

OBEDIENCE

Overview: Is Obedience a Virtue?

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In the United States, all enlisted military personnel swear to obey “the orders of the President of the United States and the orders of the officers appointed over me.”¹ Military personnel must obey orders promptly in order to facilitate effective military functioning. Obedience is touted as an essential military virtue, and disobedience to orders is a punishable offense in most, if not all, military forces.

Yet, obedience to orders has been associated with war crimes. Military personnel of all ranks have committed torture, rape, genocide, and murder under orders. ‘I was just following orders’ (*respondere superior*) is no longer accepted as a complete defense to a charge of war crimes. In the words of the Nuremberg court: “The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent.”²

This means that military personnel cannot evade responsibility for the actions they perform under orders. But when and under what conditions should military personnel disobey orders? If obedience is sometimes morally wrong, how can obedience be a military virtue?

In this overview I argue that only *reflective obedience* can be a military virtue: obedience governed and constrained by the ends of the military profession serving a legitimate state and by the laws of armed conflict. Section 1 explains the concept of obedience and outlines the idea of virtuous obedience. Section 2 explores when the military has legitimate

1 U.S. Army, “Oath of Enlistment,” <https://www.army.mil/values/oath.html>. Accessed April 16, 2018. Interestingly, officers take an oath to uphold the Constitution, rather than obey the President.

2 Martha Minow, “Living Up to Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the Superior Orders Defence,” *McGill Law Journal* 52 (2007): 17.

authority to compel obedience. Section 3 concludes by exploring the limits on obedience that derive from the military’s status as a profession and the legitimacy of the military’s authority to issue orders.

What is Obedience?

According to the philosopher Benjamin McMyler, obedience involves “rationally subjecting oneself to the will of another.”³ Obeying a person is not just a matter of doing what a person commands; it is following their command for a particular reason. In contrast to taking a person’s advice into account in my deliberations about what I should do, when I obey someone I permit her judgment to *replace* my deliberations: I allow her to make up my mind for me.⁴

But why would I allow someone else’s judgment to replace my own? How could doing so ever be virtuous? According to the Aristotelian tradition, virtue requires *phronesis*, or practical wisdom: the exercise of judgment and deliberation. As Rosalind Hursthouse explains, the virtues are felt: “on the *right* occasions, towards the *right* people or objects, for the *right* reasons.”⁵ Thus, the idea of virtuous obedience seems to be an oxymoron. But this is too quick. Obedience can be governed by reason: virtuous obedience is *reflective* obedience.⁶ If I have reason to believe that a person has legitimate authority in a particular realm of action, it may be permissible (and rational) for me to defer to her judgment. This is what McMyler calls *deferential obedience*,⁷ where I comply with a speaker’s demand because I acknowledge her “practical authority”⁸ over me – and it is my recognition of her authority to issue these demands that provides my reason for acting. The justification for deferential obedience depends on what it means for a person (or an institution) to possess legitimate practical authority. In relation to military obedience, then, we will have to explore what it means to say that the military has legitimate authority⁹ – a question I take up in Section 2.

3 Benjamin McMyler, “Obedience and Believing a Person,” *Philosophical Investigations* 39, no. 1 (January 2016): 59.

4 McMyler, “Obedience,” 66.

5 Rosalind Hursthouse, *On Virtue Ethics* (Oxford: Oxford University Press, 1999), 108–109.

6 Jessica Wolfendale, *Torture and the Military Profession* (Abingdon: Palgrave Macmillan, 2007), 95–96.

7 McMyler, “Obedience,” 63.

8 McMyler, “Obedience,” 63.

9 McMyler’s uses “practical authority” to describe the moral authority to issue demands (“Obedience,” 66). Since “legitimate authority” expresses the same idea, so I will use “legitimate authority” in the remainder of this chapter, since that term is more familiar within the military ethics literature.

