Knowing When Not to Fight

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David Luban, *OXFORD HANDBOOK OF THE ETHICS OF WAR* (Helen Frowe & Seth Lazar, ed.) (forthcoming)
KNOWING WHEN NOT TO FIGHT

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[forthcoming, OXFORD HANDBOOK OF THE ETHICS OF WAR, ed. Helen Frowe & Seth Lazar]

Draft

On the eve of battle, Shakespeare’s Henry V, disguised as a common soldier, talks with his men.

*King*: Methinks I could not die anywhere so contented as in the King’s company, his cause being just and his quarrel honorable.

**Michael Williams**: That’s more than we know.

**John Bates**: Ay, or more than we should seek after; for we know enough if we know we are the King’s subjects. If his cause be wrong, our obedience to the King wipes the crime of it out of us.¹

Henry thinks his soldiers’ clear consciences depend on the justice of his cause. If so, Bates and Williams should refuse to follow him into battle if his cause is unjust. Bates disagrees, and tethers his clean conscience solely to his duty of obedience.

*Their* is a debate about selective conscientious objection by soldiers.² Bates argues against it; Henry implicitly, and probably without meaning to, licenses it. But the

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¹ Henry V, act 4, sc. 1
² This is a different issue from selective conscientious objection by civilians. The soldier has made a commitment that the civilian has not. Even the conscript has not refused to enter the ranks of the military, and in states where the penalty for conscientious objection is not dire, this is a genuine choice. Because of this commitment, a soldier’s decision to refuse orders to deploy is harder than the civilian’s decision to refuse to join the military.

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dialogue raises an epistemic issue as well. Williams insists that the justice of Henry’s cause is more than a common soldier knows. That sounds right, especially when we read the comically arcane legalisms and dubious histories Henry’s advisors produce in Act 1 to convince him of his rightful title to French territory. What can Henry’s soldiers be expected to know of the Salic law of succession or the genealogy of eighth-century French kings?

Bates adds a moral twist to Williams’s epistemic doubts. Not only is the just cause “more than we know,” it is “more than we should seek after.” Williams’s position and Bates’s are importantly different. Williams is describing the epistemic plight of the common soldier. Bates offers prescription, not description. Not only are common soldiers not in a position to know whether their cause is just, they should not try to put themselves in a better position. Bates’s reason: “we know enough if we know we are the King’s subjects.” Apparently deference to the King’s political authority is supposed to imply deference to his epistemic authority as well.

Bates actually makes two distinct claims. One is that obedience to the king “wipes the crime out of us.” Even if the soldiers knew the king’s cause was unjust, they should still fight, because the king’s authority provides an exclusionary reason to obey. Call this the absolute deference claim. The other is that soldiers should not independently investigate the jus ad bellum – for that is the natural reading of “more than we should seek after.” Call this the no-inquiry claim. In what follows, I explore these claims, first

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Throughout, I use the word “soldiers” to refer generically to members of the active military forces of the contesting parties – recognizing that that includes sailors, fliers, and in some cases cyberwarriors and purveyors of other exotic technologies. I am generally speaking of “tip of the spear” war fighters, that is, those whose job directly includes committing acts of violence. Many of the same conclusions will apply to those in support roles, although the arguments must then be filtered through whatever moral principles apply to indirect participation in acts of violence.

For a thoroughgoing debate about the morality of selective conscientious objection, readers should consult the 2002 symposium issue on the subject in the *Israel Law Review*. 
that of Williams and then the more problematic claims of Bates. To preview the conclusions: Williams is right; Bates’s absolute deference claim is not. But I will defend a weaker version of Bates’s prescription: not absolute deference to the King’s authority, but strong presumptive deference that can be overridden only in cases where the war is manifestly unjust. This is a version of the no-inquiry claim: a manifestly unjust cause is one that wears injustice on its face, so that no inquiry is required.

This position about the obligations of common soldiers – not to fight in manifestly unjust wars, but not to delve into the justice of wars whose injustice is not manifest – is far from novel. It is the unanimous view of the early modern just war theorists Cajetan, Suárez, and Vitoria. But my argument for the no-inquiry claim will differ from theirs. I focus on the moral importance of civilian control of the military – a value I believe contemporary just war theorists wrongly neglect, just as I fear they underrate the inherent epistemic problems soldiers confront in judging *jus ad bellum*.

**Williams’s epistemic claim**

Michael Williams’s claim is that ordinary soldiers are in no epistemic position to judge whether the king’s cause is just. Like his philosopher namesake 600 years later, Williams is no radical skeptic.³ Nothing in principle makes knowledge of just cause inaccessible to the common soldier. The problem lies in contingent and context-specific challenges arising from the fog of war, including the political fog of going to war.⁴ Philosophers perhaps underestimate the epistemic difficulty of judgments about just cause. Even when the purported just cause is self-defense, it isn’t always self-evident

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⁴ On the need for particularized rather than blanket challenges to knowledge claims, see Williams, *The Problems of Knowledge*, pp. 150-51.
who attacked whom. Lyndon Johnson used the make-believe second Gulf of Tonkin incident to get Congress to authorize the Vietnam War; the truth took years to emerge. Even World War II, the standard example of a war of clear-cut right and wrong, began with a false flag operation, “Operation Himmler,” in which German troops in Polish uniforms “attacked” German border towns, shooting (to miss) at the locals. They vandalized buildings, broadcast Polish nationalist slogans from a radio station they seized, and left behind the murdered bodies of political prisoners dressed in Polish army uniforms, which were displayed to journalists as proof of a Polish incursion into German territory. The next day, Hitler announced his invasion of Poland. “This night for the first time Polish regular soldiers fired on our territory. Since 5.45 A.M. we have been returning the fire, and from now on bombs will be met by bombs.”

