



Living Up to Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the Superior Orders Defense

Citation

Martha L. Minow, Living Up to Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the Superior Orders Defense, 52 McGill L. J. 1 (2007).

Published Version

http://lawjournal.mcgill.ca/userfiles/other/2172095-1219617374_Minow.pdf

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Living Up to Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the Superior Orders Defence

Martha Minow*

Recent world events underscore the importance of the dilemma of the superior orders defence and the question of how to prevent soldiers from undertaking abusive conduct or committing atrocities. This article examines the degree to which holding individual soldiers legally responsible for their actions can be seen to be an effective strategy for the prevention of atrocities and explores complementary strategies aimed at the prevention of abusive conduct by soldiers.

The article surveys historical and legal materials to illustrate the ongoing debate over the scope of the superior orders defence in U.S. and international law. The author then surveys a range of social science literature that suggests why some people participate in atrocities, and illuminates how difficult it would be for individuals to understand and comply with a rule expecting compliance with all superior orders except those that are illegal. The author concludes that the evidence undermines the likelihood that a norm establishing individual responsibility would succeed in changing conduct.

The author argues that it is important to restrict the application of the superior orders defence in order to uphold a symbolic ideal of individual responsibility, but that real prospects for preventing atrocities by soldiers depend on changing the organizational design and resources surrounding the soldier and specifying new obligations for those in command. The author recommends changes to military incentives, culture, and practices. Proposed strategies include the provision of meaningful and effective training programs for both soldiers and officers, the establishment of a military culture in which soldiers understand their superiors to care about violations of law and morality, and the integration of legal analysis into the daily operations of all levels of the military hierarchy so that the burden of understanding lawfulness does not rest solely on the shoulders of the ordinary soldier.

Les événements internationaux récents mettent en évidence l'importance le dilemme posé par la défense des «ordres supérieurs», ainsi que la question de comment prévenir la conduite abusive des militaires et dissuader ces derniers à commettre des actes d'atrocités. Cet article analyse à quel point le fait d'imposer une responsabilité légale aux militaires peut s'avérer une stratégie efficace afin d'empêcher que des actes d'atrocités ne soient commis. L'auteure examine également la force de stratégies complémentaires ayant pour but de prévenir la conduite abusive des militaires.

L'auteure se penche sur des sources historiques et juridiques pour démontrer la portée du débat sur la défense des ordres supérieurs au niveau du droit américain et du droit international. L'auteure passe en revue un ensemble de recherches académiques émanant du domaine des sciences sociales qui illustre comment des individus peuvent être amenés à commettre des actes d'atrocités. L'auteure explique à quel point il serait difficile de comprendre et de respecter une règle générale qui imposerait une conformité aux ordres supérieurs pour autant que ceux-ci soient légaux. L'auteure conclut qu'une politique axée sur l'instauration d'une norme de responsabilité individuelle aurait peu d'effet sur le comportement des militaires.

L'auteure soutient qu'il est important de restreindre la portée de la défense des ordres supérieurs afin de maintenir l'idéal symbolique que représente la responsabilité individuelle. Néanmoins, certains changements doivent être apportés à la structure organisationnelle qui entoure les militaires et aux ressources qui leur sont allouées. Les obligations incombant aux dirigeants militaires doivent également être redéfinies. Les réformes proposées par l'auteure touchent aux primes de service, à la culture et à la pratique militaire. Elles comprennent la mise en place de programmes de formation pour les militaires et les officiers, la création d'une culture militaire au sein de laquelle les militaires sont conscients que leurs officiers portent grande attention aux infractions à la loi et à la moralité, et l'intégration d'une culture d'analyse juridique pour les opérations quotidiennes à tous les niveaux afin que le fardeau de déterminer ce qui est conforme au droit ne repose pas uniquement sur les épaules du militaire ordinaire.

* Jeremiah Smith, Jr. Professor, Harvard Law School. This was presented as the Raoul Wallenberg Human Rights Lecture, a lecture organized by the Centre for Human Rights and Legal Pluralism of McGill University Faculty of Law, 9 March 2006, and as the "chair lecture" when I was receiving the Jeremiah Smith, Jr. Professorship, Harvard Law School, 22 February 2006. I am very grateful to Dean Nicholas Kasirer, Professor Colleen Sheppard, and to the students and community of McGill Faculty of Law who offered such an engaging discussion about the topics raised in this lecture. An earlier elaboration of some of these arguments and ideas was presented as the Laurence Kohlberg Lecture to the Association of Moral Education and Facing History and Ourselves / Harvard Facing History Conference, 4 November 2005, and published as "What the Rule of Law Should Mean for Civics Education: From the 'Following Orders' Defence to the Classroom" (2006) 35 *Journal of Moral Education* 137. I am deeply grateful for comments from Arthur Applbaum, Gabby Blum, Larry Blum, Mary Casey, Rebecca Cohen, Dick Fallon, Lani Guinier, Lt. Col. Patrick Gawkins, Amos Guiora, Dean Elena Kagan, Pnina Lahav, Daryl Levinson, Dana Savoray, Oded Savoray, Sarah Sewell, Joe Singer, Mira Singer, Adam Strom, Margot Strom, Cass Sunstein, and Richard Weissbourd, and participants in presentations at the Boston College Law School, Harvard Law School, and Harvard J.F.K. School of Government Intervention Seminar. For research help, special thanks go to Yael Aridor Bar-Ilan, Ryan Budish, Caleb Donaldson, Christine Monta, David Oliwenstein, and Noah Weisbord.

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To be cited as: (2007) 52 McGill L.J. 1

Mode de référence : (2007) 52 R.D. McGill 1

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Introduction

In 1945, Raoul Wallenberg sent a message to SS Commander General August Schmidhuber to the effect that “I will see that you will be charged and hanged as a war criminal if you follow Adolf Eichmann’s order and direct the massacre of the over 60,000 Jews remaining in the Budapest Central Ghetto.”¹ His message to General Schmidhuber, remarkably, worked: the Jews in the Budapest Ghetto survived. We remember and honour Raoul Wallenberg for this and countless other acts of courage that directly saved thousands of lives during the Holocaust. A man then in his early thirties, Wallenberg used delay, persuasion, threats, bribes, and his invented “protective passes” to save a large remnant of Hungarian Jewry. As Irwin Cotler observed in his address marking the opening of an exhibit on the life and work of Wallenberg, his example and his memory teach us that “[n]eutrality and indifference by individuals or neutrality and indifference by state[s] must be rejected.”²

Wallenberg disappeared and died, probably murdered, in Soviet custody. His personal sacrifice was extraordinary. It is unlikely that many of us would give our lives to save strangers in a strange land. Perhaps even more pressing, though, is discovering not what it takes to engage in such extraordinary heroism and sacrifice, but what it takes to resist committing abusive, illegal acts when ordered to commit them.

Consider the soldier³ directed to shoot a civilian or the guard pushing people into the gas chambers; consider General Schmidhuber, ordered by Adolf Eichmann to massacre the more than 60,000 Jews remaining in the Budapest Central Ghetto. Schmidhuber could have thought, “I will be shot if I do not obey, or if I ever face trial, I will just say that I was following orders.” Instead, he backed down and the Jews were saved. What would it take for an officer to resist the order of his commander and halt the planned massacre? Would he simply compare the risks to himself and evaluate whether he would be more likely to lose his life (or his status) if he pursued the massacre or cancelled it? Or perhaps moral judgment would enter into consideration: perhaps the reminder of the wrongness of the planned massacre tipped the scales? What would an ordinary soldier under the general’s command think and do if ordered to undertake the massacre?

¹ See David Metzler, “Raoul Wallenberg”, online: Jewish Virtual Library <<http://www.jewishvirtuallibrary.org/jsourc/biography/wallenberg.html>>. For a historically informed fictional account, see Carl L. Steinhouse, *Wallenberg Is Here! The True Story About How Raoul Wallenberg Faced Down the Nazi War Machine & the Infamous Eichmann & Saved Tens of Thousands of Budapest Jews* (Bloomington, Ind.: 1st Books Library, 2002) at 272.

² Quoted in Marshall Shapiro, “Cotler decries neutrality at Wallenberg memorial exhibit” (27 January 2004), online: B’nai Brith Canada <<http://www.bnaibrith.ca/article.php?id=123>>.

³ Throughout this article, “soldier” is used to refer to any member of a military organization.

The Nuremberg trials, held at the International Military Tribunal established by the Allies after World War II, rejected the “I was just following orders” defence to charges of military atrocity and human rights violations.⁴ A landmark in international law, the trials established that individuals, not only nations, are responsible for war, war crimes, genocide, and crimes against humanity. Crucial to this concept was the explicit rejection of the superior orders defence, as the denial of the defence confirms that responsibility runs to the individual even where that individual was acting pursuant to orders.

The Nazi period in Germany exposed better than any other historical experience how untenable it would be to embrace absolute obedience in all circumstances. The ostensibly civilian legal system wrested by Adolf Hitler from the Weimar Republic adopted a conception of the leader-state, making all law the command of the leader and enabling every single other person in the society to claim they were following orders.⁵ Rejecting the defence of superior orders thus became especially urgent if anyone would be held responsible in a regime that officially made the orders of one man, Adolf Hitler, the supreme law of the land.⁶ This would be true in any hierarchical society.⁷ Orders that violate the international consensus of acceptable conduct even in wartime should not shield soldiers from criminal culpability.

⁴ See note 51 and accompanying text.

⁵ See Hilaire McCoubrey, *The Obligation to Obey in Legal Theory* (Aldershot, U.K.: Dartmouth, 1997) at 185-87.

⁶ In August 1934, the Nazi Reichstag adopted a law combining the positions of president and chancellor and transferring all authority to Adolf Hitler (*Gesetz über des Staatsoberhaupt des Deutschen Reichs* [Law Concerning the Head of State of the German Reich], 1 August 1934, RGBl. I 1934 at 747 (F.R.G.)). The Germany Army then revised its required oath of allegiance to include “unconditional obedience to the Leader of the German Reich and people, Adolf Hitler, the supreme commander of the armed forces” (Richard J. Evans, *The Third Reich in Power, 1933-1939* (New York: Penguin Press, 2005) at 43, translating *Gesetz über die vereidigung der Beamten und der Soldaten der Wehrmacht* [Law on the Allegiance of Civil Servants and Soldiers of the Armed Forces], 20 August 1934, RGBl. I 1934 at 785, §2 (F.R.G.)). As one commentator explains, “The unprecedented oath was to Hitler personally, not the German state or constitution, as were previous Army oaths. Obedience to Hitler would now be regarded as a sacred duty by all men in uniform, in accordance with their military code of honour, thus making the German Army the personal instrument of the Führer” (“Hitler Becomes Führer” in *The Triumph of Hitler*, online: The History Place <<http://www.historyplace.com/worldwar2/triumph/tr-fuehrer.htm>>).

⁷ See A.P.V. Rogers, *Law on the Battlefield*, 2d ed. (Manchester, U.K.: Manchester University Press, 2004) at 190-91, 208-14 [Rogers, *Law on the Battlefield*]. For a discussion of whether allegiance to the person or the office of the U.S. presidency should command primary military loyalty, see James H. Toner, *True Faith and Allegiance: The Burden of Military Ethics* (Lexington: University Press of Kentucky, 1995) at 27-29, 31 (discussing views of the General of the U.S. Army, Douglas MacArthur, in 1951). See also Brian Tierney, *Church Law and Constitutional Thought in the Middle Ages* (London: Variorum Reprints, 1979) c. VI (discussing thirteenth-century Bishop Robert Grosseteste who disobeyed Pope Innocent IV in light of his duty to obey the Apostolic See, distinguishing the person and the institution).

This legacy of the Nuremberg Tribunal is widely cited, but the reality of the rule both at Nuremberg and since is more complicated.⁸ Those complications reflect Cold War struggles and national self-interest. Yet even if political considerations could be put aside, clarifying the rule governing superior orders poses conceptual and practical difficulties. Conceptually, there is the basic difficulty of modifying the general rule of military obedience with any exception. How should the rule convey both the duty to obey orders and the liability for following an illegal order? Specifying the scope of the exception also raises complex considerations about the scope and meaning of international treaties, customary law, natural law, national law, and common morality. Even if a clear and cogent rule emerges, separate problems arise with turning it into an actual guide for soldier behaviour.

Here the problem is even more profound than the usual translation of technical legal rules into guides for conduct. Military training and discipline emphasize compliance with commands and conformity within the unit; penalties attach to failures to comply even with trivial directives in order to underscore military discipline. How can this training maintain its effectiveness if it includes not only the invitation but also the command to question or evaluate orders for their lawfulness? The conflict between obeying orders and assessing whether an order is one that deserves obedience is obvious and confusing to commanding officers and soldiers alike. In case common sense alone is insufficient to establish the point, several lessons from psychology underscore obstacles to a workable rule teaching both military obedience and resistance to illegal orders.⁹

Moreover, the psychological and organizational contexts in which soldiers find themselves differ considerably from the contexts for the rest of law. The stress of war and the special problems posed by the war on terror accentuate these obstacles. The challenge, then, is not merely to devise a workable rule and effective training but also to address the design of the organization and culture within which responsibility must be distributed—and here, it is not merely the individual soldiers who must be the focus.

Thus, no honest treatment of the subject can proceed without acknowledging the central dilemma: telling soldiers that they face punishment unless they disobey illegal orders means telling them to think for themselves and question authority, yet directing them to do that risks undermining their training to follow orders, work as a cohesive whole, and subordinate their own desires and views to the collective enterprise. Taken to an extreme, directives to “think for yourself” and “question authority” would disturb the command structure and practice of drilled obedience in the military. As one military expert has explained:

During military operations decisions, actions and instructions often have to be instantaneous and do not allow time for discussion or attention by committees.

⁸ See Part II, below.

⁹ See Part III, below.

It is vital to the cohesion and control of a military force in dangerous and intolerable circumstances that commanders should be able to give orders and require their subordinates to carry them out.¹⁰

Hence, court martial proceedings pursue acts of insubordination.¹¹ Disobedience in the context of combat can lead to immediate sanctions.¹² All of us are often in a position where we are expected to obey laws, directives from a boss, assignments from teachers or clients, dress codes, or the traffic directives of police officers. Even for civilians, individual thought and resistance jeopardize the order sought by official rules and the rule of law itself. Yet the soldier operating in modern, complex operations is expected more than most of us to follow training and work as a team member rather than as a unique individual. What, then, should be the rule about following orders, the rule that governs the soldiers who must both comport with military discipline and avoid becoming an instrument for committing atrocities during war?

Add to this basic dilemma the stress in the exigent circumstances of war and sheer confusion over what is right and what is wrong in the context of war. Is it reasonable to expect soldiers to exercise independent judgment to resist faulty orders? Serious violations of human rights by military actors are more likely to occur today not due to explicit orders from above but instead through a combination of lax supervision, tacit encouragement from above, and the stress from both immediate danger and ongoing pressures to deliver success against difficult odds. These factors severely complicate judgments about when soldiers and their superiors should be held responsible for mistreating prisoners and killing civilians. In addition, reliance on post hoc punishment based on a formal rule will always be at best a partial solution; not every instance of misconduct can or will be punished, and the deterrent and pedagogical signals from punishments are insufficient to prevent future abuses. Advance planning and training are crucial to preventing atrocities. But what should be the content of such planning and training?

For soldiers to develop the capacity to perceive and resist illegal directions when they are fundamentally expected to obey orders and military discipline, the resources of law, morality, psychology, and education are needed. In this work, I first describe recent events that underscore the importance of the topic; I then examine legal materials to demonstrate the continued and understandable debate over the scope of the superior orders defence today in U.S. and international law. I then examine social science findings that illuminate how difficult it would be for individuals to understand and comply with a rule expecting compliance with superior orders except those that are illegal and findings that indicate why people participate in atrocities. Ironically, the evidence undermines the likelihood that a norm establishing individual

¹⁰ Rogers, *Law on the Battlefield*, *supra* note 7 at 208-209 [footnotes omitted].

¹¹ For failing to follow orders, the *Uniform Code of Military Justice* allows punishment including the death penalty, depending on the circumstances (10 U.S.C. 47 §§890, 891, 892 (2000)).

¹² See *ibid.* § 815.

responsibility would succeed in changing conduct but underscores the potential importance of maintaining that norm in order to advance the ideal of individual responsibility. I conclude with an argument that maintaining grounds for individual responsibility remains important for symbolic reasons but that real prospects for preventing atrocities by soldiers depend on changing organizational design and resources surrounding the soldier, including specifying new obligations for those in command.¹³

I. Why Talk About This Now?

Knowing when to disobey the law is a classic problem in Western philosophy and the subject of enduring plays and texts, from Plato's Socrates to Denzel Washington's *Crimson Tide*.¹⁴ Holding soldiers responsible for failing to resist orders is a particularly vexing question explored in popular films such as *A Few Good Men*¹⁵ and *Breaker Morant*.¹⁶ Rev. Martin Luther King, Jr. led peaceful civil rights protestors in strategic acts of disobedience that brought international attention to the corruption and oppression of the Jim Crow South while triggering new rounds of debate over the appropriate times and places for disobeying the law.¹⁷

The Enron scandal raised the issue in the context of contemporary corporate practices in the global economy.¹⁸ The corporation's Chief Financial Officer, Andrew Fastow, initially claimed he was following the orders of chief executives Jeffrey Skilling and Kenneth Lay in devising illicit profit-making schemes that ultimately led him to plead guilty and testify against his former bosses.¹⁹ The Enron scandal and

¹³ This argument has some similarity with the concept of "acoustic separation" developed by Meir Dan-Cohen in "Decision Rules and Conduct Rules: Acoustic Separation in Criminal Law" (1984) 97 Harv. L. Rev. 625 at 627, 630 [Dan-Cohen, "Acoustic Separation"]. However, rather than distinguishing the rule of conduct (laws addressed to the general public) from the rule of decision (laws addressed to judges, officials, etc.), I suggest maintaining the rule of decision, but shifting resources to effect organizational changes in order to affect conduct.

¹⁴ See Plato, *The Last Days of Socrates*, trans. by Hugh Tredennick (London: Penguin Books, 1954); *Crimson Tide*, 1995, DVD (Burbank, Cal.: Walt Disney Video, 1998) (Washington plays a Navy officer who must decide whether to disobey the commander's order to fire nuclear missiles or to follow his command and risk launching an unprovoked nuclear war).

¹⁵ 1992, DVD (Culver City, Cal.: Sony Pictures, 1997). See also *The Hunchback of Notre Dame*, 1996, DVD (Burbank, Cal.: Walt Disney Video, 2002) (a soldier hero disobeys orders).

¹⁶ 1979, DVD (New York: Fox Lorber, 1997).

¹⁷ See David Luban, *Legal Modernism* (Ann Arbor: University of Michigan Press, 1997) at 209-82; Taylor Branch, *Parting the Waters: America in the King Years 1954-63* (New York: Simon and Schuster, 1989).

¹⁸ See Nancy B. Rapoport, "Enron, *Titanic* and the *Perfect Storm*" (2003) 71 Fordham L. Rev. 1373 at 1393; Jaclyn Taylor, "Fluke or Failure? Assessing the Sarbanes-Oxley Act after *United States v. Scrushy*", Case Comment, (2005) 74 UMKC L. Rev. 411 at 428.

