

On the Moral Equality of Combatants*

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I. THE DOCTRINE OF THE MORAL EQUALITY OF COMBATANTS

THERE'S a well-known scene in Shakespeare's *Henry V* in which the King, disguised as an ordinary soldier, is conversing with some of his soldiers on the eve of the battle of Agincourt. Hoping to find or inspire support among them, he remarks: "Methinks I could not die anywhere so contented as in the King's company, his cause being just and his quarrel honorable." One soldier replies: "That's more than we know," whereupon a second says: "Ay, or more than we should seek after; for we know enough if we know we are the King's subjects: if his cause be wrong, our obedience to the King wipes the crime of it out of us."¹

I don't know whether Shakespeare recognized the now familiar legal distinction between justification and excuse. But if he had meant for this soldier to be claiming only an excuse, he probably would have had him say that the King's authority wipes the *guilt* from them. But instead he says that it clears them of the *crime*: that is, even if the cause for which they fight is wrong, they commit no crime, or do no wrong, in fighting for it.

This has been the dominant view about participation in an unjust war throughout history. And it's central to the theory of the just war in its currently orthodox form. According to contemporary just war theory, the principles governing the conduct of war make no distinction between soldiers whose war is just and those whose war is unjust. These principles are held to be equally satisfiable by all those who fight. According to the theory, combatants do wrong if they violate these principles, though not if their war contravenes the principles that determine whether a war is just. For these latter principles apply only to those who have a role in deciding whether to resort to war, or to keep a war going.

*This article is the text of the first of three Uehiro Lectures that I presented at the Oxford Uehiro Centre for Practical Ethics in May and June of 2006. A revised and expanded version of this lecture will be published, along with expanded versions of the two other lectures, in a book provisionally titled *The Ethics of Killing in War*. This book will appear in the Clarendon Press's Oxford Uehiro Series in Practical Ethics under the editorship of Julian Savulescu. The other two lectures deal, respectively, with whether the exculpating factors that often apply to unjust combatants impose a requirement of restraint in fighting against them, and whether civilians can be morally liable to military attack.

¹IV.i.128–35.

Michael Walzer, the most distinguished proponent of the just war theory in its contemporary form, refers to the idea that combatants on all sides in a war have the same rights, immunities and liabilities as the “moral equality of soldiers.” I will refer to this as the “moral equality of combatants,” since the term “soldiers” doesn’t obviously include air and naval personnel. All combatants, he says, have an “equal right to kill.” Although Walzer is asserting a moral claim, he might equally have been citing international law, which holds that it’s not a crime merely to participate in an unjust war. Combatants act illegally only if they violate the laws that regulate the conduct of war.

A war can be unjust for various reasons. It might, for example, be fought for a just cause but be unnecessary for the achievement of that cause, or disproportionately destructive relative to the importance of the cause. Usually, however, wars are unjust because they’re fought for a *cause* that’s unjust. I’ll refer to combatants who fight for an unjust cause as “unjust combatants” and to combatants who fight in a just war as “just combatants.” These categories are not exhaustive because they leave out combatants who fight in unjust wars which have just causes.

My remarks will focus on the more common cases in which war is unjust because the cause for which it’s fought is itself unjust. Though many of my subsequent claims will apply to combatants who fight in wars that are unjust for other reasons, I’m restricting the focus of my argument because it’s in cases in which a war’s goals are unjust that the doctrine of the moral equality of combatants is least plausible. If it can be shown that the doctrine is indefensible in these cases, that will be sufficient to refute it, since it’s supposed to be universal in scope and application. No one, to my knowledge, claims that it’s impermissible to fight in a war with an unjust cause yet permissible to fight in a war that has a just cause but is unnecessary or disproportionate, or in a war that has a good aim that doesn’t rise to the level of a just cause.²

Although I will sometimes characterize the moral equality of combatants as asserting that unjust combatants don’t act wrongly as long as they obey the rules governing the conduct of war, it would be a caricature of the doctrine to say that it holds that every single combatant who fights according to the rules acts permissibly. The doctrine actually asserts a weaker claim: that on its own it’s not a reason to believe that a combatant acts wrongly that the war in which he fights is unjust. Thus, a proponent of the doctrine might consistently hold the Augustinian view that a combatant acts wrongly if he fights out of hatred for the enemy, or for the pleasure of killing. This would apply to just and unjust combatants alike and would thus preserve the essential claim that it’s not a reason to regard different combatants as morally unequal, or as having different rights, that some fight for a just cause while others don’t.

²For the distinction between a good cause and a just cause, see Jeff McMahan, “Just cause for war,” *Ethics and International Affairs*, 19 (2005), 1–21.

Although the doctrine of the moral equality of combatants has been the dominant view throughout history, it's hard to see how it could be correct as a matter of basic morality. In part that's because it's hard to see how *any* means to the achievement of an unjust end could be anything other than wrongful – unless, perhaps, it were simultaneously an end in itself that was just, or a means to another end that was just, and achieving the just end would morally outweigh bringing about the unjust end.

