

# Collectivist Defenses of the Moral Equality of Combatants

JEFF MCMAHAN

*Department of Philosophy, Rutgers University, New Brunswick, NJ, USA*

**ABSTRACT** *This article examines the view that the doctrine of the moral equality of combatants can be defended by appeal to a collectivist understanding of war, according to which individual combatants on both sides act not in their capacity as individuals but as agents of their collective. I argue that the collectivist argument fails and, moreover, cannot be salvaged by an appeal to the epistemic limitations under which combatants must usually act. Considerations of moral risk in fact suggest that epistemic limitations militate in favor of refusal rather than obedience.*

**KEY WORDS:** Moral equality of combatants, ethics, war, killing, liability

The moral equality of combatants is the doctrine that all combatants in war have the same rights and liabilities irrespective of whether their war is just, provided that they act in accordance with the rules governing the conduct of war, variously known as the principles of *jus in bello* or the rules of International Humanitarian Law. The most important of the rights shared by all combatants is the right to participate in war. This is not what is known as a ‘claim right’, which carries a supplementary right of noninterference. A combatant’s right to fight in war does not entail that others are forbidden to stop him from fighting. It is a mere ‘liberty right’ – in effect, a permission. Thus the main substantive implication of the doctrine of the moral equality of combatants is that combatants do not act impermissibly merely by fighting in a war that lacks a just cause or is otherwise unjust.

The doctrine of the moral equality of combatants implies that those who fight in an unjust war are neither culpable nor liable to punishment merely for fighting. But the denial of the moral equality of combatants does not entail any commitment to the view that those who fight in an unjust war are for that reason culpable or liable to punishment. It is coherent to believe, as I do, that most combatants who fight in unjust wars thereby act impermissibly, that most nevertheless have excuses that mitigate their culpability and are sometimes entirely exculpatory, that many are not liable to punishment, and that even those who are morally liable to punishment because they have no excuse for participating nevertheless ought not, for pragmatic reasons,

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*Correspondence Address:* Jeff McMahan, Professor, Department of Philosophy, Rutgers University, 26 Nichol Avenue, New Brunswick, NJ 08901, USA. E-mail: [mcmahan@philosophy.rutgers.edu](mailto:mcmahan@philosophy.rutgers.edu)

to be punished. Issues of culpability, punishment, and humane versus harsh treatment are all distinct from the moral equality of combatants, though they tend to get run together in many discussions of the doctrine.

Despite the label, the doctrine of the moral equality of combatants can be understood either as a moral or a legal doctrine. Understood as a moral doctrine, its main claim is that one who fights in a war with an unjust cause – an ‘unjust combatant’ – does not do wrong merely because the war is unjust. His moral status is no different from that of a ‘just combatant’, who fights for a just cause. Understood as a legal doctrine, its main claim is that mere participation in an unjust or illegal war is not itself illegal.

The legal doctrine is not in doubt. While some political leaders and certain high-ranking military officers who are involved in the formulation of policy may be prosecuted under international law for the crime of initiating an unjust or illegal war, ordinary soldiers who do the actual fighting need not fear criminal sanction unless they are guilty of war crimes. There is, however, always a question of what the law ought to be. And there is a presumption that the law ought to follow morality. So if the moral doctrine of the equality of combatants is mistaken, that would suggest that there is reason to revise the legal doctrine.

The moral doctrine is hard to defend. Acts of war by unjust combatants serve goals that are unjust. And these acts harm or kill people who seem to be innocent in the generic sense that that term has in the theory of the just war. In a book that contains an influential defense of the moral equality of combatants, Michael Walzer (1977: 146) states this sense of the term when he writes that ‘*innocent* [is] a term of art’ that we apply to people when ‘they have done nothing, and are doing nothing, that entails the loss of their rights’. It does not seem that people can forfeit or lose moral rights simply by defending themselves and other innocent people from unjust attack. If that is so, then those who fight in a just, defensive war and have done nothing else to lose their rights must be innocent in this generic sense. So unjust combatants use wrongful means – the killing of people who are innocent in the relevant sense – to achieve ends that are unjust. It is hard to see how that could be morally permissible.