¹⁹ See Demetri Sevastopulo, "Enron Task Force Slowly Closes in on Higher Level Targets" *Financial Times* [U.S. edition] (4 December 2002) 2; William Lyons, "Former Enron Finance Chief to

other colossal instances of corporate misconduct generate questions about whether Skilling and Lay themselves were following the implied command of shareholders to succeed at all costs. Thus, commentators have considered—and rejected—the possibility that in their corruption, deception, and destruction of a company, its pension fund, and the jobs of thousands, CEO Jeffrey Skilling or CFO Andrew Fastow were “just following orders.”²⁰ The issue persists in ongoing evaluations of corporate misconduct. Hence, the U.S. Attorney prosecuting an accountant for making false entries for the WorldCom Corporation explained that “just following orders” is no defence to breaking the law.²¹

Military misconduct since the United States launched the war against terrorism after 9/11 has made the issue of following orders one of public salience. Thus, just as the Marine Corps filed charges of murder and conspiracy after the shooting of a civilian in Iraq, the media reported investigations of a separate case in which Marines apparently killed at least twenty-four Iraqi civilians in Haditha and then tried to cover it up.²² Lawyers for a CIA contractor, charged with assaulting a detainee in Afghanistan who then died, argued that he was following orders.²³ Military and media investigations have begun to highlight potentially systematic violations of international and domestic law—and basic decency—in the interrogation and treatment of people captured in Iraq and Afghanistan and held in Guantánamo Bay, other facilities maintained by the U.S. government, and facilities maintained by other

Face 78 Charges” *The Scotsman* (2 November 2002) 22; Alexei Barrionuevo, “The Courtroom Showdown, Played as Greek Tragedy” *The New York Times* (12 March 2006) 4-1.

²⁰ See “Faint Whistle: Enron and Ethics” (21 February 2004), online: Ethics Scoreboard <<http://www.ethicsscoreboard.com/list/enron.html>>; Jim Wasserman, “For Students, Enron’s Fall Has Ethics Lessons Galore” *The Sacramento Bee* (26 May 2006) D1; Michael Lewis, “How Do Lay, Skilling and Fastow see themselves?” *Taipei Times* (10 March 2002), online: Taipei Times <<http://www.taipetimes.com/News>>. See generally Bethany McLean & Peter Elkind, *The Smartest Guys in the Room: The Amazing Rise and Scandalous Fall of Enron* (New York: Portfolio, 2003). In the context of Enron—as in the context of the military—the central problem probably stemmed less from obedience to bad orders than from bad conduct throughout the hierarchy flowing from an organizational culture that lacked moral compass.

²¹ See Susan Pulliam, “A Staffer Ordered to Commit Fraud Balked, Then Caved: Pushed by WorldCom Bosses, Accountant Betty Vinson Helped Cook the Books” *The Wall Street Journal* (23 June 2003) A1 (quoting James Comey who prosecuted Betty Vinson).

²² Tony Perry, “Murder Charges Likely for Marines in Iraq Death” *Los Angeles Times* (2 June 2006) A1. Military investigation concluded that Marine leadership failed in multiple ways, including in pre-deployment training. See Thomas E. Ricks, “Haditha Probe Finds Leadership Negligent” *The Washington Post* (9 July 2006) A13.

²³ See Estes Thompson, “Civilian Abuse Trial Starts Today” *The Boston Globe* (7 August 2006) A4 (describing prosecution of the first civilian brought to trial for misconduct in the Afghanistan and Iraq wars). The court convicted the ex-CIA contractor, who was charged after beating a detainee for forty-eight hours during questioning; the detainee died. See Estes Thompson, “Ex-CIA Contractor Convicted” *The Boston Globe* (18 August 2006) A7 (CIA Director Michael V. Hayden described the defendant’s actions as “totally inconsistent with the normal conduct of CIA officers and contractors”).

nations.²⁴ These incidents have prompted some to revisit the atrocity of the My Lai Massacre which itself holds an ambiguous place in American memory.²⁵

Sorting out lawful military orders from unlawful ones is difficult under the best of circumstances. The multiple relevant sources of law include the rules of the particular military service, the national constitutional law, and international humanitarian law. Interpreting these complex materials and applying them to shifting contexts, new military technologies, and disputed facts are subtle and difficult tasks. Widely quoted by military lawyers is the comment of a U.S. Army officer after a training exercise exposing some of these complexities. He said, “I know that if I ever go to war again, the first person I’m taking is my lawyer.”²⁶

Yet contemporary charges of abuses by the U.S. military are especially complicated by the administration’s departure from traditional military rules. Indeed, U.S. troops can fairly object that in many of their operations they do not even know what legal framework applies. Lawyers for President George W. Bush concluded that the Geneva Conventions do not protect as prisoners of war members of the al Qaeda network, the Taliban militia, or persons in detention suspected of these memberships,²⁷ and so argued to the U.S. Supreme Court.²⁸ After authorities at Guantánamo requested approval of stronger interrogation techniques, Secretary of Defense Donald Rumsfeld announced that prisoners at Guantánamo Bay would not be viewed as prisoners of war²⁹ and authorized—but later withdrew—a list of

²⁴ See Rebecca Carr, “Torture Hearing to Begin in Geneva” *The Atlanta Journal-Constitution* (5 May 2006) A9; Eric Schmitt & Carolyn Marshall, “In Secret Unit’s ‘Black Room,’ A Grim Portrait of U.S. Abuse” *The New York Times* (19 March 2006) 1-1; “Abu Ghraib’s Ghosts: U.S. Decision to Withdraw from Infamous Prison Does Not Solve Human Rights Violations in Iraq” *Houston Chronicle* (14 March 2006) B8.

²⁵ Kendrick Oliver, *The My Lai Massacre in American History and Memory* (Manchester, U.K.: Manchester University Press, 2006).

²⁶ Colonel Patrick Finnegan, “Operational Law: Plan and Execute” (1996) 76:2 *Military Review* 29 at 32.

²⁷ See Memorandum re: Application of Treaties and Laws to al Qaeda and Taliban Detainees from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice to William J. Haynes II, General Counsel, U.S. Department of Defense (9 January 2002), online: The National Security Archive, The George Washington University <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf>> at 1-2, reprinted in Karen J. Greenberg & Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (New York: Cambridge University Press, 2005) at 38-79 [Yoo Memorandum]; Jane Mayer, “The Hidden Power: The Legal Mind Behind the White House’s War on Terror” *The New Yorker* (3 July 2006) 44.

²⁸ See *Rasul v. Bush*, 542 U.S. 466 (2004) [*Rasul*]; *Hamdi v. Rumsfeld*, 542 U.S. 507 at 549-50 (2004), Souter J., concurring [*Hamdi*]. On the moral questions raised for the lawyers giving such advice, see W. Bradley Wendel, “Legal Ethics and the Separation of Law and Morals” (2005) 91 *Cornell L. Rev.* 67; Jeremy Waldron, “Torture and Positive Law: Jurisprudence for the White House” (2005) 105 *Colum. L. Rev.* 1681.

²⁹ See *Rumsfeld Visits Camp X-Ray* (CNN television broadcast, 27 January 2002), online: CNN.com <<http://edition.cnn.com/TRANSCRIPTS/0201/27/sun.09.html>>; Steven Strasser, ed., *The Abu Ghraib*

approved measures, including interrogation techniques challenged by human rights advocates as violations of U.S. and international law.³⁰ In the meantime, these expansive interpretations informed forces on the front lines through Department of Defense directives about treatment of detainees.³¹

As a result, actions taken by members of the U.S. military violated U.S. and international law.³² These include (1) detaining individuals without giving them the

Investigations: The Official Reports of the Independent Panel and the Pentagon on the Shocking Prisoner Abuse in Iraq (New York: Public Affairs, 2004).

³⁰ See Mike Allen & Susan Schmidt, "Memo on Interrogation Tactics Is Disavowed: Justice Document Had Said Torture May Be Defensible" *The Washington Post* (23 June 2004) A1; Eric Lichtblau, "Gonzales Says Humane-Policy Order Doesn't Bind C.I.A." *The New York Times* (19 January 2005) A17. These developments were especially worrisome in light of research indicating the heightened tendency of guards to treat prisoners as less than human. See Craig Haney, Curtis Bank & Philip Zimbardo, "Interpersonal Dynamics in a Simulated Prison" (1973) 1 *International Journal of Criminology and Penology* 69 at 69, 80. See also Erik Saar & Viveca Novak, *Inside the Wire: A Military Intelligence Soldier's Eyewitness Account of Life at Guantánamo* (New York: Penguin Press, 2005) at 72-73, 75, 97-99 (describing how guards in Guantánamo prison wanted detainees suspected as terrorists linked with 9/11, subdued them with brute strength, and wished misery upon them). Approved techniques included dietary manipulation, sleep deprivation, and isolation. See Saar & Novak, *ibid.* at 281-92 (reprinting U.S. Department of Defense Category I, II, and III interrogation techniques approved by the secretary of defense on 2 December 2002); Memorandum re: Counter-Resistance Techniques from William J. Haynes II, General Counsel, U.S. Department of Defense to Secretary of Defense (27 November 2002); Memorandum re: Request for Approval of Counter-Resistance Strategies from Lt. Col. Jerald Phifer, Director, J2, Joint Task Force 170 to Commander, Joint Task Force 170 (11 October 2002) [Haynes Memorandum]. Both documents can be found online: The National Security Archive, The George Washington University <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf>>.

³¹ See Deborah N. Pearlstein, "Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture" (2006) 81 *Ind. L.J.* 1255 at 1263-1266 (citing internal military documents regarding treatment of detainees since 2002).

³² Extreme examples are the instances of detainee abuse in Abu Ghraib and Guantánamo, documented by several investigations. See U.S., Army Public Affairs, *AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade* (Washington, D.C.: U.S. Army Public Affairs, 2004) (Investigating Officer: Maj. Gen. George R. Fay), online: U.S. Government Printing Office <<http://permanent.access.gpo.gov/lps53415/ar15-6.pdf>> [Fay Report]; U.S., Department of Defense, *Review of Department of Defense Interrogation Operations* (2005) (Investigating Officer: Vice Adm. Albert T. Church III), online: Department of Defense <<http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf>> [Church Report]; U.S., Department of Defense, *Army Regulation 15-6: Final Report, Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility* (2005) (Investigating Officer: Brig. Gen. John T. Furlow), online: Department of Defense <<http://www.defenselink.mil/news/Jul2005/d20050714report.pdf>>. Certainty about the legality of some measures is impaired not because the administration sought—and failed—to create a space outside of the application of any laws, but because overlapping and conflicting sources of law actually applied to the civilian, military, and CIA actors involved with detaining prisoners at Abu Ghraib. See Diane Marie Amann, "Abu Ghraib" (2005) 153 *U. Pa. L. Rev.* 2085 at 2087, 2140. For an analysis of the international and domestic norms that apply to interrogation of detainees under U.S. control, see Committee on International Human Rights and Committee on Military Affairs and Justice, "Human Rights Standards Applicable to the United States' Interrogation

opportunities to challenge their confinement as required for prisoners of war,³³ (2) deploying interrogation techniques that violate international standards enacted into U.S. law,³⁴ and (3) transferring detainees to secret prisons where ill treatment or

of Detainees” (2004) 59 The Record of the Association of the Bar of the City of New York 183. To remedy ambiguities, the report recommended amending U.S. law to clarify the application of domestic and international standards to intelligence personnel, to ensure that the *Uniform Code of Military Justice*, *supra* note 11 applies to detainees under U.S. control, and to investigate human rights compliance in countries where the U.S. “render[s]” detainees (Saar & Novak, *supra* note 30 at 250). Even without any such changes, the general counsel to the U.S. Department of Defense maintained that the United States complies with its legal obligations in the treatment of detainees, including the ban against torture and the prohibition of acts of cruel, inhuman, or degrading treatment (but only insofar as U.S. constitutional law would treat the particular acts as unconstitutional). See Letter of William H. Haynes III to Sen. Patrick J. Leahy (25 June 2004), reprinted in Saar & Novak, *ibid.* at 269-70. After Congress adopted a law to clarify U.S. commitments to disavow the use of torture on detainees, President George W. Bush issued a signing statement reserving authority to the Executive Branch for interpreting U.S. law. See *Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006*, Pub. L. No. 109-148, §1003, 119 Stat. 2680 at 2739 (2005), repassed to correct punctuation, *National Defense Authorization Act for Fiscal Year 2006*, Pub. L. No. 109-163, §1403, 119 Stat. 3136 at 3475; Statement on Signing the National Defense Authorization Act for Fiscal Year 2006, 42 Weekly Comp. Pres. Doc. 23 (6 January 2006), online: U.S. Government Printing Office <<http://www.gpo.gov>>, incorporating by reference the Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 42 Weekly Comp. Pres. Doc. 1918, 1919 (30 December 2005), online: U.S. Government Printing Office <<http://www.gpo.gov>> [Signing Statement].

³³ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

³⁴ For many months following 9/11, U.S. policy disputed the applicability of international standards to “enemy combatants” and detained terror suspects on the theory that these people were neither civilians of, nor prisoners of war from, a nation party to the Geneva Conventions. This view contradicted the interpretation prevalent among signatory states that the Geneva Conventions were intended to cover all individuals. Thus, international legal standards, which the United States has accepted, are clear about the requisite treatment of civilians during war. See e.g. *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287, art. 3, 6 U.S.T. 3516 (entered into force 21 October 1950) [*Fourth Geneva Convention*]. It states:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;

torture may be underway.³⁵ A senior Pentagon lawyer, Albert Mora, repeatedly advised the Bush administration that its policy on the coercive interrogation of terror suspects violated the law, came close to torture, and could give rise to criminal prosecutions of those giving the orders.³⁶ Under these circumstances, what rules *do* apply? At best, such uncertainty exposes the soldiers to the risk of punishment after they engage in conduct that turns out to violate the laws that a tribunal applies after the fact. At worst, uncertainty about the legal status of enemy combatants, putative terrorists, or civilians who might be associating with terrorists actually invites soldiers to commit abuses and atrocities in a climate of fear and disorder.³⁷

Complexity about what tactics and techniques are lawful is further compounded by ambiguities about who is responsible for conduct that proves, post hoc, to be illegal. Should a soldier be liable for following an order that later turns out to be illegal but was not obviously illegal in his or her eyes? One military law expert argues that the law must protect the soldier who is risking his or her life: "In return for [his] unswerving obedience the soldier needs the protection of the law so that he does not

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

³⁵ See Human Rights Watch, "Questions and Answers: U.S. Detainees Disappeared into Secret Prisons: Illegal under Domestic and International Law" (9 December 2005), online: Human Rights Watch <<http://hrw.org/backgrounder/usa/us1205/us1205.pdf>> (discussing application of *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976) [*ICCPR*] and *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85, Can. T.S. 1987 No. 36 (entered into force 26 June 1987) [*Convention Against Torture*]).

³⁶ See Tim Golden, "Senior Lawyer at Pentagon Broke Ranks on Detainees" *The New York Times* (20 February 2006) A8. Mora retired in January 2006 after four years as general counsel of the Navy; his objection contributed to the decision to suspend the use of coercive techniques in Guantánamo approved in December 2002, but did not halt Secretary of Defense Rumsfeld's approval of new techniques in April 2003. See *ibid.* The White House subsequently proposed retroactive protection for political appointees and CIA personnel involved in interrogations using techniques such as waterboarding and other acts prohibited under Article 3 of the *Fourth Geneva Convention* (which bans "outrages upon personal dignity, in particular humiliating and degrading treatment" (*supra* note 34, art. 3(1)(c))). See Pete Yost, "White House Proposes Retroactive War Crimes Protection" *The Boston Globe* (10 August 2006) A8.

³⁷ One Pentagon investigation concluded that "leader responsibility and command responsibility, systemic problems and issues also contributed to the volatile environment in which the abuse occurred" in Abu Ghraib (Fay Report, *supra* note 32 at 8). See also Church Report, *supra* note 32 at 16. One U.S. interrogator described both intensive training in complying with the restrictions of international law and, while serving in Afghanistan after 9/11, pressure to press the limits of those restrictions by using sleep deprivation and scare tactics. See Chris Mackey & Greg Miller, *The Interrogators: Inside the Secret War Against Al Qaeda* (New York: Little, Brown, 2004) at 30-31, 282-89.

afterwards risk his neck for having obeyed an order that later turns out to be unlawful.”³⁸ This view is problematic if it revives the “just following orders” defence, but it exposes the problems with eliminating mitigation entirely for the soldier who follows an order that was not obviously illegal or about which lawyers and other experts disagree. Members of the military no less than any other members of the community deserve clarity about the law that governs their conduct. The current free fall from legality concerning the conduct of detentions and interrogations denies members of the military the clarity that would make it fair to hold individuals liable for breaching the rules.

The notorious prisoner abuses in the Abu Ghraib prison by U.S. military, CIA, and employees under contract with the U.S. government reflect ambiguity and disagreement over the rules governing permissible detentions and interrogations,³⁹ although the wrongness of most of the abusive conduct is undisputed.⁴⁰ Also at work were inadequate training,⁴¹ confused lines of command, competition between the military and intelligence teams, the boredom and anxiety experienced by young and inadequately trained members of the military reserve, and at least in the case of one person, the psycho-sexual politics of trying to impress or please a boyfriend.⁴²

³⁸ Rogers, *Law on the Battlefield*, *supra* note 7 at 209.

³⁹ See U.S., Independent Panel to Review Department of Defense Detention Operations, *Final Report of the Independent Panel to Review Department of Defense Detention Operations* (2004), reprinted in Strasser, *supra* note 29 at 14-19 (describing the migration of interrogation techniques from Guantánamo to military intelligence and military police soldiers in Afghanistan and Iraq without specific guidelines, safeguards, or limits; leadership failures; inadequate resources; and tangled command relationships). Military justice rules do not reach civilian contractors. As the United States increasingly relies on civilian contractors—estimated at 20,000-30,000 contract employees in the current Iraq conflict—this exposes a gap in legal accountability for misconduct and abuse. See Martha Minow, “Outsourcing Power: How Privatizing Military Effort Challenges Accountability, Professionalism, and Democracy” (2005) 46 B.C.L. Rev. 989 at 989, 994-96, 1016-20.

⁴⁰ One of the guards at Abu Ghraib told investigators, “I witnessed prisoners in the MI hold section, wing 1A being made to do various things that I would question morally” (quoted in U.S., Department of Defense, *AR 15-6 Investigation of the 800th Military Police Brigade* (2004) (Investigating Officer: Maj. Gen. Antonio M. Taguba) at 18, online: Department of Defense <http://www.dod.mil/pubs/foi/detainees/taguba/TAGUBA_REPORT_CERTIFICATIONS.pdf> [Taguba Report]). The same guard explained that he neither reported nor protested the abuses “[b]ecause [he] assumed that if they were doing things out of the ordinary or outside the guidelines, someone would have said something” (*ibid.* at 19).

⁴¹ Soldiers initially deployed in Abu Ghraib were trained for military rather than prison operations. See Interview of Lt. Col. Patrick Gawkins by Martha Minow (22 March 2006) on file with author; Taguba Report, *supra* note 40 at 37. The military police in charge of operations at the time of severe abuses at Abu Ghraib had no training in handling detainees. See Interview of 1st Sgt., 372nd Military Police Company by Taguba panel (10 February 2004) summarized in Taguba Report, *ibid.*, Annex 81, online: Department of Defense <http://www.dod.mil/pubs/foi/detainees/taguba/ANNEX_081_FIRST_SERGEANT_372ND_MP.pdf>; Church Report, *supra* note 32 at 19.

