

On Following Orders in an Unjust War*

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IS a soldier morally obligated to obey ordinary (including lethal) commands, even when the war is unjust? I will argue that under the right conditions, the answer is “yes.” What drives me is hardly a pro-authority impulse, but rather a conviction that this kind of authority depends on demanding background conditions. Counterbalancing the authoritarian aspect of my argument is (among other things) a democratic imperative that warring nations have not often heeded. To this extent, declarations of war have often lacked the authority that would require soldiers to obey.

The view taken here stands between two extant views of the matter. Some have held that if the war is unjust then the soldier is morally equivalent to a murderer. Others have held that the soldier’s obedience to his state automatically sanitizes his participation in an unjust war (even if there might yet be impermissible ways of fighting it). I will argue that when the political and institutional process producing the commands is duly looking after the question whether the war is just, the soldier would be wrong to substitute his own private verdict and thwart the state’s will. On the other hand, these pre-conditions are substantial, and the soldier will need to think for himself about whether they are met. The soldier is not exonerated simply because he was following orders. On the other hand, when the state and its procedures are of the right kind the soldier’s participation in an unjust war is sanitized precisely because he was following orders.

Jus in bello, or justice in the conduct of war, is traditionally contrasted with *jus ad bellum*, or the justice of going to war. This traditional bifurcation (I will sometimes call it the *ad/in* distinction) leaves my question more or less out of the picture. The issue I want to consider arises for soldiers even if all issues of the justice of a war, and all issues of justice in the conduct of war are settled. Suppose that a war which is unjust to wage will nevertheless be fought with

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otherwise just means. This allows us to take all issues of both kinds as settled. And yet my question remains: should the soldier obey the order to fight? This seems closer to the standard questions about conscientious refusal. But these are ordinarily posed in the context of conscription: when may a drafted citizen refuse to join or fight on the basis of moral objection to this or to all wars? But my question arises even if all soldiers have joined the armed forces voluntarily, as I will assume here. The fact that a soldier joined the services voluntarily is clearly not a blanket permission to engage in atrocities in the conduct of war. Similarly, I think, it does not immediately answer whether he is obligated to fight even an unjust war. I will take for granted that if the war is just and the commands are within the rules of war, the soldier normally has a duty to obey. By the “rules of war,” I mean whatever the moral content of *jus in bello* and *jus ad bellum* really is. This is bound to be affected in certain ways by treaties and other legal issues, but it is better thought of as more discovered than created.

There are questions about how soldiers come to be under the authority of their commanders at all, but to concentrate on my issue I will assume there are no problems of that kind in our examples. Suppose, if it helps, that our soldiers have volunteered and given informed consent to the rule of their superiors.

So, I will mean by the term, *normally binding* orders:

orders that, at least if the army is justly in the war, a.) are issued with legitimate authority, and b.) command acts that soldiers would be required to carry out if the war were just.

Now, suppose the soldier’s army is unjustly at war, or that the soldier believes it is. Either way, the soldier faces the same question, and I will take it up in this form:

Ought I to obey this normally binding command, even though my side is (apparently) unjust in pursuing this war?

I. SOME EXTANT VIEWS

Vitoria, in a brief but fascinating treatment of this question, 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.¹

Vitoria’s argument anticipates the modern rejection of the “Nuremberg defense,” in which someone defends their participation in grave wrongs by pointing out, as

¹Francisco de Vitoria, “On the law of war,” *Political Writings*, ed. Anthony Pagden and Jeremy Lawrence (Cambridge: Cambridge University Press, 1991, originally published 1539), p. 307.

Nazi officials did at the Nuremberg trials, that they were only following orders.² I believe Vitoria is wrong about this, and that our attitude toward the Nuremberg defense needs to be refined.

A few terminological preliminaries: First, by “lawfully,” let’s assume Vitoria means permissibly, morally speaking. Second, by “innocent” we will not mean non-combatants, which is how the term is often used in discussing the ethics of war.³ Vitoria realizes that the victims of unjust wars are often combatant soldiers, but he counts them as innocent when the war against them is unjust. Their killing wrongs them, and they are innocent in that sense. Defining innocence in that way might seem to build the answer to our question into the definition. If the victim is wronged, doesn’t that already guarantee that the soldier is wrong to do it? I do not believe that it does, and this is important in understanding my argument. My thesis is precisely that under the right conditions, even though the victim is wronged by the unjustly warring side, the soldier on that side is nevertheless morally obligated (and so morally permitted) to follow all normally binding orders—those that would be binding at least if the war were just.

Vitoria says that the soldier on the unjust side is morally wrong, and surely the wrong in question is a grave one. Robert Nozick takes a similar view, arguing that if the soldier doesn’t manage to get himself out of such a situation, he is indeed at a “moral disadvantage.”⁴ One way to make this sound plausible is to say that the description of the action, “knowingly killing an innocent person,” still applies even if it is also correctly described as “obeying orders,” or “obeying the law.” If knowingly killing an innocent person is always wrong, then it is wrong even in these cases.⁵

On the other side, there is Michael Walzer’s position, that the soldier who is following normally binding commands is not to blame for the injustice of the war.⁶ Walzer’s view is that there are duties of patriotism, a nobility to answering the call of one’s country, that puts the soldier beyond criticism unless he violates the rules of *jus in bello*. Walzer’s view is disconcerting, knowing as we do that armies are often ordered into the most flagrantly immoral wars by the most flagrantly criminal governments, even if the rules of *jus in bello* might happen to be respected. We would need to know what morally accounts for the overriding value of such a blind patriotism, when a more discerning version of patriotism might be available. One thing that Walzer’s view gets right, though, is that

²For a thorough account of the Nuremberg Trials see Robert E. Conot, *Justice at Nuremberg* (New York: Harper and Row, 1983).

³Lionel McPherson critically discusses uses of innocence and the combatant/non-combatant distinction in these contexts in “Innocence and responsibility in war,” *Canadian Journal of Philosophy*, 34 (2004), 485–506.

⁴Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974), p. 100. Jeff McMahan takes a similar view in, “The ethics of killing in war,” *Ethics*, 114 (2004), 693–733.

⁵Arthur Applbaum discusses the significance of this fact that “descriptions persist”; *Ethics for Adversaries* (Princeton, N.J.: Princeton University Press, 2000).