A second form of obedience is *coerced obedience*.¹⁰ I display coerced obedience when I comply with someone's demands not because I recognize her authority over me but because I fear the consequences of disobedience, such as when I comply with a mugger's demand to hand over my wallet. Coerced obedience may be rational, if the costs of disobedience are high, but it cannot be morally obligatory in the absence of practical authority.

Coerced obedience and deferential obedience often occur in tandem. For example, many people believe that states (at least democratic states) have the legitimate authority to make and enforce laws.¹¹ Yet states also use the threat of punishment to coerce obedience to the law. So, I might obey the law because I acknowledge the state's legitimate authority to make law *and* because I fear the consequences of breaking the law.¹²

The military, like the state, enforces obedience through the threat of punishment. Yet, the military is also presumed to have practical authority. Military personnel are often thought to have a duty to obey all legitimate orders from their superiors – not just because they might be punished for disobedience, but because their superiors have the *right* to their obedience. This means that the question of the scope and basis of legitimate authority arises for the military as it does for the state. If the military lacks legitimate authority, military personnel might have no duty to obey orders.

The Military and Legitimate Authority

The military in most states views itself as a profession, and many military forces have codes of honor. However, this is not sufficient to establish that the military has legitimate authority. After all, some organized crime groups have codes of honor, yet such groups do not possess any form of legitimate authority.

Unlike organized crime groups, however, the military serves the state and protects the state's national security interests. Those ends define the scope of the military's professional expertise. This means that the military's legitimate authority is tied to that of the state which it serves. There are

10 McMyler, "Obedience," 65.

11 The basis and justification of the state's right to make and enforce laws is at the heart of debates about political obligation. See Richard Dagger and David Lefkowitz, "Political Obligation," *The Stanford Encyclopedia of Philosophy* (Fall 2014 Edition), ed. Edward N. Zalta, <https://plato.stanford.edu/archives/fall2014/entries/political-obligation/>.

12 McMyler, "Obeying a Person," 67.

two central questions regarding a state's legitimate authority:¹³ Firstly, what is the *justification* of a state's authority to coerce its citizens? And, secondly, what are the *constraints* on that authority? That a state is justified in coercing its citizens does not mean that the scope of the state's authority is unlimited. There is broad consensus, for example, that no state has the authority to torture and murder its citizens, or subject them to indefinite detention without trial.¹⁴

We do not need to settle the question of the basis and scope of the state's authority here. For the purposes of this chapter, I propose the following minimal standard of legitimacy: A state has legitimate authority if it protects citizens' basic human rights (including a commitment to upholding basic principles of justice) and involves a governing process subject to some form of regular and transparent review. A state that met these conditions would be a minimally just state,¹⁵ and state institutions such as the military (and the criminal justice system) would have *prima facie* legitimacy as well. In contrast, a tyrannical state that violated citizens' basic rights would lack legitimacy, and military forces that served such a state would also lack legitimacy. This would mean that military personnel in such a state would have no moral obligation to obey orders.

However, just as there are moral constraints on what a legitimate state may do to its citizens, there are moral constraints on how institutions serving a legitimate state may pursue their aims. For example, the criminal justice system of a legitimate state has the authority to punish citizens found guilty of committing a crime. This means that employees of the criminal justice system, such as prison guards, have a duty to obey orders even if they disagree with them. However, as David Estlund argues, this duty is contingent on the criminal justice system meeting a minimal standard of procedural justice, such as a "legitimate procedure for determining who

13 A discussion of state legitimacy is beyond the scope of this chapter. See John Simmons, *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2000); Michael Walzer, "The Moral Standing of States: A Response to Four Critics," *Philosophy and Public Affairs* 9, no. 3 (1980): 209–29, and Stephen Perry, "Political Authority and Political Obligation," in *Oxford Studies in Philosophy of Law: Volume 2*, ed. Leslie Green and Brian Leiter (Oxford: Oxford University Press, 2013), 1–74.

