

What the rule of law should mean in civics education: from the ‘Following Orders’ defence to the classroom

Martha Minow^{*†1}
Harvard Law School, USA

Sixty years after the International Military Tribunal opened in Nuremberg to try ‘major war criminals’, how should soldiers learn not to follow clearly illegal or unconscionable orders? Following the Charter of the International Military Tribunal, judges during the Nuremberg Trials rejected defendants’ efforts to avoid punishment on the basis of superior orders. The Cold War stymied subsequent efforts to codify the norm; subsequent tribunals have adopted similar, but not identical, versions of the rule, as have domestic legal systems. Psychological research by Lawrence Kohlberg and Stanley Milgram raises serious questions about whether young soldiers can or will use their own moral assessments to disobey illegal orders or resist engagement in conduct abusing the rights of others. Further adding to the risks of atrocity are the stress and fear of wartime, the ambiguities and complexities of the war against terror, and confusion about the actual standards governing detentions, interrogations and treatment of civilians by the military. Hence, reducing the risks of atrocity requires not only refining and teaching the rule that superior orders are not a defence to military atrocity but also integrating legal and ethical analysis into the day-to-day operations of the military, and conceiving of law in this context as a constant set of questions. The dilemma posed for the soldier who must learn both to obey orders and to resist illegal orders offers a rich focal point for students in middle and high school settings. Such instruction could strengthen civilian oversight of the military while also deepening students’ abilities to bring their conscience to bear in many settings where obedience and conformity jeopardize adherence to law and morality.

Sometimes I have dreams in which people I know from different parts of my life meet one another – and these people find so much to talk about with one another that I do not have to do anything. In many ways, this moment, and this audience is a dream, bringing together people I have long admired:

*Harvard Law School, 1525 Massachusetts Avenue, Griswold 4 South, Cambridge, MA 02138, USA. Email: minow@law.harvard.edu

† This is the text of the 18th Lawrence Kohlberg Memorial Lecture presented at the 31st annual conference of the Association for Moral Education and the Facing History and Ourselves/Harvard Facing History Conference, Harvard University, Cambridge, MA, 4 November 2005.

- in the Association for Moral Education, devoted to linking moral theory and educational practice;
- my friends and collaborators at Facing History and Ourselves, who so beautifully support teachers and community members to link history to the challenges of civic engagement in our complex world and the difficult choices that young people make every day;
- students and colleagues from the Harvard Law School, the Harvard Graduate School of Education, and elsewhere.

Now, perhaps I need not talk at all, as you all have so much to connect with one another! I do know, looking around the room, that we can defy the assertion of the author Rebecca West, who wrote in a short story: ‘There is no such thing as conversation. It is an illusion. There are intersecting monologues, that is all’ (Maggio, 1992, p. 67). I promise to make time for conversation before we are done here this morning, for it is in conversation, I believe, that we acknowledge and enact our mutual respect and dignity, but I do have something to start the conversation.

If I can be so audacious, I bet that Larry Kohlberg would have liked the convergences in this occasion. I remember hearing him speak, when I was a student, about bridging the academic and the practical and, as I will explore here, he was embroiled in the conjunctions of law, morality and education, just as we are here today.

Sixty years after the International Military Tribunal opened in Nuremberg to try ‘major war criminals’ is a good time to reflect on what is worth teaching about ‘the Nuremberg trials’: what is important to teach about the rule of law, and how can we teach the moral alertness necessary to prevent atrocities and to promote democracy and human dignity?

Specifically, I want to explore with you how the issue of obeying the law could, and should, be taught. Because it has direct roots in the Nuremberg trial, I will focus specifically on what we do and should teach soldiers about following orders. This question is important to soldiers and to the society they protect. The ideal behind the rule of law is that people in both official and lay roles should defer to the rules established rather than their own desires or views. This ideal is complicated for soldiers who, on the one hand, are directed to follow orders, and on the other hand, are told that ‘just following orders’ is no defence to genocide. Indeed, the soldier faces a real dilemma for he or she may be punished for failing to follow orders but also punished for following orders that produce grave violations of human rights. This dilemma, I will suggest, presents issues genuine and challenging enough to motivate and prepare young people even if they have no destiny of military services to take up civic and moral adulthood. So first: I will explore the context of the Nuremberg trials and recent echoes; then, I will draw connections to work in moral development and education; next, I will consider challenges in teaching soldiers about their duties after Nuremberg. Finally I consider what the entire topic suggests about law that should be shared with students on their way to adulthood in societies that must be vigilant about genocide, atrocity, accountability and human rights (and by that I mean every society, everywhere).

The context of the Nuremberg Trials

Authorized by a Charter framed by the United States, Great Britain, France and the Soviet Union, the Allies launched criminal proceedings, starting with the initial trial of ‘major war criminals’ and 12 subsequent trials each of the occupying countries managed, followed in turn by international trials in Tokyo, and then domestic trials conducted in Germany, Israel, the United States and Canada, going on well through the rest of the 20th century. All of these trials tried to establish legal accountability for the aggression and violations of human dignity during World War II.

Critics attacked the effort as ‘victors’ justice’ because the trials pursued only the Axis powers of Germany and Japan, and never the behaviour of the Allies during the war. Critics also decried the trials as retroactive justice, allegedly applying norms that were not previously laid down or endorsed by those under judgment.² Here, the criticism was overstated; murder, theft, physical abuse were certainly criminalized under the German criminal code prior to the Nazi regime. In any case, despite sharp criticism, the Nuremberg trials have come, especially by the close of that violent 20th century, to serve as a kind of ‘gold standard’ for international criminal prosecutions. (When I used that phrase with historian Charles Meier, he remarked: ‘yes, precisely, with all the ups and downs of pegging your currency to gold’.)

The Cold War put the dream of a permanent international court on hold. But after the collapse of the Soviet Union and in the wake of subsequent violence, the United Nations Security Council authorized an *ad hoc* International Criminal Tribunal with jurisdiction over breaches of the Geneva Conventions, genocide, war crimes and crimes against humanity committed in the territory of the former Yugoslavia since 1991.³ Initially hampered in its efforts to arrest major figures, that tribunal did finally get the top figure, Slobodan Milosevic, in the dock.⁴ However long and laboured its process may be, the International Criminal Tribunal for Yugoslavia (ICTY) directly demands accountability from the top down for the plans and details of the mass violence in the Bosnian region.

The UN next authorized the *ad hoc* International Criminal Tribunal for Rwanda (ICTR), then a tribunal for East Timor, and the Special Court for Sierra Leone. In 1998, 120 nations agreed to create the permanent International Criminal Court (ICC); recently, Mexico became the 100th nation to ratify the governing treaty (leaving the US nearly alone in its refusal to join). With the ICC, the Nuremberg trials found a permanent legacy, described on the court’s website as the firm commitment ‘to promote the rule of law and ensure that the gravest international crimes do not go unpunished’ (see the website of the International Criminal Court).

Promoting the rule of law – and ensuring that the gravest international crimes do not go unpunished – these ideals are the legal legacies of the Nuremberg trials. Each of these legal legacies can be stated more precisely, though, and when we do, we will see a tension between them.

The first legal legacy is the model of criminal justice – complete with indictments, trials and convictions – to deal with those alleged to have perpetrated genocide and mass international violence. Rather than summary execution of the apparent perpetrators of atrocity, rather than new waves of revenge against their families and

communities, and rather than no official response at all, criminal trials couple accountability with the restraint of lawful adversarial proceedings and the example of actual acquittals. The criminal justice framework used at Nuremberg rested on assigning to individuals the responsibility for war crimes, crimes of aggression and crimes against humanity. If individuals are held responsible, then maybe in the future, individuals will resist. Holding individuals responsible rejects the fiction that states do the acting that makes war and atrocities. Holding individuals accountable also resists the temptation to blame a whole group – laying the ground for the new scapegoating, resentments and violence that such thinking inspires.

