

Foreword

Selective Conscientious Objection

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According to international law and international criminal law, soldiers do not act illegally by fighting in an illegal war, provided they obey the laws that govern the conduct of war (*jus in bello*). Similarly, and presumably on the basis of the same considerations that have shaped the law of armed conflict, the traditional theory of the just war holds that soldiers do no wrong by fighting in a war that is unjust, provided they do not violate the moral principles of *jus in bello*. If the traditional theory is right, most conscientious objectors are simply mistaken. For if fighting by the rules is always morally permissible, even in a war that is unjust, then there can be no general moral basis for refusing to fight, and hence nothing for a person's conscience to object to. While it is obvious that just war theory rejects the pacifist claim that morality requires conscientious refusal to participate in any war, it is surprising that it also denies that there is any general moral objection to participation in wars that fail to meet the conditions of a just war and thus, by implication, denies that there is any general moral basis for selective conscientious objection to participation in wars that are impermissible by the theory's own lights. But, while this seems a clear implication of the traditional theory, I know of no traditional just war theorists who have called attention to it. (When I say that traditional just war theory implies that there is no *general* moral basis for selective conscientious objection, I mean to allow for the possibility that a person may have a moral reason for refusing to fight that is specific to his individual situation, such as that he has promised his mother that he will never fight in an unjust war. We need not consider such possibilities here.)

In recent years many philosophers, myself included, have argued that traditional just war theory is itself mistaken. They have argued that the moral permissibility of fighting in a war cannot be divorced from the aims of the war. Consider, for example, a soldier who is fighting in a war that is intended to achieve only aims that are unjust. Suppose that he is not under threat, so that his purpose in firing his weapons is not self-defense but only to contribute to winning the war. He is therefore killing soldiers on the opposing side, who have done nothing wrong, as a means of achieving unjust aims. His reason for killing them is only that they are attempting to defend themselves and others from unjust aggression – that is, he is killing them as a means of preventing them from justifiably obstructing the achievement of unjust aims. It is difficult to see how that could be morally permissible.

Just war theorists often say that the reason it is permissible to fight in an unjust war is that the moral principles that govern the resort to war, the principles of *jus ad bellum*, apply only to states and their authorized leaders, not to individual soldiers. That is, it is only the state that may not fight if the war would be unjust. That it is impermissible for the state to fight is supposed to be compatible with its being permissible for the soldiers to fight (though what the difference is between their fighting at the command of the state and the state's fighting is rather obscure). The parallel claim about the law of *jus ad*

bellum – that it is illegal for the state to fight but legal for its soldiers to fight – is certainly true, for that law was intentionally designed to give soldiers immunity from legal liability to punishment as long as they fight by legally permissible means, no matter how obviously illegal their war may be. In the world as it is, there are sound reasons to grant this conditional immunity. For immunity from punishment, which combatants forfeit if they violate the laws of *jus in bello*, is intended as an incentive for adherence to those laws. The law in effect offers combatants a deal: even if the war in which they are fighting is criminal, it offers them immunity from punishment, as well as humane treatment if they are captured, in exchange for their obedience to certain rules, the most important of which is the prohibition of intentional attacks on civilians. But this and other related reasons for granting combatants legal immunity from punishment for fighting in an unjust and criminal war are not reasons for supposing that fighting in such a war is morally permissible. While morality may dictate that in certain circumstances we design and enforce certain rules with the aim of manipulating people's behavior through the use of incentives and penalties, it is not itself a set of such rules.

Another often proposed explanation of why it is permissible to fight in an unjust war is that responsibility for the war, and for the soldiers' participation in the war, lies exclusively with the state's political leaders. A soldier is, in Augustine's words, "but the sword in the hand of him who uses it, [and so] is not himself responsible for the death he deals."¹ But there are many objections to this, each of which seems conclusive.² One is that if one can deliberate about whether to do an act, it cannot be true that, if one decides to do it, all responsibility for one's action will lie with someone else. But even if it were true that all responsibility for one's act would go to someone else, it would not follow that it would be permissible for one to do the act. It cannot become permissible to do an otherwise impermissible act just because the responsibility for it would go to someone else. At most, all that would follow from one's lack of responsibility is that one would be excused.