14 David Estlund makes a similar point in relation to punishment: "some acts are too objectionable to be sanitized by being officially commanded" even by a just state. David Estlund, "On Following Orders in an Unjust War," *The Journal of Political Philosophy* 15, no. 2 (2007): 220.

15 See Brian Orend, *The Morality of War*, 2nd edition (Peterborough, Ontario: Broadview Press, 2013). Orend defines a minimally just state as one that is "1) is recognized as legitimate by its own people and most of the international community; 2) avoids violating the rights of other legitimate states; and 3) makes every reasonable effort at satisfying the human rights of its own citizens" (2013, 86).

gets punished."¹⁶ In the absence of such a procedure, there is no duty of obedience. For example, if a legitimate state implemented a popular vote system to decide who gets punished and how severely, those working for the punishment system would no longer have a moral obligation to carry out its commands.¹⁷

In relation to the military, these constraints mean that a military force serving a legitimate state has the authority to compel obedience to commands related to the *legitimate* ends of military service, in a context where decisions to use military force are governed by a decision-procedure that is committed to 'getting it right.' In other words, for the military to have practical authority over its members, it is not enough that it serves a legitimate state; there must also be evidence that the "justice of the war is being duly looked after" by the state and military leaders.¹⁸

When is Disobedience Justified?

I argued above that, in the absence of legitimate authority, military personnel have no moral obligation to obey orders. However, there may be grounds for disobedience even in military forces that possess legitimate authority and where the use of military force is governed by a commitment to justice.

Constraints on the Scope of Military's Legitimate Authority

Military officers serving a legitimate state have the authority to order subordinates to perform any actions necessary for the achievement of military goals. But, a military officer does not have the authority to (say) order her subordinates to marry each other, clean her house, or cook her dinner. Orders that are unrelated to military objectives are not orders that military personnel have a duty to obey.

The moral rights of military personnel also impose constraints on the military's practical authority. While military personnel give up many rights when they join the military, they do not give up *all* rights. The military owes a duty of care to military personnel (what Brian Orend describes as an internal *jus in bello*).¹⁹ For example, the military has an obligation to

16 Estlund, "On Following Orders," 221.

17 Estlund, "On Following Orders," 221.

18 Estlund, "On Following Orders," 226. Estlund is not claiming that such procedures must always "get it right," but that any mistakes must be "honest mistakes." (Estlund, "On Following Orders," 221.)

19 See Orend 2013.

adequately house, feed, and provide medical care for its members and, arguably, an obligation not to expose them to excessive or unnecessary risk.²⁰ While the extent of the military's duty of care is a matter of debate, orders that *clearly* expose military personnel to a significant risk of unjustified harm (such as an order to fly a plane that failed a maintenance test) violate this duty of care and need not be obeyed.

The moral rights of the targets of military violence, as encoded in treaties and conventions such as the Geneva Conventions, impose a third set of constraints. The military's practical authority does not extend to orders that violate the laws of armed conflict. As stated in the *U.S. Army Field Manual*, the *U.S. Naval Handbook*, and the *U.S. Soldiers Handbook*, military personnel are bound to "only obey lawful orders."²¹ While identifying lawful and unlawful orders is a difficult issue, the principle is correct: there is no duty to obey illegal orders.

Selective Conscientious Objection

What if a combatant in a legitimate military force believes that a war is unjust? Selective conscientious objection (SCO) refers to an objection to a *specific* use of military force, rather than an objection to serving in the military in general.

Early just war scholars, such as Francisco de Vitoria and Suarez, disagreed profoundly over whether soldiers may refuse to fight in wars they believe to be unjust.²² One argument in favor of a right to SCO appeals to the moral stakes of fighting in a war. In de Vitoria's words, "if the war seems patently unjust to a subject, he must not fight, even if he is ordered to do so by the prince. One may not kill an innocent man on any authority."²³ A different argument appeals to the value of integrity.²⁴ If we believe that "individuals should be allowed to live in accordance with their own conceptions of the good and the right,"²⁵ then it may be wrong to force a combatant to violate her deeply-held moral beliefs, particularly

20 See Nikki Coleman, *Does the Australian Defence Force have a compelling justification for the duty to obey orders?* (UNSW Canberra School of Humanities and Social Sciences, 2016): 60.