The world’s worst war of aggression was off and running under color of self-defense.

Shakespeare well understood that politicians launch wars for deceptive reasons and ulterior motives. He depicts King Henry as an honest and honorable sovereign, but Henry’s advisors are clerical schemers. The play opens with them plotting war to distract Parliament from a bill to confiscate church property. That sheds a harsher light on the legalistic argle-bargle they serve up to the King about his territorial rights in France. To be sure, political mendacity, and the difficulty for outsiders to know what happened on the ground, are contingent obstacles to right judgment of just cause, not in-principle

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challenges. But they belong to the background description of the world in which just war theory has a point; so even ideal theory must not abstract from them. They are so wired into the world that we should regard them as (in the terminology of Valentini and Lazar), *parametric.⁷*

Philosophers sometimes write as though just war theory is an ideal theory of justification that should develop its principles without taking frictional forces into account. Such a theory will provide criteria for moral scorekeeping undertaken by an ideal observer. On this view of the nature of just war theory, the fact that common soldiers are epistemically poorly positioned to use a principle is said to provide an excuse for their objectively wrongful actions (maybe); indeed, it may provide a blanket excuse for all agents similarly situated – which might be nearly everyone. But an excuse is not a justification, and we have no reason to backpedal from the search for justificatory principles of *jus ad bellum*, even if soldiers cannot apply them in real-world deliberation.⁸

This line of argument, in my opinion, places more weight on the distinction between justifications and excuses than it can bear. I agree with Judith Lichtenberg that appeals to excuses make sense where it is reasonable to expect most people to act in a certain way, but where unusual conditions sometimes prevail or where a particular individual falls short of the general requirements. … But if the conditions that relieve people of responsibility are pervasive, if practically everyone falls short, thinking in terms of excuses makes little sense.⁹

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⁷ Seth Lazar and Laura Valentini, “Proxy Battles in the Ethics of War” (2014) manuscript, p. 11.
The language game of excuses is played against a background of typical conditions, where excusing conditions are exceptional. For the common soldier deciding whether to follow the King into battle, the fog of war and politics are not exceptional conditions. Neither are bounded rationality, time constraints on decisionmaking, and limited access to information. These epistemic limitations parametrically define common soldiers’ situation and constrain them to moral principles usable within the scope of those limitations.  

The JAB court proposal

Jeff McMahan, among the most prominent recent defenders of selective conscientious objection by soldiers, recognizes the epistemic difficulty facing ordinary soldiers judging *jus ad bellum* (JAB) and offers an institutional solution: an international court (or commission, or tribunal) that will provide impartial and authoritative findings on whether armed conflicts satisfy the JAB criteria. Its purpose is to provide guidance to the war fighters – guidance that can assist their moral deliberations about whether to fight or to take the momentous step of becoming selective conscientious objectors to unjust war. This would alleviate Williams’s epistemic doubts.

The prominence and relevance of McMahan’s proposal make it worth considering in detail. For reasons I now explain, the JAB court proposal is unworkable. These reasons concern its legitimacy, its fact-finding capacity, and its problematic relationship with

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10 For further reflections on the idea of usable moral principles, see Gabriella Blum and David Luban, “Unsatisfying Wars: Degrees of Risk and the *Jus ex Bello*,” *Ethics* 125 (2015), pp. 770-71.
12 McMahan, pp. 240-41.
existing international institutions and international law.\textsuperscript{13}

\textit{Legitimacy}

1. \textit{Who sits on the JAB court, and who selects its members?} McMahan favors an unofficial court, for the excellent reason that an official court would become captive of the states that establish it.\textsuperscript{14} Then the question arises how an unofficial, non-state-sanctioned court could win the credibility and heft to do what McMahan wants it to do: provide at least some authoritative basis for a fantastically weighty moral decision by soldiers—a basis that soldiers can feel comfortable relying on if they refuse to deploy.

The JAB court cannot afford to be perceived as a politicized organization. Recognizing this, McMahan proposes international lawyers, scholars of international law, including representatives of various national organizations, such as the American Society of International Law, and veteran prosecutors, defenders, and judges from the criminal tribunals for Rwanda and Yugoslavia. This list could also include just war theorists, moral philosophers, political theorists, retired military officials, particularly former Judge Advocate Generals and their counterparts in other countries, and perhaps even some serving military personnel with training in law or ethics who might be seconded to the congress in an advisory capacity.\textsuperscript{15}

The JAB court would include judges from every region of the world—a crucial structural feature adopted by all international tribunals.\textsuperscript{16}

The problem is that the higher the stakes in any international body’s decisions—

\textsuperscript{13} I note at the outset of this discussion that McMahan acknowledges most of these problems, which he believes can be solved. For the reasons that follow, I remain unpersuaded.

\textsuperscript{14} McMahan, pp. 246-47.

