

## *Innocence and Responsibility in War*<sup>1</sup>

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### **I The Question of Moral Innocence**

Innocence is a notion that can prove controversial. Claims of innocence typically support not imposing burdens on the innocent when their conduct is relevantly unobjectionable. This paper examines innocence in the context of violent conflict between states or groups. Many thinkers about the morality of such violence want to establish a principle that would protect innocent civilians. Yet the common view in just war theory does not affirm the *moral* innocence of civilians. Similarly, the common view that soldiers have an equal right to kill does not affirm their equal moral culpability.

Talk of innocence usually starts from the idea that a kind of moral appraisal makes sense. We assume that persons can be innocent or not by virtue largely of the choices they have made. I will accept this assumption and set aside metaphysical doubts about our capacity for freedom. There is, of course, no issue of moral innocence if in fact we cannot be morally responsible for our actions.

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I defend a view of innocence in war that maintains a connection between innocence and the absence of moral culpability. Persons may warrant criticism or the denial of rights or liberties because of their conduct. Justification for imposing these burdens would lie with the goal of ending or remedying wrongs, provided that the persons targeted are not innocent. I will contrast innocence not with guilt but with 'noninnocence'; the language of guilt and innocence can be misleading since it brings to mind an unqualified contrast between being culpable or not. We should recognize that persons may be noninnocent to the degree that they bear moral responsibility for relevant wrongs. With regard to war, the partially noninnocent make up a much larger class than the fully noninnocent.

My focus in this paper is on soldiers, not civilians. The main argument is that ordinary combatants generally may be innocent or partially noninnocent. When they are innocent and on the side of a just war, attacking them is not morally permissible. This position runs contrary to the common view that although ordinary combatants are not morally responsible for the war they fight, they are legitimate targets of attack. I argue that legitimate targets are available only for combatants on the side of a just war. By 'just war' I mean foremost a war fought for a just cause, as compared to a just or morally respectable aim that may not be sufficient for a just cause for war.<sup>2</sup>

## II Harmfulness and the Common View

The common view in just war theory designates as innocent certain classes of people — typically, civilians — it holds should not be harmed. Thomas Nagel and Michael Walzer give accounts of this sort. Their arguments appear to be backed by the weight of judgments of moral innocence yet turn out to be in tension with such judgments. While Elizabeth Anscombe's account is often linked with the common view because of her stance toward civilians, she believes that assigning innocence in war does involve moral evaluation.

Nagel defends non-utilitarian moral restrictions on conduct in war.<sup>3</sup> One such restriction is that people who are innocent cannot deliberately

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2 This distinction between a 'just cause' and a 'just aim' follows Jeff McMahan and Robert McKim, 'The Just War and the Gulf War,' *Canadian Journal of Philosophy* 23 (1993), 502.

3 Thomas Nagel, 'War and Massacre,' in *International Ethics*, Charles R. Beitz et al., eds. (Princeton: Princeton University Press 1985), 56. He admits the possibility of

be harmed. We reasonably take this restriction to apply to innocent civilians on both sides at war and anywhere else. But the restriction does not tell us whether certain persons count as innocent on moral grounds. If these persons are not morally innocent, the presumption supporting their immunity to deliberate attack is less obvious.

The common view of who counts as innocent and why deliberately harming them is prohibited might be motivated as follows. A central goal of just war theory is to keep injury and loss of life to a minimum when war cannot or will not be avoided. We start by acknowledging the reality of war, which is also to acknowledge a class of persons whose job is to do the fighting. Some of them will be injured or killed in their role as combatants: this is inherent to war. Harm to noncombatants, though an expected byproduct of modern warfare, is not inherent to war. Since noncombatants are not direct participants in war, they are supposed to lie outside the acceptable bounds of warfare. This judgment could be marked by the claim that noncombatants are innocent. Their innocence in war would translate into their having a fundamentally different moral status than combatants.

