Abuse by Authority: The Hidden Harm of Illegal Orders

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ABSTRACT: When a leader orders a subordinate to commit a crime—to kill anything that moves, as at My Lai; to extract information no matter what it takes, as at Abu Ghraib; to execute prisoners of war, as at Biscari—how should the law and a society respond? Often we ignore the leader and blame the "bad apple" subordinate who failed to do the right thing. Or, when a leader is punished, domestic and international criminal law regard them in relation to their subordinate's offense, either as an accomplice or perhaps a perpetrator; the order simply offers the pathway to rendering the superior a party to the crime. The law says nothing, however, about an entire dimension of wrongdoing that this Article highlights: The illegal order is an abuse of the authority the leader holds over their subordinates, a misuse of control over another, a betrayal of what was supposed to be a relationship of protection, an infliction of suffering on those who—even if they themselves become perpetrators legitimately subject to punishment—are also victims of their leaders' violation of the duty to ask of them only what is right.

This Article urges a new framing of the illegal order as a wrong by the superior against the subordinate. Focusing on the military, and drawing on fields of knowledge within the law and beyond it, the Article argues that international and domestic law should acknowledge the superior's order not only as a link to the crimes of the subordinate, but also as an abuse of the superior's relationship of authority over the subordinate. Explaining that the military obligation of the superior toward the subordinate is both legally founded and

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legally protected, the Article exposes the legal and cultural obsession with the subordinate's ostensible autonomy as but a convenient distraction, one that relies on traditional (and contested) criminal-law assumptions of individual choice and insistence that no person has obligations to another. Further, scholars' and practitioners' accounts of the law of war increasingly acknowledge that soldiers are not mere instruments, but individuals, separate from the state and the superiors they serve. This shift opens the door to this Article's proposed recognition of the harms subordinates experience when they are ordered to commit a crime.

Global in its reach and immediate in its application, this Article aims to reorient conceptions of the relationship between superior and subordinate, to elucidate how perpetrators of crimes can also suffer injuries by those who exert control over them, and to excavate and upend conventional assumptions about authority and autonomy.

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I. INTRODUCTION

How should the law and a society respond when a leader orders a subordinate to commit a crime?

Two moments bookending the Trump administration provide a glimpse of how we *do* respond. On the campaign trail in 2016, then-candidate Trump declared that he "would bring back waterboarding and . . . a lot worse than waterboarding."[1] Then, in the waning days of his presidency, he intimated that he would deploy the military to keep himself in power.[2] Both times, observers quickly turned to the individuals who would be subject to Trump's orders and their obligation to disobey. Former CIA director Michael Hayden, for example, seemed to think that the proper response to Trump's torture threat lay simply and entirely with the subordinates. The "punchline," as he put it, was that the military would be not merely allowed to disobey an order to torture; it would be "required" to do so.[3] Four years later, observers' reactions were noticeably more sober, but they still were focusing on prospects for disobedience.[4] Indeed, in the fall of 2020, several attorneys and former military judge advocates created the Orders Project, a standalone nonprofit

1. Patrick Healy & Jonathan Martin, *In Republican Debate, Rivals Jab at Marco Rubio to Try to Slow His Rise*, N.Y. TIMES (Feb. 6, 2016), https://www.nytimes.com/2016/02/07/us/politics/republican-debate.html [https://perma.cc/RS8D-8DXS]; *see also Transcript of the Republican Presidential Debate in Detroit*, N.Y. TIMES (Mar. 4, 2016), https://www.nytimes.com/2016/03/04/us/politics/transcript-of-the-republican-presidential-debate-in-detroit.html [https://perma.cc/3ZBC-MXFQ] (recording Trump's renewed call for waterboarding).

2. Michael Crowley, *Trump Won't Commit to 'Peaceful' Post-Election Transfer of Power*, N.Y. TIMES (Sept. 23, 2020), https://www.nytimes.com/2020/09/23/us/politics/trump-power-transfer-2020-election.html [https://perma.cc/WVF3-B7VR].

3. Peter Holley, *Former CIA Director: Military May Refuse to Follow Trump's Orders if He Becomes President*, WASH. POST (Feb. 28, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/02/28/former-cia-director-military-may-refuse-to-follow-trumps-orders-if-he-becomes-president [https://perma.cc/4Q4E-6YVJ]; *see also* Shane Reeves & David Wallace, *Can US Service Members Disobey an Order to Waterboard a Terrorist?*, LAWFARE (Apr. 6, 2016, 9:56 AM), https://www.lawfareblog.com/can-us-service-members-disobey-order-waterboard-terrorist [https://perma.cc/KXF2-5AV9]. For a less sanguine assessment, *see* Rosa Brooks, Opinion, *The Military Wouldn't Save Us from President Trump's Illegal Orders*, WASH. POST (Mar. 4, 2016), https://www.washingtonpost.com/opinions/the-military-wouldnt-save-us-from-president-trumps-illegal-orders/2016/03/04/9ef8fd44-e0ea-11e5-846c-10191d1fc4ec_story.html [https://perma.cc/GP4L-CX4X] (cautioning that "[m]ilitary resistance is no safeguard" and urging instead that "[c]itizens need to speak out strongly and repeatedly").

4. *See* Jennifer Steinhauer & Helene Cooper, *At Pentagon, Fears Grow That Trump Will Pull Military into Election Unrest*, N.Y. TIMES (Sept. 25, 2020), https://www.nytimes.com/2020/09/25/us/politics/trump-military-election.html [https://perma.cc/TAX2-QMVN].

organization dedicated to offering service members legal advice in the event the president ordered them to keep him in the White House.[5]

Neither threat ultimately materialized, as far as is currently known,[6] but these still are moments that, this Article urges, demand attention and interrogation. For these are examples that epitomize a fundamental problem in law and in our culture: our repeated and longstanding failure to recognize the full scope of the harm a superior perpetrates when they order their subordinates to commit a crime.[7] As this Article explains, an illegal order is not only a test of the subordinate's strength to resist, and it is not only a pathway to the target crime; it is an independent wrong, one perpetrated on the subordinates who are subject to that order.

Today, when attention turns to war crimes or other atrocities, we often ignore the leader's transgressions and focus blame on "bad apples" who could have disobeyed the order to commit a crime but failed to do the right thing.[8] Or, when the leader is punished, domestic and international criminal law in their current form tie the leader to the crimes their subordinates ultimately commit by calling the leader an accomplice to or a perpetrator of those crimes. And then, even when the law does finally address the leader's superior rank—by adding a sentencing enhancement for the leader's use of an esteemed position to commit crime instead of using it to do good—it still ignores the superior's unique relationship of authority over the subordinate.[9] By ascribing responsibility to the leader for the ultimate crime in this way, the law directly equates the wrong of the illegal order with the wrong of the ultimate crime. When the superior orders the subordinate to torture, the superior is responsible for torture; when the superior orders the subordinate to murder, the superior is responsible for murder. The superior is punished

5. *See* William L. Enyart, Opinion, *These Military Lawyers Are Joining Forces to Help Troops Stand Up to Unlawful Orders*, MILITARY.COM (Oct. 15, 2020), https://www.military.com/daily-news/opinions/2020/10/15/these-military-lawyers-are-joining-forces-help-troops-stand-unlawful-orders.html [https://perma.cc/PUT6-N8JU]; *see also* Eugene R. Fidell, *Wrestling with Legal and Illegal Orders in the Military in the Months Ahead*, JUST SEC. (Oct. 19, 2020), https://www.justsecurity.org/72934/wrestling-with-legal-and-illegal-orders-in-the-military-in-the-months-ahead [https://perma.cc/6N58-SFRE].

6. As with any presidential administration, information will continue to be disclosed into the future, and revelations since the end of the administration indicate that Trump's plans to contest the 2020 presidential election are not yet fully known. *See* Matt Zapotosky, Rosalind S. Helderman, Amy Gardner & Karoun Demirjian, *'Pure Insanity': How Trump and His Allies Pressured the Justice Department to Help Overturn the Election*, WASH. POST (June 16, 2021), https://www.washingtonpost.com/politics/interactive/2021/trump-justice-department-2020-election/?itid=lk_inline_manual_9 [https://perma.cc/M5FZ-NKQC].

7. This Article uses the term "harm" in the sense of the criminal law's harm principle, which defines "harm" to include not only the reality of sufficiently serious harm, but also the risk of harm. *See* 1 JOEL FEINBERG, HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW 11 (1987).

8. *See infra* notes 40–42 and accompanying text.

9. *See infra* Section II.A.4.

for creating the reality of that crime occurring, just as would be any ordinary accomplice or perpetrator. The law's restrictive vision of the superior's culpability, meanwhile, sets the terms for research in this area as well. Scholars predominantly focus on the legal standards governing the subordinate's obligation to disobey an illegal order. When they do examine the act of giving the order, they primarily consider the doctrinal requirements for liability or the culpability of the superior by reference to the relationship between the superior and the ultimate crime. In this vision, the superior is no different from any other accomplice or indirect perpetrator.[10]

This conventional approach to the superior's responsibility for that ultimate crime is accurate, but it is incomplete. It fails to recognize that when the superior orders someone subject to their authority to commit a crime, that order betrays that person, for it exploits and distorts the relationship between the superior and the subordinate and puts that subordinate in a position of being treated as nothing more than a tool to accomplish wrongdoing. Even when that subordinate is a willing participant in the conduct, the superior still violates their obligation to protect the subordinate when they order that subordinate to commit a crime. And this betrayal has costs: it transmutes a relationship of trust between commander and commanded into one of exploitation, and it contributes to disastrous mental health consequences for those struggling to make sense of being directed to do wrong by those they trusted.[11] "Our moral fibers have been torn," writes one veteran of the war in Iraq, "by what we were asked to do and by what we agreed to do."[12]

This Article's proposed recognition of the injuries subordinates suffer at the hands of their superiors draws on the work of scholars and practitioners of the law of war, who increasingly acknowledge that soldiers are not mere instruments for war-making, but individuals, separate from the state and the superiors they serve.[13] And it builds on existing theories of international criminal law as an institution that aims to subject systemic abuses of power to the rule of law.[14] The Article synthesizes these multiple strands to ultimately expose the legal and cultural obsession with the subordinate's autonomy—encapsulated in the obligation to disobey illegal orders, and the well-known aphorism that just following orders is no defense—as a convenient distraction. It is one that intuitively and even theoretically makes sense, relying as it does on traditional (though contested) criminal-law assumptions of individual choice and insistence that no person has obligations to another. And yet, it is misplaced,

10. *See infra* notes 44–46 and accompanying text.

11. *See infra* Part IV.

12. Tyler Boudreau, *The Morally Injured*, 52 MASS. REV. 746, 753 (2011).

13. *See infra* Part III. This Article uses the colloquial term "soldier" to mean a person who serves in the military, including those in not only a state's army, but also services such as the air force or navy. *See Soldier*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2012).

14. *See infra* notes 145–47 and accompanying text.

for the obligation of the superior to the subordinate is both legally founded and legally protected.[15]

Although it is widely recognized that Trump was an outlier, an exceptionally irresponsible commander-in-chief,[16] the problem this Article identifies is no outlier, and is not exceptional. The abuses by authority highlighted here are the same as the abuses perpetrated when American commanders ordered soldiers to execute German and Italian prisoners of war in Sicily,[17] to drop bombs on refugees in South Korea,[18] to raze villages in Vietnam,[19] to shoot unarmed townspeople in Afghanistan.[20] They are the same as the abuses perpetrated when U.S. military and intelligence leaders ordered interrogators to torture individuals detained around the world in the early days of the so-called War on Terror.[21] And although this Article begins with the example of the United States, and draws primarily from examples involving the U.S. military, this is a topic that transcends national boundaries; war crimes and abusive leaders and soldiers struggling with betrayal by their superiors are pervasive throughout the world.[22] The problem of illegal orders

15. *See infra* Section IV.C.

16. *See* Mark Bowden, *Top Military Officers Unload on Trump*, ATLANTIC (Nov. 2019), https://www.theatlantic.com/magazine/archive/2019/11/military-officers-trump/598360 [https://perma.cc/GGS7-EY82] ("I have never heard officers in high positions express such alarm about a president.").

17. *See* RICK ATKINSON, THE DAY OF BATTLE: THE WAR IN SICILY AND ITALY, 1943–1944, at 118–20, 617 nn.118–19 (2007).

18. *See* CHARLES J. HANLEY, SANG-HUN CHOE & MARTHA MENDOZA, THE BRIDGE AT NO GUN RI: A HIDDEN NIGHTMARE FROM THE KOREAN WAR 126–27, 286–87 (2001).

19. *See* Seymour M. Hersh, *The Massacre at My Lai: A Mass Killing and Its Coverup*, NEW YORKER (Jan. 14, 1972), https://www.newyorker.com/magazine/1972/01/22/coverup [https://perma.cc/XM23-UJXD]; Christopher J. Levesque, Opinion, *The Truth Behind My Lai*, N.Y. TIMES (Mar. 16, 2018), https://www.nytimes.com/2018/03/16/opinion/the-truth-behind-my-lai.html [https://perma.cc/Y2FZ-Z6MV]; *see also infra* notes 265–70 and accompanying text (describing atrocities at My Lai).

20. *See, e.g.*, Greg Jaffe, *'The Cursed Platoon*,' WASH. POST (July 2, 2020), https://www.washingtonpost.com/graphics/2020/national/clint-lorance-platoon-afghanistan [https://perma.cc/7VU2-LEDR] (discussing orders by Army First Lieutenant Clint Lorance to subordinates to shoot unarmed villagers, including children); Mark Boal, *The Kill Team: How U.S. Soldiers in Afghanistan Murdered Innocent Civilians*, ROLLING STONE (Mar. 28, 2011, 2:00 AM), https://www.rollingstone.com/politics/politics-news/the-kill-team-how-u-s-soldiers-in-afghanistan-murdered-innocent-civilians-169793 [https://perma.cc/6LXZ-B6PD] (reporting on Maywand District killings by group known as the "Kill Team" and detailing allegations of superior's illegal orders).

21. *See infra* notes 40–42 and accompanying text; *see also, e.g.*, JUSTINE SHARROCK, TORTURED: WHEN GOOD SOLDIERS DO BAD THINGS 5 (2010) (describing "a junior guard" at a prison in Iraq who was ordered to mistreat prisoners).

22. *See, e.g.*, BREAKING THE SILENCE, OUR HARSH LOGIC: ISRAELI SOLDIERS' TESTIMONIES FROM THE OCCUPIED TERRITORIES, 2000–2010, at 10, 15 (2012) (collecting soldiers' testimonies, including of situations involving illegal orders); Judy Dempsey, *East German Shoot-to-Kill Order Is Found*, N.Y. TIMES (Aug. 13, 2007), https://www.nytimes.com/2007/08/13/world/europe/13germany.html [https://perma.cc/3KJH-L4UU] (discussing Stasi order to East German border guards that they must "shoot to kill anyone," including children, attempting to flee to West Germany); Yan Zhuang, *Australian Military Moves to Dismiss Soldiers After Killings in Afghanistan*,

is a problem that inheres in any military organization (and, indeed, in many organizations beyond the military) in which individuals are expected to carry out orders, and in which leaders exploit the authority they have to give an order and to see their will readily carried out.

The goal of the Article, however, is not simply to advocate for attaching criminal liability to giving an illegal order. Ordering a person to commit a crime is already the basis of criminal liability in national and international criminal law.[23] Nor is it merely to recommend the creation of a new war crime that defines a superior's act of giving an illegal order as an abuse of the subordinate. In the United States, anyway, mistreatment of a subordinate already is a punishable offense,[24] but an illegal order continues to be overlooked as a form of mistreatment.

In seeking to recast the illegal order, to transform it from a wrong that exists solely as a bridge from the leader to the ultimate crime into a wrong that also marks an abuse by the leader of the subordinate, this Article has bigger goals. It aims to persuade readers to consider that leaders abuse the authority they have over another person when they ask the person to do wrong. It aims to impel readers to reexamine their assumptions that the cure to abusive leadership is simply disobedience. It aims to convince readers that the exploitation of relationships of authority or control or power should not be off limits to criminal law, or to judgments about right and wrong, just because those subject to that authority or control or power have consented to it, or because they can say no to it, or even because they are obligated to resist. The goal, ultimately, is that next time a president threatens torture, or a commander tells a soldier to "[k]ill everything that moves,"[25] we notice, and we find abhorrent, the leader's mistreatment of their subordinates as a core part of the wrong. Through this acknowledgment, we can more accurately capture the harm that inheres in ordering a subordinate to commit a crime; we might more readily rein in or reject abusive leaders; we might extend some grace to those subordinates who have committed crimes by granting that even in their own wrongdoing, they, too, have been wronged, that the fact (and feelings) of their betrayal need not remain hidden.

N.Y. TIMES (Dec. 11, 2020), https://www.nytimes.com/2020/11/26/world/australia/military-troops-afghanistan.html [https://perma.cc/7NGX-3J68] (reporting on Australian superior officers who had ordered subordinates to execute Afghan prisoners); *see also* David H. Kitterman, *Those Who Said "No!": Germans Who Refused to Execute Civilians During World War II*, 11 GERMAN STUD. REV. 241, 248 (discussing research finding that eight percent of Germans who refused orders to kill civilians cited a concern "that the murders would damage the men carrying them out or that they would create emotional disturbances" as the reason for refusing).

23. *See infra* Section II.A.

24. *See* 10 U.S.C. § 893 (2018); *infra* notes 324–25 and accompanying text.

25. NICK TURSE, KILL ANYTHING THAT MOVES: THE REAL AMERICAN WAR IN VIETNAM 2 (2013) (reciting soldiers' accounts that they were ordered at My Lai to "kill everything in the village," "kill everything that breathed," and "[k]ill everything that moves" (citations omitted)).

This Article proceeds in six Parts. Following this Introduction, Part II maps the existing approaches the criminal law takes to address illegal orders and explains that the law consistently seeks only to tie the superior to the risk or reality of the crime they ordered, neglecting the superior's exploitation of the relationship of authority they have over the subordinate. Part III brings together three developments in contemporary law—(1) an increasing embrace of the idea that the law of war sets forth obligations of a state toward its own soldiers; (2) the turn toward "individualization" in the law of war; and (3) the expanding conception of the relevance of human rights law in armed conflict—to argue that the era of subordinates as "cannon fodder" should be over, and that soldiers ought to be thought of not as mere extensions or instruments of the state, but as individuals in their own right, subject to injury at the hands of their states and their superiors.

This foundation lays the groundwork for Parts IV and V, which argue that the superior owes a recognizable duty to the subordinate and violates that duty in ordering the subordinate to commit a crime. Detailing the contours of the legal and moral obligations from superior to subordinate, Part IV explains why an illegal order itself should be considered an abuse of the subordinate and an independent wrong that is separate from the crime that may result from the order. Drawing on research in psychology and psychiatry on the concept of moral injury—the suffering caused by a betrayal by a leadership figure—this Part further demonstrates the palpable, devastating harm, even beyond that abuse of the relationship itself, that can be caused by a superior's illegal order. As Part V contends, reframing an illegal order as a superior's abuse of their authority over the subordinate thus may contribute both to healing the wounds suffered by service members, and to a larger political project of delineating appropriate boundaries on the use of authority over others. A brief conclusion follows.

Global in scope and immediate in its application, this Article aims to reorient conceptions of the relationship between superior and subordinate, and to excavate and upend conventional assumptions about authority, agency, and the wrong of improperly using another person to commit a crime. In so doing, it seeks to begin a conversation, even as it intervenes in existing scholarly and practice-oriented discussions of the nature of wrongdoing in collective settings. This Article focuses on the military in particular, but it invites a broader set of questions about how we understand the exercise of power or authority over another. Most first-year Criminal Law courses teach the contours of the duress defense, the requirements for accomplice liability, the details of innocent-agency doctrine. But most law students will never have a discussion in that course about the trauma the coercer inflicts upon the perpetrator of the crime when they impel them to engage in wrongdoing, or about the unique wrongfulness of using one's power or authority over another person to turn them into a tool in accomplishing crime. The approach of this Article offers a new way to understand these questions of longstanding and urgent importance.

II. LEGAL ACCOUNTS OF ILLEGAL ORDERS

Across the world, obedience to superior orders is the cornerstone of military discipline.[26] In 1890, the United States Supreme Court wrote that an army's "law is that of obedience."[27] In the United States today, every enlisted service member takes an oath to "obey . . . the orders of the officers appointed over [them]."[28] Some idealize the system of unfailing obedience to orders. In a speech titled *The Soldiers Faith*, delivered on Memorial Day in 1895, Oliver Wendell Holmes, Jr.—a Civil War veteran and at that time an associate justice of the Massachusetts Supreme Judicial Court—declared that "in the midst of doubt, in the collapse of creeds, there is one thing" he did "not doubt": "that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has little notion, under tactics of which he does not see the use."[29] Others, perhaps less starry eyed, focus on the practical benefits: obedience strengthens group cohesion and ensures the smooth functioning of the unit, and it maximizes the possibility of safety and success. "If every subordinate officer and soldier were at liberty to question the legality of the orders of the commander, and obey them or not as they may consider them valid or invalid," wrote Judge Matthew Deady in a case arising out of the defendant's ordering of the arrest of a civilian who had been exulting in the assassination of President Lincoln, "the camp would be turned into a debating school, where the precious moment for action would be wasted in wordy conflicts between the advocates of conflicting opinions."[30] The same logic

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26. JEAN-FRANÇOIS CARON, DISOBEDIENCE IN THE MILITARY: LEGAL AND ETHICAL IMPLICATIONS 2 (2019) (discussing obedience around the world); Telford Taylor, *Superior Orders and Reprisals*, *in* WAR, MORALITY, AND THE MILITARY PROFESSION 380, 381 (Malham M. Wakin ed., 1986) (same); *see also* Parker v. Levy, 417 U.S. 733, 758 (1974) (noting "[t]he fundamental necessity for obedience"); McCall v. McDowell, 15 F. Cas. 1235, 1240 (C.C.D. Cal. 1867) ("The first duty of a soldier is obedience . . . .").

27. *In re* Grimley, 137 U.S. 147, 153 (1890); *see also* Chappell v. Wallace, 462 U.S. 296, 300 (1983) ("[C]enturies of experience have developed a hierarchical structure of discipline and obedience to command . . . .").

