

Uniform Exceptions and Rights Violations

Though the Geneva Conventions and their additional protocols address the proper responsibilities and expectations pertaining to nonuniformed combatants, there is still substantial disagreement on this issue, and rightly so. It is commonly argued that resource disparity or alternative sources of political legitimacy, such as national self-determination or the constitution of a political collective, justify the use of such unconventional warfare. This article contends that nonuniformed combat is impermissible and its practitioners cannot be accorded full combatant rights under the rules of engagement, because of the manner in which this tactic endangers and infringes on the rights of genuine noncombatants.

Despite the disadvantages facing resource-poor groups, there are several arguments against allowing nonuniformed combat (and by proxy, the relevant Geneva Conventions passages):

- (1) Nonuniformed combat morally infringes on civilians' rights by forcing them to participate in the fighting and thus unwillingly give up fundamental rights to immunity.
- (2) The coercion of civilians exacted by nonuniformed combat differs substantively from conscription, and is not acceptable as a lesser form of conscription.
- (3) This form of unofficial conscription fails to meet standards of transparency, one of the requirements of a well-ordered society, because the conscripted civilians are unaware of what has happened to them.
- (4) Civilians are also morally prohibited from knowingly consenting to their own unofficial conscription.
- (5) The formation of a political entity by the nonuniformed combatants is not in and of itself enough for them to reap the benefits of legitimate statehood. The collective good of behaving like a legitimate political entity does not permit their infringement on individual civilians' rights to refrain from fighting.

Nonuniformed combatants come in several different categories. The primary focus of inquiry here is those who claim the full privileges of uniformed combat—namely, urban and rural guerrilla fighters who are usu-

ally but not always nonuniformed (and who often qualify under the Geneva Conventions' First Protocol) and some groups of nonuniformed terrorists (sometimes classified separately as "illegal combatants" because they intentionally attack civilians). Military special forces and spies, who neither expect nor receive treatment as legal combatants, are assumed ineligible for POW protections, and instead rely on whatever deals they can get through ad hoc negotiations and agreements between applicable governments. As a consequence, the moral appropriateness of current legal code has little relevance to these groups.

History of the Military Uniform

Uniforms were not always common, and the practice of national militias wearing coordinated garb in the Western world is not a particularly old one, dating back only to the seventeenth and eighteenth centuries.¹ Successful European generals during this period paid painstaking attention to detail, including recruitment and training. Oliver Cromwell was one of the first to clothe his militia in uniform—its visual symbol buttressed the professionalization of the military and enforcement of discipline.² Uniforms represented standardization as well as sovereign control.³ Even when impractical for movement, combat, or efficiency, such as certain versions of the British "redcoat" or some wildly extravagant and expensive Napoleonic uniforms,⁴ those concerns were trumped by the importance of creating cohesion in the military and projecting an image of state power. Not surprisingly, systematic uniforming of soldiers coincided with the nation-state's development, and has since become standard prac-

¹Members of warrior classes all over the world have long worn distinctive armor and markings (e.g., crests, coats of arms, and other heraldry) to distinguish ally from enemy. Japanese shogunates were probably the first to clothe their armies in official uniform, requiring their samurai to wear the *mon* of their shogun lords as far back as the eleventh century; meanwhile, European knights wore their individual coats of arms or that of their religious orders into battle. Not until the mid-seventeenth century in Europe does Oliver Cromwell dress his army in uniforms, and the ensuing trend reaches its height with Frederick the Great's elaborate regalia in the mid- to late-eighteenth century. See Geoffrey Parker, *The Military Revolution: Military Innovation and the Rise of the West 1500-1800* (New York: Cambridge University Press, 1988), pp. 71-72; Richard Holmes (ed.), *The Oxford Companion to Military History* (New York: Oxford University Press, 2001), pp. 931-35; and Toni Pfanner, "Military Uniforms and the Law of War," *International Review of the Red Cross*, no. 853 (March 2004): 93-130, pp. 95-99.

²Extrapolated from Jeremy Black, *War and the World: Military Power and the Fate of Continents, 1450-2000* (New Haven: Yale University Press, 1998), p. 209.

³*Ibid.*, p. 132.

⁴Scott Hughes Myerly, *British Military Spectacle: From the Napoleonic Wars Through the Crimea* (Cambridge, Mass.: Harvard University Press, 1996); and Emir Bukhari, *Napoleon's Hussars* (Oxford: Osprey Publishing, 1978).

tice as well as synonymous with legitimate statehood in warfare. The influence of uniforms has been felt far beyond the European sphere and is codified in international military law.

Current international law on nonuniformed combatants, which this article considers reasonably representative of international moral opinion, can be found in the Geneva Conventions.⁵ Article 44.3 of the First Protocol (1977) requires combatants to distinguish themselves from civilians (by wearing uniforms or by some other recognizable identifying mark) when engaged in or preparing for attack, but excepts “situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself,” and extends combatant protections to the nonuniformed so long as they carry arms openly in combat.⁶

⁵The text of the Geneva Conventions and Additional Protocols can be found at: <http://www.icrc.org/web/Eng/siteeng0.nsf/html/genevaconventions>.

⁶*Article 44. Combatants and prisoners of war*

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.
2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.
3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
 - a. during each military engagement, and
 - b. during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.
 Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).
4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.
5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.
6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.
7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.
8. In addition to the categories of persons mentioned in Article 13 of the First and

It does not address the circumstances qualifying for this exception, but the most common scenario (and the one that prompted this exception) is when one party is very resource-poor and/or lacks legitimate political authority, such as an insurgent political subgroup. In these cases, a combatant is not required to distinguish himself in any way from civilians in order to retain all the rights and privileges of lawful combatants, provided that he “carries his arms openly” while engaged in or deploying for an attack. He is then exempted from charges of perfidy⁷ under Article 37.1.c for “feigning ... civilian, non-combatant status.” It is implied that these circumstances are to be narrowly construed, as this exception “is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.”⁸ All lawful combatants, uniformed or not, must adhere to the Conventions’ laws, but violations will not necessarily deprive the combatant of his full complement of rights.⁹ Unlawful nonuniformed combatants (who do not carry their arms openly when required) forfeit their rights as POWs should they be captured, but will “nevertheless be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol.”¹⁰

The practical and legal viability of this law is complicated in its own right. First, it is not clear what carrying arms “openly” requires. Must one hold an AK-47 in one’s hands and akimbo to the body, or can it be strapped across the back? Even if arms are carried openly into combat, this would not be enough of a symbol in societies where everyone carries weapons.¹¹ Furthermore, nothing is said about undercover special opera-

Second Conventions, all members of the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.”

⁷Perfidy is defined as follows in the Geneva Conventions, First Protocol:

“*Article 37. Prohibition of perfidy*

1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:
 - a. the feigning of an intent to negotiate under a flag of truce or of a surrender;
 - b. the feigning of an incapacitation by wounds or sickness;
 - c. the feigning of civilian, non-combatant status; and
 - d. the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.”

⁸Geneva Conventions, First Protocol, Art. 44.7.

⁹Ibid., Art. 44.2.

¹⁰Ibid., Art. 44.4.

¹¹In militarized societies (e.g., Afghanistan, Somalia), there are lots of weapons to be had and many people carry arms on a regular basis, regardless of military standing. This

tions forces, although they do not expect or receive the rights of uniformed combatants.

But more serious problems remain. First, the language describing exceptional situations is imprecise and nondescriptive. The historical circumstances that led to the adoption of these articles are well known and their original intent is clear; Article 1.4 singles out “armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.” In actuality, the regulations are so vague that they are obviously ripe for abuse. Because the terms are laden with historical baggage and quite incendiary, they are often misapplied to suit the purposes of their users. Furthermore, the circumstances only “include” these in particular, so exemptions are not exclusive to anticolonial or antiracist movements. Antiglobalization movements or rebellions over consistent poverty, for example, could qualify since they can claim economic disparity. In addition, what motivation is there for everyone else to maintain the status quo when tempted with the advantages of nonuniformed combat? Article 44.7 tries to address this issue, but it is toothless in light of the vagueness of 44.3.

Contemporary Purposes of the Uniform Convention

The original objective of wearing uniforms was internal, to help impose discipline and professionalism on previously disordered militia and to

is problematic for Geneva Conventions Art. 44.3, which relies on open arms to substitute for uniforms as martial identification. Wearing uniforms is really about visually identifying oneself in a manner that would be readily perceived by an observer, and this can encompass many things, including the unofficial uniforms of rebel groups. For example, rebels can wear distinctive colors, funny hats, or whatever piece of clothing so long as it is plainly displayed, it is obvious that such an item constitutes their “uniform,” and it is reasonably hard to accidentally wear that “uniform.” All three conditions must be met in order to serve that function. Carrying arms openly, then, may not be enough identification even in generally unarmed societies. Depending on their size and how they are carried, weapons and many common items (such as cell phones, wallets, tools, pipes, etc.) can easily be confused with each other under stressful circumstances requiring quick responses to perceived threats. It also matters whether one is fighting in urban or rural areas, and in what type of rural environment (heavy forests, open desert dunes, etc.). All these factors affect whether or not arms are adequate to differentiate soldiers from civilians, and more often than not, arms will not be enough. The “open arms” alternative is insufficient, as a general rule, to substitute for uniforms and to absolve nonuniformed combatants of this rights violation. This regulation should be made both stricter to eliminate the loophole of “open arms” and broader to embrace a less pomp-and-circumstance-influenced definition of “uniform.” Such broadening would eliminate the need for any exceptions that deem “open arms” sufficient.

Whenever this article refers to uniforms, it does not limit them to full regalia. It includes any acceptable standardized identifying markers that a resource-poor group could adopt as an alternative to full uniform dress.

help solidify loyalty to the sovereign from mercenary fighters. While this rationale still applies, the primary motivation behind wearing uniforms has changed. It must have quickly become obvious that wearing uniforms disadvantaged the soldiers in them, particularly when moving through civilian populations. Yet, the expectation that this convention would be honored has persisted. It is incorrect to think that warfare has only recently spread to civilian-populated areas and that, previously, soldiers could wear uniforms with impunity. In fact, soldiers have always fought among or near civilians, yet the uniform's evident drawbacks have not overcome over three hundred years of this practice—certainly long enough to have figured out its hardships.

