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# Moral Exceptionalism and the Just War Tradition: Walzer's Instrumentalist Approach and an Institutional Response to McMahan's "Nazi Military" Problem

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## ABSTRACT



The conventional view of Just War thinking holds that militaries operate under "special" moral rules in war. Conventional Just War thinking establishes a principled approach to such moral exceptionalism in order to prevent arbitrary or capricious uses of military force. It relies on the notion that soldiers are instruments of the state, which is a view that has been critiqued by the Revisionist movement. The Revisionist critique rightly puts greater emphasis on the moral agency of individual soldiers: they are not mere instruments of the state. Although Revisionism has something particularly important to contribute when applied to cases that are short-of-war, where an individual agent's moral culpability plays a greater role, soldiers fighting wars are not wholly autonomous moral agents. An Institutional approach that responds to Revisionist criticisms is a plausible alternative to the conventional Just War account for grounding the moral exceptionalism of war. For the Institutional, soldiers are moral agents with state-imposed obligations whose fundamental responsibility is the performance of the proper moral ends of the military institution they serve. If this is true, then soldiers have a moral obligation to be attentive to the moral corruption of the military institution of which they are a part.

## KEYWORDS

Just War; moral exceptionalism; revisionism; moral agency; institutionalism

## Introduction

The conventional understanding of the Just War Tradition holds that militaries operate under "special" moral rules in war. Military combatants are treated according to a moral standard different from the everyday benchmark. That is, soldiers<sup>1</sup> are morally permitted to kill enemy soldiers, and vice versa, because both parties hold the status of military combatants. This moral exceptionalism gives the military special permissions to kill enemy combatants in war. Michael Walzer refers to this as the adaption of ordinary morality to the "moral reality of war." In saying this, he was summarising the long history of thinking in the Just War Tradition where it is assumed that wars are not the moral responsibility of soldiers (Walzer 1977). This understanding of the moral exceptionalism that applies to military combatants

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in war has, however, been disputed by the Just War Revisionist movement. Jeff McMahan – the foremost Just War Revisionist – disagrees with the notion that a military’s use of lethal force in war is morally exceptional in the way that conventional Just War thinking presumes. He argues that the establishment of political relations among a group of people does not confer on them an exceptional right to harm or kill others, when the harming or killing would be impermissible in the absence of that political relationship (McMahan 2007, 53). Similarly, Helen Frowe (2016) – another prominent member of the Revisionist movement – has argued that there is nothing morally special about war. In making this point, she was responding to Walzer’s more recent argument that Just War Theory should seek to develop the notion of *jus ad vim* because he believed there was an “urgent need for a theory of just and unjust uses of force outside the conditions of war” (2006a, xv). Walzer’s concern was that there was a need to improve our moral judgments in relation to the use of military force short-of-war.<sup>2</sup> But Frowe argued in response that *jus ad vim* was conceptually irrelevant because war is not a special moral domain (Frowe 2016, 117).

The Revisionist argument that there is nothing special about war, morally speaking, is the claim I take up here. First, I outline the way in which the Just War Tradition relies on moral exceptionalism to justify killing in war. I demonstrate that conventional Just War thinking establishes a principled approach to moral exceptionalism in order to prevent arbitrary or capricious uses of military force. It relies on the notion that soldiers are mere instruments of the state, which removes much of the culpability for killing from individual military combatants. Then I explore the Revisionist critique of this conventional understanding of the moral exceptionalism of military combatancy in war. Just War Revisionists, such as McMahan and Frowe, dispute the claim that a political community can generate exceptional rights to harm or kill others. They put the emphasis on the moral agency of individual soldiers. Next, I address the Revisionist critique. I agree with the Revisionist argument that soldiers are *not* mere instruments of the state. But I argue that soldiers fighting wars are also not wholly autonomous moral agents in the sense ascribed by Revisionists. Most Revisionists fail to account for the broader moral responsibilities of political authorities, such as the upholding of justice, the promotion of the common good, and the securing of a lasting peace. Finally, I outline the benefits of an Institutional approach that addresses the Revisionist critique and is a plausible alternative to the conventional Just War account for grounding the moral exceptionalism of war. For the Institutional, military combatants are moral agents with state-imposed obligations. I conclude that soldiers have a moral responsibility to be attentive to the moral corruption of the military institution of which they are a part.

## The moral exceptionalism of war

### *Decisive tactical advantage*

The Just War Tradition is an ongoing philosophical debate occurring over centuries that has attempted to make moral sense of the violence and brutality of warfare as a feature of social life.<sup>3</sup> Fundamental to this debate has been the notion that military combatants have special moral permissions to kill enemy combatants. In war, a soldier

is acting on behalf of a sovereign state and is thus not a person who is solely morally responsible for his own acts of killing. That is, military combatants in active theatres of war are not bound by the same moral rules about killing that should apply to an ordinary person in everyday circumstances. By “moral exceptionalism” then, I mean to refer to the moral and legal exceptions for using lethal force that apply to military combatants fighting a war. A clear example of this moral exceptionalism at work in warfare is the approach taken to the tactic of ambushing or military surprise. That is, attacking an enemy when he or she is unprepared. In discussing the ethics of ambushing an enemy on the battlefield, Thomas Aquinas argues that a soldier has to learn the art of concealing his purpose lest it come to the enemy’s knowledge (2006, 181). He cites Augustine who states that “Provided the war be just, it is no concern of justice whether it be carried on openly or by ambushes” (2006, 180). This is, after all, not a sporting competition: it is warfare. Good military operational practice seeks the decisive tactical advantage.<sup>4</sup> A successful ambush is an ideal form of concentrated force at the right time and place. In other words, attacking the enemy when they are not prepared is considered good soldiering.

