curriculum at the JAG School in Charlottesville, Virginia, represent a very striking and forceful attempt by this officer to draw a clear line between the more empathic military concrete order and the competitive, commercial civilian traditions of authority. In his words, “…we are the only law school in the country that has any responsibility for its product, and that’s true.”\textsuperscript{18} He goes on to mention that while some law schools may have placement services, students in the civilian world have to prepare for the bar on their own.\textsuperscript{19} Apparently, JAG School takes better care of its students. To outsiders, this comment will seem strange. Even back in 1985, well-ranked law schools counted on their coursework to prepare their students to pass the bar and find jobs. The seemingly trivial point of comparison, however, conceals Persons’ deep-seated view that the Army is a nurturing and caring institution and that the legal departments within are not to be structured along adversarial lines as they are seen to be among civilians. The reader will see, in the course of the entire biography, Persons’ strong desire to distinguish the army from the civilian world and thereby keep the latter out. He therefore prefers in-house army concrete order solutions to importing civilian strategies.

In reminiscing on his daily work at the JAG School, Persons recalls that he made an effort to find out how his instructors were teaching in class. He in turn welcomed his

\textsuperscript{18} Ibid., 42.

\textsuperscript{19} Ibid.
teaching style being scrutinized, which was rare. “...I have very little sympathy with the academic world that says they won’t tolerate that.”

He proceeds to say that academic department heads are figureheads and there is no accountability for what gets taught in class. More pointedly, he draws a distinction between JAG School being first a service school and then a graduate school. Also, he did not support the Commandant of the school in his efforts to get the institution’s degree recognized as an MA.

Why would Persons care so much about these issues? I will suggest here that the difference between these two styles of academic administration is no mere bureaucratic artifact. Rather, it is a reflection of the two different registers of legalistic thought. The style he practices and prescribes involves carrying over the Army chain of command into the classroom. Supervision in Persons concrete order is top down and hierarchical. The civilian world by contrast has settled on using student evaluations to assess the pedagogical abilities of an instructor. The evaluation of an instructor is done through a democratic vote, which transmitted to the bureaucracy of the department. In contrast to the Army, academia has a decisionist culture. Both styles could work in the JAG school. Persons’ preference of one over the other, and his going so far as to snub even the title of an MA, speaks volumes of the tenacity and strength of concrete order thinking. To understand this adamant insistence on seemingly small issues, one has to wait for his experience as a law student at Harvard. His reconstruction of the pedagogy of JAG school is made in

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20. Ibid., 48.
21. Ibid.
hindsight and he seems to place a great deal of importance to the responsibility and empathy that he feels is there in these unique military styles of training. Perhaps, there is more empathy in these schools. The differences seem to produce trivial results, such as the refusal to use the term MA, that show Persons as more focused on symbolic differentiation of the worlds of civilians and soldiers. Persons is retroactively exaggerating small differences between the two traditions, under the influence of some real and significant factor we can’t see. At least, not yet. As we shall soon encounter, civilian lawyers were the instruments of the media’s drive to exonerate the Green Berets guilty of war crimes.

By 1947, Persons, who did not see combat in WWII, graduated from Fort Knox Armor School and was stationed in Austria, in the occupation armies that were democratizing the country. With the draft removed, he notes that the quality of the soldiers had declined and would not improve until it was re-introduced in 1948.22 In his own revealing words, cited below, Persons shows the relevance of our distinctions between concrete and decisionist orders. In dealing with soldiers with criminal records, he took into account their caliber on the battlefield. If they were good soldiers, he cut them slack. Yet, quite significantly, he notes that this tension, or the situation getting ‘pretty wild’, is when he decided to become an Army lawyer. As lawyers, they had the spirit of justice, but lacking proper prosecution procedures, there were miscarriages of justice.

We had, I don’t know how many guys who had records, I mean records as long as

22. Ibid., 59.
your arm, felony convictions, and we had some who were underage. I was startled to find out that my very best platoon sergeant was at that time only seventeen years old, and had been in for almost two years. So it was obvious that he was a fraudulent enlistee. However, he was such a good soldier that I decided not to worry about it. He was a great big Texan and just a straight arrow and a good man, but he was one of the exceptions…We had young ones who had enlisted because their big brothers told them that there were lots of free booze and women and a good time to be had in the army of occupation. It was pretty wild. That’s where I first got involved in the military justice system.²³

and further:

We may have been not too versed in the niceties of the law, but my experience was that we fought like tigers on the facts and never any question, my contemporaries anyway, took it very seriously whichever side of the fence you were on. In retrospect, justice was fair. I never saw anybody unfairly convicted, but it probably would make your blood run cold to think about how the laws of evidence were mangled.²⁴

From what Persons say above, why does it matter if the drafted soldiers were criminals? Specifically, why is it important that the platoon sergeant was a good soldier but had a rap sheet? Once again, we encounter a seasoned soldier, drawing on his battlefield experiences to narrate the importance of law in combat situations. His reflections on the war crimes in Vietnam, refracted though the understanding of what happened in Nazi Germany, led him to appreciate that privileging normativist, technical proficiency in war, to the exclusion of ethics, would lead to dangerous excesses. Seemingly manageable crimes that were excused for service in war, were the tell tale signs of more dangerous ones to come.

²³. Ibid., 59.

²⁴. Ibid., 60.
At this juncture in his life, Persons attended an elite law school, Harvard, for a JD.

Army tradition, which is by now embedded in Persons-the-West-Pointer, and not only a legacy from his father as it had been in his high school years, conditions the way he reacts to Harvard University. The reader encounters the apparent contradiction of being academically humbled amongst superficially articulate people. The liberal arts are superficial. He notes that students got up and argued with their professors. While the reader understands that this did not happen in the army, one is left wondering why Persons does not factor in that Harvard was not the Army. Why did Persons care about doing well in Harvard if he did not care for the culture it represented? In order to understand this, we need to introduce the third of our juristic discourse, that of normativistic law. Normativism or law as a scientific-technical expertise lurks in the memoirs of Persons. Doing well in this field, is an end in itself.

It was a grind and I was terrified because I found myself in the company of people who had a great deal more education in liberal arts than I did and who were much more articulate, at least superficially, and got up and argued with the professors and that sort of thing...it didn’t make any difference how hard I worked I was never going to be at the top of the class. That was a humbling experience.²⁵

He worked hard and did well, ranking forty eight out of four hundred and forty students, or “…just under the top ten percent, which was a great comfort.”²⁶ On looking closer, Persons is making a sharp distinction which is simultaneously a value judgment, between performative competence as represented by class rank and experiential knowledge

²⁵. Ibid., 65.
²⁶. Ibid., 66.
stemming from ones’ physical being. This is Persons’ distinction between appearances and essences. It is rooted in the distinct worlds of Army concrete orders, in which physical performance is indispensable and decisionist civic-corporate society, is perceived as vocative and vacuous. This distinction becomes clearer when we recall his earlier comment made during the discussion of the strengths of Starke High School. His reference to his background in engineering being a source of strength blends technical normativistic expertise with concrete order military discipline to enable him to gloat as follows:

Even when I got to law school, I can remember, I was surrounded by all kinds of Phi Beta Kappa keys, and very bright people, from a lot of good schools who had majored in political science and that sort of stuff. I really felt like a fish out of water, all my background was engineering. But when the end of the year came and we had to take six four-hour exams, one every other day for two weeks, an awful lot of them fell by the wayside.27

For the purposes of our thesis, it is immaterial if this sense of alienation from the civilian world, was experienced in association with the events recounted, or exaggerated under the influence subsequent life experiences and retroactively read into the past. Either way, we encounter in Persons’ life a persistent theme of the superiority of Army life and morals over civilian ones. In our search for the meaning of virtuous intent, if Persons seems to be consistently equating virtue with order and discipline, we can get a sense of or even predict where his sympathies will lie in a case involving war crimes. To conclude this section, Persons view of Harvard illustrates the very sharp divide in his

27. Ibid., 6.
mind, between army and civilian worlds. He felt like a fish out of water in more than the academic sense. In his second year, he met an Army officer ironically named Noble, who was adamant about getting out of the military as soon as he could. He was in it for the ride, the army was paying for school. Persons found that startling. He hoped to, if deemed competent enough, spend the rest of his life working for Army JAG. To add to his amazement, regular students would, on finding out that he was an army officer, a fact he would neither volunteer nor conceal, ask when he would leave the army. “…they never met or ever expected to meet anyone who was a career officer and intended to stay in the Army.” In the conclusive sounding words of the General, Harvard was “…a little world all its own.” These last closing words are an apt encapsulation of what Persons identifies as the root problem of war crimes, namely isolation. What may look to us as class snobbery, is something very different for Persons. This is not a tale of a rustic yokel from the boondocks of Alabama experiencing the cramps of status anxiety. It is the story of a soldier who, after dealing with the experience of war crimes, came to see the civilian world’s rootless and frivolous intellectualism as the causes of the moral decay and self-indulgence. This intellectualism, detached from a networked practice, provided the reasoning with which general intent and inclination to commit a war crime, was transformed into specific intent.

28. Ibid., 68.
29. Ibid., 74.
30. Ibid., 73.
If law school was not a sufficient culture shock, Persons experience working as an unpaid associate for an established Boston law firm was an even more amusing. He worked out of a broom closet and recalls how the partners met to discuss if his work was to be billed to the client. On deciding that clients should not get anything for free, they billed them. Drawing on *Harvard Law Review* articles and as Persons put it, common sense and luck, he was able to write useful legal memos. All through the description of his experience at the firm, there is a sharp distinction between him as a soldier and outsider and them politely putting up with him. In invoking common sense and luck, he seems to be mocking their solemnity as officiousness. A world built around words cannot rival one built around armor. This stark dichotomy between word and deed can only make sense if one factors in the differences between decisionist legal authority in a Bostonian lawyer of the 1950’s and concrete order in a southern army officer rising through the ranks. After all, while Persons defended his country in far off places, “…they represented about four or five big insurance companies. In other words they were defending the establishment, that was their function.” Later, the media, also a key defender of this real or imagined establishment, would along with lawyers, play a critical role in getting the Green Beret war criminals off the hook.