Why would such a detrimental convention persist? The uniformed soldier allows himself to be recognized as such, even though it makes him an easier target, for several reasons. One of the most compelling is utilitarian: because wearing uniforms makes it easier for soldiers and civilians to tell each other apart, it prevents soldiers from hiding among civilians and helps reduce accidental civilian casualties. Second, it encourages clumping for protection. A single, readily identified soldier would not want to be caught alone in hostile territory. This helps keep soldiers away from civilians, further reducing civilian risk, and keeps wars between soldiers.

Although overall utility is increased by obeying a uniform convention, individual soldiers are disadvantaged. Other reasons have emerged to reinforce the tradition and to combat the natural tendency of every individual to abandon his uniform, including an element of reciprocity. Soldiers wear uniforms, thereby making themselves vulnerable, because they expect the same courtesy from their opponents.

Noncombatant Immunity

Despite this convention, refusal to wear uniforms persists and receives official international sanction. In addition to the three historical reasons for requiring uniforms (nationalism/sovereign control, utilitarianism, reciprocity), this article suggests a fourth, one that fits well into the contemporary moral climate—the right to immunity. The purpose behind noncombatant immunity and the practice of wearing uniforms is not uniquely or best explained by utilitarian, egalitarian, or nationalistic interests. In contemporary times, it is more plausibly explained by a robust concern with rights that is common to deontological liberal theories. While they differ on exactly how they would defend this right to immunity, they all agree that civilians come to the table with an assumption of immunity and cannot be unduly deprived of it.

To demonstrate this “overlapping consensus” on civilian immunity, I

sketch two different deontological liberal ways of getting to this conclusion—self-ownership and the integrity of the person—and argue that the right to civilian immunity can only be surrendered by becoming a soldier under very limited circumstances that preclude nonuniformed combat.¹²

Self-ownership

At the core of any liberal's convictions, no matter what his particular strand, are the beliefs that there is a natural right to self-ownership and that bodily violations constitute a special category of wrong. The concept of ownership in the self, which can be traced back to Locke, is now often called "control self-ownership,"¹³ and:

[it] consists of the rights of use and exclusion, the power of transfer, and an immunity from expropriation with respect to one's own body and labor power, with these incidents being held permanently and *in rem* (i.e., against the world).¹⁴

Control self-ownership is motivated by the inviolability of the person and the desire to protect individual autonomy. John Christman writes:

What matters in self-ownership ... is individual rights to control oneself—to no intervention in use [of one's talents]. The specific motivation behind self-ownership involves the strong interest that I have in running my own life. If the state or other entity tells me when and where I must utilize my abilities—forcing me to produce this or preventing me from producing that—something deep and fundamental is sacrificed."¹⁵

Control self-ownership is "arguably the *complete* liberal conception of self-ownership,"¹⁶ meaning that liberals of any stripe can and should en-

¹²This "overlapping consensus" of deontological liberal agreement on civilian immunity can be supplemented by a consequentialist "liberalism of fear." According to Judith N. Shklar in "The Liberalism of Fear," in G.W. Smith (ed.), *Liberalism: Critical Concepts in Political Science* (New York: Routledge, 2002), pp. 91-106, "Liberalism has only one overriding aim: to secure the political conditions necessary for the exercise of personal freedom" (p. 91). This minimalist liberalism is a method of securing "freedom from the abuse of power and intimidation of the defenseless" (p. 96), and seeks only to prevent fear "created by arbitrary, unexpected, unnecessary, and unlicensed acts of force and by habitual and pervasive acts of cruelty and torture performed by military, paramilitary, and police agents in any regime" (p. 98). This would require making civilians immune from attack in times of warfare.

¹³Control self-ownership was first developed by John Christman in "Self-Ownership, Equality, and Structure of Property Rights," *Political Theory* 19 (1991): 28-46; and *The Myth of Property: Toward an Egalitarian Theory of Ownership* (Oxford: Oxford University Press, 1994).

¹⁴Robert S. Taylor, "Self-Ownership and the Limits of Libertarianism," *Social Theory and Practice* 31 (2005): 465-82, p. 468.

¹⁵Christman, "Self-Ownership, Equality, and Structure of Property Rights," p. 39.

¹⁶"Control self-ownership is either explicitly or implicitly endorsed by John Christman, James Grünebaum, [and] Andrew Kernohan," says Taylor ("Self-Ownership and the Limits

dorse this definition without amendment or reservation. This results in liberal agreement on some domestic policies, namely that forced labor such as “Good Samaritan” laws and *corvée* labor should be prohibited.¹⁷ Internationally and in the context of a war, the basic right of exclusion with respect to one’s own body and its corresponding duty of noninterference are tantamount to civilian immunity. Unless a person somehow gives up his right of exclusion—for example, by enlisting—a soldier violates that right by attacking him. The immunity that each civilian starts (and most end) with in wartime equates to having permanent rights of exclusion over his own body.

Integrity of the person

One of the Rawlsian basic liberties is integrity of the person, which includes “freedom from psychological oppression and physical assault and dismemberment.”¹⁸ Like control self-ownership, physical and psychological integrity is grounded in a right to one’s natural assets¹⁹—here, one’s body. Rawls, however, offers a more complicated apparatus to justify this integrity as a basic right. Inherent in an individual’s equal liberties are the possession of a free internal life and the freedom to revise and alter one’s own ends. These, in turn, are feasible only when accompanied by the possibility of self-respect.²⁰ All of this would be meaningless and impossible without the aforementioned physical integrity. So people have a fundamental interest in the integrity of their own person and would want to guarantee its priority from behind the veil of ignorance.²¹ In the same manner as with control self-ownership, the priority of physical and psychological integrity translates into civilian immunity as the default condition on the international stage and in the context of war.²²

of Libertarianism,” p. 474). It plays an even larger role in libertarian thinking, e.g., Robert Nozick and Murray Rothbard. See Christman, “Self-Ownership, Equality, and Structure of Property Rights,” p. 39; James Grünebaum, *Private Ownership* (London: Routledge & Kegan Paul, 1987), p. 171; and Andrew Kernohan, “Rawls and the Collective Ownership of Natural Abilities,” *Canadian Journal of Philosophy* 20 (1990): 19-28, p. 22. See also Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), and Murray Rothbard, *The Ethics of Liberty* (Atlantic Highlands, N.J.: Humanities Press, 1982).

¹⁷Taylor, “Self-Ownership and the Limits of Libertarianism,” p. 472.

¹⁸John Rawls, *A Theory of Justice*, revised ed. (Cambridge, Mass.: Harvard University Press, 1999), §11, p. 53.

¹⁹*Ibid.*, §17.

²⁰*Ibid.*, §§32, 33, 82.

²¹*Ibid.*, §§26, 39.

²²The constraints of nonideal theory on the moral principles of nonuniformed combat are directly addressed below, in the section “Voluntary assumption of risk by civilians.”

Giving up civilian immunity

When a war begins, status quo ante for all individuals is civilian standing with immunity from attack and the right to be protected. Legally, some of them become combatants and acquire military standing with respect to their own governments, by virtue of exchanging their right to immunity for the right to kill opposing combatants and thus making those killings acceptable wartime deeds rather than murders. The right to not be attacked is forfeited through an intentional exchange. It is the only way a civilian can give up his immunity, and in contemporary times, this is the understanding that noncombatants have when they become combatants.²³ Killing in combat is therefore a legitimate action because of rights exchanges by combatants who knowingly choose to enter the arena of war.

The conditions under which civilians can give up or lose their immunity are very specific and restricted, and they preclude the possibility of nonuniformed combat. Soldiers relinquish their right to not be killed in exchange for the right to kill other soldiers. Civilians, on the other hand, retain their right to immunity but are obligated to not interfere with the activities of soldiers, whether by hindering or helping.²⁴ A person can readily move from one category to the other and back again without restriction, provided circumstances are reasonable and the distinction is not being exploited, for example, not in the middle of a battle.

What is going on here is a multifaceted contract between soldiers and their governments with a very limited scope (the realm of war), which

²³There are actually two separate agreements. The first is the exchange of civilian immunity for the right to kill. In the second, between combatants and *other* governments, the former trade their right to immunity for later protections as POWs (who are not deemed to have murdered and are not held responsible for the political actions of their governments) if they are captured on the battlefield.

This relationship between combatant and POW status is also noted by Helen Kinsella, "Discourses of Difference: Civilians, Combatants, and Compliance with the Laws of War," *Review of International Studies* 31, Suppl. S1 (2005): 163-85. Kinsella tries to explain why the Bush administration was so particular about abiding by Geneva Convention regulations for the civilian/combatant distinction but much less so about the ones providing protections for POWs held at Camp X-Ray in Guantanamo Bay. But she does not consider that all the combatants who did not receive full POW protections were suspected of engaging in nonuniformed terrorism. These nonuniformed combatants did not exchange their rights in good faith. They claimed all the rights of killing in war, without accepting any of the burdens or responsibilities (including protecting civilians and wearing uniforms). They sought to retain civilian immunity through their dress while still demanding protection as POWs. This clearly violates the terms of the exchange.

²⁴There is, of course, a gray area between unquestionable combatants (e.g., soldiers on the front line) and unquestionable noncombatants (e.g., babies), which includes non-combatants who contribute to the war effort in some substantive way, e.g., workers in military munitions factories, military medical personnel, workers in food and agricultural sectors supplying the military, or civilian transporters of military supplies.