\textsuperscript{15} Ibid., p. 246.

and the JAB court has very high stakes, namely the decision by soldiers to disobey their own governments—the greater the political pressures brought to bear on it, and the harder it is to maintain impartiality, either in appointing court members or in their decisions. This problem appears at two levels: not only in selecting the panelists, but also in selecting the selectors.

Suppose, for example, that the Russian Academy of Sciences proposes a candidate for an open slot on the JAB court, and Amnesty International proposes a candidate, and the African Commission on Human and Peoples’ Rights, the Australian Philosophical Association, and the OAS each propose candidates. Suppose, realistically, that all the candidates have impeccable credentials, but also have strongly opposed points of view that their critics think are ideological. Amnesty lodges strong objections against the Russian Academy’s candidate, a nationalist professor and Putin crony; the Arab League objects to Amnesty’s candidate, a secular feminist; and the Chinese government finds unacceptable the human rights expert who holds a chair at Oxford and defends the universality of human rights. Nobody outside the U.S. and UK likes the American legal expert who argues that nothing the United States does can possibly violate customary international law, because if the United States does it, its prohibition can’t be custom.

Unfortunately, the soldiers who are the court’s intended audience will discover in their first minutes on the Internet that reputable bodies have denounced some nominees as ideologues and complained that others were excluded for ideological reasons. Rather than alleviating their doubts, the JAB court will replicate them. In soldiers’ minds, it will lack legitimacy, and that is because so many interested parties contest its legitimacy.

The difficulty is compounded in the case of hot-button issues, like Israel’s wars.
Fifty-three African countries have formally pledged “to eliminate zionism,” and anti-zionism is presumably a constant across the left-right spectrum throughout these countries, as it is in the Arab world. How likely is it going to be that African representatives on a JAB court will agree that any of Israel’s wars is ever just? But how credible would a panel be that excluded African voices? The difficulties, it seems to me, are intractable.

2. Philosophical disagreement all the way down. The problem is not only a matter of cultural, regional, and political diversity and conflict. Suppose we stipulate a single culture and subculture: Anglophone academic just war theorists. Is there any likelihood that a JAB court is going to agree on criteria of just war, after they invite McMahan, Gabriella Blum, Cecile Fabre, Adil Haque, James Turner Johnson, Asa Kasher, George Lucas, David Rodin, Michael Walzer, and the editors of this volume to develop the criteria? The fact is that today significant philosophical dissensus exists on criteria of just cause.

3. Competition with existing international organizations. The JAB court is supposed to be a trustworthy epistemic resource for troubled soldiers facing the issue of conscientious disobedience. However, there are already two official world bodies authorized to make determinations of aggression: the UN Security Council and the ICC. Suppose neither of them is willing to declare that a conflict includes acts of aggression. In fact, suppose the Security Council—determined to head off or even undermine the JAB court—declares there has been no aggression. How is a soldier supposed to conclude that the JAB court got it right while the Security Council and the ICC are wrong? Unless the

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17 The undertaking appears in the preamble to the African (Banjul) Charter on Human and Peoples’ Rights – the fundamental African human rights treaty.
18 Article 39 of the U.N. Charter; article 5(1)(d) of the Rome Statute of the ICC.
JAB court can somehow displace the UNSC and ICC from the epistemic field, it will have a hard time establishing its own credibility.

All the points so far are challenges to the likelihood of establishing a JAB court that has legitimacy, yet is also able to reach consensus on controversial conclusions in the face of intense politicking around its membership and selection process. But suppose these challenges can be overcome. Daunting problems still remain.

*Fact investigation*

4. *The difficulty of fact investigation.* JAB judgments are fact-intensive. Who sank the boat? How intense is the violence? Did troops cross the border? Who fired first? While McMahan by no means ignores the difficulty of a JAB court making factual findings, he underestimates those difficulties.¹⁹ Fact-finding in conflict zones is dangerous, expensive, frustrating, and unreliable. The international criminal tribunals have a very hard time conducting fact investigations, because so many people on the ground have an interest in concealing facts, including by silencing witnesses.²⁰ Not only witnesses and their families are threatened: investigator protection is an issue as well.

I mention these unhappy realities about international criminal investigations because it seems clear that if it is hard to gather evidence *post bellum*, it will be even harder in a hot war zone. How will the JAB court get investigators in while the bullets are

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¹⁹ Ibid., pp. 250-51.
flying to figure out who started it and whose fault it was? For that matter, why would the warring parties let them in? Perhaps the JAB court will rely on local investigators. They too will have difficulty gaining access to conflict zones, and there is no reason to suppose they will get to see anything the belligerents don’t want them to see.

A related problem is:

5. *Intense disputation of facts, backed by claims of secret intelligence*. Suppose the JAB court must judge whether the United States has a preventive-war justification for attacking a Middle Eastern adversary. The United States claims it has secret intelligence showing the adversary has developed A-bombs and long-range missiles. It declines to reveal the intelligence, on the ground of protecting sources and methods. How would a JAB court evaluate those U.S. claims for factual accuracy? Would it develop its own intelligence assets? Would it reveal their identities? McMahan responds that few of us accept that our lack of access to classified information always, or even usually, renders us incapable of justifiably believing that a war in progress is just or unjust. … In general, however, the important question is not whether an *ad bellum* court would be infallible, but whether its judgments could be reasonably believed to be more reliable than those of any state or individual. And clearly, they could be. … The court might still lack information possessed by a state that refuses to divulge it, but in most cases the lack of such information would be compensated for by the absence of self-interest that inevitably contaminates the empirical and evaluative claims made by states.21

These arguments are unconvincing. No doubt contaminating self-interest is a fatal epistemic disqualifier for many state assertions; but lack of information is an equally fatal

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epistemic disqualifier – and honesty does not make up for ignorance.