⁶*Just and Unjust Wars*, Basic Books, 1977, ch. 3, esp. pp. 34–40.

sometimes a person's moral duty is to follow even unjust orders. We can see this by turning to non-military contexts first.

II. THE JAILER

Knowingly killing an innocent person is not always wrong. Indeed, even when the killing wrongs the person, the person doing the killing is not always acting wrongly. I begin with the more general question whether it is always wrong intentionally to harm an innocent person. A good illustration for our purposes concerns a jailer:

Jason the jailer has seen the convict's trial on television. The jury was fooled, and exonerating evidence was presented but ignored. They have made a grave mistake and the jailer knows it: the man is innocent. The trial was properly conducted, under fair and sound procedural rules duly protective of a defendant's interests. These rules were not broken by the participants. The jurors were of normal capacities and made a good-faith effort at a strong presumption of innocence. The jailer could look the other way, and allow the convicted man to escape his 20 year sentence, without anyone knowing it was intentional. Maybe the prisoner would be recaptured, maybe not. What should the jailer do?

My strong intuitive reaction to this case, and I expect it is widely held, is that the jailer acts permissibly if he puts the man in jail. The jailer is not morally required under the circumstances to let the man go free. (I will shortly argue that he is also obligated not to do so.)

If you are not persuaded, then consider a slightly less elegant variant, but the most compelling one for my purposes:

Jason the jailer realizes the defendant is guilty, but knows that the sentence of 20 years in jail is excessive. Suppose the crime is embezzling \$1000. Jason sees that anything more than 5 years is morally indefensible. Jason is legally ordered to keep the prisoner for 20 years, but suppose he could easily let him escape after 5. Is Jason permitted to carry out the full punishment?

It seems clear to me that he is. If so, he is knowingly jailing an innocent person after the first 5 years have passed. The view I want to reject, call it the *primacy of private judgment* view, says that the jailer is neither obligated nor permitted to keep an innocent person in jail. He ought to follow his private judgment and set the man free. (By calling it private I mean to mark that his own judgment differs from the public judgment. It might be based on considerations that are private in some further sense, or it might not, but it counts as private in my sense either way.) I believe most people will find it implausible to think that the jailer may substitute his own private judgment for the court's verdict, but I know not everyone is persuaded by this case. We can strengthen it, though, by considering a number of points that will also be important when I return to the military context.

First, the operative element, the thing that permits and obligates the jailer to obey, is the nature of the process that generates the command, in this case, a responsible trial. So the view is not that the jailer should punish whomever comes his way regardless of the process that generated the conviction or set the punishment. If, for example, the government were rounding up and jailing political opponents simply for their inconvenient views, there is no plausibility to the idea that the jailer ought simply to do as he is told.

Second, regardless of the nature of the process that generated the command, there are limits on what the jailer should do. For example, there are some punishments, such as torture, that are not even approximately just even if the person were guilty of the alleged crime.

Third, saying that the jailer must follow the orders leaves open the possibility that he should first contest them in some way. So, for now, allow that this is so. In truth, there are complexities about such a right or duty of contestation that we will need to consider later at greater length. For now, the point is only that a responsible process might duly consider the protest and yet proceed with its original order. The right or duty to contest mistakes would not be an argument against the duty to comply with them after the process of contestation is duly concluded.

Fourth, we should acknowledge that there is a middle ground between carrying out the order and seeing that it is not carried out. The jailer could resign. If resigning is permitted, then it would be false to say the jailer is obligated to carry out the order. Surely, jailers don't have special obligations to stay at the same job forever. So resigning must, in some way, be permissible. This can be accounted for by assuming that the jailer may resign with due notice. That would not help us to know whether he may resign immediately to avoid carrying out an unjust punishment. So we can grant and put aside the right to resign with due notice.

The question is whether the jailer is permitted to resign immediately to avoid this order. The view that he is has some appeal, since resigning is different from thwarting the will of the authority, since the punishment will, suppose, be carried out by the replacement jailer. This appeal, though, depends on granting that the authority's will should not be thwarted, that if it decides the person should be jailed, then the person should be jailed. The thought that the jailer should resign *rather than set the man free*, gets its appeal from its leaving in place the eventual jailing of the convict. The view that the jailer is permitted to resign suggests that replacement jailers are also permitted to resign. In that case, no one is obligated to carry out the punishment. This is in severe tension with the stipulation that the authority's will should be done.

Fifth, we must avoid being misled by another consideration, namely, that the institution ought to make humane provisions for a jailer who is offended, or made uncomfortable by the prospect of carrying out the order. We can assume for the sake of argument that jailers who are deeply offended or discomfited by the

injustice of the punishment should not be forced to carry out the punishment, nor should they be punished if they decline under such emotional duress. This is a question about how the jailer should be treated, however, not any resolution to the question of what his moral responsibilities are.

Sixth, we should reject the idea that if the procedure is good then the verdict will be correct, or that it will at least be everyone's best evidence about the truth. These are both mistaken. Even properly carried out trial procedures must be assumed to be fallible. There are many reasons for this, but one is that sometimes the questions they face are exceedingly difficult. Nor is the proper trial's verdict bound to be everyone's best evidence about the truth. Again, letting a single example suffice, there are lots of considerations that might give an outsider an epistemic advantage even though it is not, and should not be, available to the jury. Perhaps you grew up with the defendant, and know that the accusation is incompatible with his nature. Of course, you might be wrong. The point is only that this could give you good epistemic reason to doubt the verdict even if the trial procedure were completely adequate.

Seventh, and finally, there might be an exception to the jailer's duty to obey in certain cases of first-hand knowledge. Suppose the jailer had actually witnessed the crime and saw with his own two eyes that the convict was not the perpetrator. Obviously, the jailer should offer this information, and we can assume it was aired at trial. The trial might still wrongly convict because even procedurally appropriate trials will still be fallible (or so we must assume). Should the jailer put the innocent man in jail, even for a long sentence, knowing with as much certainty as life allows that he is innocent? Of course, the jailer should contest the order in whatever ways are possible, but this doesn't solve the problem, since the sentence might stand even after due contestation.