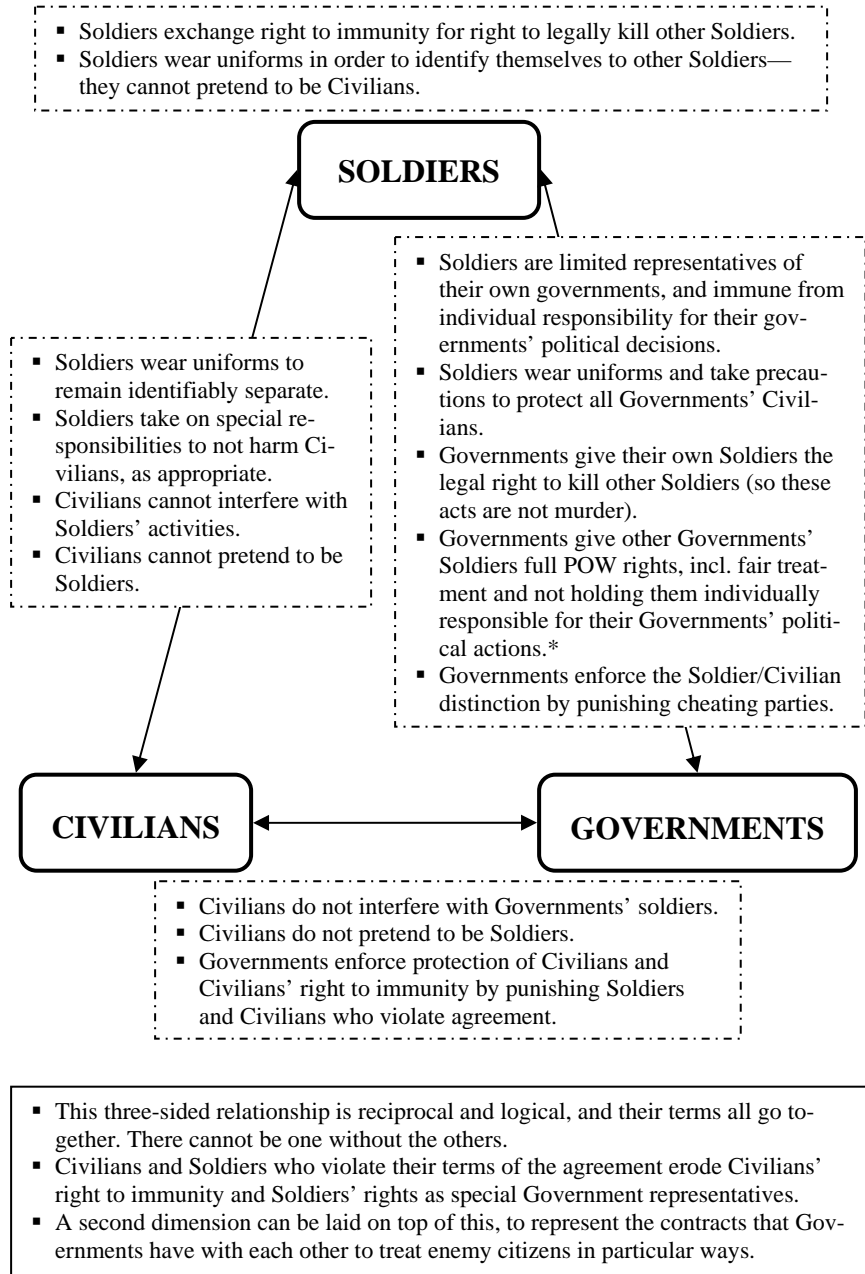
results in different statuses for everyone. Soldiers accept the disadvantages of wearing uniforms on the understanding that their opponents do so as well, with the intention of protecting civilians from both sides by clearly signaling their status. It is bolstered by an underlying and reinforcing agreement between governments (currently via the Geneva Conventions) to give uniformed soldiers certain rights and protections as befitting their positions as government representatives (and not as independent, individual agents), and to discourage violation of the soldier/ civilian distinction by categorizing and treating nonuniformed combatants differently.

This agreement is not only between soldiers and their governments, however, but a three-way understanding between soldiers, governments, and civilians.²⁵ Civilians have a right to immunity from attack as well as the responsibility to refrain from fighting or unduly obstructing it (e.g., wandering into and disrupting the course of a battle, purposefully or not). The soldier/civilian distinction cannot work without agreement, cooperation, and reinforcement from all three parties (civilian, soldier, and government).

The parameters of noncombatant immunity form the basis of the uniformed combatants' rights. Combatants agree to exchange their right to immunity for a right to kill with the understanding that conditions for engagement in war will be fair and reciprocal. One such condition is that each combatant will wear a uniform and thus identify himself as someone who has exchanged his rights. By intentionally forgoing the attire of

²⁵At first glance, the following diagram appears to resemble the famous Clausewitzian trinity: people, army, and government. This is a misconception of trinity, however. Clausewitz says that the dominant tendencies in war are a "wonderful trinity" of "the original violence of its elements, hatred and animosity, which may be looked upon as blind instinct; of the play of probabilities and chance, which make it a free activity of the soul; and of the subordinate nature of a political instrument, by which it belongs purely to reason" (Carl von Clausewitz, *On War*, trans. Colonel J.J. Graham (London: N. Trübner, 1873), <http://www.clausewitz.com/CWZHOME/VomKriege2/ONWARTOC2.HTML>, §I.i.28), which often get simplified to "emotion, chance, and reason." Clausewitz continues: "The first of these three phases concerns more the people; the second more the general and his army; and the third more the Government. The passions which break forth in war must already have a latent existence in the peoples. The range which the display of courage and talents shall get in the realm of probabilities and of chance depends on the particular characteristics of the general and his army; but the political objects belong to the Government alone."

Several contemporary interpreters—including Harry G. Summers, *On Strategy: A Critical Analysis of the Vietnam War* (Novato, Cal.: Presidio Press, 1982); and John Keegan, *A History of Warfare* (New York: Knopf, 1994)—have mistakenly identified the trinity as the people, army, and government. Clausewitz, however, clearly refers to the people, army, and government as the primary—though not exclusive—exemplars and manifestations of the trinity's elements, and not the trinity itself. For more, see Christopher Bassford and Edward J. Villacres, "Reclaiming the Clausewitzian Trinity," *Parameters* 25, no. 3 (1995): 9-19.



**This covers soldiers in standard relationships to governments, though it also has implications for stateless individuals who act outside of the authority of a state's recognized military. Those fighters could not possess the right to kill soldiers or to be treated in accordance with established international military conventions for POWs.*

recognizable uniforms or distinctive emblems—the only practical way to reasonably identify someone as a soldier or civilian on the battlefield—nonuniformed combatants violate their agreement, and their eligibility for protections under conventional laws of war subsequently becomes questionable.²⁶ Requiring uniforms has the undeniably important instrumental effect of helping to protect noncombatants—but if its benefits can be shown to be negligible, a consequentialist case can be made that wearing uniforms should be unnecessary for receiving full combatant protections.

The ability to distinguish between combatants and noncombatants, however, also has significant deontological implications; these stand separately from utilitarian doubts and apply even if they are assuaged. The tactical advantage gained by nonuniformed combat hinges on the fact that one's opponent generally respects modern uniform conventions during combat, namely, that he wears his uniform and mistakenly expects you to wear yours. It is a deliberate strategy used expressly to blend in with the protected civilian population, and when fighters do not wear uniforms, they implicitly force civilians to participate in the fighting.

Because of their similar appearances, a soldier cannot practically distinguish between his nonuniformed enemy and a civilian. This leads the soldier to view all persons as potential combatants—an entirely reasonable and expected response—even as he continues to pursue only the combatants, albeit with greater care and at greater risk to himself. But as a result, civilians are unwillingly drawn into the fighting, because they often find themselves in the vicinity of and mistaken for nonuniformed combatants. Whether or not they take up arms to defend themselves, civilians in this situation are unwittingly forced to become combatants, thus compromising the autonomy of those who have chosen to refrain from fighting.

This involuntary surrender of civilian immunity differs from government conscription into military service, because civilians in the former situation are unaware of their new status as combatants or their concomitant rights and responsibilities. So in addition to the rights violation, it fails to meet standards of transparency. One requirement of a just, well-ordered society, according to Rawls, is that it satisfy the demands of publicity, one of which is that the principles regulating society are made

²⁶In *Just and Unjust Wars* (New York: Basic Books, 1977), Michael Walzer makes a similar claim, saying that guerrilla fighters “violate the implicit trust upon which the war convention rests: soldiers must feel safe among civilians if civilians are ever to be safe from soldiers” and that when murder or assassination is committed in war, as guerrilla warfare might be called in some circumstances, the assassin cannot claim protection from the laws of war even if the deed was justified (pp. 182-83). This article goes further, by making explicit the structure that supports this implicit trust, adding the role of the government and proposing a complex three-way relationship, and explaining the foundations for civilian immunity that lie at the base of this structure.

public and everyone accepts and knows that others also accept them.²⁷ There is nothing wrong per se with a military draft so long as everyone knows that it exists and what the terms are, that is, who would be drafted and the conditions under which one might be called on to serve, but it violates transparency requirements when one is oblivious of having been pressed into military service. It is unreasonable to ask civilians to assume unawares a status that comes with such unique and serious risks of injury and death, and equally unique and serious responsibilities. It is one matter to ask citizens to risk life and limb in conscious service of the state, but another entirely when they are essentially conscripted without their knowledge.

Soldiers who do not wear uniforms violate their obligation to protect civilians and try to have the best of both worlds—retain a right to immunity while acquiring the right to kill legally. Repeated and sustained cheating, by either civilians or combatants, will gradually and inevitably erode the sanctity of civilian status in that particular conflict, and will ultimately lead to serious consequences on the battlefield. Uniformed soldiers, even if they try to continue treating civilians with special care, will be forced to assume that civilians might be nonuniformed enemy combatants and start treating them as such.²⁸

Possible Counterarguments

The next sections tackle some of the more prominent counterarguments in favor of allowing a nonuniformed exception for certain groups, and explain why they fall short.

“Weapon of the weak”

The changing nature of warfare (notably, unprecedented asymmetries in military power) is often given as a reason for exception. Proponents of

²⁷In “Kantian Constructivism in Moral Theory,” Rawls actually sets forth three levels of publicity: (1) of the principles of justice themselves; (2) of the methods of inquiry and reasoning used in reaching the principles (including science, common sense, etc.); and (3) of the entire mechanism of justification for the principles of justice, which may include some additional methodologies. See John Rawls, *Collected Papers* (Cambridge, Mass.: Harvard University Press, 1999), pp. 303-58, at pp. 324-25.