28. 10 U.S.C. § 502 (2018); *see also* CRAIG M. MULLANEY, THE UNFORGIVING MINUTE: A SOLDIER'S EDUCATION 8 (2009) (noting, of education at West Point, that "[o]ur purpose was to follow, to obey").

29. Oliver Wendell Holmes, Jr., *The Soldier's Faith.: An Address Delivered on Memorial Day, May 30, 1895, at a Meeting Called by the Graduating Class of Harvard University*, *in* THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 87, 89 (Richard A. Posner ed., 1992); *see also* G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 84 (1993) (noting Holmes's comment that he had "tried in [his] speech . . . to bring home by example that men are eternally idealists—(a speech that fools took as advice to young men to wade in gore)").

30. *McCall*, 15 F. Cas. at 1240. The decision holding the detention was illegal was thought to have so offended President Grant that it prevented Deady from securing an appellate court judgeship when the circuit courts were created a few years later. *See* CHRISTIAN G. FRITZ, FEDERAL JUSTICE IN CALIFORNIA: THE COURT OF OGDEN HOFFMAN, 1851–1891, at 44 (1991). Deady's fate

continues now, both inside and outside of the United States. Quite simply, as Michael Walzer writes, "[n]o military force can function effectively without routine obedience."[31]

The obligation to obey, however, is not absolute; it applies only to lawful orders.[32] Moreover, not only are service members not required to follow unlawful orders; they may, in some cases, be prevented from relying on the existence of an order to defend their own illegal activity. That "just following orders" is no defense is something of a platitude at this point,[33] and the defense itself—along with a gesture to its ostensible emptiness—have come to be colloquially referred to as the "Nuremberg Defense."[34] The London Charter, which set forth the laws governing the International Military Tribunal at Nuremberg, indeed rejected the respondeat superior principle, which would have provided subordinates with a complete defense.[35] In its place, the Charter provided that orders could be considered as mitigation, and the Tribunal urged in its Judgment that "the true test" of whether a person acting

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as a district judge was thus sealed, and he went on to author the district court opinion that led to personal-jurisdiction powerhouse *Pennoyer v. Neff*, 95 U.S. 714 (1878). *Id.*

31. MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 311 (1977); *see also* Geoffrey S. Corn, Opinion Note, *Contemplating the True Nature of the Notion of "Responsibility" in Responsible Command*, 96 INT'L REV. RED CROSS 901, 906 (2014) (noting that "unquestioning obedience to orders" is necessary but not sufficient for "a disciplined and tactically effective military unit").

32. *See, e.g.*, 10 U.S.C. §§ 890–92 (2018) (setting forth criminal penalties for individual covered by the Uniform Code of Military Justice who "willfully disobeys," "violates," or "fails to obey" lawful orders); Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, § 14(1) (Can.) (providing defense of obedience to superior orders if "the order was not manifestly unlawful," as long as defendant "was under a legal obligation to obey" the order and "did not know that the order was unlawful"); Carlos Gómez-Jara Díez & Luis E. Chiesa, *Spain*, *in* THE HANDBOOK OF COMPARATIVE CRIMINAL LAW 488, 511 (Kevin Jon Heller & Markus D. Dubber eds., 2011) (explaining requirements of Spanish superior orders defense). Not every legal system uses the "manifestly unlawful approach." *See, e.g.*, Wei Luo, *China*, *in* THE HANDBOOK OF COMPARATIVE CRIMINAL LAW, *supra*, at 137, 157 (explaining requirements of Chinese superior orders defense, which does not include requirement that order was not manifestly unlawful).

33. *See* SUE VICE, HOLOCAUST FICTION 16 (2000) (describing "just following orders" as "a cliché"); *see also* THOMAS U. BERGER, WAR, GUILT, AND WORLD POLITICS AFTER WORLD WAR II 40 (2012) (describing "just following orders" as a "famous line").

34. *See, e.g.*, JESS BRAVIN, THE TERROR COURTS: ROUGH JUSTICE AT GUANTANAMO BAY 144 (2013); *see also* THANK YOU FOR SMOKING (Fox Searchlight Pictures 2005) (referring to "everyone's got a mortgage to pay" as "the yuppie Nuremberg Defense").

35. *See* Charter of the International Military Tribunal art. 8, *in* 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 10, 12 (1947) [hereinafter London Charter], https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf [https://perma.cc/A9W5-AHSB] ("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 . . . ."). For discussion of the status of the defense before the London Charter, *see* ROBERT CRYER, DARRYL ROBINSON & SERGEY VASILIEV, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 393–98 (4th ed. 2019); Jonathan A. Bush, *Nuremberg: The Modern Law of War and Its Limitations*, 93 COLUM. L. REV. 2022, 2033–34 (1993) (book review).

pursuant to an order could be held responsible for their acts "is not the existence of the order, but whether moral choice was in fact possible."[36] In the decades since, decisions of both international and national courts have allowed a defense when a person commits a crime upon orders of a superior, as long as the crime "was not manifestly unlawful" and the perpetrator "did not know that the order was unlawful."[37]

The literature on the superior orders defense is massive. Scholars of law, moral philosophy, sociology, and psychology have presented careful studies of the scope, contours, and implications of the defense. Should it be absolutely barred, or offered only when the individual did not know and did not have reason to know the order was unlawful? How can service members be incentivized, trained, and acculturated to disobey only in the precise circumstances that demand it? How do service members interpret the orders they are given and the appropriateness of disobedience?[38] Courts, too, have wrestled with the doctrine of illegal orders, ultimately setting forth rules that aim to balance the importance of obedience in military systems with an expectation that every person—even those subject to command—should be held to the standard of an ordinary person who can be expected to refuse certain acts, even in the most coercive circumstances.[39]

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36. Judgment, *in* 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945 – 1 OCTOBER 1946, *supra* note 35, at 171, 224 (1947) [hereinafter IMT Judgment], https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf [https://perma.cc/Z9SX-CPD2].

37. *See* Rome Statute of the International Criminal Court, art. 33, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute], https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf [https://perma.cc/HHE7-WYNW]; United States v. Calley, 22 C.M.A. 534, 542 (1973) (excluding superior orders defense if "the superior's order is one which a man of *ordinary sense and understanding* would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful"). In the United States, the defense has remained relatively consistent over time. *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 886–87 (2d ed. 1920) (noting that "[o]f course where the authority of the superior is complete it shields all who duly act under him" but suggesting that the subordinate who obeys an illegal order will have a defense only if the order is "not palpably illegal upon [its] face").

38. *See, e.g.*, MARK J. OSIEL, OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE, AND THE LAW OF WAR 1, 299–340 (Routledge 2017) (1999); YORAM DINSTEIN, THE DEFENCE OF 'OBEDIENCE TO SUPERIOR ORDERS' IN INTERNATIONAL LAW 27 (Oxford Univ. Press 2012) (1965); Albin Eser, *"Defences" in War Crimes Trials*, 24 ISR. Y.B. ON HUM. RTS. 201, 209 (1994); Robert Cryer, *Superior Orders and the International Criminal Court*, *in* INTERNATIONAL CONFLICT AND SECURITY LAW: ESSAYS IN MEMORY OF HILAIRE MCCOUBRE 49, 59–67 (Richard Burchill, Nigel D. White & Justin Morris eds., 2005); Paola Gaeta, *The Defence of Superior Orders: The Statute of the International Criminal Court* Versus *Customary International Law*, 10 EUR. J. INT'L L. 172, 188–91 (1999).

39. *See, e.g.*, United States v. Keenan, 18 C.M.A. 108, 117 (1969); *Calley*, 22 C.M.A. at 544; United States v. Kinder, 14 C.M.R. 742, 774 (1953); *see also* Chief Military Prosecutor v. Malinki (Military Court of Appeals, Isr. 1959), *reprinted and translated in* 2 PALESTINE Y.B. INT'L L. 69, 111 (1985); LEORA BILSKY, TRANSFORMATIVE JUSTICE: ISRAELI IDENTITY ON TRIAL 177 (2004) (noting that although legal scholarship on the case "has mainly dealt with the question of the duty to obey a superior's order," the case should be recognized as "the first attempt by an Israeli court to

Although the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East primarily addressed leaders' responsibility, studies and decisions—as well as popular commentary—on illegal orders since that time have brought attention to the person subject to the order—their knowledge, their choices, their responsibility to do the right thing. Recall that even though officials at the highest levels of the U.S. government had created a program of torture, Bush Administration officials leaned on the crutch that "bad apples" were responsible when photos of torture at Abu Ghraib became public;[40] that the government pursued prosecutions only of a few low-level individuals, ranking no higher than a staff sergeant;[41] or even that recent obituaries failed to reckon with Donald Rumsfeld's authorization of torture.[42] It is thus no surprise, in light of all that came before, that when a U.S. presidential nominee threatened to resurrect torture and inaugurate the killing of family members of suspected terrorists,[43] and when the president appeared to embrace the use of armed force in order to challenge the results of an election, the ready solution was to count on the subordinates to defy any orders that may come.[44] The answer to an illegal

confront an atrocity committed by Israeli soldiers and to comprehend the suffering it caused the Arab victims").

40. *See* MAJORITY STAFF, H. COMM. ON THE JUDICIARY, 111TH CONG., REINING IN THE IMPERIAL PRESIDENCY: LESSONS AND RECOMMENDATIONS RELATING TO THE PRESIDENCY OF GEORGE W. BUSH 364 n.488 (2009) (quoting Interview with Paul Wolfowitz, Deputy Secretary of Defense, Pentagon Channel (May 4, 2004)).

41. Philip Gourevitch, *Interrogating Torture*, NEW YORKER (May 4, 2009), https://www.newyorker.com/magazine/2009/05/11/interrogating-torture [https://perma.cc/D745-55S4] (noting "the only Americans who have been prosecuted and sentenced to imprisonment . . . are ten low-ranking servicemen and women" while "superior officers enjoy their freedom"). An eleventh individual was convicted but not sentenced to imprisonment. Associated Press, *Dog Handler Convicted in Abu Ghraib Abuse*, N.Y. TIMES (June 2, 2006), https://www.nytimes.com/2006/06/02/us/02verdict.html [https://perma.cc/CJK4-P7KS].

42. *See, e.g.*, Robert D. McFadden, *Donald H. Rumsfeld, Defense Secretary During Iraq War, Is Dead at 88*, N.Y. TIMES (Aug. 24, 2021), https://www.nytimes.com/2021/06/30/us/politic/donald-rumsfeld-dead.html [https://perma.cc/584J-9KVX] (noting that "many critics . . . said [Rumsfeld] should face criminal charges for . . . abuse of detainees at Abu Ghraib" and Guantánamo and quoting Rumsfeld's memoir blaming "a small group of prison guards who ran amok in the absence of adequate supervision").

43. *See* Maggie Haberman, *Donald Trump Says Terrorists' Families Should Be Targets*, N.Y. TIMES (Dec. 2, 2015, 11:37AM), https://www.nytimes.com/politics/first-draft/2015/12/02/donald-trump-says-terrorists-families-should-be-targets.

44. The expectation that an order to torture is manifestly illegal, or that service members will know they ought to disobey, is a particularly tall order, given the deliberate efforts that have been made to obfuscate the legal status of torture and other abusive interrogation methods that do not rise to the level of torture. When high-level officials argue that certain interrogation methods are not illegal, service members will have a strong case for arguing that they were not aware of the illegality of an order and that the order was not manifestly unlawful. *See* M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RSRV. J. INT'L L. 389, 403–04 (2006) ("Their defense counsels, like those of the senior administration officials, will argue that the orders their clients' followed were not manifestly unlawful and that these

order, once again, was the subordinate. Their knowledge, their choices, their responsibility to do the right thing.

What about the person ordering the subordinate to commit a crime? Scholars and courts have less to say about them; and indeed, the law, as discussed below, is relatively straightforward in its rendering of the order as the basis for holding the superior guilty of a crime as an accomplice or as a perpetrator.[45] But when the superior is treated as a main character, the story the law is telling is myopic, treating the superior like any other perpetrator or accomplice, and neglecting the significant fact that the superior is abusing their authority over another person when they give that order.[46]

The following Sections expose that story and its myopia. They begin with the doctrinal details of the criminal prohibition against ordering a subordinate to commit a crime, analyzing the illegal order as the basis of complicity and perpetration of a crime, and also as the grounds for certain violations of military law. They then analyze those doctrinal details to elucidate how these approaches conceive of the central wrong of ordering criminal activity as beginning and ending with the criminal activity itself—that is, the harm of ordering a crime is equal to the risk or reality of the crime being committed. This conception, however, overlooks that there is a wrong, too, in ordering criminal activity of someone over whom one exercises authority, a wrong of abusing and exploiting and degrading that relationship of authority, and of risking grave harm to the person subject to the order.

A. THREE ACCOUNTS OF ORDERING SUBORDINATES

1. Ordering as a Basis for Liability for a Target Crime

Ordering a person to commit a crime primarily functions as a mode of liability—a way of connecting a person to a crime. First, ordering a person to commit a crime is the basis for accomplice liability—and a rather straightforward one at that.[47] As long as the crime is attempted or committed, the order constitutes the necessary act of assistance required to render the superior complicit in the subordinate's crime, and giving the order typically provides

military personnel could reasonably rely on the legal opinions of such government lawyers as those mentioned above."); *infra* notes 342–49 and accompanying text.

45. *See infra* Section II.A.

46. *See* Marianne Constable, *Law as Language*, 1 CRITICAL ANALYSIS L. 63, 64 (2014) ("[T]he humanities can be said to be characterized by a sensitivity to language, broadly understood, in readings (or interpretations or analyses) of texts and images and other cultural and historical artifacts . . . . Words promise truth. They ostensibly show us the world as it is.").

47. *See* Rome Statute, *supra* note 37, art. 25(3) ("[A] person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person . . . [o]rders, solicits or induces the commission of such a crime which in fact occurs or is attempted . . . ."); Statute of the International Criminal Tribunal for the Former Yugoslavia art. 7, ¶ 1 (May 25, 1993) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda art. 6, ¶ 1 (May 25, 1993) [hereinafter ICTY Statute].

sufficient evidence of the superior's intent for the subordinate to carry out the crime. A causal relationship between the order and the ultimate attempt or commission, too, may be required.[48]

Alternatively, giving an order to commit a crime may constitute the basis for what is known in international and some foreign legal systems as indirect perpetration, or perpetration through means.[49] Indirect perpetration treats as a perpetrator a person who does not physically perform the actus reus of the crime, but who uses another person to do so.[50] Under international law, this mode of liability is available whether the direct perpetrator—the person who is used, that is—is a legally responsible actor or not. (Anglo-American criminal law, by contrast, limits its approach to perpetration through means, known as innocent agency doctrine, to situations in which the direct perpetrator is not legally responsible for the crime.[51]) Even assuming the crime is carried out, not every person who orders another to commit a crime will constitute an indirect perpetrator; but as long as the person giving the order meets the requirements of an indirect perpetrator—including sufficient control over the subordinate and the mens rea required for the underlying crime—the act of ordering can constitute the basis for indirect perpetration.[52]

The law of ordering developed significantly in the aftermath of the Second World War, when prosecutions focused primarily on high-level defendants. In its judgment against twenty-two Nazi leaders, for example, the International Military Tribunal at Nuremberg devoted pages to listing and explaining the orders that Field Marshal Wilhelm Keitel gave, and that it found constituted war crimes and crimes against humanity: He circulated the

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48. *See* Prosecutor v. Mudacumura, Case No. ICC-01/04-01/12, Decision on the Prosecutor's Application Under Article 58, ¶ 63 (July 13, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_07502.PDF [https://perma.cc/3TGW-MVG9]. The doctrine is so straightforward that international criminal law and domestic criminal law casebooks do not include cases on ordering, mentioning it instead in brief descriptive paragraphs and devoting space instead to questions such as the causal connection required between any act of assistance and the crime. *See, e.g.*, DAVID LUBAN, JULIE R. O'SULLIVAN & DAVID P. STEWART, INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW 933–34 (2d ed. 2014).

49. *See* Manuel J. Ventura, *Ordering*, *in* MODES OF LIABILITY IN INTERNATIONAL CRIMINAL LAW 284, 285 (Jérôme de Hemptinne et al. eds., 2019); *see also* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, Separate Opinion of Judge Fulford, ¶¶ 7–8 (Mar. 14, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_03942.PDF [https://perma.cc/9D33-DVR4] (noting overlap between indirect perpetration and "ordering, soliciting or inducing a crime").

50. *See* Rome Statute, *supra* note 37, art. 25(3)(a) (holding a perpetrator is someone who acts "through another person").

51. *See* Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323, 370 (1985); MODEL PENAL CODE AND COMMENTARIES § 2.06, at 300–04 (AM. L. INST. 1985). The Model Penal Code also defines solicitation of an innocent agent as sufficient to establish attempt liability. *See id.* § 5.01, at 346–47.

52. For a contrary view, see GERHARD WERLE & FLORIAN JEßBERGER, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 215 (3d ed. 2014) (contending that ordering should exclusively constitute a basis for complicity, and not for perpetration, under Rome Statute).

Commando Order, authorized by Hitler, instructing that all Allied commandos should "be 'slaughtered to the last man', even if they attempted to surrender";[53] he issued an instruction that any captured paratroopers should be turned over to the SD, the German intelligence unit, which would then kill them;[54] he demanded that fifty to one hundred Communists be killed for every one German soldier attacked; he instructed field commanders to kill political officers of the Soviet Army; he directed that civilians suspected of crimes against German soldiers be executed without trial.[55] Keitel's only defense at the Nuremberg trial was that he was carrying out the orders of his own superior.[56] The Tribunal quickly dispensed with this argument and found Keitel guilty on all charges.[57]

Orders given to subordinates also were the center of the *High Command* case, one of the twelve Subsequent Nuremberg Trials held by the American occupation authorities in postwar Germany. The case was brought against fourteen leaders of the German armed forces, known as the Wehrmacht, who were charged with crimes against peace, crimes against humanity, war crimes, and conspiracy for their roles in planning aggressive war and in the ordering of, and participation in, massive crimes against civilians and combatants.[58] The convictions were ultimately convictions for the crimes that were ordered, rather than for the ordering per se.[59]

These examples demonstrate how treating ordering as a mode of liability operates as a way to hold a superior liable for the acts of the subordinate.[60]

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53. IMT Judgment, *supra* note 36, at 228.

54. *Id.* at 229. It was clear that Keitel knew such orders were illegal. *See id.* at 289–90 (discussing exchange between Keitel and Canaris in which Keitel agrees that killing Soviet prisoners of war was a violation of international law).

55. *Id.* at 290.

56. *Id.*

57. *Id.* at 290–91; *see also id.* at 291–93 (discussing conduct of Ernst Kaltenbrunner, Chief of the Reich Main Security Office, including ordering the execution of prisoners in concentration camps).

58. United States v. von Leeb (High Command Case), Judgment, *in* 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 462, 462–63 (1950) [hereinafter High Command Judgment], https://tile.loc.gov/storage-services/service/ll/llmlp/2011525364_NT_war-criminals_Vol-XI/2011525364_NT_war-criminals_Vol-XI.pdf [https://perma.cc/5ATB-P8VM].

59. *Id.* at 509–27. After considering the difference between substantive ordering and mere transmittal of an order, the tribunal held "that to find a field commander criminally responsible for the transmittal of such an order, he must have passed the order to the chain of command and the order must be one that is criminal upon its face, or one which he is shown to have known was criminal." *Id.* at 511.

60. *See* U.S. DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶ 501 (1956) (noting that "when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war," both the direct perpetrators and the commander are responsible "when the acts in question have been committed in pursuance of an order of the commander concerned"); *see also* Amy J. Sepinwall, *Failures to Punish: Command Responsibility in Domestic and International Law*, 30 MICH. J. INT'L L. 251, 288 (2009) (noting that criminal responsibility

Treating the superior who gives an order as an accomplice or as an indirect perpetrator draws a line from the superior to the ultimate harm that is perpetrated when the subordinate commits or attempts to commit the crime. If the superior orders the subordinate to commit murder and the subordinate complies, then the superior is guilty of that murder. If the superior orders the subordinate to commit torture and the subordinate complies, then the superior is guilty of that torture.[61] The superior is punished for the same reason that underlies the punishment of the person who directly commits the murder or the torture, whether because the crime ought to be deterred, or because the person who commits the crime or associates themselves with it ought to be incapacitated, or because the blameworthiness of the crime and the actor demands punishment.

2. Ordering as Inchoate Crime

A second approach—though one that has now fallen out of favor—treats ordering as an inchoate crime, such that ordering a subordinate to undertake illegal activity is itself a violation of the law. Just like attempt, solicitation, or conspiracy, liability for ordering as an inchoate offense does not require that the subordinate actually attempt or commit the act that is ordered.[62]

For example, in the *Hostages* case, another Subsequent Nuremberg Trial held by the U.S. military authorities, Wehrmacht commander Lothan Rendulic was charged with war crimes and crimes against humanity for "passing on to troops subordinate to him the Fuehrer Order of 6 June 1941, providing that all commissars captured must be shot."[63] Rendulic admitted to forwarding the order and conceded that he was aware of its illegality.[64] He maintained, however, that he was not guilty of a crime because his subordinates did not carry out the order, and soldiers had not killed any prisoners pursuant to the command.[65] In making these points, Rendulic was arguing that ordering is only a mode of liability, not an inchoate crime; and because no crime was

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for a superior who has ordered subordinates is a statement that "it is appropriate to ascribe soldiers' acts to their commander").

61. The subordinate, too, will be guilty of the crime as a direct perpetrator. *See supra* notes 32–44 and accompanying text (discussing limits on defense of superior orders for individuals who perpetrate crimes upon receiving orders to do so).

62. ANTONIO CASSESE ET AL., CASSESE'S INTERNATIONAL CRIMINAL LAW 204 (3d ed. 2013). Ordering does not require control over the person ordered, but the person giving the order must be in a position of authority. Prosecutor v. Mudacumura, Case No. ICC-01/04-01/12-1-Red, Decision on the Prosecutor's Application Under Article 58, Pre-Trial Chamber II, ¶ 63 (July 13, 2012), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_07502.PDF [https://perma.cc/2BHZ-XJYZ].

63. United States v. List (Hostage Case), Judgement, *in* 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1230, 1294 (1950), https://tile.loc.gov/storage-services/service/ll/llmlp/2011525364_NT_war-criminals_Vol-XI/2011525364_NT_war-criminals_Vol-XI.pdf [https://perma.cc/5ATB-P8VM].