31. Ibid., 75-78.

32. Ibid., 78.
On graduating from Harvard, Persons went to work for the Pentagon.33 The armed services were facing funding cuts after the Korean War and high ranking government officials convened to balance this by improving the fighting strength of the Reserve and National Guard. According to Persons, with an annual eighty percent turnover rate, these services were flimsy institutions. As the Army embarked on policies to improve these services, they faced stiff opposition from the respective commanders who, fearing a loss of civilian enrollment in a demanding fighting force, were afraid of losing their jobs and “…all this great hierarchy of civilians would be out.”34 Persons tells us that the Army prevailed, yet his account of how this was brought about, is a bewildering narrative worth analyzing, for what it leaves out as much as what it includes.35 He does not tell us how this feat was accomplished. He does tell us that he worked very hard to get a briefing for then Army Secretary Brucker which detailed the legal and Constitutional ramifications of re-ordering the Reserve Services. Rather than tell us something about the legislative content of the proceedings in Congress the next day, he recounts how he assisted Mr. Brucker in deflecting questions from the Army Chief of Staff and getting the latter off the hook during a particularly tense interrogation session. Persons’ stated:

That was what he considered his job to be, to deal with the Congress and the political problems and to shield, to the extent possible, the professionals from them.36

33. Ibid., 78.
34. Ibid., 80.
35. Ibid., 81-83.
36. Ibid., 83.
Mr. Bruker is instead remembered for his making eye contact and shaking hands with everyone in the days leading up to Christmas. He made you feel important and had great stature. He was not seen as a team player at the DoD but that was not “…how he saw his job.”

In short, Mr. Brucker, former Governor of Michigan, is Person’s point man in the civilian bureaucracy. Whether bureaucratic and constitutional proceedings were in place to produce a just outcome, or to ensure decisionist justice, is not particularly relevant. The fact that they were sidestepped wholesale is seen by Persons as a triumph. Here, his admiration for a civilian individual that protected the army from accountability reflects Persons’ deep seated disdain for civil bureaucracy. In a telling and illustrative anecdote, shortly after this hearing, Persons was assigned to overhaul a complicated and archaic cataloging system that contained the Army’s records of trials and legal proceedings. Somewhere in the thicket of this procedure, a colleague, overwhelmed by the paperwork he saw around him remarked, “Wouldn’t it be a lot simpler just to take all those cards and just throw them in the Potomac and start all over again?” Persons replied, “Well, perhaps, however, we would lose access to all these golden words and all this marvelous precedent.” His friend concluded, “I am not so sure that would be a bad thing.”

Persons and his colleague would like to get rid of these records or of institutional memory, just as the Army would like to get rid of the civilian bureaucracy that is bloating the Reserve and

37. Ibid., 83.
38. Ibid., 87.
National Guard. While there may have been some good reason for the Army prevailing, the discussion focuses on how it was accomplished by cutting through the bureaucratic procedure. We are not really told what of the bureaucracy was cumbersome. What is important is the abiding contempt for civil bureaucracy in any shape or form. At moments like these, Persons sees the civilian world as nothing more than bureaucracy. This contempt of a faceless bureaucracy, mentioned in 1985, dates back to the Green Beret case, where in Persons’ reconstruction, the war criminals kept accurate records like the Nazis. Decisionist legalism embedded and represented by the records of the civilian world, is devalued and discarded when seen through the lenses of war crimes of Vietnam and WWII.

Bureaucratic decisionism begins to loom large as Persons rises up the Army chain of command. In the words of a colleague, the rule of thumb, referred to as exercising judicial restraint, in handling army legal cases was that: “If you don’t understand it, don’t sign it.” Further down the narrative, we find Persons once again struggling to establish trust though contacts in the army bureaucracy, to get things done. The sense one gets from reading this account is that the judicial system had some working principles at the core but there seems to have been considerable room for subjective interpretation, maneuverability and even, manipulation. The preponderance of Army concrete order traditions meant that soldier-officers like Persons saw the boundary between judicial

39. Ibid., 103.
40. Ibid., 102.
administration and bureaucratic practice as thin and malleable. Things got done when networked individuals understood how to work and project Army concrete orders. It is against this backdrop that the universalized, decisionist principles of war crimes prosecution, would have to be institutionalized. Seen in this light, ideas like judicial restraint begin to look like synonyms or even euphemisms for policy. At this stage in Persons’ life or his retrospective re-construction of it, we see officers in the Army’s concrete order, project their own understanding of how things work, thereby blurring the boundary between decisionist judicial procedure and the normativist administrative features of law. One might wonder if we are reading in too much into these seemingly anecdotal recollections. The answer is no. Judicial restraint is an important legal doctrine which cannot be reduced to ‘don’t sign what you can’t understand’! And yet, we are not interested in trivializing or mocking Persons. What we are establishing here is that Persons, even after getting a JD at Harvard, seems to be adamantly opposed to decisionist legal thought. As the quote below illustrates, he prefers facts over hypotheticals, reflecting a marked disdain for abstract thinking, characteristic of concrete order jurisprudence, where decisions are made through networking, by looking people straight in the eye and with a firm handshake. I maintain in this thesis, that this contempt for or caution against abstract thinking, has its roots in Persons’ experience of war crimes. Yet, if a high ranking officer is involved, Persons recommends indulging him:

Only answer those questions that are required to be answered don’t give gratuitous opinions on problems that might arise later, or that haven’t yet arisen. I think that is a good rule, because you don’t have all the facts now. The same reason you don’t answer hypotheticals. Although you can’t always say that—obviously ones posed
to you by the Chief of Staff of the Army or the Secretary, you answer, but you see what I mean.\textsuperscript{41}

The Civil Rights Home Front

In order to better understand these issues within the US Army, we need to contextualize them in the political and cultural upheavals of the 1960’s and notice how Persons’ efforts are informed and influenced by federal judges allowing law suits against the army. The need to face lawsuits in the civilian world would force the Army towards standardization and regulation, in short, the development of decisionist legal authority. He stated:

\begin{quote}
We were being sued, everybody was being sued…We had people suing to get in the Army, suing to get out of it, suing to be transferred…it was pretty obvious to the commander that he had to have lawyers and he had to have good ones.\textsuperscript{42}
\end{quote}

Persons’ perspectives on the political upheavals of the sixties is a critical juncture for this thesis. They give us insight into the kind of judicial consciousness these events in modern US history brought into the US Army. This entails looking closer and unpacking the politics seen in casually made comments like “…it [rioting] could occur anywhere, and what usually kicked it off—of course, the Martin Luther King thing obviously kicked that off…”\textsuperscript{43} The US Army was frequently called in to quell rioters in cities like Little Rock, Oxford, Birmingham, and Detroit. With the Supreme Court and Federal Judges in mind, the Army sought to cover its bases by having its own battalion of lawyers. General

\begin{flushright}
\textsuperscript{41} Ibid., 103.\\
\textsuperscript{42} Ibid., 112.\\
\textsuperscript{43} Ibid., 142.
\end{flushright}
Abrams would eventually replace General Westmoreland in Vietnam, but it is little remembered that he was also called upon to quell riots in US cities during the Civil Rights movement. While the biography does not provide us with information as to whether the US Army was better or worse than local police forces, in legally appropriate crowd and urban control, Persons’ reconstruction of the events provides us clues about how the US Army saw the world of civilians. Once again, concrete order thinking, expressed in the same common sense that got Persons through Harvard and the Boston Law firm, prevailed over decisionism. This pattern was a continuation, into the streets, of what we saw happening in the Pentagon. So we see the JAG School in Charlottesville, Virginia sent its students through civil disturbance classes. Yet, as Persons admits, these turned out to be symbolic gestures. “You know contingency plans are usually written for practice, and you throw them away.” What was actually put in practice reveals a lot less planning. When asked by the colonels that were conducting the interview, the critical question, “How much of what you gave was legal advice as opposed to common sense practical advice?”, Persons answers:

Well, when you are talking about the law of necessity—you are talking about common sense, and you are talking about restraint, and that was always a

44. Ibid., 141. “…it all went back to that first guy that guy who went down to Little Rock, or maybe to Oxford, and said I want a JAG, and that was General Abrams. I always thought that was interesting. They said, “Abe you’re going down to this thing and you have two hours to get ready and you can take whatever you want.”…He said, “Give me a provost marshal, a PAO, a communicator and a JAG,” and that was it. That set the mode for the next twenty years, probably still is the mode.”

45. Ibid., 133.

46. Ibid., 42.
keynote…Once the law of necessity becomes the guiding light then it’s common sense, and Army commanders have a lot of that, most of them do.47

On closer observation, what is the law of necessity all about? A term as general as necessity can lend itself to many interpretations. As Persons’ retelling of the events shows, it amounts to commanders considering what use of force and related measures were deemed necessary to restore order. The law of necessity, which we can treat as synonymous with concrete order legalism, transformed questions of decisionist political dissent into questions of order. Reflecting back on patterns developing earlier in this officer’s biography, we may see this as a continuation of the tensions between army concrete orders, with its focus on custom and tradition and a developing decisionist legal authority about which scholars working on war crimes prosecution will be interested. As Persons recalled, “It was a disagreeable, unfortunate thing when you have to go out and police your own countrymen.”48

The idea or law of necessity was indeed open to a wide array of interpretations. The advantage of studying Persons’ biography is to notice how officers like him, within the chain of command provide us with evidence, that provides us with an example of the changing structure of authority that suggests that the Army was modernizing, or opening up to decisionist legal thinking. An example of this change is the policing, troubling to Persons, of the explosive movements of the 1960’s. When asked about intelligence

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47. Ibid., 140.
48. Ibid., 138.
gathering by the infiltration of these movements, with the plan to predict where the next rioting would occur, Persons is the first one to admit, that it was a hopeless task.\textsuperscript{49} The bulk of the intelligence gathered on the groups consisted of newspaper and magazine clippings that were openly available for anyone to read. Persons then tells us that the following account:

\ldots kind of intelligence they produced that was useful was the organization of the police department, the city maps the location of armories, the location of billeting places for the soldiers when they went in, the routes into the cities, marshalling areas, the size of the jails, and that sort of thing, that was very helpful. As far as trying to decide who the baddies were, and locate the baddies, and neutralize them or even be prepared for them, I never saw anything useful come out of any of that, I really didn’t.\textsuperscript{50}

Without strategic intelligence that could predict the occurrence of riots, the US Army was policing the cities. These experiences heightened Persons’ sensitivity to the domestic politics and made him develop a more nuanced view of army-state-polity relations. We will encounter this in later passages in his biography. At this point, it is sufficient to flag the origins of his judicial reform-mindedness or his political consciousness as a somewhat reluctant response to the upheavals of the 1960’s. It would set the stage for his well meaning attempts to balance concrete order and decisionist legalism within the operating procedures of the Army’s judicial system.

\textsuperscript{49} Ibid., 142.

\textsuperscript{50} Ibid., 145.
Let us now turn to Person’s tour of duty in Vietnam where the experiences garnered in the home front would play out and make urgent demands on him and an experience that in turn would provide the lens through which he would re-write his entire life.
CHAPTER 3

THE WAR

Having covered the political education of Persons in the hectic home-front of the Civil Rights movement, I now turn to the real war abroad, Vietnam. One of the most important cases to break out during Persons’ stay in Vietnam, and the central event of this thesis, was the Green Berets case in which a South Vietnamese agent, working for US intelligence, was accused of collaborating with the North and of therefore being a double agent.\(^1\) As pointed out on various occasions in this thesis, Persons anatomy of this landmark event, provided the interpretive framework for his entire biography. For Persons, this iconic event established in unmistakable terms, specific criminal intent. While Persons has, so far been delineating virtuous intent, it is no exaggeration to say that the entire memoir, interpreted through the lens of Schmitt’s work, is simultaneously an effort to delineate the road to general criminal intent. How and when do soldiers, not properly trained, end up isolating themselves to the extent of being susceptible to specific criminal intent?