Mass atrocities, aggressive war and genocide henceforth must be viewed not as acts of governments, but as actions of leaders and propagandists who foment hatred, industrialists who create the machineries of death, and those who fire the missiles, shoot the guns and wield the machetes. That means holding responsible both those who issue orders and those who carry them out. One of the biggest accomplishments of the Nuremberg Tribunal is that its very existence creates a model that, if not pursued after subsequent genocides and atrocities, becomes a question: why are there no trials? The model of trials creates a demand on those who would do nothing: a demand for government of laws, not of people. The rule of law means at minimum the commitment to applying the same norms to all, regardless of politics, popularity or power: the king and the general, the army private and the employee of the private military company, the president and the vice president's aide (Tamanaha, 2004).⁵

Working for the rule of law means developing principles with universal application, in order to promote respect for human dignity and fairness for every person. Rights run to all individuals, those who are victims or perpetrators of terrorism, and those caught in nations that ignore the rule of law.⁶ The gravest human rights violations must not go unpunished; trials should establish what happen and assign responsibility to individuals.

A second legal legacy commonly associated with the Nuremberg trials is the decision to reject the defence of 'I was following orders', given charges of war crimes, genocide or crimes against humanity. Responsibility runs to the individual. It reaches each of the actors. Finger pointing, passivity and conformity cannot bypass culpability.

While World War II still raged, Allied leaders began to talk about an international tribunal to be held after the war – perhaps in hopes of deterring further atrocities, and perhaps to raise the morale of the troops (Levine, 1990, p. 9). In 1943, 17 nations met in the United Nations Commission for the Investigation of War Crimes, and began to debate the rules and structures for such trials, including the question of whether 'following orders' should be permitted as a defence (Levie, 1991, p. 189).⁷ When the United States, two years later, drew up a draft proposal for an international military tribunal to try major German war criminals, the proposal included a provision rejecting an absolute defence of 'acting pursuant to an order of a superior or government sanction', but permitting evidence of superior orders or government sanction in a defence or mitigation of punishment (p. 191, quoting paragraphs 11 of the 1945 US proposal). The Charter of the International Military Tribunal became

the document governing the Nuremberg trials, and it went even further in restricting use of 'superior orders'. Article 8 stated:

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.⁸

This did not stop defence council. Thus, the Tribunal faced arguments by lawyers for Field Marshal Wilhelm Keitel and Colonel General Alfred Jodl that they were following orders and thus should have no or else reduced criminal liability.⁹ The Tribunal rejected these claims. The judges announced that the law of all nations rejected a defence based on superior orders to kill or torture in violation of international law.¹⁰

Subsequent trials under the individual authority of the four nations occupying Germany after the war proceeded along similar lines. 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.¹¹ Finding all 24 of the defendants guilty of war crimes, that tribunal wrote an opinion acknowledging that a military soldier's first duty is to obey, but nonetheless rejected the defence of superior orders and called for independent thinking by the soldier. The judge explained:

The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent ... The fact that a soldier may not, without incurring 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 malice of his own, he may not plead superior orders in mitigation of his offense.¹²

Here the Tribunal had the benefit of precedent in Imperial Germany to the same effect (Solis, 1999, p. 495). 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 (Greenspan, 1959, p. 442; Solis, 1999, p. 511).

In rejecting the superior orders defence, the Tribunal tried to establish that anyone, anywhere, should know that rounding up, abusing and killing civilians is wrong. It is always wrong. It is not permitted simply because a political or military leader told you to do it. Yet, and here is the point of tension with the first lesson that law should be the preferred response to mass violence: excluding a defence of 'following orders' places a firm question mark on what should count as the kind of law anyone should be bound by – and on who should be expected to know and evaluate the law.

Especially for people in the military, orders from superiors form the chain of authority that commands respect and ready adherence. Telling soldiers that they face punishment unless they disobey illegal orders means telling them to think for themselves, and question authority. Taken to an extreme, these directives to 'think

for yourself' and 'question authority' would disturb the command structure and practice of drilled obedience in the military. Introducing the same ideas to the general public also injects the unpredictable factors of individual thought and resistance in the face of official rules and the rule of law itself. There is an unavoidable tension between the conformity and independence. Conformity permits order but also risks group-think and even mass atrocity, while independence promotes resistance to atrocity but risks disorder and inefficiency.

Thus, on one hand then, the legal lesson of Nuremberg is to establish and enforce the rule of law, follow the law, hew to the rules laid down. On the other hand, the lesson is not to do just what is easy or expected or even commanded, but to do the right thing. That means, indeed, that sometimes we should disobey even a direct order, and we should teach others – soldiers, children – to do the same. That requires strength and independence to resist commands and peer pressure. That demands the clear sightedness to know an illegal order when you see one.

Recent echoes

All this adds up to a particularly challenging message to teach: follow the rules, but also learn to distinguish good orders and bad. Think for yourself. In practice, this is not easy. Sorting out good, lawful orders from unlawful ones is difficult enough. But imagine doing so in the midst of the tension and anxiety of armed conflict – or the boredom and anxiety of waiting for violent eruptions. And then imagine that you are 21, or 19, trying to please your superiors, or get along with your peers – or impress your boyfriend. How, then, do you come to know whether to follow orders or conscience, or how to treat suspected terrorists, or even how to hear your conscience while guarding suspected terrorists?

This is the situation of Private Lynndie England. She is the private in the Army reserves who became the public face of prisoner abuse in the Abu Ghraib prison. She notoriously posed with naked Iraqi prisoners, holding one by a leash while dangling a cigarette from her smiling mouth, and pointing at the genitals of naked, hooded detainees (see, for example, Cock, 2004). She should have known better.

But the story gets worse. She and her lawyers maintained that she was following orders to pose for the photos (Hampson, 2004; Solis, 2004, p. 988). Three months after the incident, during an investigation, England herself said that Graner directed her to pose with the leash. When asked if she was a willing participant, she did not say she objected to it (Cock, 2004). Then her lawyers tried to negotiate a plea bargain: she pleaded guilty in exchange for a reduced sentence. Yet Specialist Charles Graner, himself serving ten years for his role in the scandal, and England's boyfriend at the time, testified that England was following his orders, and that the photos were taken to document a legitimate exercise. Military judge Colonel James Pohl responded by throwing out Private England's plea bargain, because as he put it, 'If you don't believe you were guilty, doing what Graner told you, then you can't plead guilty.'

So rather than plea bargain, she went to trial. There, 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 has an 'overly compliant personality' and fell under the influence of Private Graner. The prosecutor countered that Private England was an enthusiastic participant. 'What soldier wouldn't know that that's illegal?' he said, pointing at her photographed grinning face as she jeered at the naked prisoner.

A month ago, a jury of five military officers convicted England of conspiracy and maltreatment of prisoners.¹³ Her defence counsel commented, 'The entire case, what this has always been about, is authority ... Private first class England's blind compliance toward authority and her lack of authority in any context.'

Private England is the last of nine military police and military intelligence reservists who have either been found guilty or accepted plea bargains following the exposé of abuses at the prison in 2003. Yet investigative reports by both the military and by outside observers suggest that the abusers did indeed follow orders: whether they were general directives to demean the prisoners – or else decisions to exercise such loose oversight that young, anxious reservists would be predictably allowed to lose self-control. Thus, England should not be the scapegoat; there are many others still free who bear responsibility for the conduct there. Nonetheless, she should not go unpunished.¹⁴ Soldiers in Abu Ghraib, soldiers in Israel, soldiers anywhere must retain their conscience even if it means at times disobeying. They must do what is right, not simply what is promised or ordered.

This is really hard. How can the military remain a disciplined force, subject to hierarchical command? Military training has to include instilling obedience to commands to do things no one would do as a civilian. As one expert on military discipline explains,

Military effectiveness depends on the prompt and unquestioning obedience of orders to such an extent that soldiers are prepared to put their lives at risk in executing those orders. During military operations decisions, actions and instructions often have to be instantaneous and do not allow time for discussion or attention by committees. 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 expect their subordinates to carry them out. In return for this unswerving obedience the soldier needs the protection of the law so that he does not afterwards risk his neck for having obeyed an order, which later turns out to be unlawful. (Rogers, 1996, p. 143)

But the Nazi period in Germany exposed better than any other historical experience how untenable it would be to embrace this position in all circumstances. The ostensibly civilian legal system wrested by Adolf Hitler from the Weimer Republic adopted a conception of the leader-state, tracing all of the nation's law the command of the leader, and enabling every single other person in the society to claim they were following orders (McCoubrey, 1997, p. 185). This would be true in any hierarchical society (Rogers, 1996, p. 143). Orders that violate the international consensus of acceptable conduct even in wartime must not supply a complete defence to criminal culpability for soldiers.