Furthermore, the important question is not whether a JAB court would be infallible (of course it won’t), or even whether its judgments are more reliable than those of any state or individual. The important question is whether the JAB court’s judgments are reliable enough to ground a soldier’s refusal to fight. That is partly the comparative question McMahan poses: Is the JAB court more reliable than me? But it is also the non-comparative question “how reliable is the JAB court?”, because if soldiers think the court is only slightly better positioned than they are, there is no reason for them to take the court’s deliverances seriously. If the court cannot challenge secret intelligence, why would soldiers believe the court?

6. Making judgments in real time. The JAB court is useless unless it can reach verdicts in real time.22 Given the speed with which armed conflicts unfold, that is scarcely possible. International fact-finders cannot act in days or weeks. Even if a war lasts for a long time, its justice ad bellum may require continual re-assessment, so the problem of making real time judgments in impossibly short intervals never goes away.

Meshing JAB judgments with law

7. Moral or legal judgments? Would the JAB court make moral judgments or legal judgments or both? I take it McMahan wants the former: philosophers and others are to develop moral criteria of JAB, based on the best moral theory, and not necessarily consistent with international law.23 But how should those judgments sit in relation to legal judgments? For better or worse, the JAB court would not operate in a normative vacuum, and just as it would have to compete for legitimacy with the Security Council

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22 Ibid., p. 249.
23 On the other hand, his proposed composition of the JAB court, quoted above at footnote 15, is heavily weighted toward lawyers.
and the ICC, philosophical criteria of just war would have to compete with existing international law for normative authority.\textsuperscript{24}

I am thinking especially of article 51 of the UN Charter, which declares that every state has an “inherent right of self-defense.” As we know, the “inherent right of self-defense” has proven more than a little controversial, not only among those philosophers who reject it, but among lawyers and diplomats trying to interpret it. The ICJ has, controversially, denied that states have an inherent right to defend themselves against terrorist attacks by non-state actors.\textsuperscript{25} The United States, also controversially, expands the inherent right of self-defense to include preventive war, as well as drone strikes against terrorist groups in the territory of states unwilling or unable to control them.

Of course, one might think these controversies are exactly why we need a JAB court to settle the dispute and enunciate the normatively best criteria of self-defense. Unfortunately, the court would face a lose-lose dilemma: plunge into the morass of legal arguments or ignore them. The former course would set it in competition with official tribunals (like the ICJ and ICC), and would risk submerging morality to legalisms. But if the JAB court ignores the law, why should soldiers accept its normative criteria when their state is claiming “inherent right of self-defense,” which sounds pretty compelling?

Legal judgments become even more acute if the JAB criteria are broadened beyond the Charter requirement of self-defense to include territorial grievances, such as King Henry’s quarrel with France.\textsuperscript{26} So many conflicts arise from territorial disputes

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\item I say this as someone who has defended a revisionist conception of just cause and criticized the UN Charter’s article 2(4)-article 51 regime. Luban, “Just War and Human Rights,” \textit{Philosophy & Public Affairs} 9 (1980): 160-81.
\item As McMahan proposes in “Just Cause for War,” \textit{Ethics & International Affairs} 19(3)(December 2005): 11-13. There he argues that just cause consists of any severe enough wrongdoing, including seizure of
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(think Kashmir, Crimea, Ethiopia-Eritrea, Turkey-Cyprus, Azerbaijan-Armenia, the South China Sea) that it seems impossible for a JAB court to declare justice *ad bellum* without addressing the territorial claims. And those are at least in part legal claims, often quite fact-intensive, of the kind the ICJ spends years adjudicating.

8. *Normative disagreement the resolution of which depends on unknown, possibly unknowable, facts.* If a JAB finding includes judgments about proportionality and reasonable likelihood of success, the court would have to evaluate the probable consequences of a war. But those depend on the military decisions and war plans of the belligerents, which they are certainly not going to disclose (honestly) to a JAB court, particularly an unofficial one that states don’t sanction.

Of course, an authoritative JAB court finding that there is no just cause could stop there; lack of just cause by itself makes a war unjust. So the JAB court could limit its mandate to evaluating just cause, and dodge the problem of predicting the unpredictable. But if, as some theorists plausibly argue, the justice of a cause turns on proportionality and necessity, even the just cause decision will be impossible for the court to tender.

For all these reasons, a JAB court will not be able to do the epistemic work that soldiers confronting the question of conscientious objection urgently need. That means they will have to deliberate on their own.

Once in a blue moon, the question of *jus ad bellum* will not be hard. A war of naked aggression, unperfumed by propaganda, would present an easy case. Appian reports that when Julius Caesar was debating with his captains about crossing the Rubicon, he said, “If I don’t cross this river, I’m in trouble; if I do, everyone in the world
is in trouble. Let’s go!” Here, at any rate, Caesar’s captains could recognize a
manifestly wrongful war in the making.