Moral innocence, according to Nagel, is not relevant since many of the moral flaws people have are irrelevant to the appraisals of just conduct in war. He argues that "in the definition of murder "innocent" means "currently harmless," and it is opposed not to "guilty" but to "doing harm".... So we must distinguish combatants from noncombatants on the basis of their immediate threat or harmfulness."<sup>4</sup> Materially innocent persons, whether or not they are morally blameless for the fighting of others, do not themselves harm anyone. As one critic describes the position, "Innocence and guilt are thereby emptied of moral content and become simply synonymous with the roles of [civilian and soldier] in war, making the role of combatant sufficient for specifying who is and who is not a legitimate target of deliberate attack."<sup>5</sup> This distorts our ordinary understanding of innocence. Persons, including soldiers, do not lose their innocence in any credible sense simply by being an immediate threat to *agents of unjust aggression*.

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extreme circumstances that compel, but do not justify, violating absolutist restrictions (ibid., 66-7).

4 Ibid., 69-70

5 Gabriel Palmer-Fernandez, 'Innocence in War,' *International Journal of Applied Philosophy* 14 (2000), 164. A similar point about the moral arbitrariness of the combatant-noncombatant distinction is made by George I. Mavrodes, 'Conventions and the Morality of War,' in Beitz, *International Ethics*.

While Nagel welcomes the rhetorical force of the language of moral innocence, he renounces the moral content of that language, which is connected to moral responsibility. It is true that moral innocence alone does not tell us who can and cannot legitimately be attacked in war; for example, the efficacy of an attack in promoting a just cause is also relevant. Nagel's notion of innocence, however, refers to a class of people who cannot legitimately be attacked, where this is determined on grounds entirely separate from moral responsibility, namely, immediate harmlessness. If the position is that harmless people should not be attacked, this can be stated without relying upon judgments of innocence.

Walzer, like Nagel, understands innocence partly as an issue of permissible treatment of persons depending on their roles. But Walzer seems to think that moral innocence is relevant. 'Innocent,' he states, is 'a term of art which means that [persons] have done nothing, and are doing nothing, that entails the loss of their rights.'<sup>6</sup> The language of rights suggests here an ordinary notion of noninnocence and its consequences. Persons who deliberately and unjustly harm or support those who so harm others would be morally noninnocent. These noninnocent persons may lose their moral right to life or liberty if this is prerequisite to end grave harms for which they bear some responsibility. Such a position is plausible. In contributing to an unjust war, persons may be morally noninnocent and thus not immune to deliberate attack, though they may not directly bear moral responsibility for the war itself.

Yet this line of thought becomes a dead end on Walzer's approach. He finds that whether combatants fight for a just cause does not matter in determining their innocence; combatants on both sides can legitimately be attacked due to their equal noninnocence. The apparent inconsistency is that combatants who are fighting a just war are doing nothing, plausibly construed, that entails the loss of their moral rights. Their moral innocence and morally permissible conduct would seem to rule out the possibility of legitimately attacking them in the service of an unjust cause. This would represent a limit on the moral grounds for self-defense that Walzer does not ultimately affirm.<sup>7</sup>

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6 Michael Walzer, *Just and Unjust Wars*, 3rd ed. (New York: Basic Books 1977), 146

7 Other writers, like Walzer, also do not recognize this limit on the legitimacy of self-defense. Some of them cite an unrestricted 'principle of self-defense' that would allow any persons to defend themselves against serious threats, regardless of the moral innocence of the attackers or the unjust cause that the defenders serve. See, e.g., Robert K. Fullinwider, 'War and Innocence,' in Beitz, *International Ethics*; and Lawrence A. Alexander, 'Self-Defense and the Killing of Noncombatants: A Reply to Fullinwider,' in Beitz, *International Ethics*. Against Fullinwider, Alexander argues

Anscombe's account appears more promising, for it truly encompasses a notion of moral innocence. 'What is required, for the people to be attacked to be noninnocent in the relevant sense,' she claims, 'is that they should themselves be engaged in an objectively unjust proceeding which the attacker has the right to make his concern; or — the commonest case — should be unjustly attacking him.'<sup>8</sup> This implies that persons who are not involved in causing unjust harms are innocent. On my reading of Anscombe, current harmfulness or simply being a combatant is not sufficient to establish noninnocence in war. Combatants would be innocent if they are fighting a just war: their conduct is not morally objectionable. Innocent combatants, as with innocent persons in general, could not legitimately be attacked by combatants on the side of an unjust cause.