Some have argued that the moral equality of combatants can be defended if we understand war properly, as a relation between or among collectives rather than as a set of relations among individuals. According to this collectivist view, a combatant acts in war not as a private individual but as an agent of the collective of which he is a member. The morality of his action cannot be understood in isolation from his relation to the collective; indeed it derives directly from that relation.

One might think that a collectivist approach would entail, on the contrary, that the moral equality of combatants is false. For when collective action is wrong, it seems that the wrongness must also be imputed to the individual acts through which collective action is implemented or manifest. This seems implicit in the view of Noam Zohar (1993), who argues for a synthesis of the individualist and collectivist approaches to war. What the collectivist view explains, according to Zohar, is not how it can be permissible for unjust

combatants to fight, but how it can be permissible for just combatants to attack and kill unjust combatants in cases in which the latter are entirely morally innocent. Zohar believes that it cannot be permissible to kill the morally innocent, even in self-defense. But an unjust combatant who is morally innocent as an individual presents himself in war not in his individual but in his collective identity. It is in his capacity as an agent of the guilty collective that he becomes a legitimate target. But by this same logic, the just combatant, both as an individual and as an agent of the collective, retains his immunity to attack and thus is not a legitimate target.

The collectivist approach has, however, been developed in ways that have been thought to block the transmission of wrongness from the collective action of fighting an unjust war to individual acts of war by unjust combatants. Christopher Kutz (2005: 173), for example, argues that ‘the fact that my nation is at war, not me, does not absolve me of responsibility towards my enemy, but it does create a normatively distinct relation between us, one structured through a set of rules specific to our interrelationship as individual members of warring nations’.<sup>1</sup> In the context of war, violence that would otherwise be morally impermissible can become permissible in a special way by virtue of its collective, political character. ‘When individuals’ wills are linked together in politics’, Kutz claims, ‘this affects the normative valence of what they do individually as part of that politics, even to the point of rendering impunable what would otherwise be criminal (156)’. He distinguishes between individual moral permissions and collective political permissions. ‘The privilege to kill as part of a collective is not’, he writes, ‘a moral permission attaching to the individual soldier. A soldier who kills as part of an unjust war morally wrongs those he kills’. But this is compatible with there being ‘an essentially *political* permission to do violence [in war], because when I do violence, I do it as a member of one group towards another (173)’.

As Kutz notes, however, mere membership in a group is obviously not a sufficient basis for a special permission to do violence to members of another group. Collective violence in the context of domestic society that is unauthorized by the state is normally subject to the law of complicity, whereby individuals may become liable to punishment for crimes of violence through certain forms of collective association, even in the absence of any personal engagement in acts of violence. So what, on this collectivist view, distinguishes collective violence in war from collective violence in domestic society, rendering the one impunable at the level of individual action while the other remains criminal?

Kutz’s answer is that the privilege of engaging in violence even for unjust ends can be claimed only by members of ‘political groups [pursuing] political goals, in the sense of aiming at creating (or restoring) a new collective ordering (176)’. A group is political in the relevant sense, rather than criminal, only if it is internally ordered or regulated, has political aims, and has a reasonable prospect of achieving those aims (176–178). The suggestion, then, is that by organizing themselves politically, with internal norms of authority and obedience, individuals can somehow authorize each other to

use violence for political reasons, thereby making it permissible for each to do what none would otherwise be permitted to do.

This, however, presupposes a form of moral alchemy to which it is difficult to give credence. How can certain people's establishment of political relations *among themselves* confer on them a right to harm or kill *others*, when the harming or killing would be impermissible in the absence of the relevant relations? How could it be that merely by acting collectively for political goals, people can shed the moral constraints that bind them when they act merely as individuals, so that it then becomes permissible for them to kill innocent people as a means of achieving their political goals? How could whether the innocent people have a right not to be killed by others depend entirely on the nature of the relations that those others have established among themselves?

I think there are no good answers to these questions. It is morally irrelevant whether the goals a group seeks by violence are political in character. Goals that are paradigmatically political may also be paradigmatically evil – for example, the goal of eliminating a people in order to create an ethnically 'pure' society. It is morally impossible that the collective pursuit of such goals could be self-justifying, or that it could automatically carry immunity to punishment. What matters in the justification of violence is not whether a goal is *political* but whether it is *just* – for example, whether it involves the prevention or correction of a wrong.