Instead of firing the man, or turning him over to the host governments’ judicial system, he was executed in secrecy. According to Persons, the man was innocent.\(^2\) The press got on this case and caused an uproar, siding with the Green Berets. Like the

\(^1\) Ibid., 163-165.

\(^2\) Ibid., 215. “As far as I am concerned, it was an overwhelmingly documented case of homicide. With two eye witnesses, three confessions, and a wealth of corroborating evidence.”
popular opposition to the prosecution of students thrown out of West Point for violating the Honor Code, the media led its audiences at home in the US to believe that the battlefields in Vietnam were so chaotic that it was unreasonable to hold these soldiers accountable to international law. As Persons points out, the army and the government had to be very careful in this and every other criminal case. If either agency did not coordinate the prosecution from the earliest stages of arrest and indictment and released facts about the case to the media, the judge may “…later on hold that the defendant could not get a fair trial because of prejudicial pre-trial publicity.”

Accepting Persons’ verdict, that the man was executed unfairly, the reaction of the press seems paradoxical. Given its overall opposition to the war, the press was against the army. It supported the soldiers who were accused by the Army of having committed war crimes. The press was less interested in what the soldiers had done. It was more interested in opposing the Army by defending the soldiers. Is the press colluding with war criminals? Why do the Army and the media seem to flip roles? It is at moments like this that the versatility of Schmitt’s forms of legalism comes in handy. As mentioned earlier, one of the great advantages of Schmitt’s framework is that these rubrics are not localized to specific institutions and locations in civil or military space. Instead, it is the blending of discourses that concerns us. Here, the media is, while operating in an anti-Army, adversarial juristic mode, defending soldiers, and donning the mantle of the

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3. Ibid., 185.: “…when the civilian attorneys got over there and started trying the case in the newspaper, their steady drum beat was that it was authorized by the CIA and directed by the CIA who later countermanded the order, but too late.”
defender of the individual citizen in a foreign war. Persons, with his experience in, and contempt of corporate America, was not moved. Rooted in his concrete order, he stuck out against the media and kept his bearings. His view of the case was that it was ‘being tried out in the papers.’ Pre-trial publicity was for Persons, a classic example of the shortcomings of civilian society. We have, for the first time in our analysis, a striking example of the Army Judge, rooted in his concrete order, coming down on the side of the prosecution of war crimes. The media, representing the world of Harvard, which in the past, could not understand the world of the Army, is paradoxically sheltering war criminals. With this paradox, we have arrived at a turning point in our study of Persons’ life. An Army Judge like Persons, who, being so immersed in Army culture and contemptuous of civilians, might at first sight, seem hesitant to abide by or uphold the international jurisdiction of the Geneva Conventions of 1948. We may have expected him to see these international obligations as encroaching on the authority of the US Army. Yet, ironically, it was Persons who drew on his native Army concrete order for a clear standard of justice with which to judge this executed man as innocent. How does one explain this irony? For this, we need to re-visit some of the very basic features of military concrete orders.

Army concrete order is represented by soldiers displaying martial courage in battle and a corresponding, chivalrous empathy for the prisoner of war. It is precisely from this tradition that we find Persons making the following observation about one of his superiors, General Mabry, who on hearing of the assassination of this alleged double
agent, was grieved and deeply saddened. In Persons retelling, Mabry’s WWII experience was to fight his enemy ferociously, but when “...helpless, wounded, in your care, then you had a clear obligation to protect them from harm.” The Army’s direct experience with combat, lead to a clear demarcation between war and peace. Parallel to the need to differentiate war from its opposite, peace or a truce, is the need to differentiate the value of courage from cowardice. Hence, drawing on traditional military concrete order, Persons and his superior General Mabry, were able to reach a verdict that would be supported by the Geneva Convention. Here, the Convention has codified in decisionist language, what the army calls chivalry and honor.

The media on the other hand, rooted in the need for corporatist decisionism, was tilting to the winds of public opinion, and hence, ironically failed to look at the details of the case. With the civil rights movement waging a metaphoric battle for justice at home, and with the media supporting this struggle, the boundary between war and peace, or combat front and civilian home front was either being re-defined or blurred. In doing so, the context of the accused’s actions also changed. They were no longer soldiers in uniform who killed a man without adequate cause. They were civilians who were now in a questionable war, carried out by a government that had yet to deliver on the civil rights front. By re-defining the context of the acts, the media had exculpated the accused! This example shows that while the three styles of juristic thought all aim to articulate justice, actual results depend on the situation specific combination of these traditions.

4. Ibid., 182.
In the final reckoning, as these cases unfold, the resolution will increasingly lead men in charge like Persons to draw on Army concrete order to come up with his own responses to the challenges posed by journalistic uses of legal decisionism. In other words, Persons’ memoirs shows the author, re-constructing in hindsight, his evolving role in helping the army’s judicial system fight the battle that the media brought to its doorstep. Persons helped the Army to do so, but in its own language and terms, which it drew from its own concrete order traditions. As this research progresses, we see how adversarial roles played by the Army and the media, representing differing articulations of juridical authority, produce varying degrees of success in the resolution of judicial conflicts.

The conflicts outlined above lead Persons to draw on or bring into prominence, the third juristic order, normativism. The following observation Persons’ makes, reveals the fear of a technological formalism bordering on fascism. It expresses itself in impersonal work procedures, where science became not a but the source of law:

They kept meticulous files, these officers in the 5th Special Forces Group, of everything they did maybe the metaphor or simile is not an apt one but it’s sort of like Germans who ran the concentration camps. Their records were so through that proving what they had done was not at all difficult, nor would it have been difficult if we had gone to trial.5

This comes as a startling observation. A US Army officer, after a brief hesitation, is drawing parallels between an army operation and the Nazis. Reading between the lines, one gets the sense that Persons is—in being apprehensive of military tradition turning

5. Ibid., 165.
into a mechanical monstrosity—echoing earlier fears seen in the biographies of Eisenhower and MacArthur—of faceless bureaucracies destroying human values. A crucial impulse animating Persons’ career is his search for and desire to re-interject this human element into the conduct of bureaucracy, military or otherwise. We therefore encounter a complex interplay between the seemingly harsh training and upbringing of soldiers balanced by a deep compassion over the plight of the dispossessed. A sign of this need for compassion was that in his experience of thirty years, most first time offenders, like those in civil society, “…want to talk when given the opportunity…”

Persons dwells on this case. It is the first time that the term Geneva Convention is used. The themes of war and criminal intent, so far dealt with amorphously in the course of the biography, are now coming together and the topic of war crimes is being addressed directly. In the second iteration of the Green Berets case that I discuss below, Persons adds more details that reveal the full and self-conscious development of his efforts at combining what we understand as the three juridical traditions. Persons’ lengthy answer, quoted in its entirety, captures the crux of his critique of normativist institutional isolation that led to the war crime being committed. The man was killed to protect normativist institutional interests. Significantly, after pointing out that the act violated the Geneva Convention, he adds that it also violated common humanity. In other words, if the soldier is not held back by decisionist logic, concrete order thinking should have worked. Also, Persons cites arguments presented by the media that the war provided mitigating

6. Ibid., 181.
circumstances, to illustrate their frivolity. In doing so, he points to the danger of misplaced uses of the fog of war argument.\textsuperscript{7} This is yet another ironic twist. It is not always the army that tries to protect its soldiers by citing mitigating circumstances. Here, a diligent soldier is pointing to the misuses of this argument by the media:

Well, it was more complicated than that in the case of the Green Berets. They had a great deal of latitude and independence. For example, they had their own supply system; they had their own source of funds, classified, all this was classified. They reported directly to intelligence operations in MACV,\textsuperscript{8} and I see that it is not an impossible thing for them to believe that they were not subject to the same rules that other people were subject to. In other words, they began to think that their part of the war was more important than anyone else’s, and that they really didn’t have to concern themselves with the niceties of the Geneva convention or even—well, I don’t know a better way to put it than to say common humanity. I am not aware of any time during my whole career in the Army when I ever heard it hinted that anything ever justified summary execution of a prisoner, a spy, a traitor, or anyone else in your control and custody. Beyond the pale, you know, just no question about it. Now I’m aware that during the public dispute and debate about this case, arguments were made in effect that this is a horrible war, people are doing horrible things all the time, and what’s so bad about this? Isn’t this what we are over there for to kill Vietnamese double agents?…I don’t think he was a double agent…I think they killed him because they didn’t know what else to do with him…I think they killed him just to cover up what they had done.\textsuperscript{9}

As further evidence of the insular nature of the 5\textsuperscript{th} Special Forces Group, Persons cites the bizarre and near delusional reluctance of its JAG officer, a Mr. Sheffield to relinquish his role as defense for the accused due to conflict of interest. “He was a JAG officer, but

\textsuperscript{7} Carl von Clausewitz, \textit{On War}, Michael E. Howard and Peter Paret, eds. (Princeton, NJ: Princeton University Press, 1976), 101. The metaphor, taken from the famous German military theorist’s work, is frequently cited in discussions of the difficulties in predicting what will happen in war. Its can be used to suggest that war crimes are an inadvertent but unavoidable outcome of war.

\textsuperscript{8} MACV stands for Military Assistance Command, Vietnam.

\textsuperscript{9} Ibid., 184.
he really preferred putting on jungle fatigues, a steel helmet, and going out in the bushes with the Green Berets....”\textsuperscript{10} and later, “I thought there must be some misunderstanding on the telephone when he told me, ‘I’m not going to leave. I’m going to stay right here because I can do a better job of defending these people if I am here.’”\textsuperscript{11} 

Under heavy pressure, and to the great disappointment of Persons, the White House forced the Army to drop the charges against the Green Berets.\textsuperscript{12} Undeterred by the level and rank of people involved in this decision, Persons draws on that all purpose concrete order common sense that had helped him maintain his bearings at Harvard, to explain how these normativist isolationist tendencies play out at the level of the individual. Persons uses the term human psychology as a general designation. He did not have any training in this field. His confidence in the concrete order he came from allows him to appropriate that term, because he is going to designate what it means. In the description of the events that followed this acquittal below, he is using his common sense to define human psychology. Here, the issue I want to bring to the reader’s attention is not that Persons is running rough shod across intellectual disciplinary boundaries, but that psychology signifies science, which left untutored by the over-arching wisdom of virtuous intent, leads to a basal animalistic behavior. Human psychology for Persons is synonymous with biology. Hence, during the celebrations and toasting, the Green Berets

\textsuperscript{10} Ibid., 191.
\textsuperscript{11} Ibid., 193.
\textsuperscript{12} Ibid., 207-208.
said that there had never been an assassination. After the charges were dismissed, facts 
were being hauntingly re-worked to constitute a new, delusional public memory.