To illustrate, let us consider a scenario where a soldier (John) fighting in a war is armed with a missile launcher and is part of a heavily armed company of soldiers who have planned the ambush of a lightly armed enemy transport platoon. As planned, the enemy transport platoon falls into the trap and the ambushing company attacks without warning. Being outgunned, the enemy soldiers quickly surrender but not before a number of them are killed or wounded and most of their vehicles are destroyed. During the engagement, John fires his missile into an armoured transport vehicle; killing or wounding the soldiers inside. Although the enemy transport platoon is vulnerable and not posing an imminent threat to the ambushers, the attacking force is permitted to target them merely on the basis of their status as military combatants. As a result, John’s role in the unprovoked attack is part of accepted practice in warfare. Such an ambush is not considered to be morally or legally problematic, suggests Seumas Miller, in the context of a war (2009, 135).

In normal circumstances, however, such a premeditated attack on an unsuspecting party would be unjustified. Imagine, for instance, that John is not a soldier but a police officer who is part of a taskforce that has been set-up to take down local organised crime. The taskforce gets a tip-off identifying the location of an arms stash belonging to one of the gangs. The taskforce sets up a stakeout surrounding the location with armed police and waits to see who turns up. During the stakeout, two cars and a van arrive with ten members of the gang, including one of its prominent leaders. Just as the gang members are exiting their vehicles, the police open fire on the group without warning. One or two of the gang members attempt to shoot back but are quickly killed. Those few who are left alive surrender to the police. If such a shooting occurred in the context of warfighting and the suspects were enemy combatants, then the attack described above would be considered permissible. But our expectations outside this context are different. In the absence of the morally exceptional justifying reasons we grant soldiers at war, we should judge the police involved in this case, including John, to be murderers. In other words, what we should expect from a peacetime state of affairs is distinct from the exceptional morality we find in war.

### ***A principled approach to moral exceptionalism***

The Just War Tradition sets out to articulate the fundamental principles for the application of moral exceptionalism in war. Of particular concern are the moral reasons for using lethal force, which is a deliberate act of violence done to a person (or persons) that kills him or is likely to kill him. That is, there must be appropriate moral reasons for the exceptions to use lethal force permitted in war in order to prevent arbitrary or capricious uses of military force. War might be morally justified in some cases, but it is always a risky course of action and usually very harmful. Combatants in war can inflict high levels of devastation; laying waste to the environment, destroying cultural heritage, wounding, maiming and killing (Lazar 2009, 699). It is a grave business with far-reaching unpredictable consequences and should never be entered into lightly. It can only be justified in the most extreme cases because of the widespread death and destruction it causes (May 2008, 23).

We should always demand (from ourselves and others) appropriate moral justifications when it comes to deliberately doing harm to others. In normal circumstances, doing harm to others – such as cutting someone with a knife – is morally wrong. But there are cases where intentional harms are clearly justified. For example, a surgeon does harm to her patient when she cuts him with a scalpel during an operation, but this is usually justified as a necessary step for improving the patient's overall wellbeing. In other words, when we harm others or consider doing harm to others, we should always be cognisant of the appropriate moral justifications for our actions. The factors that morally “justify” an act do so by changing its moral status, so that the act in question becomes permissible or, in some cases, obligatory. That is, a justified action is one that would normally be morally wrong, but which, given the circumstances, is either fully permissible or even a positive good (Rodin 2003, 28). In contrast, an ethically unjustified harm is one where the reason for causing harm does not stand up to moral scrutiny. It is inadequate for changing the moral status of an act from one that is unjust to one that is just. A fundamental part of knowing what is right and wrong is being able to establish the appropriate moral reasons for the harmful actions we take.<sup>5</sup> If we agree that the moral presumption should be that killing another human being is wrong unless proven to be for sufficient moral reasons, then, in the absence of such a sufficient moral justification, deliberately killing another person is unjustified and should be judged as such. What is more, the standard moral paradigm for evaluating the use of lethal force is self-defence (or defence of others) when faced with an immediate deadly threat.<sup>6</sup>

It might, however, be argued that allowing the military – as representatives of the state – to operate outside the standard self-defence moral paradigm means that soldiers are given license to get away with murder. That as long as the state sanctions killing, then anything goes. But the conventional Just War account for justifying lethal force does not claim that the military can make decisions without moral constraints. The moral presumption against killing applies as much to representatives of the state as it does to the average person. States are not empowered to authorise killing for any reason whatsoever. Military uses of lethal force should still be subject to strict moral limits. This is true even when the military are working in dangerous circumstances and dealing with a complex set of problems. It also remains true when such killings prove to be effective at solving some problems of national security. But if this is true, then in what sense are military

combatants in war required to follow different moral rules of killing than those that ordinarily apply in peacetime?

A place to start is to provide a principled account for the ethics of exceptionalism. According to Fritz Allhoff, the ethics of exceptionalism is concerned with principled exceptions to standard norms (by which he means moral and legal strictures). He argues that there are four elements that an account of moral exceptionalism should provide (2012, 40). First, there must be good reasons for the exception so that it is not arbitrary or capricious (Allhoff 2012, 42). As we have seen, a fundamental part of knowing what is right and wrong is being able to establish sufficient moral reasons for the actions we take, and that it is necessary that we justify our behaviour in situations where our actions harm others. According to Allhoff, what matters in conventional Just War thinking is that military combatants are members of the excepted group and so are responsible – either directly or in a support role – for creating a deadly threat, which is a role they can choose to not play (2012, 51). In comparing the moral status of military combatants to non-combatants, there is an important morally relevant difference between them: complicity or agency in imminent or otherwise future harms.

Second, a principled account of moral exceptionalism should specify the baseline morality. What is the exception to? These are the norms that should apply in the absence of the exception. In the example of the attacks described above, we changed certain facts to elicit the baseline morality. We removed the context of war and it meant there was no *bona fide* enemy military combatant to target. Without the extraordinary conditions of war, the baseline morality reverts to self-defence or defence of others. This says that killing another human is morally permissible if it is necessary to ward-off an immediate unjust deadly threat.<sup>7</sup> Third, Allhoff suggests that what gets excepted must be something to which the moral norm would otherwise have applied. The exception has to be granted to a proper subset of whatever the norm normally binds (2012, 40). Self-defence is a principle that applies to humans. It does not, however, apply to non-humans (e.g. a shark, a falling tree or large rock, or an out-of-control vehicle). These things are sufficiently different from humans as to not be subject to the relevant moral norm.