²⁸In the current Iraq conflict, the U.S. has been fastidious about maintaining the civilian/combatant distinction, more so than just about every other country in the world. American soldiers are ordered to abide by that regulation even when engaging an enemy that regularly disguises itself as civilian, and the U.S. government backs up its beliefs and intent by prosecuting cases of civilian death more often than cases of torture. But even this attention lavished on maintaining the sanctity of the civilian can only withstand so much when it is constantly battered by the reality of sustained exploitation on the battlefield.

nonuniformed combat often justify their strategy as a “weapon of the weak,” because they lack resources relative to their better-organized and better-equipped opponents.

But whether military asymmetries are merely technological or inclusive of political, diplomatic, and economic resources, they are nothing new, so proponents of this justification cannot rest their claims on the novelty of these disparities. Either the laws of warfare should never have required uniforms of anyone, or the differences in ability have no bearing on the matter at hand. For as long as people have fought each other, there have been glaring gaps in the ways of war. On the technological front, the most obvious examples of battlefield asymmetry come from the introduction of firepower. The Ottoman use of siege artillery (including cannons and mortars that fired 155-180 shots per day) greatly contributed to their victories in the siege of Modon²⁹ in 1500 and in a 1526 battle at Mohacs against Luis II of Hungary’s cavalry. When Aztecs and Incas were first confronted with firepower by Spaniards in the same century, they fared worse than their European counterparts had against the Ottomans.³⁰ Akira Kurosawa’s *The Seven Samurai* (1954) provides a more poignant example; though the samurai prevail against gun-wielding bandits in this instance, the film points to the impending end of the samurai’s way of life and warfare. Technological disparities are not limited to innovations in firepower. In the fifteenth and sixteenth centuries, the Portuguese navy enjoyed many advantages—their ships’ hull construction and lateen and square rigging, as well as navigational tools and knowledge—that translated into military benefits whether or not those ships carried cannon.³¹ This is no different from the advantages afforded to modern air forces that possess stealth fighters, vertical-landing jets, and Predator drones. Superior firepower accounts for only part of the technological gap.

One can go back further to the battle of Agincourt (1415), for a striking example of advanced technology. Henry V’s brilliant leadership was aided by horrible tactics from the French, but the English’s ability to defeat a force more than four times the size of their own had probably even more to do with their use of longbows. This battle is often cited as one of the major developments in the history of military technology, but the French were hardly lacking in absolute terms. Their force, about 25,000 strong, was comprised largely of well-equipped and heavily armored men-at-arms, including some cavalry.³²

²⁹Modon is known as Methone or Methoni by the Greeks. This battle is also referred to as the Second Battle of Lepanto, in the Ottoman-Venetian war of 1499-1503.

³⁰Black, *War and the World*, pp. 26-29.

³¹*Ibid.*, pp. 26-27.

³²For an excellent account of the Battle of Agincourt, see John Keegan, *The Face of Battle* (New York: Viking Press, 1976), chap. 2.

The Agincourt scenario raises a couple of important questions. First, how large does the gap need to be to qualify for using “weapon of the weak” strategies? There was not that much of a technological difference between the two sides at Agincourt. The longbow was a critical development, but the gap between the longbow and, say, the crossbow or the sword is not nearly as large as the difference between the stealth bomber and the AK-47. Yet, few would call the French “weak” or even significantly disadvantaged, and certainly, no one would justify the French resorting to nonuniformed combat in order to rectify that disadvantage.

That leads to the second question: Why does the playing field, or battlefield, need to be perfectly level? It is not, after all, a chess game where artificial constraints endow both sides with equal material resources at the beginning. In fact, the point of war is to determine who has the advantage and/or to gain the upper hand. The “weapon of the weak” argument is actually premised on an empirical claim about battlefield disparities, not a moral claim, and as such, it does not respond to the question at hand. It starts to sound as if proponents of this “weapon of the weak” strategy want to level the playing field for its own sake. Perhaps they believe that doing so would rectify other wrongs (e.g., economic oppression or racial discrimination) perpetuated in the past against the groups represented by the nonuniformed combatants, by reversing the inequalities in the military arena. While the technological gap obviously affects military outcomes, it may not be the deciding, or even the most important, factor in either the long- or short-run, which is why the “weapon of the weak” argument can also be understood more broadly, to include political and economic weakness. In the best-case scenario, a group has gone to war only because it has not been able to achieve its desired results through the political and economic venues in which it is also lacking. Relative weakness in military capabilities and battlefield resources, then, is a reflection of a broader, systemic incapacity.

These political and economic weaknesses are affected by a host of other elements, for example, being a nomadic versus an agrarian society or lacking previous exposure to deadly diseases.³³ Jared Diamond’s *Guns, Germs, and Steel* argues quite convincingly that the military advantages (including guns, steel swords, mounted animals, diseases/immunities, oceangoing ships, and advanced political organization) possessed by Europeans (Western Europeans, especially) that allowed them to conquer almost all of the rest of the world were actually a result of superior food production and related technologies and the development of writing. Those in turn resulted from the particular sets of available domesticable native

³³Notably, a host of European diseases such as measles and smallpox nearly decimated the Native Americans before they ever met on the battlefield.

animal and plant species, which were then spread along east-west axes across landmasses. Because of similar climates latitudinally, the east-west axis is much more conducive than the north-south axis to the spread of plants, animals, and technologies.³⁴ (Diamond's argument is grand theory—more or less compelling for specific eras on specific continents, but very convincing as an explanation covering the seven-million-year history of man.) As this or other similar theories suggest, military inequalities are the consequence of a mass of longstanding, complex factors and historical developments—battlefield capacities are merely a symptom.

Underlying political and economic inequalities need to be addressed at their source rather than with their manifestation. Blending into civilian populations gives nonuniformed combatants not only tactical parity but moreover tactical advantage, and in fact, defenders of nonuniformed combat often erroneously assume that the primary cause of not wearing uniforms is resource poverty rather than a tactical decision to violate civilian rights in order to gain an advantage in combat. (Many guerrilla groups have and regularly wear uniforms for the same reasons that official state soldiers do—to foster unity and a sense of identity and purpose—yet choose to not wear their uniforms in battle.)

It seems unreasonable to subsequently give the formerly disadvantaged group an *advantage*. While disadvantages suffered in the past may well contribute to present military inequalities and should somehow be rectified, it is unfair to force the presently advantaged soldiers to atone for asymmetries of old or for their governments' political and economic attainments by giving their current counterparts an advantage. The persons involved are different, and present individuals should not be held responsible for past injustices in this way. This is not to say that the asymmetrical situation should not somehow be addressed. But once a war has already begun, it is the wrong time and wrong arena to tackle what is really a larger problem.³⁵ Rather than put civilians at undue risk by allowing the disadvantaged special tactics, rebel groups in the right should be able to make claims on foreign aid, so they can remedy their weakness in both the broad and technological senses. Underlying inequalities behind battlefield asymmetry are best rectified, if at all, not on

³⁴Jared Diamond, *Guns, Germs, and Steel: The Fates of Human Societies* (New York: W.W. Norton, 1997).

³⁵On the practical side, making exceptions based on relative political or economic weakness is difficult to regulate. Every time there is a conflict, it must be determined not only which side is weaker but also how much the stronger side should be handicapped, based on who in particular is fighting. This raises many other questions: How much are political and economic disparities worth in terms of battlefield strategy? What about in close cases, where the two sides are not too unevenly matched? What is the threshold gap necessary for receiving special dispensation? How will this be determined before the conflict starts? Who will make these decisions?

the battlefield, but at their roots. In trying to right what is actually a symptom of a “wrong,” nonuniformed combat merely trades one “wrong” for another, which creates additional wrongs by endangering innocent civilians. And this “wrong,” battlefield inequality, is not really a wrong—it is a factual inequity, not a moral mistake.

Scale and scope of modern warfare

It may be that the nature of contemporary warfare—its increased scale and scope, along with more urbanized fighting and far- and wide-reaching weaponry, impact greater numbers of civilians than ever before—rather than the lack of uniforms is to blame for the proliferating number of civilian casualties. Whether its proponents like it or not, the inevitable implication of this argument is that because civilian deaths resulting from nonuniformed combat are negligible in comparison with those from other causes, perpetrators of nonuniformed combat should be given a pass because others commit grosser injustices.

Regardless of the truth of this argument, it is irrelevant to the question at hand—whether nonuniformed combat is unjust and whether it should be allowed. Carpet bombing, the use of “daisy cutters” or nuclear weapons, embargoes, or any number of other tactics may directly or indirectly lead to a thousand or even a hundred thousand times more civilian deaths than nonuniformed combat does, but they do not detract from the claim that nonuniformed combat leads to some unjust civilian deaths. It would be no different if a person were to declare that driving while intoxicated seriously impairs one’s motor functions and causes many traffic-related deaths and, given the cost-benefit calculation of imposing such a law, should therefore be banned, and someone responded, “You know that not wearing seat belts causes lots of deaths, too.” While not entirely unrelated, it does not address the point that has been raised.³⁶

³⁶Moreover, it is not clear that this claim—that the nature, weaponry, and tactics of modern warfare have increased civilian deaths—is even true. There is widespread disagreement not only about the absolute numbers of civilians killed, but also about the relevant trends and ways of evaluating that information. Scholars dispute whether civilian casualties have increased or decreased as a result of modern warfare. (For example, see Bethany Ann Lacina, Nils Petter Gleditsch, and Bruce M. Russett, “The Declining Risk of Death in Battle,” *International Studies Quarterly* 50 (2006): 673-80; and Meredith Reid Sarkees, Frank Whelon, and J. David Singer, “Inter-State, Intra-State, and Extra-State Wars: A Comprehensive Look at Their Distribution over Time, 1816-1997,” *International Studies Quarterly* 47 (2003): 49-70.) Some argue that the broad scope and larger scale of modern war and the rising use of air power, coupled with development of greater firepower and more deadly weapons of mass destruction, have led to more civilian casualties than ever before. On the other hand, the advent of a uniform convention and new laws against harming civilians, as well as the greater accuracy of weapons, have certainly depressed the number of civilians who would otherwise have been killed. *A New York Times*

More compelling would be the following three-part claim: (1) while wearing uniforms may have some marginal effect of decreasing the number of civilian casualties, the practice is not as useful in reducing civilian deaths as is often thought; (2) so wearing uniforms results in only a small gain in overall utility that does not outweigh the costs it imposes on already militarily disadvantaged groups; therefore (3) requiring this practice is not justified.