⁴² Lynndie England was a private in the U.S. Army Reserve who became the public face of prisoner abuse in the Abu Ghraib prison. She flagrantly posed with naked Iraqi prisoners, holding one by a

Only eight people have faced court martial and conviction related to the abuse scandal; the most senior official involved—the commander of the prison—received only a demotion in rank.⁴³ Pursuing those higher up in the chain of command—and those responsible for the absence of clear legal rules altogether—is crucial if we really care about accountability, the rule of law, and deterring gross misconduct in the war against terror. Yet following the exposure of abuses in Abu Ghraib, none of the investigations aimed higher than General Sanchez, toward the Pentagon; none of the inquiries examined the role of the CIA or civilian authorities; and apparently no investigations have been launched to assess directives given to U.S. forces in Guantánamo Bay.⁴⁴ Command responsibility—the liability of those in command for

leash while dangling a cigarette from her smiling mouth, and pointing at the genitals of naked, hooded detainees. See e.g. Anna Cock, “Abuse Guard was ‘Just Having Fun’” *The [Sydney] Daily Telegraph* (5 August 2004) 31. England’s effort to plea bargain failed when Specialist Charles Graner testified at the plea bargain hearing that England had been following his orders; the judge threw out the guilty plea on the grounds that England was apparently contesting her guilt. At trial, the witnesses disagreed about whether Graner had directed her to pose with the detainees. England’s lawyer converted the “just following orders” claim into a psychological defence, and argued for acquittal on the grounds that England had an “overly compliant personality” and had fallen under Graner’s influence. The prosecutor countered that Private England had been an enthusiastic participant (David S. Cloud, “Starkly Contrasting Portraits of G.I. in Iraqi Abuse Retrial” *The New York Times* (22 September 2005) A14). Beyond these instances of humiliation at the hands of guards, personnel engaged in interrogation pursued such questionable techniques as scattering liquid designed to look like menstrual blood on inmates, forcing them to listen to extremely loud and disturbing music for long periods of time, keeping them in squatting positions for long periods of time, and keeping them in darkness or under hoods. See Saar & Novak, *supra* note 30 at 223-27. The legality of these kinds of techniques under U.S. law and under international law is an ongoing issue of debate. See notes 27-28 and accompanying text. On prisoner abuse in Iraq, see generally Rick Hampson, “Abuse Less Shocking in Light of History” *USA Today* (13 May 2004), online: USA Today <http://www.usatoday.com/news/world/iraq/2004-05-13-cover-abuses_x.htm>. See also Gary D. Solis, “Obedience to Orders: History and Abuses at Abu Ghraib Prison” (2004) 2 *Journal of International Criminal Justice* 988.

⁴³ See Suzanne Goldenberg, “End of Infamous Prison: Abu Ghraib, Symbol of America’s Shame, to Close Within Three Months” *The [London] Guardian* (10 March 2006) 3 (Brigadier Janis Karpinski was demoted to colonel in 2005); Bob Dart, “Abu Ghraib Aftermath: Where Does the Buck Stop?” *The Atlanta Journal-Constitution* (3 May 2005) A1 (discussing issues of chain of command).

⁴⁴ See Human Rights Watch, *Getting Away with Torture? Command Responsibility for the U.S. Abuse of Detainees* (April 2005) at 19, online: Human Rights Watch <<http://www.hrw.org/reports/2005/us0405/us0405.pdf>>. Those directives apparently included explicit instruction that the Third and Fourth Geneva Conventions of 1949, addressing treatment of prisoners of war and civilians, did not apply to the detainees under U.S. control in Guantánamo Bay despite contrary prior interpretations used by the military. See Saar & Novak, *supra* note 30 at 161-65; Lt. Col. Paul E. Kantwill & Maj. Sean Watts, “Hostile Protected Persons or ‘Extra-Conventional Persons:’ How Unlawful Combatants in the War on Terrorism Posed Extraordinary Challenges for Military Attorneys and Commanders” (2005) 28 *Fordham Int’l L.J.* 681 at 688-705, 716, 722-29. The president issued a memorandum “determin[ing] that common Article 3 of [the] Geneva [Conventions] does not apply to either al Qaeda or Taliban detainees, because ... the ... conflicts are international in scope and common Article 3 applies only to ‘armed conflict not of an international character.’” Moreover, the memo stated that “the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4,” and that Article 4 does not apply to al Qaeda detainees or the conflict with al Qaeda

violations committed by their soldiers—is as important as holding individual soldiers responsible for following illegal orders.⁴⁵

There are often powerful incentives against moving up the chain of command in holding people accountable for military abuses. Loyalty, hopes for promotion, fears of retaliation, and solidarity with those in authority explain some of the reasons why prosecutions of higher authorities so seldom follow military atrocities, even though the doctrine of command responsibility obviates the difficulties in establishing orders or actual knowledge in advance of the violations. Yet, precisely because there is a chain of command, responsibility for failing to prevent or halt abusive practices can and must be asserted. Moreover, the prospects for establishing norms and preventing atrocities depend on leaders who influence military culture and practice as a whole.⁴⁶ International criminal tribunals may be more willing than domestic courts or internal military tribunals to enforce command responsibility. Notably, the International Criminal Tribunal for the Former Yugoslavia found a prison camp commander guilty under the doctrine of command responsibility for acts of murder, torture, and infliction of great suffering as committed by his subordinates at the camp he commanded for six months because he “was fully aware of the fact that the guards at

(Memorandum re: Humane Treatment of al Qaeda and Taliban Detainees from George Bush, President to The Vice President, The Secretary of State, The Secretary of Defense, The Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs, Chairman of the Joint Chiefs of Staff (7 February 2002) at 2, online: The National Security Archive, The George Washington University <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf>>, reprinted in Saar & Novak, *supra* note 30 at 275-76). Classified communications from FBI agents report abuses of prisoners at Guantánamo. Agents described “finding prisoners ‘chained hand and foot in a fetal position’ for up to 24 hours at a time, ... prisoners who had ‘urinated or defecated on themselves,’ ... a detainee [who] had been ‘gagged with duct tape that covered much of his head,’” and others subject to sexual and religious taunting by interrogators (*60 Minutes: Torture, Cover-Up at Gitmo?* (CBS News television broadcast 1 May 2005), online: CBS News <<http://cbsnews.com/stories/2005/04/28/60minutes/main691602.shtml>>).

⁴⁵ Command responsibility is the doctrine under which the commander is responsible for the misconduct of those under command if they acted “in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof” (U.S., Department of the Army, *The Law of Land Warfare* (FM 27-10) at para. 501 (July 1956), cited in Col. William G. Eckhardt, “Command Criminal Responsibility: A Plea for a Workable Standard” (1982) 97 *Mil. L. Rev.* 1 at 31).

See also A.P.V. Rogers, “Command Responsibility Under the Law of War”, online: Lauterpacht Centre for International Law, University of Cambridge <http://www.lcil.cam.ac.uk/lectures/lecture_papers.php> (“even if [the commander] does not participate directly, the fact that a breach was committed by a subordinate will not absolve a superior from responsibility if he knew or ought to have known that it was being committed and did nothing to prevent it or bring the offender to justice” at 17, paraphrasing *Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I)*, 8 June 1977, 1125 U.N.T.S. 3, art. 86, Can. T.S. 1991 No. 2 (entered into force 7 December 1978)).

⁴⁶ See Parts IV.C.2 and IV.C.3, below (discussing military culture and organization).

the Celebici prison-camp were engaged in violations of international humanitarian law.”⁴⁷

But whether or not prosecutions of higher authorities proceed, it is also right to punish individual soldiers, like Army Reserve Private Lynndie England, who actually commit abuses. Even if they thought they were following orders,⁴⁸ they knew, or should have known, that they were engaged in conduct departing from acceptable standards.⁴⁹ They should be held responsible because excusing them sends a wrong

⁴⁷ *Prosecutor v. Zejnil Delalic*, IT-96-21-T, Judgment (16 November 1998) at paras. 722, 770 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber). The *Rome Statute of the International Criminal Court* details the terms of command responsibility in the following way:

28. In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(1) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(a) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(b) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(2) With respect to superior and subordinate relationships not described in paragraph 1, a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(b) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution (17 July 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (entered into force 1 July 2002) [*Rome Statute*]).

⁴⁸ England told CBS reporter Brian Maass, “To all of us who have been charged, we all agree that we don’t feel like we were doing things that we weren’t supposed to, because we were told to do them. We think everything was justified, because we were instructed to do this and to do that” (quoted in *Private in Prison Abuse Photos Shares Her Story* (CBS4 Denver television broadcast 11 May 2004), online: CBS4 Denver <http://cbs4denver.com/topstories/local_story_132222538.html>).

⁴⁹ England noted that she thought the conduct that they were pursuing was “kind of weird” (*ibid.*). The whistle blower who shared the photos of the abusive conduct ultimately received praise as the

and dangerous message to other soldiers, the nation, and the world. This is the implicit message behind the refusal of the Nuremberg Tribunal to accept the superior orders defence, but subsequent legal developments have complicated the point.

II. Superior Orders: From the Nuremberg Trials to Today

Under an old conception, advanced by Cicero and Thomas Hobbes, the law should impute soldiers' actions to the superior, not the subordinate who obeys authority.⁵⁰ In this view, individual soldiers should not be held responsible for following the directives of their authorized commanders. It is precisely this traditional view that the Nuremberg International Military Tribunal resisted. Very often cited to demonstrate this rejection is the decision of a court run by the United States in one of the proceedings following the judgments by the Nuremberg Tribunal. In the *Einsatzgruppen Case*,⁵¹ the United States pursued elite military squads who followed the regular German army into the Soviet Union and Poland, rounded up civilians, and killed them. Applying the Nuremberg Tribunal's rules, the court found all twenty-four of the defendants guilty of war crimes and wrote an opinion with this vivid explanation:

The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. ... The fact that a soldier may not, without incurring

world community condemned the behaviour of England and others. See *Praise for Iraq Whistleblower* (CBS News television broadcast, 10 May 2004), online: CBS News <<http://www.cbsnews.com/stories/2004/05/10/iraq/main616660.shtml>>. But see Wil S. Hylton, "GQ Exclusive: The Conscience of Joe Darby", online: Peace Redding <<http://www.peaceredding.org/The%20Conscience%20of%20Joe%20Darby.htm>>.

⁵⁰ See e.g. Nico Keijzer, *Military Obedience* (Alpena an den Rijn, Neth.: Sijthoff & Noordhoff, 1978) at 145 (discussing Cicero), 146-47 (discussing Thomas Hobbes). See Thomas Hobbes, *De Cive: Latin Version* (Oxford: Clarendon Press, 1983) c. 12 at ss. 1-2. British courts rejected this view in the seventeenth century. See McCoubrey, *supra* note 5 at 163-71.

⁵¹ *United States v. Otto Ohlendorf (Einsatzgruppen Case)* (1950), 4 Trials of War Criminals 1 [*Einsatzgruppen Case*]. It became known as the *Einsatzgruppen Case* because all of the defendants were charged with criminal conduct arising from their functions as members of the Einsatzgruppen, special task forces formed in May 1941 at the direction of Hitler and Heinrich Himmler just before the German attack on Russia. These units consisted of some four thousand men who followed regular Germany army troops into conquered territory, usually in the Soviet Union. There they would round up Jews, gypsies, and others, including Soviet Communist party officials. The prisoners would then be executed and their bodies dumped into pits. The defendants were not the decision makers but members of the units who engaged in these mass roundups and killings. When the trial of the Einsatzgruppen opened in 1947, Benjamin Ferencz told the court, "[T]he slaughter committed by these defendants was dictated, not by military necessity, but by that supreme perversion of thought, the Nazi theory of the master race" (*ibid.* at 30). See Dr. Stuart D. Stein, "The 'Einsatzgruppen Case'", online: Web Genocide Documentation Centre, University of the West of England <http://www.ess.uwe.ac.uk/genocide/einsatzgruppen_case_index_page.htm>; Michael Montgomery, Stephen Smith & Deborah George, "Elite Military Killing Squads" in *Justice on Trial, Part 1: The Legacy of Nuremberg* (2002), online: American RadioWorks <<http://americanradioworks.publicradio.org/features/justiceontrial/nuremberg2.html>>.

unfavorable consequences, refuse to drill, salute, exercise, reconnoiter, and even go into battle, does not mean that he must fulfill every demand put to him.

...

The subordinate is bound only to obey the lawful orders of his superior and if he accepts a criminal order and executes it with a malice of his own, he may not plead superior orders in mitigation of his offense.⁵²

Here the court noted that it had the benefit of precedent in Imperial Germany to the same effect.⁵³ Nazi Propaganda Minister Joseph Goebbels had publicly embraced what he deemed to be international law on the subject when he ridiculed the plea of superior orders proffered by captured Allied pilots in 1944,⁵⁴ and the Nazi leaders during this period stated that they rejected the following orders defence.⁵⁵

Particular nations have over time recognized, rejected, and then recognized anew the superior orders defence. The United States and Great Britain, for example, have shifted positions, at times rejecting the defence, at times permitting it.⁵⁶ The two countries shifted once more in devising plans for what became the International Military Tribunal hearings in Nuremberg, Germany. While World War II still raged, Allied leaders began to talk about an international tribunal to be held after the war and even in early discussions urged that “following orders” should not be permitted as a defence.⁵⁷ Early attention to the topic showed that the tribunal idea was serious enough to require working out such details, but it also underscored the degree to which discussion of a postwar tribunal reflected hopes of deterring further atrocities during the war while raising the morale of the troops.⁵⁸ In 1943, leaders of seventeen

⁵² *Einsatzgruppen Case*, *ibid.* at 411, 470-71.

⁵³ See Gary D. Solis, “Obedience of Orders and the Law of War: Judicial Applications in American Forums” (1999) 15 *Am. U. Int’l L. Rev.* 481 at 495.

⁵⁴ United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: His Majesty’s Stationery Office, 1948) at 288, cited in Solis, *ibid.* at 511. See also Morris Greenspan, *The Modern Law of Land Warfare* (Berkeley: University of California Press, 1959) at 442.

⁵⁵ See Solis, *ibid.* at 511.

⁵⁶ *Ibid.*

⁵⁷ See Howard S. Levie, “The Rise and Fall of an Internationally Codified Denial of the Defense of Superior Orders” (1991) 30 *The Military Law and Law of War Review* 183 at 189-90. The first instance of a judicial response to atrocity focused on Sir Peter von Hagenbach, who was charged with murder and other violations in a court created by the Archduke of Austria in 1474 specifically to create a legal forum rather than summary execution. Von Hagenbach defended himself on the grounds that he was just following orders to maintain security as governor of a town in the Upper Rhine; thus, his case launched both the legal response to atrocity and the debate over the defence of following orders. See Don Murray, “Judge and Master” *CBC News* (18 July 2002), online: <http://www.cbc.ca/news/reportsfromabroad/murray/20020718.html>.

⁵⁸ See Hillel Levine, “Between Social Legitimation and Moral Legitimacy in Military Commitment” in Thomas C. Wyatt & Reuven Gal, eds., *Legitimacy and Commitment in the Military* (New York: Greenwood Press, 1990) 9 at 9, 11.

nations met as part of the United Nations Commission for the Investigation of War Crimes and began to debate the rules and structures for such trials.

A proposal drafted by the U.S. participants in 1945 specified that defendants would not be allowed an absolute defence based on “act[ing] pursuant to order of a superior or government sanction” but would be permitted mitigation of punishment on the basis of superior orders or government sanction.⁵⁹ The actual *Charter of the International Military Tribunal* ultimately drawn up to govern the Nuremberg trials went even further, restricting the use of “superior orders” to mitigating punishment only in instances where justice so requires.⁶⁰ Yet despite the popular understanding that the Nuremberg Tribunal flatly rejected the defence, following superior orders did not disappear from consideration. Instead, it moved from the assessment of guilt to the assessment of punishment.⁶¹

In trials before the tribunal, defence counsel repeatedly asserted that their clients were following orders, and they did not confine such assertions to the mitigation of punishment. Thus, lawyers for Field Marshal Wilhelm Keitel and Colonel General Alfred Jodl argued that the defendants were following orders and thus not only should have mitigated punishment but also should have no criminal liability.⁶² The tribunal explicitly rejected all of these claims and announced that the law of all nations rejected a defence based on superior orders to kill or torture in violation of international law.⁶³ Some judges at Nuremberg wanted to go further. They urged holding defendants responsible unless they lacked a “moral choice”—a personal capacity to act differently without risking one’s own life or the safety of one’s family.⁶⁴ This concept in contemporary terms has more in common with the defence

⁵⁹ American Draft of Definitive Proposal, Presented to Foreign Ministers at San Francisco, April 1945, art. 11 in U.S., Department of State, *Report of Robert H. Jackson: United Nations Representative to the International Conference on Military Trials, London, 1945* (Washington, D.C.: United States Government Printing Office, 1949) at 24, cited in Levie, *supra* note 57 at 190.

⁶⁰ 8 August 1945, 82 U.N.T.S. 280, art. 8, 59 U.S. Stat. 1544 [*Charter of the IMT*].

⁶¹ *Ibid.* (“The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires”).

⁶² See *United States v. Karl Brandt (Medical Case)* (1947), 1 *Trials of War Criminals* at 290-91, 325.

⁶³ U.K., H.C., “Judgment of the International Military Tribunal for the Trial of German Major War Criminals (With the Dissenting Opinion of the Soviet Member)”, Cmd 6964 in *Sessional Papers*, vol. 25 (1946-47) 511 at 556.

⁶⁴ See Charles Garraway, “Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied” (1999) 81 *Int’l Rev. Red Cross* 785. Article 6 of the *Charter of the International Military Tribunal for the Far East*, 19 January 1946, T.I.A.S. No. 1589, 4 *Bevans* 20 [*Tokyo Charter*] echoes article 8 of *Charter of the IMT*, *supra* note 60, and the Tokyo Tribunal heard and rejected defences based on superior orders. See *Re Masuda* (1945), 13 *A.D.I.L.* 286 at 287 (U.S. Military Commission). Because higher authorities were available for those prosecutions, including that of General Tomoyuki Yamashita, the Tokyo Tribunal had to focus as well on the scope of command responsibility, that is, the question of when a commander should be held responsible for conduct committed by his troops whether implicitly authorized or not. See Solis, *supra* note 53 at 514.

of duress, and indeed, duress has sometimes been confused with the defence of superior orders.⁶⁵

Yet, after the Nuremberg trials, diplomatic efforts to establish a permanent international criminal court and to codify the rejection of the superior orders defence foundered as Western powers and the Soviet Union approached each negotiation in light of Cold War tensions.⁶⁶ Despite long meetings with expert committees, the United Nations could not secure agreement on proposed codifications of the laws of war, peace, and security; efforts to formulate principles from Nuremberg failed.⁶⁷ Nor could the International Red Cross summon sufficient support to include the superior orders provision in the 1949 Geneva Conventions or the 1977 follow-up protocol.⁶⁸ National representatives disagreed over whether soldiers should ever be expected to think for themselves and decide whether or not to obey orders.⁶⁹

Some experts conclude that this failure by any international group to adopt a formal statement rejecting the defence of superior orders means that the defence is now available.⁷⁰ One scholar argues that because international law has not clearly rejected the superior orders defence, defence counsel in war crimes trials who do not assert a defence of superior orders would be “professionally derelict.”⁷¹ Others emphasize that even the Nuremberg formulation preserved the defence in connection with coercion or lack of moral choice, or in limited circumstances.⁷²

⁶⁵ See Suzannah Linton & Caitlin Reiger, “The Evolving Jurisprudence and Practice of East Timor’s Special Panels for Serious Crimes on Admissions of Guilt, Duress and Superior Orders” (2001) 4 Y.B. Int’l Human. L. 167 at 169-78.

⁶⁶ See Matthew Lippman, “The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later” (1998) 15 Ariz. J. Int’l & Comp. L. 415 at 459.

⁶⁷ See Levie, *supra* note 57 at 199.

⁶⁸ See *ibid.* at 199-203; Garraway, *supra* note 64 at 785-94.

⁶⁹ See International Committee of the Red Cross, *Report on the Work of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Second Session, Geneva, July 1972*, vol. 1 (Geneva: International Committee of the Red Cross, 1972) at 188.