Early on they said they had killed him but now they hadn’t…this phenomenon of 
how people accused of serious crimes can convince themselves by the time the 
cases comes to trial that they have never done anything wrong is not a new one. I 
have sat besides clients who look you right in the eye and say I don’t understand 
why I am even here. That’s part of the [sic] human psychology. So they began to 
believe their own press releases.13

The men mentioned above are aware of the records that the 5th Special Forces Group 
has of the alleged double agents’ testimony. The circumstances of the war and their 
estimation of the role, content and kind of media coverage available, led them to re-write 
their memories, in short “believe their own press releases.” According to Persons, the 
high command was

…under enormous pressure back there to explain it to the media, and to all these 
congressmen, and other folks who were unhappy about the idea that we could 
have had the crème de la crème commit a crime which under military law was 
inexcusable.14

Persons is blaming the media for staging a systematic cover-up. In the world of 
argumentative decisionism, press releases had, like the delusions of Mr. Sheffield, become 
an end in of themselves. Having established the failure of decisionist civilians to deliver 
justice, and made a strong case for the soundness of his judgment and the concrete order 
he hailed from, Persons closes his narration of this tragic episodes with a striking

13. Ibid., 208.
illustration of the frivolous legalism of decisionist civilians. The lawyers brought in by
the accused, played a role in turning this case into “…a classic case of trail in the
newspapers.”15 A certain Mr. Rothblatt, concerned that the Army was framing innocent
soldiers, went so far as to attack as follows:

…the constitutionality of the Military Justice System, dismissal on that grounds,
unconstitutionality of the Vietnam War, dismissal on that grounds, command
influence, prejudgment, the fact that I had gone to Harvard Law School, and you
just name it—all sorts of reasons.16

The goal of the civilian lawyers was to generate enough negative publicity against the
charges. The substance of the charges, ridiculous as they sound, was not important. Mr.
Rothblatt must have known that these were idiotic motions. The strategy was to make
noise. We are left with the very ironic and bizarre outcome, that a war crime murder is
being defended by the media.

The Talented Mr. Belli

Not all encounters with civilian lawyers were extended contests with the media.
Persons fondly remembers a famous and flamboyant civilian attorney Melvin Belli, who
came to Vietnam to represent a client.17 In the three weeks that he spent in Vietnam, he
charmed everyone, Persons included. The working style of this civilian lawyer and
Persons’ reaction to it, while seemingly anecdotal and trivial, is upon closer examination,
indicative of Persons’ view of key aspects of politics and culture and helps us further fine

15. Ibid., 220.
16. Ibid., 218.
17. Ibid., 248-252.
tune this army concrete order. It shows Persons to be a sophisticated and judicious thinker, whose positive assessment of this larger than life, celebrity personality, suggest that it was not simply the civilian world that looked frivolous to Persons but a more fine tuned problem, that civilians were more likely to, in the proverbial guise of frivolous lawsuits, produce a decisionist legalism that failed to provide substantive justice. The shrewd Mr. Belli, by showing due respect for the concrete order of the Army, and by leaving behind what Persons saw as the antics of the civilian world, won his respect. This incident therefore merits closer examination and scrutiny.

Melvin Belli had come to defend a Green Beret, also from the Special Forces, who along with his girlfriend, had taken two unauthorized R & R trips to Hong Kong by forging documents and passing himself off as an officer. What really bothered people involved in this case, was that he had done it twice. In other words, his temerity was irritating. This case had all the ingredients of frivolity that could upset a matter of fact officer like Persons: an undisciplined sergeant being defended by a flamboyant civilian lawyer, Mr. Belli. After all, this was another occasion of the decadent civilian world, infringing on serious army work. Yet, Persons’ recollections are priceless and somewhat surprising.

Belli did a very good job of defending his client, a sergeant and a few other cases that he picked up and they all got their money’s worth. Belli’s flamboyant reputation had preceded him and Persons was “…prepared to dislike him even before I saw him.”18 One

18. Ibid., 248.
of the first things Persons notes about Belli is his attire, “…a brown khaki-colored suit, but it had a red satin-lined coat...he was somewhat of a high-binder in terms of his personal life.”\textsuperscript{19} Readers may assume that had it not been for this one glaring infraction, that suit would pass for military attire. The most important fact that broke the ice and showed Belli to be an ace at working within army culture, was stating that he wanted to work within the system of military justice. Also, he asked for some jungle fatigues, which he dutifully wore for the entire length of his stay. He astutely never criticized the system of military justice. In fact, what truly endeared this highflyer to Persons was his defending it. When soldiers would gather around him and raise doubts about the fairness of the court-martial system, Belli responded, much to their disappointment, that “…it was the fairest system in the United States or anywhere else in the world....”\textsuperscript{20} According to Persons, he went on to write books defending it.

Persons recollection of Belli’s positive evaluation of military justice serves as a counterpoint to the negative one presented by the likes of Mr. Rothblatt in the Green Berets case, “…where they came armed, and before they ever left the States they were announcing it was a farce and a travesty.”\textsuperscript{21} Although the charges in the second case were trivial by comparison, in both cases, the accused were guilty and did not face a sentence. Yet, in the first, it was the civilian, political pressure that added insult to injury for

\begin{itemize}
\item \textsuperscript{19} Ibid., 249.
\item \textsuperscript{20} Ibid., 250.
\item \textsuperscript{21} Ibid., 252.
\end{itemize}
Persons. In the second case, the acknowledgment of the worth of military justice and the refusal to bypass it, carried out by an attorney who made no exaggerated gestures of patriotism, was crucial in eliciting a favorable response. Here, Belli traded in his civil-legal trappings, as seen in his playboy-like lifestyle, for military fatigues. He showed a willingness to play by the rules, or acknowledge army tradition. In other words, he was not one of those Harvard Law students who wondered when Persons would get out of the army.

Mr. Rothblatt and Lieutenant Duffy

A rapid transition is made in the interview, from the pleasant recollections of Mr. Belli to another case of military injustice, a war crime murder committed by a Lieutenant Duffy. He ordered a prisoner under his charge shot dead. **22** Once again Persons dredges out the salient features of specific intent within the context of general intent. This less publicized case of war crimes is important in that Persons establishes specific intent in a very general and diplomatic way. He does so by transitioning to a discussion of the Geneva Convention, which is the main function of this episode in the memoir, and searches for the reasons why this happened.

The court convicted Lieutenant Duffy of involuntary manslaughter and gave him three years of confinement. Persons saw him as a good officer, who having spent too long in

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22. Ibid., 252-253.
isolation, was perhaps a traumatized soldier. 23 Mr. Rothblatt shows up again and once again, he feels that the army is wrong. Once again, the case of Lieutenant Duffy brings together the tensions between the three juridical traditions and provides us with another opportunity to see Persons style of wrangling with them at work. The recurring figure of Mr. Rothblatt shows us the intrusions of a civil decisionist legal tradition which seems to have lost its connection to substantive justice. Science, or the breakdown of it, is represented by Lieutenant Duffy’s illness. Persons’ understanding of traumatic behavior, cited above and in the footnote below, is that it is institutional. As institutional isolationism is the dissociation of administrative practice from either concrete order empathy or decisionist control, the root of this pathology lies in equating administrative practice with legal norms. In other words, pathology is when science, seen here as administrative practice, becomes law. Hence, both civilian decisionism, in the hands of clowns like Rothblatt, and normative legalism, represented by the specters of fascism, have for Persons failed. He and the interviewer conclude this discussion of war crimes with a long affirmation of the concrete order of the Army. In the final reckoning, it is the Army that knows how to get things done.

A closer look at what follows in the discussion of this case reveals more complexity in the concrete order of the Army represented by Persons and the Army colleagues he is giving the interview to. As mentioned earlier, Persons’ notion of psychology is that it was

23. Ibid., 254 “…a young officer who had been under a lot of strain for a long time. He had seen a lot of people killed. He had been out on patrols many times. People do strange things when they are under that kind of stress.”
not a scientific discipline. How could Persons really believe this man was mentally ill? We notice that Persons remarks that he was a good officer. Persons is suggesting the possibility that the strange things done under great stress, are mitigating circumstances. Persons reluctance to accept psychological explanations as scientific leads the interviewer to shift the discussion-interview to war crimes. In doing so, he implies that these acts committed under stress, were war crimes. This shift in the direction of the conversation is a clear indication that both officers are looking for answers elsewhere, and that virtuous intent is very much on their minds as a guiding principle. Lieutenant Duffy, though a good soldier, had specific criminal intent and was guilty.

The Lieutenant Duffy case serves as a natural transition in the interview to a bigger question, that of war crimes and the Geneva Convention. While both the interviewer and Persons feel they are on the same page as the Geneva Convention, the analysis of their reasoning, in the following long excerpt will reveal what exactly are the sources of the tension mentioned above.

Persons gives four reasons for why war crimes are presented as a problem to soldiers in their training, the first three of which reflect practical military needs and reflect a concrete order based, functional approach to justice. The Geneva Convention’s main thrust, a respect for international law, comes in last. Normally, it is precisely this relationship, between Army concrete order tradition and international norms, that when out of line, leads to war crimes. If the Army felt that in Vietnam, it is necessary to neutralize both communists guerillas and their rural sympathizers, commanders would
have widened the definition of who is an enemy combatant. The Geneva Convention requires that Armies target only one another and to precisely avoid expanding the definition, no matter how compelling it may seem. When an army places operational necessity ahead of international law, a combat situation in which one side has a preponderance of power, as the US did throughout Vietnam, will lend itself to the temptation of using indiscriminate force to solve the problem. In other words, when an army operates only under the internal regulative constraints of its martial law, to protect its concrete order, and does not adhere to decisionist international law, war crimes could be committed.

In the answer Persons gives, we notice that despite his excellent and courageous record of upholding the standards of the Geneva Convention—by defining war crimes as a bad strategy first, and not inherently undesirable—Persons is still working from within the concrete order of the army. The idea of the decisionist Geneva Convention representing virtue has still not settled in. However, his inclusion of it as the fourth reason is a milestone. I do not know if it is possible to bridge this gap. This final enumeration illustrates the competition between Schmitt’s three forms of juristic thought. The best a commander and a military judge can hope to do, is learn how to balance them.