But an equally important reason why participation in an unjust war seems wrong is that those against whom unjust combatants fight are *innocent* in the relevant sense. This may seem a strange claim. For in the context of war, “innocent” is usually treated as synonymous with “civilian.” Yet “innocent” has *two* distinct uses in discourse about war that are commonly assumed to coincide. My claim invokes the other sense, which is acknowledged by Walzer when he notes 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.”³ The reason that the two senses are generally thought to coincide is that civilians aren't engaged in the activity of war and thus are assumed to have done nothing to lose their right not to be attacked.

But even if all civilians are innocent in this second sense, that doesn't mean that *only* civilians have this status. Suppose that a malicious person attacks you unjustly. Would you lose your right not to be attacked by him simply by trying to defend yourself? No. People don't lose moral rights by justifiably defending themselves or other innocent people against unjust attack; therefore, unless they lose rights for some reason other than acquiring combatant status, just combatants are innocent in the relevant sense. So, even when unjust combatants confine their attacks to military targets, they kill innocent people. Most of us believe that it's normally wrong to kill innocent people even as a means of achieving a goal that's *just*. How, then, could it be permissible to kill innocent people as a means of achieving goals that are *unjust*?

In effect, what I'm asserting is that unjust combatants can't satisfy the traditional requirement of discrimination in its generic formulation – that is, the requirement to attack only legitimate targets. I've argued elsewhere that they also can't satisfy the other principal constraint on the conduct of war: the requirement of proportionality.⁴ Acts of war by unjust combatants can't in general satisfy this requirement because any good effects they might have can't serve to justify, and therefore can't weigh against, the killing or maiming of innocent people.

These objections seem obvious enough. I believe that they conclusively demonstrate the moral *inequality* of combatants at the level of basic morality. Yet even after considering them, most people remain convinced that unjust combatants do not act wrongly merely by fighting in an unjust war. So, rather

³Michael Walzer, *Just and Unjust Wars* (Harmondsworth: Penguin, 1977), p. 146.

⁴Jeff McMahan, “The ethics of killing in war,” *Ethics*, 114, (2004), 693–733, especially pp. 708–18.

than further developing the arguments against the doctrine of the moral equality of combatants, I propose to explore the reasons why people are reluctant to accept that unjust combatants act wrongly in fighting. My concern here is with normative rather than explanatory reasons, and in what follows I'll examine the most cogent arguments that I've been able to find or to devise in support of the orthodox doctrine of the equality of combatants.⁵

II. THE TRADITIONAL CRITERION OF LIABILITY TO ATTACK

I have noted that “innocent” has two distinct meanings in discourse about war but that they are commonly assumed to coincide. The sense in which “innocent” is virtually synonymous with “civilian” is given by etymology. The Latin *nocentes* means “those who injure or are harmful.” The innocent are those who are not *nocentes* – those who aren't threatening or harmful. Those who are not threatening will also be those who retain their right not to be attacked if one loses this right by posing a threat to others. This is precisely the traditional view. According to Walzer, “our right not to be attacked . . . is lost by those who bear arms ‘effectively’ because they pose a danger to other people. It is retained by those who don't bear arms at all.”⁶ This is the foundation of the virtually unquestioned premise of contemporary just war theory that the distinction between legitimate and illegitimate targets coincides with that between combatants and noncombatants.

But, as I noted earlier, the idea that one loses the right not to be attacked merely by posing a threat to others has no plausibility outside the context of war. Many people think, however, that war is somehow different. They think that even unjust combatants have, at a minimum, the right to defend themselves on the battlefield. But if this is true, we need to know exactly what it is about the circumstances of war that causes people to lose their rights merely by justifiably defending themselves and others against an unprovoked attack – something that doesn't happen outside the context of war. But to identify this special feature of war, if such a feature exists, would be to offer an argument that goes beyond the simple, traditional claim that combatants make themselves liable to attack merely by posing a threat to others. What might that argument be?

III. CONSENT

A. THE BOXING MATCH MODEL OF WAR

Two such arguments are suggested in the following passage from Walzer:

⁵In *The Ethics of Killing in War* I will identify some confusions that I believe motivate people's commitment to the doctrine of the moral equality of combatants.

⁶*Just and Unjust Wars*, p. 145. On p. 136 he claims that “simply by fighting . . . [combatants] have lost their title to life and liberty.”

The moral reality of war can be summed up in this way: when soldiers fight freely, choosing one another as enemies and designing their own battles, their war is not a crime; when they fight without freedom, their war is not their crime. In both cases, military conduct is governed by rules; but in the first the rules rest on mutuality and consent, in the second on a shared servitude.⁷

According to the first of these suggestions, war is analogous to a boxing match or a duel. Just as it's part of the profession of boxing to consent to be hit by one's opponents, so combatants understand that they and their adversaries are all fulfilling their professional role and at least implicitly they consent to be done to by their adversaries as they are doing unto them.