Some persons who are involved in causing unjust harms are morally innocent as well, in that they are not morally blameworthy. Combatants may be blamelessly ignorant of why the war on their side is unjust or they may lack moral agency, say, because of brainwashing through propaganda. These 'innocent attackers' seem noninnocent in Anscombe's objective sense and hence call for a qualification to her account: not all of the noninnocent must be morally noninnocent.<sup>9</sup> In addition, cases could arise where claims to immunity conflict, for instance, innocent civilians on the unjust side acting in self-defense against a just combatant who unintentionally would cause them harm. Anscombe might allow that determining permissible conduct solely on the basis of moral innocence is not always possible.<sup>10</sup> Moral innocence would not fully explain who can count as a legitimate target of attack.

A more worrying issue is that Anscombe does not spell out, except in the broadest terms, which types of activity are morally innocent and

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that the principle of self-defense does not necessarily prohibit the killing of noncombatants. Both Fullinwider and Alexander, however, basically take it for granted that an unrestricted principle of self-defense derives from a right to self-defense.

8 G.E.M. Anscombe, 'War and Murder,' in *Ethics, Religion and Politics* (Minneapolis: University of Minnesota Press 1981), 53

9 I have been assuming that what Anscombe regards as objectively unjust can be distinguished from what the rules of war as grounded in convention and international law specify as unjust. For criticism of the conventionalist grounding of the rules of war, see my 'The Limits of the War Convention,' *Philosophy & Social Criticism*, forthcoming.

10 Jeff McMahan disagrees, claiming that Anscombe is committed to the position that morally innocent civilians would not be permitted to defend themselves against a just combatant in such a case ('Self-Defense and the Problem of the Innocent Attacker,' *Ethics* 104 [1994], 274-5).

why. She states that 'a very large number of the enemy population are just engaged in maintaining the life of the country....'<sup>11</sup> Innocence is presented generally as the moral status of civilians. Whether normal activities — e.g., voting for hawkish candidates, supporting war initiatives through public affirmation, supplying goods to the military — could morally implicate civilians in a war effort is a serious point of contention she hardly addresses. Her account is close to the common view of civilians, a view I am skeptical of, but I must leave extended discussion of civilian moral responsibility for another occasion.

I have argued so far that the distinction between noncombatants and combatants is not a good guide for determining innocence and noninnocence. Nagel and Walzer fail to separate judgments of innocence from their conclusions about how different classes of people should be treated; their conception of innocence in war comes at the expense of reasonable moral consistency about who can be targeted for attack and why. Anscombe appears torn between this kind of approach and one guided by moral innocence. The account of innocence in war that I develop makes explicit why unjust combatants generally are in no moral position to defend themselves against just combatants.

### III The Innocence of Just Combatants

My approach to innocence in war depends on a relevant conception of moral innocence. Persons are noninnocent insofar as they bear some moral responsibility for wrongdoing through war; they are innocent otherwise. Call this the Moral Agency View. I distinguish three classes of people: the innocent, the partially noninnocent, and the fully noninnocent. The account I give of who falls into these classes differs significantly from common just war theory, and there is good reason to revise the common view.

The innocent cannot be construed as bearing any moral responsibility for the cause of or the conduct in a particular war. They include persons who have not contributed to the war effort, whether as members of a side at war or of a third party. A nation and its people may be faulted for not supporting a just cause, but this is different from the criticism that they are noninnocent regarding why or how the war is fought. Individuals who lack the prerequisites for moral accountability, such as young children and the severely mentally handicapped, are also innocent; they

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11 Anscombe, 'War and Murder,' 60

are not autonomous moral agents. There is nothing controversial yet about the Moral Agency View.