The problems with this argument are that, first, it is of questionable veracity, and second, it is utilitarian at core. It weighs the net utility gained when uniforms are not required against the net utility when uniforms are mandated, and finds that the former is greater than the latter. But besides obvious problems with measuring utility in these situations (which would include measuring utility on the battlefield against any future gains and losses away from it), any utilitarian argument like this does not consider that civilian utility might receive more weight than soldier utility, and necessarily disregards the rights of immunity and their corresponding responsibilities belonging to both soldiers and civilians during war.

graphic on technological advancements in war presented fascinating statistics from the U.S.'s major wars, from World War I through the present, including the cost of the wars, precision-guided weapons as a percentage of total weapons, number of sorties flown, and total number of American soldiers killed in battle. Perhaps the most telling is the number of sorties required to hit a 60' x 100' building: World War I: N/A; World War II: 3,024; Korean War: 550; Vietnam War: 44; Persian Gulf War: 8; current Iraq war: 1 ("A Nation at War: A Historical View," *New York Times*, 20 April 2003, B16).

The first problem in determining which way casualties are trending is counting them. The dangers and disruptions of war make it difficult to get accurate numbers. Furthermore, casualty reports can be intentionally inaccurate, while some deaths often are not counted, e.g., deaths from landmines after the conflict ends or from the spread of disease exacerbated by the war, or other conflict-related mortality (see, e.g., Aldo A. Benini and Lawrence H. Moulton, "Civilian Victims in an Asymmetrical Conflict: Operation Enduring Freedom, Afghanistan," *Journal of Peace Research* 41 (2004): 403-22; Hazem Adam Ghobarah, Paul Huth, and Bruce Russett, "Civil Wars Kill and Maim People—Long After the Shooting Stops," *American Political Science Review* 97 (2003): 189-202; and Debarati Guha-Sapir and Willem Gijsbert Panhuis, "Conflict-Related Morality: An Analysis of 37 Datasets," *Disasters* 28 (2004): 418-28), and separating some of those out as direct results of war can be difficult. There are good datasets available on war deaths, however, including Nils Petter Gleditsch, Peter Wallensteen, Mikael Eriksson, Margareta Sollenberg, and Håvard Strand, "Armed Conflict 1946-2001: A New Dataset," *Journal of Peace Research* 39 (2002): 615-37.

Even with the right numbers, what is the relevant way to interpret them? The number of civilian casualties does not tell the whole story. Total absolute numbers might be interesting, but ultimately they are not very useful. Rather, civilian casualties need to be counted in the context of other people involved—perhaps as the percentage of total casualties or as percentages of civilians or total people (soldiers included) affected by the fighting—and then compared across time periods, according to type of war, and so on.

Formation of a political entity

It is often the case, however, that rights come into conflict, and some have to give way. Justifications for nonuniformed combat might be made in various ways on the basis of group rights. One such argument is offered by Christopher Kutz, who claims that when a group of nonuniformed combatants forms a valid political unit, it possesses the relevant moral authority to behave as the equivalent of a state and so should receive the full rights of uniformed combat.³⁷

But constitution of a viable political entity and its concomitant rights are not enough to trump the moral infringement of civilians' rights. The value of such a political union does not outweigh that of individual goods, even though the unfortunate side effect may be to favor well-off regimes or forces.³⁸ Exemption from uniformed combat should not be made on the basis of political cohesion, and individuals cannot be forced to unknowingly give up their rights to remain civilians, even in the face of a collective good.³⁹

Kutz argues that the formation of a collective entity is crucial, and general combat privilege is grounded in

the relation of individual combatants to a collective decision to go to war. That relation is a matter of individual commitments to the collective: their mutual orientation around each other as fellow agents in a collective project. If an essentially intentional relation among individuals grounds the privilege, then the privilege ought logically to be extended to any who together constitute a collective at war, whether or not they are uniformed.⁴⁰

A subgroup within a state may constitute a viable political entity by virtue of forming an essentially Rousseauian republic.⁴¹ Kutz claims that

³⁷In "The Difference Uniforms Make: Collective Violence in Criminal Law and War," *Philosophy and Public Affairs* 33 (2005): 148-80, Christopher Kutz does not think of this puzzle in terms of competing rights because he never addresses the question of bystander rights, but this article tackles his argument in that light.

³⁸This argument differs from the statist case against legitimizing nonuniformed combatants—that statehood is the only conferrer and recipient of moral status in the international realm.

³⁹This argument also has obvious implications for the acceptability of legitimate states whose soldiers engage in nonuniformed combat.

⁴⁰Kutz, "The Difference Uniforms Make," p. 176.

⁴¹Kutz parts ways with Rousseau on the implications of forming such a republic. While Rousseau abstracts people's soldiering from their citizenry and says that they interact only as soldiers, Kutz thinks that Rousseau's argument should lead Rousseau to say that they come into conflict as citizens. Nonetheless, Kutz uses the Rousseauian republic as the underlying premise for his argument, and this calls into question his arguments about political subgroups forming a Rousseauian republic. The standards for forming a Rousseauian republic and for participating in the General Will are so demanding that it would be almost, if not definitely, impossible to form such a political entity in this day and age. A genuine Rousseauian republic requires contracting all of one's liberties to the

wearing a uniform is “ultimately window-dressing” because it is external evidence of internal collective organization within a larger political community, and that the evidence itself is “not constitutive of such organization or ties.” For example, says Kutz, a unit of undisciplined mercenaries could be well-uniformed.⁴²

While collective organization is necessary, it is insufficient to warrant special status as a legitimate warring entity. Kutz recognizes this, and he adds that not all groups of individuals would receive protection—only “political groups engaged in violence in support of political goals, in the sense of aiming at creating (or restoring) a new collective ordering, can rightly claim the privilege.”⁴³ In other words, the group must be trying to become a state or something comparable. Says Kutz, whether a group’s violent acts count as political or criminal depends on three factors: (1) existence of internal ordering (the group must be capable of regulating its own conduct by the laws of war); (2) the character of its aims (it must be a project of national liberation or self-determination, as stated in the Geneva Conventions’ First Protocol); and (3) achievement of some degree of success on the ground.⁴⁴ Kutz acknowledges that the last criterion is problematic because it is difficult to define and measure. Even if one were to agree on what to measure, for example, popular support or territorial gain, how much is enough? In addition, the real test of legitimacy is recognition, and achieving that may take time.⁴⁵

But if it is entirely the political relationship within a group that grants rights of nonuniformed combat and if uniforms are really just “window-dressing,” then legitimate states should also be permitted to engage in nonuniformed combat, as they clearly meet Kutz’s standards for collective political organization. Perhaps all states could be allowed to inten-

sovereign and putting oneself and all of one’s powers under the direction of the General Will, which is much more than the sum of everyone’s desires, with each member as an indivisible part of the whole. The sovereign then holds a fiduciary relationship with the government. Rousseau emphasizes the subordination of the latter to the former, because for him, the sovereign is an existing, actively acting body that meets regularly and frequently to make laws, dismiss governments, and so on. No representation is allowed in the sovereign—direct citizen participation is required in lawmaking. This is necessary to reinforce patriotism, reduce corruption, and realize the General Will. A Rousseauian republic’s demands are so stringent that it is unlikely that one could ever have been constituted, and even more improbable today. In addition, Kutz’s requirement of popular support would further dilute the General Will and the republic’s cohesion, as this type of republic is possible only among a very small group of isolated people. A political relationship of this sort, then, is not a plausible basis on which to rest a claim to collective political organization and a subsequent right to nonuniformed combat.

⁴²Kutz, “The Difference Uniforms Make,” p. 165.

⁴³Ibid., p. 176.

⁴⁴Ibid., pp. 176-77.

⁴⁵Ibid., p. 177.

tionally send their soldiers into battle without uniforms, not only the relatively disadvantaged sides in the conflict. But Kutz would not allow this—he would reserve that privilege for economically or militarily disadvantaged nonstate groups, provided they are engaged in a just war.⁴⁶ If that is the case, then it is not the political relationship that this privilege hinges on. Although collective organization is necessary, it is really the relative disadvantage that Kutz is after, and as such, his claims might be reducible to a “weapon of the weak” argument. At the very least, by giving only nonstates the privilege of practicing nonuniformed combat, he is conflating nonstate status with nonuniformed combatant privilege.

Setting that aside for the moment, assume that some group unequivocally meets all three of Kutz’s criteria and its members therefore receive full combatant rights and responsibilities without wearing uniforms. Although he is right about uniforms being external constitutive symbols, Kutz forgets that this external symbol serves a very important function, which is to protect the rights of civilians. Regardless of how legitimate the collective polity is, the act of not wearing uniforms conflicts with the rights retained by civilians to not be forced to participate in fighting and to not give up their immunity. This is not a mere instrumental consideration.

While there is some merit to an argument about the political legitimacy of these subgroups, if not Rousseauian, it is still an open question whether that warrants granting the exception. This article has argued that nonuniformed combatants infringe on the rights of civilians by forcing them into a moral position that they did not choose or accept. The implication of Kutz’s claim—that being a successful political group fighting for liberation exempts one from wearing a uniform—is that such a rights violation is permissible; Kutz never tackles this issue, however.

Obviously, infringement on one’s moral standing is permissible in some cases, such as killings in self-defense against innocent attackers.⁴⁷ Briefly, the problem of the innocent attacker poses a moral dilemma because Person A is in a position to be killed by Person B (through no fault of Person B’s) and A must kill the innocent B if A wishes to survive. The hypothetical scenarios range from more to less outrageous, complete with ray guns and force shields (though, oddly, never any decoder rings or golden lassos), but the core question is the same and the conclusion is generally accepted—killing B in self-defense, innocence notwithstanding, infringes on B’s rights, but the action is both regrettable and permissible.