If, however, neither political organization nor political goals can alchemically generate permissions to attack or to kill others, then Kutz's original problem remains. Can individuals enjoy a special permission or privilege to engage in collective violence in war when the same forms of action would be criminal if the collectives through which the individuals acted were not states or if their aims were not political? If there is no reason to suppose that political collectives are fundamentally different morally from other forms of collective, then the same account of the morality of collective action should apply to both. The principles governing collective violence in war should be the same as those governing collective action in domestic contexts. If this is right, we face a dilemma. We can hold individual action in war to the same standards to which we hold individual action on behalf of collectives in domestic contexts, insisting on the logic of complicity, or we can treat collective violence in domestic contexts the way it is conventionally treated in war, claiming that even in domestic society individuals acting together as a collective acquire special permissions and exemptions from liability. No one, so far as I know, accepts the latter view; nor is anyone likely to. There is therefore pressure to revise the orthodox view that assigns special permissions and exemptions to unjust combatants in war.

One way to resist this pressure is suggested by Daniel Zupan (2006). According to Zupan, the political organization of a community requires collective decision-making and collective action, which in turn require structures of authority and norms of obedience. It is, in effect, a condition of political organization that people transfer certain of their rights of individual autonomy to the state, thereby committing themselves to

obedience in various areas of action – particularly in the use of violence against other political collectives. The combatant's justification for participation in war thus derives from his submission to political authority, to which he has rightfully subordinated his private will in the matter of war. This justification applies equally to all combatants, just and unjust alike.

There are, however, limits to what can be justified in this way. One can see this by noting that the same considerations apply in the case of lesser, nonpolitical collectives as well. Any group that engages in collective action on the basis of participatory decision-making procedures can bind its members to obedience with respect to certain collective decisions. Yet no one supposes that the commitment to obedience in such cases is absolute or cannot be overridden. If collective decision-making results in a demand that a member engage in seriously wrongful action, that member must, in this instance at least, repudiate the authority of the collective. If her refusal proves harmful to the group, that is the cost the group must bear for the malfunctioning of its decision-procedure.<sup>2</sup>

Often, however, an individual's conscientious refusal to obey a legitimately authorized command to participate in collective wrongdoing is not harmful to the collective but, on the contrary, serves the collective's higher interests by deterring, restraining, or impeding it in the commission of a great wrong or injustice. As has often been observed, when the collective veers in the direction of evil, loyalty may require dissent, refusal, and obstruction, even at considerable personal cost. Just as most of us would want our children, for their own sake, to be virtuous even at some cost in happiness, so we should want any collective with which we are identified to refrain, for its own good, from committing a grave injustice, even if restraint would involve some cost in prosperity or power.

These claims apply equally, or perhaps especially, to political collectives, including the state itself. The only difference is that political organization, particularly in the case of the state, is typically more important than other forms of collective organization, and therefore generates stronger reasons for obedience. But even when these reasons are at their strongest – when they derive from membership in a legitimate state that is democratic and otherwise internally just – their justificatory power remains limited. No individual can transfer his rights of autonomy to the state in such a way that he ceases to be an autonomous agent and thus becomes exempt from moral constraints such as the prohibition of intentionally attacking and killing people who are innocent in the relevant sense.

Zupan concedes this, or at least comes very close to conceding it. He asks (2006): 'What about those cases where the soldier really does know his country is involved in an unjust war? Stated this way, it would be difficult to justify his participation. If he actually knew what anyone could know from some sort of objective or God's-eye view, namely, that his side was unjust, could he justifiably go to war, knowing that he'd be complicitous in what would amount to mass murder? Probably not'. Kutz (2005: 173–74) offers a similar concession: 'When the injustice of the war is clear, so is the justice of

prosecuting the aggressors in that war', including ordinary combatants acting on orders. Collective action does not exclude individual responsibility.

Both Kutz and Zupan appeal to epistemic considerations at this point. Kutz notes that most of us accept that moral luck can affect the evaluation of a war. Whether a war is just may depend on how things turn out in the long run, which may not be predictable at the outset. 'A war's justification', he writes (2005: 175), 'might emerge *post bellum*, in the epistemological sense that while in advance the warrant for military action might have been deeply controversial... facts available after the war might render that initial judgment much less controversial'.