64. *Id.* at 1294.

65. *Id.*

attempted or perpetrated, his order could not be converted into the basis of either perpetration or complicity.[66] Nonetheless, the Tribunal rejected the argument, apparently treating ordering as an inchoate offense. In its judgment, the Tribunal noted that although the fact that the order was not carried out could serve to mitigate Rendulic's punishment, "it does not free him of the crime of knowingly and intentionally passing on a criminal order."[67]

While the *Hostages* trial was under way, the United States created the tribunal to try the fourteen individuals in what came to be known as the *High Command* case.[68] In a brief on the liability of Field Commander Georg von Kuechler,[69] the prosecution pushed for the idea of ordering as an inchoate form of liability in order to urge that von Kuechler be convicted for ordering the execution of prisoners of war, regardless of whether his subordinates carried out the order.[70] The brief relied on Rendulic's recent conviction to support the prosecution's argument "that the commander who knowingly and willfully distributes an unlawful order becomes guilty of a criminal act *per se*, no matter whether this order was executed or not."[71] It further noted a British military tribunal's 1947 conviction of German Air Force General August Schmidt for war crimes based on his act of issuing an order that Allied Air Force members "were to be denied protection by their German escorts if attacked by the populace."[72] Moreover, the brief noted, the British prosecutors had secured Schmidt's conviction relying exclusively on the existence of the order, without even alleging execution of the order.[73] In its closing arguments against Kuechler, too, the prosecution argued that "[t]he mere passing down

66. *See id.*

67. *Id.*; *see also* 8 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 90 (1949), https://tile.loc.gov/storage-services/service/ll/llmlp/Law-Reports_Vol-8/Law-Reports_Vol-8.pdf [https://perma.cc/F58M-NEN7] (commenting that the Tribunal's remarks on Rendulic "constitute[] recognition that the mere passing on of an illegal order, even if it is not obeyed, may constitute a crime under International Law").

68. *See supra* note 58 and accompanying text.

69. *See* SAMUEL W. MITCHAM, JR. & GENE MUELLER, HITLER'S COMMANDERS: OFFICERS OF THE WEHRMACHT, THE LUFTWAFFE, THE KRIEGSMARINE, AND THE WAFFEN-SS 47–48 (2d ed. 2012) (discussing von Kuechler's rise in the German military).

70. 12 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 118 (1949) [hereinafter High Command Notes on the Case], https://tile.loc.gov/storage-services/service/ll/llmlp/Law-Reports_Vol-12/Law-Reports_Vol-12.pdf [https://perma.cc/VQ9P-M6P6].

71. *Id.*

72. *Id* at 119.

73. *Id.* Schmidt was initially sentenced to life imprisonment, but the reviewing authority commuted the sentence to ten years. *Id.* In 1946, a British military tribunal also had held that defendant Nikolaus von Falkenhorst was guilty of war crimes for issuing an order that Jewish prisoners of war were to be transferred to the SD. *See* 11 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 29 (1949), https://tile.loc.gov/storage-services/service/ll/llmlp/Law-Reports_Vol-11/Law-Reports_Vol-11.pdf [https://perma.cc/QW4N-5MBF]. He was convicted on this count despite the fact that the order was not carried out. *Id.* The court held that the key question was not whether the order was carried out, but rather whether the defendant issued the order with expectation that it would be. *Id.*

of [the] order was a criminal act."[74] They referred again to Rendulic, and also to the conviction by the International Military Tribunal of German Navy Commander-in-Chief Erich Raeder. In the view of the prosecution, the Tribunal convicted Raeder "largely because he passed the Commando Order 'down through the chain of command.'"[75]

Defense counsel at the trial, meanwhile, rejected the notion that war crimes could be based on the act of ordering alone.[76] Challenging the notion that Rendulic's conviction was based solely on giving the order, the defense argued there was no legal basis for convicting a person for giving an order under Control Council Law No. 10, the law of the occupation authorities (known as the Allied Control Council) that governed the proceedings.[77] The argument focused on both the text of the law and its spirit, noting that the crimes punishable by the Tribunal were limited to those of a particular severity: "acts of violence against person or life."[78] Accordingly, proceeded defense counsel, "[a]n order to murder or to ill-treat somebody must consequently always have resulted in the actual perpetration of such acts of violence."[79] The issue was ultimately not resolved with respect to von Kuechler, however, for he was found not guilty based on an assessment that he had not passed on the order.[80]

Since that time, the inchoate form of ordering liability has vanished, as international criminal courts have focused their limited resources on completed or attempted crimes. Outside the exceptional case of incitement to commit genocide, inchoate crimes were deemed not sufficiently serious to merit the limited resources of the ad hoc international tribunals for Yugoslavia and Rwanda, or not sufficiently connected to the concerns of "international peace and security"[81] that motivated the creation of these bodies in the early 1990s.[82] Today, the International Criminal Court has jurisdiction over attempted crimes, but not over ordering unless the crime ordered is committed or attempted.[83] The courts have been unwilling to budge from these jurisdictional

74. Transcript at 9571, United States v. von Leeb (High Command Case) (1948) [hereinafter High Command Transcript], https://commons.und.edu/cgi/viewcontent.cgi?article=1015&context=nuremburg-transcripts [https://perma.cc/6SWK-G9XW]; *see also* High Command Notes on the Case, *supra* note 70, at 118–19 (noting prosecution's argument that passing down an order through the chain of command indicates "clear intent of [it] being enforced").

75. High Command Transcript, *supra* note 74, at 9571 (quoting IMT Judgment, *supra* note 36, at 317).

76. High Command Notes on the Case, *supra* note 70, at 119.

77. *Id.*

78. *Id.*

79. *Id.* These arguments were made by counsel for von Salmuth, as counsel for von Kuechler did not address the question of ordering as an inchoate crime during closing arguments. *Id.*

80. *Id.* at 120.

81. U.N. Charter art. 39.

82. *See* Jérôme de Hemptinne, *Incitement*, *in* MODES OF LIABILITY IN INTERNATIONAL CRIMINAL LAW, *supra* note 49, at 388, 399.

83. Ventura, *supra* note 49, at 287, 290–91; *see* Rome Statute, *supra* note 37, art. 25(3)(b).

limits. For example, in the trial of Alfred Musema, the former director of a state-run tea factory in Rwanda that became a massacre site during the genocide, the International Criminal Tribunal for Rwanda (ICTR) indirectly considered the question of whether ordering a crime was sufficient for criminal liability on its own.[84] The Tribunal declared that there was sufficient evidence to find that Musema, who used his position at the factory both to recruit genocidaires and to organize campaigns of terror, had ordered the rape and mutilation of a Tutsi woman whose husband worked at the factory.[85] The Tribunal decided, however, that there was insufficient evidence to establish that the order was carried out.[86] Because the crime was not attempted or perpetrated, the Trial Judgment held, Musema could not be convicted on the basis of the order alone.[87] Despite the historical pedigree of ordering as an inchoate crime—and despite the abhorrence of Musema's order—the ICTR declined to resurrect it.[88]

Treating ordering as an inchoate crime is worlds apart from treating it as a mode of liability, because if it is an inchoate crime, the order need not be attempted or perpetrated in order for the order to be a criminal act. Nonetheless, the rationales for punishing the order are the same. When ordering is an inchoate crime, just as when it is a way to treat a person as an accomplice or a perpetrator, the primary function of punishment is prevention of the target crime, as well as identification of the actors deemed blameworthy because of their positive disposition toward the commission of the crime.[89] This equation mirrors the typical treatment of other inchoate crimes in Anglo-American criminal law. Just as conspiracy is punished regardless of whether the group ultimately reaches the point of achieving or even attempting their criminal objective, and just as attempt punishes the steps taken prior to and with the goal of completion of a crime, ordering as an inchoate crime seeks to punish the early act of instigation as a way of both preventing others from even taking steps toward the commission of crime and punishing those who show their culpability through the willing proposal of crime in the first place.

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84. *See* Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement and Sentence, ¶ 889 (Jan. 27, 2000), https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-13/trial-judgements/en/000127.pdf [https://perma.cc/448Y-SV36].

85. *Id.* ¶¶ 823–29.

86. *Id.* ¶ 829.

87. *See id.* ¶ 889; *see also* Musema v. Prosecutor, Case No. ICTR-96-13-A, Judgment, ¶¶ 166–68 (Nov. 16, 2001), https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-13/appeals-chamber-judgements/en/011116.pdf [https://perma.cc/7KSF-N5P8] (confirming that Musema was not convicted on the basis of the order).

88. *See* Gregory S. Gordon, *Putting the Offense of Ordering in Order: Toward a Theory of Inchoate Liability*, *in* PROPAGANDA AND INTERNATIONAL CRIMINAL LAW: FROM COGNITION TO CRIMINALITY 86, 93–99 (Predrag Dojcinovic ed., 2020).

89. *See id.* at 86–87 (arguing that ordering should be an inchoate crime because of "the intrinsic likelihood of compliance with the order in light of the speaker's position of command").

3. Ordering as Substantive Offense in Military Justice

A third approach to ordering comes from national military laws that treat ordering a subordinate to commit a crime as the basis of a substantive offense under the codes of conduct governing the armed forces.[90] In the United States in particular, ordering a subordinate to commit a crime has served as the basis for convictions under two provisions: (1) the so-called General Article of the Uniform Code of Military Justice, a gap-filler that prohibits three categories of misconduct not covered in the remainder of the Code, namely (a) "all disorders and neglects to the prejudice of good order and discipline," (b) "all conduct of a nature to bring discredit upon the armed forces," and (c) "crimes and offenses not capital"[91]; and (2) the article prohibiting "conduct unbecoming an officer and a gentleman."[92]

i. Good Order and Discipline

Originating in the British military codes, the general article first emerged in the 1625 Articles of War.[93] The provision itself covers a broad reach of conduct, and the cases involving illegal orders vary in their nature, too, ranging from a superior ordering a subordinate to write another officer's name on a trip ticket so the superior could take an unauthorized visit home,[94] to cases in which superiors give subordinates orders to fire their weapons at other members of their squad,[95] to those in which superiors order subordinates to attack nationals of the country in which they are stationed. [96] Still, they are united

90. The Geneva Conventions require states parties to criminally punish not only persons who have committed grave breaches under the Convention, but also those who ordered their commission. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Fieldart. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 135.

91. 10 U.S.C. § 934 (2018); *see also* JOINT SERV. COMM. ON MIL. JUST., MANUAL FOR COURTS-MARTIAL, UNITED STATES IV-135–IV-136 (2019 ed.), https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20(Final)%20(20190108).pdf [https://perma.cc/543H-3BQB] (discussing elements of offense); *see also* D. B. Nichols, *The Devil's Article*, 22 MIL. L. REV. 111, 113–19 (1963) (examining evolution of the General Article).

92. *See* 10 U.S.C. § 933 (2018).

93. *See* Nichols, *supra* note 91, at 113–14 (discussing early roots of the General Article).

94. *See* United States v. Aitken, 30 B.R. 299, 299–300 (A.B.R. 1943).

95. *See* United States v. Ball, 33 B.R. 277, 283 (A.B.R. 1944).

96. *See* United States v. Wilson, 6 B.R.-J.C. 151, 157–58 (A.B.R. 1950) (dismissing Wilson, a commander in Japan, from service for ordering his subordinates to assault a Japanese national). The decision focused primarily on Wilson's failure to stop the subordinates from attacking the victims, rather than the order. *Id.* at 152, 157. The Board of Review, however, still found that Wilson was guilty of the ordering charge, but it also noted that the original decision was to strike mention of the order from the charge specification. *Id.*

by a common thread; the essence of the conduct is the giving of the order, which constitutes a violation regardless of whether the order is carried out.

The 1901 court martial of Brigadier-General Jacob H. Smith pursuant to this provision is instructive for its demonstration of the kinds of concerns that drive a conviction under this article for giving illegal orders. Smith—who would go on to earn the nicknames "Howling Jake" and "The Monster," among others[97]—had served in the Army since the Civil War; in the Philippine-American War, he was tasked by President Theodore Roosevelt with "pacify[ing]" the people of Samar, an island in the central Philippines.[98] The prior month, a group of forces, ranging from townspeople to the Chief of Police, launched a surprise attack on U.S. soldiers in the town of Balangiga.[99] Fifty American soldiers were killed in the attack, and dozens more were injured; some 250 Filipinos died the same day.[100]

In the hands of Smith, the order from Roosevelt became a charge for reprisal, revenge for the attack at Balangiga.[101] Smith instructed his forces to spare no one: "I want no prisoners. I wish you to kill and burn, the more you kill and burn the better you will please me."[102] Smith urged that "the interior of Samar must be made a howling wilderness" and ordered "all persons killed who were capable of bearing arms and in actual hostilities against the United States."[103] Smith gave these instructions to Major Littleton Waller, the commander of the battalion of Marines that had been sent to Samar after the Balangiga attack.[104] Surely, Waller thought, Smith could not possibly mean children should be killed, even though they were capable of bearing arms, so he asked Smith to specify a minimum age. Ten years old, replied Smith.[105] Waller reportedly ignored Smith's order and instructed his troops that only men, and not women or children, should be killed.[106] Still, treatment of the residents of Samar was brutal. The United States cut the island off from food and destroyed crops and infrastructure, causing the starvation of a still unknown

97. *See* DYLAN RODRÍGUEZ, SUSPENDED APOCALYPSE: WHITE SUPREMACY, GENOCIDE, AND THE FILIPINO CONDITION 131 (2010).

98. *See* SHARON DELMENDO, THE STAR-ENTANGLED BANNER: ONE HUNDRED YEARS OF AMERICA IN THE PHILIPPINES 168–75 (2004) (critiquing the prevalent use of the term "massacre" to describe these events in American commentary and scholarship); STUART CREIGHTON MILLER, "BENEVOLENT ASSIMILATION": THE AMERICAN CONQUEST OF THE PHILIPPINES, 1899–1903, at 206–07 (1982). *See generally* GINA APOSTOL, INSURRECTO (2018) (offering an innovative reflection on the events at Samar and the question of narrative).

99. DELMENDO, *supra* note 98, at 168.

100. *Id.* at 170–71.

101. *See* MILLER, *supra* note 98, at 220; 7 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 1114, at 187 (1906).

102. MILLER, *supra* note 98, at 220.

103. MOORE, *supra* note 101, § 1114, at 187.

104. *Id.*; MILLER, *supra* note 98, at 220.

105. MOORE, *supra* note 101, § 1114, at 187.

106. MILLER, *supra* note 98, at 220.

number of people.[107] American troops burned homes and shot civilians in a scorched-earth campaign that killed thousands.[108]

A court martial was initially convened against Waller, not for crimes he and his troops committed in the course of carrying out Smith's order, but rather for ordering the summary execution of eleven Filipino guides who had allegedly mutinied against another American officer during an ill-fated attempted expedition into the interior of the island.[109] During the court-martial proceedings, Waller initially had not intended to mention the orders from Smith.[110] But after Smith testified for the prosecution, Waller decided to set the record straight, and he explained that he had acted on orders from Smith.[111] And Waller had receipts: he presented every written order he had received from Smith—from the "take no prisoners" order to the specification that anyone over the age of ten was fair game.[112] According to historian Stuart Creighton Miller, the revelation shocked the nation, "hit[ting] the United States like a ricocheting bombshell."[113] Waller was acquitted on the grounds that if any conduct was criminal, it was Smith's order to take no prisoners.[114]

Smith was then court martialed.[115] But whereas Waller had been tried for murder, Smith was tried for violation of Article 99 of the Articles of War, crimes to the prejudice of good order and discipline.[116] The court found Smith guilty "and sentenced him to be admonished by the reviewing authority"—

107. CHRISTOPHER J. EINOLF, AMERICAN IN THE PHILIPPINES, 1899–1902: THE FIRST TORTURE SCANDAL 89 (2014); JARED YATES SEXTON, AMERICAN RULE: HOW A NATION CONQUERED THE WORLD BUT FAILED ITS PEOPLE 101 (2021); John Lawrence Tone, *The Wars of 1898 and the US Overseas Empire*, *in* 2 THE CAMBRIDGE HISTORY OF AMERICA AND THE WORLD 195, 213 (Kristin Hoganson & Jay Sexton eds., 2021); Paul J. Springer, *Balangiga Massacre (1901)*, *in* 1 THE ENCYCLOPEDIA OF THE SPANISH-AMERICAN AND PHILIPPINE-AMERICAN WARS: A POLITICAL, SOCIAL, AND MILITARY HISTORY 38, 38–39 (Spencer C. Tucker ed., 2009).

108. DAVID J. SILBEY, A WAR OF FRONTIER AND EMPIRE: THE PHILIPPINE-AMERICAN WAR, 1899–1902, at 193–96 (2007); *see* MILLER, *supra* note 98, at 220; DELMENDO, *supra* note 98, at 176–77; James Brooke, *U.S.-Philippines History Entwined in War Booty*, N.Y. TIMES (Dec. 1, 1997), https://www.nytimes.com/1997/12/01/us/us-philippines-history-entwined-in-war-booty.html [https://perma.cc/64XM-6LSZ].

109. MILLER, *supra* note 98, at 226–27.

110. *Id.* at 230.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 232.

115. *Id.* at 236.

116. MILLER, *supra* note 98, at 238; *see* An Act for Establishing Rules and Articles for the Government of the Armies of the United States, ch. 20, art. 99, 2 Stat. 359, 371 (1806) [hereinafter Articles of War]. Article 99 provided: "All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general or regimental court martial, according to the nature and degree of the offence, and be punished at their discretion." *Id.*

a slap on the wrist.[117] The court martial apparently accepted the defense theory that "Smith was wont to use extravagant language and that his subordinates did not take his words literally, so that even though some atrocities were committed, the orders as given were never executed."[118]

That, however, was not the end of the proceedings against Smith. Although the court martial conviction did not demand it, President Roosevelt reprimanded Smith and forcibly retired him from the Army.[119] Roosevelt acted pursuant to a law allowing the president to retire any officer after the age of sixty-two, but he formally explained the decision in a public statement carried by newspapers across the country. Roosevelt detailed that orders, such as the ones Smith gave, demanded serious consequences because they created a risk of misconduct by subordinates:

> [T]he very fact that warfare is of such character as to afford infinite provocation for the commission of acts of cruelty by junior officers and the enlisted men must make the officers in high and responsible positions peculiarly careful in their bearing and conduct, so as to keep a moral check over any acts of an improper character by their subordinates.[120]

Roosevelt's statement conceded that "[i]t is impossible to tell exactly how much influence language like that used by Gen. Smith may have had in preparing the minds of those under him for the commission of the deeds which we regret."[121] But regardless of the ultimate effect, "[l]oose and violent talk by an officer of high rank is always likely to excite to wrong-doing those among his subordinates whose wills are weak or whose passions are strong."[122] Even though ordering a crime was an offense on its own, the harm in it was increasing the likelihood of that crime occurring.

ii. Conduct Unbecoming

Ordering a subordinate to commit a crime also has been treated in U.S. military law as "conduct unbecoming an officer and a gentleman," conviction of which may and in prior years necessarily did result in dismissal from military

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117. MOORE, *supra* note 101, § 1114, at 187.

118. L.C. Green, *Command Responsibility in International Humanitarian Law*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 319, 326 (1995).

119. *President Retires Gen. Jacob H. Smith*, N.Y. TIMES (July 17, 1902), https://timesmachine.nytimes.com/timesmachine/1902/07/17/101959147.pdf?pdf_redirect=true&ip=0 [https://perma.cc/XJ9H-DV4Z].

120. *Id.*

121. *Id.*

122. *Id.* A circular by Secretary of War Elihu Root published alongside Roosevelt's statement concluded that Smith's orders "were not taken literally and were not followed," but concluded that if they had been, they "would have brought lasting disgrace upon the military service of the United States." *See id.*

service.[123] Centered on the damage to reputation, the "gravamen of the offense" is that the officer's misconduct "disgraces [them] personally or brings dishonor to the military profession" such that it compromises their fitness as a commander.[124] Just as the general order covers a host of types of wrongdoing, a wide range of conduct can constitute "conduct unbecoming." Among them, William Winthrop, the author of the leading treatise on military law,[125] specifically cited "[a]buse of authority over soldiers . . . by requiring or influencing them to do illegal acts" as an example of this provision.[126]

In *United States v. Reed*, for example, the accused, Lieutenant Colonel William G. Reed, ordered a subordinate, Sergeant William H. Mohney, to assault Private Ralph Edward Laschisky, who was absent without leave and was being detained at the so-called Rehabilitation Center of the 558th Antiaircraft Artillery Automatic Weapons Battalion in Louisiana.[127] Reed established the Center "to punish and rehabilitate habitual offenders and to turn 'goldbrickers' into soldiers,"[128] apparently through violent hazing.[129] Mohney was overseeing Laschinsky running laps, digging foxholes, slogging through burpees and pushups.[130] Laschinsky was starting to tire, and Reed repeatedly instructed Mohney to hit Laschinsky with a switch when he slowed down; Mohney complied.[131] The following month, Reed ordered Mohney again to use a switch on another individual in the Rehabilitation Center, Private Arthur R. McCandless; Mohney again complied.[132] In its decision, the Board of Review noted that "[c]ruel treatment of soldiers constitutes a violation of Article of War 95 as well as of Article of War 96," at that time the "General Article," and

123. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 719 (2d ed. 1920); JOINT SERV. COMM. ON MIL. JUST., *supra* note 91, at IV-135.

124. United States v. Schweitzer, 68 M.J. 133, 137 (C.A.A.F. 2009) (citation omitted).

125. Elizabeth L. Hillman, *Gentlemen Under Fire: The U.S. Military and "Conduct Unbecoming,"* 26 LAW & INEQ. 1, 18 (2008).

126. WINTHROP, *supra* note 123, at 716; *see also id.* at 716 n.45 (citing cases in which individuals were convicted for ordering subordinates to make false statements). At the time of Winthrop's writing, conduct unbecoming was a violation of Article 61 of the Articles of War. *See id.* at 23. Article 61 later became Article 133 of the Uniform Code of Military Justice (UCMJ), which came into effect in 1951, see Uniform Code of Military Justice, 64 Stat. 107, pmbl., art. 133 (1950). Winthrop explains that conduct under this article must be deemed inappropriate for both an officer and a gentlemen: "the act which forms the basis of the charge must have double significance and effect" and "must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents." WINTHROP, *supra* note 123, at 711–12 (footnote omitted).