Finally, an account of moral exceptionalism should nominate the boundaries of the exceptions. Allhoff suggests there are three ways we understand the scope of an exception. War has a *temporal* boundary because it is something that begins at one point in time and ends at another. War has also been traditionally understood to have a *spatial* boundary because it is something that happens on a battlefield. The moral exceptionalism of killing in war also includes a *group-based* boundary because it restricts applicability to military combatants. When soldiers take up arms and wear uniforms, suggests Larry May, they distinguish themselves from other people and their moral and legal status changes. If a military organisation fighting a war needed to explain why its soldiers killed a particular individual, then all that is necessary is to point out that he or she could be identified as a military combatant (2013, 49).

### ***Instruments of the state***

In order to establish the framework for moral exceptionalism, conventional Just War thinking relies on the notion that soldiers are instruments of the state. This shifts the moral culpability for killing from individual moral agents and onto the political

community as a whole. Michael Walzer was summarising the long history of thinking in the Just War tradition when he said that wars were not the moral responsibility of soldiers. He claims that the “war itself isn’t a relation between persons but between political entities and their human instruments” (2006a, 36). Similarly, Stephen Neff distinguishes between war and peacetime in his history of war and the law of nations. He identifies a set of normative features that make war different to the rest of social life on the basis that war is a violent conflict between collectives rather than between individuals (2005, 15). The notion that the only moral responsibility of soldiers is to follow the directives of their masters is immortalised in Lord Tennyson’s poem *The Charge of the Light Brigade* where he says, “Theirs not to make reply, Theirs not to reason why, Theirs but to do and die.” Michael Walzer (2006a, 45) describes this view plainly – that soldiers are primarily state instruments for killing – when again he says,

army and navy officers, defending a long tradition, will often protest commands of their civilian superiors that would require them to violate the rules of war and turn them into mere instruments for killing. The protests are mostly unavailing – for instruments, after all, they are.

Conventional Just War thinking starts by assuming that designating a context as “war” significantly alters the way in which we should understand and apply the general moral principles for justified killing. Laurie Blank and Amos Guiora, for example, argue that the roles, objectives and means for the military in a conventional war are clear. Enemy combatants are identifiable by their association with the enemy military force. The military objective is to defeat the enemy force by killing them or forcing them to surrender. And the means used for this task are the military’s weapons (2010, 58). Consequently, Blank and Guiora conclude that the rules of engagement in the conventional war context are uncontroversial and simple to interpret: soldiers kill soldiers but protect innocent civilians and others *hors de combat* (2010, 58).

The key point here is that war needs boundaries because in war we permit substantially more harm than we do in normal life. That is, we treat war as something that allows moral exceptions to destruction and killing. According to David Luban, the military paradigm offers combatants much freer rein to use lethal force. A combatant can attack an enemy without concern over whether he has done anything wrong. Luban suggests that in war, but not in law, it is permissible to use lethal force on enemy troops regardless of their degree of personal involvement with the adversary and “the conscripted cook is as legitimate a target as the enemy general” (2002, 9). Military combatants should *only* do the harm that is justifiable because it is necessary to secure victory. But this still permits much more destruction and killing than normal life. As summarised by Geoffrey Corn et al. (2013, 537):

For the soldier, the logic is self-evident: the employment of combat power against an enemy – whether an individual soldier firing her rifle, a tank gunner firing a highly-explosive anti-tank round, or an Apache pilot letting loose a salvo of rockets – is intended to completely disable the enemy in the most efficient manner in order to eliminate all risk that the opponent remains capable of continued participation in the fight.

The harmful means employed by military combatants in war is unlike, say, a police officer in a well-ordered society. Police should never blow up an apartment building full of people because a murderer is inside, yet a combatant at war might be permitted to

bomb a building if it contains an important enough military target (Luban 2002, 9). And it hardly needs to be said that we should be shocked if a private corporation routinely used lethal force against its business competitors. In contrast, military combatants take a completely different approach to killing. Soldiers on the battlefield are actively looking to destroy the enemy's military capability, which includes killing the opposing forces' troops as routine business.

In summary, then, what are some of the features of the moral exceptionalism we grant military combatants in war? First, soldiers are permitted to "shoot on sight" enemy combatants. They are actively looking to kill enemy combatants whenever the opportunity presents itself on the battlefield. This permission to "shoot on sight" enemy combatants holds regardless of an individual soldier's capability to harm others or personal culpability for the conflict. Second is the use of military-grade weapons. Professional modern militaries prepare themselves for high-intensity armed conflict where the weaponry used is highly destructive and the weapon systems are technologically sophisticated. This weaponry includes powerful automatic rifles, high-explosives, missiles, tanks, artillery and aerial bombs. Such weapons are designed to maximise the destruction of enemy military capabilities, including the killing of enemy soldiers. Third, military combatants are morally permitted to do serious collateral harm. In war, greater "collateral damage" (i.e. foreseen but unintended killing of non-combatants) is morally permissible.

## **Revisionism: denying moral exceptionalism**

### ***Individual moral agents***

The moral exceptionalism of military combatancy in war has, however, been critiqued by the Revisionist movement. Revisionists disagree with the notion that a military's use of lethal force in war is morally exceptional in the way that conventional Just War presumes. Jeff McMahan (2007) argues that the establishment of political relations among a group of people does not confer on them an exceptional right to harm or kill others, when the harming or killing would be impermissible in the absence of that political relationship. He asks,

How could it be that merely by acting collectively for political goals, people can shed the moral constraints that bind them when they act merely as individuals, so that it then becomes permissible for them to kill innocent people as a means of achieving their political goals? (McMahan 2007, 53)