Zupan (2006) makes a similar but stronger claim. The degree to which one can be certain that a war is unjust must be quite high, he assumes, to make it impermissible for one to participate in the war. But that degree of certainty is in practice never possible. The various epistemic constraints to which an ordinary combatant is subject are such that his "knowing" his war to be unjust turns out to be something he literally cannot do'.

So the collectivist argument is acknowledged, even by its most persuasive defenders, to be insufficient on its own to support the moral equality of combatants. It must be supplemented and reinforced by an appeal to epistemic limitation. The overall argument, then, seems to be this. For people to organize themselves politically and act collectively, it is necessary for them to surrender certain rights of individual autonomy. War is a case of collective political action in which it is particularly important that individuals subordinate private judgment to political authority. There is therefore a strong presumption of the permissibility – indeed the necessity – of obedience. This presumption can be defeated when it is certain that a war in which one has been commanded to fight is unjust. But when there is significant uncertainty about whether a war is just or unjust, the presumption in favor of obedience stands.

This way of locating the burden of justification relative to epistemic considerations dates back at least to Vitoria (1991: 307), who argues that '*if the war seems patently unjust to the subject, he must not fight, even if he is ordered to do so by the prince*'. This is obvious, since one may not lawfully kill an innocent man on any authority, and in the case we are speaking of the enemy must be innocent. Therefore it is unlawful to kill them'.<sup>3</sup> Yet in cases of uncertainty, Vitoria (1991: 311) takes a strong contrary view, claiming that 'subjects are not merely permitted to follow their prince into battle... where the justice of the cause is in doubt, but are indeed bound to do so'. In this he invokes the authority of Augustine, whom he quotes (312) as asserting that, 'If ordered to do so, a just man may righteously go to war, even under a sacrilegious king, so long as he is either certain the order is not against God's precept, or uncertain whether it is'.<sup>4</sup> But Vitoria adds to this appeal to authority a pragmatic claim about erring on the side of caution: 'In cases of doubt', he argues, 'the safer course should be followed; but if subjects fail to obey the prince in war from scruples of doubt, they run the risk of betraying the commonwealth into the hands of the enemy, which is much worse than

fighting the enemy, doubts notwithstanding; therefore they had better fight (1991: 311–312)'.

There are large issues here that I am unable to pursue as deeply as I would like. But as a start, let us consider the position of a person who has been ordered by his government to participate in a war that has just recently begun. He may be an active-duty member of the military who enlisted before there was any indication that this war would be fought. Or he may be a civilian who is being conscripted for service in this war. He has, we may suppose, little knowledge of the politics or history of the region in which the war is being fought. He has had comparatively little education and certainly no instruction in the theory of the just war or in international law, and finds it difficult to evaluate the case that his government has presented in favor of the war. But he knows that in his society there is considerable disagreement about whether the war is just and he finds some of the objections to the war that he has heard quite plausible. He has, however, very little time in which to decide what to do. Ought he to fight or to refuse?

The collectivist views I have been considering say that he ought to fight. He is a member of an organized political collective whose interests are at stake and whose decision-making procedures for collective action have authorized the resort to war. Since he is uncertain about the morality of the war, the presumption is in favor of obedience.

It is certainly true that considerations connected with the importance of political organization and cooperation favor obedience. But it may be that the claims about epistemic limitation to which Kutz and Zupan appeal in fact exert pressure in the opposite direction. As an individual moral agent, this potential combatant has to weigh the gravity of the wrong he will do if he fights and the war turns out to be unjust against the gravity of the wrong he will do if he refuses to fight and the war turns out to be just. He has to consider, in other words, the comparative moral risks of fighting and not fighting.

If he fights and the war is just, he will presumably make some contribution to the prevention of injustice and perhaps even to the saving of innocent lives. If he refuses, he will have failed to do his part in preventing injustice and protecting the innocent. But the consequences would not be as dire as Vitoria suggests. For Vitoria is concerned with what would happen if a significant number of potential combatants refused to fight – something that is unlikely to happen unless a war is grossly and obviously unjust or irresponsible. A single individual's conscientious refusal to fight is unlikely to have any effect on the outcome of a war.

If our potential combatant fights and the war is unjust, he will kill innocent people and contribute in some small way to the achievement of his collective's unjust aims. If he refuses, he will avoid being responsible for these serious wrongs.