But easy cases are rare; even Hitler cloaked his aggression in the language of self-
defense. A more plausible case would be the situation of a soldier deployed in an ongoing
war, whose government justifies the fighting by claims about facts on the ground that the
soldier knows are fabrications. If the government justifies its cause with palpable lies,
known to be lies by soldiers who can see the truth for themselves, and no other just cause
exists, the injustice is manifest to the soldiers. As I argue below, in that case the soldier
should not continue to fight the war.

Yet even those cases are rare. Consider an example. Notoriously, in the wake of
the 1994 Rwandan genocide, France militarily intervened on the wrong side, providing
safe passage for génocidaire forces escaping to eastern Congo. Some French soldiers
explained that their government told them the Hutus were the victims and the Tutsis the
perpetrators of the genocide – the opposite of the truth. With few journalists on the
ground and French media riddled with disinformation, they had no way to know. Being
there on the ground was no help. All the soldiers could see was desperate Hutus fleeing
from the victorious RPF.

We might object that matters have changed decisively since 1994. Today, scores
of videos would be posted on the Internet. The genocidal broadcasts of Radio Television
Milles Collines would be available for all to hear, courageous activists would live-blog
the atrocities, and it would not take diligent investigation to discredit the lies the French
government told its soldiers.

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free translation of a report from Appian, *Civil War* 2 §35; for Appian’s Greek original and its literal
translation, see p. 125 n. 18.
Yet even now the case would not be easy. YouTube would also show videos of the RPF’s military advances into Rwanda, posted by the Hutu Power government as proof of Tutsi aggression. Skeptics and deniers would claim that the atrocity videos actually depicted Tutsis killing Hutus, not the other way around, or that the videos actually came from Burundi; the blogosphere would be filled with spin. Uncertainty would continue, and – with no reliable JAB court other than an institution that might seem no more credible or legitimate than the blogosphere – soldiers would remain in doubt, with the role morality of deference to command decisions as the default.

Some might say that so few wars have been just that on purely statistical grounds soldiers in a situation of uncertainty should presume the war is unjust.28 If you believe that, you should certainly not join the military. But presumably soldiers who take moral issues seriously enough to consider conscientious disobedience don’t believe their country fights mostly unjust wars; otherwise, why did they enlist? Soldiers may be mistaken; but to take their dilemma seriously we must assume they think the wars their country has fought are mostly just. To persuade them otherwise will multiply their epistemic problems rather than solving them.

In short, we have every reason to believe that Williams’s epistemic claim about the disability of ordinary soldiers in judging *jus ad bellum* in the fog of war and politics remains as true today as in Shakespeare’s time. Regrettably, a JAB court would not remedy the problem.

**Bates’s absolute deference claim**

What about Bates’s claim that all this is beside the point, because “obedience to the King wipes the crime of it out of us”? I labeled this the “absolute deference” claim,
because if there is no moral wrong in obedience, there is nothing to balance the scales against the soldier’s duty to obey. Indeed, if the King’s authority suffices to wipe out the crime, there is no point even thinking about *jus ad bellum*. In Tennyson’s words, “Theirs not to make reply/ Theirs not to reason why/ Theirs but to do or die.” This is, perhaps, the most familiar and traditional view of military obedience.

But Tennyson is wrong on two counts. First, because soldiers are reasoning beings and moral agents, it is *always* theirs to reason why. No one, no matter how humble her military rank, is any less a moral agent than the most exalted princes and generals in the realm. No ignorance is invincible, if soldiers have closed their eyes to injustice. This is the fundamental insight behind selective conscientious objection on the part of soldiers: their own moral agency never goes away. If their participation in a war is a crime, obedience to the King cannot wipe it away. It might if obedience meant the transfer of all agency to the King, so that Bates and Williams had become nothing but instruments. But men and women are not mere instruments, and political obligation does not transfer citizens’ agency to the sovereign.

Some may object that this line of argument badly misses the point. Nearly all professional soldiers would reject the accusation that by obeying orders without question they have made themselves mere instruments without conscience. Professional military organizations pride themselves on their conscience, their unswerving moral compass; and the willingness of soldiers to sacrifice life or limb for their country is an unmistakable token of moral devotion – arguably, the most unmistakable token anyone can offer. Oliver Wendell Holmes’s famous Memorial Day address on “the soldier’s faith” eloquently articulates this point of view:
I do not know what is true. I do not know the meaning of the universe. But in the midst of doubt, in the collapse of creeds, there is one thing I do not doubt, that no man who lives in the same world with most of us can doubt, and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has little notion, under tactics of which he does not see the use.29

Holmes gets it: Tennyson’s lines are an homage to the Light Brigade’s courage and devotion, not a paean to institutionalized amorality. Something along these lines is indeed “the soldier’s faith.” I can’t help but think that it resonates with many of us – even if, as Holmes surely intended, the resonance is mixed with repulsion.