I have suggested, though, that the class of innocent people includes just combatants. They are morally innocent insofar as they fight a just war. In contrast, common just war theory claims that combatants, as combatants, are not innocent in the relevant sense. The common view is hard to maintain. Consider the case of combatants who are defending their nation against unprovoked, expansionist aggression. Their grounds for fighting are just. The common view deems this irrelevant to the question of their innocence, since combatants as such must be allowed to fight each other. This position has no analog outside the context of war. In the civil case, a previously innocent person who defends himself or innocent others against an unjust assault does not thereby become noninnocent along with the assaulter. Unjust assaulters cannot fight back in the brute name of self-defense. The grounds for fighting matter. Although the state of mind of an unjust assaulter may make a difference to moral evaluation of his actions — perhaps he mistakenly believes he is repelling a violent, criminal threat — this difference may mitigate his moral responsibility without morally absolving him. Common just war theory needs a credible explanation of why war is a fundamentally different kind of case.<sup>12</sup> Concern to minimize harms overall in war should not be divorced from considerations of responsibility.

The key is supposed to be the distinction between *jus ad bellum*, or justice of war, and *jus in bello*, or justice in war. I take Walzer's influential account largely to represent common just war theory. According to Walzer, combatants bear some moral responsibility for justice in war, that is, for how they fight. The war convention spells out certain rules, for example, civilians are never to be targeted for attack. Such rules apply to combatants, and their duty to follow these rules cannot be negated by

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12 It has been argued that a fundamental difference lies in a distinction between an individual moral perspective and a collective moral perspective. See Noam Zohar, 'Collective War and Individualistic Ethics: Against the Conscriptio of "Self-Defense,"' *Political Theory* 21 (1993) 606-22. According to Zohar, 'Analogies that proceed directly from relations among individuals to the realm of relations among states, without emphasizing the two disparate perspectives involved, produce more confusion than illumination' (619). While I share some of his skepticism about the applicability of a refined account of individual self-defense to the case of war, I do not find plausible his account of 'the dual character of our moral vision' (619). My reason, in short, is that I do not think collectivities are essentially so different from the individuals who comprise them — at least, not so different as to entail two different kinds of morality.

orders from their superiors. But combatants typically do not bear any moral responsibility for the justice of the war they fight: whether the war has a just cause is the moral responsibility of political leaders who order combatants to war. Making war 'is conceived, both in international law and in ordinary moral judgment, as the king's business — a matter of state policy, not of individual volition....'<sup>13</sup>

This distinction between justice of war and justice in war is not central to my account of innocence. Combatants, who mainly are battlefield operatives with little influence over political decision making, may not be morally responsible for the justice of a war. However, this claim is not tantamount to a defense of the principle of 'battlefield equality.' Lack of moral responsibility for an unjust war does not entail equal moral status in fighting and an equal right to fight in self-defense. Combatants who fight a just war are innocent in a straightforward sense: they ought not to be attacked, for there is no just cause for attacking the side they represent. The same cannot be said of their opponents.

To hold that just combatants are innocent is not necessarily to hold that combatants on the unjust side are morally blameworthy. The wrongdoing of fighting for an unjust cause may be morally blameless, especially when the justice of the cause would be very difficult for any morally conscientious person to judge. At the same time, the difficulty should not be overestimated; for instance, the U.S. wars in Vietnam and Panama do not seem close to triggering this rough standard for blameless wrongdoing.<sup>14</sup> Strongly subjective or national-interest based convictions about just cause, regardless of how deeply or popularly held, are not a serious indication of the difficulty of judging just cause.

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13 Walzer, *Just and Unjust Wars*, 39

14 The 1989 U.S. invasion of Panama, code named 'Operation Just Cause,' lacked any serious pretext of just cause. President George H.W. Bush claimed the following, among other reasons, as justification: Panamanian dictator General Manuel A. Noriega had declared a state of war with the United States; forces under Noriega's command killed a U.S. serviceman, wounded a U.S. officer, and unlawfully detained and abused the officer's wife; Noriega publicly threatened Americans in Panama, creating an 'imminent danger' to their lives; these and other actions put the integrity of the Panama Canal Treaties in jeopardy; and attempts to resolve the overall situation through diplomacy and negotiations had failed. See George Bush Presidential Library, 'Address to the Nation Announcing United States Military Action in Panama,' 19 December 1989, <http://bushlibrary.tamu.edu>; and George Bush Presidential Library, 'Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on United States Military Action in Panama,' 21 December 1989, <http://bushlibrary.tamu.edu>.