Military training must not only teach obedience to orders but also must teach soldiers to know – and to act on their knowledge – about the kinds of orders and practices that are clearly illegal. What would it take for someone like Private England to

do the right thing, in an atmosphere of fear, boredom and bravado? She would have to think for herself. But a military cannot work if each member is always thinking for herself. But nor can it do what it is entrusted to do if its members never pause to see if they are committing torture, or genocide or abusing human dignity. What does someone have to know and be able to pause, think and, when necessary, resist?

The soldier needs to obey orders but also always test them against higher authority. What is that higher authority, and who knows it and how? Leaving individuals to assess and act on 'higher authority' invites disorder, incoherence and error. Even if higher authority is within law – if it is international rather than national law, or constitutional rather than military law, what level of expertise do you need to know it? Many *legal* sources say that the test of illegality itself is conscience.¹⁵ So how do we hear or know the voice of conscience discerned? A renowned Israeli opinion notes that

The distinguishing mark of a 'manifestly unlawful order' should fly like a black flag ... Not formal unlawfulness, hidden or half-hidden, nor unlawfulness discernable only to the eyes of legal experts ... the unlawfulness piercing the eye and revolting to the heart, be the eye not blind nor the heart stony and corrupt – this is the measure of 'manifest unlawfulness' required to release a soldier from the duty of obedience.¹⁶

This is a vivid and compelling description. It points ultimately to the soldier's individual heart or conscience. Still, one person's conscience may well differ from another's; your conception of your moral duty could well differ from or even conflict with mine. The tension between different categories of obligation has preoccupied Western philosophy at least since Plato (1969) told us about Socrates, and time has not make the problem easier. What is the content of higher norms and who knows or can be expected to know them?

Moral development theory: the relevance of Kohlberg

This classic dilemma in fact preoccupied none other than Lawrence Kohlberg in his path-breaking research in human development and moral reasoning. Even if this were not the Kohlberg lecture, I would want to turn at this moment to his work, even though it may be bringing coals to Newcastle, given the numbers of people in this audience who teach and write about his work. Yet others here know nothing about it. I invite us all to consider the connections between Kohlberg's ideas about the stages of moral development and the conflict over whether to follow superior military orders or follow conscience or moral ideals (what follows draws upon Piaget, 1965; Kohlberg & Turiel, 1971; Crain, 1985; Power *et al.*, 1989; Reimer *et al.*, 1990). I will also ask you to consider the distance between his framework and the work by Stanley Milgram and others on conformity and obedience.

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 (see Table 1). Most people, he argued, progress at least through the first stages, while very few reach the highest stage of development.

Table 1. Kohlberg's stages of moral development

Level	Stage	Social orientation
Pre-conventional	1	Obedience/punishment
Pre-conventional	2	Individualism, instrumentalism and exchange
Conventional	3	Good interpersonal relationships, good girl/good boy
Conventional	4	Maintaining social order, law and order
Post-conventional	5	Social contract and individual rights
Post-conventional	6	Principled conscience

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. Now the child does not simply equate punishment with wrongfulness but rather views punishment as a risk.

Then, 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. These individuals justify conformity in light of larger social purposes, like the need to maintain social order.

As individuals develop more complex and abstract modes of thinking about moral issues, they start to recognize a need to coordinate people with different interests and needs. They discuss moral issues in terms of the social contract and individual rights. They use these ideas to explore complex relationships between implicit agreements to abide by collective rules and also to respect, and exercise, such individual rights as speech and autonomy. People who reason this way may locate the demands of morality – and they may call for improving society generally to incorporate moral views into laws.

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

There is a startling 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 you were following orders. Superficially, it may seem that Kohlberg's work suggests that over the course of one's lifetime, we each move through the phases. First we follow orders and conform to the conduct of

other soldiers. Then we start to think independently about what morality requires and act on our own conscience.

Yet, placed in Kohlberg's terms, the soldier's dilemma is even more complicated. For even the child would attend to the risk of punishment if he follows an order that is punishable because grossly illegal or unconscionable. For soldiers who are concerned primarily with maintaining good interpersonal relationships, being a good soldier or maintaining law and order, conformity will be the dominant mode. Many young people entering the military after high school – or these days, recruited before they finish high school – are likely to think these ways. What would it take for them to consider more complex ideas about the role of conscience? Even if they develop more complex thoughts, what would enable them actually to resist illegal orders? A persistent difficulty with work on moral reasoning is its exclusive focus on cognition rather than action. Kohlberg's own advice was to expose students to abstract moral dilemmas – and opportunities for self-governance in school. What relationship, if any, does refined analysis of moral dilemmas bear to moral action? I was intrigued to find that after World War II Larry Kohlberg himself engaged in what he understood to be moral, but illegal, action when he helped to smuggle Jews through the British blockade of Palestine (see the Psi café website). He came to that without classroom instruction. It is not at all clear whether thinking about abstract moral dilemmas would lead others to act.

It becomes a puzzle, then, to relate Kohlberg's work to another relevant body of famous psychological study: Stanley Milgram's studies of obedience. In the 1960s, Stanley Milgram conducted a now-famous series of laboratory experiments at Yale in order to study obedience (see Milgram, 1973; Cassel, 2002). You have no doubt heard about the Milgram experiments; his biography is entitled, *The Man who Shocked the World*.¹⁷ 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 given 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 indicating discomfort as the 'teacher' increased the electric shocks. An experimenter was in the booth with the 'teacher', and 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 of the experimenter. But the 'teachers' thought that they were delivering shocks. And more than 60% of the teachers were willing to administer the maximum 450 voltages, in spite of the cries of pain and screams for mercy. Some of the volunteers asked who was responsible for any harmful effects resulting from shocking the learner at such a high level. When the experimenter would answer that he assumed full responsibility, volunteers

seemed to accept the response and continue to administer the ‘shocks’, even though some were obviously extremely unhappy about it. The study raised many questions about how the subjects could bring themselves to administer such heavy shocks, about the ethical issues in conducting such a study (see <http://www.cba.uri.edu/Faculty/dellabitta/mr415s98/EthicEtcLinks/Milgram.htm>), about authority, including academic authority. Modified variations of the experiment later showed that the volunteers were impressed by the apparent authority and expertise of the experimenters, who wore white lab coats, with advanced degrees hanging on their walls and the letters PhD after their names (see Farrell, 2002, considering ethical issues for scientists and engineers given the deference to experts shown in the Milgram experiment).

How do we connect these results with Kohlberg’s theories? Were all of Milgram’s subjects – who were male Yale students – stuck in the conventional form of reasoning? Or do even more complex forms of moral reasoning fall by the wayside in the face of authority and exemption from responsibility?

There may be a kind of convergence between Milgram’s work and Kohlberg’s in the identification of conformity and responsiveness to authority at least until, in Kohlberg’s terms, the highest stages of moral reasoning. What kind of education or preparation would it take to resist the conformity and obedience showed in Milgram’s experiments? Would exposure to dilemmas in advance make any difference, or warnings about the risks of conformity and obedience?

Kohlberg controversially argued that the stages he identified are both universal, in the sense of 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.¹⁸ Therefore, he prescribed a form of moral education that would push people to experience limitations of their current stage by posing dilemmas that would prompt them to think hard enough even to rethink their premises and move to more complex levels of analysis.

It is far from clear to me that teaching a dilemma, such as whether and when a soldier should follow or disobey orders, will prompt a transition to more complex thought. Nor is it clear that complex thought translates into action. But this excursion into some long-standing research paradigms offers a warning: young people recruited into the military are likely to be predisposed to follow orders and conform to prevailing rules. Seeing what the US and other nations do teach their soldiers about this dilemma, and the complications that ensue, could teach us all about the prospects for law in these settings.

Teaching soldiers

One legacy of the Nuremberg trials is the obligation to teach soldiers. The Geneva Conventions, embraced by over 100 nations after World War II, do not only articulate norms governing the treatment of combatants, prisoners of war and civilians during war time; they also commit the signatory nations to teach our military personnel the laws of war.¹⁹ The laws of war include the punishment

associated with genocide and crimes against humanity, and also limitations on defences to such crimes.