McMahan concludes that the political nature of a group's goals is morally irrelevant to the justification of killing. Political goals, he argues, may also be paradigmatically evil (2007, 53). McMahan uses, as an example to illustrate this point, the goal of eliminating a people in order to create an ethnically "pure" society. It is morally impossible, he suggests, that the collective pursuit of such a goal could be self-justifying, or that it could automatically carry immunity to punishment (2007, 53). What matters to McMahan, in the justification of violence, is not whether a goal is political but whether it is just; for example, whether it involves the prevention or correction of a wrong. If neither political organisation nor political goals can generate permissions to attack or to kill others, he argues, then that individual cannot enjoy a special permission or privilege to engage in collective violence in war (2007, 53). The same forms of action



would be criminal if the collectives through whom the individuals acted were not states, or if their aims were not political. He concludes that if there is no reason to suppose that political collectives are fundamentally different (morally) from other forms of collective, then the same account of the morality of collective action should apply to both (2007, 53). McMahan argues that the principles governing collective violence in war should be the same as those governing collective action in domestic contexts.<sup>8</sup> If this is right, McMahan argues, then we can hold individual action in war to the same standards to which we hold *individual* action on behalf of collectives in domestic contexts, insisting on the logic of complicity. Therefore, he argues that we should deny the conventional Just War view that assigns special permissions and exemptions to military combatants in war (2007, 53).

In making his argument, however, McMahan underestimates the place of institutional accountability. The roles of “civilian” and “soldier” differ in a number of morally significant ways and shifting between them is not a simple matter. Soldiers in a war fight on behalf of a political community and have a moral responsibility to protect and preserve the life of that political community. Military combatants in war are normally accountable, in practice, to a command hierarchy (especially in modern militaries) and are judged according to the conventions of war. In contrast, civilians are not part of an institution where their actions are regulated and judged on an impartial basis. As Shannon French reminds us, this distinction allows soldiers to be held to a higher ethical standard than that required for an ordinary person within the general population of the society they serve (French 2004, 3). McMahan agrees that institutions such as the military need to function efficiently so that people act in coordinated ways in the service of morally important ends. Military institutions have to be able to react quickly in moments of crisis and so those lower down in the chain of command must obey orders immediately and without hesitating (2009, 71). But McMahan argues that a soldier’s duty to maintain the efficient functioning of the military is generated only within military institutions that are just. There can be no moral requirement to fulfill the functions of the soldier’s institutional role, he suggests, when they are required to violate other significant moral duties (2009, 73). In particular, McMahan argues that soldiers should not obey a military institution that does not itself serve moral purposes and especially not if it serves immoral purposes. For instance, the Nazi military was incapable of imposing moral duties on those who occupied roles within it, he argues (2009, 73).

### ***The moral reality of war***

McMahan’s *individualist* argument is a timely critique of the instrumentalist view. It is true to say that soldiers are more than mere instruments of the state; they are still moral agents. One response is to argue that individualist accounts potentially create a gulf between ideal moral theory and military practice. James Pattison, for instance, argues that McMahan’s emphasis on discovering “the deep morality of war” overlooks the *applied* morality of war. He suggests that an applied morality of war (or non-ideal theory) should consider important *contingent* features of war, including “the morality of institutions governing war (such as the UN Security Council) and the morality of norms and doctrines related to war (such as the responsibility to protect (R2P) and the norm against mercenary use)” (2018, 2–3). A common criticism of international

morality is the claim that it is impractical and utopian (Brown and Ainley 2005, 26). E. H. Carr famously describes utopian views as ones that hold that states are subject to the same moral obligations as individuals (Carr 1981, 141). Political realists will argue that McMahan's emphasis on individualistic moral theorising fails to acknowledge the realities of international power politics. Tony Coady points out that political realists will generally argue along these lines; that standard morality demands the impossible of statesmen and takes insufficient account of the role played by prudence in such decision-making (2005, 126). The challenge for international moralists then, suggests Stanley Hoffman, is that "a deontological ethic in which the definition of what is right is not derived from a calculation of what is possible condemns itself to irrelevance if its commands cannot be carried out in the world as it is" (1998, 152). But the concern for political realists, Hoffman says, is not simply that utopianism will retreat to practically irrelevant discussions of ideal moral theory that promise harmony in a pacified world. Rather, he argues that political realists also worry about the potential harms caused by crusading forms of political idealism that have in the past, he believes, prompted the powerful states, such as the United States, to initiate military conflicts around the world (1998, 56).

McMahan's individualist approach is vulnerable to these political realist criticisms. Walzer makes this point when he suggests that we cannot apply the individualist standard of morality without attending far more closely to the moral reality of war than McMahan is prepared to do (2006b, 45). Similarly, the main thrust of Henry Shue's critique of McMahan is his lack of concern with the reality of war. Shue argues that the ethics of war must deal with the extraordinary mass violence of war and so its content will depart greatly from the morality for ordinary life (2008, 91). More recently, Stephen Deakin argues that McMahan's idealism is unrealistic and impractical. He argues that soldiers – particularly those who are coerced – cannot make their own decisions about the justice of a war in which they are called to fight (2019, 111). Making judgements about the justice of a war can be difficult, Deakin suggests, and sometimes impossible. He believes that McMahan thus imposes an unfair moral burden on soldiers to make sacrifices in order to avoid fighting in what might be an unjust armed conflict (2019, 112). The problem with these responses to McMahan, however, is that morality shouldn't be judged merely on whether it is practical or not. If we are serious about doing the right thing, it will impose costs on us. Being a soldier naturally entails sacrifice; wars are risky and costly business after all. If this is true, then why not make sacrifices for doing the right thing? The Individualist might argue that it is better to die fighting for a good cause than a bad one.

### **Strategic considerations**

McMahan's individualist approach can also be critiqued for overlooking the strategic considerations that concern military commanders and senior decision-makers. Just War thinking has traditionally attempted to come to terms with the essentially political nature of the decision to wage war. This is one of its most important contributions. *Jus ad bellum* criteria – the moral grounds for the decision to go to war – are based on important assumptions about the nature of political authority and responsibility that do not apply to

personal self-defence (Uniacke 2014, 63). Suzanne Uniacke (2014, 73), for instance, argues that,

because the *jus ad bellum* “success condition” reflects assumptions about political authority and responsibility, its application to defensive war encompasses considerably more than fending off an attack. Within the Just war tradition, the right of a legitimate authority to wage war invokes duties on the part of political leaders that mean that the aims of war (and thus also the “right intentions” of those who declare war) extend well beyond an immediate just cause. These wider aims include the promotion of the common good and the securing of a lasting peace, which are held to be the over-arching responsibilities of a political authority who declares war on behalf of the nation that subsequently wages war.

