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

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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 as 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 superior's duty 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 du débat sur la défense des ordres supérieurs, ainsi que la question de comment prévenir la conduite abusive des militaires et d'arrêter ces derniers à commettre des actes d'atrocités. Cet article examine 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 illustrent 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 ratifiées. 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 enfreintes 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 standard de détermination de 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 Appelbaum, Gabby Blum, Larry Blum, Mary Casey, Rebecca Cohen, Dick Fallon, Lani Guinier, Lt. Col. Patrick Gawkins, Amos Guiora, Dean Elena Kagan, Prina 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-Il, Ryan Budish, Caleb Donaldson, Christine Monta, David Olivenstein, and Noah Weisbord.

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Introduction

In 1945, Raoul Wallenberg sent a message to SS Commander General August Schmidthuber 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.” His message to General Schmidthuber, 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.”

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 soldier directed to shoot a civilian or the guard pushing people into the gas chambers; consider General Schmidthuber, ordered by Adolf Eichmann to massacre the more than 60,000 Jews remaining in the Budapest Central Ghetto. Schmidthuber 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?

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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. 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. 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. This would be true in any hierarchical society. Orders that violate the international consensus of acceptable conduct even in wartime should not shield soldiers from criminal culpability.

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4 See note 51 and accompanying text.
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>).
This legacy of the Nuremberg Tribunal is widely cited, but the reality of the rule both at Nuremberg and since is more complicated. 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.

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.

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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

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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 Men15 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

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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).


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.” 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

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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

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

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

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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


\(^{34}\) 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. 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. 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.

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.


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 water-boarding 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.” 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, although the wrongness of most of the abusive conduct is undisputed. Also at work were inadequate training, 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.

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

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.


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>).

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)).

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.\textsuperscript{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,\textsuperscript{48} they knew, or should have known, that they were engaged in conduct departing from acceptable standards.\textsuperscript{49} They should be held responsible because excusing them sends a wrong

\textsuperscript{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 \textit{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 [\textit{Rome Statute}]).

\textsuperscript{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 \textit{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>).

\textsuperscript{49} England noted that she thought the conduct that they were pursuing was “kind of weird” (\textit{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. 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, 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:


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.
55 See Solis, ibid. at 511.
56 Ibid.
57 See Howard S. Leive, “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: cbc.ca <http://www.cbc.ca/news/reportsfromabroad/murray/20020718.html>.
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. 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. 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.

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. 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. 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. This concept in contemporary terms has more in common with the defence

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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.
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 delict.”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

67 See Levie, supra note 57 at 199.
68 See ibid. at 199-203; Garraway, supra note 64 at 785-94.
71 Levie, supra note 57 at 204.
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. 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”). 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. In a separate dissenting opinion, Chief
Judge Antonio Cassesse 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.  

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. After some initial ambiguity, so have the Special Panels to hear Serious Crimes in East Timor and the Statute of the Iraqi Special Tribunal, signed by the administrator of the Coalition Provision Authority. 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. In addition, an illegal order may still give rise to a defence without any assessment of whether it was manifestly illegal. Given these ambiguities, one scholar recently proposed that the United States permit detainees in Guantánamo to assert the superior orders defence.

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.).


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.] [SCLR 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).


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. Insco, “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. 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. 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.” 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.

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).
Several countries committed to the ICC have already amended their domestic law to match the ICC standard on superior orders. 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.” 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.

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

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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).
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; superior orders do supply a defence but only if the subordinate person did not know it was illegal and it was not manifestly illegal; superior orders do supply a defence but only if the subordinate had no moral choice or latitude for free action, and superior orders supply a defence if a person of ordinary sense and understanding would not know that the order is illegal. 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. 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;
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

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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.

attention and predispose the person to certain conclusions rather than others. Similarly, research on reference points indicates that the selected reference point affects perceptions and the way people assign value to options. 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. 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.

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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. 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.

<table>
<thead>
<tr>
<th>Level</th>
<th>Stage</th>
<th>Social Orientation</th>
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<tr>
<td>Preconventional</td>
<td>1</td>
<td>obedience/punishment</td>
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<tr>
<td>Preconventional</td>
<td>2</td>
<td>individualism, instrumentalism,</td>
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<td>Conventional</td>
<td>3</td>
<td>good interpersonal relationships,</td>
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<td>Conventional</td>
<td>4</td>
<td>maintaining social order,</td>
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<tr>
<td>Postconventional</td>
<td>5</td>
<td>social contract and</td>
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<tr>
<td></td>
<td></td>
<td>individual rights</td>
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<tr>
<td>Postconventional</td>
<td>6</td>
<td>principled conscience</td>
</tr>
</tbody>
</table>
Finally, a limited number of people (Mahatma Ghandi 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. 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.

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.

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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 Hewer, 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. 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.

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

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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.


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 deindividualized, 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.
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.
usually put in herds, or groups, and given numbers. Their identity is taken away.\textsuperscript{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.”\textsuperscript{121} The loss of individual identity in the situation reflects elements of conformity as much as obedience.\textsuperscript{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.\textsuperscript{21} 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.\textsuperscript{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.\textsuperscript{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.


\textsuperscript{121} Ibid.

\textsuperscript{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. Crensten & Alex P. Schmid, eds., The Politics of Pain: Torturers and Their Masters (Boulder, Colo.: Westview Press, 1995) 129.


\textsuperscript{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

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127 See *ibid.* at 161, 185.
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 countermessage. 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,\textsuperscript{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.

\textbf{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

\textsuperscript{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 Royl, “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.

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. 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 homes 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. 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 orders 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. For example, the conduct rule

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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.


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


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. 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.

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.” 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.

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. Initially, the training programs emphasized that each soldier must learn to question orders.


150 Ibid. at 29.


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.\textsuperscript{153} Subsequently, training programs teach about My Lai but tend to emphasize the importance of leadership and respect for law,\textsuperscript{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,”\textsuperscript{155} and a “stiflingly hierarchical outlook”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{159} Military training programs face substantive and pedagogical


\textsuperscript{154} “Why Haditha Matters” \textit{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 (\textit{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>.


\textsuperscript{157} See Rayman, supra note 147 (quoting William Eckhardt, prosecutor of Lt. Calley).


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
Sinai Campaign. 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.

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, there may

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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)).


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{167} It remains uncertain whether this will change with the end of Chief Justice Aharon Barak’s service on the Israel Supreme Court.
\textsuperscript{168} I would like to thank Professor Pnina Lahav for emphasizing this point.
\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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:

\begin{quote}
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.\textsuperscript{172}
\end{quote}

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

\textsuperscript{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, \textit{ibid.}

\textsuperscript{171} Toner, \textit{supra} note 7 at 43.

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, 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, 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. 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.

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. 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.
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. 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.” 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

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183 See Osiel, supra note 131 at 305-309.
technologies. 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. Platoon leaders and their teams receive general objectives, integrated with rules of engagement that incorporate domestic and international law. Soldiers in turn are trained and rehearse tasks in accordance with their specific rules of engagement.

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

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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.
187 Ibid., s. 8.4.4.
Rules of Engagement. 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. 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. Providing access to legal advisors during planning and execution of operations is now a priority in many parts of the U.S. military. Training materials increasingly look like law school materials, relying on detailed scenarios to hone the situational judgment of soldiers.

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.” 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. 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. Unlike White House and Department of Justice lawyers, who in general lacked experience with the

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189 See Myrow, ibid. at 141.


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.

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, 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.

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). 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.