Nonuniformed combat differs significantly, however, even though the civilian could be seen as an innocent bystander of sorts who finds him-

⁴⁶Ibid., p. 156.

⁴⁷See, for example, Jeff McMahan, “Self-Defense and the Problem of the Innocent Attacker,” *Ethics* 104 (1994): 252-90.

self in harm's way through no fault of his own. In the innocent attacker scenario, B is the primary object of the killing, and once A kills B in order to save himself, the scenario ends. In a combat scenario, the nonuniformed combatant is the primary object of the killing, while the innocent civilian is a secondary and accidental object of the killing. Put another way, A is the uniformed soldier who is trying to kill B, the nonuniformed and noninnocent combatant, while a new person, C (the civilian), is introduced into the scenario and it is the innocent C who is accidentally killed instead. And the scenario does not end when B or C is killed, because there are still other nonuniformed combatants and suspect civilians all around. The uniformed combatant must assume this, as he cannot distinguish between the civilian and the nonuniformed combatant.

Ultimately, the formation of a political group is not enough to justify granting a uniform exception. Coordination of and membership in political society, as well as political society itself, are moral goods; but within the hierarchy of political goods, collectively held goods sit below individual ones—in this case, the individual goods from civilians' retaining their rights to immunity. Furthermore, political society and the resulting "political solidarity" are nothing approximating a Rousseauian society. A Rousseauian republic is highly unrealistic in the modern world, if it was ever otherwise; so unfortunately for Kutz, the constitution of a Rousseauian republic is not a viable reason to allow groups to fight without uniforms while receiving all the privileges of uniformed soldiers. Although it does require participating in a cohesive political enterprise with others and sharing in its burdens and benefits, in reality, political society creates much less stringent bonds. Those who do participate derive from the society a political identity of citizenship that is unique to their society. While this political identity is necessary for the legitimacy of a political entity, it is still insufficient, because there are any number of other things a political entity must have, such as an established political structure and political and legal institutions, however rudimentary. The mere formation of a political entity does not in itself confer the full benefits and responsibilities of a legitimate political being, even if the bonds forming the political entity are legitimate.

Furthermore, although political solidarity and political identity are primary goods, they rely on the existence of and participation in a collective entity and are themselves collective goods.⁴⁸ Therefore, they should

⁴⁸Political solidarity and the understanding of political identity should be included in the list of primary social goods, albeit as collective rather than individual ones. There is essential value derived from jointly participating in a cohesive political enterprise and in sharing the burdens and benefits thereof. Individuals' identities and choices are shaped in large part by their societies' institutions of justice and by their political and moral education, all of which reflect their political systems. The reason for including political solidar-

fall below individual primary goods in a liberal's lexical ordering of primary goods (e.g., the four individual primary goods of self-respect, basic liberties, opportunities, and income, à la Rawls), and perhaps below other individual goods as well. This is because of liberalism's emphasis on moral individualism, which emerged in opposition to the group-centered, corporatist morality of feudalism. Group-focused political theories such as civic humanism (see, e.g., Rousseau and Arendt) emphasize civic virtue and the necessity of constant participation in public affairs in order to live "the good life," and they therefore value public goods over private ones. Rawlsian political liberalism, on the other hand, denies that public life is necessarily central to an individual's conception of the good—it could or could not be—for it is the individual's decision whether he wishes to adopt the public good as his personal one.⁴⁹ Liberalism in general carries with it a "presumption" in favor of individual liberty, whether in choosing one's plans of life or conceptions of the good, so any interference with that must meet certain qualitative thresholds. The formation of a political entity alone, as opposed to a legitimate state with necessary institutions, should not be enough for liberals. According to this hierarchical ordering of primary goods, complete freedom is not given to collective action, and the collective good does not take priority over individual ones. Giving nonuniformed combatants the full benefits of uniformed combatants, even provided that they meet a particular threshold of political formation, says in effect that collective goods take precedence.

This is not to say that collective rights never play a role. On the contrary, they serve a very important function in the realm of war, because

ity in the list of primary goods is similar to the reasons social contract theorists restrict the contract to within a single society. To his list of primary social goods—basic liberties, income and wealth, and opportunities for office and position (*A Theory of Justice*, §11)—Rawls later adds self-respect as the most important primary good, because no pursuit of endeavors or plans of life will be meaningful without a sense of self-worth (§67). All of these social primary goods are just that—social. Individuals in a society, even adherents of minority cultures within it who might be granted exceptions, are involved in a cooperative enterprise that is bounded by the borders of their particular system and institutions of justice. These primary goods are not meaningful outside of the context of society. Opportunities for office and position obviously require a society in which to hold them, and even the idea of a right to liberty and some material resources only makes sense when there are others who compete for them or can curtail them for you. Without other people, or with only very few, it would resemble a Rousseauian state of nature, in which one might infrequently come across another person but there would not be any serious competition with him for resources or space. In that situation, rights are not really necessary or meaningful. So it is the existence of societies that gives these goods context and meaning. Any agreement about international principles of justice, then, would want to protect political association to some degree, so political solidarity needs to be added to the list of social primary goods.

⁴⁹John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

only through the constitution of a political state can soldiers derive the right to legitimately kill each other as representatives of their states, rather than as individual, criminal murderers. Political entities have a mediating role in warfare, meaning that the state can allow its citizens to legitimately perform acts that would otherwise be disallowed under domestic governance, notably, engage in war and kill other people. It does not, however, trump all other goods. Someone who is not a recognized citizen of a state or other governing body is in a state of nature with respect to other individuals in the world. This has ramifications for what duties others owe to him. For example, stateless individuals or citizens who fight outside the authority of their state's recognized military could not possess the right to kill soldiers, or the right to be treated in accordance with established international military conventions for POWs. The government may very well choose to treat such a person like other soldiers anyway, but for reasons other than duties imposed by this battlefield exchange—for example, promoting pragmatic self-interest, fostering good public relations, straightforward compassion, or recognition of his personhood.

Public goods and implicit compulsory service

Probably the most compelling case for the legitimacy of nonuniformed combat, and for granting nonuniformed combatants the full complement of military rights, can be made with a public goods argument. To be clear, no one currently offers this justification in defense of nonuniformed combat. But if there were a compelling case to be made, this would be it.

Providing traditional public goods⁵⁰—for example, security, a justice system, or transportation infrastructure—is an expensive undertaking. They must be financed somehow, and compulsory service and taxation are standard ways of doing this.⁵¹ The state is justified in collecting vari-

⁵⁰Pure public goods are both nonrivalrous (once provided, the additional resource cost of another person consuming the good is zero—it does not add to the costs for provision or reduce the effect on others) and nonexcludable (preventing others from consuming the good is either very expensive or impossible, short of expelling them from the community, because the good benefits everyone within the boundaries). Examples include lighthouses or city holiday displays. Public goods need not be provided by the government or a public agency—they can be supplied through the private sector, e.g., by contractors. See Harvey S. Rosen, *Public Finance*, 6th ed. (Boston: McGraw-Hill Irwin, 2002), chap. 6, “Public Goods.” Very few goods are purely public: most are more nonrivalrous than nonexcludable, or vice versa, e.g., the atmosphere is rivalrous (there are competing uses for air, e.g., someone could dump a lot of pollution into the air that would affect others' breathing) but nonexcludable, while viewing a privately owned painting in a giant mansion is nonrival but excludable.

⁵¹See Jean-Jacques Rousseau, *The Social Contract*, trans. Maurice Cranston (New York: Penguin Books, 1968), Book III, Chapter 15.

ous taxes or requiring physical labor, for example, mandatory military or civil service, jury duty, or voting.

Nonstate groups that control significant swathes of territory often similarly provide public goods. Suppose there is a revolutionary group—let us call it “PFJ”—engaged in a protracted struggle with its state that regularly disregards the uniform convention for strategic advantage, controls territory in the country in question, and effectively governs that area in a parallel quasi-state. Within that territory, PFJ provides the traditional public goods of security (against government forces) and policing, as well as systems of justice, education, healthcare, and other services. Defense and justice are both ways of deterring aggression (foreign or domestic) that could potentially affect anyone within the group’s protected territory. This deterrence is at once nonrivalrous and nonexcludable, and thus a public good. Like states, PFJ must finance its operations somehow, which it does in various ways, from more traditional taxes and labor to less traditional drug smuggling or money counterfeiting.

PFJ can also be seen as providing a nontraditional public good of organizing and conducting a revolution. This is not normally considered a public good, but insofar as it is beneficial to the population (i.e., it will lead to a better form of government), everyone in that country would benefit from this nonrivalrous and nonexcludable good.⁵²

Because PFJ provides public goods (be they defense and justice or revolution), it is arguably similarly entitled to gather resources through taxation and compulsory service. It lacks official international recognition but, as a public good-providing entity nonetheless, PFJ must resort to implicit mandatory military service from the population to bolster whatever official conscription it can muster. This requires not wearing uniforms and thereby spreading some of the combat risk to the civilian population.

When its fighters refuse to wear uniforms, the PFJ can be seen to demand an unusual kind of compulsory service. Making it difficult or impossible for others to distinguish PFJ from civilians effectively conscripts all adult males, who now bear a (greater) risk of being mistaken for a combatant, and injured or killed. This provides an indirect benefit for PFJ fighters, whose risk is reduced in a complementary way, as they can more effectively blend in with the local population, stage ambushes, and so on.

So one might argue: if PFJ is genuinely providing public goods and if any such (state/equivalent) provider can justifiably do the same through

⁵²It is still an open question whether the revolution is a public good or a public bad. Much like the status of feudal lords, it is unclear whether it is more beneficial than parasitic and exploitative. For the sake of presenting the most compelling argument in non-uniformed combat’s favor, this article assumes the revolutionary movement to be a public good.

scription and/or taxation, then PFJ's refusal to wear uniforms can be seen as providing such goods on the cheap, via a weak form of the military draft. What prevents PFJ from officially drafting more conscripts is its own institutional weakness—it cannot effectively organize or afford to maintain a large army of conscripts, so it retains a smaller army of conscripts and volunteers, then buttresses its numbers and efficacy by *effectively* conscripting the rest of the adult male population through its refusal to wear uniforms much of the time. All adult civilian males therefore become possible PFJ members, yielding the obvious benefits for PFJ and the obvious detriments for civilians. Just as terrorism can be seen as asymmetric warfare for the weak, a refusal to wear uniforms or openly bear arms (standard guerrilla warfare) can be seen as local public-goods provision by the organizationally challenged, via wide conscription. PFJ would like to draft far more people, but it cannot manage that, so it officially drafts some, then effectively drafts the rest.