According to Uniacke, an individual acting in self-defence is seeking to defeat an immediate threat to his life, but he is precluded from premeditating an attack against a potential threat. This, she suggests, is distinct from political decision-making in war, which generally requires planning, coordination, and collective action to be successful (Uniacke 2002, 67). Charles Kutz turned to a modification of a tradition inaugurated by Rousseau, who conceived political authority as resting in a special relationship among individuals. When individuals’ wills are linked together in politics, he suggests, this affects the normative valence of what they do individually as part of that politics (Kutz 2005, 156). By “political,” Kutz means any forms of social action oriented around state or institutional formation, where power may in some sense be seen to rest at the level of individual voluntary commitment to the shared project. Hence, military combatants enjoy combat privileges, he suggests, because they enjoy the political status of citizens (Kutz 2005, 156). In other words, military combatants have a moral duty to identify themselves with, and serve, a legitimate political community, which has its own distinct political ends. For example, the Allied forces fighting in the Pacific Theatre during World War II were focused on achieving a military outcome: to defeat Japan’s military forces in combat by killing or capturing its soldiers. Its overarching goal was political. The Allied forces were fighting a defensive war against Japan’s military aggression. The ultimate subjects of their defensive action were the political communities (and their citizens) threatened by Japan’s military. And to achieve this political objective, it was necessary for the Allied forces to defeat Japan’s military. Consequently, on the battlefield, the Allied soldiers deliberately targeted any person who is positively identified as an enemy combatant. So, unlike the paradigmatic case of killing in self-defence, it was *not* necessary for Japan’s soldiers themselves to be an immediate threat in order to be subjected to an Allied attack.

The goals in war are determined by commanders with access to a combination of sources, including classified information about the political context and battlefield intelligence. This means that the moral responsibility for the use of lethal force is drawn upwards in the military paradigm. We shift moral responsibility upwards towards military commanders because they have a better overview of the situation. They have a significant epistemic advantage over individual soldiers when making decisions due to the intelligence to which they have access. As a result, individual soldiers have less discretion when using lethal force on the battlefield. In some cases, they must make the decision to use lethal force with no information about the target. Consider, for example, the way in which decision-making works on an Australian navy ship when it fires a surface-to-surface missile.<sup>9</sup> The “decision” is formulated by the Principal Warfare Officer (PWO)

then recommended to the Commanding Officer (CO) who will agree or not. The PWO will then give the order to the Fire Control Officer (FCO) – usually a Lieutenant or senior Non-Commissioned Officer (NCO) from the Electrical Engineering, Weapons department – who will launch the missile. There is no “moral decision” (in the McMahanian sense) made by the FCO: they merely operate the fire control panel under the orders of the PWO (or otherwise the CO if he/she decides to override the PWO). In short, the individualist approach does not adapt very well to strategic-level political decision-making.

## State-imposed moral responsibilities

### *Just military institutions*

McMahan takes aim at Kutz’s argument to attack what he dubs the “collectivist approach” to morally justifying killing in war, describing it as “the most careful development of the collectivist approach of which I am aware” (2009, 81). According to Kutz’s collectivist view, says McMahan, a combatant does not act in war as a private individual but as an agent of the collective of which he is a member. The morality of his action is derived from his relation to the collective and cannot be understood in isolation from it (McMahan 2007, 51). Kutz’s collectivist approach says that in the context of war, violence that would otherwise be morally impermissible can become permissible in a special way by virtue of its collective political character. He states that,

the fact that my nation is at war, not me, does not absolve me of responsibility towards my enemy, but it does create a normatively distinct relation between us, one structured through a set of rules specific to our interrelationship as individual members of warring nations. (Kutz 2005, 173)

Kutz claims that “when individuals’ wills are linked together in politics, this affects the normative valence of what they do individually as part of that politics, even to the point of rendering impugnable what would otherwise be criminal” (McMahan 2007, 52; Kutz 2005, 156). According to Kutz, this type of collective action can allow limited scope for a political permission to do violence as a member of one group towards another (2005, 173). For McMahan, the overall collectivist argument says that for people to organise themselves politically and act collectively, it is necessary for them to surrender their moral agency to higher authorities.<sup>10</sup> Therefore, the collectivist concludes that there is a strong presumption for the permissibility – indeed the necessity – of obedience (McMahan 2007, 55). McMahan then argues that for the collectivist, this presumption can only be defeated when it is certain that a war in which one has been commanded to fight is unjust. But the presumption in favour of obedience stands when there is uncertainty, he argues, and there is normally some uncertainty about whether an armed conflict is just or unjust (McMahan 2007, 55).

Yet Kutz’s work does not equal all collectivist approaches.<sup>11</sup> Importantly, an institutionalist approach to the moral exceptionalism in war provides a promising alternative to the collectivism described by McMahan. McMahan reasons that a presumption in favour of obedience fails as a moral justification. This, he suggests, is because where there are conflicts between duties that derive from institutional roles and duties that have other sources, there can be no *a priori* guarantee that the institutional duties will

be overriding (2009, 72). The relevant question here, according to McMahan, is whether a soldier's role-based duty to obey an order to fight in a war that is objectively unjust overrides the duties that his participation in the war would require him to violate (2009, 72). But this is not how institutionalism works. Seumas Miller's institutional account, for instance, acknowledges that basic human rights are logically prior to social institutions. And these basic human rights, he suggests, provide the collective end for social institutions such as the police and military (2010, 57). Miller argues that social institutions are necessary for human living because they produce essential collective goods. That is, fundamental goods available to the whole community such as clean drinking water and foodstuffs, electricity, education, health, safety, and security. These common goods would not be adequately available without group cooperation (Miller 2010, 57). If these social institutions fail, suggests Miller, the consequence would be great harm to the society as a whole. This means there is a *collective moral responsibility* to ensure that social institutions are producing the appropriate common goods (2010, 67). Miller argues that this collective moral responsibility means that professional obligations are moral obligations because their expertise plays a key role in the success of such social institutions. And he argues that this is not adequately encompassed by an individualist approach to morality (2010, 80). McMahan concedes that this form of argument "has wide application and in many of its applications it is obviously right" because "the failure to fulfill the duties of one's institutional role can impair the functioning of the institution" (2009, 72).