Yet the limitations to the defence of 'superior orders' are not as clear as it may have seemed. After the Nuremberg trials, although following superior orders' is not – in most observers' view – an absolute defence, it has not disappeared. A dispute about its status fills the pages of law reviews. That dispute, plus the sheer complexity of end formulation of the rule about the defence, makes it difficult to teach soldiers about it.

Five further difficulties accompany this problem. First, teaching soldiers about their duties regarding superior orders is difficult because this is instruction about conduct, not merely content. A second set of difficulties arises with the shift in military operations from strictly hierarchical command to flatter structures, with teams deployed on missions with goals, rather than commands, and groups selecting tactics on the scene, even where a conventional command structure exists. Third, it is highly unlikely that commanding officers would ever explicitly order genocide or crimes against humanity. Discerning whether an implicit order can be manifestly illegal is, to put it mildly, challenging. Fourth, the knowledge and conduct involved here come into play when people are under stress, a sharp complication. Fifth, the management, rewards and punishments of military operations are no doubt more significant than any particular rule in shaping soldier conduct. I will turn now to each of these difficulties – and ask you to consider how attending to each could enrich student understanding of the promise and limitations of law.

Complications in stating and knowing the rule

After a training exercise, one US army officer not long ago commented, 'I know that if I ever go to war again, the first person I'm taking is my lawyer' (Finnegan, 1996, p. 32). Odd as it may sound, this was not crazy.

The need is real: the actual rule governing when soldiers should and should not follow orders has shifted over time and produced debates among experts. Despite the popular understanding that the Nuremberg Tribunal flatly rejected the defence of 'following orders', even the charter for the International Military Tribunal preserved a role for superior orders in considering whether to mitigate punishment (International Military Tribunal, 1947, p. 10). Then, as now, it was difficult to devise a norm that can reconcile the military need for obedience with the commitment to preventing gross atrocities – even when ordered by a superior officer. Judges at Nuremberg and since say the question should be whether the soldier has a 'moral choice' – a personal capacity to act differently – or would he instead face a firing squad or risk his family's safety if he disobeys an order (Garraway, 1999).²⁰ But does the risk of punishment for disobeying orders always override the moral choice of a soldier? (See, for example, Greenspan, 1959, p. 493) Reasoning this way of course entirely revives the defence, but the Nuremberg Tribunal instead rejected the defence while signalling that 'Following Orders' might mitigate sentencing (Dinstein, 1965, p. 152; Cherif Bassiouni, 1999, p. 471).

Then, the Cold War set in, hampering efforts not only to establish a permanent international criminal court but even to codify the norms used in the World War II trials. Despite long meetings with expert committees, the United Nations could not secure agreement on proposed codifications of the laws of war, peace and security, and efforts to formulate principles from Nuremberg failed (Levie, 1991, p. 199). 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 (Levie, 1991, p. 203; Garraway, 1999). Not only Cold War tensions contributed to the stalemate. In addition, contributors to these documents disagreed over whether soldiers should be expected to think for themselves and decide whether or not to obey orders (International Committee of the Red Cross, 1972).

Some experts conclude that the failure by any international group to adopt a formal statement rejecting the defence of superior orders means that the defence is now available. One scholar goes further and concludes that defence counsel in war crimes trials who do not assert a defence of superior orders would be ‘professionally derelict’ (Levie, 1991, p. 204). His argument is that, by failing explicitly to codify the Nuremberg norm that ‘just following orders is no defence’, international law has rejected it. This view would review an old and classic conception, advanced by Cicero and Thomas Hobbes, that the law should view soldiers’ actions as those of the superior, not the subordinate who obeys authority (see, for example, Hobbes, 1742, Ch. 12; Keijzer, 1978, p. 145). British courts rejected this view in the 17th century (see McCoubrey, 1997, p. 163).

As I read the current authorities, this is a minority view. Most experts emphasize that, just as in the Nuremberg trials, the defence is eliminated in the face of orders that are manifestly illegal – but soldiers may still defend themselves for following orders that are not so illegal. There is good support for this view²¹ because the United Nations Security Council used the Nuremberg-style rejection of superior orders when it authorized the *ad hoc* International Criminal Tribunal for the former Yugoslavia (Staker, 2005, p. 433).²² That tribunal has in fact applied this rule to refuse a defence of superior orders.²³ Similar language is included in the authorization for the *ad hoc* International Criminal Tribunal for Rwanda (Staker, 2005, p. 434), the tribunal for East Timor, the Special Court for Sierra Leone,²⁴ and the Statute of the Iraqi Special Tribunal, signed by the Administrator of the Coalition Provision Authority. Each deny a defence based on superior orders but permit mitigation if justice so requires.²⁵

Yet a statement of international law, citing these precedents reaffirming the Nuremberg principle is not comprehensive.²⁶ The big exception is the treaty authorizing the International Criminal Court, which does permit the defence under some circumstances.²⁷ A soldier charged with war crimes—but not genocide or crimes against humanity—can defend himself from criminal liability if he can show three elements: he is obliged to follow the orders to commit the war crimes, *and* the soldier does not know the orders are illegal *and* the orders are not on their face manifestly illegal. Moreover, a soldier charged with war crimes might be able to assert such a defence if the order in question is not phrased expressly an ‘order to commit genocide’ or an ‘order to commit crimes against humanity’.²⁸

Several countries committed to the ICC have already amended their domestic law to match the ICC standard on superior orders (Staker, 2005, pp. 442–446, describing efforts by Australia, New Zealand and the UK to bring their domestic laws in line with the ICC treatment of superior orders). If many come to do that, the status of the defence in customary international law would change, for then custom would shift. Because the United States has not signed up to the ICC, it does not have to worry about this discrepancy.

The multiple legal formulations may ultimately be less significant than the underlying norm. That norm is well summarized by one author this way: ‘obedience to superior orders is not a defence under customary international law to an international crime when the order is manifestly illegal’ but ‘[i]f the subordinate is coerced or compelled to carry out the order, the norms for the defence of coercion (compulsion) should apply’ as mitigation (Cherif Bassiouni, 1999, p. 483).

Translating the law into a guide for conduct

Even if we are clear about the underlying norm, it remains a challenge for anyone to translate the law into a specific guide to distinguish legal from illegal conduct. The Canadian practice, designed to implement this norm, tells soldiers to presume an order is legitimate unless it is blatantly illegitimate, such as opening fire on schoolchildren playing; and all legal orders should be followed even if an individual perceives an order as unethical.²⁹ This kind of summary is useful in its simplicity but it tilts against questioning an order to make sure that it is legal. Another articulation of the rule could tilt in the other direction, to make it less likely that the soldier crosses the line into illegal conduct. Another option would be to list all specific acts that would be manifestly illegal. To date, no nation has done that – perhaps because context matters too much. Figuring out what belongs on a list of manifestly illegal orders is difficult for lawyers at least in the US, at this moment. This nation has recently witnessed disagreement among the president’s lawyers, the military lawyers, judges, and even justices at the Supreme Court disagree over what is and is not illegal in the treatment of detainees in Guantanamo, and even over what international norms govern the conduct of the war (Greenberg & Dratel, 2006, see also Minow, 2005, p. 2134). Soldiers until recently would not have been privy to these debates as a way to dispute whether their appalling conduct in Abu Ghraib was manifestly illegal (Solis, 2004, p. 997).

Private Lynndie England, for example, could not claim that she knew of these disputes so that debate was irrelevant to determining her guilt. But a future private – anyone who reads any newspaper or blog – would know about this debate. That could certainly affect what is ‘manifestly illegal’ in the United States. Cruel, humiliating or degrading treatment of detainees is either not illegal here or not manifestly so. The New York Times reported that White House officials are debating whether to change US law to forbid cruel, humiliating or degrading treatment of detainees in US custody, and in secret prisons we apparently run around the world. Many in the administration think coming up to the international

standard would wrongly tie our hands (Golden & Schmitt, 2005). There are some who argue we are already bound by that international standard, but the cloud of dispute makes it impossible to say that is obvious, leaving a current soldier on guard in Guantanamo, or Jordan, in the lurch.