These reflections suggest that the 'safer course', contrary to Vitoria, is to refuse to fight. This option is safer not in terms of the security of this person's collective but in terms of the *moral risks* that he faces as a moral agent. He is

less likely to act in a seriously wrongful way, and less likely to be responsible for the deaths of innocent people, if he refuses to fight.

One response to this point is to claim that where consequences are concerned, it makes very little difference whether he participates or not. If he fights, he will either protect or kill innocent people, depending on whether his cause is just or unjust. But if he does not fight, he will be replaced by someone else who is likely to be about as effective as he would have been in either protecting or killing the innocent. Refusal to participate, then, would be an empty gesture. He ought, therefore, to obey his collective's legitimately authorized command to fight.

This does not show, however, that the moral risk of participation is no greater than that of refusal to participate. If anything, it shows only that the moral risks cannot be cashed out solely in terms of consequences. The principal consideration that favors refusal is that if he fights and the war is unjust, he will *kill* innocent people, whereas if he refuses and the war is just, he will have failed to kill some people who are relevantly noninnocent, thereby, let us assume, *allowing* them to kill innocent people on his own side, such as combatants he could have protected had he been present. It may well be that if he does not fight, his replacement will kill as many innocents as he would have, or will save as many innocents as he would have. But that does not seem to affect in any substantial way the strength of *his* reason not to kill the innocent, or to protect the innocent. And most of us accept that, in general, one's reason *not to kill* the innocent is significantly stronger than one's reason to prevent, or *not to allow*, the killing of the innocent by others.

Focusing on the moral risks of participation and refusal yields a different presumption from that identified by the collectivist argument. The upshot of the focus on moral risk is that in certain cases involving uncertainty about the morality of a war, the burden of justification lies with those who would urge participation. The collectivist argument does not establish a presumption in favor of participation; rather, it has to be strong enough to rebut the presumption against risking killing the innocent.

This 'argument from moral risk' exerts pressure in the direction of a contingent form of pacifism. But this pressure can be effectively resisted if we take account, as of course we must, of the varying degrees of credibility of the arguments for and against the claim that a particular war is just. We can seldom be *certain* that a war is unjust, particularly when its outcome is not yet in view. To this extent Kutz and Zupan are right, and the condition in which Vitoria says that refusal is required seldom obtains. But it is often possible, after serious and sustained reflection, to have a high degree of confidence that a war is just or unjust, even if some uncertainty remains. If one is epistemically justified in having a high degree of confidence that a war is just, that can be sufficient for the argument from moral risk to yield a verdict in favor of participation – a verdict that may be reinforced by the collectivist argument.

Suppose, however, that a potential combatant is not warranted in having a high degree of confidence that the war in which he has been ordered to fight is just, or that it is unjust. Suppose that, on careful consideration, he finds the particular reasons that favor the war and those that oppose it to be rather

finely balanced. Even in these circumstances it is not obvious that the collectivist argument tips the scales in favor of participation. For in addition to the consideration that participation risks killing the innocent while refusal risks allowing the innocent to die, there is a further reason why epistemic considerations favor refusal.

I think it is obvious that there have been more wars that have been unjust on both sides than wars that have been just on both sides.<sup>5</sup> This follows as a matter of logic if, as most theorists of the just war have believed, it is possible for a war to be unjust on both sides but not possible for a war to be just on both sides. But if it is right that more wars have been unjust on both sides than just on both sides, and if all other wars have been just on one side and unjust on the other, it follows that when people have been ordered to fight in the past, more often than not they were being ordered to fight in an unjust war. And there is no reason to suppose that the situation is any different today. This reflection challenges the view that if the specific considerations favoring and opposing the justice of a war seem finely balanced, the default view is that if the authority of the collective demands participation, participation is morally required.

It is because governments regularly manipulate, deceive, and coerce their citizens in order to get them to fight in unjust wars that Zupan's hypothetical example of the two teams of police set against one another by their chief provides only a distant analogy to war. In this example, each team is misled to believe that the other poses a threat to it. I agree with Zupan that there is a plausible subjective account of permissibility according to which the police officers on each team act permissibly in attacking the others. They act permissibly because they are *fully justified*, in the circumstances, in holding certain beliefs that, if true, would make their action objectively justified. They are justified in believing what their chief tells them because it almost never happens that police officers are deceived by their superiors in the way they are in this example.

