

The Globe and Mail (Canada)  
January 5, 1993 Tuesday

**FIFTH COLUMN**  
**LAW AND SOCIETY**

*Bryan Schwartz on people committing crimes when they are 'just following orders'*

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'I WAS just following orders.' Coming from major Nazi war criminals, it was a vile plea. They were leaders in their own right and their commands led to the murder of millions of people. In the aftermath of the Nuremberg trials, it is tempting to insist that "superior orders" are not the slightest defence to anything.

To be true to ourselves, however, we must remain willing to judge individuals in light of their circumstances. Consider the scenario of the new movie *A Few Good Men*.

Two young marines receive a direct order to administer a "code red." That means an underperforming marine is roughed up by his colleagues. High command has actually banned "code reds," but local officers continue to encourage them. The two marines believe they are helping to train their comrade. They set out to intimidate, not injure him. By accident, they cause his death. They are charged with murder. It seems that superior orders should count for at least something in their defence.

At the Nuremberg trial of senior Nazis, the Allied powers gave the judges specific instructions: "superior orders" could not justify acquitting anyone; in some cases, they might justify a lighter sentence. The judges themselves observed that as a matter of general theory, a defendant is not guilty of a war crime if he acted without any opportunity for "moral choice." Exactly what the judges had in mind remains unclear. They might have been thinking of cases in which junior soldiers commit lesser war crimes under duress.

A half-century later, experts are still debating the moral and legal significance of "superior orders." The most sensible approach goes like this. A criminal act involves a mental element: "criminal intent." A superior order is not a defence in itself, but it can be a factor in determining whether the defendant had a guilty state of mind.

Sometimes, superior orders do not warrant the slightest leniency. The Einsatzgruppen trials concluded that the leaders of Nazi extermination squads acted willingly and zealously. They carried out their savage orders with a malice of their own.

On the other hand, a superior order can sometimes contribute to the existence of a legitimate excuse, such as mistake of fact or coercion.

Let's start with "mistake of fact." Suppose a pilot obeys an order to bomb a target. A credible officer has told him it is a command post. In reality, it is a hospital. The pilot would have a valid defence.

WHAT about "mistake of law"? It is unrealistic to expect ordinary soldiers to be fully expert in the international law of war. The existence of a particular rule may be disputable, and how it applies to a complex wartime situation may be even more baffling. Two decades after the war in Vietnam, academics are still arguing over the legality of certain actions, such as the U.S. incursion into Cambodia. Ordinary soldiers may lack "criminal intent" if they are honestly and reasonably mistaken about the legality of their conduct.

A rank-and-file soldier should be able to put some weight on an officer's assurance that an act is legal. Higher authorities will generally have more access to factual and legal information. Some orders are so obviously immoral, however, that no one can reasonably believe them to be lawful. At the My Lai massacre, a number of U.S. soldiers flouted orders to kill civilians.

Coercion (or "duress") is probably a defence under international law. A soldier must conduct a rough "cost-benefit analysis." If the penalty for disobedience is immediate execution, a soldier can be excused for pillaging property. On the other hand, if the penalty for disobedience is demotion and transfer to the front, a soldier must reject an order to massacre civilians.

A more subtle factor than coercion is "inculcation." Lower-level soldiers are trained to follow orders and exhibit solidarity with their unit. As a result, soldiers may develop a sense of "rightness" that does not easily permit them to question orders in their own mind - let alone openly challenge them. "Inculcation" is not the technical name of a defence, but it is a factor that prosecutors and judges sometimes take into account.

Inculcation does not, however, excuse anything and everything. A rank-and-file soldier should be held personally responsible for recognizing wanton cruelty and gross illegality. Nothing can ever excuse the execution of a small child. Senior officers have a responsibility of their own: to train and guide soldiers who remain human beings.

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