Defenders of the traditional theory of the just war have of course advanced other arguments to show that even in the most obviously unjust wars, fighting in accordance with the rules is always permissible. But these arguments have, in my view, been no more successful than the two just cited.³ So let us assume that it is morally impermissible to kill people solely because they are soldiers who impede the achievement of unjust aims in an unjust war. Consider, then, a soldier in a democratic society who has been commanded to fight in a war that is intended to achieve aims that are all objectively unjust. Suppose he knows that the war is unjust and that if he fights in it he will kill people who are merely attempting, by discriminate, necessary, and proportionate means, to defend themselves and others against his state's unjust aggression. Suppose he recognizes that it is impermissible for him to fight and on that ground refuses to do so. How ought his society to respond?

In contemporary democracies, selective conscientious objectors within the military are comparatively rare and are often dealt with informally – for example, by being assigned a role that does not involve combat or even close combat support. This is less troublesome than forcing such people into disobedience and then punishing them for it, which would

inevitably provoke unwelcome controversy. But if a sufficient number of soldiers were to refuse on moral grounds to fight, it might not be feasible to reassign them all to non-combat functions. At some point, the military, and the government it serves, must implement a prearranged policy for dealing with conscientious objectors.

The central issue addressed by the essays in this book is whether a state may permissibly prohibit and penalize selective conscientious objection, particularly by active-duty members of the military, or whether it ought to provide legal options for conscientious objection, perhaps combined with certain nonpunitive penalties imposed to deter exploitation of these options by those who seek to avoid combat for nonmoral reasons.

One relevant consideration that seems uncontroversial is that if a war is objectively unjust and the state punishes a soldier who conscientiously refuses to fight in it, the state thereby wrongs that soldier. In fighting an unjust war, a state wrongs many people. It wrongs all those on the opposing side, both soldiers and civilians, who are harmed by the war fought against them. But it also wrongs its own soldiers. It wrongs them if it deceives them into fighting voluntarily and it wrongs them if it coerces them to fight through a threat of punishment for refusing to fight. It is obvious that they are wronged by being made to expose themselves to grave risks for the sake of goals that are unjust. And it is a further, distinctive wrong to be made, through deception or duress, to act in ways that are objectively immoral. So when a state's war is unjust, the state wrongs its own soldiers whether it succeeds in getting them to fight or fails to do so and then punishes them for disobedience.

The problem, however, is that while punishing selective conscientious objectors wrongs them when they are right that the war is unjust, it may not wrong them if they are mistaken and the war is in fact just. Yet a policy for dealing with selective conscientious objectors must operate in conditions of uncertainty and disagreement, in which, at least at present, there is no impartial and authoritative source of judgment about whether a war is just or unjust.

One might say, then, that the punishment of selective conscientious objectors simply carries the same risk that is inherent in all forms of state punishment – namely, the risk of mistakes that will result in the punishment and wronging of innocent people. And, just as the aims achieved by punishment in general – social defense, deterrence of crime, and so on – outweigh the inevitable but relatively infrequent mistakes, so, one might argue, the values threatened by selective conscientious objection are sufficiently important to justify the inevitable mistakes made in the punishment of selective conscientious objectors. Central among these values is the ability to fight efficiently in a just war, particularly a just war of national self-defense. If soldiers were to have the legal right to opt out of particular wars, there would be greater uncertainty about their state's ability to fight effectively, even in a just war of self-defense. For some soldiers may sincerely believe that a war that is in fact just is unjust, while others may exploit the option of selective conscientious objection to evade, for nonmoral reasons, their duty to fight. Furthermore, any uncertainty about the state's ability to fight would have the further effect of weakening its ability to deter aggression against it.

There are, however, relevant differences between the punishment of selective conscientious objection and the punishment of criminal action in general. Unlike most criminals, most people who claim to be selective conscientious objectors are acting on the basis of sincere moral convictions that, even when mistaken, are based on a generally beneficial reluctance to cause harm. There is also a major difference between the two cases in the ratio between instances of punishment that wrong the victim and those that do not. Because of the presumption of innocence and the burden of proof required for conviction, the percentage of convictions that result in the punishment of the innocent is relatively low. But the situation is different with the punishment of selective conscientious objectors. This is because there are at least as many unjust wars as there are just wars, and possibly more. For whenever there is a just war, it seems that the adversary against which it is fought must be fighting an unjust war. Moreover, given the highly plausible assumption that soldiers are more likely to object on moral grounds to participation in a war that is in fact unjust than to a war that is in fact just, it follows that any sincere conscientious objector is statistically more likely to be justified than to be unjustified. Hence the punishment of any particular selective conscientious objector is more likely than not to wrong him.