There are, however, three objections to this view, each of which seems decisive on its own. First, it's just false to suppose that combatants universally, or even generally, consent to be attacked by their adversaries. This is particularly obvious in the case of people who're forced to become combatants by unjust aggression against their homeland. It's absurd to imagine such people consenting, even implicitly, to be killed by invaders.

Second, suppose they did consent. This alone wouldn't make it permissible to kill them. Sometimes a person's consent contributes to making it permissible to kill him – for example, when a person wishes to be killed because his life has ceased to be worth living or because he has some other good reason to wish to die (for example, to make his organs available to save his child). But it doesn't seem that a person's merely consenting to be attacked can, in the absence of a good reason for consenting, make it permissible for another to kill him. It is generally wrong, for example, to kill a person in a duel even if he has consented to participate.

Third, even if all combatants did consent and even if their consent would mean that they wouldn't be wronged by being killed, it wouldn't follow that unjust combatants do no wrong in fighting. For acts of war by unjust combatants aren't wrong only because they kill and injure just combatants. Attacks by unjust combatants against just combatants are merely instrumental to the ultimate aim of the war: the achievement of the unjust cause, which would have other victims. So just combatants aren't the only people who are threatened or wronged by those who fight for an unjust cause. Because of this, acts of war by unjust combatants couldn't be rendered permissible by the consent of the just combatants against whom they fight.

Note that the same is true of the kind of war that would best fit Walzer's description: a war between rival mercenary armies for control of some area. In the actual cases that are most like this, *all* the combatants on both sides are arguably unjust combatants. Perhaps none would be wronged by being killed. But in such cases, even a combatant who attacks only members of the opposing

⁷*Just and Unjust Wars*, p. 37.

army and doesn't wrong them in doing so is still acting wrongly because his action is instrumental to the achievement of an unjust cause.

B. THE GLADIATORIAL COMBAT MODEL OF WAR

Walzer's second suggestion is that in some wars the combatants on all sides are coerced to fight. In these circumstances, the acts of war of unjust combatants aren't attributable *as crimes* to the combatants themselves. Responsibility lies instead with those who have coerced them. But how can duress justify what they do? Suppose someone puts a gun to your head and credibly threatens to kill you unless you fight me to the death. The threat to your life doesn't give you a right to try to kill me, any more than a failing organ would give you the right to kill me in order to help yourself to mine. Similarly, threats used to coerce unjust combatants to fight can't justify their fighting, though they may be exculpating to a degree roughly proportional to the severity of the threatened harm.⁸

Walzer's reference to "*shared servitude*" does, however, invite an alternative interpretation, which views war as analogous to coerced gladiatorial combat. In most instances of gladiatorial combat – a form of entertainment that amused the Romans for eight centuries without provoking any significant moral protest – both contestants were coerced to fight by a threat of immediate execution if they refused. But if both fought, the winner would be spared. If he subsequently achieved further victories, he might eventually win his freedom. In most cases, therefore, it was in the interest of each for both to fight. For each could see, in advance, that the prospect of one surviving would be better for each than the prospect of neither surviving. While one might have sacrificed himself for the other by allowing the other to slay him, that couldn't coherently have been morally required of both and thus must have been supererogatory. It seems, therefore, that each was permitted to try to kill the other and that the vanquished was wronged not by the victor but only by those who compelled them both to fight.

This does, therefore, seem to be a case in which "*shared servitude*" yields a justification for killing on both sides. The problem is that war is seldom, if ever, like this. While there is a relatively new form of warfare that increasingly resembles mass gladiatorial combat – namely, war in which units of heavily armed and often drugged children are hurled against one another to fight on behalf of their adult captors – most combatants don't fight as a consequence of irresistible coercion. It's almost never true that most or all of the combatants on both sides will be killed by their own commanders if they refuse to fight;

⁸For a dissenting view of duress, see Peter Westen and James Mangiafico, "The criminal defense of duress: a justification, not an excuse – and why it matters," *Buffalo Criminal Law Review*, 6 (2003), 833–950.

therefore, it's almost never true that it's better for combatants on both sides if they all fight, on the ground that more will survive that way than if they don't fight.

There's also another obvious failure of analogy, which is that gladiators fight only for self-preservation and their action has few effects beyond what they do to each other. But, as I noted in criticizing the boxing match model, the acts of unjust combatants serve an unjust cause and are therefore wrong for reasons unconnected with the harms they inflict on just combatants.