127. United States v. Reed, 36 B.R. 93, 93, 95–96 (A.B.R. 1944).

128. *Id.* at 95.

129. *Id.* at 95–96.

130. *Id.*

131. *Id.* at 96.

132. *Id.* at 98.

found Reed guilty.[133] Pursuant to the mandatory punishment required for Article 95, he was dismissed from service.[134]

Reactions to a more recent prosecution in Israel highlight the significance of describing an act of ordering a crime to take place as "conduct unbecoming." In 2008, two soldiers—Leonardo Corea and his superior, Omri Borberg—were charged with conduct unbecoming after Corea fired his weapon, pursuant to Borberg's order, at Ashraf Abu Rahma, a blindfolded, handcuffed detainee.[135] The charging decision prompted criticism that the characterization of the shooting and the order as only conduct unbecoming "trivializes a grave incident," and itself "disgraces both the military *esprit de corps* and the integrity of the legal profession" because it indicated "a policy of tolerance towards" serious breaches of the law of war.[136] Together with four human rights organizations, Abu Rahma appealed the charges, and the Israeli High Court ordered reconsideration of the charging decision.[137] After the military authorities decided to retain the original charges, the High Court ultimately demanded amendment of the indictment, holding that the initial charging decision was unreasonable and that new charges must "adequately reflect the facts and the nature of the acts described in the indictment."[138] In the amended indictment, both were still charged with conduct unbecoming, but Corea was charged also with unlawful use of a weapon, and Borberg was charged with making threats.[139] Both were convicted.[140] Punishment for the superior was secured along with the subordinate; but, consistent with the prevailing conception of ordering only as a pathway to the ultimate crime, there was never a mention of the unique wrong of Borberg using his relationship

133. *Id.* at 101 (citation omitted).

134. *See id.* at 102.

135. *Israeli Solider, Officer Convicted*, UPI (July 15, 2010, 11:23 PM), https://www.upi.com/Top_News/World-News/2010/07/15/Israeli-soldier-officer-convicted/62811279250598 [https://perma.cc/48VB-PQ9A]; Orna Ben-Naftali & Noam Zamir, Note, *Whose 'Conduct Unbecoming'?: The Shooting of a Handcuffed, Blindfolded Palestinian Demonstrator*, 7 J. INT'L CRIM. JUST. 155, 156–58 (2009). The officer, Omri Borberg, was charged with conduct unbecoming an officer, and the subordinate, Leonardo Corea, was also charged with unbecoming conduct. *See id.* Ben-Naftali and Zamir do not oppose the existence per se of a conduct unbecoming offense; instead, their concern was with the particular use of the offense to cover ordering the shooting of a detained person, which should be recognized as a war crime. *See id.* at 167–68.

136. *Id.* at 159, 172–73.

137. *See* BUREAU OF DEMOCRACY, HUM. RTS., & LAB., U.S. DEP'T OF STATE, ISRAEL AND THE OCCUPIED TERRITORIES: 2009 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2010), https://2009-2017.state.gov/j/drl/rls/hrrpt/2009/nea/136070.htm [https://perma.cc/85V8-SCMQ].

138. *The Army Must Internalize the Gravity of the Ni'lin Shooting Incident*, B'TSELEM: THE ISRAELI INFO. CTR. FOR HUM. RTS. IN THE OCCUPIED TERRITORIES (Jan. 27, 2011), https://www.btselem.org/firearms/20110127_nilin_shooting_sentence [https://perma.cc/P8CG-XSWK].

139. Anshel Pfeffer, *IDF Convicts Commander, Soldier in Shooting of Bound Palestinian*, HAARETZ (July 15, 2010), https://www.haaretz.com/1.5149078 [https://perma.cc/HNZ6-BSD9]; JPost.com Staff, *Soldiers Convicted in Nil'in Shooting*, JERUSALEM POST (July 15, 2010, 11:38), https://www.jpost.com/israel/soldiers-convicted-in-nilin-shooting [https://perma.cc/6JGC-7F6E].

140. Pfeffer, *supra* note 139.

of authority over Corea to put Corea in the position of shooting an unarmed, handcuffed, blindfolded person.

iii. Goals of the Substantive Military Offenses

For these crimes, too, the law does not acknowledge as a wrong the treatment of the subordinate by the superior. When ordering is treated as a violation of good order and discipline, or as conduct unbecoming, the focus is prevention of the target crime, or punishing culpability for the creation of risk of the target crime. President Roosevelt's announcement of General Smith's dismissal, for example, warned of the risk that subordinates will carry out crimes when superiors order them, even if the superiors' words can be dismissed as mere rants that should not be taken seriously. Braided into the concerns about the crimes themselves taking place are fears that reputation—of the individual or of the military more broadly—will be damaged by either the orders or the orders being carried out. The *Smith* case took place at a moment when anti-imperialist sentiment produced particular interest in the atrocities that American service members were perpetrating against individuals in the Philippines,[141] and Roosevelt's statement demonstrates a preoccupation with how the orders might reflect on the reputation of the military.

In cases not involving military conduct overseas, similarly, charges of good order and military discipline or of conduct unbecoming reflect a concern about the stain on the reputation of the officer who gave the order. For example, in a decision in which a superior officer, George Weller, ordered his subordinate, Arley Thompson, to lie or remain silent about Weller's false claim that he had not received payroll, the Board of Review described the act of ordering the subordinate as "a serious offense," and expressed particular concern about the goal of the scheme to defraud the United States.[142] But ultimately, the harm the decision described was that the order was "highly degrading" to Weller himself—with no mention of the degradation of the subordinate.[143]

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141. *See, e.g.*, George F. Hoar, U.S. Senator, Mass., The Attempt to Subjugate a People Striving for Freedom, Not the American Soldier, Responsible for Cruelties in the Philippine Islands, Speech Before the U.S. Senate 14 (May 22, 1902) (on file with author) ("You have devastated provinces. You have slain uncounted thousands of the people you desire to benefit. You have established reconcentration camps."); Homer Davenport, '*Kill Everyone Over Ten' – Gen. Jacob H. Smith* (illustration), N.Y. EVENING J., May 5, 1902, at 1, https://www.theodorerooseveltcenter.org/Research/Digital-Library/Record/ImageViewer?libID=0274576 [https://perma.cc/CTZ7-U8DN] (posting cartoon captioned with banner headline on newspaper's front page); *see* MILLER, *supra* note 98, at 247 (discussing newspaper coverage of atrocities).

142. *See* United States v. Weller, 10 B.R.-J.C. 381, 389–90 (A.B.R. 1950).

143. *See id.* at 390; *see also* United States v. Gilliam, 4 B.R. (A-P) 163, 163–69 (A.B.R. 1945) (convicting Gilliam under Article 96, the General Article, for ordering subordinate to trade government property for a local man's watch so Gilliam could give the watch to his own son).

4. Sentencing Enhancements

Under international criminal law, abuse of a position of authority can serve as an aggravating factor at sentencing.[144] Although this does not relate exclusively to ordering a subordinate to commit a crime, a superior who orders a subordinate may be punished more severely for this order because they are in a position of authority.

International criminal courts conceive of a position of authority as the power to make something happen—a power over resources that are meant to be used in the public's interest. Accordingly, they understand abuse of a position of authority as using power to accomplish criminal ends instead of lawful ones (an interpretation of abuse of authority that aligns with that in the U.S. Sentencing Guidelines).[145] Thus, for purposes of sentencing, the superior's reliance on the position of authority to commit a crime through the subordinate is particularly culpable because the superior used that position to commit the crime, rather than using the position to accomplish lawful ends. Meanwhile, that the superior misused the authority over the subordinate, and in so doing mistreated that subordinate, is nowhere mentioned.[146] Similarly, when international courts express an interest in punishing those "most responsible" for crimes—which prosecutors often interpret to mean senior leaders—they are concerned with those leaders who use their position to accomplish a crime.[147]

B. THE LEGAL INVISIBILITY OF ORDERING AS INDEPENDENT WRONG

In the vision of the law, and of legal scholars, ordering a crime is a punishable wrong because it contributes to the commission of crime (or creates the risk of doing so, for those who support inchoate liability), and this should be prevented and identified as culpable.[148] Ultimately, the story of ordering under the law is a story about the leader's relationship to the ultimate crime. The leader who is responsible for a crime because they ordered it. The leader who is culpable because they created a risk that another

144. *See* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Prosecution's Submissions on the Procedures and Principles for Sentencing, ¶ 28 (Apr. 18, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_05146.PDF [https://perma.cc/DYT7-SKT2]; Barbora Holá, Alette Smeulers & Catrien Bijleveld, *International Sentencing Facts and Figures: Sentencing Practice at the ICTY and ICTR*, 9 J. INT'L CRIM. JUST. 411, 435 (2011).

145. *See* U.S. SENT'G GUIDELINES MANUAL § 3B1.3 (U.S. SENT'G COMM'N 2018).

146. *See* Saira Mohamed, *Leadership Crimes*, 105 CALIF. L. REV. 777, 806 & n.134 (2017) (collecting cases in which the International Criminal Tribunals for the Former Yugoslavia and Rwanda find superior position as an aggravating factor at sentencing).

147. Serge Brammertz, *International Criminal Justice and the Rule of Law: The Experience of the International Criminal Tribunal for the Former Yugoslavia (ICTY)*, *in* THE CONTRIBUTION OF INTERNATIONAL AND SUPRANATIONAL COURTS TO THE RULE OF LAW 267, 276 & n.32 (Geert De Baere & Jan Wouters eds., 2015) (quoting S.C. Res. 1534, ¶ 5 (Mar. 26, 2004)).

148. *See, e.g.*, Gordon, *supra* note 88, at 98; CHANTAL MELONI, COMMAND RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW 209 (2010).

will commit a crime. The leader who should be disciplined because they sullied their own reputation or that of their organization because they created a risk that another will commit a crime. The leader is especially culpable because they used their position to accomplish crime, when they should have used it to achieve some greater good.

Here is another story of a leader: a leader who degrades his subordinates by ordering them to commit a crime. A leader who commands them to kill anything that moves, or to extract information at any cost. A leader who uses his position of authority to compel or convince his troops to do something that they never thought they would do, something they thought they never signed up for. A leader whose subordinates emerge from that moment facing prosecution, or facing judgment, from community or family or themselves, whose subordinates wonder why they placed their trust in this leader, in this entire command structure, only to be led by the hand into a darkness beyond what they anticipated they would face, even in war.

The story of that leader is real. We hear it in the accounts that service members and veterans voice in memoirs and share in therapy and disclose to journalists.[149] But it is nowhere in the law. The accounts of ordering that the law presents are accounts of a relationship between a superior and the crime that ultimately transpires, with no acknowledgment that when the superior is ordering the crime, that superior is taking advantage of their relationship of trust and authority over the subordinate, who is trained to follow that superior, and to not question them, even if the law expects the subordinate to know to assert their own autonomy in the exceptional moment of the illegal order. This overlooked wrong, however, can be emended. The following Part situates this Article's interpretation of ordering within current developments in the law of war and human rights law in order to explain why the time is ripe for a new approach to those who order their subordinates to commit a crime.

III. BEYOND CANNON FODDER

Readers familiar with the law of war (also known as international humanitarian law, or the law of armed conflict) may resist the idea that a superior's illegal order constitutes an abuse against the subordinate. The law of war generally does not set out obligations for a state with respect to its own combatants, or for a superior against a subordinate; instead, protections are extended primarily to civilians and to the enemy.[150] This is because the law of war above all governs the relationship between parties to a conflict, whether that means states or nonstate armed groups. As Sandesh Sivakumaran writes,

> International humanitarian law has not traditionally been viewed as governing relations within the group. The commonly held view is that references to the obligation to protect presupposed that a party

149. *See infra* Section IV.A.

150. *See* SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 247 (2012).

> would take care of its own forces and that the aim of international humanitarian law in this regard was to ensure that the party would also take care of the other side.[151]

Even for those *not* immersed in the law of war, it may seem counterintuitive that the obligation to abstain from ordering crimes would somehow center on any obligation of the superior toward their own troops, perhaps for the reasons that Sivakumaran surfaces above. After all, soldiers are resources of the state—and valuable ones at that—so it is already in the state's interest to protect those resources; any legal obligation would seem to be superfluous. Indeed, the International Committee of the Red Cross (ICRC) noted in its 2016 Commentary on the first Geneva Convention that a state might treat its own forces humanely not because of any legal obligation, but rather "out of self-interest."[152]

Or it might seem obvious, or even appropriate, that no obligation runs from superior to subordinate because soldiers have been thought of for so long as cannon fodder—tools to be used (or abused) however the state—embodied in each superior down the chain of command with authority to order a subordinate—chooses. Indeed, military life is known for its ruthlessness—service members live at the will or whim of their superiors. Their identities are broken down. It is a system built on brutal hierarchy.[153] And even when we do recognize breaches of some obligation from superior to subordinate, they center on physical violence.[154] Colonel Jessup orders the

151. *Id.*

152. INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD ¶ 548 (2016) [hereinafter ICRC 2016 Commentary]. The Commentary also explains that including a state's own forces in the protections under common Article 3 "is logical," for "[i]n practice, it is often impossible in non-international armed conflict to determine whether members of the general population not actively participating in hostilities are affiliated with one or other Party to the conflict." *Id.* ¶ 546. The Commentary further notes that "recourse to common Article 3 may not be necessary" in some cases because "domestic law and international human rights law require treatment at least equivalent to that of humane treatment in the sense of common Article 3." *Id.* ¶ 548.

153. *See* JESSICA WOLFENDALE, TORTURE AND THE MILITARY PROFESSION 136 (2007); YOUR NEIGHBOUR'S SON: THE MAKING OF A TORTURER (Ebbe Preisler 1976) (documenting training of Greek police torturers during military junta).

154. For a notable exception, see Corn, *supra* note 31, at 911 ("Little attention has been paid . . . to the role of the law in protecting the moral integrity of the soldier . . . .").

Code Red.[155] A commander bullies their troops.[156] An officer sexually assaults a subordinate.[157]

This Part calls into question these conventional ways of thinking about the obligations of the superior to the subordinate and crafts an alternative account of those obligations. Part II established the absence of a proper vocabulary to reckon with what is happening to the subordinates when leaders demand illegality from them. This Part explains that developments in the law of war make a new vocabulary possible. I bring together three strands—first, the narrow but potentially expanding understanding of a state's legal obligations under the law of war to its own soldiers; second, the increasing recognition that soldiers are individuals, rather than mere extensions of the state; and third, the expanding application of human rights law to situations of armed conflict—to demonstrate the scholarly conversations, and the doctrinal developments, that lay a foundation for rethinking illegal orders as this Article urges.

A. LEAVE NO ONE BEHIND: A STATE'S DUTY TO ITS SOLDIERS[158]

The traditional account of the law of war declares that this body of law generally does not address a state's treatment of its own soldiers, apart from exceptional situations.[159] Instead, international humanitarian law focuses its

155. *See* A FEW GOOD MEN (Columbia Pictures 1992); *see also* Alfred Avins, *A Military Superior's Duty to His Subordinates*, 31 MO. L. REV. 329, 329 (1966) (listing the following as examples of superiors "violat[ing] the rights of their subordinates": "superiors strike men below them, make them stand in the sun, beat them, and even take them on a 'death march'").

156. *See, e.g.*, John Vandiver, *Fort Hood-Based Commander Fired for Bullying His Staff*, STARS & STRIPES (Apr. 8, 2021), https://www.stripes.com/branches/army/fort-hood-based-commander-fired-for-bullying-his-staff-1.669011.

157. *See, e.g.*, *Testimony on Sexual Assaults in the Military: Hearing Before the Subcomm. on Personnel of the S. Comm. on Armed Services*, 113th Cong. *passim* (2013) (including testimony from multiple witnesses who had been assaulted by superiors). One of the most prominent accounts in recent years came from Martha McSally, a former Air Force pilot who revealed during a Senate hearing that she had been raped by a superior officer. *See* Helene Cooper, Dave Philipps & Richard A. Oppel Jr., *'I, Too, Was a Survivor': Senator McSally Ends Years of Silence*, N.Y. TIMES (Mar. 26, 2019), https://www.nytimes.com/2019/03/26/us/senator-martha-mcsally-rape-assault.html [https://perma.cc/D2WV-S8CR].

158. *See* Elizabeth D. Samet, *Leaving No Warriors Behind: The Ancient Roots of a Modern Sensibility*, 31 ARMED FORCES & SOC'Y 623, 627 (2005) (tracing military ethos of leaving no one behind from Homer to *Saving Private Ryan*).

159. *See* Prosecutor v. Sesay (RUF Case), Case No. SCSL-04-15-T, Judgment, ¶ 1451 (Mar. 2, 2009) ("[T]he law of armed conflict does not protect members of armed groups from acts of violence directed against them by their own forces."); SIVAKUMARAN, *supra* note 150, at 247 ("International humanitarian law has not traditionally been viewed as governing relations within the group."); Gabriella Blum, *The Individualization of War: From War to Policing in the Regulation of Armed Conflicts*, *in* LAW AND WAR 48, 51 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2014) ("Very few, if any, prohibitions [in treaties through 1977] applied to the relationship between a state and its own nationals."); Larry May, *Humanity, Necessity, and the Rights of Soldiers*, *in* WEIGHING LIVES IN WAR 77, 77 (Jens David Ohlin, Larry May & Claire Finkelstein eds., 2017) ("In both morality and law, it is still common to say that soldiers' lives do not count for very much

affirmative protections primarily on civilians and on enemy soldiers. But this façade has some cracks. International humanitarian law contains protections for soldiers who are *hors de combat*—outside the fight, whether because of sickness or injury or because they intend to surrender, and thus deserving of protection because they no longer constitute a threat.[160] Some of those protections apply regardless of nationality.[161] The first Geneva Convention of 1864, the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, provided that "[w]ounded or sick combatants, to whatever nation they may belong, shall be collected and cared for."[162] This led to similar language in the 1906 Geneva Convention,[163] and to similar language in the 1929 Convention,[164] and ultimately to similar language—but even more specific and emphatic—in the most recent iteration, the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.[165] Article 12 provides that "[m]embers of the armed forces . . . who are wounded or sick, shall be respected and protected in all circumstances" and "shall be treated humanely and cared for by the Party to the conflict in whose power they may be, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria."[166] The ICRC Commentary written just after the treaty's adoption makes clear that no exceptions shall be made for a state's own soldiers: "The wounded are to be respected just as much when they are with their own army or in no man's land as when they have fallen into the hands of the enemy."[167]

Although the text does not mention nationality, common Article 3 of the Geneva Conventions, which addresses the minimum treatment required for

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in assessments of whether or not a particular war or armed conflict is justifiably initiated and conducted.").

160. *See* Gloria Gaggioli & Nils Melzer, *Methods of Warfare*, *in* THE OXFORD GUIDE TO INTERNATIONAL HUMANITARIAN LAW 241, 243–45 (Ben Saul & Dapo Akande eds., 2020).

161. For examples of provisions that do not apply to a state's own forces, see SIVAKUMARAN, *supra* note 150, at 249.

162. Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field art. 6, Aug. 22, 1864, 22 Stat. 940, T.S. No. 377.

163. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field art. 1, July 6, 1906, 35 Stat. 1885, T.S. No. 464 ("Officers, soldiers, and other persons officially attached to armies, who are sick or wounded, shall be respected and cared for, without distinction of nationality, by the belligerent in whose power they are.").

164. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field art. 1, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 303.

165. *See* Geneva Convention I, *supra* note 90, art. 12. The Second Geneva Convention contains a similar provision. *See* Geneva Convention II, *supra* note 90, art. 12.

166. Geneva Convention I, *supra* note 90, art. 12; Geneva Convention II, *supra* note 90, art. 12; *see also* ICRC 2016 Commentary, *supra* note 152, ¶¶ 1337, 1368, 1370 (noting protections of Article 12 do not pivot on whether the treatment is of a state's own forces or of the enemy).

167. 1 INT'L COMM. OF THE RED CROSS, THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY 135 (Jean S. Pictet ed., 1952) [hereinafter ICRC 1952 Commentary]; *see also infra* notes 192–93 and accompanying text (discussing rule's origin).

certain populations in non-international armed conflicts,[168] is also understood to provide protections for soldiers with respect to their own states. As elegantly phrased in that same original ICRC Commentary, "[W]hen faced with suffering no distinction should be drawn between brothers-in-arms, the enemy and allies."[169] The ICRC addresses the issue more extensively in its updated Commentary, from 2016, on Geneva Convention I.[170] The Commentary poses the question "whether armed forces of a Party to the conflict benefit from the application of common Article 3 by their own Party."[171] For example, should members of armed forces who are tried by their own states for war crimes benefit from the protections of common Article 3? Or should members of armed forces rendered *hors de combat* be protected by common Article 3 from sexual assault by their fellow soldiers? The ICRC concludes that they should, for "[t]he fact that the trial is undertaken or the abuse committed by their own Party should not be a ground to deny such persons the protection of common Article 3."[172]

In a recent decision, the International Criminal Court (ICC) used those Geneva Conventions protections, and the ICRC Commentary, as a basis for holding that states, and therefore individuals acting on their behalf, have a broader obligation to not commit war crimes against their own soldiers.[173] Bosco Ntaganda, a leader of the Patriotic Forces for the Liberation of Congo (FPLC), a militia group in the Democratic Republic of the Congo, was charged with war crimes and crimes against humanity for conduct in the early 2000s, including allegations of rape and sexual slavery by several children in the FPLC.[174] Ntaganda argued that those allegations could not constitute war

168. *See, e.g.*, Geneva Convention I, *supra* note 90, art. 3; *see also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 2, adopted June 8, 1977, 1125 U.N.T.S. 609, 611 ("This Protocol shall be applied without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.").

169. ICRC 1952 Commentary, *supra* note 167, at 55.

170. *See* ICRC 2016 Commentary, *supra* note 152, ¶ 545 (emphasizing absence of express exclusion of persons on same side as party and noting text "contains no limitation requiring a person taking no active part in hostilities to be in the power of the *enemy* in order to be protected under the article"). The original Commentary did not address this question, but it did note the omission of the word "nationality" in the protected categories and concluded that the provision stands for the proposition "that every man taking no part in hostilities, or placed *hors de combat*, receives the minimum standard of treatment which the law of the country itself accords." ICRC 1952 Commentary, *supra* note 167, at 56.