⁷⁰ In his August 2002 memorandum explaining why the *Convention Against Torture*, *supra* note 35 would not prevent the use of coercive practices in interrogation, then-Assistant Attorney General Jay Bybee indicated that superior orders could be a defence in an international prosecution for violations of the *Convention Against Torture*. See Memorandum re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340, 2340A, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice to Alberto R. Gonzales, Counsel to the President (1 August 2002) at 45, online: FindLaw <<http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/doj/bybee80102mem.pdf>>, reprinted in Greenberg & Dratel, *supra* note 27 at 172-217 [Bybee Memorandum].

⁷¹ Levie, *supra* note 57 at 204.

⁷² See *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, UN SCOR, 48th Sess., Supp. April, May and June 1993, UN Doc. S/25704, 117 at para. 57; Theodore Meron, *War Crimes Comes of Age: Essays* (New York: Oxford University Press, 1998) at 224; *Report of the International Law Commission on the Work of its Thirty-Ninth Session*, UN GAOR, 42d Sess., Supp. No. 10, UN Doc. A/42/10 (1987) at 16-20. Obedience to superior orders is not a defence under customary international law to an international crime when the order is manifestly

Most experts, in contrast, emphasize that even though efforts to codify the rejection of the superior orders defence failed, developing international law eliminates the defence in the case of orders that are manifestly illegal.⁷³ This leaves the defence available to soldiers who can show that the orders they followed were not clearly and obviously illegal. Chief sources for this idea of an emerging international legal norm on the subject are the charters authorizing international tribunals in the past decade. Thus, the United Nations Security Council followed the Nuremberg Tribunal's rejection of superior orders when it authorized the ad hoc International Criminal Tribunal for the Former Yugoslavia ("ICTY").⁷⁴ That tribunal in a recent case ruled that the sheer presence of superior orders is neither a defence nor sufficient evidence of duress to serve as a defence.⁷⁵ In a separate dissenting opinion, Chief

illegal, but "[i]f the subordinate is coerced or compelled to carry out the order, the norms for the defense of coercion (compulsion) should apply" as mitigation (Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2d ed. (The Hague: Kluwer Law International, 1999) at 483).

⁷³ The resolution by the United Nations General Assembly at its first session in 1946 affirmed "the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal" (*Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*, GA Res. 95(I), UN GAOR, 1st Sess., UN Doc. A/RES/95(I) (1946) 188). For an example of analysis using this resolution to presume continuity in international law, absent the explicit contrary authority in the authorization of new tribunals, see Christopher Staker, "Defence of Superior Orders Revisited" (2005) 79 *Austl. L.J.* 431 at 431-32.

⁷⁴ *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991* (1993), Annex to Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), *supra* note 72, 134 [ICTY Statute]. The United Nations proceeded with very similar language when it authorized the International Criminal Tribunal for Rwanda. See *Statute of the International Tribunal for Rwanda*, Annex to SC Res. 955, UN SCOR, 49th Sess., UN Doc. S/RES/955 (1994) 15 [ICTR Statute]. For the adoption of these respective statutes, see SC Res. 827, UN SCOR, 48th Sess., UN Doc. S/RES/827 (1993) 29 at para. 2 (Yugoslavia) and SC Res. 955, *ibid.* at para. 1 (Rwanda).

⁷⁵ Although these abstract statements have not yet received much application in practice, the ICTY has reinforced the principle that following superior orders by itself does not supply a defence to a charge of war crimes, genocide, or crimes against humanity. In a case that did not squarely raise the question, four judges of the ICTY emphasized that acting in compliance with superior orders cannot by itself serve as a defence; a threat to the defendant's life or limb could supply evidence of duress, but the presence of orders would not satisfy the requirements of this defence. See *Prosecutor v. Drazen Erdemovic*, IT-96-22-A, Separate and Dissenting Opinion of Judge Cassesse (7 October 1997) (ICTY, Appeals Chamber); *Prosecutor v. Drazen Erdemovic*, IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah (7 October 1997) at paras. 34-36 (ICTY, Appeals Chamber); *Prosecutor v. Drazen Erdemovic*, IT-96-22-A, Separate and Dissenting Opinion of Judge Stephen (7 October 1997) at paras. 59-60 (ICTY, Appeals Chamber). The Trial Chamber of the ICTY has subsequently recognized this distinction between superior orders and duress. The tribunal concluded that the defendant was acting in accordance with the orders of a commanding officer but found no evidence of threats causing duress when the defendant participated in a massacre of around two hundred civilians. See *Prosecutor v. Darko Mrda*, IT-02-59-S, Sentencing Judgment (31 March 2004) at para. 67 (ICTY, Trial Chamber I). Moreover, the tribunal emphasized that orders to participate in the massacre "were so manifestly unlawful" that the defendant "must have been well aware that they

Judge Antonio Cassese maintained that not only does an illegal order provide no defence but that a soldier also has a duty to disobey an order that is manifestly illegal.⁷⁶

The United Nations authorizations for the ad hoc International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone each omit superior orders as a defence but permit the use of superior orders to mitigate punishment.⁷⁷ After some initial ambiguity, so have the Special Panels to hear Serious Crimes in East Timor⁷⁸ and the *Statute of the Iraqi Special Tribunal*, signed by the administrator of the Coalition Provision Authority.⁷⁹ Yet while each uses the same approach, denying a defence based on superior orders but permitting mitigation if justice so requires, there are complications. Superior orders did supply a defence at the time the mass violence in East Timor was committed, so the tribunal's elimination of the defence raises the danger of punishment under a retroactive law.⁸⁰ In addition, an illegal order may still give rise to a defence without any assessment of whether it was manifestly illegal.⁸¹ Given these ambiguities, one scholar recently proposed that the United States permit detainees in Guantánamo to assert the superior orders defence.⁸²

violated the most elementary laws of war and the basic dictates of humanity." Therefore, reasoned the court, the fact that the defendant "obeyed such orders, as opposed to acting on his own initiative, does not merit mitigation of punishment" (*ibid.*).

⁷⁶ *Prosecutor v. Drazen Erdemovic*, IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, *ibid.* at paras. 14-19.

⁷⁷ For Rwanda, see *ICTR Statute*, *supra* note 74, art. 6(1). For Sierra Leone, see *Statute of the Special Court for Sierra Leone*, Enclosure to UN SC, *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, UN Doc. S/2000/915 (October 2000), art. 6(4) [mimeo.] [*SCSL Statute*] ("The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires"). See also *Prosecutor v. Morris Kallon*, SCSL-2004-14-AR72E, Decision on Constitutionality and Lack of Jurisdiction (13 March 2004) at para. 62 (Special Court for Sierra Leone, Appeals Chamber).

⁷⁸ *On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses*, TAET Reg. 2000/15, UN Doc. UNTAET/REG/2000/15, s. 21 [mimeo.]. For illustration of ambiguity in initial drafts, see Human Rights Watch, "Unfinished Business: Justice for East Timor" (August 2000), online: Human Rights Watch <<http://www.hrw.org/backgrounder/asia/timor/etimor-back0829.htm>> (urging limits on superior orders defences).

⁷⁹ *The Statute of the Iraqi Special Tribunal*, GC/Law/10 December 2003/1, Al Waqai Al-Iraqiya Official Gazette of Iraq 2003, vol. 44, No. 3980 at 127, art. 15(e). For delegation of authority for the tribunal, see Coalition Provisional Authority, Order 48, Appendix A, *The Statute of the Iraqi Special Tribunal*, CPA/Ord/10 December 2003/48, Al Waqai Al-Iraqiya Official Gazette of Iraq 2003, Vol. 44 No. 3980 at 125.

⁸⁰ See Linton & Reiger, *supra* note 65 at 34.

⁸¹ See *ibid.* at 44 (considering application of the defence in the East Timor situation). The authors also suggest that the cultural context may make obedience to orders especially compelling there (*ibid.* at 45).

⁸² See James. B. Insko, "Defense of Superior Orders Before Military Commissions" (2003) 13 *Duke J. Comp. & Int'l L.* 389 at 416-17 (proposing that detainees should be able to assert the defence in order to identify their intentions and whether they had acted under duress or mistake).

The drafters of the treaty authorizing the International Criminal Court departed from the other recent statements by permitting the defence where the order, given by a superior to a subordinate, was not manifestly unlawful and where the soldier did not know the order was unlawful.⁸³ A soldier charged with war crimes—though not genocide or crimes against humanity—can defend himself or herself from criminal liability by satisfying three conditions: that he or she was legally obligated to follow the orders to commit the war crimes, that he or she did not know the orders were illegal, and that the orders were not on their face manifestly illegal.⁸⁴ Moreover, though this seems excessively literal, a soldier charged with war crimes might be able to assert such a defence if the order in question was not phrased expressly as an order “to commit genocide” or an order “to commit ... crimes against humanity.”⁸⁵ The appellate panel interpreting this law incorporated the moral choice test, further expanding the potential availability of the defence to situations where the soldier experiences duress.⁸⁶

⁸³ The *Rome Statute*, *supra* note 47 authorizing the creation of the Permanent International Criminal Court, makes clear that it is no defence to follow orders that are manifestly illegal, and it defines orders to commit genocide and crimes against humanity as manifestly illegal. Yet, it specifically permits the defence in other circumstances. Article 33 of the *Rome Statute*, entitled “Superior orders and prescription of law”, states:

(1) The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

- (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
- (b) The person did not know that the order was unlawful; and
- (c) The order was not manifestly unlawful.

(2) For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful (*ibid.*).

Although the ICC has not yet interpreted this statute, it seems to permit the defence in circumstances that the other tribunals would forbid. One scholar argues that “although a defence of superior orders is now expressly recognised in Art 33 of the ICC Statute, that defence does not yet form part of customary international law. Rather, in customary international law, the Nuremberg principle still prevails, according to which superior orders is no defence but may be taken into account in mitigation of sentence” (Staker, *supra* note 73 at 446). Staker warns that inconsistencies between the ICC and the Nuremberg principle could produce different results based entirely on where a person happens to be tried (*ibid.* at 447).

⁸⁴ *Rome Statute*, *ibid.*, art. 33(1).

⁸⁵ *Ibid.*, art. 33(2).

⁸⁶ See *Prosecutor v. Drazen Erdemovic*, IT-96-22-T, Sentencing Judgment (29 November 1996) at paras. 14-19 (ICTY, Trial Chamber); *Prosecutor v. Drazen Erdemovic*, IT-96-22-A, Judgment (7 October 1997) (ICTY, Appeals Chamber). See also Garraway, *supra* note 64; Paola Gaeta, “The Defence of Superior Orders: The Statute of the International Criminal Court *versus* Customary International Law” (1999) 10 E.J.I.L. 172 at 173, 184, 187.

Several countries committed to the ICC have already amended their domestic law to match the ICC standard on superior orders.⁸⁷ If many come to do so, this could change the status of the defence in customary international law, for it would show a shift in custom. In the meantime, without having endorsed the ICC, the United States has indicated room for the defence under limited circumstances. Thus, the U.S. *Manual for Courts-Martial* currently permits the defence as follows: “It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.”⁸⁸ This provision not only permits superior orders as a defence but does so when a person of ordinary sense and understanding would not realize that the order is unlawful. By pegging the standard to the person of ordinary sense and understanding, this version extends the defence beyond an objective test of illegality to a standard considering ordinary persons’ knowledge of the law. Moreover, the manual indicates that doubts about the legality of an order are to be resolved in favour of its legality.⁸⁹

The Canadian version permits the defence except if the order was manifestly unlawful to a reasonable soldier under the circumstances.⁹⁰ It adopts a definition of manifest illegality as that which is “obviously and flagrantly wrong.”⁹¹ Variations over time, across nations, and among tribunals render doubtful the assertion that the

⁸⁷ See Staker, *supra* note 73 at 442-46 (describing efforts by Australia, New Zealand, and the United Kingdom to bring their domestic laws in line with the ICC treatment of superior orders).

⁸⁸ U.S., Department of Defense, *Manual for Courts-Martial* (2005), R.C.M. 916(d), online: Air University, Maxwell-Gunter Air Force Base <<http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf>> [*Manual for Courts-Martial*]. The manual’s “Discussion” of the rule explains, “An act performed pursuant to an unlawful order is excused unless the accused knew it to be unlawful or a person of ordinary sense and understanding would have known it to be unlawful,” and notes that “[o]rordinarily the lawfulness of an order is finally decided by the military judge” (*ibid.* at II-109).

⁸⁹ Despite procedural variations across Western nations, doubts about an order’s legality are generally to be resolved in favour of their legality for purposes of the defence of illegal orders. U.S. law historically directed soldiers to presume orders to be lawful, and therefore courts martial are to place on the soldier who disobeys an order that is not “patently illegal” the burden of rebutting the inference of lawfulness. See *ibid.* at para. 14(c)(2)(a)(i); Keijzer, *supra* note 50 at 97, 133 (comparing court martial rules in the U.S., U.K., France, the Netherlands, and Israel).

⁹⁰ “An act is performed in compliance with an order which is manifestly unlawful to a reasonable soldier given the circumstances prevailing at the time does not constitute a defence and cannot be pleaded in mitigation of punishment” (Canada, Department of National Defence, *Law of Armed Conflict at the Operational and Tactical Levels* (Ottawa: Department of National Defence, 2003) at para. 1615.2, online: Office of the Judge Advocate General <http://www.forces.gc.ca/jag/training/publications/law_of_armed_conflict/loac_2004_e.pdf> [*JAG Manual*]). This rule implies that, absent manifest illegality, following orders can supply a defence in Canada.

⁹¹ *Ibid.*, citing *R. v. Finta*, [1994] 1 S.C.R. 701 at 834, 112 D.L.R. (4th) 513, Cory J. The *JAG Manual* further cites Cory J. to the effect that in order for an order to be considered manifestly unlawful, “[i]t must be one that offends the conscience of every reasonable, right thinking person. It must be an order which is obviously and flagrantly wrong” (*ibid.*).

Nuremberg Tribunal rejected the superior orders defence as a matter of international law.

No single international norm governing the defence of superior orders currently exists. The following variations currently govern in different settings: there is no defence of following superior orders but superior orders provide grounds for mitigation;⁹² superior orders do supply a defence but only if the subordinate person did not know it was illegal and it was not manifestly illegal;⁹³ superior orders do supply a defence but only if the subordinate had no moral choice or latitude for free action;⁹⁴ and superior orders supply a defence if a person of ordinary sense and understanding would not know that the order is illegal.⁹⁵ Taken together, these articulations imply that there exists a set of orders that lies between the manifestly illegal order and the order that could be illegal, but is not manifestly so, and that this intermediate order could indeed be the basis for a defence against charges of atrocity.⁹⁶ This nuanced idea and each of the specific efforts to articulate the norm complicate the message that soldiers and others receive about individual responsibility. Whether phrased as a defence or instead as mitigation of punishment, the line between acceptable and unacceptable obedience to superior orders is not likely to produce clarity or changes in soldiers' conduct. Yet even these complications pale as a problem when compared with the psychological barriers to resisting orders or pressures to participate in wartime abuses.

III. Moral Development and Psychological Theories: Why Resistance to Orders is Difficult

Each of the versions of the rule poses serious difficulties of comprehension and compliance. For each of them requires individual soldiers to obey directives from superiors but also to disobey under a very limited set of circumstances. The soldier is told simultaneously, "Obey all orders" and "Do not obey a manifestly illegal one or one to commit a genocide." Under some versions, the soldier is told, "You will not face the full brunt of punishment if you did not know the order was illegal and other people of ordinary intelligence and knowledge did not know that either, but you will still face some punishment. Thus, you should take responsibility unless you cannot;

⁹² See *Charter of the IMT*, *supra* note 60, art. 8; *SCSL Statute*, *supra* note 77, art. 6(4).

⁹³ See *Rome Statute*, *supra* note 47, art. 33.

⁹⁴ See generally Levine, *supra* note 58. The impact of hierarchy on the subject's sense of choice may well vary depending on setting. Thus, the soldier "may feel there is no choice but to obey, knowing what the orders entail. In contrast, the member of a civilian bureaucracy may not know there is a need to make a choice because the orders have no known link to a harmful outcome" (Herbert C. Kelman & V. Lee Hamilton, *Crimes of Obedience: Toward a Social Psychology of Authority and Responsibility* (New Haven: Yale University Press, 1989) at 315 [emphasis in original]).

⁹⁵ See *Manual for Courts-Martial*, *supra* note 88, R.C.M. 916(d).

⁹⁶ The *Rome Statute*, *supra* note 47, art. 33(2) clarifies that superior orders never supply a defence in the ICC if the charges are genocide or crimes against humanity.

you should obey all orders unless you think you should not.” Under the version emphasizing the soldier’s moral choice, the message is: “You should resist an illegal order unless you cannot—however, people later will assess whether you could not.”

These difficulties with the legal treatment of superior orders may come to mind simply through common sense. But they are substantiated by research in moral psychology, social psychology, and cognitive psychology. Five insights from these fields expose the enormous and perhaps insurmountable difficulties in training soldiers to prevent atrocity.⁹⁷

A. Insights from Psychological Research

1. Cognitive Dissonance

Using superior orders as a defence or as mitigation of punishment effectively summons competing and indeed contradictory beliefs about authority. This is the classic set-up for what psychologists call cognitive dissonance. When we are in the presence of two conflicting messages, over time we drive one out of view because the dissonance itself is too difficult to bear.⁹⁸ As a result, we may try to change one or more of the conflicting beliefs, opinions, or behaviours to reduce the dissonance; we may look for new information to reconcile the conflicting views. Given the situation of hierarchical command, obedience to the immediate superior is the view likely to prevail. In any case, many people will find it hard to hold onto both the view that each order from a commander deserves respect and obedience and the view that the superior’s orders can be grossly illegal and must be disobeyed.

2. Heuristics and Baseline References

Another body of psychological research suggests that the specific formulation of the rule about superior orders is likely to affect how it is perceived and what judgments it generates. Research into heuristics and bias suggests that people overemphasize an “anchor” or starting point when making judgments involving a comparison between that starting point and something else; the anchor seems to affect

⁹⁷ Social scientists turned to such questions not only because of the Nuremberg trials, but also after the trial of Lt. Calley following the My Lai Massacre during the Vietnam War. See Kelman & Hamilton, *supra* note 94.

⁹⁸ See Eddie Harmon-Jones & Judson Mills, “An Introduction to Cognitive Dissonance Theory and an Overview of Current Perspectives on the Theory” in Eddie Harmon-Jones & Judson Mills, eds., *Cognitive Dissonance: Progress on a Pivotal Theory in Social Psychology* (Washington, D.C.: American Psychological Association, 1999) 3. Festinger, who originated research on the topic, indicated that people tend to try to reduce cognitive dissonance by changing one of the beliefs involved in the dissonance, trying to reduce the importance of one of the beliefs, or else trying to acquire new information or beliefs that will make the conflicting views seem consonant. See Leon Festinger, *A Theory of Cognitive Dissonance* (Stanford: Stanford University Press, 1957) at 25-26.

attention and predispose the person to certain conclusions rather than others.⁹⁹ Similarly, research on reference points indicates that the selected reference point affects perceptions and the way people assign value to options.¹⁰⁰ Hence, the starting point that treats superior orders as presumptively legal is going to affect people differently than the version stating that superior orders are no defence except under limited circumstances, even if semantically the two versions have the same meaning. Any training of soldiers that states the superior orders rule to emphasize that there is no defence based on manifestly illegal orders will invite disobedience with more salience than a statement of the rule emphasizing that, in the ordinary case, superior orders are due deference. Other research—about stages of moral development and studies of obedience and conformity—suggests dimensions of human behaviour that may well swamp the cognitive response to the statement of the rules governing superior orders or the lawfulness of the orders.