There are various other relevant differences between criminal punishment in general and the prohibition and punishment of selective conscientious objection but I will mention only one more. This is that while the deterrent effects of the punishment of ordinary crime are generally good, and socially desirable, the deterrent effects of punishing selective conscientious objection are mixed: some good, some bad. The good effect I have already mentioned: it is that there is a greater guarantee of military efficiency and effectiveness when the probability of any significant level of disobedience is low. This is highly important when a state needs to fight a just war. But there is an important bad effect that is less often noted, which is that soldiers are also deterred from refusing to participate in unjust wars, which makes it easier for governments to initiate such wars. If governments instead had to fear conscientious objection on a significant scale in response to the initiation of an unjust war, they would be less likely even to try. For a significant level of conscientious objection within a state's own military would be profoundly humiliating and delegitimizing to the government. If soldiers were to believe that participation in a war that lacks a just cause is morally wrong, and if there were a legal option of selective conscientious objection by active-duty soldiers, the effect would almost certainly be a decrease in the number of unjust wars, which would have as a corollary a decrease in the need to fight just wars in response.

Perhaps the most significant question, then, is which effect of having a legal option of selective conscientious objection would be greater: the inhibition of unjust wars or the weakening of the ability of states to fight just wars (and the consequent weakening of deterrence of unjust wars). It seems clear that an option of selective conscientious objection would be much more likely to be exercised in the case of a war that is in fact unjust than in a war that is just. This is in part because, as history shows, there is a strong bias toward believing that a war fought by one's own state must be just. This bias may be particularly strong among soldiers who have been commanded to fight. For there are

usually many pressures operating to get them to fight and if they can foresee that these pressures are likely to succeed, they may seek, if only subconsciously, to shield themselves from guilt by allowing themselves to be convinced that the war is just. Because of this natural bias, it is quite easy for soldiers to believe that an unjust war in which they have been commanded to fight is just and quite difficult for them to believe that a just war is unjust. And, at least in the case of a just war of national self-defense, any reasons they might have to believe that it is unjust are likely to be opposed by considerations of self-interest. Thus, while soldiers who believe their state's war is just are in general at least as likely to be wrong as to be right, those who believe their state's war is unjust are in general more likely than not to be right.

This alone, however, is insufficient to settle the matter, for there is another disturbing complication. It is primarily liberal, democratic, and largely unaggressive states that are most likely to permit selective conscientious objection. States that are more aggressively disposed, particularly those that are undemocratic, are unlikely to be impressed by the arguments in favor of selective conscientious objection. But if the unaggressive states permit conscientious objection while the aggressive ones do not, that could give aggressors a systematic advantage over their victims.

It may not be enough to appeal again to the claim that soldiers are highly unlikely to mistake their own state's just war of national self-defense for an unjust war. But there is more that can be said. One point is that some democratic societies have already experimented with certain forms of conscientious objection and do not seem to have suffered any ill effects as a result. In the United States, for example, soldiers are not just permitted but legally required to disobey a "manifestly unlawful order" received in the course of a war. A hundred years ago this would have been unthinkable. The response to such an idea would have been that it would wholly undermine the chain of command and lead to paralysis on the battlefield. But that has not happened. Proposals for legally permitting selective conscientious objection by serving military personnel seek to extend this permission from the *jus in bello* to *jus ad bellum*. But they are significantly weaker, in that they propose that we permit, but not require, disobedience to a manifestly unlawful order to fight at all.

Another point is that the alternative to granting rights of selective conscientious objection is to force soldiers to bear an unfair share of the burden of national security. They are already asked to bear the physical risks of combat. And they bear the moral risk of inadvertently engaging in gravely immoral action, which in turn increases the risk of profound psychological damage if they survive the war. Meanwhile the civilian beneficiaries of their action, for all their pious expressions of "support for our brave men and women in uniform," do nothing to provide them with more impartial moral guidance than that which they receive from their government. It may seem intolerable if, in addition to this, the society punishes them when they have the courage and strength of character to refuse to do its bidding when it demands that they kill people as a means of achieving unjust aims. It may well be that a fair distribution of the burdens in society requires that civilians share some of the risks that go with respecting moral constraints on the pursuit of national security.

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- ¹ Augustine, *The City of God*, translated by Marcus Dods (New York: Modern Library, 1950), Book I, chapter 21, p. 27.
- ² Jeff McMahan, “War,” in David Estlund, ed., *The Oxford Handbook of Political Philosophy* (New York: Oxford University Press, 2012), pp. 308-9.
- ³ For critical discussions of the other main arguments, see Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009), chapters 1 and 2.