What should the jailer do? The problem is only sharper in the case of the executioner, discussed next. An adequate treatment is not possible here, but a few points are important. If some such exception were granted, so that the jailer may or should, say, resign rather than jail a person whose innocence he knows as a first-hand eyewitness, this would not mean that anything central to my account is being conceded to opposing views. First, there isn't a clear analogue to that kind of certainty when the question is whether a war is just, and that is my main topic. Second, an exception of that kind wouldn't require conceding that the jailer ought only to carry out what he thinks are just punishments. I still deny that. There would remain a duty to carry out many punishments even when they are wrong, and believed to be wrong by the jailer. Therefore the narrow exception would need a basis other than the idea that the jailor is under a duty to carry out only just punishments. I must leave the matter here, except for a brief note in the discussion of democracy below.⁷

⁷See note 14.

III. THE EXECUTIONER

My strategy will be to extend these points to the case of an executioner, and then to a soldier in an unjust war. The executioner's situation is not exactly the same, mainly because the punishment in question—death—is so much more severe. Many people believe that the legal infliction of the punishment of death is never morally justified. I mean to argue only that if capital punishment can be justified for the perpetrators of certain crimes, then under the right conditions the executioner can be permitted to execute knowingly even an innocent person. Moreover, she can have a moral duty to do it. It is crucial, then, to assume for the sake of argument both that capital punishment would have been a just punishment if the convict had been guilty of the crime in question, and that the trial procedure, along with its social and cultural background, is not so irrational or prejudiced that it no longer counts as an adequate (though fallible) legal method for accurately punishing the guilty without punishing the innocent. I don't mean that there is a bright line here, but objections of those kinds to capital punishment should be put aside for present purposes.

To bring the elements of the example together then:

Elizabeth, the executioner for the state of Texas, is in charge of arranging the execution, and then throwing the switch. The condemned man was convicted in a fair trial by an honest jury. But they were fooled by the prosecuting attorney, and very strong exculpatory evidence was inappropriately ignored. No one behaved badly: the prosecutor believed his case, and the jurors were persuaded. But Elizabeth can see that the man is innocent. If Elizabeth carries out her appointed task, she will knowingly kill an innocent person. She could, instead, rig the switch to fail. Maybe he will be executed anyway or maybe he will escape. (But assume there is no reason to think he will some day be exonerated. The official view of his guilt will never change.) What should the executioner do?

First, is Elizabeth even morally permitted to throw the switch? Or should executioners substitute their own judgment about the justice of the sentence in each individual case? Second, if she is permitted to throw the switch, is she also morally duty-bound to do so?

Arthur Applbaum considers the historical case of Sanson, the Executioner of Paris, in great detail.⁸ Sanson was widely reviled for, as he saw it, simply doing his job, even as the authorities above him changed constantly. Sanson argued that it was not his place to decide who lives and who dies, but that this was to be decided by the government. If Sanson was knowingly killing innocent people, and if this is always wrong, then doing it under the authority of law cannot make it right. The jailer's story shows that even punishments that are unjust to their victims can, under the right conditions, be morally permissible and even mandatory acts of those duly ordered to do so. The trial procedure can be a legitimate and competent method for officially trying to punish the guilty without

⁸Applbaum, *Ethics for Adversaries*, esp. ch. 2.

punishing the innocent, even if it is fallible. In that case, the jailer can be permitted and required to leave that job to others, such as the judge and jury, and simply be the jailer. The question is what relevant difference it might make if the punishment is death rather than imprisonment.

While death is more severe, the severity of extended imprisonment should not be underestimated. If the primacy of private judgment were necessary as an extra protection when death is the punishment, why not also for imprisonment? I don't propose to foreclose all possible ways of distinguishing the two cases. I limit myself to a few points. First, as I have just said, it is not at all clear how the difference between very severe and more severe would explain the different duties of the jailer and the executioner (putting aside, as a separate issue, any chance of later exoneration). Second, if it is to be shown that the executioner should indeed substitute her private judgment it is important to see that this does not rest on any such principle as one forbidding the carrying out of punishments that are unjust to their victims. If I am right about the jailer case, it strongly suggests that there is no such principle. Third, the intuitive plausibility of my saying that Elizabeth is obligated to execute the innocent man depends on rehearsing the points we added to the jailer case about the background process, limits on what can be required, the rights and duties to contest the command, and the need for institutional accommodations for executioners unable or unwilling to obey what they believe to be an unjust command.

McMahon briefly anticipates this sort of argument, and rejects it:

There are . . . some types of act that are so seriously objectionable that they cannot become permissible even if they are demanded by institutions that are both just and important. . . . [I]t may not be permissible for them to punish, and would certainly be impermissible for them to execute, a person they know to be innocent of violating the law, even if that is what their institutional role requires.⁹

Many readers might agree with him. My argument shows only that they must either bite the bullet, saying that not just the executioner but also the jailer should ignore the jury's verdict, or explain the reason why he should only do so when the punishment would be death.

McMahon is certainly correct that some acts are too objectionable to be sanitized by being officially commanded. Boiling a person in oil would be one example. But that would be wrong even if the person were guilty. McMahon is suggesting a different class of punishments: punishments that are fine if the person is guilty and duly convicted, but impermissible if the person is duly convicted but innocent. He says, in effect, that perhaps all punishment is in this class, but certainly execution is. His choice, as I have said, is between biting the bullet to say the jailer must ignore the verdict, or explaining the reason why only death makes this difference.

⁹McMahon, "The ethics of killing in war," p. 705.

IV. PROCEDURAL CONDITIONS

The examples so far suggest that following orders is not by itself enough to let the jailer, the executioner, or the soldier off the hook morally. Sanson the executioner was following orders too, but he was wrong to carry them out. What is missing in his case is the origin of his orders in an honest, competent and legally legitimate, though necessarily fallible, effort to inflict the harm only if it is just to do so. Mistakes might still have been made in that case, but they would have been honest mistakes.

I want to concentrate on the epistemic, or knowledge-seeking aspect of this standard. In the punishment cases, it is a crucial part of the story that there was a fair trial. In a fair trial, a fair and competent effort is made not to convict unless the defendant is guilty. If we remove this epistemic aspect from the story, I doubt that we still think that Jason and Elizabeth are permitted simply to do their jobs even when they know the defendant is innocent. Suppose, for example, that we substitute for a trial a process of preference voting by the citizens. For our purposes we need to imagine that people are not voting on the basis of their judgment of innocence or guilt, but on the basis of whatever reasons they might have for wishing the person to be incarcerated or killed. Perhaps the defendant is a political opponent, or from a warring family, or a business competitor, or a friend, or ally, for example. There's no epistemic tendency or even aim in this process to accurately determine guilt or innocence.