For the sake of discussion, I am assuming that a just cause on one side is paired with an unjust cause on the other side. The situation in actual conflicts can be more complicated: reasonable grievances may exist on both sides, though the grievances might not rise to the level of a just cause for war. There then may be no unqualified or decisive judgment about which side, if either, is fighting a just war. As for the combatants themselves, we are asking whether they fight a just war, without primarily judging their personal motives. It is sufficient that the cause on their side, as articulated by their political leaders, is just and that they use just means in fighting.

I accept a familiar view of what constitutes a just cause for war. In short, this view recognizes a right to war only in self-defense or defense of others against unjust forms of aggression, namely, that threaten basic freedoms of persons and the decent political and social institutions of their societies.<sup>15</sup> Just cause is one principle among others — including proportionality, last resort, reasonable hope of success, competent authority, and right intention — that can be understood as governing the right to resort to war.<sup>16</sup> I focus on just cause because this principle seems paramount: without a just cause, there is no possibility for contemplating whether a war would be just.

#### IV The Moral Agency of Combatants

Considerations that inform just cause seem relatively accessible. Morally conscientious persons ought to ask the following questions. Have we as a state or people been widely attacked by those we would make war against? Or is such an attack on us imminent? Or are persons elsewhere widely being unjustly attacked or harmed, and calling for our military intervention? We should be very wary when answers to these questions are not affirmative. While the mechanisms of domestic or international law — e.g., authorization for war by the U.S. Congress or the UN Security Council — can provide public guidance about just cause, the verdicts of law and morality can diverge, and I am assuming the priority of morality. For the purposes of my argument, it is enough that reasonable persons could recognize some wars in advance as being unjust, not that every unjust war must be recognizable in advance.

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15 See, e.g., John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press 1999), 91-2.

16 See McMahan and McKim, 'The Just War,' 501-2.

The challenge for common just war theory is how to explain away the moral responsibility of combatants who fight for an unjust cause. A place to start could be by looking at whether their route to the battlefield is voluntary or conscripted. The difference may well seem relevant to assessing their moral responsibility for fighting, though this is complicated by the social conditions (e.g., discrimination, poverty) that lead some to volunteer, the personal consequences (e.g., punishment) of refusing conscription, and the accessibility of current or historical indications that they would be fighting a just war. In any event, Walzer does not say much about the moral significance of the particular circumstances under which combatants serve an unjust cause. His account of just war stresses status as a combatant and the pressures to serve their side that all combatants experience.

Walzer tries to reduce legal combatants to a moral par by claiming that an 'equal right to kill' is necessary to preserve 'war as a rule-governed activity'.<sup>17</sup> Yet war can be rule governed when both sides recognize limits on conduct in war: combatants who should not be fighting in the first place may still fight within certain rules. The cost of recognizing some limits need not be to endorse the fighting by combatants on the unjust side. By contrast, Walzer's conception of war would make even patently unjust wars practically possible by supplying all soldiers license to fight. Such a conception is expedient for political leaders on the side of an unjust cause, but a theory of just war that enables this conception seems crucially, morally flawed.

The distinction between justice of war and justice in war is not deeply at odds with asking whether combatants can bear any moral responsibility for fighting for an unjust cause. For Walzer, this kind of question has an uncomplicated answer. He suggests that whether a soldier bears moral responsibility for fighting depends on whether combat 'is a personal choice that the soldier makes on his own and for essentially private reasons': the choice 'effectively disappears as soon as fighting becomes a legal obligation and a patriotic duty'.<sup>18</sup> These pressures are widespread within modern societies. The moral problem is that neither legal obligation nor patriotic duty has overwhelming moral weight on its own (nor together). There are too many examples of injustices and atrocities that have been carried out under the banners of law and patriotism. Further, the picture of agency by which soldiers have no choice about fighting

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17 Walzer, *Just and Unjust Wars*, 41

18 *Ibid.*, 28

and therefore no moral responsibility for fighting is implausible. Conscientious objectors are a case in point.

Common just war theory may cite, instead of sheer patriotism, a patriotic presumption of just cause: the patriot is committed to his country partly because he believes it stands for good. So he is strongly disposed to believe that his country's political leaders will pursue only just causes for war.<sup>19</sup> While this is morally more substantial than patriotism alone, its application seems limited. First, if the cause for war is egregiously unjust, a patriotic presumption of just cause will be too weak to make much moral difference. Second, if a country has lately proven the patriotic presumption of just cause grossly misplaced, maintaining the presumption without scrutiny is unreasonable. Love of country provides no moral license to support whatever causes for war political leaders set forth.