Here is Persons’ response on being asked if there was any truth to the speculation in the New York Times that US soldiers were not well aware of the laws of war in the Geneva Convention:24

24. Ibid., 256.
Gosh, I don’t know. I know that only after I got there, and observing JAG officers giving training to the new arrivals in the country at the Long Binh Replacement Center. In all the outfits I visited after that when they actually got to the line companies they would have a week or two of intensive training, teaching them how to stay alive and also teaching them how to behave with prisoners. I think we were talking about some of these reasons earlier. There are a lot of practical reasons that you can persuade young men who are armed with deadly weapons not to mistreat or kill prisoners, and some of them are pretty obvious. If you kill them, you are not going to get any information out of them, any intelligence. You are going to make it more difficult to take prisoners once the word gets around that if you surrender to the Americans, they are going to shoot you or mistreat you. Obviously, if you can get them to surrender, it’s a lot better than having to continue to trade high velocity lead with them, it’s far more likely they’ll mistreat US prisoners when they capture them. The final reason is that it’s against the law. You will be severely punished. As I say, I heard that and saw it being communicated to young soldiers and old for that matter, the whole time I was there…I used to think it was really ironic in World War II and Korea we had war crimes teams. Their job was to investigate and document war crimes by the enemy. In Vietnam we had war crimes teams and war crimes directives, but the purpose was to document war crimes by our people. As far as I know, it is the only historical example of such a thing. So I think it’s a bum rap to say that nobody was trying to do anything about it. The Army was trying, trying hard and seriously.25

Alternately, we could take a closer, second look at the quote and arrive at different conclusions. The quote above is packed with information, that lends itself to more than one interpretation. If, instead of the order in which reasons are cited, one pays attention to the use of the evaluative terms ‘practical reasons’ that are ‘pretty obvious’ to bracket off the first three pragmatic, military concrete order concerns, one gets the idea that Persons’ thinks of Army necessity as commonsensical practice. In contrast, Persons calls the Geneva Convention, ‘the law’ and threatens severe punishments for breaking it. In

25. Ibid., 259.
this second reading of Persons’ answer, the General has balanced the demands of concrete and decisionist legal orders. These two possible readings of Persons’ answer, perhaps reflect the tensions in balancing the three discourses of justice.

In closing, I highlight a second interesting and illustrative point in the answer, namely, Persons’ use of the term ironic. In wondering why they were witnessing a reversal of roles—from the US Army as documenting the war crimes of WWII Axis Powers to having to document its own in Vietnam—Persons provides the historic bookends for his own life. He graduated from West Point at the end of WWII while his father had served General Eisenhower in central Europe. Vietnam was the acme of his combat career, and the basis for much of his ruminations. The ironic reversal represents the importance of war crimes and intent, both virtuous and criminal, in Persons’ life.

Lessons Learned: The Twilight Years

How did Major General Persons integrate the lessons of Vietnam into his later career? Having finished his tour of duty at Vietnam in July of 1970, Persons spent a year in Hawaii and then took up a post in Germany.26 He tackled issues pertaining to race relations and discipline in the US Army. The reader gets a sense of the difficulties in maintaining discipline within the army. In light of our juristic traditions, this was a twilight zone, in which soldiers and commanders did not know what to do. If we look at Persons’ recollections in the quote cited below carefully, we get the sense that there is

26. Ibid., 282.
more going on than meets the eye at a first read. This was not simply a problem of discipline within the ranks as a first read of the quote would suggest. Punishments and court martial would have solved that problem. The problem was deeper. It was one of legitimacy. The soldiers responsible for maintaining martial law within the base, were not sure if they would be backed up by their superiors higher up in the chain of command. Those men were in turn not sure how to grapple with this issue. In other words, the norms and codes of the concrete order were being re-formed. Decisionist constitutionalism was posing a challenge and it was being manifested in unintended and potentially harmful ways. Persons’ point of view recreates the anxieties of a senior US Army officer concerned about the discipline and fighting morale of his troops. Military justice is of necessity built around the exigencies of battle and is, in its orientation and execution, time sensitive and primarily process-driven. Martial law is primarily written to maintain order and discipline during combat. The requirements of war dictate the parameters of law. Hence, we see this process orientation in the paralysis that results when soldiers are unwilling to enforce rules on minority soldiers, for fear that the chain of command would not support them. On the other hand, civilian, decisionist law is written during peacetime with domestic geographically bound political and cultural order in mind. It is therefore spatially oriented. We see this in Person’s observation that minority soldiers were segregating themselves in areas of the base. Much like the urban
unrest contingency plans we encountered early in Persons’ career—which were thrown away once they were made—Persons’ words, said in answer to whether he had planned what he wanted to accomplish in Germany, were:

When you add to that you had significant stirrings of black unhappiness and unrest. People were just beginning to come to grips with that. Black soldiers had walked around with no hats on, needing haircuts, with their trousers un-bloused, and people afraid to say anything to them. Black soldiers had self-segregated themselves by saying, “This is a black barracks and no one else lives here.” This kind of thing. Blacks took over parts of mess halls and allowed no one else to sit down. Commanders were trying to do something about this, but in the process inevitably ended up with some confrontation and some disciplinary actions. The drug scene, and grabbing hold of this. I guess there was a time when commanders and NCOs were not sure they would be backed up. If they did order someone to do something wrong or not doing something he should do, would they be backed up or would they simply be wasting their time. This kind of feeling pervaded the command.27

These seemingly mundane observations represent the battles of the Civil Rights movement being fought out in the barracks. Later in the interview, Persons’ mentions that in a report commissioned by the Army, they found out that “…in the area of soft drugs and hard drugs that the incidence of white soldiers was higher than black soldiers.”28 However, in keeping with the concrete order of the US Army, and in balancing it with the dictates of decisionist justice, Persons’ strategies for dealing with these problems reveal interesting preferences for informal strategies over civilian legal procedure. Persons’ choice of words reflects an informal common sense:

27. Ibid., 282.
28. Ibid., 371.
Later on when the drug program got cranked up we found the thing the soldier hated most of all about it was the requirement to report to the counselor, to go to that counselor and sit down and listen to that counselor. Everybody new he went to that counselor. They didn’t like that at all. They didn’t like being singled out and being hassled. That was a hassle. General Davison’s feeling was that they were going to hassle them not only in that way, but we were going to get the drugs out of the barracks. 29

Further down in the narrative, we see the same logic at work in a more elaborate response to the issue of the reform of the military justice system. Much of his energies were spent trying to speed things up, which on one level, satisfied his sense of military discipline. On closer inspection, Persons’ is pairing up his lifelong concern with holding on to the solace, empathy and interpersonal interaction that characterizes Army concrete order jurisprudence. His joy lies in getting army lawyers in closer contact with the accused. He has one eye on the civilian world, and wants the army to resolve its issues in ways that are both parallel to it, but different:

…this confinement order had to be have stapled to it or on the same piece of paper with it, a written designation of the attorney and the signature by him that he had seen the man before he went into confinement….If you were in the practice of criminal law in New York City, Chicago, or any other place and your client called you and said, “They have got me down at the police station,” and its two o’clock in the morning, you would go down to see him. This is exactly what we wanted to do….We had the idea of calling cards….I reminded them they were lawyers….anyone who doesn’t want their home phone on there, I would consider that a considerable minus on his professionalism. When I sent that word out, they all came in with their home phone numbers….There were a few who thought it was really unnecessarily interfering with their traditional authority to decide how their offices were going to be run. 30

29. Ibid., 299.
30. Ibid., 333.
The quote above is striking when one recalls the low regard Persons had for held Harvard. However, we can see various strands of Persons’ biography coming together in this quote. His lifelong concern with networking and contacts, represented by the visiting cards he wants all the army lawyers under him to carry, blends in with a growing awareness of the need for compassion and empathy. If civilian lawyers can show up at two in the morning to see their client, then the Army can do better than that. Through the card that represents embedded networking, Persons blends two vastly different worlds, that of civilian, decisionist attorney-client relationships with the concrete order of the stockade in which the soldier was being held for a crime.

…a lawyer who had assumed an attorney/client relationship, have him a card identifying the attorney to the soldier and to the stockade, and then I felt the counsel would feel a lot more professional obligation and contact the client and to keep him informed. Also, I was hopeful that it would build a fire under the counsel to get going on to preparing for trial….\(^\text{31}\)

And further down, we see an interesting and revealing change of mind in Persons’ choice of words. He uses the word institutional bias, that suggest systemic discrimination and that settles on what he really meant, or should have said, namely individual bias. In Persons’ usage, ‘institutional’ stands for decisionism. This concerted attempt to address racial bias with the resources of virtuous intent internal to the Army and to avoid unwelcome intrusions from the litigious, civilian world, is the balancing act only Persons’ was capable of doing:

We discovered that the blacks were more likely to receive confinement and that

\(^{31}\) Ibid., 337.
the blacks were more likely to receive a punitive discharge that the whites…we tell them everything we are doing about it, to remove any institutional bias—not institutional bias but personal bias that exists when everybody is making a decision along the line.  

Persons’ straunachly Schmittian perspective, with its preference for individuals remaining organically embedded in traditional concrete orders, and with his disdain for rootless individuals, shows up right after his formulation of the race problem cited above. In discussing two lawyers who worked for the army, Persons’ comments reflect his desire to work empathy into army tradition.

They had become radicalized. They really had decided that their job was to reform the system. They saw themselves as knights on white chargers out to reform the system.  

Unions in the Army?

Finally, the issue of radicalization would play itself out in very practical and legally interesting ways. The army would move to declare a soldier’s decision to join a union unconstitutional. Persons notes that the recruitment into unions started in the National Guard, which had a number of civilian technicians. They had a military and a civilian status. The effective maneuverings of the Army high command and Persons’ leg work led them to declare these unions illegal. It would be impractical for a labor union to be at hand to provide advice if the soldier should engage in a particular action or not. How do soldiers go on strike? Persons summarizes this as follows:

32. Ibid., 371.
33. Ibid., 431.
34. Ibid., 599.
...immediate unquestioning obedience to orders in emergency and combat situations and the unacceptability of having anyone or any organization interposed between a commander and a soldier.35

At this juncture, it is important to point out that our interest here is not to depict Persons as a reactionary. He always has a point. The analysis here aims at looking at how he reaches this point. His trajectory is a road-map of the Army concrete order. The issue of unionized soldiers however, was important for symbolic reasons. They indicate that through the exclusive definition of the National Guard as military, Persons was able to demarcate a clear boundary against the civilian world. While serving a practical defense purpose, this was nevertheless, yet another moment of Army concrete order exclusivity.

War and the Walk down Memory Lane

As expected, the colonels interviewing Major General Wilton B. Persons ended with the summary question, how has it all been? Persons’ response very aptly summarizes the entire biography and is in itself, an introspective masterpiece. It contains within it the entire life of an officer who in turn, stood at the cross-roads of some of the most significant events in modern US history.