3. Kohlberg's Stages of Moral Development

Lawrence Kohlberg researched how moral reasoning shifts over the course of human development. Based on an assessment tool used to catalogue the methods and sophistication of individuals based on their responses to descriptions of hypothetical moral dilemmas, Kohlberg articulated six stages of moral development. These stages can illuminate how different people, with different degrees of sophistication in moral reasoning, would approach the conflict between following superior military orders and following conscience or moral conceptions.¹⁰¹ Kohlberg's work suggests that the moral reasoning of most adolescents and many adults is characterized by commitment to following conventions and authority. These individuals will not be likely to articulate a duty to resist manifestly illegal orders.

⁹⁹ See Amos Tversky & Daniel Kahneman, "Judgment Under Uncertainty: Heuristics and Biases" in Daniel Kahneman, Paul Slovic & Amos Tversky, eds., *Judgment Under Uncertainty: Heuristics and Biases* (Cambridge: Cambridge University Press, 1982) 3 at 14-18; Paul Slovic, Baruch Fischhoff & Sarah Lichtenstein, "Facts Versus Fears: Understanding Perceived Risk" in Kahneman, Slovic & Tversky, *ibid.*, 463 at 481-82; Daniel Kahneman, "Reference Points, Anchors, Norms, and Mixed Feelings" (1992) 51 *Organizational Behavior and Human Decision Processes* 296.

¹⁰⁰ See H.R. Arkes, "Cost and Benefits of Judgment Errors: Implications for Decisions" (1991) 110 *Psychological Bulletin* 486.

¹⁰¹ What follows draws upon William C. Crain, *Theories of Development: Concepts and Applications* (Englewood Cliffs, N.J.: Prentice Hall, 1980); Lawrence Kohlberg & Elliot Turiel, "Moral Development and Moral Education" in Gerald S. Lesser, ed., *Psychology and Educational Practice* (Glenview, Ill.: Scott, Foresman, 1971); Jean Piaget, *The Moral Judgment of The Child*, trans. by Marjorie Gabain (New York: Free Press Paperbacks, 1997); F. Clark Power, Ann Higgins & Lawrence Kohlberg, *Lawrence Kohlberg's Approach to Moral Education: Critical Assessments of Contemporary Psychology* (New York: Columbia University Press, 1989); Joseph Reimer, Diana Pritchard Paolitto, & Richard H. Hersch, *Promoting Moral Growth: From Piaget to Kohlberg*, 2d ed. (New York: Longman, 1983).

Kohlberg built on Jean Piaget's theories of human development, from childhood through adulthood, and from concrete to abstract thinking. Kohlberg studied how individuals over the course of their lives think in moral terms. He identified six stages of human development in thinking about moral issues.¹⁰² Most people, he argued, progress at least through the first several stages and very few reach the highest stage of development.

Kohlberg and others working with him found that young children start by thinking of themselves rather selfishly, and not in terms of membership in society. Young children thus talk about the right thing to do in terms of obedience: they think they should do the right thing in order to avoid punishment. When they advance a bit, they move to thinking in terms of their own self-interest but understanding that in order to get what they want, they may need to bargain or do things in exchange. At this stage the child does not simply equate punishment with wrongfulness but rather views punishment as a risk.

Most teenagers attain what Kohlberg called the "conventional" mode: they think about doing the right thing in order to develop and maintain good interpersonal relationships and in order to be a "good girl" or "good boy." When asked what people should do in response to particular moral dilemmas, at this stage a person tends to say that everyone should conform to prevailing laws or norms. A more advanced version of this emerges for many by the end of high school. Individuals at this stage justify conformity in light of larger social purposes, like the need to maintain social order.

Many people progress and come to use more abstract thinking about the need to coordinate people with different interests and needs. Typically, they use more complex bases to justify adherence to collective rules and respect for the collective arrangements specified by a constitution, including the respect accorded to individual rights of speech and autonomy. People who reason this way may call for improving society generally to incorporate moral views into laws.

¹⁰² The following table has been adapted from Kohlberg's work. In addition to the sources listed in note 101, see e.g. Lawrence Kohlberg, *The Philosophy of Moral Development: Moral Stages and the Idea of Justice*, vol. 1 (San Francisco: Harper & Row, 1981) at 17-19.

Level	Stage	Social Orientation
Preconventional	1	obedience/punishment
Preconventional	2	individualism, instrumentalism, and exchange
Conventional	3	good interpersonal relationships, good girl / good boy
Conventional	4	maintaining social order, law and order
Postconventional	5	social contract and individual rights
Postconventional	6	principled conscience

Finally, a limited number of people (Mahatma Gandhi and, as it turns out, Lawrence Kohlberg) develop beyond even this advanced stage to offer complicated assessments of right and wrong, based on universal principles and not whim or even merely national norms. Kohlberg noted how Mahatma Gandhi's thought took this advanced form.

There is a striking convergence between Kohlberg's language and the problem for the soldier who is instructed both to follow orders and to remember that it is no defence to genocide or war crimes to say that he or she was following orders. Kohlberg's stage theory may seem to imply that we each move through the phases of moral development over the course of a lifetime.¹⁰³ If that were the case, younger people would think it right simply to follow superior orders and conform with the conduct of other soldiers; adults would come to think independently about what morality requires and about acting according to their own conscience.¹⁰⁴

Yet not every person follows the path laid out in Kohlberg's stages, and dilemmas about dealing with orders arise even within stages. Thus, even the child who is focused on the risk of punishment faces tension between the punishment by the superior and the punishment by peers. When they think about moral conduct, soldiers who are concerned primarily with maintaining good interpersonal relationships and with being a "good soldier" will choose conformity and look to peers as well as authority figures. This preoccupation with conformity may characterize the majority of soldiers in the volunteer military. Many young people enter the military after high school—or, these days, accept recruitment before they finish high school. Many lack the cognitive and emotional sophistication to distinguish compliance with moral ideals from compliance with orders or peer pressure. A military that recognizes this pattern among its soldiers must cultivate leaders, organizational structures, and a peer culture committed to resisting rather than sliding into atrocities, even under the stress of war.¹⁰⁵

¹⁰³ Kohlberg controversially argued that the stages he identified are both universal, in the sense of being cross-cultural, and invariable, in the sense that every individual moves through each stage in the order listed until he or she stops somewhere on the path of development. See *ibid.* at 20ff., c. 4. Many critics through the years have challenged the assumption of invariable stage development and progression and universality of the stages. Critics have faulted the work for cultural and gender bias and what some would call self-referentialism. See e.g. Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass.: Harvard University Press, 1982) at 18, 21-22, 25-27, 30-31, 54-55, 82; Sohan Modgil & Colin Modgil, eds., *Lawrence Kohlberg: Consensus and Controversy* (Philadelphia: Falmer Press, 1986). For responses to the critics, see Lawrence Kohlberg, Charles Levine & Alexandra Hower, *Moral Stages: A Current Formulation and a Response to Critics* (New York: Karger, 1983).

¹⁰⁴ Research has not established that educational programs will enhance either the complexity of the students' moral reasoning or the likelihood that the student will behave differently—for example, will resist illegal authority.

¹⁰⁵ This conclusion departs from Kohlberg's own prescriptions, which focused on cognitive development and involved presenting students with moral dilemmas that would challenge them to

4. Milgram's Studies of Obedience

The controversial and influential studies of obedience by Stanley Milgram precisely address the issue of following orders raised by criminal defendants at the Nuremberg war crimes trials.¹⁰⁶ Milgram set up a task in which the volunteer would play the role of a “teacher” who was to help a “learner” learn a list of words. The volunteer teachers were told to administer an electric shock, with increasing voltage, each time the learner made a mistake. These were not actual electric shocks, but the volunteers did not know that. The fictitious story told to these volunteer “teachers” was that the experiment was exploring effects of punishment (for incorrect responses) on learning behaviour. The teacher was not aware that the “learner” in the study was actually an actor, merely simulating discomfort as the teacher increased the electric shocks. An “experimenter” in the booth with the teacher would encourage the teacher to push the volt-delivering button when the teacher expressed reluctance. In fact, the experimenters would tell the teachers that they had no choice but to deliver the shocks.

The “experimenters” and the “learners” were confederates, employed by Milgram. The volunteer teachers initially received assurance that there would be no lasting physical damage, but they heard and watched manifestly painful reactions to the “shocks” that they delivered; nonetheless, most went ahead. In Milgram’s repeated runs of the experiment, sixty-five per cent of the teachers were willing to administer the maximum shock of 450 volts despite the cries of pain and screams for mercy. No volunteer stopped before reaching what was marked as 300 volts. Some of the volunteers asked who would be responsible for any harmful effects resulting from shocking the learner at such a high level. When the experimenter answered that he assumed full responsibility, volunteers seemed to accept the response and continue to

think in more sophisticated ways. Kohlberg prescribed educational programs in light of his research. He developed materials for a form of moral education that would push people to experience limitations of their current stage by posing dilemmas that would prompt them even to rethink their premises and move to more complex levels of analysis. See Lawrence Kohlberg, “Stage and Sequence: The Cognitive-Developmental Approach to Socialization” in David A. Golsin, ed., *Handbook of Socialization Theory and Research* (Chicago: Rand McNally, 1969) 347; F. Clark Power, Ann Higgins, & Lawrence Kohlberg, *supra* note 101. It remains unclear whether pedagogy addressing moral dilemmas promotes enduring cognitive advances in approaching moral dilemmas, and whether any cognitive development translates into desirable behavioural outcomes.

¹⁰⁶ See Stanley Milgram, *Obedience to Authority: An Experimental View* (New York: Harper & Row, 1973); Thomas Blass, “The Social Psychology of Stanley Milgram” in Mark P. Zanna, ed., *Advances in Experimental Social Psychology*, vol. 25 (San Diego: Academic Press, 1992) 277. See also Stanley Milgram, *Obedience*, 1965, VHS (University Park, Pa.: Penn State Audio-Visual Services, 1969); Elaine Cassel, “Why Do People Want To Be Executioners? A Review of *The Last Face You’ll Ever See* by Ivan Solotaroff”, Book Review, online: Houghton Mifflin College Division <http://college.hmco.com/psychology/resources/students/shelves/shelves_20020504.html>.

administer the “shocks”, even though many expressed great discomfort with it and tried to resolve the conflict by conveying complaints to the experimenter.¹⁰⁷

These and subsequent studies raised many questions about how the subjects could bring themselves to administer such heavy shocks and about the ethical issues in conducting such research.¹⁰⁸ Follow-up studies found that factors associated with increased obedience include perceived legitimacy of the authority figure, greater distance from the victim, closer supervision by the authority figure, and the presence of people who modelled obedience.¹⁰⁹ Yet studies of nurses showed a strong tendency to follow instructions to deliver an excessive dose of medication even though the order came over the telephone from an unfamiliar physician.¹¹⁰

Milgram’s work has had real influence, including on the U.S. military. His biographer Thomas Blass reports that Milgram’s work had been integrated into two psychology courses in the U.S. Military Academy in 1985, and his work continues to remain influential in training soldiers “how to *disobey* illegitimate orders.”¹¹¹ The head of the academy’s Department of Behavioral Sciences and Leadership wrote in 1985, “One of the desired outcomes of this is that our future military leaders will be

¹⁰⁷ The preceding description of Milgram’s experiments draws from the following sources in addition to the sources listed in note 106: Stanley Milgram, “Behavior Study of Obedience” (1963) 67 *Journal of Abnormal and Social Psychology* 371; Stanley Milgram, “Group Pressure and Action Against a Person” (1964) 69 *Journal of Abnormal and Social Psychology* 137. See also Kelman & Hamilton, *supra* note 94 at 152-53; James Waller, *Becoming Evil: How Ordinary People Commit Genocide and Mass Killing* (New York: Oxford University Press, 2002) at 121-22, 209, 236, 249, 251, 274; Arthur G. Miller, Barry E. Collins & Diana E. Brief, “Perspectives on Obedience to Authority: The Legacy of the Milgram Experiments” (1995) 51:3 *Journal of Social Issues* 1.

¹⁰⁸ See *Stanley Milgram’s Experiment*, online: College of Business Administration, University of Rhode Island <<http://www.cba.uri.edu/Faculty/dellabitta/mr415s98/EthicEtcLinks/Milgram.htm>>.

¹⁰⁹ See Kelman & Hamilton, *supra* note 94 at 162-66; Waller, *supra* note 107 at 105-106; Wim H.J. Meeus & Quinten A.W. Raaijmakers, “Obedience in Modern Society: The Utrecht Studies” (1995) 51:3 *Journal of Social Issues* 155 at 159, 163. One scholar maintains that social psychological factors, such as peer behaviour and the difficulty of knowing or achieving personal goals in social conversation, influenced the level of compliance by subjects in these experiments. See Neil Lutsky, “When Is ‘Obedience’ Obedience? Conceptual and Historical Commentary” (1995) 51:3 *Journal of Social Issues* 55 at 57-62. If this is so, these factors suggest that peer influence and personal interests may contribute to the commission of atrocities alongside or instead of the sense of a duty to obey.

¹¹⁰ See Charles K. Hofling *et al.*, “An Experimental Study in Nurse-Physician Relationships” (1966) 143 *Journal of Nervous and Mental Disease* 171. On the compliance and disobedience of nurses to physician orders, see generally Annamarie Krackow & Thomas Blass, “When Nurses Obey or Defy Inappropriate Physician Orders: Attributional Differences” (1995) 10 *Journal of Social Behavior and Personality* 585.

¹¹¹ Thomas Blass, *The Man Who Shocked the World: The Life and Legacy of Stanley Milgram* (New York: Basic Books, 2004) at 278 [Blass, *Man Who Shocked*] [emphasis in original]. See also Thomas Blass, “The Man Who Shocked the World” *Psychology Today* 35:2 (March/April 2002) 68 at 73 [Blass, 2002]. The studies formed the basis of a television drama, *60 Minutes: The Tenth Level* (CBS television broadcast) and many articles in popular media. Milgram’s work has been translated into eleven languages. See Waller, *supra* note 107 at 102-103.

fully cognizant not only of their authority but also of their responsibility to make decisions that are well considered and morally sound.”¹¹²

Critics not only addressed the ethics of conducting such experiments¹¹³ but also explored whether the tendency to obey reflects an inevitable deference to authority or instead a response to particular features of the situation.¹¹⁴ One scholar recently concluded that despite the gap between the laboratory setting and combat situations, Milgram “correctly focuses our attention on the social and situational pressures that can lead ordinary people to commit extraordinary evil.”¹¹⁵ Less enduring is Milgram’s claim that such behaviour stemmed from a kind of shift into the role of passive agent without a sense of personal responsibility; neither his own evidence nor subsequent work substantiates the claim that the shifting out of a sense of personal responsibility or the development of a separate self is necessary to commit great harm.¹¹⁶

Milgram’s work has thus supported educational interventions on the premise that self-awareness for both authority figures and those who follow them can mitigate the risk of unswerving obedience to illegal commands. Subsequent work on obedience has produced greater attention to the effects of context, internalization of roles, dehumanization of victims, and peer conformity.¹¹⁷ In a parallel inquiry, Philip Zimbardo and others conducted the Stanford Prison Experiment in 1971 in which undergraduates received random assignments, some to play the role of prison guard, others to play the role of prisoner.¹¹⁸ In a few days, many of the “guards” became aggressive and abusive, and many of the “prisoners” became passive, submissive, or depressed.¹¹⁹ Zimbardo later explained, “When people are deindividuated, they are

¹¹² Quoted in Blass, 2002, *ibid.* at 73.

¹¹³ See Blass, *Man Who Shocked*, *supra* note 111 at 111-30; Alan C. Elms, “Obedience in Retrospect” (1995) 51:3 *Journal of Social Issues* 21 at 26-27. Milgram’s study may be more famous for having ushered in rigorous restrictions on the use of human subjects in experiments. Ethics considerations and concerns that some of the subjects in Milgram’s work may have experienced unhappiness and even trauma triggered a process of self-examination among university and hospital authorities about the methods used by experimenters, leading ultimately to greater regulation. See *ibid.*

¹¹⁴ See Thomas Blass, ed., *Obedience to Authority: Current Perspectives on the Milgram Paradigm* (Mahwah, N.J.: Lawrence Erlbaum Associates, 2000); Moti Nissani, “A Cognitive Reinterpretation of Stanley Milgram’s Observations on Obedience to Authority”, *Comment*, (1990) 45 *American Psychologist* 1384 at 1384.

¹¹⁵ Waller, *supra* note 107 at 108. Waller notes that Milgram’s subjects did not have certain knowledge that their actions would produce lasting damage; they did not experience years of socialization devaluing the victims; they did not show the kind of sadism sometimes exhibited by perpetrators of mass violence; and they did not have long periods of time in which to act or reflect on their actions (*ibid.* at 107-108).

¹¹⁶ See *ibid.* at 111, 120-123. See also Nissani, *supra* note 114.

¹¹⁷ See Waller, *supra* note 107 at 133-35, 180-82, 195-96, 202-20, 225-30, 247-49.

¹¹⁸ Craig Haney, Curtis Banks & Philip Zimbardo, “Interpersonal Dynamics in a Simulated Prison” (1973) 1 *International Journal of Criminology and Penology* 69.

¹¹⁹ *Ibid.* See also Philip G. Zimbardo, *Stanford Prison Experiment*, online: Stanford Prison Experiment <<http://www.prisonexp.org/>>.

usually put in herds, or groups, and given numbers. Their identity is taken away.”¹²⁰ Zimbardo concluded that the abuses by guards in the Abu Ghraib prison were predictable because “the guards had a mob mentality, a group mindset. You start to do things because other people in your group are doing them.”¹²¹ The loss of individual identity in the situation reflects elements of conformity as much as obedience.¹²² This points toward another line of research.

5. Studies of Conformity

One more set of insights relevant to the issue of obeying orders deals with the dynamics of group conformity and social cohesion. Psychologist Solomon Asch showed that an individual is likely to go along with the statements of others about the perceived length of lines on a card; three quarters of subjects in the experiment conformed at least once even though that meant suppressing their knowledge of an obvious fact.¹²³ More recent efforts to replicate the study fail to do so. That has led psychologists to conclude that conformity is affected by culture, child-rearing, and other factors, and does not represent a stable feature of human interactions.¹²⁴

Yet studies of processes of social obedience indicate that some people comply with directed behaviour not because they believe it, but because it will achieve an effect they want. Such effects can include avoiding conflict with a closely supervising authority figure.¹²⁵ Conformity can similarly appeal to those who want to avoid being ridiculed or rejected by peers, and conformity pressures increase in groups with cohesive ties built by affection or mutual dependence. The military epitomizes such a group.

¹²⁰ Quoted in Nastassia Lopez, “Abuse At Iraqi Prison Predictable, Decades-Old Study Shows” MTV (27 May 2004), online: MTV <<http://www.mtv.com/chooseorlose/headlines/news.jhtml?id=1487984>>.

¹²¹ *Ibid.*

¹²² Willingness to torture also goes beyond obedience to authority often in involving the individual in a culture of violence, turning torture into normal behaviour. See Mika Haritos-Fatouros, “The Official Torturer: A Learning Model of Obedience to the Authority of Violence” in Ronald D. Crelinsten & Alex P. Schmid, eds., *The Politics of Pain: Torturers and Their Masters* (Boulder, Colo.: Westview Press, 1995) 129.

¹²³ See Solomon E. Asch, “Studies of Independence and Conformity: I. A Minority of One Against a Unanimous Majority” (1956) 70:9 *Psychological Monographs* 1 at 9-10. See also S.E. Asch, “Effects of Group Pressure Upon the Modification and Distortion of Judgments” in Harold Guetzkow, ed., *Groups, Leadership and Men* (New York: Russell & Russell, 1963) 177; Solomon E. Asch, *Social Psychology* (New York: Prentice Hall, 1952) at 450-59.