171. ICRC 2016 Commentary, *supra* note 152, ¶ 547.

172. *Id.*

173. Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06 OA5, Judgment on the Appeal of Mr. Ntaganda Against the "Second Decision on the Defence's Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9," ¶ 61 (June 15, 2017) [hereinafter Ntaganda Appeals Decision], https://www.icc-cpi.int/CourtRecords/CR2017_03920.PDF [https://perma.cc/R5JE-3VGC].

174. Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda,

crimes under the Rome Statute of the International Criminal Court, which sets forth the crimes under the Court's jurisdiction, because "international humanitarian law . . . does not protect persons taking part in hostilities from crimes committed by other persons taking part in hostilities on the same side of the armed conflict."[175] The Court rejected Ntaganda's challenge and held "that international humanitarian law does not contain a general rule that categorically excludes members of an armed group from protection against crimes committed by members of the same armed group."[176]

The decision generated considerable controversy.[177] As a preliminary matter, it seemed an unnecessary foray into the scope of protections required by international humanitarian law. In the first decision on this issue, rendered after Ntaganda had challenged the charges against him,[178] the ICC Pre-Trial Chamber had altogether avoided the question of whether international humanitarian law covers a state's treatment toward its own soldiers. Instead, the Chamber decided the challenge on the narrow ground that the alleged victims of rape and sexual slavery were not participating in hostilities at the time of the crime and thus were protected persons—those not directly taking part in hostilities and persons *hors de combat*.[179] As protected persons, they benefited from the protections of the law of war.[180] The Pre-Trial Chamber accordingly did not have to address the broader question of whether the prohibitions applied to all persons, regardless of protected-person status and regardless of involvement in hostilities. Once the trial began, Ntaganda continued to press this argument before the Trial Chamber and the Appeals

¶¶ 12–34 (June 14, 2014) [hereinafter Ntaganda PTC Decision], https://www.icc-cpi.int/CourtRecords/CR2014_04750.PDF [https://perma.cc/9YAQ-K2PJ].

175. *Id.* ¶ 76.

176. Ntaganda Appeals Decision, *supra* note 173, ¶ 63.

177. *See, e.g.*, Kevin Jon Heller, *ICC Appeals Chamber Says a War Crime Does Not Have to Violate IHL*, OPINIOJURIS (June 15, 2017), https://opiniojuris.org/2017/06/15/icc-appeals-chamber-holds-a-war-crime-does-not-have-to-violate-ihl [https://perma.cc/K9U5-G7MT]; Yvonne McDermott, *ICC Extends War Crimes of Rape and Sexual Slavery to Victims from Same Armed Forces as Perpetrator*, INTLAWGRRLS (Jan. 5, 2017), https://ilg2.org/2017/01/05/icc-extends-war-crimes-of-rape-and-sexual-slavery-to-victims-from-same-armed-forces-as-perpetrator [https://perma.cc/PQ2N-KQNL]. *Cf.* Michael A. Newton, *Contorting Common Article 3: Reflections on the Revised ICRC Commentary*, 45 GA. J. INT'L & COMPAR. L. 513, 515 (2017) (critiquing ICRC commentary for relying on Prosecutor's position in *Ntaganda*, which "represents an aspirational statement of *lex ferenda*"). Some supported the interpretations of the Appeals Chamber and the Trial Chamber. *See, e.g.*, CARSTEN STAHN, A CRITICAL INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 82–83 (2019) (describing the Appeals Chamber approach as "in line with the understanding of Common Article 3 as a 'minimum yardstick' in all armed conflicts" (quoting Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 218 (June 27))).

178. *See* Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Transcript, at 27 (Feb. 13, 2014), https://www.icc-cpi.int/Transcripts/CR2014_02349.PDF [https://perma.cc/TMK3-5H2P].

179. Ntaganda PTC Decision, *supra* note 174, ¶¶ 77–80.

180. *Id.*

Chamber.[181] But instead of sticking to that narrow holding that the victims merited protection because they were not direct participants in hostilities at the time of the crime, the Trial Chamber held that the prohibitions against rape and slavery under international humanitarian law are not limited to protected persons and instead apply with respect to all persons on the same side of the conflict as the perpetrator.[182] The Trial Chamber ultimately held "that members of the same armed force are not *per se* excluded as potential victims of the war crimes of rape and sexual slavery."[183] Ntaganda appealed, and the Appeals Chamber affirmed this conclusion.[184] Conceding that it "appreciate[d] the seemingly unprecedented nature of this conclusion," the Appeals Chamber held "that international humanitarian law does not contain a general rule that categorically excludes members of an armed group from protection against crimes committed by members of the same armed group,"[185] and that the war crimes prohibitions in the Rome Statute apply to combatants on the same side of hostilities.[186]

To be sure, the Trial and Appeals Chambers' decisions are odd readings of the law, and they are difficult to defend on the merits.[187] Nevertheless, the holding does not constitute solely a representation of the narrow legal question of how to interpret a provision in the Rome Statute. If we shift our focus from the question of the doctrine itself to its significance, the *Ntaganda* decision—which remains the law governing the ICC—can be understood as a distinct and significant plot twist in the story of what a state owes its troops. When in *Henry IV* Falstaff asserts that soldiers are no more than "food for powder," intended only to "fill a pit,"[188] Shakespeare planted the seeds of the language that would shape centuries of treating soldiers as expendable. Today, *Ntaganda* announces a radically different vision of soldiers, and a radically different world of law, in which relationships among members of military groups can be regulated, and in which states should be expected to fulfill duties to their own

181. Prosecutor v Ntaganda, Case No. ICC-01/04-02/06, Second Decision on the Defence's Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9, ¶¶ 27–28 (Jan. 4, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_00011.PDF [https://perma.cc/NS4G-W55Y].

182. *Id.* ¶¶ 47–52.

183. *Id.* ¶ 54.

184. Ntaganda Appeals Decision, *supra* note 173, ¶¶ 12, 63–71.

185. *Id.* ¶¶ 63, 67.

186. *Id.* ¶ 67.

187. *See* SIVAKUMARAN, *supra* note 150, at 248 (noting expansiveness of common Article 3 but specifying that protections apply only "[a]s long as the individual concerned is not taking an active part in hostilities"); ICRC 2016 Commentary, *supra* note 152, ¶ 518 (noting obligations apply only when the victims have protected person status—that is, "[p]ersons 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," as defined in the Convention); Geneva Convention I, *supra* note 90, art. 3(1).

188. WILLIAM SHAKESPEARE, HENRY IV act 4, sc. 2; *see also* CHARLES EDELMAN, SHAKESPEARE'S MILITARY LANGUAGE: A DICTIONARY 132–33 (2000) (discussing evolution of "food for powder" to "cannon fodder").

service members, regardless of whether they fit within the category of protected person.[189] A world of which Falstaff never would have dreamed.

B. SOLDIERS AS INDIVIDUALS

These isolated examples from the law of war of course do not speak directly to the question of how to conceive of the harm of an order to commit a crime, but they do offer some understanding of the expectations behind what a state owes its service members. As Sivakumaran explains, the very existence of individual provisions in the law of war spelling out that states must protect their own makes clear "that states were not assumed to look after their own forces," and that the law needed to regulate more than treatment of the enemy.[190]

To be sure, some legal provisions simply codify states' existing practices,[191] so the adoption of a law requiring some behavior does not establish that the behavior is not already taking place. But the long history of war demonstrates

189. SHANE DARCY, TO SERVE THE ENEMY: INFORMERS, COLLABORATORS, AND THE LAWS OF ARMED CONFLICT 153 (2019) ("The *Ntaganda* findings represent a conscious effort to abandon the prevailing position concerning the extent to which international humanitarian law is concerned with how members of armed forces of a party to an armed conflict treat other members of the same forces.").

In the quite different context of "fighting terror," Asa Kasher and Amos Yadlin have urged that states owe a duty to their own combatants. Asa Kasher & Amos Yadlin, *Assassination and Preventive Killing*, 25 SAIS REV. INT'L AFFS. 41, 45, 50 (2005). They write, "Usually, the duty to minimize casualties among combatants during combat is last on the list of priorities, or next to last, if terrorists are excluded from the category of noncombatants. We firmly reject such a conception because it is immoral. A combatant is a citizen in uniform." *Id*; *see also* Avishai Margalit & Michael Walzer, *Israel: Civilians and Combatants*, N.Y. REV. BOOKS (May 14, 2009), https://www.nybooks.com/articles/2009/05/14/israel-civilians-combatants [https://perma.cc/SWD2-3ABL]; David Luban, *Risk Taking and Force Protection*, *in* READING WALZER 277, 279 (Yitzhak Benbaji & Naomi Sussman eds., 2014); Iddo Porat & Ziv Bohrer, *Preferring One's Own Civilians: May Soldiers Endanger Enemy Civilians More than They Would Endanger Their State's Civilians?*, 47 GEO. WASH. INT'L L. REV. 99, 100 (2015).

In a related vein, Cécile Fabre has written, in the context of considering the morality of mercenaries:

> [S]tates have a duty of care to the private soldiers whom they hire – just as they have a duty of care to their armed forces. More specifically, they have a duty to deploy them in accordance with the *jus in bello* requirements of proportionality (whereby the harms done by a particular tactical decision must not exceed the good it brings about) and necessity (whereby states should risk soldiers'–and civilians'–lives if and only if it would serve their (just) ends.) States which fail in that duty are morally guilty of wrongdoing . . . .

Cécile Fabre, *In Defence of Mercenarism*, 40 BRIT. J. POL. SCI. 539, 554 (2010).

190. SIVAKUMARAN, *supra* note 150, at 248.

191. Nikki C. Gutierrez & Mitu Gulati, *Custom in our Courts: Reconciling Theory with Reality in the Debate about* Erie Railroad *and Customary International Law*, 27 DUKE J. COMPAR. & INT'L L. 243, 278 (2017). Indeed, the U.S. Army's Soldier's Creed includes the promise, "I will never leave a fallen comrade." *See Soldier's Creed*, U.S. ARMY, https://www.army.mil/values/soldiers.html [https://perma.cc/4ELP-PPQQ].

that the humane treatment of one's own soldiers is not a given. The grim magnitude of the suffering inflicted by the 1859 Battle of Solferino famously gave rise to the creation of the ICRC by Henry Dunant, who was "seized by horror and pity" for the wounded soldiers who had been left on the battlefield to die by the very governments that they were defending.[192] It was clear then that states cannot be trusted to protect their own.

The rationale for these laws that require a state to protect soldiers regardless of nationality is thus to protect soldiers from abuse by their own state.[193] This policy rationale, in turn, reveals a normative commitment: the idea that soldiers are not mere extensions of the state, and not mere resources with which the state can do what it pleases. Instead—at least in the matter of their life or death—they are individuals.

Although this normative commitment to seeing soldiers as more than resources was evident in these early protections extended to the wounded and the shipwrecked, the law at the time more often saw the individual soldier as an extension of the state—as a weapon of war, no different from a tank or a plane or a bomb. In the *High Command* case, the U.S. military tribunal at Nuremberg reflected that the "misdeed" of those who planned aggressive war across Europe was "all the greater in as much as they use[d] the great mass of the soldiers and officers to carry out an international crime."[194] The statement is notable in part because it betrays an understanding that the perpetrators of crimes against peace committed a wrong of heightened blameworthiness because they used others to perpetrate it—a broader point to which I will return.[195] But also striking is the Tribunal's assumption that this act of instrumentalization is unassailable, that it cannot be viewed as a wrong in and of itself. The decision proceeds: "[T]he individual soldier or officer below the policy level is but the policy makers' instrument, finding himself, as he does, under the rigid discipline which is necessary for and peculiar to military organization."[196] To describe a subordinate as "but the policy makers' instrument" at this time is stunning. This statement was offered in the context of a legal decision by a military tribunal that was convened because of a revolutionary assessment that the appropriate way to respond to the war was not to hold Germany legally responsible, but to hold individual Germans legally responsible. And it was made in the context of an approach to individual

192. JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 25 (1985); *see also* ICRC 2016 Commentary, *supra* note 152, ¶ 1327; *see also* SIVAKUMARAN, *supra* note 150, at 248 ("After all, the 1864 Geneva Convention was a direct response to the Battle of Solferino, at which wounded soldiers of both sides were left to die." (citation omitted)).

193. *See* Blum, *supra* note 159, at 51–52 (noting absence of protections for soldiers (and civilians) against their own governments "was in line with the traditional view of sovereignty: subjects (citizens) as the extension of the sovereign (state)" and reflected "the traditional concept of sovereignty as a shield from external intervention in a state's own internal affairs").

194. High Command Judgment, *supra* note 58, at 489.

195. *See infra* Part IV.

196. High Command Judgment, *supra* note 58, at 489.

responsibility that insisted on soldiers' autonomy, stripping away the superior orders defense because every person was understood to have the opportunity for moral choice even in the face of orders.[197] And still, even at this time, the Tribunal insisted that the individual soldier is merely an instrument.

Today's world of law and war, however, looks quite different from that of 1945. The normative commitment to recognizing soldiers as individuals, rather than as mere instruments of the state, is underscored by the wave of scholarship in recent years focusing on the rising "individualization" of international humanitarian law.[198] This term represents an array of meanings. For some, it means the disaggregation of armed groups into the individuals who constitute them, a transformation that brings war-making into closer alignment with policing.[199] Others see the individualization of international humanitarian law as a shift from a body of law primarily (though not exclusively) rooted in reciprocity to one that binds states and individuals regardless of reciprocity, and regardless of the application of any treaty, for these laws have attained the status of customary international law or *jus cogens*, applicable to all and not only to those states that have consented to the exchange of mutual benefits and burdens represented in a treaty.[200]

The individualization of international humanitarian law has also meant greater attention to individual human rights in the realm of war. In the words of Evan Criddle and Evan Fox-Decent, "The utilitarian spirit of early [international humanitarian law] instruments—which sought to decrease the aggregate amount of human suffering caused by war—has been supplanted gradually by an 'individual-rights perspective.'"[201] What does an "individual-rights perspective" in the law of war entail? Perhaps the most cited passage on

197. *See* London Charter, *supra* note 35, art. 8; United States v. Ohlendorf (*Einsatzgruppen* Case), Judgment, *in* 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 411, 470 (1949), https://tile.loc.gov/storage-services/service/ll/llmlp/2011525364_NT_war-criminals_Vol-IV/2011525364_NT_war-criminals_Vol-IV.pdf [https://perma.cc/F4PN-V8GH] ("The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. He does not respond, and is not expected to respond, like a piece of machinery."). That said, the lower-level "instruments" described in *High Command* were not considered viable targets for prosecution under crimes against peace, the crime that this section of the Judgment is addressing. High Command Judgment, *supra* note 58, at 489.

198. *See* Blum, *supra* note 159, at 48–49; Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 247–51 (2000); David Luban, *Human Rights Thinking and the Laws of War*, *in* THEORETICAL BOUNDARIES OF ARMED CONFLICT AND HUMAN RIGHTS 45–46 (Jens David Ohlin ed., 2016); *see also* Eliav Lieblich, *The Humanization of* Jus ad Bellum*: Prospects and Perils*, 32 EUR. J. INT'L L. 579, 579–80, 583 (2021) (examining humanization in the context of resort to force).

199. *See* Blum, *supra* note 159, at 48 ("[W]artime regulation has evolved from a predominantly state-oriented set of obligations—which viewed war as an intercollective effort—to a more individual-focused regime . . . .").

200. *See* EVAN J. CRIDDLE & EVAN FOX-DECENT, FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY 175–77 (2016) (explaining that international humanitarian law has shifted from a consent-based, reciprocity system to one that "accommodate[s] the fiduciary obligations associated with the possession of sovereignty").

201. *Id.* at 177 (citations omitted).

this question comes from the International Criminal Tribunal for the Former Yugoslavia, in its judgment in *Furundžija*. The defendant was a local commander of the Jokers, a unit that terrorized Muslims in central Bosnia during the disintegration of Yugoslavia in the early 1990s.[202] Furundžija was charged with war crimes based on his participation in crimes of sexual violence against Bosnian Muslim women.[203] In determining whether forced oral penetration could constitute rape under the law, the Trial Chamber offered the following reflection on the nature of international humanitarian law and war crimes:

> The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person . . . . The general principle of respect for human dignity is . . . the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law.[204]

To be sure, this language has raised eyebrows of some who question whether "human dignity" really is the "essence" of a body of law rooted in setting up reciprocal arrangements for warmaking.[205] But the ICTY is not alone in drawing attention to the centrality of protecting human dignity in international humanitarian law. The ICRC Commentary of 2016, for example, states that the wide scope of protection under common Article 3 "is supported by the fundamental character of common Article 3[,] which has been recognized as a 'minimum yardstick' in all armed conflicts and as a reflection of 'elementary considerations of humanity.'"[206] And in describing the "consistently increasing focus on the protection of individuals" in the law of war, Eliav Lieblich notes an accompanying "wider perception of the concept of harm" and draws attention in particular to the "[t]he concept of the person

202. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 2 (Dec. 10, 1998), https://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf [https://perma.cc/P98T-4Q4D].

203. *Id.* ¶¶ 2, 39–41.

204. *Id.* ¶ 183.

205. *See, e.g.*, Luban, *supra* note 198, at 45–46.

206. ICRC 2016 Commentary, *supra* note 152, ¶ 547 (quoting Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶¶ 218–19 (June 27)). Although the idea of humanity or humaneness within the law of war is relatively uncontroversial, what that means is another question. Yoram Dinstein, for example, argues that "[t]here is no overarching, binding, norm of humanity that tells us what we must do (or not do) in wartime. What we actually encounter are humanitarian considerations . . . . [T]hese considerations do not by themselves amount to law . . . ." Yoram Dinstein, *The Principle of Proportionality*, *in* SEARCHING FOR A 'PRINCIPLE OF HUMANITY' IN INTERNATIONAL HUMANITARIAN LAW 72, 73 (Kjetil Mujezinovic Larsen, Camilla G. Guldahl Cooper & Gro Nystuen eds., 2013). Larry May, by contrast, argues that "[t]here certainly is legal precedent for seeing a principle of humanity as a strong principle in international law." May, *supra n*ote 159, at 85.

as a distinct value." [207] Though limiting the analysis to protected persons, Lieblich recalls the original ICRC Commentary on the Fourth Geneva Convention on Civilians, which urged that "the concept of the person" should be interpreted "in 'its widest sense'" as protective of "the rights and qualities which are inseparable from the human being by the very fact of his existence and his mental and physical powers."[208] The individualization of the law of war thus safeguards protected persons' "right to physical, moral and intellectual integrity"[209]—which constitutes, in the words of the Commentary, "an essential attribute of the human person."[210]

Individualization in international humanitarian law is not only about protection of non-combatants, however. It is also about soldiers. In particular, the increasing individualization of the law of war is apparent also in the now routine treatment of soldiers as perpetrators of crimes. Instead of identifying the relevant actor as the state or the armed group, the body of international criminal law zeroes in on the particular person who has committed the crime; it looks at their conduct, their mental state, their motivations, their defenses.[211] In so doing, it identifies individual soldiers as persons in their own right, separate from the state.

C. *HUMAN RIGHTS IN WARTIME*

Treating soldiers as individuals leads, of course, to questions about whether soldiers have human rights. This question is in some ways an outrageous one; soldiers are human, and humans have rights by virtue of being human, so soldiers have human rights. But in the theory and practice of the law, this question is far more difficult, because of the thorny relationship between human rights law and the law of war.[212] In some renderings, this is a jurisdictional battle, a question of whether international humanitarian law displaces international human rights law altogether in some particular time and space, or whether both bodies of law apply during a time and place of

207. Eliav Lieblich, *Beyond Life and Limb: Exploring Incidental Mental Harm Under International Humanitarian Law*, *in* APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES: INTERNATIONAL AND DOMESTIC ASPECTS 185, 195 (Derek Jinks, Jackson N. Maogoto & Solon Solomon eds., 2014).

208. *Id.* (quoting 4 INT'L COMM. OF THE RED CROSS, THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY 201 (Jean S. Pictet ed., 1958), https://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-IV.pdf [https://perma.cc/KMS8-SV5D]).

209. Lieblich, *supra* note 207, at 195 (quoting INT'L COMM. OF THE RED CROSS, *supra* note 208, at 201).

210. INT'L COMM. OF THE RED CROSS, *supra* note 208, at 201.

211. *See* Blum, *supra* note 159, at 57.

212. *See generally* STEPHEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 9 (1997) ("[I]nternational human rights law refers to the body of international law aimed at protecting the human dignity of the individual . . . . [T]he law . . . of armed conflict . . . addresses both limits on warmaking methods (the Law of the Hague) and protections of certain individuals during wartime (the Law of Geneva)." (emphasis omitted)).

armed conflict and the key question is what particular obligations each body of law sets forth and when.[213] But this is not only a black-letter question of applicable bodies of law. It is also a matter of narrative, of continuing to expand the distance between where we are in the present and where we were when all bets were off in war, of shoring up the idea that every individual has rights even in the direst situations. The crucial point here is thus not where the weight of authority is on the jurisdictional debate at this time, but rather that the debate has existed, and that in the course of this debate the narratives around the relevance of human rights in situations of armed conflict have been rewritten. That is, the frameworks for evaluating the legality, and morality, of conduct in war are shifting. Accordingly, the relevant questions no longer are simply those of military necessity or proportionality of attack; they are no longer just questions about the status that makes a person a permissible target or not.[214] Instead, they are questions about the treatment of the individual as an individual.

The 2013 case *Smith v. Ministry of Defence*, before the United Kingdom Supreme Court, demonstrates the impact of human rights law's application in war.[215] The United Kingdom deployed lightly armored Snatch Land Rovers in Iraq and Afghanistan, even though the Defence Ministry had known for

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213. *See, e.g.*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8); Louise Doswald-Beck, *The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?*, 88 INT'L REV. RED CROSS 881, 881 (2006) ("It is now generally recognized, even by the most sceptical, that international human rights law continues to apply during all armed conflicts alongside international humanitarian law."); Meron, *supra* note 198, at 239; Louise Doswald-Beck & Sylvain Vité, *International Humanitarian Law and Human Rights Law*, 293 INT'L REV. RED CROSS 94, 94 (1993); William A. Schabas, Lex Specialis*? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of* Jus Ad Bellum, 40 ISR. L. REV. 592, 593 (2007).