One way to deal with this risk of ambiguity is to impose a *duty to disobey* orders that violate the law. This is different from simply removing a defence of 'following orders'. A duty to disobey illegal orders imposes more pressure on the soldier to be active in assessing the legality of orders and threatens punishment for failures to act accordingly.

Yet sorting out what is required and where is discretion remains confusing even with this idea. Legal scholar Mark Osiel claims that the manifest illegality provision does just this: in his words, that prevailing test 'imposes a broad duty to obey superior orders that is qualified by an equally bright-line duty to disobey orders to commit atrocities' (Osiel, 1998, p.287). 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. His rule would put individual soldiers more on guard to be checking out the legality of orders (Osiel, 1998, p. 289). The effect, he argues, 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 push for more awareness by ordinary soldiers of their legal duties.³⁰

I confess that as much as I like discussion and debate, this seems highly implausible. Soldiers operate in contexts of fear and anxiety; they are not a debating society. In Iraq today, I suspect soldiers in their down time spend as much time as they can thinking about matters other than the conflict, and when they do think of the conflict, they probably have to steel themselves to believe that what they are doing is right, justified and well-directed. Otherwise, how could they get up and do it again the next day?

It is far from clear that soldiers fresh from boot camp or a prior tour of duty would debate the legality of their commanding officer's directives.³¹ If such debate were to occur, it is hard to conceive that the military that would welcome it.

Recent developments in Israel are a case in point. The military pursued courts martial after arresting several individuals for refusing to obey orders and obtained convictions in every instance. A study of these proceedings by Hadar Aviram demonstrates the court martial process as a vehicle for comprehensive debate – far from the barracks and the battlefield (Avriam, 2005). In two high-profile cases, the courts allowed considerable latitude to six objectors. The court permitted the objectors to introduce wide ranging legal, personal and political arguments to explain their objections to service in the occupied territories since 2000. After these open and wide-ranging hearings, the courts convicted all of them (Avriam, 2005). The adversarial trial offered a setting for debate over following orders but paradoxically may have increased the legitimacy of the punishment (Avriam, 2005). It also produced judicial decisions affirming the legality of the orders in question and the duty to obey them.

Tacit orders, decentralized authority

We have a further problem figuring out what soldiers should be taught about their duties to obey orders: soldiers will often be operating without explicit orders at all. Let's take the cases where the law is clearest. Manifestly illegal orders provide no defence to charges of genocide, war crimes or crimes against humanity. Such orders surely include orders to engage in genocide and orders to kill unarmed civilians. Yet what 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? When, and how, should a soldier think for himself or herself about such issues? Officers broaching the borders of legality in their orders will most likely not give an explicit directive, and then the challenge for the soldier in assessing legality is simultaneously difficult and less salient; the soldier may not even be put on alert that a potentially illegal order is at hand.

Consider the ways that commanding officers can be vague or even refrain from giving explicit orders. Thus, 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, wipe them out – and, less euphemistically, kill the people who are here (Osiel, 1998, pp. 305–309). Yet precisely because it is conveyed as a hint, such comments may be taken as a powerful directive, especially when conveyed by an officer to a young soldier who has been primed to follow his superior.

The absence of explicit orders is not simply a risk from clever officers seeking to avoid consequences. Changes in the methods of war have produced less strict hierarchy and more 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 having better knowledge of local situations than distant commanders and control over complex weapons, communications and other technologies (Keijer, 1978, p. 43; Osiel, 1998, p. 297; Martins, 1994, p. 3).

Teaching for action under stress

Whatever the content, instruction to soldiers must teach them not just how to reason and argue, but how to act. This, of course, is the challenge of any ethics teaching, but it is especially difficult for student who will be performing and living under stress, dealing with emergencies and facing jeopardy to themselves and others. I think that just about summarizes the situation of the soldier; even those who are far from daily combat face these conditions.

I am not an expert in moral psychology under the 'fog of war' (see von Clausewitz, 1976, p. 120), but I bet that ambiguity about what is an illegal order and when a soldier should disobey an order is not only unfortunate, but dangerous. It is too late to think it through when the crisis happens.

Elaine Scarry, a wide-ranging scholar whose work has addressed torture, beauty, dreams and military pilots gave an amazing lecture called 'Thinking in an Emergency' (Scarry, 1997). Its key idea is a succinct rejoinder to its title:

Thinking in an Emergency? The rejoinder is: You can't. We don't think in emergencies, *so* if thought matters, we have to do it ahead of time.

It is difficult to teach soldiers about their duties to disobey illegal orders: the governing law is itself very complicated and does not lend itself to a single bright-line rule; converting complex legal analysis into a guide for conduct is difficult and contentious. It is not clear whether the educational goal is to drill answers or instil a questioning stance. Either is problematic in this context. The soldiers must be taught to deal with decentralized command and tacit orders – and to act under stress and emergency conditions.

Add to all this the psychological prediction: many or even most of these young soldiers will be inclined to obey authority and conform – whether to the commands of the authority, or more chilling, to abusive conduct started by some of their peers. The behaviour of reservists at Abu Ghraib seems a noxious combination of these factors.

All of this makes me think that teaching soldiers about their duties to follow and to resist orders must integrate instruction with the design and operation of the organization and culture of the military. Making 'just following orders' no defence to atrocity requires more than a good lesson plan or curriculum. That task demands full integration into the design of military operation.

Designing the organization and culture to get the message across

It is hard to teach norms under any circumstance; even more difficult to ensure that they actually change behaviour, and perhaps near impossible to generate rules that alter behaviour under stressful circumstances. But thoughtful observers inside and outside of the military emphasize that instruction must be built into the plans and operations of the military. This means devising and maintaining a forms of collective action that embed experts in the norms – including lawyers – into the day-to-day operations, and crafting ongoing training activities that acknowledge the real psychological pressures and organizational incentives that strongly influence behaviour.

In fact, horrific episodes prompt re-evaluation. Thus the US military overhauled its training programs after US soldiers massacred approximately 500 unarmed civilians in My Lai and then sought to cover up the event. After persistent efforts by a 22-year-old ex-GI named Ronald Ridenhour to investigate, an internal military investigation confirmed war crimes and prompted the prosecution and conviction of Lieutenant William Calley (Linder, 1999).

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 under the standard of 'commonest understanding'. The US Court of Military Appeals rejected that argument and concluded that *if* Lt. 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 conceptual difference they may be between a person “of commonest understanding” and a person of “common understanding” would be irrelevant.³²

Although the courts martial secured convictions of no one besides Calley, the military pursued the matter internally, and a report by Lt. General William Peers cited lack of proper training in law of war and lack of leadership and insufficient attention to training in the law of war and the independence of officers. This report and related critiques produced new teaching programs aimed at preventing and reporting violations.³³

Training programs have changed many times since.³⁴ Lawyers who are remote from the platoon do not make as effective instructors as officers who have earned the respect of their troops. Who brings the message affects how it is heard, and if lawyers are viewed as outsiders, naive or remote from the real demands of the military, their message will not be terribly effective. As one lasting effect of the response to the My Lai massacre, lawyers became much more directly involved in planning operations, in reviewing or even drafting the rules of engagement, and in shaping and participating in training programs with their credibility enhanced precisely due to their involvement in operations (Center for Military Law and Operations and International Law Divisions, 1991, p. 17; Myrow, 1996–1997, p. 134). Discussion about the legality or justifiability of conduct is now threaded throughout the US military training.

Integrating lawyers into military operations promotes clear and specific interpretation of law. It also could make law seem internal rather than external, and help forge a tie between the lawyers and the other soldiers. That would build on the premise of military training around the world: it cultivates a sense of membership in a team, attachment to the virtues of loyalty and honour, and integration of physical, cognitive and emotional learning characterize typical military training. Mark Osiel emphasizes that military training in the United States is more consistent with virtue ethics than rule-based morality, and he argues that the best way therefore to teach soldiers the scope of duties to obey and disobey orders is to attach the commitment to hew this line to the ideal of the good soldier (Osiel, 1998, pp. 328–335). This approach de-emphasizes the focus on law and rules and emphasizes ethical sensitivity as part of the soldier’s character and practical reasoning.