But I am not convinced. “Theirs but to do or die” sentimentally obscures the fact that the doing involves not just dying but killing, and failing to notice this is Tennyson’s second and fatal error. My life may be my own to sacrifice; yours is not. Moshe Halbertal nicely explains the fallacy involved in thinking otherwise: from the fact that the soldier is willing to die for the cause, she wrongly infers that the cause has objective value weightier than a human life – in which case she has moral license to kill for the cause.30

The fallacy lies in reasoning from the strength of commitment, measured by what the soldier is willing to sacrifice in its name, to objective value. Without this fallacy, Tennyson’s sentiments are a lot less appealing. “Theirs not to reason why/ Theirs but to kill on command” is not poet laureate material – and not just because it doesn’t rhyme.

(No rhyme, but also no reason.)

Now Holmes was not one to confuse strength of commitment for objective value. He was a thoroughgoing skeptic about objective values. Famously, his outlook was formed by his own Civil War experiences, when he recognized that his equals in intelligence and moral seriousness on the Southern side were driven by commitments as deep as his own abolitionism.\(^{31}\) Holmes doubted any decision procedure could settle the issue—that’s why the war was fought.\(^ {32}\) In our time, Jeremy Waldron has argued that objective values are beside the point, not because there are none but because we have no reliable method for settling disagreements about them.\(^ {33}\) In Holmes’s eyes, this leaves commitments you are willing to sacrifice your life for as bedrock, and he did not shrink from the prospect of killing for one’s commitments, however ungrounded they are in anything else.

Holmes can be faulted for cranky metaphysics, but this is not the place for that discussion.\(^ {34}\) Fortunately, we don’t need to fish in such deep waters. For even on its own terms, Holmes’s argument undermines, not supports, the absolute deference claim. If a soldier recognizes the manifest injustice of her cause — as judged by her own moral commitments — then she must decline to fight, regardless of the personal sacrifice her disobedience entails. Otherwise, by Holmes’s own argument, the commitment not to kill unjustly is not a wholehearted one, regardless of the soldier’s protestations to the contrary.

**Manifest injustice and the no-inquiry claim**

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\(^{31}\) Holmes, Memorial Day speech, in *The Occasional Speeches of Justice Oliver Wendell Holmes*, p. 4.

\(^{32}\) “Deep-seated preferences can not be argued about … and therefore, when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way.” Holmes, “Natural Law,” in *Collected Legal Papers*, p. 181. Holmes had a penchant for blunt, sanguinary rhetoric.


Where does that leave us? I’ve argued that soldiers never surrender their power of moral decision – Bates’s absolute deference claim fails – but that the decision might be epistemically impossible for an ordinary soldier in the fog of politics and war. Williams’s epistemic claim is right. Faced with uncertainty and faint prospect of relieving it, what should the soldier of conscience do?

We can take a clue from the law of *jus in bello*. Under international law, soldiers are required to disobey manifestly illegal orders, and this legal principle straightforwardly has its moral counterpart: you must disobey manifestly immoral orders, such as orders to shoot prisoners or non-combatant civilians, to torture captives, to condone rape, or to cover up war crimes. Conversely, military discipline requires soldiers to obey lawful orders, and international law permits obedience.

In doubtful cases, those that do not “fly the black flag of illegality,” soldiers get the defense of superior orders unless they know the order is unlawful; and they disobey at their own risk, meaning that if the order was lawful, their mistaken belief that the order was unlawful will not protect them from whatever punishment their military code imposes. Thus, the *in bello* law of armed conflict incorporates a tripartite scheme of obligation and permission, depending on whether an order is lawful, manifestly unlawful, or unlawful but not manifestly so. Lawful orders may be obeyed, and manifestly illegal orders must be disobeyed. Orders unlawful but not clearly so, and not known to be so, may also be obeyed (and the soldier disobeys at her own peril).³⁵ The parallel tripartite

³⁵ Article 33 of the Rome Statute of the International Criminal Court (ICC) sets out a prototype of this liability scheme. Superior orders do not relieve a person of criminal responsibility “unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful.”
scheme couched in moral terms would distinguish legitimate orders, orders of unclear moral propriety, and manifestly immoral orders.

The tripartite scheme undoubtedly puts a heavy thumb on the scale in the direction of obedience: in doubtful cases it strongly favors erring on the side of obedience – because then the soldier gets the superior orders defense – over erring on the side of disobedience. Nevertheless, the scheme incontrovertibly recognizes soldiers as moral and legal agents who are expected to evaluate the rights and wrongs of their actions. In other words, the tripartite scheme recognizes the inevitability of conscience even in a military role morality that assigns central importance to obedience and deference.

Suppose we adopt a parallel tripartite scheme for ad bellum judgments. A soldier ought to fight in just wars; to say otherwise is to embrace pacifism, and pacifists have no business becoming soldiers. But soldiers should refuse to fight in manifestly unjust wars.