In addition to patriotism, common just war theory emphasizes the difficulty that ordinary people, soldiers and civilians, have in evaluating whether the cause for war on their side is just. Walzer rejects the Catholic doctrine that soldiers should not fight if they reasonably believe the cause is unjust: he argues that such knowledge is hard to come by, leaving them little option but to fight.<sup>20</sup> Indeed, the issue of knowledge breaks down into a question of the actual facts surrounding a cause for war and a question of whether the facts sustain a just cause, both of which may be difficult to evaluate. As previously discussed, however, what should be fairly obvious, advance judgments about unjust cause are sometimes possible. The knowledge problem would in such cases be no barrier to finding soldiers noninnocent and blameworthy for fighting.

What Walzer presents as description of the moral condition of soldiers is in fact moral prescription. Legal obligation and patriotic duty do not necessarily render soldiers unable to think or act apart from the dictates their political leaders identify with duty. Rather, Walzer encourages us to see things this way. We recognize that soldiers are human beings and

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19 Alasdair MacIntyre rejects the idea that patriotism should rely on the presumption that one's country has a just cause for war ('Is Patriotism a Virtue?' The Lindley Lecture [University of Kansas, Lawrence, KS, 26 March 1984]). He claims that the willingness of soldiers to sacrifice their own lives must not be contingent upon their 'evaluation of the rightness or wrongness of their country's cause on some specific issue, measured by some standard that is neutral and impartial relative to the interests of their own community and the interests of other communities. And, that is to say, good soldiers may not be liberals and must indeed embody in their actions a good deal at least of the morality of patriotism' (ibid., 17). I do not find this a compelling or morally plausible view of patriotism.

20 Walzer, *Just and Unjust Wars*, 39

moral agents, even if their political and military leaders do not invariably treat them as such. Some persons refuse to fight — not always for ‘private’ religious reasons but also because they reasonably believe that a particular war is unjust. Although we have come not to expect most soldiers to reach such conclusions or to suffer the personal consequences of choosing not to fight, this does not mean they lack moral agency in this sphere of action.

Common just war theory does hold soldiers morally responsible for their conduct in war. Walzer claims that superior orders are no defense when soldiers commit atrocities in violation of the rules of war. His objection to the idea that combatants have moral agency is therefore limited: moral responsibility does emerge at the level of justice in war. This two-level account is philosophically puzzling. Soldiers in battlefield conditions may not be any better situated to evaluate whether their actions are just than whether the war itself is. Perhaps from a soldier’s perspective some enemy soldiers or civilians must be tortured in the interest of preventing great harm to civilians on his side; or military occupation of another people’s territory, using force against their combatants and civilians, is necessary to secure the survival of his state; or some women, children and old men are not merely civilians but look-outs, human shields or human bombs. The rules of war are not as clear and unexceptionable in application as they are in letter.

To clarify, I am not arguing that rules of conduct in war are as hard to grasp as whether a cause for war is just. The rules themselves may be straightforward. How the rules apply in specific circumstances is another matter. Because the rules are widely known and firmly entrenched, soldiers assume that their superiors have information that would reveal why commanded actions are permissible. Thus one effect of the rules of war is to motivate the acceptance of orders, despite doubts soldiers may have about whether certain orders are lawful. The military has already conditioned soldiers to act based on orders.<sup>21</sup> We might suppose that common just war theory, by its own lights, take this practical bind as reason to place moral responsibility for justice in war squarely on superiors, not subordinate soldiers. The common view and military practice deny this.

The two-level puzzle — combatants would not be morally responsible for fighting but would be morally responsible for how they fight — seems intractable. There is no denying that soldiers typically experience their volition as being constrained. Common just war theory neverthe-

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21 See, e.g., Chris Hedges, *What Every Person Should Know about War* (New York: Free Press 2003), 13.

less holds soldiers morally responsible for how they fight. This view is correct. But if soldiers can bear moral responsibility for their conduct in war, I see no morally consistent basis for denying that they also can bear moral responsibility for fighting for an unjust cause. Their situation with respect to knowledge, authority and viable options is not so much better regarding justice in war than justice of war.