But the background conditions in which potential combatants deliberate about whether to participate in a war are utterly different. Everyone knows that there are unjust wars – indeed, that in virtually all wars at least one side fights unjustly – and that most of those who fight in unjust wars mistakenly believe that their war is just. We even understand *why* most unjust combatants believe their cause is just. Typically their government will have concealed certain facts, fabricated 'evidence' that supports its case, manipulated and bullied the media, and so on. Combatants themselves are usually aware that their own perspective is limited and they view their government as the upholder and enforcer of morality in their society; therefore they tend to regard its judgments as authoritative and to defer to them. It is also difficult for them even to suspect that they may be acting criminally when they are aware that their own motives are benign. But if we all know these facts about unjust combatants generally, why should any potential combatant assume that he is different, that unlike combatants in other countries or at other times, he surely cannot be misled into serving as an instrument of injustice?

It is true, of course, that background conditions vary considerably from country to country. For example, in light of Switzerland's long record of nonaggression and neutrality, it may well be the 'safer course' for any Swiss who is ordered to fight to do so. But there are not many states in which citizens or soldiers would be entitled to take at face value their government's assurance that a war in which it demands that they fight is just. It seems to me, therefore, that the collectivist argument fails in its own terms and that the epistemic considerations to which collectivists tend to appeal in order to buttress that argument turn out to be a treacherous source of support.

## Notes

- <sup>1</sup> For another powerful articulation of the collectivist view, see Fletcher (2002: 3–9 and chs 3 and 4).
- <sup>2</sup> For elaboration of this point, see McMahan (2006).
- <sup>3</sup> For Vitoria, the 'seems' is important, for he is a subjectivist about permissibility, as we see when he claims further (308) that 'if their conscience tells subjects that the war is unjust, *they must not go to war even if their conscience is wrong*'.
- <sup>4</sup> The relevant passage from Augustine's *Contra Faustum* (22:75) is differently translated in Dyson (2001: 177–78), as follows: 'A righteous man, even if serving under an ungodly king, may do the duty belonging to his position in the commonwealth by fighting according to the command of his sovereign – for in some cases it is clearly the will of God that he should fight, and in others, where this is not so clear, it may be an unrighteous command on the part of the king, but the soldier is innocent because his position makes obedience a duty'. In this translation, Augustine seems to embrace a version of the collectivist argument.
- <sup>5</sup> In an influential paper called 'War and Murder', Elizabeth Anscombe (1981: 52) wrote that 'human pride, malice and cruelty are so usual that it is true to say that most wars have been mere wickedness on both sides'.

## References

- Anscombe, E. (1981) *Ethics, Religion, and Politics: Collected Philosophical Papers*, vol. 3 (Minneapolis, MN: University of Minnesota Press).
- De Vitoria, F. (1991) On the Law of War, in A. Pagden and J. Lawrance (Eds), *Francisco De Vitoria: Political Writings* (Cambridge: Cambridge University Press).
- Dyson, R. W. (2001) *The Pilgrim City: Social and Political Ideas in the Writings of St. Augustine of Hippo* (Woodbridge, UK: The Boydell Press).
- Fletcher, G. P. (2002) *Romantics at War: Glory and Guilt in the Age of Terrorism* (Princeton, NJ: Princeton University Press).
- Kutz, C. (2005) The Difference Uniforms Make: Collective Violence in Criminal Law and War, *Philosophy and Public Affairs*, 33(2), pp. 148–180.
- McMahan, J. (2006) On the moral equality of combatants, *Journal of Political Philosophy*, 14(4), pp. 377–393.
- Walzer, M. (1977) *Just and Unjust Wars* (Harmondsworth: Penguin).
- Zohar, N. J. (1993) Collective war and individualist ethics: against the conscription of 'self-defense', *Political Theory*, 21(4), pp. 606–622.

## Biography

**Jeff McMahan** is Professor of Philosophy at Rutgers University. He is the author of *The Ethics of Killing: Problems at the Margins of Life* (Oxford University Press, 2002). He is currently working on three books on war: *The Ethics of Killing in War*, *The Morality and Law of War*, and *The Ethics of Killing: Self-Defense, War, and Punishment*.