¹²⁴ See Marie-France Lalancette & Lionel Standing, “Asch Fails Again” (1990) 18 *Social Behavior and Personality* 7; Steven Perrin & Christopher Spencer, “The Asch Effect—A Child of Its Time?” (1980) 33 *Bulletin of the British Psychological Society* 405.

¹²⁵ See Kelman & Hamilton, *supra* note 94. They distinguish this stance from identification, when one is oriented toward fulfilling a role that calls for the behaviour in question, and from internalization, when someone accepts the authority because it matches his or her own value system. See *ibid.* at 103-16.

The power of conformity as an influence when members of the military follow orders to kill civilians is exhibited in Christopher Browning's historical study of a battalion of German policemen pressed into service in World War II.¹²⁶ This battalion was responsible for killing 38,000 Jews. Browning studied interviews conducted after the war with the men who mainly returned to their homes and ordinary lives. On the first day of the mass killing, the commander permitted members of the battalion to opt out of the killing. A handful did at first, and more did over the course of the day, but no more than twenty per cent ever did. Most indicated horror or disgust over their involvement in the massacre. Browning concluded that group conformity and the desire not to be seen as cowards by others or be ostracized by the battalion helped to explain their conduct. Some also conceived of their participation as sharing in an unpleasant collective duty.¹²⁷ The records of the men also showed that they did not for the most part have anti-Semitic views at the start of the operation. Many over time overcame an initial reluctance to participate in the mass slaughter.¹²⁸ Similar dynamics seem to accompany the activities of bullies in schools. Peer pressure and conformity affect classmates who assist, encourage, or simply remain silent in the face of the bully.¹²⁹

Peer pressure is one of the key mechanisms through which obedience to higher authority works. Developing a strong enough sense of self and beliefs to stand up for what is right often means risking disapproval from peers. How can we expect people to develop the clear-sightedness to know an illegal order (whether explicit or implicit) when they see one and to practice resisting authority—and group pressure—when we also expect people generally to respect and conform to authority? There is an unavoidable tension between conformity and independence. Conformity permits

¹²⁶ Christopher R. Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (New York: Harper Collins, 1992).

¹²⁷ See *ibid.* at 161, 185.

¹²⁸ See *ibid.* Daniel Goldhagen wrote a more controversial piece using some of the same sources and arguing that the ideology of anti-Semitism, rather than social conformity, motivated these men, thus making the killings voluntary. See Daniel Jonah Goldhagen, *Hitler's Willing Executioners: Ordinary Germany and the Holocaust* (New York: Alfred A. Knopf, 1996). See also Daniel Jonah Goldhagen, "The Evil of Banality", Book Review of *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* by Christopher R. Browning, *The New Republic* 207:3-4 (15 July 1992) 49. In the Afterword of the 1998 reissue of his book, Browning tries to refute Goldhagen's argument. See Christopher R. Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland*, reissued 1st ed. (New York: Harper Perennial, 1998) at 191-223. See also Waller, *supra* note 107 at 29-49 (challenging Goldhagen's claims as illogical, unsubstantiated, and unable to explain other genocides and mass killings). On the importance and rarity of nonconformity in the context of genocide and mass killings, see Michael Geyer & John W. Boyer, eds., *Resistance against the Third Reich, 1933-1990* (Chicago: University of Chicago Press, 1994) (discussing rare nonconformists who resisted the Third Reich).

¹²⁹ See Dan Olweus, *Bullying at School: What We Know and What We Can Do* (Cambridge, Mass.: Blackwell, 1993) at 34-35, 43-45. See also David P. Farrington, "Understanding and Preventing Bullying" in Michael Tonry, ed., *Crime and Justice: A Review of Research*, vol. 17 (Chicago: University of Chicago Press, 1993) 381.

order but also risks groupthink and even mass atrocity, while independence promotes resistance to atrocity but risks disorder and inefficiency.

B. Learning from Psychology: Ordinary Soldiers Are Not Well Placed to Prevent Atrocity

Taken together, these five kinds of social science research generate real doubts about the efficacy of relying on the judgment and conduct of ordinary soldiers to prevent atrocities that stem from the orders of superiors, the lax supervision of superiors, or permission by superiors. Cognitive dissonance arises when individuals are expected both to respect and question superior orders, and the dominant message—here, the obligation to follow orders—will most likely push out the countermesssage. As studies of heuristics show, stating the rule about liability for following superior orders in terms of a prohibition with exceptions will be understood differently than the emerging statement of the rule as permission with limitations. Stage development theory underscores that most young soldiers will approach moral questions by thinking about approval and disapproval by peers and authority figures; expecting people to distinguish illegal and legal orders neglects the pervasiveness of this kind of conventional moral thinking and the preference for compliance and getting along. Holding people responsible or punishable for following orders does not match evidence about the psychological readiness of individuals to take and follow orders from people they understand as authority figures. Nor does it comport with evidence of how ready people are to identify with an assigned role and to conform to group behaviour. Thus, on the basis of varied sources of social science research, we can predict that soldiers will follow orders whether legal or illegal, that soldiers will conform to expectations of superiors and peers, and that soldiers will be unlikely to resist a commander or peer group authorizing or engaging in atrocities. Indeed, many or even most of these young soldiers will be inclined to obey authority and to conform—whether to the commands of the authority or, what is more chilling, to abusive conduct started by some of their peers.

But excusing people on any of these bases compounds the risks of catastrophic abuses committed by soldiers and communicates disregard for the values of human decency and individual responsibility. So what should the military and civilian authorities do with the defence of superior orders; what should they do to prevent military atrocities? I argue in the next part for separating these two questions: there should be a rule regarding superior orders, but the primary effort to prevent military atrocities must pursue other routes.

IV. What Should We Do to Prevent Atrocities?

If the goal is to minimize atrocities, restricting the ability of soldiers to claim that they were following orders holds at best limited promise. The varied statements of the

rule are too confusing,¹³⁰ and most of the incentives and practices for soldiers point toward obeying directions and orders. It is the unusual soldier who will resist. Thus, counting on individual soldier responsibility is an insufficient guard against abuse. Moreover, pushing the distinction between obviously or manifestly illegal orders and other kinds of orders as the basis for liability is likely to increase the already obvious pressure on superior officers to avoid explicit orders that direct genocide or violations of domestic or international law. If the result is more vagueness in orders, the risks of atrocity rise rather than decline.

There may be symbolic value but slight practical benefit arising from training ordinary soldiers to know and remember that they may be held responsible for acts even when performed under orders or superior direction. How to increase the chances that such training methods will be effective is worth some consideration, but a chief value of such training both comes from and depends upon its integration into the larger value system of the military organization—and hence requires action and follow-through in the behaviour of the superior officers. In this part, I will offer further reflections on the superior orders defence, the potential avenues for training, and the organizational implications of serious efforts to prevent military atrocity.

A. Limited Prevention from Restricting the Superior Orders Defence

It is a truism that no military atrocities can occur without the participation of the individuals who wield the weapons, abuse the detainees, and kill the civilians. It is tempting to focus attention on these individuals, to hold them responsible, and to make them examples for others. Indeed, individual soldiers who murder civilians or abuse detainees should be held responsible. But doing so is not likely to reach the deeper causes of military atrocity.

The social and psychological influences on those individuals reach far beyond their own consciences. Insights from social science indicate good reasons to think that a person placed in a subordinate position and instructed to obey presumptively legitimate authority will be likely to follow those orders even if they see them as wrong. The most effective methods for preventing abuse by the military will most likely involve (1) organizing military teams, management structure, rewards, and promotions in order to integrate legal and moral considerations into command decisions and to create sufficient checks against both illegal commands and lax supervision; and (2) assigning the specific task of evaluating the legality of orders to commanders close enough to the field to be able to make concrete decisions guiding soldier conduct.

Clarifying whether and when following superior orders reduces or eliminates liability is not likely to prevent military atrocities. Both research and common sense indicate the near futility of teaching soldiers the rule that superior orders do not shield

¹³⁰ See Part II, above and Part IV.A., below.

them from punishment or liability for genocide, mass violence, or crimes against humanity. However formulated, the rule produces cognitive dissonance: sometimes the soldier should obey without question and sometimes the soldier should question and not obey. Some formulations may push toward more questioning than others, but once in the field, this rule is not likely to be foremost in the soldier's mind.

Legal scholar Mark Osiel criticizes the dominant rule that denies a defence to soldiers who follow superior orders if those orders are manifestly illegal. He argues that denying a defence to soldiers who follow a manifestly illegal order as a practical matter "imposes a broad duty to obey superior orders that is qualified by an equally bright-line duty to disobey orders to commit atrocities."¹³¹ Osiel notes that this approach obliges the soldier to comply with orders in the ambiguous middle area, where orders to commit abuses may be illegal, but not manifestly so. This precise logical analysis comports with the predictions of the social psychological research surveyed earlier. Given the competing directives to obey all orders but to expect liability for obeying manifestly illegal ones, the soldier—likely attached to conventional morality and influenced by peer pressure—is most likely to obey all orders.

Osiel himself prefers a different rule, one that calls for obedience only to lawful orders and punishes obedience to unlawful orders except if the soldier makes a reasonable mistake about the lawfulness of those orders.¹³² He argues that when compared with the dominant rule, his rule would put individual soldiers on greater guard to assess the legality of orders in that zone of ambiguity and would hold more soldiers responsible for following orders whose lawfulness is ambiguous.¹³³ In effect, he maintains, his rule would generate more discussion and debate among groups of soldiers about what is the right thing to do. And, he claims, that in turn would lead to more awareness by ordinary soldiers of their legal duties.¹³⁴

¹³¹ Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline & the Law of War* (New Brunswick, N.J.: Transaction, 1999) at 287. In conversation with me, Lawrence Blum has pointed out that this suggestion increases the burden on the individual to take initiative in finding out if an order is illegal and to resist unlawful ones, but even this heightened pressure accomplishes little if the actual content of the legal duty is ambiguous.

¹³² *Ibid.* at 287-89.

¹³³ *Ibid.* at 290-91, 293, 295.

¹³⁴ Osiel also argues that his rule would shift onto the soldier the burden of producing evidence of knowledge and persuading the relevant tribunal that the soldier's error was honest and reasonable, while the "manifest illegality" rule leaves the burden on the prosecution to show that the defendant knew or should have known that the orders were illegal. See *ibid.* at 292. However, Osiel has faced criticism on this point. See Maj. Walter M. Hudson, Book Review of *Obeying Orders: Atrocity, Military Discipline and the Law of War* by Mark Osiel, (1999) 161 Mil. L. Rev. 225 at 231-32 (citing *Manual for Courts-Martial, supra* note 88, R.C.M. 916(b) to illustrate that Osiel mischaracterized military law).

His prediction and claims for his alternative rule implicitly comport with the insights from heuristics about the importance of the anchoring phrase in a rule.¹³⁵ But Osiel's proposal otherwise does not match the insights from cognitive dissonance, stage development, obedience studies, and studies of conformity as conveyed by the social science research. If the line between legal and illegal orders is seriously ambiguous, and most of the training and ethics of the military emphasize obeying orders, a small training unit on superior orders will not alter the overall message, even if the rule is recast as Osiel suggests. Inviting front-line soldiers to police the borderline cases misunderstands their pressures, capacities, and incentives.

If the problem is finding the courage to dissent and act on conscience, soldiers will need direct and repeated training with detailed factual situations to cultivate the conscience and motivation to dissent. Even then, unless the larger contexts of military hierarchy and values are altered considerably, such training will have limited value. Moreover, even avid debate among soldiers makes no difference if the nation's law, despite Osiel's view, draws the line to include as lawful those orders that some find violate their consciences. Anecdotal evidence suggests that the Israel Defense Force ("IDF") is characterized by more internal debate, less hierarchical relations, and more dissent than the U.S. military forces.¹³⁶ Even in the court martial process, the Israeli government has allowed latitude to objectors, permitting not only legal but personal and political arguments about service in the occupied territories. Nonetheless, the courts have convicted all of the objectors, and construed "manifestly illegal" orders to cover narrow ground.¹³⁷

Osiel claims that by punishing obedience to unlawful orders, his proposed rule would lead soldiers to engage in more debate among themselves about what is and what is not lawful. This implication is not so obvious. The soldiers would have to risk peer disapproval if they raised objections to orders; there is no assurance that debate would reflect knowledge about legal standards or raise the level of actual moral conduct. Such debate might produce more resistance to illegal orders but it might equally generate more mutual reinforcement to follow orders. The most likely effect of Osiel's rule would be to discourage those giving the orders from doing so in

¹³⁵ See Part III.A.2, above. His emphasis on cultivating the soldier's sense of honour and commitment to his fellow soldiers also matches prevalent understandings of soldiers' motivations. See e.g. Wolfgang Roysl, "Military Pedagogy and the Concept of Leadership Development and Civic Education" in Edwin R. Micewski & Hubert Annen, eds., *Military Ethics in Professional Military Education—Revisited* (Frankfurt am Main, F.R.G.: Peter Lang, 2005) 22 at 22, 24.

¹³⁶ I base this in part on three focus groups I held with veterans of the IDF in spring 2006. My informants suggested that universal service, a small, relatively homogeneous society, the presence of highly educated individuals in each platoon, and the irreverence and informality of Israeli culture contribute to an atmosphere of questioning and debate. None of my informants served in another military, however, and thus each had limited basis for comparison.

¹³⁷ See Hadar Aviram, "Discourse of Disobedience: Law, Political Philosophy, and Trials of Conscientious Objectors" (UC Berkeley Public Law Research Paper No. 728743, 23 May 2005), online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=728743>.

specific terms. Ratcheting up the attention to potentially illegal orders is likely to generate fewer explicit superior orders whose legality is debatable. Commanders would risk liability (which could also come with low rates of enforcement) under command responsibility for the actions of the soldiers under command. Superiors would then be likely to seek the deniability afforded by ambiguous or vague orders.

The significance of the legal treatment of the superior orders defence lies less in its actual ability to deter atrocities than in terms of the expressive values of the law.¹³⁸ Here, maintaining the message of individual responsibility, etched since the Nuremberg Tribunal, conveys national and international will to curb military atrocities but is even more directly a refusal to excuse atrocities or war itself as the products of abstract forces or nations. Holding individuals responsible even if they followed orders is a way to reaffirm that though neither killing unarmed civilians in their homes¹³⁹ nor prisoner abuse is genocide, both are blatantly wrong. Even if the national laws fall short, the individual soldier must be held responsible for failing to resist explicit or tacit orders that are morally wrong, including a command structure that produces obviously unacceptable and harmful behaviour. That apparent lesson from the Nuremberg trials is tested by current U.S. military conduct; this makes revisiting the lesson all the more urgent.¹⁴⁰ The expression of individual responsibility in this setting helps to anchor the democratic ideals of participation and accountability, individual autonomy, and freedom of expression. Historic resistance to limiting the defence of superior orders¹⁴¹ is couched usually in concern for maintaining military discipline. Those who want to maintain restrictions on the superior orders defence should still seek to reinforce the individual responsibility that attaches to soldiers for their own misconduct, quite apart from following illegal orders.

To some degree, I am suggesting here something akin to the concept of acoustic separation, developed by Professor Meir Dan-Cohen, in which the conduct rule aimed to affect the behaviour of ordinary citizens has different content than the decisional rule that seeks to guide decision makers like judges.¹⁴² For example, the conduct rule

¹³⁸ See Robert Cooter, "Expressive Law and Economics" (1998) 27 J. Legal Stud. 585; Sara Sun Beale, "Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?" (2000) 80 B.U.L. Rev. 1227 at 1254-63; Lawrence Lessig, "The Regulation of Social Meaning" (1995) 62 U. Chicago L. Rev. 943; Bernard E. Harcourt, "After the 'Social Meaning Turn': Implications for Research Design and Methods of Proof in Contemporary Criminal Law Policy Analysis" (2000) 34 Law & Soc'y Rev. 179.

¹³⁹ Investigations of two recent incidents of such Marine conduct in Iraq communicate that the United States still sets legal limits while engaged in Iraq. See "Civilian Deaths Send Top Marine to Iraq" (25 May 2006), online: CNN.com <<http://edition.cnn.com/2006/WORLD/meast/05/25/hagee.iraq/>>.

¹⁴⁰ See note 22 and accompanying text (Marines charged with murdering Iraqi civilians).

¹⁴¹ See Part II, above.

¹⁴² See Dan-Cohen, "Acoustic Separation", *supra* note 13. Dan-Cohen's idea is actually part of a larger project that emphasizes individual dignity and the socially constructed contexts of morality. See

“Ignorance of the law is no excuse” has the desirable effect of encouraging people to learn about the law, but decision makers might well operate under a different rule that excuses ignorance of the law in some circumstances. Rather than making a distinction between one rule to guide conduct and another to guide decision makers, I suggest that we need a rule restricting superior orders as a defence for moral and expressive purposes, but that serious efforts to constrain military abuses also require work at the levels of military organization, staffing, and incentives.¹⁴³

Expressive purposes should not be treated in this context as wholly apart from instrumental effects. The very expressive dimensions of law may stimulate collective investment in monitoring activities or the willingness of community members to report offences—with the effect of strengthening the norm at issue.

This is the finding of recent research on hate crimes legislation.¹⁴⁴ This research acknowledges that hate crimes legislation is often designed for symbolic reasons, such as changing the social meaning of certain bias-motivated criminal acts in public discourse. Identifying a law as symbolic tends to suggest that it does not have actual effects, but this study suggests that although California’s hate crimes legislation generated quite varied practices in different agencies and departments, those that adopted policies of community engagement, such as watchdog groups or a human rights commission, were associated with increased levels of hate crimes reporting.¹⁴⁵ Symbolic legal acts can have measurable effects when connected with organizational features enabling those effects. Similarly, restrictions on a superior orders defence, if joined with activities, particularly training programs and organizational changes devoted to preventing atrocities, could produce results.

B. Small Gains Through Training Programs

The prescription that follows military atrocities tends to be training. That is what observers have demanded following the abuses of detainees in Abu Ghraib and Guantánamo.¹⁴⁶ Yet determining the appropriate mode and content of training is a complicated task, as three experiences illustrate: the civilian massacre at My Lai, the Israeli “Black Flag” incident, and a recent experience of U.S. troops in Iraq.

Meir Dan-Cohen, *Harmful Thoughts: Essays on Law, Self, and Morality* (Princeton, N.J.: Princeton University Press, 2002).

¹⁴³ Serious enforcement of command responsibility would offer one source of incentive. See Part I, above.

¹⁴⁴ See Valerie Jenness & Ryken Grattet, “Beyond Symbolic v. Instrumental Law: Hate Crime Policy and Law Enforcement Practice” (21 January 2006) [unpublished], online: Center for Organizational Research, University of California, Irvine <<http://www.cor.web.uci.edu/documents/jennesspaper.pdf>>.

¹⁴⁵ *Ibid.* at 32.

¹⁴⁶ See e.g. Committee on International Human Rights and Committee on Military Affairs and Justice, *supra* note 32 at 193-94. Except for soldiers in legal and military intelligence units, former soldiers I consulted tend to remember the training in ethics and law as cursory and summary, often taking place in a one-hour presentation.