If prisoners were delivered to jailers and executioners by a preference voting process, it is hard to see what justification Jason or Elizabeth would have for doing their work even when they think the convict is guilty. What would their justification be? They can no longer say, "my job is to carry out the punishment; the determination of guilt or innocence has been duly looked after elsewhere." This is not true. It is not being looked after anywhere.

The jailer and executioner might put their case differently. They might say that there is a justified and legally legitimate procedure for determining who gets punished. The question is whether any procedure without a significant epistemic element—an effort and tendency to get the right answer—could *be* a justified way of sending defendants to prison or their death. Notice that our preference-voting procedure could be a fair procedure. Each person gets one vote; no one counts more than anyone else. In fact, let the defendant get a vote too. This is about as fair as a procedure could be, short of introducing the epistemic aim of only convicting guilty people, the element our example is designed to exclude. I doubt that anyone thinks this gives the jailer or the executioner any moral basis for knowingly jailing or executing innocent people.

This gives us some reason to think that when authoritative commands arise out of an epistemic procedure of a certain kind there can be a duty to obey commands to carry out even some unjust policies or punishments. I will call this the *honest mistake standard*.

V. THE SOLDIER: VITORIA

The case of the soldier can be placed under the same template we have applied to the cases of the jailer and executioner. What sort of epistemic authoritative procedure would be required and sufficient to sanitize the soldier's fighting an unjust war, and even to make this a duty?

I want to contrast this kind of standard with the view sketched by Vitoria. Vitoria's view combines his conviction that authority cannot sanitize the injustice of killing an innocent person, with a subtle explanation about why and when people should defer to the commanding authority. In particular, he has an epistemic model that points in a useful direction. Vitoria says that, for most citizens, it should be enough that the war is waged on public authority. And yet he also argues that if the prince sins in ordering me to kill an innocent (foreign or domestic), then I sin too if I obey: "one may not lawfully kill an innocent man on any authority."¹⁰ A clue to how we might reconcile these can be found in his argument that,

the king is not capable of examining the causes of war on his own, and it is likely that he may make mistakes, or rather that he *will* make mistakes, to the detriment and ruin of the many. So war should not be declared on the sole dictates of the prince, nor even on the opinion of the few, but on the opinion of the many, and of the wise and reliable.¹¹

War should be declared only on the basis of some collective opinion. We don't know what collective this is yet. He speaks of "the opinion of the many and of the wise and reliable." (We are tempted to ask him to make up his mind.) I'll return to this. But the reason for requiring collective opinion is explicit: it is to avoid mistakes. The authority of war declarations derives from their being arrived at through a process with significant epistemic value, a tendency to get things right.

No one is permitted to prosecute an unjust war simply because the prince orders it. But if the war is declared by way of the appropriate deliberative procedure, most citizens ought to regard it as authoritative *because this is now the citizen's best evidence about whether the war is just*.

So understood, Vitoria seems excessively optimistic about the epistemic value of collective deliberation (whichever collective he might have in mind, be it the many or the most reliable). He seems to believe that it is a reliable enough procedure to remove the individual citizen's antecedent doubts about the justice of a war. The citizen could never be permitted to kill an innocent person. Since he thinks the citizen may obey after the collective deliberation, then he must think that citizens would no longer have any reason for thinking it is unjust. The public authority, after due deliberation, should be assumed to be making a correct

¹⁰Vitoria, "On the law of war," p. 306.

¹¹*Ibid.*, p. 308.

decision, but not to have some other kind of authority that would survive an incorrect decision. This might set us on the question of what collective deliberation procedure would be so good that its decisions would be those the citizens normally had the most epistemic reason to believe. But this is hopeless. No real deliberative political procedure could rise to that level of reliability from the citizen's point of view. If Vitoria is right that the soldier may not fight unless he believes the war is just, and if, as I believe, the declaration of war would only provide very uncertain and questionable evidence of the war's justice, it would by no means automatically permit the citizen to go to wars merely on public authority. Where the authority seems to them to be mistaken, Vitoria would have to say they must not fight.

Since we should not believe that political authority could be presumed correct often enough to explain a general duty of a soldier to obey, we either have to conclude that soldiers will often still think the war wrong and should refuse to fight on that ground, or we need an alternative account of the duty to fight even the unjust wars. From reflecting on the jailer's case, we have seen that even acts that would wrong their victims can sometimes be rendered permissible by suitable authoritative sources. So in order to generate a reasonably broad duty of obedience for soldiers, we do not need to follow Vitoria's implausible optimism about how often a government's war declarations can be presumed to be correct. That is not the only way to include an epistemic element.

VI. THE SOLDIER: DEMOCRATIC IMPLICATIONS

Let me only briefly suggest how we might get from Vitoria's ideas to the more democratic conclusions that are likely to seem more plausible to us. Vitoria recognizes the epistemic value of collective deliberation. The prince operating alone will make mistakes. This explains why Vitoria thinks the declaration of war must come from a decision made in conjunction with the "wise and the reliable." He also mentions "the many," but this does not obviously imply a democratic procedure. It leaves open the possibility of what we might call a consultative epistocracy:¹² an elite of wise and reliable decision-makers make the decisions after consulting the views of the many. This incorporates the epistemic aim, the epistemic value of a collective decision-making body, and the epistemic value of hearing from the many. None of this yet requires including the many in the actual decision-making—not even in the form of electing representatives to make the decision.

We can get the stronger democratic conclusion, I would argue, if we add a constraint on political justification of the following form: political justifications must be generally acceptable (at least to all points of view that are not, in Rawls's

¹²I have coined the term "epistocracy" to refer to the rule of the knowers.

term, “unreasonable,” or beyond certain limits).¹³ Notice, then, that the consultative epistocracy, or any form of epistocracy, would require identifying those who are better at knowing and doing the right thing. Even assuming, as I think we must, that some are better than others at this, there will be wide and reasonable disagreement about who they are. Catholics might think the Pope and his advisors in the Vatican are best. Others, like John Stuart Mill, might think those with more education are best. No generally acceptable political justification can make either of these claims, or any claim like them.¹⁴

My hypothesis is that certain kinds of democratic decision-making do have epistemic value, and yet saying this does not involve any controversial claims about who is wiser than whom. I can’t pursue this matter further here. But this is the reason I would offer for thinking of certain democratic political arrangements as the epistemic authoritative procedure that is the counterpart to the jury trial: it is the epistemic device that allows the authoritative order to go to war to sanitize the soldier’s (otherwise impermissibly) knowingly killing innocent people. It is important to emphasize that a society could count as democratic (for example, having free and fair elections) without having the relevant features. My claim is only that having the relevant features would depend on a society’s being democratic in certain ways.