He starts off by telling us that he has blocked out the unpleasant memories in his life. In other words, these 600 pages of transcribed interviews are a subjectively chosen selection of all that happened. War had indeed structured his memory. Here, Persons stands in contrast to the polar opposites of his life and of his virtuous intent, the Green

35. Ibid., 598.
Berets, whose memory, as we recall, had played a different kind of a game with them. At the time of their acquittal, they had come to believe their own press releases. Persons pairs up the terms Army and law, and takes a pointed jab at the commercialism of the civilian world. After reading the entire interview, we see that Persons, having borrowed the formal, legal techniques of civilian, decisionist law, declared the whole tradition to be substantively opportunist. Persons’ rapid transition from memory to ethics, confirms one of the concerns or components of our thesis: that the search for virtuous intent in the military is best understood by analyzing memoirs that are structured along ethical-juristic lines.

Gosh, I can’t think of anything except to say again that this sounds like an ego trip. We’ve talked about successes. One tends to forget the failures. Just like I have a real blank space in my head for remembering peoples’ names whom I do not like or don’t care for. Your memory plays tricks, and I recognize that. The only thing I can say is that it is a very exciting career. I wouldn’t have done it any differently. I can’t think of any better way to spend your productive years than serving the Army and the law. And being in the company of men, both JAG and non-JAG in the Army who are motivated by a sense of duty to a higher calling than that of making money and whose word and behavior you can depend. I wouldn’t take anything for that. Particularly since I have retired and had a chance to get to know and to work with in a voluntary way a number of people who have spent their lives in the business world. Don’t misunderstand me—most businessmen are honest. But the standards with which they operate are way, way below what we took for granted all the time. Loyalty in the sense we know it, doesn’t exist in a lot of the business world, particularly once you get above the peasant level. So I consider myself very fortunate.36

Having highlighted the themes at the end of the interview, I conclude the thesis by drawing out the implications of the juridical structuring of memory in military memoirs.

36. Ibid., 605.
CHAPTER 4

CONCLUSION

As far as I can tell, there is no study of the writing of memoirs in the US military, or one that analyzes the structure of memory in the US Army, in relation to war crimes. Nevertheless, this literature survey focuses on the academic study of war and memory, in order to ground my paper within an existing body of literature that addresses similar issues. We have established that memoirs are the potentially mitigating context in which Army officers situate the virtuous intent of guilty officers, and that understanding this context is vital to reconstructing the Army’s view of crime and punishment. This could help in prosecuting war criminals. However, what does this thesis contribute to the field of war and memory studies, that is not primarily interested in assisting in prosecution?

On War and Memory

Paul Fussell, *Great War and Modern Memory*

I start with the iconic and illustrative 1994 work of Paul Fussell, *Great War and Modern Memory*. Drawing on a vast array of literary sources and memoirs written around the British experience of World War I, Fussell documents the literary and aesthetic tools with which the war was “…remembered, conventionalized and mythologized.”¹ On closer observation, these three terms are analogs to Carl Schmitt’s three forms of juristic thought. Remembering and recording these memories as accurate records, with

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prescriptive value, is a scientific process and is Fussell’s equivalent of normative law. Conventionalizing a war is to show its mundane workings which are regulated by decisionist laws. And the mythical aspects of war, defined as the imaginatively heroic, honourable and larger than life role of the soldier, represents key features of Army concrete orders. Fussell’s introduction of the concept of myth, which I am placing within Army concrete order, opens up a useful line of inquiry. The myths within a concrete order, are neither pure fabrications, nor are they grounded in incontrovertible facts. This liminal area within an Army’s self-perception and a nation’s perception of its army, opens up the possibility, if unregulated by the Army’s own internal martial law, or international law, for war crimes to be committed. To illustrate, I present the work of a well known Harvard scholar, Daniel Goldhagen, who opens his tome on war crimes thus:

Harry Truman, the thirty third president of the United States, was a mass murderer. He twice ordered nuclear bombs dropped on Japanese cities. The first, an atomic bomb exploded over Hiroshima on August 6, 1945, and the second, a nuclear bomb, detonated over Nagasaki on August 9. Truman knew that each would kill tens of thousands of Japanese civilians who had no direct bearing on any military operation, and who posed no immediate threat to Americans. In effect, Truman choose to snuff out the lives of approximately 300,000 men, women and children. Upon learning of the first bomb’s annihilation of Hiroshima, Truman was jubilant, announcing that “this is the greatest thing in history.” He then followed up in Nagasaki with a second greatest thing. It is hard to understand how any right thinking person could fail to call slaughtering unthreatening Japanese mass murder.2

This is a controversial interpretation of a much debated issue. The point here is not to debate the issue, but to use this interpretation as an example of the idea of myth laid out

by Fussell. Let us for the purpose of argument, assume that Goldhagen, who like Persons, devotes 600 pages to this issue, is right and that Truman ought to be remembered as a war criminal. If recruits at West Point are taught a history of WWII which is solely focused on the fact that the US defeated Japan, and that this was an unqualified success and that no one reads Goldhagen at West Point, every single cadet might graduate with a mythical, though not incorrect, view of the war. Should Goldhagen lecture at West Point on his 2009 work, some in the audience may revisit the issue, even if they are silent musings over coffee. The war will then have been moved from the realm of myth to that of the conventional. The process will have begun with the visit of Goldhagen to the Academy. As long as there is an alternate interpretation, the myth has not been shattered, but conventionalized. The strength and value of Fussell’s variant of Schmitt’s juristic discourses lies in not defining myths as true or false, but as part of a process or continuum. In our reading of Fussell, war crimes therefore occur when the soldier’s mythmaking is never subjected to conventionalization. In Schmitt’s terms, the heroic aspects of the Army’s concrete order are not constrained by military or international decisionist law. From Fussell, we learn that myth is a specific and crucial component of Schmitt’s concrete order. And since myths, by their very definition are amorphous and can lend themselves to ambiguous interpretations, students of war crimes can, following this insight, further investigate as to where war crimes originate. Is the proverbial fog of war the product of mythmaking? There is however, a striking correspondence between Fussell’s idea that war memories serve to mythologize and Persons remark that the
soldier’s in the Green Beret case came to believe their own press releases. In Fussell’s terms, Persons’ 600 page memoir conventionalizes the memory of training for war before WWII and fighting in Vietnam. What does Fussell’s notion of conventionalization do for us here? It is both analogous to Schmitt’s notion of decisionist justice--which is what Persons struggled with all his life--and the process by which mythical features of a concrete order can be converted or conventionalized into decisionist justice. In the introduction, I had mentioned that the relation between Schmitt’s discourses was historiographical in nature. This meant that jurists and judge advocates differed from one another in the way they related the three discourses by using a different historical development or historiography. Drawing on Fussell, the conventionalization of war memory, as done by Persons, is the historiographical act. Unlike a legal jurist writing a scholarly article, Persons does not delve into US history, military or civil. Instead, he draws on his biography to do the work. The search for virtuous intent leads Persons to either retroactively in retrospect or contemporaneously with the events, find civilians to be frivolous.

Another important contribution of Fussell, is that “…we perceive the impossibility of ever satisfactorily distinguishing a memoir from a first person novel.”3 By this he means that the subjectivity with which any Army memoir is written, by determining how facts, personal and political will be presented, sets the memoir so far apart from a documentary

3. Ibid., 310.
source, that it is as good as a novel. He further develops this idea by using an example, as follows:

From all the quite detailed evidence of these diary entries, I can’t add up a coherent picture of how it really was to be on a bomber squadron in those days. There is nothing you can really get hold of if you were trying to write a proper historical account of it all. No wonder the stuff slips away mercury wise from proper historians. No wonder they have to erect artificial structures of one sort or the other in its place. No wonder it is those artists who re-create life rather than try to re-capture it who, in one way prove the good historian in the end. 4

The thought that we just read a 600 page novel might sound odd. Yet, we should treat this oral history as a ‘novel’ in a functional sense of the word. It was not Persons intent to narrate fictional events, nor was it to primarily entertain the reader. The oral history is a novel in that the subjectivity Fussell highlights, is what determines where virtuous intent is to be found. Context can be narrated and fudged in legal proceedings. Fussell’s use of the term novel might tell us why this genre of writing has been ignored by historians of war crimes, by being relegated to the field of literary studies. Like most historians, I would also not consider memoirs as primary sources for the reconstruction of events in a war. Yet, the ‘novel’, is needed as a possible supplement to re-construct contexts and intent.

George Mosse, *Fallen Soldiers: Reshaping the Memory of the World Wars*

George Mosse’s 1990 book *Fallen Soldiers: Reshaping the Memory of the World*
Wars, while interested in the questions similar to those of Fussell’s, covers a far greater historical epoch, and integrates scholarly works and political tracts. A single thread, the myth of the war experience, defined as the politics of sacralizing World War I and World War II thereby rendering it meaningful, runs through the work. Unlike Fussell, Mosse is closer to historians, as stated below:

The Myth of the War Experience was designed to mask war and to legitimize the war experience; it was meant to displace the reality of war. The memory of the war was refashioned into a sacred experience which provided the nation with a new depth of religious feeling. Putting at its disposal ever present saints and martyrs, place of worship and a heritage to emulate.⁵

What is interesting about Mosse’s work is his conclusion that this process was ambivalent, that the ubiquity of the myth leads to its trivialization, to the chagrin and anger of veterans.⁶ For our project here, we find that Mosse is highlighting the negative functions of myth, and that Fusell’s process of conventionalization, is defined here as legitimation. Mosse’s work is relevant not to Persons, but to the media that he is battling. In revisiting Persons’ reconstruction of the case of Green Berets, we recall that the media was defended soldiers accused of war crimes and raising a ruckus to get the charges against them dropped. Having declared the war illegal, they have concluded that the murder by the soldiers could not be illegal. In doing so, their understanding of the war is that it is laced with a myth in Mosse’s sense of the term. The media thinks the US government is trying to mask the reality of war. The media is the instrument for the

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⁶. Ibid., 7-11.
trivialization of the myth and they are urging and abetting angry, disenchanted soldiers. It is only when this elaborate process of unmasking and de-legitimization is understood, through the works of scholars like Mosse, working in war and memory studies, that we can understand what Persons, who does not believe psychology is a science, meant when he said that these men had believed their own press releases.

The Study of Intent in War Crimes

I now turn to the second relevant field in my thesis, that of war crimes. The literature on war crimes is vast. As this thesis is meant as a contribution to war and memory studies, and seeks to show the effect of a legal debate on the construction of memory and not vice versa, I only use the thorough discussion of intent in war crimes by the Morten Bergsmo, a noted specialist in international criminal law, published in the *Encyclopedia of Genocide and Crimes against Humanity*. I draw on Daniel Goldhagen’s political critique of this tradition.