The U.S. military overhauled its training programs after U.S. soldiers massacred approximately five hundred unarmed civilians in My Lai and then sought to cover up the event. Recent reports of military abuses prompt a return to the events leading up to My Lai and its consequences for military training.¹⁴⁷ An internal military investigation confirmed war crimes only after persistent efforts to investigate by a twenty-two-year-old ex-GI named Ronald Ridenhour; the investigation in turn triggered the prosecution and conviction of Lieutenant William Calley.¹⁴⁸

Calley's defence attorney argued unsuccessfully that it would be asking too much to judge him by the standard of a person "of ordinary sense and understanding" and that instead, given Calley's lower-than-average intelligence (as measured on standardized tests), he should be assessed according to the standard of "commonest understanding."¹⁴⁹ The U.S. Court of Military Appeals rejected that argument and concluded that *if* Lieutenant Calley had been given an order to murder infants and unarmed civilians, as he claimed, such an order would have been "so palpably illegal that whatever conceptional difference there may be between a person of 'commonest understanding' and a person of 'common understanding'" would be irrelevant.¹⁵⁰

The courts marshal secured convictions of no one other than Calley, though the military did pursue the matter internally. A report by Lieutenant General William Peers cited as causes for the massacre the lack of leadership and proper training for soldiers and superiors about the law of war. This report and related critiques produced new teaching programs aimed at preventing and reporting violations.¹⁵¹ Initially, the training programs emphasized that each soldier must learn to question orders.¹⁵²

¹⁴⁷ See Graham Rayman, "2 Wartime Incidents, 1 Lesson: A Vietnam Massacre Recalled in the Light of Recent Haditha Killings Set a Tone for Military's Response, Some Say" *Newsday* (18 June 2006) A24. Recent events have also spurred renewed interest in the Vietnam era and unearthed declassified evidence revealing 320 substantiated claims of war crimes and atrocities, not including the My Lai massacre. See Nick Turse & Deborah Nelson, "Vietnam Horrors: Darker Yet" *Los Angeles Times* (6 August 2006) A1.

¹⁴⁸ See Douglas O. Linder, *My Lai: An Account*, online: Famous Trials, University of Missouri-Kansas City School of Law <<http://www.law.umkc.edu/faculty/projects/ftrials/mylai/mylai.htm>>.

¹⁴⁹ *United States v. Calley*, 48 C.M.R. 19 at 27 (U.S.C.M.A. 1973) [emphasis added].

¹⁵⁰ *Ibid.* at 29.

¹⁵¹ See U.S., Department of Defense, *DoD Law of War Program* (DoD Directive 5100.77) (5 November 1974). This directive was reissued as U.S., Department of Defense, *DoD Law of War Program* (DoD Directive 5100.77) (10 July 1979), then as U.S., Department of Defense, *DoD Law of War Program* (DoD Directive 5100.77) (9 December 1998), and subsequently as U.S., Department of Defense, *DoD Law of War Program* (DoD Directive 2311.01E) (9 May 2006), online: Washington Headquarters Services <<http://www.dtic.mil/whs/directives/corres/pdf/231101p.pdf>>.

¹⁵² Some thought the initial reforms reflected an overreaction. Initially, the army used a training film entitled *The Geneva Conventions and the Soldier* (U.S., Department of Army, Training Film 21-4228 (1972)). Referring to the film, W. Hays Parks, a member of the Judge Advocate General Corps ("JAG Corps") at the time, wrote, "It was a well-produced movie, with professional actors, but it was a bureaucratic overreaction to the My Lai massacre that had every soldier questioning every order issued by his superior—in addition to portraying superiors in a less-than-flattering light. Needless to say, the movie enjoyed a very short run as one commander after another ordered it removed from his

Participants telling their own stories warned of peer pressure.¹⁵³ Subsequently, training programs teach about My Lai but tend to emphasize the importance of leadership and respect for law,¹⁵⁴ yet the conditions giving rise to the My Lai incident persist. Brigadier Nigel Aylwin-Foster of the British Army, the second most senior officer responsible for training Iraqi forces, has criticized the U.S. military for “institutional racism, moral righteousness, misplaced optimism, of being ill suited to engage in counter-insurgency operations,”¹⁵⁵ and a “stiflingly hierarchical outlook”;¹⁵⁶ his critiques portray a military largely the same as at the time of the My Lai atrocity.

Citing My Lai, U.S. military leaders act more promptly to investigate and prosecute at least the abuses that come to public attention.¹⁵⁷ Nonetheless, many commentators have suggested that the military seems to have inadequately instructed its members in the laws of war and in each individual’s personal responsibility for complying with them.¹⁵⁸ Calley tends to be remembered more than helicopter pilot Hugh Thompson, who witnessed the slaughter and struggled to halt it and to save civilians’ lives.¹⁵⁹ Military training programs face substantive and pedagogical

base—justifiably, in my opinion” (“A Few Tools in the Prosecution of War Crimes” (1995) 149 Mil. L. Rev. 73 at 79).

¹⁵³ See Paula Bock, “The Choices Made: Lessons from My Lai on Drawing the Line” *The Seattle Times Pacific Northwest Sunday Magazine* (10 March 2002), online: The Seattle Times <<http://seattletimes.nwsourc.com/pacificnw/2002/0310/cover.html>> (reporting reflections of Lawrence Colburn, the helicopter gunner).

¹⁵⁴ “Why Haditha Matters” *The Nation* (19 June 2006) 4 (“A generation of future US military officers were taught the details of the My Lai massacre as a particular lesson: What makes war crimes is criminal leadership”). See also Geoffrey S. Corn, “Haditha and My Lai: Lessons from the Law of War”, in which Corn, Professor at South Texas College of Law in Houston and a retired Lieutenant Colonel from the Army JAG Corps, emphasizes that lessons from My Lai include the importance of leadership and respect for the laws and logic of war (*Jurist* (2 June 2006), online: University of Pittsburgh School of Law <<http://jurist.law.pitt.edu/forumy/2006/06/haditha-and-my-lai-lessons-from-law-of.php>>).

¹⁵⁵ Richard Norton-Taylor, “My Lai’s Untaught Lessons” *Guardian Unlimited* (2 June 2006), online: Guardian Unlimited <http://commentisfree.guardian.co.uk/richard_nortontaylor/2006/06/the_untaught_lessons_of_my_lai.html> (paraphrasing Aylwin-Foster, *infra* note 156 at 3, 6, 7).

¹⁵⁶ Brig. Nigel Aylwin-Foster, “Changing the Army for Counterinsurgency Operations” (2005) 85:6 *Military Review* 2 at 5.

¹⁵⁷ See Rayman, *supra* note 147 (quoting William Eckhardt, prosecutor of Lt. Calley).

¹⁵⁸ See Robert S. Rivkin, “A Duty to Disobey: The Forgotten Lessons of My Lai” *La Prensa San Diego* (2 May 2004), online: La Prensa San Diego <<http://www.laprensa-sandiego.org/archieve/may21-04/disobey.htm>>.

¹⁵⁹ For Thompson’s own accounts, see Douglas O. Linder, “The Heroes of My Lai”, online: Famous Trials, University of Missouri-Kansas City School of Law <http://www.law.umkc.edu/faculty/projects/ftrials/mylai/My_l_hero.html>; *Cold War Chat: Hugh Thompson, U.S. Army Helicopter Pilot at My Lai* (CNN television broadcast, 6 December 1998), online: CNN.com <<http://edition.cnn.com/SPECIALS/cold.war/guides/debate/chats/thompson/>> (Thompson recalling receiving hostile treatment from the public and from Congress).

difficulties in addressing precisely how a soldier should reconcile the duty to obey orders with the potential defence of illegal orders to justify disobedience.¹⁶⁰

For the instruction to be meaningful and effective, it must involve more than one hour of lecture. Soldiers need to drill through experiential learning so that they have reflexes to reject abusive action just as they have reflexes to shoulder a weapon. Some of this can come from immersion in hard case studies. Teaching case studies provides an encounter with vivid factual descriptions, helps alert people to issues, and helps cultivate the ability to recognize problems in practice. Major Mark Martins of the Judge Advocate General's Corps of the U.S. Army shows in detail that soldiers cannot remember or use all the relevant abstract rules of war and instead need schemas, or organized structures of patterned knowledge, repetitive practice, and ongoing learning grounded in real stressful situations and real mistakes that real soldiers have made.¹⁶¹ In tense situations of combat or anticipated violence, soldiers will rightly fall back on repetitive training for particular operations, and such training can include exposure to paradigmatic examples of orders that are manifestly illegal and orders that are on the borderline but can be questioned. To be implemented by soldiers, the laws of war and ethical limits must be drilled to the same degree that training cultivates a sense of membership in a team, attachment to the virtues of loyalty and honour, integration of physical, cognitive, and emotional learning, and familiarity with one's weapon.

Repeated exposure to vivid examples and involvement in role-playing exercises can structure effective drills that have lasting effects. In three informal focus groups,¹⁶² veterans from the Israel Defense Force each recalled learning about the "Black Flag" incident, even though most did not remember learning the laws of war.¹⁶³ The Black Flag incident at Kfar Kassem occurred at the onset of the 1956

¹⁶⁰ When Hugh Thompson appeared in a training program held at the controversial School of the Americas (preparing military action in South America), he received a standing ovation, and yet "the ensuing discussion never clarified how soldiers faced with commanders like Calley, Medina, and Brooks could deal effectively with illegal orders; indeed, if one soldier had been moved to self-mutilation to avoid complicity, a direct refusal to obey orders was probably out of the question and perhaps even life threatening" (Lesley Gill, *The School of the Americas: Military Training and Political Violence in the Americas* (Durham, N.C.: Duke University Press, 2004) at 147-48).

¹⁶¹ Maj. Mark S. Martins, "Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering" (1994) 143 Mil. L. Rev. 1 at 24, 71-76, 84-85.

¹⁶² In spring 2006, I conducted two sessions with individuals enrolled as graduate students and their spouses who had served in the IDF, and I met with the Wexner Israel Fellows, a group of Israelis including current members of the military and government. See "Wexners Pledge Additional 6.3 Million to Center" *Harvard University Gazette* (1 June 2006), online: Center for Public Leadership, John F. Kennedy School of Government, Harvard University <http://www.ksg.harvard.edu/leadership/waren/wexner_gazette.pdf> ("Since 1989, this initiative has brought up to 10 Israeli governmental officials to the Kennedy School each year for a one-year master's degree").

¹⁶³ The following discussion reflects collaboration with and suggestions from Amos Guiora, professor and director of the Institute for Global Security Law and Policy, Case Western Reserve

Sinai Campaign.¹⁶⁴ Israeli authorities imposed a curfew to run from 5 p.m. to 6 a.m. on Arab villages in Israel near the Jordanian border. At 3:30 p.m. a border patrol unit was assigned the task of enforcing the curfew, which was set to begin before villagers who were in the fields tilling the land were notified. During the preparatory briefing, a member of the force asked what would happen to those returning from the fields after the curfew was in effect. The commanding officer replied briefly, “God have mercy upon them.” Subordinate officers translated this comment into a directive to shoot anyone returning after the curfew. As a result, soldiers killed forty-seven men, women, and children returning from the fields. In subsequent trials arising from the incident, the Israeli courts concluded that an order to shoot curfew violators was blatantly unlawful, and those who followed such an order were court-martialed and given long sentences, although none ultimately served more than three and one-half years.¹⁶⁵

Even long after training and long after military service, veterans of the IDF remember the Black Flag incident. In fact, its history is well known throughout the country, where it is taught to children in civics classes. Indeed, several Israelis have told me that they think basic training is too late a moment to teach soldiers how to prevent atrocities. The instruction must start in childhood. Because universal military service is a feature of Israeli society, their schools and their youth groups do teach about this subject to teens and even younger children. But interestingly, because theirs is not a volunteer but a mandatory-service military, the commanders have to win the confidence and respect of the soldiers especially around issues of ethics. The civilian population is in touch with, and participates in, discussions about acceptable conduct. And because their Supreme Court has provided repeated and high-profile rulings about what is and what is not acceptable conduct by the military,¹⁶⁶ there may

School of Law, and Lt. Col. (retired), Israel Defense Force. See Interview of Amos Guiora by Martha Minow (March 2006) on file with author.

¹⁶⁴ The phrase “black flag” was used vividly in a court opinion discussing manifestly illegal orders:

The distinguishing mark of a ‘manifestly unlawful order’ should fly like a black flag ... Not formal unlawfulness, hidden or half-hidden, nor unlawfulness discernible only by the eyes of legal experts, is important here, but ... unlawfulness piercing the eye and revolting the heart, be the eye not blind nor the heart stony and corrupt—that is the measure of ‘manifest unlawfulness’ required to release a soldier from the duty of obedience (*Chief Military Prosecutor v. Melinki* (1958), 13 Pesakim Mehoziim 90, cited in *Israel (A.G.) v. Adolf Eichmann* (1961), 36 I.L.R. 18 at 256 (Israel, District Court of Jerusalem)).

¹⁶⁵ See “Kfar Kassem 1956”, online: Palestine Facts <http://www.palestinefacts.org/pf_1948to1967_kfarkassem_1956.php>; Leora Bilsky, *Transformative Justice: Israeli Identity on Trial* (Ann Arbor: University of Michigan Press, 2004) at 169-70, 310-24; Shira Robinson, “Local Struggle, National Struggle: Palestinian Responses to the Kafr Qasim Massacre and Its Aftermath, 1956-66” (2003) 35 *International Journal of Middle East Studies* 393. These sources show that there is some disagreement as to the exact number of civilians killed.

¹⁶⁶ See e.g. *Public Committee against Torture in Israel v. Israel*, 2005 HCJ 769/02 (Isr.); *Public Committee against Torture in Israel v. Israel*, 1999 HCJ 5100/94 (Isr.).

be a basis for the report by some military veterans that they operated with a constant sense that higher authorities are looking over their shoulders.¹⁶⁷

The IDF has not solved the dilemma of obedience to superior orders, nor is it blameless when it comes to human rights standards. But the strong impact of the Black Flag case suggests that vivid scenarios can have an enduring hold. That said, given the light sanctions actually enforced in the incident itself, it is frankly not so clear what lessons soldiers actually learn.¹⁶⁸ Soldiers should learn from the incident that they should never assume that an ambiguous order means that they should kill civilians or engage in any other conduct that on its face looks illegal. They should know that in such an instance, they can question superiors without being viewed as insubordinate, and they should know that court martial or other sanctions follow from blindly following orders that are clearly illegal.

Pushing in the opposite direction is the emphasis some place on training soldiers to follow directions precisely to ensure that they do not give in to their own impulses to violate the laws of war. Lieutenant Colonel Patrick Gawkins of the U.S. Army described to me an incident in which his convoy entered an area in Iraq where intelligence had alerted them to likely violence from insurgent forces.¹⁶⁹ Indeed, the caravan was hit by some kind of exploding material from the side of the road, wounding several individuals, including Gawkins, and shattering the windshield of his armoured vehicle. Gawkins told me that as he tended to his own wounds, he saw one of the soldiers in his car train his weapon on a man standing at the side of the road. The man appeared to be a shepherd; he stood with a young boy and several sheep, and he was talking into a cellphone. The soldier was ready to shoot, but his commanding officer told him to put down the weapon while keeping an eye on the man, and the soldier complied. Gawkins indicated it was a reasonable guess that the man was involved in triggering the explosion, but he also could have been simply an innocent civilian. When I asked why the soldier so readily put down the weapon, Gawkins explained that this was the result of rigorous training that had prepared him to follow commands under pressure. When I pressed further, Gawkins also explained that the training in his unit included rules against using dehumanizing or degrading names for the Iraqis or for Muslims, and he suspected that this further contributed to the soldier's ability to hear and accept the officer's direction to lower his weapon.

Here, then, is the dilemma that reliance on training presents in dealing with superior orders and the dangers of military atrocities. Swift obedience to orders may be crucial to avoid atrocities just as questioning and refusal to conform may at other times be important. It is not clear whether the primary educational goal should be to drill answers or instill a questioning stance. Either is problematic in this context. Gawkins suggested that the tension can be mitigated to some extent in the process by

¹⁶⁷ It remains uncertain whether this will change with the end of Chief Justice Aharon Barak's service on the Israel Supreme Court.

¹⁶⁸ I would like to thank Professor Pnina Lahav for emphasizing this point.

¹⁶⁹ Interview of Lt. Col. Patrick Gawkins, *supra* note 41.

which the unit relays orders. The superior gives the order and the junior officer who receives it should repeat it and ask any clarifying questions about it. But in Gawkins' account, that routine does not include questioning the substance of the order.¹⁷⁰

The content of the training is ultimately less important than the importance given to it by daily command structure and military culture. Training that emphasizes the legal and moral duties attaching to each soldier, including adherence to the laws of war, may be helpful, but only if the officers reinforce that message and subscribe to the same legal and moral duties. Then, it will not be the training alone that matters, but also the message throughout the organization, and especially from the top, about the significance of those duties and about the equal priority of legal and ethical training as compared to training in weapons and intelligence. Competence in handling weapons does not imply moral competence: "Officers and soldiers not morally competent are not militarily competent."¹⁷¹ Absent inspiration to pursue honour and allegiance to the standards of morality exemplified by the leaders, soldiers may bring disgrace.

Demonstrating and communicating the interdependencies of moral and legal duties with all other dimensions of military preparedness would be crucial for gaining requisite credibility with soldiers and officers alike. Amos Guiora, who ran training programs in the IDF before setting up the Institute for Global Security at Case Western Reserve Law School, found it possible to win the support of officers for rigorous ethics instruction precisely by connecting it with combat preparation:

Commanders buy into training about moral and legal duties because they believe that operating well in armed conflict calls for training their soldiers on issues of morality and that is just as important as issues of intelligence, and weapons. Discipline in the field around these issues is crucial because if the soldiers are not prepared on this, it is just as bad as if they are not prepared in intelligence, how to shoot a gun, [or] medics. An ill-disciplined unit lacking compliance with the codes will perform less well operationally, make mistakes in the field, and often be a failure. So teaching this is just as important as teaching operations, intelligence, and weapons.¹⁷²

Training in the legality of tactics has to be early and constant. It is too late to think it through when the crisis happens.

¹⁷⁰ Gawkins also indicated that the U.S. Army has used surveys to assess the atmosphere of units especially around issues of ethnic and racial harassment. Soldiers are asked about their comfort level in the unit and this contributes to a grade given to the commanding officer. In this context, another atmospheric feature that could be assessed is how comfortable soldiers feel to raise questions—but even that question, and the value behind it, would require a notable change in how to value questions in comparison with obedience. See Interview, *ibid.*

¹⁷¹ Toner, *supra* note 7 at 43.

¹⁷² Interview of Amos Guiora by Martha Minow, *supra* note 163. See also Amos Guiora & Martha Minow, "National Objectives in the Hands of Junior Leaders: IDF Experiences in Combating Terror" in James J.F. Forest, ed., *Countering Terrorism in the 21st Century* (Westport, Conn.: Praeger Security International, 2007).

Selecting who teaches the material on law and ethics may make the difference between effective and ineffective instruction. Lawyers who are remote from the platoon do not make as effective instructors as officers who have earned the respect of their troops. Especially if the instructors are viewed as outsiders, naive, or remote from the real demands of the military, their message will not reach the soldiers.¹⁷³

C. *Aligning Commands with Law and Morality*

If we are serious about wanting to enable individual soldiers to resist peer pressure, the burden cannot be placed solely on the individuals. The concern must also infuse soldiers' training and incentives, the command structure, and the stance taken by superior officers if atrocities during wartime are ever to be prevented.¹⁷⁴ The authorization for massacres, abuse, and dehumanization of those victimized may come from military and civilian leaders, but these forces cannot produce atrocities unless front-line soldiers and their immediate commanders commit them instead of asserting their own moral judgments and actions. High authorities tend to blame soldiers participating in abuses as errant "bad apples", but bad orders, environment, culture, command and organizational structure, and relationships between operations and legal analysis are also implicated. Work addressing the individual's knowledge and incentives, the organization's structure and practices, and the processes of accountability must proceed in a coordinated fashion if atrocities are to be prevented or reduced.