Naturally, it would be good to have more specific institutional prescriptions in order to clarify the questions that a soldier ought to ask. I doubt that much can be said that would make it a straightforward empirical matter. One fruitful direction for further work on this question would involve studying historical examples, with an eye to this question. Certain facts would clearly raise doubts and concerns, such as: severely restricted public political debate; a cultural incapacity to know relevant facts (about history, psychology, strategy, likely effects, conditions on the ground, nature of the opponent, and so on); profound official corruption or deception; a radical imbalance of political power favoring those more eager for war; and so on. On the other hand, politics will often contain these flaws to various degrees and their mere presence is not obviously enough to destroy the ability of a polity to duly look after the justice of war

¹³John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 137.

¹⁴This is a line of argument I develop elsewhere. See “Making truth safe for democracy,” *The Idea of Democracy*, ed. David Copp, Jean Hampton and John Roemer (Cambridge: Cambridge University Press, 1993), pp. 71–100; “Beyond fairness and deliberation: the epistemic dimension of democratic authority,” *Deliberative Democracy*, ed. James Bohman and William Rehg (Cambridge, Mass.: MIT Press, 1997), pp. 173–204; “Why not epistocracy?” *Desire, Identity and Existence: Essays in honor of T. M. Penner*, ed. Naomi Reshotko (Kelowna, BC: Academic Printing and Publishing, 2003), pp. 53–69. This suggests one possible explanation for a narrow exception for jailers and executioners, when they have, say, first-hand eyewitness knowledge of the convict’s innocence. A properly narrow exception of that kind might improve the epistemic value of the overall process in a way that could be generally accepted. Broader exceptions, such as only jailing or executing those who you believe or even know to be guilty would be more open to dispute. This doesn’t mean the jailer couldn’t be right, or even be more reliable than the trial procedure. The point is that his being so would not usually be generally accepted, except in a certain very narrow kind of case such as first-hand eyewitness knowledge.

making in a way that supports the soldier's duty to comply even when he disagrees. Like many moral matters, we can identify some relevant elements more easily than we can state a clear theory of their weight or significance.

VII. THE SOLDIER: WALZER

Michael Walzer argues that there is no special moral cloud over soldiers so long as they are complying with the moral rules of *jus in bello*. This goes too far. It differs from the view defended here by absolving all soldiers regardless of whether the justice of the war is, in any significant way, being duly looked after by the process or authority that issued the command to fight. It is not entirely clear what reason Walzer has for such a sweeping acquittal, but he mentions two kinds of consideration: coercion, and the moral value of patriotism. If soldiers have no acceptable alternative to fighting, then this must certainly limit their moral responsibility. Perhaps they will be shot if they refuse, or their family's prospects ruined. It is hard to know where to draw this line, of course, but coercion would tend to be exculpatory. On the other hand, Walzer believes that "soldiers are not, however, entirely without volition."¹⁵ This is why they can indeed be held responsible for violations of the rules of *jus in bello*. But, in both cases—choices of how to fight, and choices of whether to fight—there might be severe social pressure, institutional sanction including threat of violence, imprisonment for disobedience, and so on. It is hard to see how there can be enough volition for the one category but not for the other.¹⁶

Walzer quotes a penetrating remark from Vitoria: "A prince is not able, and ought not always to render reasons for the war to his subjects, and if the subjects cannot serve in the war except they are first satisfied of its justice, the state would fall into grave peril."¹⁷ I agree with this, and it is part of what lies behind the view I am developing. But it does not lead—logically, or in Vitoria's own thought—straight to the view that Walzer sympathetically quotes from Shakespeare's *Henry V*: "We know enough if we know we are the king's men. Our obedience to the king wipes the crime out of us." Walzer qualifies this only by saying that when the soldier violates the rules of *jus in bello*, "superior orders are no defense. The atrocities are his own; the war is not."

This leads Walzer (unenthusiastically) to exonerate Erwin Rommel, one of Hitler's generals, who fought for Hitler but evidently obeyed the rules of *jus in bello*. Here we see the second kind of consideration that seems to motivate Walzer's position, the moral value of patriotism. The issue is no longer coercion. Walzer exploits a more normative meaning of the term "servant": "Rommel was

¹⁵*Just and Unjust War*, p. 40.

¹⁶Lionel McPherson makes this point in "Innocence and responsibility."

¹⁷Quoted by Walzer, *Just and Unjust War*, p. 39. All Walzer quotes in this paragraph are from p. 39.

a servant, not a ruler, of the German state; he did not choose the wars he fought but, like Prince Andrey, served his ‘Tsar and country.’ . . . [H]e is . . . a loyal and obedient subject and citizen, acting sometimes at great personal risk in a way he thinks is right.”¹⁸ The suggestion is not that Rommel had no choice, but that there is something noble in his answering his country’s call without question – the call of Hitler’s Germany.

The general topic of patriotism is clearly too much to take up here. I can only note the different conclusion that my own view supports in this case. It is indeed a mistake to assume that soldiers are acting wrongly whenever the war is unjust, but it cannot be correct to assume that they are never acting wrongly in obeying the order to fight even when there is no reason to think the justice of the war is being duly looked after at any point. In Nazi Germany I would hold at least some soldiers responsible for their abdication of a responsibility to ask whether justice is being duly looked after. They knew, or should have known, that Hitler’s aggression was without justification. Insofar as they had an acceptable alternative they should have refused to fight and done what they could to obstruct the German effort. Soldiers lower down in the chain of command also have a responsibility to ask themselves whether justice is being looked after, but it will sometimes be much harder for them to make this determination. Moreover, they are more likely than generals to be without an acceptable alternative to obeying. How much blame is reasonable in their case is, for these reasons, often less clear. This does not mean that they are not to blame; I believe that they often are when they know or should know that the war is without justification, fought on a pretext, or based entirely on lies.