## V Innocent, Unjust Combatants

My Moral Agency View is not without precedent. Anscombe's view is similar for soldiers, though not for civilians. More recently, Jeff McMahan has proposed a 'Moral View' according to which combatants for an unjust war generally cannot justifiably attack combatants for a just war. He claims that 'mere material noninnocence (that is, causing harm) is not sufficient for the loss, or even the weakening, of a person's moral immunity to intentional attack.'<sup>22</sup> I agree broadly with McMahan that moral innocence and noninnocence are relevant to how soldiers and civilians may legitimately be treated in war. What distinguishes our views is less the major conclusions we reach than some of the routes by which we arrive at these conclusions. Yet there are substantive differences worth discussing.

McMahan's view is more expansive than mine in recognizing conditions that can fully excuse combatants who serve an unjust cause. For example, McMahan believes that an unjust combatant could be morally innocent 'if, even if he knows or suspects that the war is unjust, he is subject to irresistible coercion that compels him, against his will, to fight.'<sup>23</sup> McMahan is prepared to excuse such combatants not only for fighting for an unjust cause but also for using unjust means in fighting. This is because the same excusing conditions of coercion, ignorance, manipulation, etc. can lie behind violation of the rules of war.<sup>24</sup> An innocent, unjust combatant might not be culpable, then, for killing any number of just combatants or innocent civilians if otherwise, say, he or his family would be executed.

While my view recognizes excusing conditions that may considerably diminish a combatant's moral culpability, I am doubtful of the notion of

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22 Jeff McMahan, 'Innocence, Self-Defense and Killing in War,' *The Journal of Political Philosophy* 2 (1994), 201

23 Ibid., 205

24 See, e.g., McMahan, 'Self-Defense and the Problem of the Innocent Attacker,' 264.

'irresistible coercion' that would negate moral responsibility. Even hard choices allow for the possibility of making better or worse decisions. It seems plausible to maintain that self-preservation does not justify or fully excuse shifting an indefinite amount of unwarranted and severe harm to others. This explains why unjust combatants who retain their moral agency fall into the wide class of the partially noninnocent.

A crucial problem for views McMahan would criticize 'is to find a difference between the Innocent Attacker and the Innocent Bystander (someone who bears neither causal nor moral responsibility for a certain threat) that is sufficiently morally important to justify killing the former given our belief that intentionally killing the latter ... is a paradigm of wrongful action.'<sup>25</sup> McMahan thinks this difference is difficult to measure. Where there is no significant difference, an unjust combatant, if he is morally innocent, could be morally immune to deliberate attack: 'his being materially noninnocent may have no effect on the moral barriers to harming him.'<sup>26</sup> This implies that innocent, unjust combatants could have a right to self-defense against just combatants.

By contrast, my Moral Agency View, like Anscombe's view, takes moral responsibility as the central consideration — not the only consideration — in justifying defense against unjust combatants of any kind. Their causal responsibility is also relevant. Since they are causally responsible for unjust harms, despite perhaps being morally innocent, this is sufficient to void their claim to immunity to deliberate attack and to void a right to self-defense against just combatants. I have indicated my skepticism about how many innocent, unjust attackers there will be in war. Insofar as some might exist, my view would treat them no differently than other tragically ignorant, desperate or legally insane assailants. We can regard this as a situation where innocent, unjust combatants are dealt with primarily as forces of nature, not as moral agents, in the interest of preventing unwarranted harms of which they are a source through no fault of their own.<sup>27</sup>

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25 McMahan, 'Innocence, Self-Defense and Killing in War,' 201. Pacifists, along with many just war theorists, take the problem of the unjust combatant qua innocent attacker to be central. For pacifists, this represents a general challenge to the permissibility of war. See, e.g., Cheyney C. Ryan, 'Self-Defense, Pacifism, and the Possibility of Killing,' *Ethics* 93 (1983) 508-24; and Jenny Teichman, *Pacifism and the Just War* (Oxford: Basil Blackwell 1986).