Hence, a plausible alternative to the problematic collectivist (or instrumentalist) approach for grounding the moral exceptionalism of war that addresses Revisionism's individualist critique is an institutionalist approach. A key distinction between institutionalism and instrumentalism is the question of moral agency. Who (or what) is the appropriate agent where moral obligations are attached? For the instrumentalist, the appropriate moral agent is the collective. In contrast, institutionalism holds that individuals continue to be the relevant moral agents. In other words, the Institutionalists claim to morally judge collective actions in individualist rather than collectivist terms. Miller's institutionalist theory of social action claims that joint actions consist of the individual actions of a number of agents directed to the realisation of a collective end. This is an end possessed by each of the individuals involved in the joint action, he suggests, but it is not realised by the action of any one individual. Joint actions can be analysed in individualist (rather than collectivist) terms (Miller 2001, 24, 1995). Soldiers are not treated as mere instruments in the Institutional account and, consequently, the moral agency of soldiers remains intact. This helps Institutionalism to avoid the more serious criticisms made by Revisionists.

### **Disobeying orders**

Conventional Just War thinkers (including Walzer) might argue that what I have described as an institutionalist approach is simply the Traditional Just War view. Henrik Syse (2015, 262), for example, describes as the classical view the notion that soldiers were obliged to obey their superiors. But then he goes to point out that soldiers fighting an unjust war might only be excused for their wrongdoing: that "there is thus no equal right to kill on the two sides" (Syse 2015, 263). I agree with this claim but

then in this case I argue that an institutionalist approach is a better reflection of the Just War Tradition than the more modern Conventional (or Instrumentalist) view. Institutional accounts agree that obeying lawful orders is a moral obligation. For instance, the Lieber code – published by the U.S. Government in 1863 – emphasised the importance of following orders. The pivotal concept in the Lieber code was military necessity, which it defined as “those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war” (Bellamy 2006, 95). To be effective in battle, the military relies on soldiers habitually responding to orders quickly. Yitzhak Benbaji suggests that for a military system to be morally optimal, states must be able to expect their soldiers to obey commands (2011, 59). He suggests that military combatants are *not* acting in their capacity as individuals. Instead, they carry out the actions of the state that they serve (Benbaji 2011, 69). A key exception to this military obligation is when an order is clearly illegal.<sup>12</sup> An illegal order should *not* be obeyed. A subordinate, suggests Gary Solis, should refuse to obey an illegal order and instead report the incident (2010, 361). But he argues that in cases where there is any doubt about the wrongfulness of the order, a soldier should presume that it is lawful and the duty to obey holds (Solis 2010, 359).

If we agree that it is correct to say that the Nazi military was incapable of imposing moral duties on those who occupied roles within it, however, on what grounds might an individual soldier refuse its lawful military orders? I argue that soldiers might refuse to obey the orders of a military whose institutional and professional purpose has been substantially corrupted. According to Jessica Wolfendale, the literature has largely ignored refusal of service on professional grounds. That is, dissent on the basis of a commitment to the moral values of the military profession (2009, 128). George Lucas examines the various views for an alleged duty of dissent as a professional obligation upon all military personnel to withhold their professional service whenever providing such service would implicate them in the commission of unjust or illegal acts. He responds by arguing that this unfairly imposes a duty to dissent on “the most junior, least experienced, and potentially most vulnerable members of a profession under such contested circumstances” (Lucas 2009, 141). This is true if we demand that the individual soldier must make such a moral calculation for every action or deployment. Soldiers are not given that type of discretion. But the corruption of the purpose of a military institution is a different story. David Estlund, for example, argues that soldiers have a duty to follow orders but that this depends on the background conditions in the political system that produced that order to go to war. That is, he suggests citizens must work to protect or restore or create a free, open and sometimes adversarial epistemic forum of political deliberation (2007, 234). This explains why, in McMahan’s example, the Nazi military was incapable of imposing moral duties on those who occupied roles within it. An institutionalist account addresses McMahan’s Nazi military example by focusing on the moral ends of the military as a social institution. It says that it is morally justified for the agents of state-sanctioned security institutions to use lethal force when it is necessary to meet their state-imposed responsibilities. For the military, this generally means defending the peaceful functioning of a sovereign political community from armed threats or other forms of political violence. But where the military fails in its moral ends as a social institution (i.e. it becomes substantively corrupted), the obligation on

soldiers to obey may no longer hold. In such cases, the soldier's duty is to the professional purpose of the military institution.

## Conclusion

Conventional Just War thinking holds that the rules of war are morally exceptional, and it concludes that military combatants are largely instruments of the state without much in the way of their own moral autonomy. This is to say that conventional Just War thinking is instrumentalist. This instrumentalist approach puts much less emphasis on the moral agency of individual soldiers. Instead, it emphasises the obligation of military combatants to follow lawful orders. In contrast, Revisionists deny that the rules of war are subject to moral exceptionalism in the sense assumed by the instrumentalist approach. Revisionism concludes that military combatants in war remain individual moral agents whose obligation is to follow "deep morality" in preference to the presumably shallow morality encapsulated by the rules of war. The Revisionist argument works better with cases that are short-of-war, where an individual agent's moral culpability plays a greater role. But it loses traction in war proper, where moral responsibility for killing is drawn upwards into command and political decision-making circles.