If I am right that the soldier in an unjust war is not acting wrongly in obeying his orders when the background conditions are right, then surely he is not acting wrongly in defending himself against the soldiers he is obligated to fight. This might accord better with our ordinary view of a soldier’s right to self-defense, whereas the hard-line view would be harder to swallow. It says that when a war is unjust, a soldier carrying out the war orders of a responsible and democratic nation, and obeying the rules of war, is not only wrong to attack enemy soldiers, but is wrong to defend himself if attacked.¹⁹ This is a matter of intuitions, and while they are worth noting they are hardly decisive. Indeed, based on my own less hard-line view I might be forced to say that when the political background cannot support a soldier’s duty to fight, self-defense might not be morally permissible. That, too, might depart from common sense, though to a lesser extent. In any case, I don’t know if it is correct, and I leave the matter open here.

How contestation and dissent should be handled is not always the same in military contexts as in cases involving jailers and executioners. I briefly note just

¹⁸Walzer, *Just and Unjust War*, p. 39.

¹⁹Again, McPherson, “Innocence and responsibility,” takes this view, as does McMahon, “The ethics of killing in war.”

one important example. There seems reason to think that a jailer's opinion about the correctness of a criminal verdict is less important to the overall system's epistemic value than the soldier's opinion about the justice of a war. While there are pragmatic difficulties with allowing soldiers the same rights of expression, dissent and protest as civilians, these must not be overstated, and they are subject to manipulation by governments seeking to control dissent for political, not military purposes. The perspective of soldiers prior to and during a conflict might very often contribute information and arguments that a responsible justice-loving people would need to know in order to make a decision worthy of a soldier's obedience. How this is to be institutionally achieved goes beyond the purview of the sort of philosophical framework I am sketching here.

VIII. ON SOLDIERS AND GANGSTERS

I judge soldiers more harshly than Walzer does. Some theorists, following Vitoria, take a hard line. They judge soldiers even more harshly than I do, holding that if the war is unjust the soldier is wrong to fight it.²⁰ As we've seen, they seem forced to say that the jailer is wrong to keep the convict in jail for his full sentence if only a shorter sentence would truly have been just. So far, I have developed that analogy as my main argument against the hard-line view. It faces another difficulty, which is worth mentioning briefly.

A difficulty for the view that the soldier acts wrongly if the war is unjust concerns the question of a right to self-defense. Soldiers have traditionally been thought to be permitted to defend themselves even if their side is unjust. The victims are wrongly killed, and so the killers are morally equivalent to murderers. It is absurd, this view continues, to think a murderous mugger who encounters vigorous and dangerous resistance has a moral right to defend himself. Soldiers fighting an unjust war have no better right to self-defense than murderous muggers. It's true, these views concede, soldiers might get some moral leeway if they are coerced or non-negligently uninformed. This doesn't much alter the analogy, since the same could be said for muggers. The core of the analogy is that when these mitigating conditions are absent, the soldier fighting the unjust war is morally equivalent to the mugger.

In important ways, however, soldiers are not like muggers. They are acting under political authority, not simply for their own purposes. Certainly, the mugger's having a boss (an "authority") wouldn't normally permit him to defend himself against appropriate violence from his victims. But political authority, in the cases I am defending, is not like a criminal boss. We are imagining soldiers wrongly sent to war by their government after fair and competent public determination that the war is just, and that their government does have authority to conduct just wars. This doesn't, of course, settle our main question—whether

²⁰McPherson, "Innocence and responsibility," takes this position.

these governments also can obligate their soldiers when the war is unjust. It does, however, dispose of the analogy with outlaws who have no corresponding authority, competence or fairness. Keep in mind, too, that as the jailer analogy should make clear, my argument in defense of the soldier does not hinge on a right to self-defense, or on some inability of the soldier to know whether the war is just or not.²¹

IX. THE NUREMBERG DEFENSE

Does my argument vindicate the Nuremberg defense, “I was following orders”? It would be easy, I think, to show that Nazi soldiers and officers had no basis for thinking that the political source of their commands was duly looking after the question of whether the war was just.²² I don’t mean the question of the merits of each decision to invade another country, but the question of the political background in Germany. There was no decent reason to believe that justice was being looked out for. In any case, the mere fact that the soldiers were following orders is not sanitizing on my account. It must be combined with an epistemically adequate source of the commands, and this is patently absent in Nazi Germany.

What about Sanson, the executioner of Paris? He was following orders too, but not in a context that would support his thinking that the justice of the punishment was being duly looked after by the legal and political process that delivered the prisoners to him for execution. Sanson worked through a number of regimes, and in many cases people were executed for blatant political purposes, or other reasons radically disconnected from the question of whether they had violated any legitimate law.²³

This raises the question whether any political arrangements could ever meet the epistemic standard I have sketched. Any actual political process will involve elements of ignorance, deception, bias and manipulation. But this would not show that no possible political process could have the capacity to sanitize the pursuit, by soldiers, of unjust wars. It is a difficult judgment in any given case whether these deviations from some ideal epistemic process are egregious enough, or whether despite being damaging on their own they might be countervailed by other elements of the political environment.

To allow the soldier to excuse his actions by pointing to the fact that he was obeying orders might seem to treat the soldier as something less than an autonomous agent, as a mere instrument of the military system. There are ways in which we ought to be instruments of larger systems in a certain sense. We ought to make ourselves available for the pursuit of certain collectively

²¹See McMahon’s discussion of these points in “The ethics of killing in war,” pp. 698–702.

²²Two useful sources are: Daniel Goldhagen, *Hitler’s Willing Executioners* (New York: Vintage, 1997); and Alan S. Rosenbaum, *Prosecuting Nazi War Crimes* (Boulder, Colo.: Westview Press, 1993).

²³Applbaum, “Innocence and responsibility,” p. 17.

authorized purposes. Still, jailers and soldiers ought to do their best to do the morally right thing, and nothing in my view denies this. The view I defend here is a view about what the right thing is, about what they will do if their deliberations are sound. Sometimes the responsible and courageous conclusion is to acknowledge a moral obligation to obey a command even though you disagree with it, and even though, in your own view, others will be unjustly harmed. Your own view of whether the order is just is one thing, and nothing here tells the soldier to ignore that question. But your own view of what you ought to do when it is unjust is another. The very idea of agency is hardly incompatible with a being's having moral duties of obedience. Obedience is a substantive moral question that agents must face.