21 International Committee of the Red Cross, IHL Database: Customary IHL, "United States of America Practice Relating to Rule 154. Obedience to Superior Orders," https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_us_rule154. Accessed May 14, 2018.

22 See George Lucas "Advice and Dissent: 'The Uniform Perspective,'" *Journal of Military Ethics* 8, no. 2 (2009): 141–61 for an overview of this debate.

23 Quoted in Lucas, "Advice," 142.

24 Paul Robinson, "Integrity and Selective Conscientious Objection," *Journal of Military Ethics* 8, no. 1 (2009): 34–47.

25 Mark Navin, "Sincerity, Accuracy and Selective Conscientious Objection," *Journal of Military Ethics* 12, no. 2 (2013): 112.

since integrity is (as many believe) a military virtue. Thus, the military ought not punish soldiers for exercising a moral virtue that the military itself praises.²⁶

There are two main arguments against a right to SCO. The first argument focuses on the impact of permitting a right to SCO on military effectiveness. George Lucas, for example, argues that “[w]e simply cannot have a military organization grounded in dissent and disobedience.”²⁷ However, this objection is not an in-principle objection to SCO but rather an empirical objection, the validity of which requires empirical study that is beyond the scope of this chapter.²⁸ A second argument questions whether military personnel have the *right* to usurp the authority of their superiors. Lucas again: “it is fundamentally opposed to the very structure, purpose, and function of military forces that those in the rank and file should retain a right of veto over procedural decisions of their superiors and legitimate sovereign masters.”²⁹

The key phrase in the above quote is ‘*legitimate sovereign masters*.’ The duty of military personnel to defer to the military’s authority depends on the legitimacy of the military institution. But, firstly, not all military forces are or serve ‘*legitimate sovereign masters*.’ And, secondly, even when a military force serves a legitimate state, military personnel cannot just accept on faith that all the state’s uses of the military are legitimate. Given the moral costs of war, blindly “trusting the process” is not acceptable. Military personnel have a duty to check that the decision to go to war meets the procedural commitment to justice discussed by Estlund. While the strength of this duty might depend on a combatant’s rank (those of a higher rank have greater access to information about the relevant decision-procedures, for example), even the lowest-ranking combatant has access to some information about decisions to use military force. If there is reasonable³⁰ evidence that the ‘*justness of a war*’ is not being looked after by military and political leaders, then I argue that military personnel may permissibly prioritize their personal judgment and refuse to fight.

26 See Robinson, “Integrity.”

27 Lucas, “Advice,” 152.

28 Although see Orend 2008 for a critique of the effectiveness argument.

29 Lucas, “Advice,” 152.

30 “Reasonable” here does not mean “reasonable from the perspective of the combatant.” Rather, I mean a “reasonable person” standard of evidence. I cannot provide a complete account of a “reasonable person” standard here, but the central idea is that, if a combatant can point to evidence that a reasonable person would agree demonstrates a lack of care in ensuring the justness of a war, such as evidence of a state’s failure to seek legal advice about a war, or evidence that the state is misrepresenting or withholding relevant information about a conflict, then that combatant may refuse to fight.

Conclusion

Virtuous military obedience is not blind obedience. The duty of military personnel to obey orders depends on the military’s practical authority to compel obedience. Not all military forces possess this practical authority, however, and the duty to obey is not absolute even in those that do. In a legitimate military force, the duty of obedience is constrained by the military’s legitimate professional aims, and by the moral rights of military personnel and the potential targets of military force. Virtuous military obedience therefore requires the exercise of moral reflection on the part of military personnel regarding how decisions to use military force are made, as well as the legal and moral status of specific orders.