214. Frédéric Mégret notes recent literature that has "voiced distinct disquiet about the continued hegemony of international humanitarian law in an age of human rights." Frédéric Mégret, *What is the Specific Evil of Aggression*, *in* 2 THE CRIME OF AGGRESSION: A COMMENTARY 1398, 1431 (Claus Kreß & Stefan Barriga eds., 2017). Mégret comments:

> What distinguishes these authors from the dominant technical-reductionist approach to the problem of the relationship between international human rights and the laws of war, or even the drive to 'humanize' the laws of war through human rights, is their willingness to adopt a much broader normative view of these regimes . . . . They have as a result helped excavate a moral and political sensitivity that is much more unsettled by the extent to which war represents a monstrous exception to the notion that all human beings have a[] . . . right to life, security, bodily and psychological integrity, freedom of movement and expression, etc.

Id. at 1431–32 (footnotes omitted); *see also* TOM DANNENBAUM, THE CRIME OF AGGRESSION, HUMANITY, AND THE SOLDIER 1–2 (2018) (seeking "to explain the normative posture of international law *vis-à-vis* soldiers, particularly with respect to the criminalization of aggression"); Karima Bennoune, *Toward a Human Rights Approach to Armed Conflict: Iraq 2003*, 11 U.C. DAVIS J. INT'L L. & POL'Y 171, 174–75 (2004); Thomas W. Smith, *Can Human Rights Build a Better War?*, 9 J. HUM. RTS. 24, 24–25 (2010).

215. *See* Smith v. The Ministry of Defence, [2013] UKSC 41 at [67], [76].

years that the vehicles were insufficiently protective to be used in combat.[216] (Indeed, the moniker derived from their originally intended use, in Northern Ireland during the Troubles, to snatch suspects off the streets.[217]) Private Phillip Hewett was killed in 2005 by a roadside bomb in Iraq while he was in this vehicle;[218] he was the ninth of thirty-seven service members killed in a Snatch Land Rover, which came to be known as a "mobile coffin."[219] Hewett's mother, Susan Smith, and other families sued the Ministry of Defence.[220] The courts initially held that the suit could not proceed, because the British human rights obligations under the domestic Human Rights Act and the European Convention on Human Rights did not apply to the war in Iraq.[221] The Supreme Court then reversed the decision, reasoning that human rights law regulated the government's treatment of soldiers that ultimately resulted in death.[222]

The majority emphasized that the state does not violate its obligation to respect and ensure the rights in the European Convention simply because it requires that members of the armed forces risk their lives.[223] Nor can a state be expected to limit that risk in all circumstances; "[s]ituations may develop where it is simply not possible to provide troops in time with all they need to conduct operations with the minimum of casualties. Things tend to look and feel very different on the battlefield," the Court wrote, "from the way they look on such charts and images as those behind the lines may have available to them."[224] And the allocation of resources that is the core of procurement is, above all, a political question, not one best suited for resolution by courts.[225] Still, the Court held, human rights obligations could not be displaced just because the matter concerned deaths of service members in war.[226] Human rights would not end simply because armed force had begun.[227]

Ultimately, cases like *Smith* highlight that the application of human rights in wartime extends beyond the rules that bind individuals not to commit war crimes or that protect civilians from harm; it also embraces the notion that

216. *Id.* at [5].

217. *Why Our Troops Are Fighting with Equipment That Isn't up to the Job*, HERALD (Sept. 9, 2006), https://www.heraldscotland.com/default_content/12427006.troops-fighting-equipment-isnt-job [https://perma.cc/U4SS-NU7R].

218. *Smith*, [2013] UKSC 41, at [6].

219. Clive Coleman, *Mother Wins Apology Over "Snatch" Land Rover Death*, BBC NEWS (Aug. 18, 2017), https://www.bbc.com/news/uk-40958686 [https://perma.cc/N5YW-4ZXK].

220. *Smith*, [2013] UKSC 41, at [4], [10].

221. *See id.* at [13]–[15].

222. *Id.* at [42]–[55], [67]–[76], [101].

223. *Id.* at [62].

224. *Id.* at [64].

225. *Id.* at [65].

226. *Id.* at [55], [58].

227. *Cf. id.* at [86] (discussing the view that "application of private law by the ordinary courts may end where the active use of arms begins").

soldiers' human rights must be protected, even against abuses by their own state.[228] Thus, if one takes seriously the statement of the Inter-American Court of Human Rights that "[d]isrespect for human dignity cannot serve as the basis for any State action,"[229] one cannot simply dismiss a rights violation as an inevitable consequence of war that is off-limits to international law, and one cannot simply dismiss a service member as outside the bounds of the body of law that sees in every person rights that demand protection. One cannot look at soldiers as mere cannon fodder.

IV. ORDERING AS ABUSE BY AUTHORITY

Part III laid a theoretical and doctrinal foundation for recognizing the soldier as an individual, separate from the state they serve, worthy of attention not only as a perpetrator of wrongs but also as a victim of wrongs. In light of that foundation, this Part argues for recognizing a superior's act of ordering a crime as a violation perpetrated against the subordinate. While current law is undoubtedly justified in treating the act of ordering as a crime by virtue of it risking or causing the ordered crime to take place, this narrow characterization of ordering neglects the additional wrong that is done with respect to the individual who is subject to the order.

Consider, for example, the experience of Camilo Mejía, who was sent to Iraq in 2003 as a Staff Sergeant in the Florida National Guard. At Al-Assad airbase, Mejía witnessed Iraqi prisoners who were "deprived . . . of sleep for forty-eight hours," who "endured mock executions," whose "genitalia [was] 'inspected' for no reason."[230] Then the day came when Mejía's commanding officer ordered him to take charge, with his battalion, of the abuse. Mejía did not want to do it, but he "was afraid of speaking up . . . and appearing soft and weak as a squad leader."[231] He feared the possibility of a court martial for insubordination.[232] And so he pulled rank, and he watched, instead of participating, while his subordinates abused the prisoners.[233] They continued the sleep deprivation, smashing sledgehammers against the walls so hard that it sounded like a bomb was exploding.[234] He said later that he was thankful his men did not have pistols, so at least they avoided the mock executions.[235] Mejía

228. *See* Saira Mohamed, *Cannon Fodder, or a Soldier's Right to Life*, 95 S. CAL. L. REV. (forthcoming 2022) (manuscript at 29–32) (on file with author).

229. Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 4, ¶ 154 (July 29, 1988).

230. RITA NAKASHIMA BROCK & GABRIELLA LETTINI, SOUL REPAIR: RECOVERING FROM MORAL INJURY AFTER WAR 34 (2012); *see also* CAMILO MEJÍA, ROAD FROM AR RAMADI: THE PRIVATE REBELLION OF STAFF SERGEANT CAMILO MEJÍA 44–55 (2008) (discussing abuse of Iraqi prisoners).

231. MEJÍA, *supra* note 230, at 55.

232. *Id.*

233. *Id.*; BROCK & LETTINI, *supra* note 230, at 34.

234. *Id.* at 52, 55.

235. *Id.* at 55.

soon lost trust in his superiors, betrayed by both the abuses he witnessed and his conviction that the war itself was wrong.[236] He lost confidence in himself, burdened by the cowardice he had shown.[237] He started to pray.[238] He managed to secure a two-week furlough back in the United States.[239] But at the end of the two weeks, he did not get on the plane back to Iraq.[240] After turning himself in a few months later, he was convicted of desertion in a court martial.[241]

During the court-martial proceedings, Mejía tried to claim that his desertion was lawful because he had been ordered to violate the law.[242] The judge, however, refused to allow any allegations regarding prisoner abuse to be brought before the court martial, and the orders given by Mejía's superior were never addressed or condemned.[243] But even if they had been part of the trial, the law would have rendered invisible Mejía's experience of betrayal by his commanding officer. It would have passed over his confusion and anguish that the leaders who were supposed to stand in a relationship of trust with him, and who were supposed to respect right and wrong, were instead turning him into a torturer, treating him as an instrument of their wrongful desires.[244]

This Part makes the case that when a superior orders the subordinate to violate the law—as Mejía's commanding officer did to him, and as Mejía himself did to his subordinates—the superior is committing a wrong against the subordinate. This Part begins by foregrounding the experiences of service members, as told through memoirs and journalism and the research of psychologists, psychiatrists, and philosophers. These accounts convey, concretely rather than merely theoretically, that individuals who have been ordered by superiors to commit crimes experience a sense of betrayal—known as "moral injury"—by those who hold authority over them. This Part then proposes that this betrayal is properly understood as a legal wrong, for the superior owes a duty to a subordinate that is breached when the superior gives an illegal order. This duty derives from the law's protection of the superior-subordinate relationship, and recognizing its distortion as an independent wrong aligns with the normative orientation of the law of mass atrocity toward restraining abuses of power and abuses of authority.[245]

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236. BROCK & LETTINI, *supra* note 230, at 34–35.

237. MEJÍA, *supra* note 230, at 56, 238.

238. *Id.* at 139.

239. *Id.* at 201.

240. *Id.* at 220.

241. Ariel Hart, *The Struggle for Iraq: Court-Martial; Soldier Who Refused to Return Is Found Guilty of Desertion*, N.Y. TIMES (May 22, 2004), https://www.nytimes.com/2004/05/22/world/struggle-for-iraq-court-martial-soldier-who-refused-return-found-guilty.html [https://perma.cc/2D27-TVAC].

242. MEJÍA, *supra* note 230, at 269, 271.

243. *Id.* at 270, 273.

244. *Cf. id.* at 213.

245. *See* Mohamed, *supra* note 146, at 802–07 (discussing international criminal law's focus on abuses of power in hierarchical structures).

The point here is a subtle but crucial one. The law typically either ignores the superior's illegal order, or conceives of it narrowly as a misuse of power to accomplish the ordered crime. Ordering a subordinate to commit a crime, however, is not merely a misuse of a high-ranking position; it is a misuse of the subordinates themselves, perpetrated through exploitation of a relationship of authority that is constituted and valued by law—and, indeed, beyond the law, too, in the broader culture that venerates the worldwide military system of order and discipline. Because this relationship of authority—a duty of protection, really—is prized under the law, the abuse of that relationship, too, should be recognized, with the subordinate as its victim.

A. THE SUBORDINATE'S EXPERIENCE OF BETRAYAL

Examining the experiences of individuals ordered to commit crimes suggests that the wrongfulness of the illegal order inheres not only in the degradation of the relationship between superior and subordinate, but also in the injury—and, indeed, destruction—that it can create.[246] Studies of combat exposure have long established the suffering of those who have fought in wars, from the days of "shell shock" and "combat fatigue" during the World Wars, to depression and post-traumatic stress disorder (PTSD) today.[247] In the midst of the Vietnam War, American clinicians first began to discuss the impact of *committing* crimes on patients who had been in combat. Writing in 1973 about her experience of treating patients who reported participating in atrocities in Vietnam, Sarah Haley urged therapists "to distinguish the patient who reports atrocities from the patient suffering classical traumatic war neurosis" and proposed ways for therapists to "best approach[] and engage[]" these patients.[248]

In the 1980s, PTSD became the dominant frame for analyzing the experience of Vietnam veterans, and research increasingly turned toward examining those who *participated* in atrocities, rather than solely those who witnessed them. A team from the Veterans Administration's National Center for PTSD, for example, found in a study of approximately thirteen hundred Vietnam veterans that guilt may explain the connection between participation

246. For discussion of harm as the basis for criminal punishment, see generally FEINBERG, *supra* note 7; Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 120–38 (1999).

247. *See, e.g.*, Rachel Yehuda, Steven M. Southwick & Earl L. Giller, Jr., *Exposure to Atrocities and Severity of Chronic Posttraumatic Stress Disorder in Vietnam Combat Veterans*, 149 AM. J. PSYCHIATRY 333, 334–35 (1992) (finding connection between exposure to atrocities and severity of symptoms of PTSD); Jean C. Beckham, Michelle E. Feldman & Angela C. Kirby, *Atrocities Exposure in Vietnam Combat Veterans with Chronic Posttraumatic Stress Disorder: Relationship to Combat Exposure, Symptom Severity, Guilt, and Interpersonal Violence*, 11 J. TRAUMATIC STRESS 777, 783–84 (1998) (studying relationship between both combat exposure and atrocities exposure and PTSD).

248. Sarah A. Haley, *When the Patient Reports Atrocities: Specific Treatment Considerations of the Vietnam Veteran*, 30 ARCHIVES GEN. PSYCHIATRY 191, 194 (1974) (internal quotation marks omitted).

in wartime atrocities and PTSD or major depressive disorder.[249] A group of researchers studying hundreds of Vietnam War veterans in the Durham area found that "involvement in wartime atrocities may convey greater psychological and behavioral risks above and beyond combat exposure."[250]

In the 1990s, meanwhile, Jonathan Shay began to develop a theory about the experience of veterans that was not captured by PTSD.[251] Shay, a clinical psychiatrist working with American combat veterans, found a unique form of suffering in what he came to call "moral injury"—the psychological consequence of "[a] betrayal of what's right . . . by someone who holds legitimate authority . . . in a high stakes situation."[252] Whereas PTSD research was focusing on fear-based responses to life-threatening events,[253] Shay brought attention to injury resulting from "leadership malpractice" by soldiers' superiors.[254] The idea of moral injury sought to capture the pain and disaffection endured by service members and veterans whose experiences created feelings of abandonment by leaders and misalignment between what they had done and the good or honorable people they thought they were.[255] Shay conceived of moral injury not as a hyperactive fear response; the injury was, instead, the degradation of character.[256] Thus, not only were the roots of this suffering distinct from those understood to be the sources of PTSD; the consequences, too, differed. Whereas the standard definition of PTSD listed flashbacks and nightmares and the "fight-or-flight" response as symptoms, the "wreckage" from moral injury is a "loss"[257] of "social trust"—a demise of "the expectation that power will be used in accordance with 'what's right.'"[258]

In initially building the concept of moral injury, Shay's work was qualitative and humanistic, weaving together the first-hand accounts of the veterans with whom he worked with the depiction of war and betrayal experienced by

249. Brian P. Marx et al., *Combat-Related Guilt Mediates the Relations Between Exposure to Combat-Related Abusive Violence and Psychiatric Diagnoses*, 27 DEPRESSION & ANXIETY 287, 288, 291 (2010).

250. Paul A. Dennis et al., *Moral Transgression During the Vietnam War: A Path Analysis of the Psychological Impact of Veterans' Involvement in Wartime Atrocities*, 30 ANXIETY, STRESS, & COPING 188, 197 (2017).

251. Jonathan Shay, *Moral Injury*, 31 PSYCHOANALYTIC PSYCH. 182, 182–83 (2014).

252. *Id.* at 183.

253. *See* John G. Sackett, *Guilt-Free War: Post-Traumatic Stress and an Ethical Framework for Battlefield Decisions*, WRIGHT FLYER PAPERS, Dec. 2015, at 1, 5, https://apps.dtic.mil/sti/pdfs/AD1003680.pdf [https://perma.cc/VUF4-MTGA].

254. *See* Jonathan Shay, *Casualties*, *in* THE MODERN AMERICAN MILITARY 295, 303 (David M. Kennedy ed., 2013).

255. *Id.*

256. *Id.* at 303–04; Shay, *supra* note 251, at 184–86.

257. David Berreby, *Scientist at Work—Jonathan Shay; Exploring Combat and the Psyche, Beginning With Homer*, N.Y. TIMES (Mar. 11, 2003), https://www.nytimes.com/2003/03/11/science/scientist-work-jonathan-shay-exploring-combat-psyche-beginning-with-homer.html [https://perma.cc/D9JX-KB2A] (describing "the loss of trust in others" as "[t]he deepest danger" of moral injury).

258. JONATHAN SHAY, ODYSSEUS IN AMERICA: COMBAT TRAUMA AND THE TRIALS OF HOMECOMING 151 (2002) (emphasis omitted).

Achilles and Odysseus in Homer's epic poems.[259] In doing so, Shay aimed to develop an analysis of the consequences of betrayal by leaders that transcended time and place and yet had no name. In the years since Shay began this work, researchers have expanded the concept of moral injury to include not only responses to betrayal by leaders, as Shay defined it, but also responses to betrayals of one's own "assumptions and beliefs about right and wrong and personal goodness."[260] The two types of moral injury—self-inflicted and leader-inflicted[261]—can overlap, such as in a situation in which a superior orders a subordinate to torture another person, and the subordinate complies with the order, despite their beliefs that torture is wrong and that it is something they would never do.[262] In both, the person suffering moral injury experiences a deterioration of character,[263] and "may begin to view him or herself as immoral, irredeemable, and un-reparable or believe that he or she lives in an immoral world."[264]

Narrative accounts of veterans fill out these studies of moral injury. I draw here on a sampling of memoirs and journalism to offer a portrait of service members' experiences of betrayal and its consequences. The goal is not to argue that these experiences are universal or even common, and I emphasize that those service members who have written about their experiences are a self-selecting group.[265] Rather, the aim is to offer a glimpse of what happens to some soldiers whose superiors ordered them to commit a crime.

Perhaps the most infamous atrocity in the Vietnam War was the massacre at My Lai, when American troops killed some three to five hundred unarmed

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259. *See id.* at 3–7; JONATHAN SHAY, ACHILLES IN VIETNAM: COMBAT TRAUMA AND THE UNDOING OF CHARACTER, at xiii, xx–xxiii (2003).

260. Brett T. Litz et al., *Moral Injury and Moral Repair in War Veterans: A Preliminary Model and Intervention Strategy*, 29 CLINICAL PSYCH. REV. 695, 698 (2009); *see also* SHARROCK, *supra* note 21, at 198 (describing one veteran who says he "prefers terms like 'anger,' 'resentment,' and 'betrayal'" to "PTSD"). Philosopher Nancy Sherman has contributed immensely to the study of moral injury as well, though she avoids placing responsibility on leaders. *See* NANCY SHERMAN, AFTERWAR: HEALING THE MORAL WOUNDS OF OUR SOLDIERS 8–9 (2015) (defining moral injury and discussing the book's approach); *see also* Roy Scranton, *Choosing War*, DISSENT (2016) (reviewing SHERMAN, *supra* and MICHAEL PUTZEL, THE PRICE THEY PAID: ENDURING WOUNDS OF WAR (2015)), https://www.dissentmagazine.org/article/choosing-war-nancy-sherman-afterwar-review [https://perma.cc/5V9Y-6M2T] ("Sherman's phenomenon of 'moral injury' produces a victim without a perpetrator: no agent is ever named who does the injuring, nobody is responsible, no one is at fault.").

261. *See* Shay, *supra* note 251, at 184 ("In [Litz et al.'s] definition the violator is the self, whereas in mine the violator is a powerholder.").

262. *Id.* at 185. Justine Sharrock describes a number of service members in exactly these circumstances in *Tortured*. *See generally* SHARROCK, *supra* note 21 (reporting on experiences of guards and interrogators who worked at Abu Ghraib and Guantánamo).

263. Shay, *supra* note 251, at 185–86.

264. Litz et al., *supra* note 260, at 698.

265. Service members have been reluctant to speak publicly about illegal orders and about their own suffering for fear of being prosecuted or ostracized and for fear of losing their benefits or their families. SHARROCK, *supra* note 21, at 148–49.

persons and raped twenty women and girls.[266] Varnado Simpson was one of the soldiers in Second Platoon, Charlie Company, under the command of Captain Ernest Medina.[267] Simpson admitted to killing more than twenty people, including children, at My Lai.[268] He said he was ordered to kill.[269] After he returned home, he thought he would see the people he had killed if he left his home, so he tried to lock himself inside whenever he could.[270] He told two documentary filmmakers that he thought a part of him was "evil," and that he was "a walking time bomb."[271] Simpson died by suicide in 1997.[272]

More recently, veterans of the wars in Iraq and Afghanistan have described their experiences of participating in torture and other atrocities, and their efforts to reconcile what they did—what they were told to do—with their moral and ethical frameworks for operating in the world. Eric Fair offered one such account. Reflecting on his time as an interrogator at Abu Ghraib, Fair writes, "I failed to disobey a meritless order, I failed to protect a prisoner in my custody, and I failed to uphold the standards of human decency. Instead, I intimidated, degraded and humiliated a man who could not defend himself. I compromised my values. I will never forgive myself."[273]

Justine Sharrock, a journalist who has investigated the experiences of soldiers who were stationed at Guantánamo and Abu Ghraib in the early 2000s, writes that "[m]ore than guilt or shame, the soldiers [she] interviewed described a deep-seated rage at having been betrayed. They thought they were nobly defending America, only to find themselves following orders that crossed moral lines."[274] They distance themselves from their families, drink too much, consider and attempt suicide. They suffer, both for having hurt

266. *See* Levesque, *supra* note 19 ("The massacre at My Lai was not the only time American troops committed war crimes against Vietnamese civilians, but it was the single worst instance . . . .").

267. Roy Reed, *Veteran Says He Slew Ten in Vietnam Village*, N.Y. TIMES (Nov. 27, 1969), https://timesmachine.nytimes.com/timesmachine/1969/11/27/79439418.pdf.

268. Michael Bilton & Kevin Sim, *My Lai: A Half-Told Story*, SUNDAY TIMES MAG., Apr. 23, 1989, at 26.

269. Reed, *supra* note 267; *see also* HERBERT C. KELMAN & V. LEE HAMILTON, CRIMES OF OBEDIENCE: TOWARD A SOCIAL PSYCHOLOGY OF AUTHORITY AND RESPONSIBILITY 17, 48–50 (1989) (discussing orders at My Lai); TURSE, *supra* note 25, at 18–19.

270. Bilton & Sim, *supra* note 268, at 26.

271. *Id.* Simpson had initially admitted to killing ten people. *See* Reed, *supra* note 267.

272. HOWARD JONES, MY LAI: VIETNAM, 1968, AND THE DESCENT INTO DARKNESS 352 (2017).

273. Eric Fair, Opinion, *An Iraq Interrogator's Nightmare*, WASH. POST (Feb. 9, 2007), https://www.washingtonpost.com/wp-dyn/content/article/2007/02/08/AR2007020801680.html [https://perma.cc/B89T-ELQE]; *see also* Jamie Mayerfeld, *In Defense of the Absolute Prohibition of Torture*, 22 PUB. AFFS. Q. 109, 121–22 (2008) (noting that torture "wrecks the lives of those ordered to torture"); SHARROCK, *supra* note 21, at 6 (describing death of Alyssa Peterson, who ended her life while stationed at an Iraqi prison and who had said after participating in two interrogation sessions that "she could no longer withstand having to abuse the prisoners").