It seems a bit far-fetched to expect every soldier to take on debate over the legality of orders as part of his or her daily job. But for officers, and especially the platoon leader, closest to the ordinary soldier, the US military adopts this conception of active, thinking, ethical sensitivity specifically tuned into the legality of orders. Thus, the Army Field manual, foundation text of Army leadership for every officer, includes this provision:

A good leader executes the boss’s decision with energy and enthusiasm. The only exception to this principle is your duty to disobey illegal orders. This isn’t a privilege you can conveniently claim, but a duty you must perform. If you think an order is illegal, first be sure that you understand both the details of the order and its original intent. Seek clarifications from the person who gave the order. This takes moral courage, but the question will be straightforward: Did you really mean for me to ... steal

the part...submit a false report....shoot the prisoners? If the question is complex or time permits, consult legal counsel. However, if you must decide immediately—as may happen in the heat of combat – make the best judgment based on Army values, your experience, your previous study and reflection. You take a risk when you disobey an illegal order. It may be the most difficult decision you'll ever make, but that's what leaders do. (*Army Field Manual*, quoted in Perry, 2005, p. 157)

Similarly, attention to the legality of orders is a central part of the training program used by the US Marine Corps which asserts its goal is ensuring compliance with the spirit as well as the letter of the law.³⁵

Remember the officer I quoted who said he would want to take his lawyer with him next time he goes to war?³⁶ This may not have been so sarcastic. Ensuring access to legal advisors during planning and execution of operations is now a priority in many parts of the US military.³⁷ Lawyers currently help draft the Rules of Engagement for ground forces and the training materials. Training materials increasingly look like law school materials as they rely on detailed scenarios as material for honing the situational judgement of soldiers (Center for Military Law and Operations and International Law Division, 1991, p. 3; Martins, 1994, p. 11; Myrow, 1996–1997). Integrating law into the fabric of daily operations is an idea pushed by thoughtful figures within and outside of the military. Major Mark Martins of the Army Judge Advocate Corps 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 the mistakes real soldiers have made (Myrow, 1996–1997, p. 144).

The law here becomes a tool for analysis and critical thinking rather than a set of commandments. As one commentator explained, the lawyer serving as a judge advocate is to give detailed advice and 'to ensure that if the commander breaks the law, he is doing it intentionally' (Martins, 1994, p. 24).

Similarly, philosopher Hillel Levine comments,

Both those who are prepared to rely on some vague sense of soldier's honor and those who believe in draftsmanship may be missing important opportunities to provide ideas for new procedures and institutions based on the lessons learned from the battlefield, from the activities of POWs, and from the agonized discussions of terrorized populations in Nazi ghettos ... there is room for the collaboration of social scientists, organizational theorists, and ethicists in providing counterstrategies to what we know about the forces that impair human judgment. (Levine, 1990, p. 9)

Lessons for civics education

Teaching soldiers when to obey and when to disobey orders raises hugely important and riveting issues for the military and the society. Yet the issues may seem far away from the daily lives of students. Joining soldiers and children in this way may seem odd. Certainly their worlds and challenges are very different. Yet of all the people in any society, soldiers and children share the presumed status of subordination to others. We expect that they will take directions. They are not in charge of their actions or themselves.

The obedience dilemma of soldiers is oddly analogous to issues that students so often face in school, with friends and with gangs – and it previews the problems of moral and political conduct in adult worlds. Should the corporate lawyer follow the directions of the CEO even if that means breaking or sneaking around the law? Should morality trump the demands of economic or political competition? The pervasiveness of the issues makes the topic vital; the starkness of the soldier's dilemma makes it a terrific avenue for thinking through what we should think about teaching young people about the rule of law.

Hence, I suggest using this problem as a rich focal point for civics education for students in middle school and beyond. Pondering the dilemma of the soldier who must, for her own safety, obey orders but also know when to disobey them, may prompt the kind of conflict that produces advances in personal moral development. But whether it does or not is not, in my view, the key reason.

Teach the soldier's dilemma to illustrate how complicated the very statement of an important rule can be. Teach it to show how instruction in a rule may not sufficiently affect conduct, especially conduct in stressful situations. Teach how ethical thinking calls for individual courage but also a larger strategy to design and maintain the organization, management, rewards and punishments of day-to-day living. The integration of law into day-to-day operations involves recasting law from a set of rules and legislated norms to the ongoing practices of questioning and guiding authority. The situation of the soldier needing to follow orders and also needing to resist unlawful ones would provide a valuable topic for instruction in the independent thinking crucial to preventing future atrocities, to strengthen democracies and to pursue human dignity. And, as Kohlberg taught us, involving students in democratic governance in their own schools would be a vital part of that instruction.

There are, of course, special reasons to focus on children and teens in instruction. They are captive audiences. They may be impressionable. They are capable of raising questions – but they need help to anticipate dangers of conformity, and to find constructive modes of resistance. They can use practice to prepare for the privileges of democratic citizenship. Voting and exercising freedoms of speech and assembly require active engagement and the practice of questioning authority.

Teaching kids to exercise freedoms of speech and criticism of course means giving them room to do so. The trends in the US, especially since the shooting of students by students in Columbine and 9/11, have been in the opposite direction. Even more chilling are the extraordinary pressures inducing teens – even young children – to become child soldiers and child sex slaves in many places in the world. Teaching them to resist – and providing international supports for that resistance – would be crucial to their future, and to ours.

Websites

International Criminal Court <http://www.icc-cpi.int/about.html>

Psi café <http://www.psy.pdx.edu/PsiCafe/KeyTheorists/Kohlberg.htm>

Notes

1. Jeremiah Smith, Jr. Professor, Harvard Law School.
2. For a thoughtful argument that the drafters could have avoided the critique of illegality by relying on the German Penal Code of 1871, see Cherif Bassiouni, 1999, pp. 10–12.
3. UN Security Council Resolution 827, para 2 (1993).
4. The speech was delivered before the death of Milosevic, which led to the premature conclusion of the trial (Moore & Williams, 2006).
5. For a nuanced analysis of the complex meanings the phrase has acquired in the context of US constitutional law, see Fallon, 1997, p. 1; for consideration of the key notions of predictability of clarity associated with the rule of law as a predicate for economic transactions, see Llewellyn, 1938, pp. 1243–1271.
6. The rule of law notion at times seems to carry export of ideas particularly developed in England and the United States. See, for example, Thornburgh, 1990, discussing due process and minority rights.
7. 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 defense of following orders (see Murray, 2002).
8. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 82 United Nations Treaty Series 279 (entered into force 8 August 1945).
9. Amplify, and see 1 Trial of Major War Criminals 2981, 325 (1947).
10. Nuremberg Trial, Judgment, Cmd. No. 6964, 42.
11. 'The units – called the Einsatzgruppen – consisted of some 4000 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. These were not top Nazi leaders but elite military squads that conducted widespread killing. When the trial of the Einsatzgruppen opened in 1948, Benjamin Ferencz told the court: "The 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."' See Montgomery *et al.*, 2002.
12. United States v. Otto Ohlendorf (the Einsatzgruppen Case), in 4 Trials of War Criminals Before Nuremberg Military Tribunals Under Control Council Law No. 10, at 411, 470–471 (1950).
13. It made international news. See, for example, *Mercury*, September 28 2005, p. 23.
14. She received a three year sentence – a year longer than what she was seeking through the plea bargain.
15. Today the German Military Penal Code defines a manifestly illegal order as one that is contrary 'to what every man's conscience would tell him'. See Osiel, 1998, p. 1010, quoting Arendt, 1996).
16. Chief Military Prosecutor v. Melinki and Others (13 Pesakim Mehozlim 90), in A. G., Israel v. Eichmann, *International Law Reports*, 36, 277 (Supreme Court of Israel, 1962).
17. Did you know that they were inspired by the defence of 'just following orders'? Milgram thought he would be able to show that Americans would not have followed orders, unlike those accused at the Nuremberg Trials.
18. 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, for example, Gilligan, 1982; Modgil & Modgil, 1986. For responses to the critics, see Kohlberg *et al.*,