Both of Walzer's suggestions presuppose highly unrealistic conceptions of the nature of war: that war is a conflict between armies whose members all freely choose to fight rather than being driven to fight by their commanders or their adversaries, or that it's a conflict between armies whose members are all irresistibly compelled to fight by their own commanders. In all wars involving just and unjust combatants, many among the just combatants are compelled to fight, though only by the moral necessity of defending themselves and others against unjust aggression, while others may fight for a variety of reasons, including coercion by their commanders. But few fight "freely," as they might if war were genuinely optional. Among unjust combatants, many may fight under varying degrees of duress but there are always many who fight for other reasons, including profit, adventure and commitment to the unjust cause. In no actual war do all consent; in no actual war are all mere slaves.

C. HYPOTHETICAL CONSENT

It might be claimed that even though combatants don't in fact consent to be attacked by their adversaries, it would nevertheless be rational for them all to agree, in advance, to accept principles that would permit them all to fight rather than principles that would condemn those who fight in wars with an unjust cause. For they know that when they're ordered to fight, there's a chance that their cause will be unjust but that they won't know this or will fight in spite of their suspicions, as most military personnel do. In other words, they can see in advance that it's more a matter of luck than anything else whether they'll be on the just or unjust side in future conflicts; but whatever side they're on, they'll want to be able to defend themselves. So they would consent to be governed by rules that permit combatants on both sides to fight.⁹

One response to this appeal to hypothetical consent merely repeats what I said in response to the claims about actual consent: that consent by opposing combatants can't render acts of war by unjust combatants permissible when these acts are also instrumental to the achievement of an unjust cause. But perhaps the appeal to hypothetical consent at least mitigates the overall wrongness of participating in a war with an unjust cause by eliminating the objection that acts

⁹I'm indebted to Raymond Martin for suggesting to me a version of this argument.

of war by unjust combatants wrong the just combatants who are their targets. This might be correct if it really would be rational for all combatants to agree in advance to be governed by principles that would permit all to fight irrespective of whether their cause was just. Yet it seems that this wouldn't in fact be rational, since potential combatants would have more reason to accept a principle that would require them to attempt to determine whether their cause would be just and to fight only if they could reasonably believe that it would be. If they were to accept that principle, there would be fewer unjust wars and fewer deaths among potential combatants. Each potential combatant would be less likely to be used as an instrument of injustice and less likely to die in the service of unjust ends.

IV. THE ARGUMENT FROM INSTITUTIONAL COMMITMENT

In many countries, the military is a morally important institution. It functions to deter various threats to the society it serves and to defend that society when deterrence fails. But for the military to serve these purposes effectively, those who occupy roles within it must fulfill their institutional duties consistently rather than act on their private judgment on a case-by-case basis. The military, even more than most other institutions, depends on a division of moral labor. Because military institutions are typically large and complex but have to be able to react quickly and efficiently in moments of crisis, they're organized hierarchically with a rigid chain of command. Success or failure, which can make the difference between life and death for many people, may depend on whether those lower in the chain immediately and unhesitatingly obey the orders they receive from above. The exigencies of war may afford no time for those lower down to engage in reflection, and the necessity of classifying information may in any case deprive them of resources necessary for informed deliberation. The institution, in other words, may better achieve its morally important aims if those who occupy certain roles within it surrender their autonomy and defer to the authority of those above them in the chain of command. Overall, the moral aims that the institution is designed to serve will be better achieved if people within the military don't act on their own moral judgment, at least in matters of *jus ad bellum*. This, it might be argued, is what makes it morally justifiable for combatants to fight in wars in which they're commanded to fight, even when a war turns out to be unjust. They may be presented with conflicting reasons, but their moral reason not to fight in what they may believe to be an unjust war is overridden by their moral reason to fulfill their role within the military in order not to subvert the institution.

There is an analogy here with legal institutions. The criminal justice system is designed to produce just outcomes when all those who occupy roles within it fulfill their designated functions rather than acting on the basis of personal moral judgment. For example, institutional design is premised on the requirement that lawyers make every effort to ensure the acquittal of their clients, even when they reasonably believe that their client is guilty. Their working vigorously for an

acquittal of course runs the risk of securing the release of a guilty and dangerous person, but overall this is thought to be the best way to balance the risks of punishing the innocent and freeing the guilty. Here we find a paradigm of the division of moral labor. It's the task of the court, not the police or jailer, to determine whether a person is guilty or innocent. Once the court has reached its verdict, it's the jailer's task to keep the convicted person in jail. The moral purposes of legal institutions would be undermined if jailers were to release convicted prisoners they believed to be innocent, or if they were to collude with the police in imprisoning people who'd been acquitted but whom they personally believed to be guilty.

This general argument has considerable plausibility. There are indeed many instances in which a person can be morally required by his role within a just institution to do what, in the absence of the institutional demand, it would be impermissible to do. But the argument also suffers from a great many limitations, especially in its application to the problem of participation in an unjust war.