Distinct from either Instrumentalist or Revisionist schools of Just War thinking, I argue, is the Institutionalist approach. Institutionalism agrees that the rules of war are morally exceptional. Moral rules in war are distinct from peacetime. Yet an institutionalist approach concludes that military combatants are still moral agents, albeit with additional state-imposed moral responsibilities. Soldiers are not mere instruments nor are they wholly autonomous moral agents. For the Institutionalist, the fundamental obligation of military combatants is the performance of the proper moral ends of the institution they serve. Such an institutionalist account encourages soldiers to reflect on the moral purpose of the military as a social institution without undermining its efficient functioning. But a soldier's duty to obey and maintain the efficient functioning of the military is generated only within a military institution that is just. Significant institutional deviation from the proper telos of the military is grounds for military disobedience. That is, substantial corruption of the institution's moral ends. If this is true, then soldiers have a moral responsibility to be attentive to the moral corruption of the military institution of which they are a part. Professional soldiers think deeply about their role in the military institution and can be its biggest critics. The pushback by the U.S. military against the Trump Administration's corrupting influences, for instance, led Trump and his supporters to talk of a "Deep State." What they were describing, however, was merely a military institution properly steeped in professional ethics.

## Notes

1. I use the term "soldiers" as a generic reference to actively serving members of a military force, including airmen, sailors, submariners, bombardiers, sappers, and so on.
2. Walzer's proposal in relation to *jus ad vim* had also been criticised by Tony Coady – a prominent Just War Theorist – for being unnecessary and dangerous. For a discussion, see especially (Coady 2008) and (Ford 2013).

3. I make a distinction here between the Just War Tradition as a whole – which is the broad ongoing debate about the morality of war – and Conventional Just War thinking – which is the modern variant encapsulated within Michael Walzer’s work.
4. For example, the Australian Army’s Land Warfare Doctrine (2014, 21) states that: “Success in conflict depends on achieving a concentration of force at critical locations and times. Concentration of force is the ability to apply decisive military force at the right place, at the right time and in such a way as to achieve a decisive result.”
5. Justification should be distinguished from post hoc rationalization, which is a reason given after the event in an attempt to make a harmful action appear justified. But it is not the true reason for acting. Thomas Merton notes the difficulty of discriminating between rationalization and truth in cases where unintended consequences are post facto declared to have been intended. He compares such reason-giving to the instance of “the horseman who, on being thrown from his steed, declared that he was ‘simply dismounting’” (Merton 1936, 897).
6. For a discussion of justified killing on the basis of self-defence see Chapters 2 and 3 of Ford (2016).
7. Furthermore, killing in self-defence and defence of others is an exception to the moral norm that says humans have the right to not be killed at all! And thus we return to our overall moral presumption against doing harm.
8. According to McMahan, collective violence in the context of domestic society that is unauthorized by the state is normally subject to the law of complicity, whereby individuals may become liable to punishment for crimes of violence through certain forms of collective association, even in the absence of any personal engagement in acts of violence (2009, 82). McMahan also raises a second possibility. We might treat collective violence in domestic contexts the way it is conventionally treated in war, claiming that even in domestic society individuals acting together as a collective acquire special permissions and exemptions from liability. But he suggests that no one accepts this second view (2007, 53).
9. Thanks go to former Royal Australian Navy officer Sam Coleman for this example.
10. McMahan dismisses Kutz’s collective approach to moral exceptionalism in war on the basis of three criticisms. First, McMahan argues that Kutz’s collective approach leads to the conclusion that the same act can be both morally impermissible and politically permissible (2009, 81). Second, McMahan argues that Kutz’s collective view does not successfully distinguish how it is that by acting collectively for political goals, people can shed the moral constraints that ordinarily bind them when they act merely as individuals (2009, 82). Third, McMahan questions why the collective approach does not conclude that political leaders, who, like military combatants, are agents of a political collective, are also released from their moral responsibility for their contribution to fighting an unjust war (2009, 83). Consequently, McMahan argues that a collectivist approach is insufficient on its own to morally justify killing in war and must appeal to epistemic limitation (2007, 55). That is, McMahan believes that the conditions of war change nothing at all; they simply make it more difficult to ascertain relevant facts (2006, 47).
11. For discussions of collectivism, see: Lazar (2017); Erskine (2003); Schwenkenbecher (2020)
12. For a discussions of dissent in the military, see: Whetham and Carrick (2009); Ellner, Robinson, and Whetham (2014).

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## References

- Allhoff, Fritz. 2012. *Terrorism, Ticking Time-Bombs, and Torture: A Philosophical Analysis*. Chicago: University of Chicago Press.
- Aquinas, Thomas. 2006. "Just War and Sins against Peace." In *The Ethics of War: Classic and Contemporary Readings*, edited by Gregory Reichberg, Henrik Syse, and Endre Begby, 169–198. Oxford: Blackwell.
- Australian Army. 2014. *Land Warfare Doctrine 1: The Fundamentals of Land Power*. Canberra: Australian Army.
- Bellamy, Alex J. 2006. *Just Wars: From Cicero to Iraq*. Cambridge: Polity Press.
- Benbaji, Yitzhak. 2011. "The Moral Power of Soldiers to Undertake the Duty of Obedience." *Ethics* 122 (1): 43–73.
- Blank, Laurie, and Amos Guiora. 2010. "Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare." *Harvard National Security Journal* 1: 45–85.
- Brown, Chris, and Kirsten Ainley. 2005. *Understanding International Relations*. 3rd ed. Hampshire: Palgrave Macmillan.
- Carr, E. H. 1981. *The Twenty Years' Crisis 1919-1939: An Introduction to the Study of International Relations*. Hampshire: Palgrave Macmillan.
- Coady, C. A. J. 2005. "The Moral Reality in Realism." *Journal of Applied Philosophy* 22 (2): 121–136.
- Coady, C. A. J. 2008. *Morality and Political Violence*. Cambridge: Cambridge University Press.
- Corn, Geoffrey S., Laurie R. Blank, Chris Jenks, and Eric Talbot Jensen. 2013. "Belligerent Targeting and the Invalidity of a Least Harmful Means Rule." *International Law Studies* 89: 536–626.
- Deakin, Stephen. 2019. "How Is a Man to Decide? Unjust Combatants, Duress and McMahan's Killing in War." *Journal of Military Ethics* 18 (2): 110–128.
- Ellner, Andrea, Paul Robinson, and David Whetham. 2014. *When Soldiers Say No: Selective Conscientious Objection in the Modern Military*. Surrey: Ashgate.
- Erskine, Toni. 2003. *Can Institutions Have Responsibilities? Collective Moral Agency and International Relations*. Hampshire: Palgrave Macmillan.
- Estlund, David. 2007. "On Following Orders in an Unjust War." *Journal of Political Philosophy* 15 (2): 213–234.
- Ford, S. Brandt. 2013. "Jus Ad Vim and the Just Use of Lethal Force-Short-Of-War." In *Routledge Handbook of Ethics and War: Just War Theory in the 21st Century*, edited by Fritz Allhoff, Nicholas G. Evans, and Adam Henschke, 63–75. New York: Routledge.