1983. Critics have disagreed with the content of particular stages, especially the last stage (where Kohlberg, at least at times, placed himself).
19. 'The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military ... instruction ...' Geneva Convention I, art. 47. A similar requirement appears in the 1949 Geneva Convention II, art. 48, the 1949 Geneva Convention III, art. 127, and the 1949 Geneva Convention IV, art. 144.
 20. The Tokyo International Military Tribunal's Charter 6(b) echoed the IMG's Article 6, and the Tokyo tribunal heard and rejected defences based on superior orders. See, *in re*, Masuda *et al.*, reprinted in Lauterbach, 1951. Because higher authorities were available for those prosecutions, including General Tomoyuki Yamashita, the Tokyo Tribunal had to focus as well on the scope of command responsibility: when should a commander be held responsible for conduct committed by his troops whether implicitly authorized or not. See Solis, 1999, p. 514.
 21. The resolution by the United Nations General Assembly at its first session in 1946 to affirm 'the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgments of the Tribunal'. The resolution is United Nations General Assembly Resolution 95(1) of December 1946, Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal (<http://daccessdds.un.org/doc/RESOLUTION/GEN/NRO/033/46/IMG/NR003346.pdf?OpenElement>). As an example of analysis using this resolution to presume continuity in international law – in the absence of the explicit contrary authority in the authorization of new tribunals, see Staker, 2005, pp. 431–432.
 22. See also United Nations Security Council Resolution 827, para 2 (adopting the Statute of the International Criminal Tribunal for Yugoslavia). The United Nations proceeded with very similar language when it authorized an International Criminal Tribunal for Rwanda. See also Staker, 2005, p. 434.
 23. These abstract statements have not yet received much application in practice, but the Yugoslav tribunal has reinforced the principle that following superior orders by itself does not supply a defence to charge of war crimes, genocide or crimes against humanity. In a case that did not squarely raise the question four judges on the Yugoslav tribunal emphasized that acting according to superior orders by itself cannot serve as a defence; a threat to the defendant's life or limb could supply evidence for the defence of duress, but the sheer fact of orders would not satisfy this requirement. See Prosecutor v. Erdemovic, Judgment, Case No IT-96-22-A, Appeals Chamber, 7 October 1997, Separate and Dissenting Opinion of Judge Cassesse; Joint Separate Opinion of Judge McDonald and Judge Cohrah, para 36; Separate and Dissenting Opinion of Judge Sir Ninian Stephen, para 59–60. Judge Cassesse, a distinguished scholar of international law, went further and maintained that a soldier has a duty to disobey an order that is manifestly illegal. See Separate and Dissenting Opinion of Judge Cassesse. The Trial Chamber of the Tribunal has followed this distinction between superior orders and duress. The Tribunal concluded that the defendant was acting in accord with the orders of a commanding officer but found no evidence of threats causing duress when the defendant participated in a massacre of around 200 civilians. See Prosecutor v. Mrdja. Sentencing Judgment, Case no IT-02-59-S, Trial chamber, 31 March 2004, para. 67. Moreover, the Tribunal emphasized that orders to participate in the massacre 'were so manifestly unlawful' that the defendant 'must have been well aware that they 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'.
 24. For East Timor, see United Nations Regulation No.2000/15 from 6 June 2000 (<http://www.un.org/peace/etimor/untaetR/Reg0015E.pdf>); for Sierra Leone, see Article 6(4), Statute of the Special Court for Sierra Leone (a bilateral agreement between the United Nations and

the government of Sierra Leone, 16 January 2002). See also Staker, 2005, p. 440 (citing *Prosecutor v. Norman*, *Prosecutor v. Kallon*, *Prosecutor v. Norman*, *Prosecutor v. Kamara*, Decision on Constitutionality and Lack of Jurisdiction, Case Nos SCLS-2004-15-AR72(E), SCSL-2004-14-AR72(E) and SCSL-2004-16-AR72(E), Appeals Chamber, 13 March 2004, para. 62).

25. Article 15(e), Statute of the Iraqi Special Tribunal (http://www.cpa-iraq.org/human_rights/Statute.htm).
26. In this light, one author recently proposed that the United States should permit detainees in Guantanamo to assert the defence of following superior orders at least in so far as that would identify their intentions and whether they acted under duress or mistake (Insko, 2003, pp. 416–417).
27. The statute authorizing the creation of the permanent International Criminal Court makes clear that it is no defence to follow orders that are manifestly illegal – and orders to commit genocide and crimes against humanity are manifestly unlawful. The ICC Statute, Art. 33 entitled ‘Superior orders and prescription of law’, holds that:
 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.

Thus, as in the Nuremberg principle, obedience to an order to commit genocide or crimes against humanity cannot supply a defence to criminal charges on those bases. But this provision departs from the terms of the Nuremberg and Tokyo tribunals – and those for the former Yugoslavia and Rwanda – in opening the possibility for a defence of following orders under limited circumstances while neglecting to mention superior orders as a possible mitigating factor. Thus, the ICC Statute appears to permit a defence of following orders given charges of war crimes; to exclude the defence altogether against charges of genocide or crimes against humanity; and to permit the defence against other charges if the order was not manifestly illegal and the accused did not know that the order was illegal. See Garraway, 1999. What does this mean? Although the ICC has not yet acted to interpret its statute, simply reading its language suggests that a soldier charged with war crimes – but not genocide or crimes against humanity – can defend himself from criminal liability if he can show three elements: he is obliged to follow the orders to commit the war crimes, *and* the soldier does not know the orders are illegal *and* the orders are not at face value manifestly illegal. Moreover, a soldier charged with war crimes might be able to assert such a defence if the order in question is not expressly an ‘order to commit genocide’ or an ‘order to commit crimes against humanity’ (Article 33, section 2). Yet even if the claim of superior orders offers a defence under these limited circumstances, they do not offer grounds for mitigation of sentencing. See, Staker, 2005, pp. 442–446 (describing efforts by Australia, New Zealand, and the UK to bring their domestic laws in line with the ICC treatment of superior orders). Staker concludes on p. 446 that ‘although a defence of superior orders is now expressly recognized 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 also warns (p. 447) that inconsistencies between the ICC and the Nuremberg approach could produce different results entirely based on where a person happens to be tried.

28. See Article 33 of the ICC Statute.

29. Email to Col. P. J. Olseon from Charmaine Rand, Development Officer, Defence Ethics Program, Canada, citing Queens Regulations & Orders, article 10.015 and Notes, and article 19.02 (http://www.admfincs.forces.gc.ca/qr_o/intro_e.asp); Law of Armed Conflict Manual (<http://www.forces.gc.ca/jag>), Soldier's Code of Conduct rule 11.
30. Osiel (1998, p. 292) also argues that his rule would shift the burden of producing knowledge and persuading a court martial or other court 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. Osiel has faced criticism, however, on this point: military law makes clear that the prosecution retains the burden to prove 'beyond a reasonable doubt that the defence did not exist', and hence, under current law, the prosecution would have to show beyond a reasonable doubt that the defendant *did* know or should have known the order in question was illegal (Hudson, 1999, pp. 231–232, citing United States Manual for Courts-Martial, R.C.M. 916(b) (1998)).
31. To be fair, Osiel made his proposal before the current global situation, and he may well have had in mind peacekeeping operations and manoeuvres other than war, where soldiers have time on their hands.
32. See United States v. Calley, 48 C.M.R. 19 (United States Court of Military Appeals, 1973).
33. See US Department of Defense Directive 5100.77, The Department of Defense Law of War Programs (10 July 1979).
34. Some thought the initial reforms reflected an overreaction. Initially the US Army used training film entitled *The Geneva Conventions and the Soldier*, US Department of Army (1972) Training film 21–4228, '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 less-than-flattering light. Needless to say, the movie enjoyed a very short run as one commander after another ordered it removed from his base – justifiably, in my opinion' (Hays Parks, 1995, p. 79) (the author was in the Judge Advocate General's Corps at the time).
35. US Department of Defense, Marine Corps Order 3300.4 Section 1 a (1) (20 October 2003).
36. See Note 20.
37. See Marine Corps Order 3300.4 Section 1 (a) (3); Martins, 1994.