There are limits to what a person can be morally required to do by his role within a just institution. Even if the limits are set rather high, many of the forms of action required by participation in an unjust war go beyond them. Killing people who've done no wrong and collaborating in depriving others of their freedom and political independence lie beyond what can become permissible through institutional commitments. Similarly, though we may accept that a jailer mustn't free a prisoner he knows to be innocent, but must instead seek legal means of securing the prisoner's release, it's hard to accept that an executioner would be justified in executing a person he knows to be innocent if he could instead enable that person to escape.

Notice, too, that this "argument from institutional commitment" applies only to acts required by the functioning of institutions that are just. What the argument asserts is the moral necessity of upholding the efficient functioning of just institutions, even if on occasion that requires one to act in a way that is, at least in its local effects, unjust. But there's no moral requirement, in the face of countervailing considerations, to fulfill a role in an institution that doesn't serve moral purposes, much less in an institution that serves immoral purposes. The Nazi military, for example, was an instrument of aggression, conquest and mass murder. As an institution, it could not impose moral requirements on its members. The same is true of all other military institutions, such as Iraq's Republican Guard, that are designed and structured for external aggression and domestic repression, torture and murder. What this shows is that, even if the argument from institutional commitment could justify participation in an unjust war by members of a military that normally serves just goals, the argument doesn't apply universally. It can't, therefore, support the doctrine of the moral equality of combatants, which holds that whether an individual combatant acts wrongly is unaffected by whether his war is unjust or indeed by whether the government or military he serves is unjust or illegitimate.

It seems, however, that whether it's morally justifiable for combatants in the military chain of command to defer to the judgment of a superior officer depends, crucially, on the moral character of the military institution they serve, which in turn may depend on the nature and history of the larger institutions in which it's embedded. Today, in 2006, it may well be justifiable for a soldier in the Swedish army to defer unreflectively, in matters of *jus ad bellum*, to the authority of those higher in the chain of command. But the form of justification available to this soldier is unavailable to soldiers in a great many other contemporary armies.

According to the argument from institutional commitment, the source of the moral permissibility of fighting in an unjust war is the threat to military institutions and the moral purposes they serve that would arise if potential combatants were permitted to exercise private judgment in determining whether or not to fight. Their duty to sustain the functioning of the military overrides conflicting duties. It is, however, open to doubt whether the efficient functioning of the military would be fatally compromised by a weakening of the automaticity of obedience to orders to fight in a war. The history of war shows that it's relatively easy to get people to fight in any war, no matter how obviously unjust it may be. Wars that political leaders are determined to fight do tend to get fought. Mass insubordination or mutiny is comparatively rare, especially when motivated by moral concerns.

So even if potential combatants were encouraged to deliberate morally about whether to participate in a war in which they were ordered to fight, the effects would probably be very limited. It is, indeed, doubtful that the effects would be perceptible at all in the case of a just war of national defense. For when people's homeland is under attack, and their own lives and the lives of those they care about are wrongfully threatened, they tend to show great determination to fight, even against overwhelming odds.

Resistance to orders is, of course, more likely to occur and to affect military efficiency in the case of unjust wars – as became increasingly evident as the Vietnam war progressed. But, at least where the local effects are concerned, it's difficult to maintain that this is undesirable. Conscientious refusal to fight in an unjust war can reduce the probability that the war's unjust ends will be achieved, hasten the end of the war, thereby reducing the number of casualties, and contribute to the deterrence of further unjust wars.

But, while true as far as it goes, this response is overly simplistic. An unjust war can be an aberration in the history of a country and its military. A military organization that's currently prosecuting an unjust war may nevertheless be on balance a just institution that it's important to preserve for a variety of reasons. In such a case, might the need to preserve the institution override the importance even of impeding its prosecution of an unjust war?

In answering this question, we can't ignore considerations of justice. When the malfunctioning of political and military institutions results in unjust war, who ought, as a matter of justice, to pay the cost? It seems that when an institution

malfunctions in a harmful way, those who designed, direct, participate in and benefit from the institution are liable to pay the costs. They are responsible for the institution's functioning by virtue of having established and administered it as a means of furthering their purposes. It would be unjust if they were to impose the costs of its malfunctioning on others.

It makes a difference, in other words, if the victims of the malfunctioning of an institution are among those whom the institution is designed to serve. Particularly if they have in some way consented to accept the risks in exchange for the benefits of having the institution, or if they have actually benefited from it, the injustice they suffer if they are made victims by its aberrant malfunctioning is less than it would be otherwise. Thus, a person who occupies a role in an institution that is just overall may have a strong moral reason to continue to adhere to the requirements of her role even when she believes that the institution is functioning unjustly, provided that the victims are members of the group the institution serves. But if the victims aren't members of the group by and for whom the institution has been constructed, as is true when a normally just military fights an unjust war, the reason a participant has to fulfill the requirements of her role must generally yield to the demands of justice. Certainly it must yield when the conflicting demand is that she not kill the innocent.