What about doubtful cases? One approach would require soldiers in doubt to err on the side of non-violence, by refusing to fight unless the war is manifestly just. The reasoning is simple: if there is even a possibility that you might kill someone in an unjust cause, don’t put yourself in that position. But such reasoning is faulty, because it assumes that the moral risk lies exclusively in the decision to use violence. In a just war of self-defense or a humanitarian intervention, that is not so, because the soldier who errs on the

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36 This sentence may be objectionable to those who believe that pacifism is objectively and universally correct as a moral position – in which case, I suppose, nobody ought to become a soldier. Obviously, I am treating pacifism as an optional commitment.
side of non-violence risks exposing those she is sworn to defend to mortal danger. Innocent lives are at stake in either direction.\textsuperscript{37}

Under the tripartite scheme, soldiers should refuse to fight only when the war is \textit{manifestly} unjust; in doubtful cases the soldier may defer to her nation’s political leadership and her superiors in the chain of command. That is the view articulated by several early modern just war theorists, and I think it is largely right. Consider Suárez’s 1621 \textit{De bello}: although kings and their advisors are required to make “diligent examinations” of the justice of war, “common soldiers, as subjects of princes, are in no wise bound to make diligent investigation, but rather may go to war when summoned to do so, provided it is not clear to them that the war is unjust.”\textsuperscript{38} Note that common soldiers are required to judge whether the war is \textit{clearly (constat)} unjust – thus, Suárez is no military amoralist, and he recognizes the inevitability of conscience. But soldiers have no obligation to delve when the war does not wear injustice on its face. Identical views, in nearly identical words, can be found a century earlier in treatises by Cajetan and his great

\textsuperscript{37} A point noted in David Enoch, “A Defense of Moral Deference,” \textit{Journal of Philosophy} 61 (2014): 230. For useful discussion of the decision theory of killing, see Seth Lazar, “In Dubious Battle: Uncertainty and the Ethics of Killing” (MS). I do not explore the decision theory here. All decision-theoretic methods require assigning probabilities to outcomes. But in my view the Williams predicament means that soldiers will often be unable to assign even subjective probabilities in a way they regard as anything more than picking numbers out of a hat. The probabilities fall into the category of “unknown unknowns.” Moreover, when one of the questions soldiers must answer, and about which they are uncertain, is “what is the best theory of just cause?” I believe that assigning probabilities to the competitor theories and running the numbers is a mistake. “What are the odds that utilitarianism is the best moral theory?” strikes me as a misguided question, although I recognize that some philosophers disagree.

\textsuperscript{38} Francisco Suárez, \textit{De bello}, part of the larger work \textit{De triplex virtute theologica}, is excerpted in Gregory M. Reichberg, Henrik Syse, and Endre Begby, \textit{The Ethics of War: Classic and Contemporary Readings} Blackwell, 2006), Disputation XIII, section VI: What Certitude as to the Just Cause of War is Required in order that War may be Just?, pp. 357-59. Generals and princes called to consult with the king must also “inquire diligently” – but not if they are not consulted. Suárez reasons that in the former case, launching the war will be partly their responsibility, but in the latter “their part in the affair becomes simply that of private soldiers.” I think the war is always partly the participants’ responsibility – that is what it means to recognize their moral agency – and so if the generals in their non-consultative role are closer to soldiers, it will be for the reasons I advance in this paper: a role morality of deference grounded in the importance of civilian control of the military.
contemporary Vitoria. For all three, then, common soldiers must refuse to fight in an unjust war, but only if the war is clearly, manifestly, patently unjust (I take it that their words are synonymous). Soldiers lie under no affirmative duty to investigate unclear cases. And, given a baseline expectation of obedience, if they need not investigate, they should deploy.

**Deference and civilian control of the military**

Why believe this? For Cajetan, Suárez, and Vitoria, the reason soldiers should obey unless their prince’s cause is manifestly unjust derives from broader accounts of political authority, of debatable relevance in modern democracies. I offer a different answer: the crucial importance of maintaining civilian control over the military, which imposes a strong rather than a weak role obligation.

To see this, let’s examine two central concepts of military role morality: obedience to orders and civilian control of the military. As a first approximation, we may think of obedience as the requirement of subordinates in the military hierarchy to obey orders of their military superiors. Civilian control refers to the requirement on all the military to obey orders from the civilian government.

Obedience to orders is part of military discipline. It is only one part: the larger project of discipline is to train the soldier to know what to do even without orders. In

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40 Vitoria concedes that “there may nevertheless be arguments and proofs of the injustice of war so powerful, that even citizens and subjects of the lower class may not use ignorance as an excuse for serving as soldiers.” Ibid. As I read him, though, Vitoria is here spelling out what he means by a “patently unjust” war; he is not imposing an affirmative obligation on soldiers to investigate the arguments and proofs. Vitoria makes clear that what he means to be ruling out is ignorance that is “willful and wicked, deliberately fostered out of hostility,” not negligent failure to investigate. Ibid.
41 Some countries, like the United States, place the civilian leader formally at the top of the military chain of command, so that orders from the president as commander-in-chief are military orders. In other countries, for example Israel, the top of the chain of command is a military officer (the chief of staff), so that civilian control is formally distinct from obedience to military orders. Either way, the important point is the subordination of military decisions to those of civilians.
combat, such discipline is a life or death matter. So there is a prudential point to discipline. But there is a moral point as well. Highly disciplined soldiers know when they must disobey orders because they are illegal – which already shows that discipline is far from the same thing as absolute deference.

More broadly, military discipline is the most important antidote to war crimes. The disciplined soldier does not fire wildly out of panic. Discipline restrains soldiers from taking vengeance on prisoners and from raping and looting when their basest desires tell them to rape and loot. Disciplined obedience can lay genuine claim to being a role morality – a set of role expectations that fulfills a compelling moral purpose.