- Ford, S. Brandt. 2016. *Security Institutions, Use of Force and the State: A Moral Framework*. PhD Thesis. Canberra: The Australian National University.
- French, S. E. 2004. *The Code of the Warrior: Exploring Warrior Values Past and Present*. Lanham: Rowman & Littlefield.
- Frowe, Helen. 2016. "On the Redundancy of Jus ad Vim: A Response to Daniel Brunstetter and Megan Braun." *Ethics & International Affairs* 30 (1): 117–129.
- Hoffmann, Stanley. 1998. *World Disorders: Troubled Peace in the Post-Cold War Era*. Lanham: Rowman & Littlefield.
- Kutz, Christopher. 2005. "The Difference Uniforms Make: Collective Violence in Criminal Law and War." *Philosophy & Public Affairs* 33 (2): 148–180.
- Lazar, Seth. 2009. "Responsibility, Risk, and Killing in Self-Defense." *Ethics* 119 (4): 699–728.
- Lazar, Seth. 2017. "Just War Theory: Revisionists versus Traditionalists." *Annual Review of Political Science* 20: 37–54.
- Luban, David. 2002. "The War on Terrorism and the End of Human Rights." *Philosophy and Public Policy Quarterly* 22: 9–14.
- Lucas, George R. 2009. "Advice and Dissent: 'The Uniform Perspective'." *Journal of Military Ethics* 8 (2): 141–161.
- May, Larry. 2008. *Aggression and Crimes Against Peace*. Cambridge University Press.
- May, Larry. 2013. "Targeted Killings and Proportionality in Law: Two Models." *Journal of International Criminal Justice* 11 (1): 47–63.
- McMahan, J. 2006. "Killing in War: A Reply to Walzer." *Philosophia* 34 (1): 47–51.
- McMahan, Jeff. 2007. "Collectivist Defenses of the Moral Equality of Combatants." *Journal of Military Ethics* 6 (1): 50–59.
- McMahan, Jeff. 2009. *Killing in War*. Oxford: Oxford University Press.
- Merton, Robert K. 1936. "The Unanticipated Consequences of Purposive Social Action." *American Sociological Review* 1 (6): 894–904.
- Miller, Seumas. 1995. "Intentions, Ends and Joint Action." *Philosophical Papers* 24 (1): 51–66.
- Miller, Seumas. 2001. *Social Action: A Teleological Account*. Cambridge: Cambridge University Press.
- Miller, Seumas. 2009. *Terrorism and Counter-Terrorism: Ethics and Liberal Democracy*. Oxford: Blackwell.
- Miller, Seumas. 2010. *The Moral Foundations of Social Institutions: A Philosophical Study*. Cambridge: Cambridge University Press.
- Neff, S. C. 2005. *War and the Law of Nations: A General History*. Cambridge University Press.
- Pattison, James. 2018. "The Case for the Nonideal Morality of War: Beyond Revisionism vs. Traditionalism in Just War Theory." *Political Theory* 46 (2): 242–268.
- Rodin, David. 2003. *War and Self-Defense*. New York: Oxford University Press.
- Schwenkenbecher, Anne. 2020. *Getting Our Act Together: A Theory of Collective Moral Obligations*. New York: Taylor & Francis.
- Shue, Henry. 2008. "Do We Need a 'Morality of War'?" In *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, edited by David Rodin, and Henry Shue, 87–111. New York: Oxford University Press.
- Solis, Gary D. 2010. *The Law of Armed Conflict: International Humanitarian Law in War*. Cambridge: Cambridge University Press.
- Syse, Henrik. 2015. "The Moral Equality of Combatants." In *The Ashgate Research Companion to Military Ethics*, edited by James Turner Johnson, and Eric D. Patterson, 259–270. Burlington: Ashgate.
- Uniacke, Suzanne. 2002. "Self-Defence and Just War." In *Gerechter Krieg: Ideengeschichtliche, Rechtsphilosophische und Ethische Beiträge*, edited by Dieter Janssen, and Michael Quante, 64–78. Paderborn: Mentis Verlag.
- Uniacke, Suzanne. 2014. "Self-Defence, Just War, and a Reasonable Prospect of Success." In *How We Fight: Ethics in War*, edited by Helen Frowe, and Gerald Lang, 62–74. Oxford: Oxford University Press.

- Walzer, Michael. 1977. *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. 1st ed. New York: Basic Books.
- Walzer, Michael. 2006a. *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. 4th ed. New York: Basic Books.
- Walzer, Michael. 2006b. "Response to McMahan's Paper." *Philosophia* 34 (1): 43–45.
- Whetham, David, and Don Carrick. 2009. "Saying No': Command Responsibility and the Ethics of Selective Conscientious Objection." *Journal of Military Ethics* 8 (2): 87–89.
- Wolfendale, Jessica. 2009. "Professional Integrity and Disobedience in the Military." *Journal of Military Ethics* 8 (2): 127–140.