It's usually assumed to be obvious that significant conscientious refusal to fight in an unjust war by active duty military personnel would have a devastating effect on the integrity and continued capacity for efficient functioning of the military. The case of the Israeli Defense Force (IDF) suggests otherwise. In 1982, when Israel invaded Lebanon, a group of soldiers refused to participate on the ground that they could not in conscience participate when the lawful borders of their country had not been threatened. The group later took the name "Yesh Gvul" ("there is a limit"). Twenty years later, a second group of IDF officers and soldiers, "Courage to Refuse," declared their refusal to serve in missions in the Occupied Territories. In both cases there was no apparent diminution of the IDF's ability to fight just wars of defense and it's arguable that on both occasions military and political institutions in Israel emerged in an overall healthier condition as a consequence of the democratic debate these groups stimulated.¹⁰

An argument can be made that unjust wars themselves can be more harmful to military institutions than the resistance they may provoke within the military. At present, the US Army is experiencing serious difficulty in recruiting enlisted personnel and the retention rate for young officers is alarmingly low. More than a third of the West Point class of 2000 retired from active duty at the earliest

¹⁰For a brief account of both groups and the effects of their action, see Guy Grossman and Rami Kaplan, "Refusal in Israel: the third wave 2002–2005," *Journal of Peace Review* 18, forthcoming. (The authors were co-founders of Courage to Refuse). For an important contribution to the debate in Israel, see David Enoch, "Some arguments against conscientious objection and civil disobedience refuted," *Israel Law Review*, 36 (2004), 227–53.

possible point, in 2005.¹¹ While the explanation for these problems is complex, it's uncontroversial that one of the causes is a reluctance to participate in the war in Iraq, which is widely perceived to be unjust.

If we look back over the history of war, which has been the more significant problem: the unwillingness of potential combatants to fight in just wars and the consequent undermining of just military institutions, or the willingness of people to fight in unjust wars? The argument from institutional commitment stands or falls with the answer to this question.

Before concluding this section, it's worth returning briefly to the analogy with legal institutions. Our legal institutions constitute an exemplary instance of the division of moral labor precisely because they include an impartial procedure based on the presumption of innocence that has been designed to be epistemically more reliable than any individual judgment. This is why it's rational for jailers and others to subordinate their private judgment to the judgment of the court. But in the matter of resort to war, there's no comparable procedure that's designed to yield an impartial and epistemically well-grounded decision. In the US, for example, the only constraint on the resort to war by the executive is a requirement of congressional authorization – a requirement that can be fudged, as it was when the Johnson administration treated the Gulf of Tonkin resolution as authorization for war in Vietnam, or can be obtained with comparative ease when the party of the President controls both houses of Congress, as was the case when Congress authorized the present Bush administration's war in Iraq. There are no institutional or procedural mechanisms that ensure that moral considerations are even taken into account, much less taken seriously, in decisions concerning resort to war. Thus, if the executive branch is staffed, as it is at present, with persons who are dishonest, unscrupulous and contemptuous of the mass of people they're supposed to serve, and who have no understanding of or concern for matters of morality, there is no reason to suppose that their determinations about the resort to war have even a modest presumptive moral authority.

From the point of view of the potential combatant in the US at present, and in a great many other countries as well, the analogy with well-functioning domestic legal institutions is therefore wholly irrelevant. One should add, however, that *if* we eventually have institutional procedures governing the resort to war that are as effective in delivering reliable judgments as our legal institutions are now in reaching reliable judgments about individual guilt and innocence, the epistemic situation of the ordinary combatant will be very different and the argument from institutional commitment will have considerably more force than it does in present conditions. Formal procedures for the resort to war that have a high degree of moral reliability are an extremely important goal in the design of future domestic and international institutions.

¹¹“Young officers leaving army at a high rate,” *New York Times*, April 10, 2006.

V. SUBJECTIVE JUSTIFICATION

One point that's often made in defense of participation in an unjust war is that it's normally very hard for an ordinary combatant to determine whether the war in which he's been ordered to fight is just or unjust. The factual information accessible to him is limited and may have been distorted by the political leadership. He typically has no familiarity with just war theory or training in moral philosophy, and in any case he may have little opportunity for careful moral reflection. When the moral and legal authorities in his society tend to agree that a war is just (or even when they can't reach consensus) and the legitimate government orders him to fight, it seems reasonable for him to defer to the authority and the judgment of the government.

These reflections can be expanded into an argument for the moral equality of combatants. There are two premises. The first is a principle stating a subjective account of permissible action. According to this principle, one acts permissibly if (1) some of the beliefs one has that are relevant to what one ought to do are false but are reasonable or epistemically justified in the circumstances and if (2) one acts in a way that would be objectively justified if those beliefs were true. The second premise is that it's reasonable, for the reasons given in the preceding paragraph, for combatants to defer to the judgment of the political authorities in their society and therefore to accept that the war in which they're commanded to fight is just. This will be true whether or not the war really is just. From these two premises it follows that all combatants, just and unjust alike, are permitted to fight when commanded to do so. I'll call this the "epistemological argument" for the moral equality of combatants.