X. BEYOND THE AD/IN DISTINCTION

The distinction between *jus ad bellum* and *jus in bello* cannot bear too much weight, and it is not bearing as much weight in my account as it might seem. There are questions about legitimate authority in both cases, and there are moderate and more severe wrongs that fall into each category. It can't be that even the mildest violation of *jus in bello* is the soldier's own responsibility, while even significant violations of *jus ad bellum* are entirely the "business of kings," as Walzer's view seems to suggest. Some commands to act in violation of the rules of war (*in bello*) should be regarded as still authoritative under the proper background conditions. Likewise, some orders to enter unjustly into war (*ad bellum*) lack authority even if the background conditions meet the criterion I have sketched above. This criterion is legally legitimate procedures subject to robust public deliberation resulting in a publicly evident (though fallible) tendency to go to war only justly. Rather than the sharply different treatment of the *ad* and *in* realms, we should try for a more unified criterion.

The trial context can help us get our bearings. The obvious analogy to the *ad/in* distinction is the justice of punishing a person versus the justice of the chosen punishment (*jus ad poena*, *jus in poena*?). Pushing that analogy too far raises complexities I'd rather avoid, but something close to it will be evident in what follows. As a first step we can ask which punishments the jailer should not carry out even if they have been produced by adequate background procedures. Their being unjust is not enough to disqualify them, so what is? We know, for example, that the jailer must not boil anyone in oil, or rape or torture them, even if ordered to do so by (ostensibly) the right kind of process.

Here is a rule for determining which punishments lack authority regardless of their source:

If the punishment is not even close to what would be just if the person were indeed guilty of the crime in question, or if the verdict of guilt is not even close to a reasonable conclusion based on the appropriate materials, the jailer is not obligated (and probably not permitted, though that is separate from my main question) to

carry out the order, even if the procedure that produced the order meets the honest mistake standard. Otherwise, the order carries authority.²⁴

The phrase “not even close” is, of course, vague. The structure of the view, however, seems to me to be correct. On one hand, there is a range of error within which the authority is entitled to obedience even when it is mistaken. On the other hand, authority does not extend to every error without limit. The limits of this range of error would be very difficult to treat in a general way. In any case, my aim is not to draw this line with any specificity, but only to propose a philosophical framework.

This structure, giving authority a range of error, transfers more or less neatly to the two contexts of war. I will call it the *range of error* approach. If an order to go to war or an order to fight in a certain way is not even close to what would be just if the facts were as the authority states them to be, or if the stated view of the justifying facts is not even close to a reasonable conclusion based on the appropriate materials, the soldier is not obligated (and probably not permitted) to carry out the order even if the procedure that produced the order meets the honest mistake standard.

We can see how this range of error criterion is compatible with my main thesis: if war is sometimes a just response to the facts, such as when it is a defense against certain kinds of aggression, then a nation that judges that those facts obtain can morally obligate its soldiers to fight even if this judgment is a mistake, so long as it is not too unreasonable a conclusion based on the appropriate materials, and the procedures leading to this decision meet the stated honest mistake standard. The same criterion appears to give plausible results both for when the order to go to war, and for when orders to fight in certain ways, should be thought of as going beyond the authority’s range of error.

The range of error criterion also gives the outlines of an account of when orders violating the rules of war ought to be obeyed. This shows us that the *ad/in* distinction is not the morally crucial one for purposes of ascertaining the limits of authority. The crucial issue, to put it in a succinct form, is *whether the command*

²⁴David Luban, in written comments on this paper, offers this historical note (quoted by permission): “This rule, and [Estlund’s] range-of-error account, is very close to Radbruch’s Formula, devised in the wake of World War II by Gustav Radbruch to explain when judges should not enforce the law. According to Radbruch, “The conflict between justice and legal security can be resolved by saying that the positive law . . . will have priority even when it is unjust or unsuitable unless the contradiction between the positive law and justice reaches such an unbearable degree that the statute—as ‘incorrect law’—must give way to justice.” [Gustav Radbruch, “Gesetzliches Unrecht und Übergesetzliches Recht,” *Süddeutschen Juristen-Zeitung*, 1 (1946), 105 reprinted in 3 *Gustav Radbruch Gesamtausgabe*, volume 3, ed. Arthur Kaufmann (Heidelberg: D.F. Müller, 1990), p. 89.] Interestingly, Radbruch thought that judges should be bound by this formula, but he exonerated executioners who carried out unjust executions. Radbruch’s Formula is not well-known in the English-speaking world, but it is familiar within German jurisprudence, and figured prominently in the trial of the East German border guards after 1989.” See Peter E. Quint, “The border guard trials and the East German past—seven arguments,” *American Journal of Comparative Law*, 48 (2000), 541–72.

is (or is not) too far from a just response, in light of a reasonable view of the facts, by a legitimate authority that has, in a publicly recognizable way, a general capacity to respect justice of waging and fighting wars.

I note just a few cases that suggest the plausibility of this criterion. Consider very minor mistreatment of prisoners. Suppose that *jus in bello* stipulates that prisoners ought to be given three meals a day, and they are only given two in order to conserve resources. This is unjust. But this might be close enough that the order retains authority, obligating soldiers to comply with it (after due contestation if applicable, and so forth).

Suppose, in a more serious violation, a soldier is ordered to attack a certain non-combatant. This is seriously wrong by traditional rules of war. But suppose the authority believes, erroneously but not too unreasonably, that the person is actually a combatant. Depending, of course, on many more details of the particular case, the commanded soldier might be obligated (after due contestation if applicable) to carry out the order.

Turn to the question of *jus ad bellum*, the justice of waging war. Consider a minor violation. Suppose that *jus ad bellum* requires seeking the approval of some international political body before proceeding (such as the U.N. or some such thing, but suitably altered so that this would really be a requirement of justice). But suppose that in a particular case there was some time pressure (though not enough to cancel the duty to get approval), and everyone knows that the international body would indeed have approved, even though approval was not actually sought. This would be unjust, but it might be a minor enough infraction that the order to wage war retains its authority in a way that it would not if the international body might not have approved.

To consider a more serious kind of violation, suppose the attacked country is not actually aggressive or a threat, and suppose *jus ad bellum* only allows war under those conditions. This looks like a very serious injustice. However, suppose that the attacking nation's government mistakenly believes that the other country is an imminent threat, and suppose further that under the circumstances this is not too unreasonable. They commit a serious injustice by going to war in that case, but the premise for going to war might be reasonable enough that the order to wage war retains its authority over the soldier (assuming the other procedural standards I call the honest mistake standard are also met).