274. SHARROCK, *supra* note 21, at 6.

innocent, defenseless people, and for having been betrayed by superiors who were supposed to be protecting them.[275]

To be sure, these accounts do not specifically address the causal role of orders in the moral injuries described, and experiences like PTSD or moral injury by definition need not be linked to orders from a superior.[276] Moreover, research on moral injury provides only limited understanding of the unique role of leadership betrayal in causing moral injury. For example, while Shay's finding that the body "codes" leadership betrayal "as physical attack, mobilizes for danger and counterattack, and lastingly imprints the physiology every bit as much as if it had been a physical attack"[277] advances understanding of this condition, much work remains to be done in separating the interlaced strands of betrayal by a leader, betrayal of oneself, and participating in violence.

Still, these accounts highlight two important facts that merit emphasis when considering illegal orders as independent wrongs. First, the perpetrators of crimes—not just their victims—can suffer on account of having been ordered to commit, and committing, those crimes. In previous work, I have studied both the existence of perpetrator trauma and the roots of the deep reluctance to acknowledge its reality—the refusal to see perpetrators of crimes as victims, too; the association of suffering with innocence; the expectation that wrongdoers are barbarous monsters.[278] Add to these barriers the longstanding expectation that soldiers are mere instruments,[279] and the journalistic, narrative, and empirical accounts of these service members' experiences of moral injury become something of a revelation. Although we may be reluctant to admit that service members who cause suffering can suffer themselves, that truth is undeniable.

Second, these experiences reveal that a leader's betrayal plays some role in these service members' suffering. The fact that "war is hell" is not the only catalyst driving soldiers to desert, like Camelo Mejía, or to take their own lives, like Varnado Simpson, or to see themselves as ruined, like Eric Fair. To be sure, I do not suggest here that betrayal by a superior is the sole explanation either; but, still, that betrayal means something to these individuals.

B. THE SUPERIOR'S DUTY TO THE SUBORDINATE

The fact that soldiers experience illegal orders to commit crime as a betrayal by their superiors not only is borne out by first-hand accounts, but also aligns with the military's own existing descriptions of a leader's duty to the subordinate. The dominant vision of the superior's relationship to the

275. *Id.* at 6, 40–41, 56–57, 194–95. *See generally* JOSHUA E.S. PHILLIPS, NONE OF US WERE LIKE THIS BEFORE: AMERICAN SOLDIERS AND TORTURE (2010) (describing similar experiences).

276. See SHAY, *supra* note 259, at 166–72.

277. Shay, *supra* note 251, at 185.

278. *See* Saira Mohamed, *Of Monsters and Men: Perpetrator Trauma and Mass Atrocity*, 115 COLUM. L. REV. 1157, 1206–15 (2015).

279. *See supra* Part III.

subordinate in military organizations, across nations, is as a site of obligation and protection. From court-martial decisions to speeches and writings by four-star generals, "[t]he power and authority vested in an officer" vis-à-vis a subordinate are described as "a sacred trust."[280] General Douglas MacArthur, the Commander-in-Chief of the U.S. Armed Forces in the Pacific during World War II, embraced this idea in a statement affirming the death sentence of General Tomoyuki Yamashita, who led the Japanese defense of the Philippines. A military tribunal had concluded that Yamashita was criminally responsible for the atrocities committed by his troops because of his failure to control them.[281] Acting as the Confirming Authority, the final arbiter of the conviction and sentence, MacArthur stated that Yamashita failed an "irrevocable standard" to which he was bound because of his position of authority.[282] In so doing, he "failed his duty to his troops," as well as "to his country, . . . enemy, . . . mankind."[283]

Although the *Yamashita* decision is known in the field of international humanitarian law and international criminal law as the birth of the doctrine of superior responsibility,[284] it also reveals an understanding that when a superior opens the door to their subordinates committing a crime—whether by looking the other way or by carrying them over the threshold—that superior is betraying not only the ultimate victims of the crime, but also the subordinates who perpetrate it.

What is the root of this duty? In a law review article written in the early days of the Vietnam War, military law scholar Alfred Avins articulated a broad duty of "protection" on the part of superior toward subordinate, which exists

280. United States v. Willetts, 35 B.R. 231, 238 (A.B.R. 1944); *see also* U.S. DEP'T OF THE ARMY, FIELD MANUAL 6-22, ARMY LEADERSHIP: COMPETENT, CONFIDENT, AND AGILE ¶ 2-11 (2006) ("Command is about sacred trust."); U.S. DEP'T OF THE ARMY, FIELD MANUAL 22-100, ARMY LEADERSHIP: BE, KNOW, DO ¶ 1-61 (1999) ("Command is a sacred trust. The legal and moral responsibilities of commanders exceed those of any other leader of similar position or authority."); Kevin Gentzler & Ken Turner, *Commandership: A Fresh Look at Command*, SMALL WARS J. (Mar. 12, 2020, 3:16 AM), https://smallwarsjournal.com/jrnl/art/commandership-fresh-look-command [https://perma.cc/BA88-YL5A] ("Command is a sacred trust not lightly given."); John Michael Loh, *The Responsibility of Leadership in Command*, *in* AU-24: CONCEPTS FOR AIR FORCE LEADERSHIP 91, 91 (Richard I. Lester & A. Glenn Morton eds., 2001) ("Command is a sacred trust.").

281. *See* Trial of General Tomoyuki Yamashita, *in* 4 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 35 (1948), https://tile.loc.gov/storage-services/service/ll/llmlp/Law-Reports_Vol-4/Law-Reports_Vol-4.pdf [https://perma.cc/G324-CZ4C].

282. Order of General Douglas MacArthur Confirming Death Sentence of General Tomoyuki Yamashita, February 6, 1946, *reprinted in* 2 THE LAW OF WAR: A DOCUMENTARY HISTORY 1598–99 (Leon Friedman ed., 1972).

283. *Id.*

284. The doctrine holds a superior responsible for the crimes of the subordinates based on the superior's failure to prevent or punish those crimes. *See* GUÉNAËL METTRAUX, THE LAW OF COMMAND RESPONSIBILITY 5–8 (2009); DARRYL ROBINSON, JUSTICE IN EXTREME CASES: CRIMINAL LAW THEORY MEETS INTERNATIONAL CRIMINAL LAW 194–223 (2020); Rome Statute, *supra* note 37, art. 28.

because a soldier hands over their autonomy to their superior.[285] Because a soldier is legally required to obey, he writes, the superior is reciprocally required to protect.[286] And when a superior gives an illegal order, "the superior abuses his authority and subjects the subordinate to risk of criminal penalties, which is contrary to his duty to protect the subordinate."[287]

Another account of the superior's duty to the subordinate conceives of it in moral and ethical terms. Law of war scholar Geoffrey Corn argues that "inherent in the responsibility of any military commander is the obligation to protect subordinate forces from the risks associated with combat operations, consistent with the dictates of the mission."[288] Indeed, as Corn notes, "one of the first leadership principles taught to US Army personnel is the prioritization of . . . 'mission, men, [and] equipment'": the commander's obligation to the subordinate is thus not absolute—it must yield to the mission—but it does exist.[289] This account views the superior as holding a position of protection toward subordinates, less because of reciprocity than because of the special nature of military command as leadership in navigating "the moral hazards of military duty."[290] In particular, Corn urges that the commander has "an inherent obligation to prepare subordinates for the physical, mental and . . . moral challenges inherent in combat."[291] Abiding by the law of war fulfills that duty, for it furnishes "a moral framework that allows [soldiers] to reconcile their individual participation in the brutal endeavour that is 'war'" with their lives as civilians, and thus helps the subordinate to "carry the mental and emotional weight of" using deadly force in combat.[292]

This idea that superiors' obligation to restrain their subordinates exists to protect the subordinates themselves, and has a moral and ethical dimension, is echoed in other accounts of the relationship between superior and subordinate. In the book *Platoon Leader*, reflecting on his experiences as an infantry platoon leader in Vietnam, James McDonough identifies the same obligation toward his subordinates: "I had to do more than keep them alive,"

285. Avins, *supra* note 155, at 331.

286. *Id.* at 333–34.

287. *Id.* at 352–53 (1966); *see also id.* at 333–34 ("[T]he duty of protection is co-extensive with and reciprocal to the duty of obedience."); KELMAN & HAMILTON, *supra* note 269, at 205 (discussing "subordinate's duty . . . to carry out orders" and superior's "reciprocal obligation . . . to oversee subordinates"). Alongside his focus on topics of military law, Avins also defended the constitutionality of literacy tests in the Supreme Court case *Katzenbach v. Morgan*, and he "spearheaded academic originalism in the law reviews." Calvin Terbeek, *"Clocks Must Always Be Turned Back":* Brown v. Board of Education *and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 821, 830 (2021).

288. Corn, *supra* note 31, at 908.

289. *Id.*

290. *Id.* (citation omitted).

291. *Id.* (emphasis omitted).

292. *Id.* at 908, 910 (citations omitted).

he writes.[293] "I had to preserve their human dignity."[294] This duty, in turn, required protecting them from wrongdoing: "War gives the appearance of condoning almost everything, but men must live with their actions for a long time afterward. A leader has to help them understand that there are lines they must not cross."[295] In Steven Pressfield's *Gates of Fire*—a fictionalized account of the Battle of Thermopylae that is required reading at the Basic School for Marine Corp officers, the U.S. Military Academy, and the Naval Academy[296]—the narrator, Xeones, explains that "the role of the officer" is "to prevent those under his command, at all stages of battle—before, during and after—from becoming 'possessed.' To fire their valor when it flagged and rein in their fury when it threatened to take them out of hand."[297]

These broad visions of the obligation of superior toward subordinate are reflected in the law of war—even if the violation of the obligation is not captured as a cognizable wrong. "Responsible command," a relationship in which subordinates are governed by responsible commanders, is one of the requirements for members of an armed group to be recognized and given protections under international law.[298] Individual states' domestic laws, too, require armed groups to be under a system of responsible command as a prerequisite for recognition.[299] Quite simply, the law not only constitutes the superior-subordinate relationship; it venerates it.

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293. JAMES R. MCDONOUGH, PLATOON LEADER: A MEMOIR OF COMMAND IN COMBAT 77–78 (Ballantine Publ'g Grp. 2003) (1985).

294. *Id.* at 77.

295. *Id.* at 77–78; *see also* Corn, *supra* note 31, at 912 (interpreting McDonough as arguing that "commanders bear a responsibility for protecting subordinates from the moral corrosion inherent in the use of lethal force").

296. ANDREW J. BAYLISS, THE SPARTANS 142 (2020).

297. STEVEN PRESSFIELD, GATES OF FIRE: AN EPIC NOVEL OF THE BATTLE OF THERMOPYLAE 112 (1998); *see also* Nathaniel Fick, *A Former Marine Captain in Afghanistan and Iraq Tells of the Books That Helped Him Most*, WASH. POST (July 17, 2005), https://www.washingtonpost.com/archive/entertainment/books/2005/07/17/a-former-marine-captain-in-afghanistan-and-iraq-tells-of-the-books-that-helped-him-most-nathaniel-fick/b40467b9-9f7e-4ee1-8c22-d940b5dddaco [https://perma.cc/WF2W-M22Q] ("If there's a better description of combat leadership, I've not seen it.").

298. *E.g.*, Geoffrey S. Corn & Rachel E. VanLandingham, *Strengthening American War Crimes Accountability*, 70 AM. U. L. REV. 309, 321–22 (2020); *see* Geneva Convention III, *supra* note 90, art. 4; Geneva Convention Relative to the Treatment of Prisoners of War art. 1, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343; Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land art. 43, Oct. 18, 1907, 36 Stat. 2277; Hague Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land art. 43, July 29, 1899, 32 Stat. 1803.

299. *See* 2 INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, PRACTICE – PART 1, at 88–94 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (collecting national laws requiring obedience to orders); *see also* Corn, *supra* note 31, at 907–08 (discussing importance of discipline and obedience).

C. ILLEGAL ORDERS AS VIOLATION OF THE SUPERIOR'S DUTY

To properly attend to relationships that are valued by the law requires formal recognition not only of their existence under the law, but also of the wrongfulness of their distortion. I draw here on the work of feminist scholars who have articulated a relational vision of criminal law that, founded on the idea that the self is constituted within the context of human relationships and by human relationships, identifies abuse within relationships and abuse of relationships as unique sites of wrongdoing.[300] The law's protection of a relationship, in this theory, demands reckoning with its exploitation and misuse as well; as Ngaire Naffine writes, "Relations may be positive and beneficial . . . but they can also be oppressive and even cruel."[301] Although the law of mass atrocity has not on its face embraced a relational posture, relational theory offers a fruitful lens for analyzing its deficiencies and its promise. This is because the normative orientation of the law of mass atrocity focuses it on addressing abuses of power and abuses of authority.[302] International criminal law and the law of war recognize that the relationship of superior to subordinate is built around an expectation of trust and obligation, and it insists that this relationship should not be used to accomplish crime. Realizing the normative commitment to opposing these abuses, however, also requires recognition that when the superior uses the authority to lead the subordinate to wrongdoing through an illegal order, that is a wrong in itself because it perverts the authority relationship. In doing so, the order degrades the relationship, and it degrades the subordinate, who was supposed to be protected by the superior, and instead is treated as a mere instrument of their will.

The illegal order is thus wrongful not only because it uses a position of authority to accomplish crime; it is also a breach of the duty owed to the subordinate, a degradation of the relationship itself, and an injury to the subordinate. To punish such an order only by reference to the ultimate crime ignores these dimensions of the wrong, the dimensions that service members are wrestling with when they describe feelings of betrayal by those whom they

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300. *See* JENNIFER NEDELSKY, LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW 173–86 (2011); JONATHAN HERRING, LAW AND THE RELATIONAL SELF 167–95 (2020).

301. Ngaire Naffine, *The Liberal Legal Individual Accused: The Relational Case*, 29 CANADIAN J.L. & SOC'Y 123, 127 (2013) (reviewing NEDELSKY, *supra* note 300 and JOCELYN DOWNIE & JENNIFER J. LLEWELLYN, BEING RELATIONAL: REFLECTIONS ON RELATIONAL THEORY AND HEALTH LAW (2012)). Exploring relational approaches to law, Naffine writes that if we "think of human beings as inseparable from their relations," then "the role of law is to regulate relations rather than to ward them off," and "to ensure that they run smoothly and that they neither oppress nor harm us." *Id.* at 123.

302. *See supra* Section II.A.4. In my prior work, I have argued that international criminal law focuses on "coercive" power—that is, formal command exercised through hierarchies, which is the subject of this Article—while neglecting "persuasive" power—the capacity for influence wielded through more informal and non-hierarchical relationships. *See* Mohamed, *supra* note 146, at 802–13.

trusted to do "what's right."[303] The same is true, moreover, even if the subordinate does not undergo feelings of betrayal; the illegal order violates that obligation of trust and protection toward the subordinate whether the subordinate experiences it as injury or not.[304]

International and domestic criminal law, meanwhile, lack a full account of what authority is and how authority can be improperly used, for these bodies of law limit the concept of abuse of a position of authority to using that position to achieve wrongdoing.[305] In so describing the superior's illegal order as the abuse of a position of authority, without reference to the position the superior has with respect to the subordinate, international and domestic criminal law miss the nature of authority as relational, not merely positional. Michel Foucault explains that "power is not something that can be possessed, and it is not a form of might; power is never anything more than a relationship."[306] If we shift our attention from the superior's mere position as commander or Defense Secretary or President, to the authority the superior has over the subordinate—the control that is legitimized by the state and the law and the culture of honoring the chain of command as central to military organization—then we can see the additional wrong that is the central concern of this Article: the degradation of, and injury to, individuals subject to an order to commit a crime.

Skeptics might argue that this account of the wrongfulness of illegal orders falls apart when one considers that the soldier is *not* legally required to obey when the superior gives an illegal order (and, in fact, is legally obligated to disobey).[307]Accordingly, a critic might argue, the soldier in those circumstances is no longer subject to the control of the superior, and they can act on their own. The better understanding, however, is not that there is no duty to protect at that moment, but rather that the superior has breached the duty to protect. Under the reciprocal interpretation of the superior-subordinate relationship, if the subordinate's duty of obedience creates the superior's duty

303. SHAY, *supra* note 258, at 151.

304. For a discussion of a similar question in the context of sexual assault, see Sharon Cowan, *Beyond the War on Crime: Personhood, Punishment, and the State*, 9 BUFF. CRIM. L. REV. 655, 679 (2006) (book review) (explaining that a "[v]iolation of the right to autonomy does not require that the victim has a *sense* of that violation," for "even where there is no feeling of violation there is still a criminal wrong" in "instrumentalization . . . that amounts to a 'denial of personhood'" (citation omitted)).

305. *See supra* Section II.A.4.

306. MICHEL FOUCAULT, "SOCIETY MUST BE DEFENDED": LECTURES AT THE COLLÈGE DE FRANCE, 1975–76, at 168 (Mauro Bertani & Alessandro Fontana eds., David Macey trans., 2003); *see also* MAX WEBER, 3 ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 941–54 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., 1968) ("As far as sociology is concerned, power of command does not exist unless the authority which is claimed by somebody is actually heeded to a socially relevant degree."). Although Foucault's discussion here refers to power, it is ultimately about the internalization of power and thus serves as a useful perspective on the relational dimensions of authority. *See id.*

307. *See supra* notes 32–40 and accompanying text.

of protection, then it is the failure of the duty of protection that leads to the elimination of the duty of the obedience. The illegal order is the wrongful breach of the duty—not a legitimate choice made by the superior to grant the subordinate the freedom to exercise their own autonomy. And even considering the superior's obligation outside of any theory of reciprocity, the superior still is violating their obligations of responsibility toward the subordinate when they order the subordinate to commit a crime. The autonomy of the subordinate does not vitiate the duty that the superior owes the subordinate.

The autonomy of the subordinate, moreover, is a red herring, one that incongruously—given that superiors have legally founded obligations to their subordinates—relies on the individualistic, atomistic foundations of Anglo-American criminal law and of international criminal law, which treat individuals as free agents who are unhindered by others and unaccountable to others as long as they stay out of their way.[308] This foundation is evident not only in particular doctrines—consider, for example, the "every man for himself," "not my brother's keeper" limits on omissions liability[309]—but also in the broader assumption that a person has the moral freedom to choose what conduct they will undertake, which in turn is relied upon to justify punishment when they use that freedom to violate the law. The name of the game is individual culpability, based on voluntary, individual wrongdoing.[310] And because the subordinate has the freedom to follow the order or to disregard it, the argument goes, the law has already adequately protected the subordinate, and no wrongdoing needs to be recognized on the part of the superior toward the subordinate.

This interpretation, however, accepts a bounded, atomistic vision of authority merely as a status, as an accumulation of power. And of course, using that status or accumulation of power to achieve criminal ends constitutes a unique wrong. There is broad acceptance that the power of the state should be used to protect individuals, not to hurt them.[311] But that rendering of illegal orders is inadequate and incomplete, because it says nothing about the

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308. *See* Saira Mohamed, *Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law*, 124 YALE L.J. 1628, 1639–51 (2015) (discussing individual responsibility in international criminal law and incongruousness of applying traditional rules of individual responsibility to collective crimes).

309. *See* Andrew Ashworth, *The Scope of Criminal Liability for Omissions*, 105 LAW Q. REV. 424, 427–30 (1989). *But see generally* Glanville Williams, *Criminal Omission—The Conventional View*, 107 LAW Q. REV. 86 (1991) (defending the conventional approach to omissions liability but arguing that this approach is not individualistic).

310. *See* V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691, 1700 n.37 (2003) ("[I]f there were a single principle that could be identified as unassailable within the criminal law scholarship of the latter half of the twentieth century, it would be the virtue of individualization (the idea that we can save defendants from the wrath of the state by ever more particularly describing their character, characteristics, background, or virtue)."); R.A. Duff, *Choice, Character, and Criminal Liability*, 12 L. & PHIL. 345, 361–70 (1993); ALAN NORRIE, CRIME, REASON AND HISTORY: A CRITICAL INTRODUCTION TO CRIMINAL LAW 366 (3d. ed. 2014).

311. *See, e.g.*, G.A. Res. 60/1, 2005 World Summit Outcome, ¶ 120 (Sept. 16, 2005).

superior's relationship to the people who are subject to the superior's authority. And that relationship, again, is a crucial dimension of the power of the superior.

The autonomy of the subordinate thus does not diminish the law's normative interest in recognizing an abuse of the relationship between superior and subordinate. The question is not whether the subordinate is free to act on their own, but rather whether the superior wrongs the subordinate by taking advantage of their own relationship of authority over that person. The same is true, moreover, even if the subordinate embraces the unlawful action. Individuals subject to orders to commit crime often recount that they followed the order enthusiastically. But the order in such cases remains an abuse of the relationship of authority over the subordinate, for it degrades the relationship, fails the obligation to protect the subordinate, and mistreats the subordinate in so doing. Indeed, the superior's moral injury to the subordinate may be even greater if and when the latter degrades themselves by following the order.

V. A NEW APPROACH TO THE SUPERIOR'S ILLEGAL ORDERS

A. INTERNATIONAL AND DOMESTIC CRIMINAL LAW

What would it mean to incorporate the perspective that this Article urges? First, recall that ordering a crime is already the basis for criminal responsibility, whether through accomplice liability or indirect perpetration (or also, in the American military justice systems, for example, as substantive violations of the prohibitions on conduct unbecoming or conduct prejudicial to good order and discipline). The approach this Article adopts, however, would change the narrative around those crimes. Today, the law is not merely neglecting to tell the story of abuse that is conveyed in this Article; instead, that omission is telling a different story, one in which the superior's abuse of the subordinate does not exist or does not matter. Recognizing illegal orders not only as wrongs with respect to the ultimate victims of the crime, but also as wrongs with respect to those subject to the orders, can change that account.