This scenario is hardly far-fetched in real life. For example, the FARC (Revolutionary Armed Forces of Colombia), a Marxist-Leninist guerrilla rebel movement that claims to represent the rural poor against government and wealthy classes, can be seen as running a quasi-state by virtue of providing services (public goods)—traditional public goods of security (against government and paramilitary forces) and policing, and rudimentary systems of justice (through extrajudicial “revolutionary courts”), education, healthcare, and other services, and the nontraditional public good of revolution⁵³—in the part of the country it controls, especially since the Colombian government effectively ceded some 42,000 sq. km. in southern Colombia to the FARC between 1998 and 2002.⁵⁴ FARC must finance its operations and services somehow and, indeed, it relies on some of the same strategies as states do. In addition to receiving foreign assistance, it imposes “taxes,” especially on all stages of illegal drug trafficking activities, and conscripts locals to serve as fighters in order to provide internal and external security.

FARC regularly capitalizes on norms of soldier-civilian distinction in the pursuit of strategic advantage in this conflict. Its uniform is the same bland green camouflage that all the parties (state army, police, right-wing paramilitaries, left-wing guerrillas) wear, occasionally embellished with

⁵³One can quibble with designating such unofficial governance as a public good, as the FARC could and probably do exclude some people within their territory from protection—no different from painting some people green and announcing to criminals that they are fair game.

⁵⁴See “FARC,” *Encyclopædia Britannica* (2007), <http://search.eb.com/eb/article-9398098>; and “An Honest Citizen—Handbook: Colombia’s Civil Warriors,” *WIDE ANGLE* PBS Series (2005), produced by WNET/Thirteen, directed by Angus Macqueen, <http://www.pbs.org/wnet/wideangle/shows/colombia/handbook2.html>.

a variation on the Colombian national colors in their insignia and arm-bands. Much of the time, however, FARC prefers civilian dress in order to blend in with the larger population and has reportedly attacked and kidnapped civilian targets. It also commonly disappears into and occupies villages, forcing civilians who live there to quarter them. If asked whether or not their actions are justified in the context of the soldier-civilian distinction in the rules of war, FARC could respond with something like the following: “We are fighting for these people [the civilians in these rural villages], protecting them from the government and paramilitary forces, and risking our lives to change things for them, so they need to help us in exchange, by housing us, hiding us. We are doing all this for them, after all.” Although FARC does not put it in those terms, such an explanation would amount to a public goods argument.

Why is this improper behavior, and why does the public goods argument ultimately fail? First, it is an open question whether PFJ or FARC is providing a public good, as opposed to a public bad. For the sake of argument, let us suppose that it is a good, but a strong case can be made for this revolution being a public bad, given the disruption and damage caused to civilian lives by the revolution’s fighting and questionable tactics.

Second, it is only acceptable to impose taxes or conscription on non-consenting people when the imposing party is a legitimate state or the equivalent thereof. In a state or state-equivalent, the people hypothetically consent to rule in general by the governing entity, even if they disagree with particulars like a certain tax code or the regulations for conscription. While FARC’s status as a state-equivalent fulfills one of the necessary conditions that allow it to conscript, it must also be domestically legitimate. It is unclear whether FARC has done enough to legitimate its governance, given its terrorist tactics, forced (overt) conscriptions, kidnappings, and so on. Given this, it may not be able to lay claim to *legitimate* statehood or quasi-statehood.⁵⁵

Third, not wearing uniforms is successful as a military tactic only because it relies on and exploits the civilian/soldier distinction, the widespread reluctance to kill civilians, and the mutual understanding of civilian immunity. Such infringement on civilians’ moral rights will eventually lead to the practical erosion of civilian immunity on the battlefield. Fourth, this kind of weak or unofficial conscription—by blending in with civilians—is not on a par with official drafts. The so-called “conscripts” are unaware of what is happening to them, their new status as pseudo-

⁵⁵In addition, though public goods can be provided by private entities—e.g., by government subcontractors or by independent, private agents providing private charitable funds, open source software, or beautifully maintained gardens on front lawns of private homes—it does not follow that those private entities are then entitled to collect taxes or demand compulsory services.

combatants, or the terms of conscription. Again, this does not meet the standards of transparency and publicity. Now suppose FARC simply announced to everyone that some of its soldiers were not going to wear uniforms and civilians were therefore at risk. While everyone would know what was happening and this move would satisfy standards of publicity, there is still another problem that unofficial conscription cannot overcome. What official conscription can do (even if it does not always) that unofficial conscription cannot is achieve discrimination among classes of people. For example, official conscription can select able-bodied males of a certain age, while unofficial conscription must “draft” everyone at once—young, old, and handicapped included. Such indiscriminate conscription is not something that people would hypothetically consent to, even if it were done by a legitimate government.

Finally, just because one is allowed to perform an action “A” does not mean it is similarly acceptable to do anything that is *prima facie* “<A.” Assuming that it is morally permissible to execute someone, it does not follow that amputating his arm, for example, is also allowed. One might say, “Surely it is less bad to cut off the person’s arm—he would at least be alive, which is certainly better than being dead, and he himself would prefer to have his arm cut off than to be executed.” But that is not necessarily the case. In the situation at hand, the ability of a state to conscript officially (in the strong sense) does not inevitably make it acceptable for the state to conscript unofficially (in the weak sense) by having its soldiers not wear uniforms.

To understand this, killing and coercion must be distinguished. Barbara Herman writes:

Although many violent acts are coercive ..., it will not do to claim that killing is a limiting case of coercion. A coercive act aims at the control of a person’s will; killing does not (at least not of the will of the person killed). In killing, someone is prevented from doing anything at all, but he is not made to do something against his will. There is a significant difference between threatening pain or twisting your arm (or even threatening to kill) to keep you from joining the opposition party and killing you to achieve the same result. The coercive act looks to alter what will happen by controlling what an agent wills. In killing, the victim is not prevented from *doing* something—the killing prevents something from happening. Killing (and noncoercive violence in general) poses a moral problem that needs to be kept separate from that of coercion.⁵⁶

For rational beings for whom the exercise of autonomy is supreme, coercion can be worse than straightforward killing. The latter simply stymies the will and prevents it from acting, while the purpose of the former is to subvert and control the will, forcing it to act in a way it would not have

⁵⁶Barbara Herman, *The Practice of Moral Judgment* (Cambridge, Mass.: Harvard University Press, 1993), p. 119.

chosen, accepted, or endorsed.

This type of violent manipulation of the will is a gross failure of the respect due to an autonomous agent and is worse than simply killing the agent. Killing the agent does not necessarily infringe upon nor is it necessarily directed toward his moral autonomy. (Mere) violence is directed primarily at the body and only secondarily at the agent, since the body houses the agent.⁵⁷ Coercion, on the other hand, is a direct attack on agency, and it cannot be universally willed without contradiction in conception or will. In addition, coercion undermines the “possibility of coordinated free human activity,” to use Herman’s language,⁵⁸ which is the desired moral foundation of all human interaction. Therefore, “<A” is not always acceptable if “A” is. Coercion stems from a failure of respect for the rational autonomous agent, and this manipulation of the will is worse than simply thwarting the action of the will.

Soldiers who do not wear uniforms put civilians at risk in a way that turns the latter into de facto soldiers without them knowing it. This is veiled coercion. Although being possibly-a-soldier poses less danger to a person than if he were straightforwardly conscripted as an official soldier, the manner of this weak so-called “conscription” uses deception in order to manipulate the civilian’s will, unbeknownst to him, and is thus worse than actual conscription. This tactic fails to respect people’s moral autonomy, equally so whether it is done by a state or a quasi-state.

⁵⁷Herman calls violence an attack on the “conditions of agency”: “Unlike coercion or deception, which involve assault on the integrity of willing itself, the object of violent action is not the will but a person’s body. (Threats of violence and threats involving violence are other matters.) Coercion involves an attack on agency; violence, an attack on its conditions. Although violent actions usually prevent an agent from *doing* what he wills, they do not (they cannot) control willing. The agent in the hands of violence has his will obstructed, as he would if the general circumstances of his action turned recalcitrant. This is why a world of universal violence is conceivable” (*The Practice of Moral Judgment*, p. 126).

Herman’s argument is not without controversy or problems. The first is that insofar as Kantian theory has been developed for rational autonomous agents in human form, a body is a necessary condition of agency. Should other rational autonomous beings possessing all the relevant traits but without bodies be discovered, that would be a different matter, but as it currently stands, bodies are required. This problem does not deter us from making the distinction between targeting the will and targeting the vessel of the will, however.

A more interesting problem is that preventing someone from doing X and manipulating someone into doing Y may actually fall along the same continuum, rather than being entirely different actions. There are many ways to manipulate, directly or indirectly, and one way to coerce someone into doing Y would be to lay down obstacles to doing not-Y. For example, one wishes to force a person to walk the path from A to B, when he really wants to head to C. Landmines can be laid everywhere except from A to B, and mines placed behind him as he moves. Lay down enough obstacles, and preventing not-Y starts to look like forcing Y.

⁵⁸Herman, *The Practice of Moral Judgment*, p. 127.

Voluntary assumption of risk by civilians

What about cases in which civilians implicitly or explicitly consent to rebel use of nonuniformed combat—that is, they willingly forfeit their rights to immunity without taking on combatant privileges? This might happen if they feel their lives are currently so oppressive and worthless that they are willing to accept the dangers and heavy casualties to themselves from nonuniformed combat in the hopes that it will secure them better lives in the long run.