Bergsmo states that war crimes prosecution requires three constituents: material elements that cover the conduct of perpetrators, mental elements pertaining to the state of mind and contextual elements. Establishing intent requires ascertaining what was in the mind of the perpetrator. Distinctions are made in these trials between the degree and intensity of this intent and the results it produced, or the scope of the crime. Intents range in degree from premeditation to recklessness. As the Geneva Convention does not specify

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what constitutes intent, great pains are taken in these trials and in the commentaries that follow, to distinguish specific from general intent. The effort to establish specific intent beyond a reasonable doubt centers around an accurate mapping of the mental world or mindset of the perpetrator and the acts in question. While this might seem like a very basic principle of law, a closer look at the prosecution of war crimes shows that the fine tuned, thinking that goes into establishing specific intent. For example, in the case of Prosecutor v. Radislav Krstic, the latter being a Serbian convicted for war crimes by the International Criminal Tribunal for the former Yugoslavia (ICTY) in August of 2001, it was noted by the Trial Chamber that “some legal commentators further contend that genocide embraces those acts whose foreseeable or probable consequences is the total or partial destruction of the group without any necessity of showing that destruction was the goal of the act.”

Failure to establishing specific intent can have startling consequences. National governments can unleash plainclothes henchmen on targeted groups and deny any involvement by framing the issue as a case of ethnic conflict. The popular commentator on war crimes Daniel Jonah Goldhagen, in his tome *Worse than War*, critiques the Geneva Convention and aptly summarizes the problem thus:

The convention’s crafters included the word “intent” as an artful and catastrophic dodge of the problem. A regime slaughtering hundreds of thousands can allege that it is an anti-insurgency campaign’s collateral damage, or famine’s unfortunate consequence, even if the regime willfully causes or fails to alleviate the famine. It can maintain that it has never intended to destroy one of the designated kinds of groups. According to the convention, such acts are not genocide. (As I was composing this section, the United Nations issued its

8. Ibid., 526.
disgraceful report that the Sudanese government's colossal eliminationist and murderous assault in Darfur is not genocide, and therefore does not qualify under the genocide convention, for intervention.) A regime fighting an insurgency that withholds food from a famine ridden region can claim that the insurgency itself is preventing the food delivery thus avoid international intervention because no intent to kill through starvation can be proven. Without a mass murdering regime’s secret records, it is *almost always impossible to meet a legal threshold of proving intent.* This makes it all but impossible for the United Nations to establish a legal finding of genocide while mass murder is under way, while acting against the murderers and saving lives is possible.⁹

Needless to say, distinguishing between specific vs. general intent is a central issue in war crimes prosecution and has not been resolved. Drawing on Carl Schmitt, we can see why, given the potentially serious tensions between the three forms of juristic thought and practice, it is so difficult to establish or ascertain specific intent. Any effort on the part of the prosecution to link a person’s mindset to actions can be thwarted by the defense on the various grounds Goldhagen spells out above, which are concrete order and normativist juristic justifications. Combining the insights of Carl Schmitt as they have been flushed out and illustrated by the memoirs of Wilton B. Persons, with the terse debates of legal scholars on establishing specific intent, we have a set of political-legal insights from which I draw three conclusions:

Having noticed similarities between the pursuits of scholars like Fussell and Carl Schmitt, I suggest that war and memory studies can benefit from using Schmitt’s framework to analyze soldier memoirs. Fussell’s incomprehension on reading an aviator’s account most likely stems from his inability to locate the account within an

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institutional context, the sort that can be understood through Schmitt’s juristic lenses. In short, I highlight the importance of Carl Schmitt to war and memory studies.

Further, the concept of myth, centrally important as it is to the field, could be critically redefined using Schmitt’s ideas. The field works with a fairly conventional definition and understanding of myth. Indeterminacy, vagueness and possible fabrication are characteristics associated with myths. In short, war and memory studies sees myth as lacking or missing content. By drawing on Carl Schmitt, we can redefine myths as the conceptual spaces were the three forms of juristic thought overlap, intersect and contend for attention. In short, myths are battle grounds and not vacuums. They contain ‘something.’ Contrary to what Mosse thinks, they do not perform a political function of legitimizing the war experience. Instead, being products of three contending juristic discourses, they are produced as a function of politics. They are the fog of war, and like fog anywhere, they have a liminal, transitional quality.

Finally, by following the intricacies of the legal debates on specific vs. general criminal intent in war crimes prosecution, and keeping the long trek through Persons’ life in mind, I establish that general criminal intent, the latent potential for crime, emerges or lies where Schmitt’s three forms of juristic thought and practice are out of order, in conflict or undergoing transformative change.

By combining the second and third conclusions, I deduce that an anatomy or analysis of the truths, half-truths and fabrications that constitute myths will reveal how the three juristic discourses are interacting and to what extent are they out of joint. In other words,
myths and general criminal intent share the same political and cultural space. To use an illustrative metaphor, just as a seismologist can deduce from a printout of the aftershocks where the epicenter and magnitude of the earthquake lies, scholars can potentially analyze myths to deduce or re-construct general criminal intent. This seemingly incongruous pairing of the amorphous idea of myth, taken from war and memory studies with a more well defined, legal notion of general criminal intent, could assist in the prosecution of war crimes. I now turn to this problem.

As we recall from Goldhagen’s harsh criticisms of the Geneva Convention, like any legal code, it prosecutes individuals and not groups. It therefore requires evidence of specific criminal intent, which is the result of an individual translating latent, general criminal intent into active criminal intent. Biographies, memoirs and oral history interviews can reveal and catalog the processes by which this transformation is occurring. As was catalogued by the legal scholar Bergsmo, establishing specific intent in war crimes prosecution requires establishing what was in the mind of the perpetrator. Few war criminals leave behind memoirs that are not brazen justifications for their deeds that add insult to injury. Therefore, reading and analyzing the memoirs of commanders and Judge Advocate Generals like Wilton B. Persons—officers who worked closely with and understood rank and file soldiers, who knew what could be expected of these men in tense battlefield situations—will help us better understand both specific and general criminal intent. As mentioned at the start of the thesis, memoirs are not a widely used resource in court room prosecution. In light of what I have established in this thesis, they
could however be used as a supplementary resource, for example, in training prosecutors on how to question the accused. These prosecutors may not necessarily use a three fold Carl Schmittian grid to read a memoir. They may elect to use their own perspectives.

I set out to establish how war crimes and their prosecution structured the memories of Wilton B. Persons and hence, contrary to much of the research in the social sciences that traces the influence of culture and politics on law, I maintain that the reverse is also true: law structures culture and politics and is ever present in the lives of people. Much is at stake in establishing the direction of these causal arguments: does law reflect cultural politics? Are cultural politics structured by law? Are they mutually dependent? If a prosecutor were to be inclined to the first assumption, he will be inclined to be deferential to cultural politics. Establishing guilt in a criminal prosecution will be harder. Individual agency will be seen as amorphously embedded in the structure of cultural politics. If a prosecutor works with the second and third assumption, he or she is more likely to see the law as present within cultural and political life and is likely to hold the accused responsible as the latter either knew the law or was able to ascertain it. I have in this thesis, by discussing the life and times of Wilton B. Persons, established that law is a pervasive and structuring force in cultural and political life. Therefore, legal discussions on specific and general criminal intent should potentially include biographical memoirs as a window into the minds of individual soldiers and the myths that lurk in the hallways of the barracks.
Historiographical Afterword

The conclusions of this thesis have been drawn using the cultural historians Paul Fussell and George Mosse’s iconic works as landmarks. In this afterword, I discuss works produced by a wider array of scholars as the study of war crimes is intricately interdisciplinary. In doing so, I highlight how Persons, in his own language, anticipated many of the conglomerate concerns and research questions of present day scholars of war crimes. Needless to say, this section is a pitch for the study of US Army memoirs. In noting Persons’ contribution to the art of recollection, it is also highlights the General’s contribution to historiography, which as we had seen early in the thesis, is our label for Carl Schmitt’s observation on the self-understanding of juridical traditions.

In searching for intent in biographical writings, I have situated this work in war and memory studies, and not military history. However, if one were to situate Wilton B Person’s biography within the field of historical writing in the military, one would find further evidence of the soundness of Schmitt’s work and proof of the juristic structure of biographical narration. Thus Philip Caputo’s widely read Rumor of War, which narrates the everyday details of war, is an example of normativist writing. The mechanics or science of war constitute memory. The author’s disavowal of all political commentary or partisanship, while drawing harsh criticism from scholars for being blatant evasiveness and contrived neutrality, is nevertheless a part of the genre of normativist historical
In order to expand the range of historical writing beyond the focus on operational details of combat, seasoned military historians have crafted a second genre or generation of biographical writing, concrete order military history. Veterans of this art, like John Keegan in his famous *The Face of Battle*, refer to the latter genre as a “…two sided picture of events…”11 His re-narration of soldier experiences from past wars seeks to capture additional features of combat experience, such as fear. Persons’ biography, rooted in its concern for maintaining warfare within the bounds of the law, is therefore decisionist in its overall orientation, even as it contains significant amounts of the first two genres. Persons’ memoir therefore belongs to a third generation of military historical writing.

An illustration of how this third generation Army intellectual corroborates modern day scholars is his use of the word *to know* at certain critical junctures of his biography: in reconstructing the mind-set of the Green Berets, Persons, as we recall, says that they killed the agent because they did not know what else to do.12 The critical comment outlining the reasons for adhering to the Geneva Convention also begins with “Gosh, I don’t know. I only know that ….”13 This comment ends with Persons’ noting as ironic, the fact that in WWII, the US Army was documenting enemy war crimes, but in Vietnam

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12 Wilton B. Persons’ Interview, 184.

13 Ibid., 259.
it was documenting its own. The incongruity implied by the term irony also connotes incomprehension. What does to know or not to know really mean? From our analysis here, we can conclude that to know is to operate within one of Schmitt’s three juristic traditions. To not know is the inadvertent failure or deliberate, intentional refusal to recognize a different juristic tradition. In other words, incomprehension is characteristic of where juristic traditions are in conflict or are poorly integrated. With this formulation, we can transition from Persons to the work of scholars like Samantha Power who very perceptively describes this incomprehension as a twilight. In grappling with the recurrence of war crimes long after the Holocaust and Nuremberg Trials, she notes as follows:

We gradually came to accept the depravity of the Holocaust, but then slotted it in our consciousness as “history;” we resisted acknowledging that genocide was occurring in the present. Survivors and witnesses had trouble making the unbelievable believable. Bystanders were thus able to retreat to the “twilight between knowing and not knowing.” But this is not an alibi. We are responsible for our incredulity.  

The questions raised in this study of Persons resonate with concerns raised in Samantha Power’s other study, that of the UN veteran, Sergio Vieira de Mello. Like Goldhagen, both de Mello and Power notice that the UN, by safeguarding the sovereignty of nations, is an institution where governments “…come to be themselves….”