XI. CURRENT EVENTS

Consider next the U.S. war on Iraq that began in 2003, which raises significant questions about duties of both the war-waging and the war-fighting kind. First, consider the order to wage war. For simplicity, suppose that a major and necessary basis for the war's counting as just was that Iraq either possessed weapons of mass destruction, or that it represented a critical support for terrorist organizations that were a serious threat. To apply my criterion to a case like this,

we should simplify further. Assume for our purposes that the U.S. political system meets the honest mistake standard, so it is a process in which public debate and electoral discipline give the process an adequate and generally recognizable epistemic value, that is, a tendency (fallible, of course) to go to war only justly. If it does not, the implications of my view are clear: the orders to wage war would lack authority. Now, consider a soldier who believes with good reason that Iraq is not actually a significant threat either through any weapons of its own or by its support for terrorists. Would this fact, which would indeed make the U.S. war a serious injustice, cancel the soldier's duty to obey the order to wage war? On my view it would not. So long as the mistaken view about Iraq's threat is nevertheless not too unreasonable, the authority's judgment is within an acceptable range of error, and the soldier's duty is to carry out the orders. The justice of the war is being duly looked after elsewhere by his nation, and that nation is entitled to have its will done under the conditions we have specified, even when it is making a mistake. If, on the other hand, the soldier believes that not only are the attributions of threat mistaken, but they are either utterly irrational or even disingenuous, the graveness of his concerns might cross a line such that he may or even must refuse the order to fight. This is the structure provided by the range of error approach, though drawing a specific line would require reflection on many more details.

Turn to orders to fight the war in certain ways. Supposing that orders concerning many of the forms of physical and psychological torment and degradation to which Iraqi prisoners were subjected by U.S. military personnel are beyond the range of error within which the authority is entitled to obedience, the soldiers who might have been ordered to perform these acts were not obligated to do so (and were very probably obligated not to do so).²⁵ (I leave aside what sort of defense might be open to them at law.)

Next, consider much milder forms of mistreatment, such as keeping prisoners awake for, say, 24 hours in order to increase the chance of obtaining information that might save lives. Suppose this is unjust by appropriate moral rules of war. Those who ordered the treatment are to be blamed. But those ordered to carry it out might retain an obligation to do so, since it is a relatively mild infraction, and might be close enough to what justice would allow. The question isn't whether the 24 hour treatment is the right place to draw the line. The aim is only to illustrate the form of my criterion. Small deviations from *jus in bello* might be small enough that the authority's range of error is not exceeded. (If this example is not persuasive, readers can construct a case of their own in which there is a deviation, but it is very small.) The authority acts unjustly, but the soldier does no wrong by following orders, even if he acts without duress.

²⁵On the abuses of Iraqi prisoners by U.S. forces, see Seymour Hersh, "Torture at Abu Ghraib," *The New Yorker*, May 10, 2004.

There is much discussion of the *Uniform Code of Military Justice*²⁶ in connection with the abuses in Iraq. That code determines the soldier's legal duties, and sets the standards by which any court martial would proceed. It directs soldiers to obey "lawful" orders, and precedent suggests that illegal orders are illegal to obey. This has no evident range of error built into it, no scope for the legal authority of a command that is only a small violation of the applicable law. On the other hand, the Code says that the fact that something has been ordered should be taken by the ordered soldier as providing a presumption that it is legal.²⁷ This doctrine makes allowances for uncertainty by the soldier, but unlike my view, does not allow a range of error in the command in the case where the soldier has reason to be very sure it is (moderately) wrong. In any case, my question is not what the soldier's legal obligations are, but what his moral obligations are. If a command is outside the scope of the commanding agent's legitimate authority, my view implies that it does not create any moral obligation to obey. This still leaves the possibility of an authoritative command that violates the rules of war, but only modestly.²⁸ Under the right background conditions, the range of error view says it retains authority.

XII. DISSENT AND DEMOCRACY (OR HOW TO SUPPORT OUR TROOPS)

Alfred Lord Tennyson captured part of the self-conception of the soldier in his famous lines, "theirs not to reason why; theirs but to do and die."²⁹ I have argued that even though this smacks of the Nuremberg defense, under favorable conditions it is correct. Naturally, this would be important to the soldier. When we are urged to support our troops, we can't be expected to say to them, absurdly, that our country never has and never will wage an unjust war, so they can rest assured that this war too is just. Soldiers know better than anyone the folly and mendacity of many declarations of war. So that is not the kind of support the troops could reasonably expect. However, they might worry that their actions are under a moral cloud if the war is unjust. I have argued that under

²⁶Article 92, "Failure to obey order or regulation," says:

Any person subject to this chapter who—

- (1) violates or fails to obey any lawful general order or regulation;
 - (2) having knowledge of any other lawful order issued by any member of the armed forces, which it is his duty to obey, fails to obey the order; or
 - (3) is derelict in the performance of his duties;
- shall be punished as a court-martial may direct.

²⁷UNITED STATES, Appellee v WILLIAM L. CALLEY, JR., First Lieutenant, U.S. Army, Appellant. No. 26,875, United States Court of Military Appeals, 22 U.S.C.M.A. 534, December 21, 1973.

²⁸I leave open the possibility that for some rules of war, such as rules against torture, there is no such thing as a modest deviation.

²⁹"The charge of the Light Brigade," 1854.

the right conditions there is no moral cloud. But this depends on the background conditions in the political system that produced that order to go to war.

The soldier often proceeds on the faith that, whatever these background requirements are, they are met. One way to support our troops, then, is to see to it that these conditions are met—that if our decisions to go to war are mistakes, they are at least honest mistakes. This requires that citizens work to protect or restore or create the free, open and often adversarial epistemic forum of political deliberation that could sanitize the soldiers the way a jury trial sanitizes the jailer. The adversarial element is crucial for epistemic reasons, as is clear from its importance to a properly conducted jury trial. Adversarial deliberation often means dissent, protest and demonstration in addition to reasoned engagement with opposing arguments.

In one way, soldiers and protesters have common cause. They both want the background political culture to support the supposition that while mistakes will be made, they will be honest mistakes, and that soldiers who “do and die” as their country asks of them are under no darker moral cloud than every other citizen of the country which has, despite its best efforts, mounted an unjust war.