When civilians forfeit their immunity, however, they automatically become combatants and, in this case, nonuniformed ones. With immunity comes responsibility, not just privilege. By agreeing to be put into harm's way as a civilian decoy with an understanding of the battlefield effects (increased difficulty for opponents in telling civilians and soldiers apart), these individuals are renegeing on their responsibilities to refrain from influencing the battle's outcome; so even if they surrender their privilege to kill enemy soldiers, they are no longer civilians.

Second, in cases in which the consent is thought to be implicit, an individual cannot so part with this right to civilian immunity, although it might appear at first that he can. After all, says Rawls, "it may be necessary to forgo part of these [basic] freedoms when this is required to transform a less fortunate society into one in which all the basic liberties can be fully enjoyed."⁵⁹ Liberty may be restricted for its own sake.⁶⁰ More specifically, "it seems possible to consent to an unequal liberty only if there is a threat of coercion which it is unwise to resist from the standpoint of liberty itself."⁶¹ This is exactly the circumstance described, that the only way to improve an oppressed civilian's nonideal situation—in which his liberties are already severely curtailed—is to give up his right to physical integrity (i.e., civilian immunity) by accepting nonuniformed combat in the hopes that the rebels will secure him fuller liberties in the future with a victory against the oppressive regime. Nonideal conditions can be countenanced if they are both temporary and instrumentally valuable in creating a world in which ideal theory applies.

For the sake of argument, let us assume that giving up rights to civilian immunity would help the rebels win and that they would institute a regime in which basic liberties are better protected. Even then, a civilian may not give up his immunity in this way. Nonideal theory, and therefore allowance of nonuniformed combat, must meet the following three conditions:⁶²

⁵⁹Rawls, *A Theory of Justice*, §39, p. 217; see also §11.

⁶⁰*Ibid.*, §39, p. 214.

⁶¹*Ibid.*, §33, p. 182.

⁶²See Christine Korsgaard, *Creating the Kingdom of Ends* (Cambridge: Cambridge

(1) *Consistency with the “general conception of justice.”* This means that “all social values—liberty and opportunity, income and wealth, and the social bases of self-respect—are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone’s advantage.”⁶³ Let us assume that the unequal protections of liberty and physical integrity from nonuniformed combat are to everyone’s advantage. The next two requirements keep nonideal permissions from being merely consequentialist in their pursuit of ideal conditions.

(2) *“Order of action” constraints.* Priorities in nonideal theory must reflect the priority relations of ideal theory in its “order of action,” such that nonideal theory must first focus on realizing conditions required for the priority of equal liberties to apply, then on those required for fair equality of opportunity, and so forth. In this case, it means that securing the basic liberties (including physical integrity through civilian immunity) cannot be delayed in the pursuit of economic gains, for example, land distribution. Whether a rebel group would run afoul of this requirement will vary case by case, of course, but if its complaint is economic rather than physical, then nonuniformed combat would not be permitted, nor would the beleaguered civilians be allowed to give up their immunity in service to the rebel cause.

(3) *Consistency with the spirit of ideal theory.* Rawls’s “special” conception of justice helps tell us which of the many nonideal options is closest to the ideal, that is, the least bad.⁶⁴ While this constraint operates in different ways with every case, the spirit of ideal theory requires “fidelity to law” and respect for the fundamental values of autonomy and freedom. The lack of transparency in *sub rosa* conscription (as described in the section on public goods) is blatantly inconsistent with the spirit of ideal theory. In order to exhibit a Kantian respect for persons consistent with the spirit of ideal theory, individuals must be able to substantively exercise their autonomy and give meaningful consent as much as possible under the nonideal conditions at hand. This, in turn, is only feasible when conditions are as transparent as they can be.

Third, in cases in which consent may be explicit, a public plebiscite on this matter could never be reliable even in the best-case scenario. Civilians would of course agree to give up their immunity for fear of retaliation if they said otherwise. Even a secret ballot in which no one could identify dissenting individuals would not solve this problem, because any result that does not give the rebels their desired outcome is

University Press, 1996), pp. 147-51; Tamar Schapiro, “Kantian Rigorism and Mitigating Circumstances,” *Ethics* 117 (2006): 32-57; and Robert S. Taylor, “Rawlsian Affirmative Action,” *Ethics* 119 (2009): 476-506.

⁶³Rawls, *A Theory of Justice*, §11, p. 54.

⁶⁴See Korsgaard, *Creating the Kingdom of Ends*, p. 148.

dangerous for everyone. There is only one correct answer to a plebiscite on this question, and it is better for people to ensure that the vote is overwhelmingly in favor of the proposition, in order to minimize a retaliatory search for dissenters.

Furthermore, there is no way for the *opposing soldiers* to reliably identify dissenters to this democratic mandate on nonuniformed combat. Because the externalities of nonuniformed combat mean that a civilian decision to accept this risk can only be made as a group, not by particular individuals—as dissenters cannot “opt out” of this arrangement—the minority must accept this infringement on its rights to immunity. In addition, a majority-determined civilian policy on nonuniformed combat is particularly problematic when considering the effect on children and other minors. They, too, are harmed—perhaps most of all, as rebels often use children as shields if they know their opponents are loath to shoot and risk killing the children—but because of their age or other incapacity, they cannot consent to undertake this danger.

Majorities, even substantial majorities, should not be permitted to impose those types of risks on others. As I have argued, neither rebel groups nor governments are allowed to employ any method they want in pursuit of a cause, and this does not change if it is the civilians who have chosen to place themselves in this kind of danger. A democratic mandate depriving people of their civilian immunities does not make doing so any more legitimate. This is not any ordinary political or social directive, but rather one that imposes great risks on people’s lives. A minority could not be legitimately made to accept a democratic mandate to use babies as ammunition or to submit to torture, for example, and neither can it be required to accept nonuniformed combat by a majority. Following from earlier arguments about formation of political entities, some collective rights cannot take precedence over rights of the individual.

Conclusion

Not wearing a uniform or its equivalent in preparation for or during combat should always be illegal, with no exceptions for extenuating circumstances. Two remaining potential objections to this principle both mistakenly conflate *jus in bello* and *jus ad bellum*. The first claims that it is the unjust side in the conflict (whichever that may be), rather than the nonuniformed combatants per se, who forces civilians to become targets of attack and give up their immunity. (If the party without meritable cause is inherently incapable of just behavior in combat and is thus responsible for all unjust battlefield conduct, this makes *jus in bello* dependent on *jus ad bellum*. It would follow, then, that the opposite is true—all combat actions of the party with just cause are similarly just.)

The second objection worries that resource-poor groups fighting against despotic regimes for greater freedom will rarely succeed without nonuniformed combat and that justice will be ill-served by this restriction. History is replete with many such noble causes, such as French *partisan* resistance against Nazi occupation or the American Revolution; without guerrilla and nonuniformed combat, the Americans might not have won, and the world would certainly have been poorer for it. Both objections are frequently followed by a consequentialist claim that the party in the right therefore should receive special advantage (in the form of nonuniformed combat) in order to increase the chances of justice prevailing.

Jus in bello and *jus ad bellum* are, however, separate questions and one does not determine the other. It does not hold that any tactic employed in the service of a just cause is also just. A party unambiguously in the right is not necessarily warranted in using whatever means are at its disposal in order to win—for example, we would not countenance the execution of small children in the pursuit of a just war. So neither should we necessarily blame an unjust strategy (nonuniformed combat) on the party with the unjust cause. This welding of *jus in bello* with *jus ad bellum* also sometimes appears in the broader just war literature.⁶⁵ And although *jus ad bellum* violation “triggers” nonideal conditions, it does not make combat behavior a morality-free zone for the party in the right. This collapses valuable moral distinctions and makes nonideal theory consequentialist by deeming rightful whatever means bring about a rightful end. In order to maintain consistency with the spirit of ideal theory, there must be limits on combat behavior. We cannot accept that the ends justify the means by sanctioning use of nonuniformed combat as a moral matter, even if the ends are very good ones.

However much one may want to condone the just rebel movements in their entirety, it does not detract from the wrongness of their engagement in nonuniformed combat. This does not mean that everything about their missions was wrong. In practical terms, moral prohibition against nonuniformed combat is problematic for revolutionary groups in the right who would otherwise never be able to succeed. I do not venture a complete answer here, but one possibility—provided that the cause is truly just, essential, and otherwise hopeless—would be to engage in nonuniformed combat and then accept the punishments that are meted out. Rather than claim the full rights of uniformed combatants and POWs, they could take a page from the history of civil disobedience, accept the consequences, try to win the conflict, and hope that history vindicates their actions and forgives their wrongs. This is not to say that, in cases in

⁶⁵See, e.g., Jeff McMahan, “On the Moral Equality of Combatants,” *Journal of Political Philosophy* 14 (2006): 377-93.

which rebels with a just cause are fighting a stronger and unjust opponent, there are no considerations due to them based on the justice of their cause. *Jus ad bellum* matters, so these rebels may have legitimate claims on other countries to aid them, for example, but the means they employ while fighting must remain a separate issue.

Of course, arguing that nonuniformed combat is morally unacceptable will not eliminate it. A different scheme of protections and punishments for nonuniformed combatants under international law still needs to be developed, one that minimizes the incentive to blend in with noncombatants. How the infraction should actually be punished is unclear and this article will not venture to define a punishment scheme. Penalties could range from completely stripping all nonuniformed (and therefore illegal) combatants of POW privileges and rights and requiring only that states treat those detainees within the scope of human rights law, to mitigating the punishments in various ways for some groups depending on the extenuating circumstances. And what of civilians who willfully aid soldiers, because they believe in the soldiers' cause but do not want to bear all the risks of a soldier's life? In addition to serving as nonuniformed decoys, they might carry messages or supplies, or even kill enemy soldiers. These "civilians" are just as guilty of exploiting the soldier/civilian distinction as nonuniformed combatants, and should be deterred accordingly. There will always be cheating from both sides, soldiers and civilians, and no matter what the punishment, this behavior will be difficult to discourage. What is essential, however, is that the moral characteristics and ensuing categorical distinctions first be recognized, so that the exact nature of the wrongs is clear. Only then can the relevant and proper legal punishments and incentives be created to best encourage compliance with moral demands.⁶⁶

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