For example, when the ICC or a national court applying international criminal law—or even a non-criminal institution like a truth commission—is deciding a case involving ordering, both court and prosecution should identify the subordinate as one of the parties injured by the orders of the accused and should acknowledge the abuse of the relationship with the subordinate as relevant at sentencing. Most important is to appreciate that the superior had a duty not only to not use their particular position to accomplish a crime, but also to not distort the superior-subordinate relationship—this "sacred trust"—by turning or attempting to turn the subordinate into an instrument of criminal wrongdoing rather than treating them as a subject worthy of protection.

Consider, for example, the testimony of Johan Martin van Zyl before the South African Truth and Reconciliation Commission.[312] Van Zyl was the head of the security police unit that killed four prominent anti-apartheid activists, known as the Cradock Four.[313] George Bizos, the lawyer for the families of these victims, pressed Van Zyl on his role as the commander, asking him, "What is it that makes an Officer such as yourself, able to command a Unit that inflicts 63 stab wounds, but you yourself want to have hands supposedly free of blood?"[314] Van Zyl responded that he had intended to perform the killing himself but "in the end . . . could not do that."[315] Van Zyl did not explain what he meant in that response—whether he could not bring himself to do it, or whether he simply was not available at the time. Bizos then asked whether Van Zyl thought it was "better" that his junior officers, who were Black, had had to carry out the killing rather than himself.[316] Van Zyl insisted that he did not think it better, only that "[t]hat is the way it happened."[317] The colloquy then proceeded to the next topic, never acknowledging explicitly the perversity of Van Zyl having ordered his subordinates to brutally kill these individuals, never acknowledging the brutality Van Zyl showed not only to those four activists but also to his subordinates.

This example is not meant to suggest that those subordinates were not guilty of a crime when they killed the Cradock Four, nor to contend more broadly that a subordinate carrying out an illegal order cannot be guilty of a crime alongside their abusive superior.[318] Indeed, if that subordinate complies with the order, then that person may be convicted, too, given the legal obligation to disobey that order and the limited circumstances under which the order can provide a defense. But to call the subordinate injured by the superior's order—even to name the subordinate a victim of that superior—is not to exculpate.[319]

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312. Transcript of Amnesty Hearing, Case No. 5637/96, S. Afr. Truth & Reconciliation Comm'n (Feb. 23, 1998), https://www.justice.gov.za/trc/amntrans/pe/cradock1.htm [https://perma.cc/7HK4-EQTT]. Van Zyl was denied amnesty because the Commission found that he failed to make full disclosure of his crimes, but he still has not been prosecuted. *See* Yasmin Sooka, *Cradock Four Families Denied the Right to Truth and Justice for 36 Years*, DAILY MAVERICK (June 27, 2021), https://www.dailymaverick.co.za/article/2021-06-27-cradock-four-families-denied-the-right-to-truth-and-justice-for-36-years [https://perma.cc/5YD4-YRH7].

313. Transcript of Amnesty Hearing, *supra* note 312.

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. The fact that Van Zyl's subordinates who perpetrated the killings were Black South Africans, however, exposes the even more extreme circumstances of situational coercion at work there, circumstances that are not captured by the requirements of the typical superior orders or duress defense.

319. *See* Mohamed, *supra* note 146, at 833–34. Moreover, identifying an injury on the part of the subordinate should not be taken as a statement that the subordinate is equal in their level of suffering to the person ultimately harmed in the crime that takes place.

The categories of victim and perpetrator are not mutually exclusive, and they are not absolute—even though these labels are too often drawn in black and white. Victims are expected to be "perfect"—innocent, blameless, meek;[320] and framing the experiences of soldiers as stories of victimization requires confronting the particular difficulty that, as Claire Garbett writes, members of the armed forces are "often viewed as 'merely thugs or perpetrators of violence' rather than victims of its unlawful conduct."[321] Clearly, the proposal here is not easy. But rendering the illegal order an abuse of the subordinate not only achieves the recognition of the full dynamics of what it means to give an illegal order, but also helps complicate the prevailing narratives around perpetrators and victims. Indeed, this proposal can unsettle those categories and remind us that they are flawed tools for understanding the nature of wrongdoing and the experience of those who perpetrate it and are impacted by it.

National jurisdictions, too, can play an important role in transforming the legal treatment of illegal orders—and the broader cultural understanding of superiors who give illegal orders. In the United States, treating ordering as a wrong perpetrated against the subordinate should impel greater commitment to prosecutions of those who order subordinates to commit crimes, rather than resting on the "bad apples" theory of selective prosecution to punish only lower-level individuals. Moreover, recognizing the full harm that an illegal order constitutes, as this Article counsels, should inspire a commitment to prosecuting ordering crimes under Article 93 of the Uniform Code of Military Justice. The provision punishes "cruelty toward, or oppression or maltreatment of, any person subject to [the] orders" of the perpetrator.[322] The provision succeeds the former Article 96 of the Articles of War, the so-called General Article that punished a range of misconduct. Article 93 was based on a provision from the Articles for the Government of the Navy.[323] While that language "was designed principally to punish ship captains, who, away from the restraint of any superior power or authority, were occasionally wont to inflict on their subordinates every manner of unauthorized or cruel punishment or treatment, extending even to death,"[324] Article 93 was meant

320. *See* Christine Schwöbel-Patel, *The 'Ideal' Victim of International Criminal Law*, 29 EUR. J. INT'L L. 703, 709–13 (2018).

321. Claire Garbett, *The Legal Representation of the Civilian and Military Casualties of Contemporary Conflicts: Unlawful Victimisation, Its Victims and their Visibility at the ICTY*, 16 INT'L J. HUM. RTS. 1059, 1061 (quoting Lara J. Nettelfield, *From the Battlefield to the Barracks: The ICTY and the Armed Forces of Bosnia and Herzegovina*, 4 INT'L J. TRANSITIONAL JUST. 87, 90 (2010)); *see also* 3 RICHARD RORTY, TRUTH AND PROGRESS: PHILOSOPHICAL PAPERS 168 (1998) (describing tendency to think of perpetrators as "animals").

322. 10 U.S.C. § 893 (2018).

323. Avins, *supra* note 155, at 339 & n.34.

324. *Id.* at 336–37 (footnotes omitted). Herman Melville's novel *White-Jacket*, a critique of the horrors of naval life, is in part based on Melville's own experiences in the Navy at the hands of a captain who was later court-martialed for oppression of subordinates. *See generally* HERMAN

to capture the broader range of conduct that had been punishable under the General Article.[325] The paradigm case involved a superior causing physical injury to a subordinate,[326] and today it is often used to prosecute a superior's sexual harassment or sexual assault of a subordinate.[327] Still, the Manuals for Courts Martial have noted consistently that the provision is not limited to physical harm: "[t]he cruelty, oppression, or maltreatment must be real, although not necessarily physical."[328]

Both at the national and international level, the message sent through the law must transform, shifting from treating the person subject to the order as significant solely with respect to whether they carry out the illegal order or not, to treating them as significant with respect to the injury of having been subject to that order. The law could announce that the superior has exploited the subordinate, that they have subjected the subordinate to an abuse that may well (but need not necessarily) result in real injuries to mental and physical health.

B. BEYOND THE LAW

Some might ask why, if the abuse and the injury identified in this Article are so significant, they should not be recognized as a new crime under international criminal law, one that recognizes on its own the abuse of a subordinate. The pragmatic answer is that the crimes of international law are largely static, and the body of international criminal law is a limited one, composed as it is of only four crimes—genocide, war crimes, crimes against humanity, and aggression—and by definition focused on "the most serious crimes of concern to the international community as a whole."[329] To the

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MELVILLE, WHITE-JACKET: OR, THE WORLD IN A MAN-OF-WAR (Floating Press 2011) (1850) (depicting nineteenth-century American naval life).

325. *See A Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearings on H.R. 2498 Before the Subcomm. of the H. Comm. on Armed Services*, 81 Cong. 1227 (1949), https://www.loc.gov/rr/frd/Military_Law/Morgan-Papers/Vol-VI-hearings-on-HR-2498.pdf [https://perma.cc/9QV5-DCUA].

326. *See* MANUAL FOR COURTS-MARTIAL UNITED STATES 325 (1951), https://www.loc.gov/rr/frd/Military_Law/pdf/manual-1951.pdf [https://perma.cc/EU74-97E2].

327. *See Core Criminal Law Subjects: Crimes: Article 93 - Cruelty and Maltreatment*, U.S. CT. OF APPEALS FOR THE ARMED FORCES, https://www.armfor.uscourts.gov/digest/IIIA17.htm [https://perma.cc/9J9A-H5L7] (summarizing Article 93 cases since October 1999).

328. MANUAL FOR COURTS-MARTIAL UNITED STATES, *supra* note 326, at 325; *see also* Avins, *supra* note 155, at 346–47, 358 (listing examples including "subjecting of a subordinate to an unnecessary deprivation of comfort and convenience, inflicting hurt or humiliation on him, or otherwise intentionally violating a superior's duty to protect his subordinate," as well as forcing sick persons to work when unnecessary and denying due process in punishment).

329. Rome Statute, *supra* note 37, preamble & art. 5. *See generally* Saira Mohamed, *Contestation and Inevitability in the Crimes of the International Criminal Court*, *in* THE ELGAR COMPANION TO THE INTERNATIONAL CRIMINAL COURT 49 (Margaret M. deGuzman & Valerie Oosterveld eds., 2020) (examining the designation of these crimes under the Rome Statute).

extent that this body of law embraces new crimes, they must be seen as equal in gravity to the existing four "core crimes." Notwithstanding the arguments made here, it is somewhat incongruous to think of abuse of a subordinate by a superior—especially when the subordinate is already seen as a wrongdoer—as similar in nature to crimes against humanity or genocide, or even the most serious war crimes.

Crafting a new crime, moreover, would not on its own resolve the central concern of this Article, for the law is only one piece of the puzzle. The recasting this Article defends will require changing behavior beyond the law. It will require responding to an illegal order, both in legal institutions and outside of them, by naming the abuse toward the subordinate and the damage the illegal order will do to the subordinate and to the relationship that forms the heart of military organization. It will require refusing to lean on autonomy and consent as reasons to disregard the subjugation of a person. It will require listening to the voices of those who have been subjected to illegal orders, and it will require an openness to seeing them as victims of abuse by authority even if those subordinates themselves have abused their own positions by victimizing others. And it will require going beyond criminal accountability to secure real change.

C. THE CONSEQUENCES OF RECOGNIZING ILLEGAL ORDERS AS ABUSE BY AUTHORITY

Recognizing the full scope of the wrong of an illegal order may yield significant benefits. To the extent that the subordinate suffers as a result of an illegal order, their recovery may be facilitated by the law's recognition that they have been harmed. As Jonathan Shay writes, moral injury "deteriorates the[] character" of the person who experiences it; "their ideals, ambitions, and attachments begin to change and shrink"; and the injury "sometimes destroy[s] the capacity for trust."[330] Even if the superior who orders the crime inflicts that injury, recognition by a higher authority that the superior has abused the subordinate is one step toward restoring that trust.[331]

Consider the anecdote shared by Bryan Doerries, the founder of a project that stages Greek tragedies as well as more contemporary work, alongside town hall-style discussions, in order to foster community dialogue around some of the day's most difficult and pressing questions.[332] Doerries writes that after a reading of Sophocles' *Ajax* for a group of American service members

330. Shay, *supra* note 251, at 186.

331. *See* Juan E. Méndez, Book Review, 8 N.Y.L. SCH. J. HUM. RTS. 577, 584 (1991) (reviewing LAWRENCE WESCHLER, A MIRACLE, A UNIVERSE: SETTLING ACCOUNTS WITH TORTURERS (1990)) ("Official acknowledgement at least begins to heal the wounds.").

332. *See* BRYAN DOERRIES, THE THEATER OF WAR: WHAT ANCIENT GREEK TRAGEDIES CAN TEACH US TODAY 3, 7 (2015); *see also* Patrick Healy, *The Anguish of War for Today's Soldiers, Explored by Sophocles*, N.Y. TIMES (Nov. 11, 2009), https://www.nytimes.com/2009/11/12/theater/12greeks.html [https://perma.cc/K55V-J27X] (discussing Doerries' work).

in Germany, he asked the audience, "Why do you think Sophocles wrote this play?"[333] A person whom Doerries identifies as a junior enlisted soldier replied that it was "to boost morale."[334] Doerries pressed him further. "What is morale-boosting about watching a decorated warrior descend into madness and take his own life?"[335] he probed, neatly summarizing the plot of the play. Standing in that "sea of green uniforms," the soldier responded: "It's the truth . . . and we're all here watching it together."[336] Doerries uses this conversation to demonstrate his point that *Ajax* is healing because "Sophocles didn't whitewash the horrors of war."[337] Instead, by presenting "the unvarnished truth," he "sought to give voice to" the "secret struggles" of combat veterans and "to convey to them that they were not alone."[338] We may find comfort in expectations of autonomy, of freedom and responsibility of subordinates to obey the law, and not their superiors, at the crucial moment; and it is easy to cast those subordinates as villains when they submit to their superiors. Offering up the "unvarnished truth" instead—that the illegal order is a kind of betrayal that destroys a person's trust in authority and trust in rightness—may not be a cure, but it is a step toward recovery.

These consequences to individual subordinates are significant; when four times as many veterans and active-duty service members have died by suicide as in combat in the wars of the past twenty years, any contribution to emotional repair is significant.[339] But the proposal of this Article is a political project, too. The goal is to expose our conventional ways of thinking about authority relationships, and to foster a better understanding of the abuses in those relationships. In that register, shifting the law's account of illegal orders to consider the abuse of the subordinate may have profound consequences, because official acknowledgement through legal decision-making can incorporate a truth into "the public cognitive scene," to use philosopher Thomas

333. DOERRIES, *supra* note 332, at 3.

334. *Id.* at 4.

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

339. Jennifer Steinhauer, *Suicides Among Post-9/11 Veterans Are Four Times as High as Combat Deaths, a New Study Finds*, N.Y. TIMES (June 22, 2021), https://www.nytimes.com/2021/06/22/us/911-suicide-rate-veterans.html [https://perma.cc/FU7A-JUNB]. This figure is not meant to suggest that all or most or many suicides are caused by illegal orders. The causes are varied and difficult to discern, though many studies have attempted to identify whether there is a relationship between suicide and betrayal giving rise to moral injury or participation in atrocities. *See* AnnaBelle O. Bryan, Craig J. Bryan, Chad E. Morrow, Neysa Etienne & Bobbie Ray-Sannerud, *Moral Injury, Suicidal Ideation, and Suicide Attempts in a Military Sample*, 20 TRAUMATOLOGY 154, 158–59 (2014); Litz et al., *supra* note 260, at 697–99; Meghann Myers, *Some Combat Experiences—Like Ambushes or Killing a Civilian—More Closely Linked to Suicide, Study Finds*, MIL. TIMES (Feb. 19, 2021), https://www.militarytimes.com/news/your-military/2021/02/19/some-combat-experiences-like-ambushes-or-killing-a-civilian-more-closely-linked-to-suicide-study-finds [https://perma.cc/VK9X-BHSL].

Nagel's famous phrase distinguishing mere knowledge from public acknowledgement of an abuse.[340] Although Nagel was referring to the importance of acknowledging particular crimes, the same holds for acknowledging the dimensions of a crime, and especially those that the law and the powerful have silenced or ignored. Public embrace of the idea that superiors are abusing their subordinates when they order them to commit crimes can put more pressure on authorities not merely to announce those dynamics in decisions on guilt and sentencing, but to question the fitness for leadership of superiors who do abuse their subordinates in this way. It also would counsel setting boundaries on appropriate ways that individuals may use relationships of authority or hierarchy, regardless of the consent or autonomy of those subject to that authority or at the bottom of the hierarchy.

VI. CONCLUSION

This Article urges a new framing of illegal orders as violations that run from commander to commanded. The current approach of the law—and of our culture—envisions a superior's order to commit a crime as a bridge to that crime, culpable only if the crime is attempted or carried out, and wrongful only in relation to the crime that is attempted or carried out. Under this view, the experience of the person who is subject to the illegal order is erased; the law regards them only as another perpetrator, and neglects that they have been exploited and abused by a person who is violating a duty to protect them. The Article thus seeks to unsettle that terrain, to give voice to that experience, to broaden our understanding of what is being done when a person uses their authority to command crime.

This Article also seeks to spark a larger discussion about authority, in the military and beyond. From the epicenter of this Article, we can look out, beyond the reach of illegal orders, and onto the vistas that expose the many ways superiors invite and coerce and enable their subordinates to commit crimes.[341] Donald Rumsfeld, of course, at times knew better than to order interrogators to torture persons who were detained; instead, he told them "to 'take the gloves off.'"[342] The Army intelligence officer who received those particular instructions questioned John Walker Lindh for days while he was "naked and tied to a stretcher."[343]

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340. WESCHLER, *supra* note 331, at 4 (recounting Nagel's comments).

341. Martha Minow, *Living Up to Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the Superior Orders Defence*, 52 MCGILL L.J. 1, 49 (2007) (describing "hint[s]" like "Get the detainees ready for interrogation" and "Clear the area" that may "convey approval or expectation of abusive or atrocious behavior" and "be interpreted as a powerful directive, especially when communicated by an officer to a young soldier who has been primed to follow [their] superior") (footnotes omitted)).

342. Richard A. Serrano, *Prison Interrogators' Gloves Came Off Before Abu Ghraib*, L.A. TIMES (June 9, 2004, 12:00 AM), https://www.latimes.com/archives/la-xpm-2004-jun-09-fg-prison9-story.html [https://perma.cc/8FRW-NS7H].

343. *Id.*

A further concern in this emerging conversation about authority should be a superior's responsibility not to obfuscate what conduct is permissible and what is not. Indeed, the report of Brigadier General Richard Formica on the abuses at Abu Ghraib concluded that "[t]he soldiers [who participated] believed the techniques had been approved."[344] The explanation in that case had to do with a specific set of interrogation techniques that had been authorized in a memo that was soon quietly rescinded.[345] But this sequence of authorization and rescission was not a mere administrative error; it was rather the product of explicit instructions given and refusals to intervene that signaled that the usual protections of the laws of war did not apply. The *New York Times* spoke with one member of "[a]n Ohio-based Army Reserve unit [that] . . . was [stationed at] Bagram at the time" that two Afghans being detained there died in apparent homicides.[346] The person opined that labelling the detainees "'enemy combatants' not subject to the Geneva Conventions had contributed to an unhealthy attitude in the detention center." In their words, "We were pretty much told that they were nobodies . . . . I think that giving them the distinction of soldier would have changed our attitudes toward them."[347] At Guantánamo, similarly, "when new interrogators arrived they were told they had great flexibility in extracting information from detainees because the Geneva Conventions did not apply at the base."[348]

To be sure, soldiers experience a lack of clarity around morality even without illegal orders. Tim O'Brien famously wrote in *The Things They Carried*:

> For the common soldier, . . . war has the feel—the spiritual texture—of a great ghostly fog, thick and permanent. There is no clarity. Everything swirls. The old rules are no longer binding, the old truths no longer true. Right spills over into wrong. Order blends into chaos,

344. *Wrong Advice Blamed for US Abuse*, BBC NEWS (June 17, 2006, 12:18 PM), https://web.archive.org/web/20070104045041/http://news.bbc.co.uk/2/hi/americas/5090372.stm [https://perma.cc/93GR-SBD8]; *cf.* Elisabeth Jean Wood, *Rape as a Practice of War: Toward a Typology of Political Violence*, 46 POL. & SOC'Y 513, 514–15 (2018) ("When rape is a practice, commanders do not order, authorize, or otherwise promote it—but neither do they effectively prohibit it.").

345. *Wrong Advice Blamed for US Abuse*, *supra* note 344.

346. Douglas Jehl & Andrea Elliott, *The Reach of War: G.I. Instructors; Cuba Base Sent Its Interrogators to Iraqi Prison*, N.Y. TIMES (May 29, 2004), https://www.nytimes.com/2004/05/29/world/the-reach-of-war-gi-instructors-cuba-base-sent-its-interrogators-to-iraqi-prison.html [https://perma.cc/6RFZ-WSAS].

347. *Id.*

348. Neil A. Lewis, *Fresh Details Emerge on Harsh Methods at Guantánamo*, N.Y. TIMES (Jan. 1, 2005), https://www.nytimes.com/2005/01/01/us/fresh-details-emerge-on-harsh-methods-at-guantanamo.html [https://perma.cc/88GT-2TQP]; *see also* Ian Fishback, *A Matter of Honor*, WASH. POST (Sept. 28, 2005), https://www.washingtonpost.com/wp-dyn/content/article/2005/09/27/AR2005092701527.html [https://perma.cc/MRK5-3GKZ] ("[C]onfusion over standards was a major contributor to the prisoner abuse.").

> love into hate, ugliness into beauty, law into anarchy, civility into savagery.[349]

This very ambiguity, however, heightens the superior's obligations and renders comments like "take the gloves off" even more destructive. This does not mean that these types of comments must fit into a separate definition of crime. But if this Article succeeds in its goals, then we will treat this moral muddying not simply as a failure to adequately prevent crime, but as an abuse of a relationship of authority and a violation of a duty under which the superior is supposed to be protecting, clarifying, and facilitating what is right for the subordinate.[350]

And so the next time that a leader toys with the idea of using their subordinates to torture or murder or to illegally amplify their own power, we should not rest easy in our expectation that those subordinates will disobey, will resist, will use their agency to do the right thing. Nor should we let longstanding perceptions of soldiers as mere instruments, mere cannon fodder, deter us from calling out the subordinates subject to orders as exploited and abused by those words. Instead, we should see them as full human subjects, and make explicit the abuse that exists in those words—abuse not only of the victims of the crimes being ordered, but abuse of the individuals who are directed to carry them out.

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349. TIM O'BRIEN, *How to Tell a True War Story*, *in* THE THINGS THEY CARRIED 64, 78 (First Mariner Books 2009) (1990).

350. The creation of ambiguity described here could constitute the basis for superior responsibility, the mode of liability that assigns a superior criminal responsibility for the subordinate's crimes based on failure to prevent or punish that crime. *See* Rome Statute, *supra* note 37, art. 28; *supra* note 284 and accompanying text. Superior responsibility, however, is justified by reference to prevention of the target crime—not by the injury the superior is perpetrating with respect to the subordinate in failing to properly restrain them. *See, e.g.*, ROBINSON, *supra* note 284, at 197–98, 215–18.