The subjective account of permissible action might be understood as an account of when an act is morally justified, but only in a weak sense of justification. In both the moral and legal literature on the distinction between justification and excuse, there's an ambiguity in the notion of justification. Some writers understand justification to entail more than mere permission. By the claim that an agent is justified in doing a certain act, they mean that she has a right to act in that way, which in turn implies that others have a duty not to prevent her from doing so. A subjective account of justification in this strong sense is, in my view, implausible. On such a view, a reasonable but mistaken belief could be the source of a right. By contrast, the principle in the argument I'm considering implies that a reasonable but false belief can make it *permissible* for an agent to do an act that would otherwise be wrong, but can't give her a *right* to do it.

I will not dispute this subjective account of permissibility except to note that those who accept it should be aware that it may commit them to certain unwelcome conclusions. For example, if it's reasonable for an uneducated teenage boy to defer to the judgment both of his parents and of the political and theological authorities in his society, then it may be permissible, on this view, for him to kill as many innocent people as he can in a terrorist suicide bombing. Or,

if it's reasonable for an ordinary soldier to defer to the judgment of his superior officer in the heat of battle, then it may be permissible for him to kill a group of children who're in fact harmless because the officer suspects that they may be child soldiers.

The reason why the epistemological argument is unsuccessful is that the second premise is false. While it's *sometimes* reasonable for unjust combatants to believe that their war is just, it isn't always. But the doctrine of the moral equality of combatants doesn't hold that participation in an unjust war can be permissible provided that one reasonably believes that the war is just; it holds, rather, that combatants aren't responsible for whether their war is just and therefore don't do wrong if they obey an order to fight even if they reasonably and correctly believe that the war is unjust.

But a proponent of the doctrine might be willing to settle for a more modest version. Suppose that the epistemological argument shows that most unjust combatants – the vast majority – don't act wrongly merely by fighting in an unjust war. A proponent of the doctrine could then argue that, since in war we can't distinguish between unjust combatants who reasonably believe that their war is just and those who know it's unjust or whose belief that it's just is unreasonable, in practice we must always act on the presumption that unjust combatants act permissibly. This weaker, partly pragmatic version of the doctrine may be all that many people have in mind when they register their agreement with the doctrine.

But I think that even this more modest view is false. It's probably true that most unjust combatants believe that their cause is just. But it's false that this belief is usually reasonable. I think, in fact, that it's seldom reasonable.

What it's reasonable for combatants to believe obviously depends on what evidence is available to them and how difficult it is for them to get access to it and to understand its significance. But it also depends on how important it is that their beliefs should be true. The standard for reasonable belief may be quite low in the case of beliefs that are insignificant. But what combatants are considering is whether to kill people of whom they have no personal knowledge and what they need to know is whether that would be permissible. The standard for whether a belief about this matter is reasonable is high. For a belief about this matter to count as reasonable, the person whose belief it is must have done some epistemic work – for example, by investigating the facts and engaging in serious moral reflection.

There are certain background considerations that are readily accessible to potential combatants deliberating about whether a war is just. One that's particularly salient in the US at present is that governments lie to their people when they want to go to war but there's no morally compelling reason to do so. Experience has repeatedly shown that in a matter as serious as war, it is unwarranted to trust in the wisdom and honesty of even a democratically elected government and therefore unreasonable simply to defer to its judgment. A second

consideration that's obvious with only a little reflection is that throughout history most of the combatants who have fought in wars have done so in the absence of a just cause. This follows from the plausible assumption that wars in which both (or all) sides have a just cause (which most theorists in the just war tradition have denied is possible at all) occur less frequently than wars in which no side has a just cause. This alone should prompt grave doubts about the moral reliability of governments in the matter of resort to war.

There are, moreover, certain features of a war that should raise doubts about whether its cause is just. If, for example, a combatant is ordered to fight in a foreign country that hasn't itself invaded another country, and if those he's fighting against live in the territory where the fighting is occurring, and in particular if they aren't feared or betrayed by the local civilian population but on the contrary are able to hide and find shelter and support among the territory's inhabitants, then this combatant has *prima facie* evidence that his cause is unjust that he can't reasonably ignore. For it to be reasonable for a combatant in these circumstances to believe that his cause is just, he must have a highly compelling explanation of how these features of the war are compatible with the war's being just.

VI. SYMMETRICAL DISOBEDIENCE?

If combatants should disobey an order to fight when they think a war is unjust, should they also disobey an order *not* to fight when they think a war would be just? That is, ought they to initiate and fight just wars without authorization, or even in opposition to a command not to?¹²

It seems that there ought to be symmetry here. Yet in one respect there can't be. While an individual can refuse to participate in a war, that individual can't start or fight a war on his own. War is a collective activity.