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14 Samantha Power, A Problem from Hell (New York: Perennial, 2003), 505.

de Mello therefore sets out to “…interpret the ambiguity in these charters…” \(^{16}\) and thereby adapt them to the particular circumstances of Third World, post colonial polities. Once again, we see an academic wrangling with security concerns by balancing concrete order and decisionist justice. Like Persons’ dealings with soldiers, years of working in the field taught Sergio de Mello to respect the *dignity* of people he was dealing with. In Power’s words, he wanted to introduce this quaint concept into international relations. \(^{17}\) The fact that Power finds this concrete order notion *quaint*, is itself indicative of the tensions between classical concrete and modern decisionist orders. A testament to the formative influence of international war crimes legislation on memory can be seen in the interviewer, Harry Kreisler call to—in carrying on de Mello’s work—“…institutionalize competencies…” and “… create a memory bank with skills, with people who can actually go out in the world and do things.” \(^{18}\)

With the call to do things, we transition to the realm of policy making. The limits of decisionist international law, that both Person and Power note, are starkly illustrated in the work of Daniel Jonah Goldhagen. I revisit this scholar’s contribution as the debates and criticisms around his work are very informative.

Much ink has been spent by scholars in tearing apart the work of Daniel Jonah Goldhagen. Critics of this recent magnum opus consider him to be simple minded and essentialist. However, in my reading of that work, I have tried to not throw the baby out

\(^{16}\) Ibid.

\(^{17}\) Ibid.

\(^{18}\) Ibid.
with the bathwater. While Goldhagen’s policy recommendations—a call for abolishing the UN and expanding the scope and scale of military interventions against genocidal regimes—may strike these critics as controversial and impractical, I find a different connection, laid out in this work, between autocracy and mass murder to be useful. It was this very connection that Persons’ pointed at when he traced the war crime of the Green Berets to the lack of democratic accountability, or the normativist institutionalism that led to the murder.

Why cite Goldhagen, if as critics have noted, this connection between a failure of democracy and mass murder is not original to his work? In fact, it can be traced to the work of Hannah Arendt, in her famous work, the *Origins of Totalitarianism*. Goldhagen may be guilty of re-inventing the wheel by recycling the work of other scholars, yet I find his work relevant to my project as he discusses various issues informally discussed in Persons’ biography, under one cover: the difficulty of legally establishing specific criminal intent, the link between autocracy and war crimes and finally, in the PBS rendition of the work on video, the importance of intergenerational memory as seen in the close relationship between Goldhagen and his father, which mirrors that of Persons’ and

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his father. In short, Goldhagen’s tome and its video adaptation by PBS, open up discussions of both hard and soft power, namely policy institutions and the cultural memory that suffuses them. I discuss hard power first.

As the reader may recall, in my first interpretation of Persons’ long answer as to whether the US Army was educating its soldiers on the Geneva Convention, I noted that it could be interpreted as privileging combat necessity over international law. In my second interpretation, I drew attention to the difference that a shift in emphasis could make. To an un-attentive listener, the qualitative differences between the reasons Persons gave, could and may well have been lost. While Persons and the legal team under his command did their job, the inadvertent or deliberate neglect of the differences, which are likely to increase the chances of war crimes being committed, are strikingly similar to what scholars have noted in the case of the war crimes committed by Nazi Germany. As one perceptive scholar states:

   Indeed, it may be conjectured that the greatest single factor in discrediting the Hitler regime in the German eyes as of 1945 was not the crimes of that regime but its military defeat—just as the popularity of the same regime had been founded not primarily upon its racism but upon its economic and foreign policy successes.

   Further, in considering the distribution of political power at the national level, cultural historians like Jay Winter note that the bereavement and mourning experiences of WWI

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22 Wilton B. Persons’ Interview, 605.

had the effect of bringing Europeans, in the various countries he considers, from different classes together.\footnote{Jay Winter, \textit{Sites of Memory, Sites of Mourning: the Great War in European Cultural History} (New York: Cambridge University Press), 227-229.} However, we see the opposite at work in the writings of Persons. How do we explain this paradoxical outcome, as the cultural world of Persons’ was, in comparison to that of WWI Europe, much less hierarchical and better integrated? The answer lies in the fact that this is additional evidence supporting the use of Schmitt’s juristic schools and not cultural hierarchies as an analytical grid. In other words, Persons’ place in an institution like the US Army, that is situated at the nexus of three juristic discourses, is what matters.

Narrowing in further into the workings of institutional power, we again find Persons to be insightful. The scholar Wittmann documents how the prosecution of Nazi officers after the iconic Nuremberg Trials, by operating out of a criminal law perspective, targeted the most vicious camp guards and let off a host of what he calls, desk murderers or \textit{Schreibtischtater}.\footnote{Rebecca Wittmann, “Tainted Law: The West German Judiciary and the Prosecution of Nazi War Criminals,” in \textit{Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes}, eds. Patricia Heberer and Jurgen Matthaus (Lincoln and London: University of Nebraska, 2008): 212.} Persons’ biography highlights the importance of studying the bureaucratic procedures behind the physical violence, as decisions or willful negligence, frequently originates in these hallways.

Finally, in considering the acts of the individual, the product of this institutional nexus of juristic discourses, we concluded that Persons’ biography is a resource that captures the transformation of general into specific criminal intent. We encounter an analogous
observation in the war and memory field, in another work of Jay Winter: “We all recollect the past, but remembrance is generated by action.”

Turning to the question of soft power, or cultural memory, Goldhagen’s relationship with his father, which mirrors that of Persons and his father, brought to our attention the link between war crimes and the intergenerational structuring of memory. The question of how war crimes tribunals have influenced memory has been addressed by scholars working on the Holocaust. Historians for example, have narrowed down memory to their discipline-specific equivalent i.e. historiography. One such historian, Donald Bloxham has very astutely pointed out the shortcomings of the Allies’ use of the Nuremberg Trials for didactic purposes. The focus of the victorious Allies on prosecuting the Nazis for conspiracy to wage aggressive war reflected the international relations focus of these trials. What got lost in the process was that specific intent was not operating at the individual level only but at a larger, political-cultural level and was driven by racial hatred. In short, the early historiography or memory of the Holocaust, was structured by the legal parameters of the Nuremberg Trials. While historians have raised these new questions by re-visiting the archives, I have pointed at the importance of individual memoirs in raising similar questions in the institutional context of the US Army.


27 Donald Bloxham, Genocide on Trial: Trials and the Formation of Holocaust History and Memory (Oxford: Oxford University Press, 2001), 1-17.
Critics of this revisionism however contend that these historiographical distortions were unavoidable and not unfortunate. They point to the fact that convening the trials was in itself an accomplishment and that scholars like Bloxham are looking in hindsight and seeing twenty-twenty. Such critics suggest that the worlds of law and memory cannot be reconciled.

While in this thesis, I have made a sharp distinction between law and culture by seeing them as separate spheres, and have proceeded to trace the influence of one over the other, some scholars like W. James Booth have, taking a different approach, argued that justice and memory are not spheres, but two faces of the same coin and hence, intertwined or overlapping. Booth forcefully argues that justice has memory embedded in it and calls the duo memory-justice. All trials, of homicide or genocide, are ambivalent in that the punishment meted out to the accused does not and is not meant to punish the full range of the crime. The memory of the act lives on long after the accused have been punished. In other words, remembering for didactic purposes is re-accusing and memory is a retrial. This perspective has great force when one considers the reparations paid by governments to aggrieved parties across generations. I have, for the sake of analyzing the memoir accentuated the difference between the two spheres. In doing so, I can use Schmitt’s legal categories as heuristic devices. The mundane details in a memoir are thereby highlighted.


29 W. James Booth, “The Unforgotten Memories of Justice,” The American Political Science Review 95, no.4 (December 2001): 77
After this exercise in using Schmitt, Booth’s notion of memory-justice can be seen as modern tensions in reconciling concrete order memory with decisionist justice.

Beyond addressing the need for remembering war crimes, scholars have voiced concern over the potential manipulation of these memories. The scholar Todorov, considering war crimes trials to be theatrical performances, decries their use for didactic purposes.\(^\text{30}\) The need to provide a verdict of innocent or guilty so simplifies the question of intent as to render the verdict culturally meaningless. On the other hand, critiques of Todorov, like Lawrence, point out that the theatrical or cinematically spectacular nature of these trials is not such a bad thing.\(^\text{31}\) He reminds us that the fear felt by many cultural critics of the “hollywoodification” of the Holocaust experience by the airing in Germany, of the NBC miniseries “Holocaust”, turned out to be unfounded. Even if NBC, by stripping the Holocaust experience of nuance, simplified history into epic, it nevertheless lead to profound soul-searching. Nevertheless, we notice a striking similarity between this fear and that of Persons’, that the media and characters like Belli, would trivialize warfare in the name of a contrived misinterpretation of the Civil Rights movement. In criticizing the melodramatic nature of the trials, even Hannah Arendt voiced similar concerns.\(^\text{32}\)


To summarize the themes we have considered so far—and to conclude this thesis—I look closely at an unusual example of the juridical structuring of memory, that seen in Franz Kafka’s use of delusion, the opposite of memory, in his work, The Trial. A priest, having concluded that the protagonist Joseph K is a trustworthy man, narrates a surreal account. The priest wants to persuade K that he should not be deluded about the Court. The surreal account is a description of the delusion. The entire work is about a trial and while the process is supposed to render justice, the priest is wary of trusting the very court that oversees the administration of justice. The court represents Hobbesian decisionism. The novel contains within it a warning against being deluded, of the sort Wilton B. Persons ends his interview with. Loyalty in Persons’ conclusion is analogous to trust in Kafka’s novel. The delusion, which functions as myths do, is the polar opposite of trust, truth and hence memory. In The Trial, injustice is the source of delusions or contrived memories.

In the surreal account, a man from the countryside, very much like the Persons’ peasant in the business world, shows up to a government facility seeking justice. A guard keeps him out, and informs him that there are more powerful guards higher up in the hierarchy. The poor man waits a lifetime outside the gate and before dying notices that no one else has come to the facility, seeking justice. On inquiring from the guard why this was the case, he is told that the gate was designated for him only, and now that he is dying, it will be shut. This description of the delusion, paradoxically contains the truth

about the novel and by extension, Persons’ critique of decisionist justice. Devoid of concrete order values like trust or loyalty, the means of judicial process become ends in of themselves. Joseph K’s role in Kafka’s *The Trial* is strikingly similar to Persons’ experience in the elite Boston law firm, where he worked out of the broom closet and watched the attorneys defend the establishment. I am not suggesting that the line between fiction and history is blurry. I am pointing to the pervasive influence of law on individual and political memory.
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