1. Try to Eliminate Bad Orders

The most direct way to avoid the problem of soldiers following illegal orders is to ensure that they do not receive any. Recent developments expose at least two difficulties with this direct solution. First, debate within the executive branch and responses by the U.S. Supreme Court and Congress over the lawfulness of detention practices has strained the ability of anyone in the military to know for certain the line of illegality. Following 9/11, memoranda written for the U.S. president contended that offshore detainees lacked protections under domestic and international law and lacked access to U.S. courts to challenge their detention or conditions.¹⁷⁵ Another memorandum construed the U.S. ban against torture to encompass only suffering "equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result."¹⁷⁶ On these bases, Guantánamo interrogators received

¹⁷³ See Interview, *ibid.*

¹⁷⁴ Entirely understandable is the reaction of the guard at Abu Ghraib who saw conduct he thought immoral but who assumed that someone would have said something if relevant guidelines were not being followed. See *supra* note 40.

¹⁷⁵ See Yoo Memorandum, *supra* note 27.

¹⁷⁶ Bybee Memorandum, *supra* note 70 at 13. Accord U.S., Department of Defense, *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical,*

authorization to use certain “counter-resistance techniques”, including sensory deprivation, hooding, playing on phobias, and stress positions,¹⁷⁷ and some of these techniques migrated to the prison at Abu Ghraib. Subsequently, the U.S. Supreme Court set some limits on the detention policies, opening access to judicial review,¹⁷⁸ and Congress enacted a law re-establishing the U.S. commitment to refrain from cruel or inhumane treatment of detainees, but also passed a law drastically limiting access to judicial review.¹⁷⁹ Against this high-level dispute, sorting out good and bad orders would be nearly impossible for ordinary soldiers, especially considering that military lawyers advised against the direction pursued by the White House.¹⁸⁰

A second difficulty in preventing bad orders is the shift from explicit to implicit or vague orders. Such a shift is a likely effect of learning legal rules. Certainly no commanding officer would give as the order, “Commit genocide.” What precisely should a soldier know to be unlawful? When does a less explicit order amount to a command to commit genocide? A soldier would have to know genocide’s legal elements, including the element of intention, in order to recognize that particular directives adding up over time might constitute genocide, crimes against humanity, or other violations of legal norms. When, and how, should a soldier think for himself or herself about the ultimate or aggregate meaning of vague orders? Officers breaching the borders of legality in their orders will most likely not give a directive that explicitly states, “Deprive this person of treatment required under international law,” or “Use torture on this detainee.” The commander may well instead say, “Keep this detainee quiet,” or “Make this detainee aware we mean business,” or “Make sure there is no local person aware of our approach toward the village.” The soldier may not even be aware that a potentially illegal order is at hand: it may be the soldier’s interpretation of a vague or euphemistic order that leads to crossing the line to illegality.¹⁸¹ Here, as elsewhere, perceiving a moral problem can be as crucial as

Policy, and Operational Considerations (4 April 2003), online: The National Security Archive <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.04.pdf>>.

¹⁷⁷ Haynes Memorandum, *supra* note 30.

¹⁷⁸ See *Hamdan v. Rumsfeld*, *supra* note 33; *Rasul*, *supra* note 28; *Hamdi*, *supra* note 28.

¹⁷⁹ See *National Defense Authorization Act for Fiscal Year 2006*, *supra* note 32, §1403. The skirmish over cruel or inhumane treatment standards continued with the presidential signing statement announcing the Executive’s intention to interpret the law. See Signing Statement, *supra* note 32. Congress also enacted the *Military Commissions Act of 2006*, which forecloses access to court for detainees named as enemy combatants or awaiting determination regarding enemy combatant status (Pub. L. No. 109-366, §7, 120 Stat. 2600 at 2636).

¹⁸⁰ See note 36 and accompanying text (discussing Albert Mora).

¹⁸¹ No written orders were issued before the My Lai massacre—and the prevalence of vague orders containing ambiguities transmitted down the chain of subordinates is well known. See Kelman & Hamilton, *supra* note 94 at 2. As military operations develop in urban settings, in occupations, and in stealth operations, actual “orders” are less common than general purpose directions, and discretion in selecting tactics is exercised by platoon leaders or their equivalents close to the ground. See Part IV.C.3, below.

working up the courage to act upon it.¹⁸² But to achieve the goal of preventing violations of international and domestic norms, officers must neither give illegal orders nor give the impression that they condone or permit abusive conduct.

Consider the ways that commanding officers can convey approval or expectation of abusive or atrocious behaviour: The officer may simply say, “Get the detainees ready for interrogation,” but mean, “Abuse and humiliate them.” Or he may say, “Clear the area” but convey, instead, “Kill the people who are there.”¹⁸³ Conveyed as a hint, such comments may be interpreted as a powerful directive, especially when communicated by an officer to a young soldier who has been primed to follow his or her superior.

2. Promote a Constraining and Aspirational Culture

The absence of explicit orders may occasionally result from clever officers seeking to avoid consequences, doubt, or even dispute among officers about what the law permits. Yet it is more likely to reflect either failure to establish a culture of honour and morality, or changes in military methods that include reducing strict hierarchy and decentralizing decision making. For vague orders to be construed as direct orders to commit abuses, members of the unit must not believe that their superiors or their peers care about violations of law and morality. The pressures and temptations of armed conflict make such violations always a risk, so failure to establish a constraining—and aspirational—culture increases the likelihood of atrocities. Hence, blind obedience to noxious commands may be less dangerous than ordinary soldiers “filling in the blanks” with poor judgment or anxiety-triggered viciousness. It is not entirely fair to characterize events at My Lai or Abu Ghraib as the results of “bad apples” if the environment and military organization fail to provide the cultural norms and direct supervision needed to prevent violations.

3. Address Command and Organizational Structure

Current military practice, when compared with nineteenth- and mid-twentieth-century norms, operates less through strict hierarchy and more through decentralized and team-based decision making. Soldiers may proceed without explicit hierarchical orders when they work in teams responding to an immediate problem. In fact, modern military procedures tend to replace strict hierarchical command with independent, small groups that have better knowledge of local situations than do distant commanders, and that control complex weapons, communications, and other

¹⁸² See Lawrence A. Blum, *Moral Perception and Particularity* (New York: Cambridge University Press, 1994) at 41-45, 124-43.

¹⁸³ See Osiel, *supra* note 131 at 305-309.

technologies.¹⁸⁴ Current analysis prefers military organizations that allow for maximum flexibility so that each unit in the hierarchy can arrange its tactical operations to meet the overarching goal identified in the stated mission.¹⁸⁵ Platoon leaders and their teams receive general objectives, integrated with rules of engagement that incorporate domestic and international law.¹⁸⁶ Soldiers in turn are trained and rehearse tasks in accordance with their specific rules of engagement.¹⁸⁷

It may seem logical that an increasingly flat organizational structure eases the dilemma of the superior orders defence. With greater collaboration and less rigidly hierarchical discipline, the problem of blind obedience to illegal orders would appear to diminish. But in many ways, this development exacerbates the dilemma and the risk of abusive conduct. True, a soldier may be confronted less often with the choice to either obey a direct and explicit order to commit a war crime or else face personal jeopardy from a commanding officer. But general directions to a team demand individual discretion. As a participant in an urban operation in an occupied territory, under a general direction to “clear the area” or “secure the street”, each soldier risks becoming involved in harming civilians in violation of the laws of war. As a member of the team in charge of detainees, each soldier is in danger of both falling under the sway of peer pressure and of acting without sensible guidance. Therefore, contemporary command structure requires that each soldier be taught to maintain attention to the laws of war while operating amid decentralized command and tacit orders—and while acting under stressful and emergency conditions.

4. Integrate Legal Analysis into Platoon Command

Still, it cannot be left to the individual soldier to know the laws of war and apply them to particular operations. Instead, legal analysis must be incorporated at each stage of command and therefore with the support and participation of the command structure. This may seem unrealistic to outsiders, but in fact (and this is one lasting consequence of the My Lai massacre), lawyers have become much more directly involved in planning U.S. military operations. Lawyers review and often draft the

¹⁸⁴ See Keijzer, *supra* note 50 at 43-48; Osiel, *ibid.* at 214-21, 233-34; Martins, *supra* note 161; Hermann Jung, “Preparing for Asymmetry—Joint Visions 2010 and 2020—An Organizational Learning Perspective” in Micewski & Annen, *supra* note 135, 179 at 190-92.

¹⁸⁵ See U.S., Department of the Navy, Marine Corps, *Warfighting* (MCDP 1) at 77-78 (1997), online: Defense Technical Information Center <http://www.dtic.mil/doctrine/jel/service_pubs/mcdp1.pdf>.

¹⁸⁶ See U.S., Department of the Army, *Legal Support to Operations* (FM 27-100), ss. 8.2, 8.3 (1 March 2000), online: United States Army Training Support Center <<https://atiam.train.army.mil:443/soldierPortal/atia/adlsc/view/public/9422-1/fm/27-100/fm27-100.pdf>> [*Legal Support to Operations*] (field manual on the mission and methods of the judge advocates and supporting legal personnel detailing how rules of engagement implement strategic policy decisions, serving operational or tactical military goals while bringing U.S. forces in compliance with domestic and international law).

¹⁸⁷ *Ibid.*, s. 8.4.4.

Rules of Engagement.¹⁸⁸ They shape and participate in training programs whose credibility is enhanced precisely due to their involvement. Discussion about the legality or justifiability of conduct is now threaded throughout U.S. military training and the planning of operations.¹⁸⁹ Integrated attention to the legality of orders is a central part of the training program used by the U.S. Marine Corps, which embraces the goal of ensuring compliance with the spirit as well as the letter of the law.¹⁹⁰ Providing access to legal advisors during planning and execution of operations is now a priority in many parts of the U.S. military.¹⁹¹ Training materials increasingly look like law school materials, relying on detailed scenarios to hone the situational judgment of soldiers.¹⁹²

Through these means, the law can become a tool for analysis and critical thinking rather than a set of commandments. As one commentator explains, the lawyer serving as a judge advocate is supposed to give detailed advice and “ensure that if the commander breaks the law, he is doing it intentionally.”¹⁹³ Thoughtful figures within and outside the military argue for integrating law into the fabric of daily operations. Some identify how “lawfare”, as a tool for winning and keeping hearts and minds, can deeply affect the perception of the military by its own nation and by its enemies.¹⁹⁴ The White House circumvented the process of involving military lawyers in the planning and assessments of interrogation and detention practices between 9/11 and when the abuses at Abu Ghraib and Guantánamo were exposed.¹⁹⁵ Unlike White House and Department of Justice lawyers, who in general lacked experience with the

¹⁸⁸ See Maj. Derek I. Grimes, Maj. John Rawcliffe & Capt. Jeannine Smith, eds., *Operational Law Handbook* (Charlottesville, Va.: International and Operational Law Department, The Judge Advocate General’s Legal Center School, 2006) at 93ff., online: Air University, Maxwell-Gunter Air Force Base <http://www.au.af.mil/au/awc/awcgate/law/oplaw_hdbk.pdf>; Stephen A. Myrow, “Waging War on the Advice of Counsel: The Role of Operational Law in the Gulf War” (1996-1997) 7 U.S. Air Force Academy Journal of Legal Studies 131 at 136, 140-42.

¹⁸⁹ See Myrow, *ibid.* at 141.

¹⁹⁰ U.S., Department of Defense, *Marine Corps Order 3300.4*, s. 1(a)(1) (20 October 2003), online: U.S. Marine Corps <<http://www.usmc.mil/directiv.nsf/mco?openview&count=5000&start=1>>.

¹⁹¹ See e.g. *ibid.*, s. 1(a)(3); Myrow, *supra* note 188.

¹⁹² See Martins, *supra* note 161; Myrow, *ibid.* at 137-39, 142. See generally Grimes, Rawcliffe & Smith, *supra* note 188 at 3.

¹⁹³ Myrow, *ibid.* at 144. See also *Legal Support to Operations*, *supra* note 186.

¹⁹⁴ See Council on Foreign Relations, “Lawfare, the Latest in Asymmetries” (summary of meeting held as part of Roundtable on National Security: Military Strategy & Options, 18 March 2003), online: Council on Foreign Relations <<http://www.cfr.org/publication.html?id=5772>> (“Lawfare is a strategy of using or misusing law as a substitute for traditional military means to achieve military objectives”); Jeremy Rabkin, “Lawfare” *The Wall Street Journal* (17 July 2004) A14 (arguing that law can be used cynically to gain a military advantage, but a military’s failure to comport with law gives a lever to opponents both practically, as when a court deals a blow to the military’s tactics, and in the court of public opinion). For cautions against counting on legal vocabulary and rules to strengthen personal responsibility for soldiers and leaders, see David Kennedy, *Of War and Law* (Princeton, N.J.: Princeton University Press, 2006) at 12, 125-28, 142, 163-70.

¹⁹⁵ See Kantwill & Watts, *supra* note 44 at 730-40.

laws of war and knowledge of the practices of the military, the military Judge Advocate General's Corps lawyers who consulted on the issues integrated the spirit of international law into their recommendations for treatment of al Qaeda and Taliban suspects.¹⁹⁶

Weaving law into strategy and tactics, rules of engagement, and training is an example of the organizational approach that involves the ordinary soldier but does not place the burden of lawfulness on his or her solitary shoulders. Especially where the scope of legality is contested or ambiguous, it is unreasonable, indeed far-fetched, to expect every soldier to monitor and take full responsibility for understanding debates over the legality of orders as part of his or her daily job. The rank-and-file soldier does not usually have access to lawyers for opinions and advice.¹⁹⁷ More than the front-line soldier, officers must carry responsibility for assessing the legality of directives, and yet generals and other high-ranking officers are generally too removed from the action to make the judgments that integrate law into what the soldier must actually do. Hence, the platoon leader, closest to the ordinary soldier, should carry special responsibility for knowing and applying the law of war in assessing commands from above and framing directives for action. The army field manual that serves as foundational text of army leadership for every officer includes these provisions that are especially well-suited to the platoon leader:

4-74. Under normal circumstances, a leader executes a superior leader's decision with energy and enthusiasm. The only exception would be illegal orders, which a leader has a duty to disobey. If a Soldier perceives that an order is illegal, that Soldier should be sure the details of the order and its original intent are fully understood. The Soldier should seek immediate clarification from the person who gave it before proceeding.

4-75. If the question is more complex, seek legal counsel. If it requires an immediate decision, as may happen in the heat of combat, make the best judgment possible based on the Army Values, personal experience, critical thinking, and previous study and reflection. There is a risk when a leader disobeys what may be an illegal order, and it may be the most difficult decision that Soldier ever makes. Nonetheless, that is what competent, confident, and ethical leaders should do.¹⁹⁸

¹⁹⁶ See *ibid.* at 740-41.

¹⁹⁷ With modern technology such as cellphones and text messaging, this would not be an impossibility; determining who has access to military lawyers is now a military choice that itself should be relevant in assigning responsibility for compliance with the law.

¹⁹⁸ U.S., Department of the Army, *Army Leadership: Competent, Confident, and Agile* (FM 6-22) (October 2006), online: United States Army Training Support Center <https://atiam.train.army.mil/soldierPortal/atia/adlsc/view/public/23230-1/FM/6-22/FM6_22.pdf>. See also David L. Perry, "How Ethics is Taught in the U.S. Army War College" in Micewski & Annen, *supra* note 135, 152 at 157; Richard A. Gabriel, "Legitimate Avenues of Military Protest in a Democratic Society" in *Military Ethics: Reflections on Principles—the Profession of Arms, Military Leadership, Ethical Practices, War and Morality, Educating the Citizen-Soldier* (Washington, D.C.: National Defense University Press, 1987) 101 at 104-10 (morally permissible avenues for military officers to protest orders include

With increasingly more discretion and tactical decision making at the platoon level, the platoon leader should be the focus of training and responsibility for ensuring the lawfulness of orders,¹⁹⁹ including both orders coming from above and the platoon leader's own orders. Indeed, in some circumstances, perhaps the platoon leader should be given the specific job of playing devil's advocate in order to reduce the groupthink and conformity surrounding a superior officer.²⁰⁰

5. Allocate Resources for Translation and Consultation

Sensible allocation of resources to prevent abuses is the kind of detail that, once again, the lowest-level soldier cannot accomplish. A member of the IDF Judge Advocate Corps described the instance of an eighteen-year-old guard serving at a checkpoint between two parts of the territories (not between Israel proper and a territory).²⁰¹ One order from high authority directed that no person could pass through the checkpoint with food or drink without taking a bite or a sip in front of the guard in order to demonstrate that the substance was not a biological weapon or other danger. A Palestinian woman carrying a container filled with a clear liquid came to the checkpoint. The guard directed her to take a sip. The guard did not speak Arabic and apparently the Palestinian did not understand Hebrew. The guard, frustrated, repeated the direction and finally pointed her gun at the Palestinian, and motioned that she should drink the liquid, which she did. The guard passed her through the checkpoint only to hear her collapse in convulsions shortly thereafter. As it turned out, the liquid was machine oil that the woman was bringing to her husband so he could clean his engine.

Here the order under which the guard operated was not itself illegal, and certainly not manifestly so, but her implementation of it was thoughtless and inflicted genuine harm. She faced disciplinary sanctions. The individual soldier should indeed be induced to think more carefully than this soldier did. But so should resources be arranged so that a soldier in such a situation would have someone to turn to for translation given the predictable communication problem at a checkpoint, or at least someone to consult about what to do in the face of such a problem. This mess would

resignation, request for relief in protest, appeals to a higher command, and refusal, with potential defence at a court martial). By addressing officers rather than rank-and-file soldiers, such guidelines indicate how the question of disobedience affects the duties and capacities of officers differently than other soldiers.

¹⁹⁹ See Guiora & Minow, *supra* note 172. The omission of the topic of serious ethic abuses in training materials for junior officers is striking, given their pivotal role in implementing commands and setting the right tone. See e.g. Karel Montor *et al.*, eds., *Ethics for the Junior Officer: Selected Cases from Current Military Experience*, 2d ed. (Annapolis, Md.: Naval Institute Press, 2001).

²⁰⁰ This might begin to approximate the variations on Asch's experiments in which the presence of dissenters reduced the likelihood that a subject would suppress his own perceptions and conform with the group. See *supra* note 123.

²⁰¹ Interview of Oded Savoray, Judge Advocate, Israel Defense Force by Martha Minow (17 May 2006) on file with author.

not be avoided if the soldier was perfectly trained to resist a manifestly illegal command nor if she had memorized the Geneva Conventions. Teaching alone will be insufficient; there must be related changes in the organization, management, rewards, and punishments of military operations in order to guard against abuses and atrocities. The integration of law into day-to-day operations requires recasting law from a set of rules legislating norms to ongoing practices of reflection and interrogation of action and operations.

Conclusion

When should a soldier be held responsible for following orders? Pursuing this question illustrates how complicated the very statement of an important rule can be, how instruction in a rule may not sufficiently affect conduct, especially conduct in stressful situations, and how ethical thinking requires individual courage but also reinforcement through a larger strategy to design and maintain the organization, management, rewards, and punishments of day-to-day operations. If only to express the symbolic importance of individual accountability central to democratic ideals, the law should permit no defence to charges of genocide, crimes against humanity, or violations of the law of war on the basis of following orders. Yet social science research predicts that soldiers will in fact follow orders, whether legal or illegal, and that soldiers will conform to expectations of superiors and peers. Soldiers will not only be unlikely to resist a commander or peer group authorizing or engaging in atrocities but will also be prompted to join in with abusive behaviour started by peers or prodded by superiors. Reducing the risk of military atrocity requires the direct engagement of the entire military, civilian authorities, and citizens in designing the organization, the norms, and a culture that demand lawful and ethical conduct. Otherwise, atrocities will recur—and we will all be responsible.