Still, it can be said that if individual combatants ought to disobey an order to fight in a war that's unjust, then it should also be permissible for them to act together to fight a war that's just, even if they've been ordered not to. But clearly we don't want members of the military to go to war on their own, without proper authorization. The subordination of the military to civilian control is part of what's required by the traditional just war theory's principle of legitimate authority.

I believe, therefore, that there is a certain asymmetry. In general, combatants ought not to obey an order to fight in an unjust war but they also ought not to fight in a just war unless they're ordered to do so, and certainly not if they're ordered not to. Yet the impermissibility of war that's not properly authorized is not, in my view, a matter of fundamental principle but is instead a largely

¹²This challenge is suggested in Cheney Ryan, "The responsibility of soldiers and a new symmetry problem," (unpublished manuscript), and in Colonel Daniel Zupan, "The logic of community, ignorance, and the presumption of moral equality: a soldier's story," (unpublished manuscript).

pragmatic matter. War has such serious consequences, both for those warred against and for those who're led into it, that it must be subject to institutional constraints designed to ensure that it's not undertaken without moral justification.

But it's possible, certainly in principle and occasionally in practice, for it to be permissible, or even obligatory, for people to band together to fight a war in the absence of proper political authorization, and perhaps even in defiance of legitimate orders to the contrary. A *levee en masse* in response to unexpected aggression for which the government is unprepared is one example. Or, to take a couple of recent actual cases, I think it would have been permissible for volunteers, including reservists or other military personnel on leave from active duty from any country in the world, to have organized and participated in a coordinated military response to the Serbian genocide against Bosnian Muslims between 1992 and 1994 or to the genocidal slaughter of the Tutsi by the Hutu in Rwanda in 1994 – cases in which the Clinton administration was too pusillanimous to act.¹³

So, while in practice there is a general asymmetry between disobeying an order to fight in an unjust war and disobeying an order not to fight in a just war, in principle there is at least a limited symmetry. Just as it can be necessary for a combatant to resist an order to participate in an unjust war, it can be – though rarely is – permissible for a combatant to disobey an order not to fight in a war that's just.

VII. CONSCIENTIOUS REFUSAL

What are the practical implications of the argument I've been developing? The principal lesson I believe we should draw is that we must reject the complacent view of the orthodox theory of the just war that combatants do nothing wrong by fighting in a war with an unjust cause, or indeed in any unjust war. We should stop telling combatants that they needn't concern themselves with whether their war is just and that they will be doing all that's required of them if they simply obey orders and conduct themselves honorably on the battlefield. We ought instead to encourage moral reflection, even among active duty military personnel, and not only about what it's permissible to do during war but also about when it's permissible to participate in war at all.

This means that we have to break the grip of certain assumptions that have been with us for many centuries. We must foster a different moral and intellectual culture in matters of war. We should cease to treat combatants as instruments and instead recognize them as morally autonomous beings. But we must also insist that they too abandon the comforting fiction that responsibility for their action

¹³See Samantha Power, *"A Problem From Hell": America and the Age of Genocide* (New York: HarperCollins, 2002), chs 9 and 10.

lies not with them but with those who're the source of their orders, so that their obedience to the President wipes any crime out of them.

Since people in the military are more likely than most other people to be used as instruments of serious wrongdoing and injustice, they have a stronger reason than most others to remain knowledgeable about politics and world events and to strive to understand the morality of war. Their vocation is not only morally important but also morally perilous; they *must* seek to understand the moral constraints by which it's governed.

But as members of the society they serve and protect, we owe it to them to do what we can to reduce their burden in complying with the demands of morality. We should train them not just for combat but also for the exercise of moral and political judgment. And we should make institutional provisions to mitigate the costs to them of morally conscientious action. We should, for example, establish some provision for conscientious refusal to fight even among active duty military personnel. This will of course strike many people as utterly unrealistic, but I think the examples of the Israeli conscientious objectors that I mentioned earlier show that on this issue we may have a rather unrealistic sense of what's realistic.

Any provision for conscientious refusal by active duty personnel would of course be vulnerable to abuse. Cowards and malingerers could seek to exploit such a provision for reasons of self-interest. Selective conscientious refusal to fight would, therefore, have to carry significant penalties to deter abuse. The penalties could range from forfeiture of the benefits of military service, such as educational assistance and retirement funds, through compulsory public service, to imprisonment.

Military personnel who exercise their right of conscientious refusal, after receiving wages, training and so on from the military, would have to submit to the penalties in order to demonstrate their sincerity and respect for the law. While their action needn't be an instance of conscientious objection, in that it needn't be intended to make a public statement, they might be compelled, like those who engage in conscientious objection, to make themselves martyrs to morality.