References

- <http://www.cba.uri.edu/Faculty/dellabitta/mr415s98/EthicEtcLinks/Milgram.htm>
- Arendt, H. (1996) *Eichmann in Jerusalem – a report on the banality of evil* (New York, Penguin Books).
- Avriam, H. (2005) *Discourse of disobedience: law, political philosophy, and trials of conscientious objectors* (draft).
- Cassel, E. (2002) Why do people want to be executioners? A review of Ivan Solotaroff, *The last face you'll ever see* Available online at: http://college.hmco.com/psychology/resources/students/shelves/shelves_20020504.html (accessed 17 March 2006).
- Center for Military Law and Operations and International Law Divisions, US Army Judge Advocate General's School (1991) *Operational law handbook* (2nd draft), p. 17, Available online at: <http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (accessed 22 March 2006).
- Cherif Bassiouni, M. (1999) *Crimes against humanity in international criminal law* (2nd edn) (The Hague and Boston, MA, Kluwer Law International).
- Cock, A. (2004, August 5) Abuse guard was 'Just having fun', *Daily Telegraph*, p. 31.
- Crain, W. C. (1985) *Theories of development: concepts and applications* (Englewood Cliffs, NJ, Prentice-Hall).
- Dinstein, Y. (1965) *The defence of 'obedience to superior orders' in international law* (Leiden, A.W. Sijthoff).

- Fallon, R. H. Jr. (1997) 'The rule of law' as a concept in constitutional discourse, *Columbia Law Review*, 97, 1–56.
- Farrell, J. (2002) The power of E? Contemplating the influence we yield., Available online at: <http://www.nd.edu/~techrev/Archive/Spring2002/a6.html> (accessed 17 March 2006).
- Finnegan, P. (1996) Operational law: plan and execute, *Military Law & Law of War Review*, 76, 29–37.
- Garraway, C. (1999) Superior orders and the International Criminal Court: justice delivered or justice denied, *International Committee of the Red Cross*, 836, 785–794, Available online at: <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/4F89CC080CE0E792C1256B66005DD767> (accessed 22 November 2005).
- Gilligan, C. (1982) *In a different voice: psychological theory and women's development* (Cambridge, MA, Harvard University Press).
- Golden, T. & Schmitt, E. (2005, November 2) Detainee policy sharply divides Bush officials, *New York Times*, p. A1.
- Greenberg, K. J. & Dratel, J. L. (Eds) (2006) *The torture papers: the road to Abu Ghraib* (New York, Cambridge University Press).
- Greenspan, M. (1959) *The modern law of land warfare* (Berkeley, CA, and Los Angeles, CA, University of California Press).
- Hampson, R. (2004, May 13) Abuse less shocking in light of history, *USA Today*, p. A1.
- Hays Parks, W. (1995) A few tools in prosecution of war crimes, *Military Law Review*, 149, 73–79.
- Hobbes, T. (1742) *Elementa philosophica de cive* (Amsterdam, H. & V.T. Boom).
- Hudson, W. M. (1999) Obeying orders: atrocity, military discipline and the law of war (book review), *Military Law Review*, 161, 225–236.
- Insko, J. B. (2003) Defense of superior orders before military commissions, *Duke Journal of Comparative and International Law*, 13, 389–418.
- International Committee of the Red Cross (1972) *Report on the work of the conference of government experts on the reaffirmation and development of international humanitarian law applicable in armed conflicts* (Second Session) Vol. 1, (July) 188.
- International Military Tribunal *Trial of the major war criminals before the International Military Tribunal. 42 vols. Nuremberg: 1947–1949.* (1947) (The 'blue series') Vol. 1. (Nuremberg).
- Keijzer, N. (1978) *Military obedience* (Alphen aan den Rijn, Sijthoff & Noordhoff).
- Kohlberg, L. & Turiel, E. (1971) Moral development and moral education, in: G. Lesser (Ed.) *Psychology and educational practice* (Glenview, IL, Scott, Foresman).
- Kohlberg, L., Levine, C. & Hewer, A. (1983) Kohlberg's moral stages: a current formulation and a response to critics, *Contributions to Human Development*, 10 (Basel, New York, Karger).
- Lauterbach, H. (Ed.) (1951) *Annual digest and reports of public international law cases* (Cambridge, Cambridge University Press).
- Levie, H. S. (1991) The rise and fall of an internationally codified denial of the defense of superior orders, *Military Law and Law of War Review*, 30, 184–214.
- Levine, H. (1990) Between social legitimation and moral legitimacy in military commitment, in: T. C. Wyatt & R. Gal (Eds) *Legitimacy and commitment in the military* (New York, Greenwood Press).
- Linder, D. (1999) An introduction to the My Lai Courts-Martial. Available online at: <http://www.law.umkc.edu/faculty/projects/ftrials/mylai/mylai.htm> (accessed 17 March 2006).
- Llewellyn, K. N. (1938) The rule of law in our case law of contract, *Yale Law Journal*, 47, 1243–1271.
- Maggio, R. (1992) *Beacon book of quotations* (Boston, MA, Beacon Press).
- Martins, M. S. (1994) Rules of engagement for land forces: a matter of training, not lawyering, *Military Law Review*, 143, 1–160.
- McCoubrey, H. (1997) *The obligation to obey in legal theory* (Aldershot, Dartmouth).
- Mercury* (2005, September 28) Private guilty of abuse at Iraq jail, *Mercury*, p. 23.
- Milgram, S. (1973) *Obedience to authority: an experimental view* (New York, Harper and Row).

- Minow, M. (2005) What is the greatest evil?, *Harvard Law Review*, 118, 2134–2169.
- Modgil, S. & Modgil, C. (Eds) (1986) *Lawrence Kohlberg: consensus and controversy* (London and Philadelphia, PA, Falmer Press).
- Montgomery, M., Smith, S. & George, D. (2002) Part of the story justice on trial, in: *The legacy of Nuremberg* (American RadioWorks®, the documentary project of Minnesota Public Radio and NPR NewsSM). Available online at: http://americanradioworks.publicradio.org/features/justiceontrial/nuremberg_print.html (accessed 21 November 2005).
- Moore, M. & Williams, D. (2006, March 15) Jail rules probed in Molosevic death, *Washington Post*, p. A15.
- Murray, D. (2002, July 18) Judge and master, *CBC News Analysis*. Available online at: http://www.cbc.ca/news/viewpoint/vp_murray/20020718.html (accessed 17 March 2006).
- Myrow, S. A. (1996–1997) Waging war on the advice of counsel: the role of operational law in the Gulf War, *U. S. Air Force Academy Journal of Legal Studies*, 7, 131–158.
- Osiel, M. J. (1998) *Obeying orders: atrocity, military discipline and the law of war* (New Brunswick, NJ, Transaction Publishers).
- Osiel, M. J. (1998) Obeying orders: atrocity, military discipline and the law of war, *California Law Review*, 86, 993–1130.
- Perry, D. L. (2005) How ethics is taught in the U.S. army war college, in: E. R. Micewsky & H. Annen (Eds) *Military ethics in professional military education – revisited* (New York, Peter Lang).
- Piaget, J. (1965) *The moral judgement of the child* (New York, Free Press).
- Plato (1969) *The last days of Socrates, Apology* (Hammondsworth and Baltimore, MD, Penguin).
- Power, F. C., Higgins, A. & Kohlberg, L. (1989) *Lawrence Kohlberg's approach to moral education* (New York, Columbia University Press).
- Reimer, J., Paolitto, D. P. & Hersh, R. H. (1990) *Promoting moral growth: from Piaget to Kohlberg* (2nd edn) (New York, Longman).
- Rogers, A. P. V. (1996) *Law on the battlefield* (Manchester and New York, Manchester University Press).
- Scarry, E. (1997) *Thinking in an emergency*, lecture given in Harvard University's Edmund F. Safra Foundation Center for Ethics.
- Solis, G. D. (1999) Obedience of orders and the law of war: judicial applications in American forums, *American University International Law Review*, 15, 481–526.
- Solis, G. D. (2004) Obedience to orders: history and abuses at Abu Ghraib Prison, *Journal of International Criminal Justice*, 2, 988–998.
- Staker, C. (2005) Defence of superior orders revisited, *Australia Law Journal*, 79, 431–447.
- Tamanaha, B. Z. (2004) *On the rule of law: history, politics, theory* (New York, Cambridge University Press).
- Thornburgh, R. (1990) The Soviet Union and the rule of law, *Foreign Affairs*, 13.
- von Clausewitz, C. (1976) *On war* (M. Howard & P. Paret, Eds and Trans.) (Princeton, NJ, Princeton University Press).

Copyright of Journal of Moral Education is the property of Routledge and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.