Disciplined obedience has to do with in bello decision-making. What about the ad bellum decision of whether to fight at all, our focus here? That decision is equivalent to the question whether to follow the orders to deploy given by the civilian political leadership. Here, the key argument for the role morality I have called “the tripartite scheme” is the crucial importance of maintaining civilian control of the military.

My impression is that theorists of just war have overlooked the moral importance of civilian control – it is rarely discussed in the philosophical literature on just war. Possibly this is because most theorists live in democratic, civilian-led, countries where military coups and violence against civilians by garrisoned soldiers pose no serious threat. We lucky residents of advanced democracies take civilian control for granted.

43 What I mean by “disciplined obedience” is obedience to orders as part of a broader military discipline that teaches soldiers to disobey wrongful orders. It is constrained obedience. I develop a theory of role morality in Luban, Lawyers and Justice: An Ethical Study (Princeton University Press, 1988), pp. 129-37.
Doing so is a mistake of monumental proportions. It’s like dismissing the need for polio vaccination on the ground that polio no longer poses a threat. If polio no longer poses a threat, that is because of vaccination. If military coups no longer pose a threat, it is because of institutions of civilian control and ceaseless efforts to make it part of military culture. As a brief review of history reminds us, stable civilian control is a hard-won and recent achievement of civilization.

The oldest and most universal of all political problems involving militaries is how to domesticate a society’s warriors – violent, proud men, mostly young, with a yen for action. The world’s oldest work of literature centers on the problem that King Gilgamesh is at once “violent, splendid, a wild bull of a man, unvanquished leader, hero in the front lines, beloved by his soldiers ... ,” but also “arrogant, his head raised high, trampling its citizens like a wild bull.” The central theme of the epic is the domestication of Gilgamesh. In the Hebrew Bible, Samuel warns of similar problems if the Hebrews insist on appointing a king to lead them in wars. Plato discussed the problem in the Republic, when he asks how the Guardians can be fierce toward their enemies yet gentle toward their friends. All these are literary texts, but obviously they are based on real and bitter experiences that their audiences could readily recognize.

In the European Middle Ages, feudal retainers, roaming mercenaries, and garrisoned armies were a chronic source of murder, rape, and looting. As Blackstone warned with this history in mind, “In a land of liberty it is extremely dangerous to make a distinct order of the profession of arms.... The laws therefore and constitution of these

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47 1 Samuel 8:10-18.
kingdoms know no such state as that of a perpetual standing soldier, bred up to no other profession than that of war.”

Coupled with the violence of soldiers comes the other chronic problem I mentioned: military coups. The Roman law that Caesar breached by crossing the Rubicon with his army forbade generals from bringing armed troops into the city; the Romans rightly foresaw mortal danger to the Republic. After empire replaced the republic, no fewer than a dozen emperors were deposed through military coups, and those who weren’t survived by currying favor with the army. The English civil war saw five military coups and an unsuccessful mutiny within fifteen years. In founding-era constitutional debates over whether the American republic should have a standing army, the framers repeatedly warned of the dangers of “a Caesar or a Cromwell” deposing the government or embroiling it in military adventures. They remembered that during the Revolution, the Continental Army twice came close to mutiny.

There are two additional reasons for emphasizing the stringency of civilian control of the military within the role morality of military officers. Civilian control has the paradoxical property of vesting ultimate command authority in military amateurs. Of course, responsible civilian leaders listen carefully to military advice. But nothing obligates the political leaders to heed it, and contemporary history contains notable examples of civilian leaders making awful decisions contrary to military advice. Military leaders are bound to find this structure of authority galling. This is a tension hard-wired into the very structure of civilian control.

A second tension lies in an uncomfortable fact that neither military officers nor civilians in democracies like to speak of openly: many military officers look down on their civilian society and despise its civilian leaders. The officers have sworn to put themselves in harm’s way for their country, and subjected themselves to a grueling discipline; by comparison, their civilian counterparts seem like decadent, morally shallow hedonists. In some countries, where the officer corps is almost a *de facto* hereditary caste, the result has been military coups and military dictatorships. But even in democracies where military coups are unthinkable, part of the reason they are unthinkable is a discipline of civilian control of monastic stringency. Officers whose secret instincts tell them they are morally a cut above their civilian counterparts – including their civilian leaders – and who sometimes see the civilian leaders making gallingly bad security decisions must repress those instincts ruthlessly.

The solution to the problem of soldier violence is strict military discipline. And the solution to the problem of coups lies in placing the military firmly under civilian control, both in the formal chain of command and – more importantly – in the culture and training of military officers. Such a military culture must be built around deference to the chain of command, including above all deference to the political decisions of the civilian government. As Mark Osiel observes, we want colonels to stop and think, but “we do not want the generals to start thinking about whether they could do a better job of running the country.”

That’s the dilemma the tripartite scheme aims to address. It does so by insisting that soldiers take heed whether the war they are asked to fight is manifestly unjust, but obey the order to deploy when the fog of politics and war means that nothing

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is manifest. Bates’s no-inquiry claim is wrong if it denies that manifest injustice matters, but right that the duty of inquiry stops there.

This is not a return to the unquestioned obedience celebrated by Tennyson and Holmes – a wholly exclusionary obligation that forecloses conscience and deliberation. But, between the unrestricted requirement of due diligence on the part of soldiers, and more limited version of the tripartite scheme, the political arguments grounded in civilian control of the military strongly favor the latter.