26 McMahan, 'Innocence, Self-Defense and Killing in War,' 201

27 McMahan has retracted his view that innocent, unjust combatants are immune to defensive violence and therefore could be justified in attacking just combatants in self-defense. His revised (unpublished as yet) view is that because almost all unjust

Unjust combatants, as common just war theory acknowledges at the level of justice in war, generally remain moral agents. Unlike the common view, the Moral Agency View holds that they thus bear partial responsibility for fighting for an unjust cause. This allows us to distinguish unjust combatants from innocent bystanders.

## VI Ramifications of the Moral Agency View

That persons, including combatants, are noninnocent does not by itself mean they can legitimately be attacked. It does mean they do not warrant stringent moral protection from deliberate attack, which they would warrant if they were innocent (and not causally responsible for unjust harms). A high burden still must be met showing that the use of force against noninnocents is necessary in pursuit of just and vital aims. My approach, similarly to common just war theory, rejects political realism in favor of a justice-based conception of cause for and conduct in war. Of course, the content of my revisionist view regarding justice in war differs from the common view.

When resort to war is justified, the Moral Agency View holds that combatants who are noninnocent by virtue of fighting for an unjust cause are not morally permitted to defend themselves against innocent, just combatants. Unjust combatants have no right to self-defense in this case, since they have no moral right to use violence against combatants fighting unjust aggression using just means. The partial noninnocence that characterizes most unjust combatants is sufficient for this restriction to apply. Otherwise, just war theory becomes morally perverse: it would allow unjust aggression, because the unjust combatants must be permitted to defend themselves, to take advantage of a moral loophole that enables the unjust side to prevail through fighting.

An incredible account of political obligation would be required to exempt from moral responsibility, under all circumstances, combatants

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combatants are morally responsible agents, they are liable to some degree for the unjust threat they pose. McMahan does continue to hold that there is no justification for self-defense against 'nonresponsible threats,' i.e., persons who are in no way morally responsible for the threats they pose. But since he now accepts that unjust combatants will almost never count as nonresponsible threats, the difference in our views about this will not have much relevance in the context of war. For a general statement of the problem of nonresponsible threats, see, e.g., Jeff McMahan, *The Ethics of Killing: Problems at the Margins of Life* (New York: Oxford University Press 2002), 411-14.

who — abiding by the conventional rules of war and indifferent to the unjust cause on their side — deliberately kill morally innocent combatants and unintentionally often kill innocent civilians. Stated bluntly, I am arguing that soldiers should refuse to obey unjust directives, whether to fight using unjust means or to fight for an unjust cause. Critics may worry that this position, at least at the level of the causes for war, threatens the state's legitimate interest in maintaining structures of authority, such as control of the military by the executive branch of government. After all, if soldiers could rightfully refuse to fight when they reasonably believe that a war is unjust, could the military rightfully engage in a war of just cause on its own initiative? My response is guided by the common-sense idea that individuals are specially responsible for what they themselves do. While this responsibility gives them a moral basis for refusing to obey unjust directives, it does not imply that they have independent moral license to engage the military in a war of just cause. The state's legitimate interest in authority structures can thus be maintained within limits.

Such scope for individual volition is consistent with recognizing that noninnocent combatants typically fight under duress or with misguided beliefs about the cause for which they fight. Unless combatants, as morally conscientious persons, have no good reason to believe that the war on their side is unjust, their moral responsibility for fighting can only be mitigated, not justified or fully excused. In the event that the causes for war or the means of fighting are seriously compromised on both sides, combatants on both sides could be noninnocent, which might ground their equal right to kill. But this is to acknowledge a prerequisite for an equal right to kill, not a wholesale, morally indiscriminating application of the right. When there is a just war, the moral judgment that the unjust side cannot fight reaches to the unjust combatants themselves and not exclusively to political leaders.

There is consensus about the moral responsibility of political leaders who send their country to fight a war that is unjust. They are fully noninnocent. A possible challenge to this verdict is that if we would accept the excuses offered on behalf of soldiers, similar excuses may work for political leaders: like soldiers, they are not free from influences (e.g., exaggerated assessments of threats to national security, patriotic delusions) that can distort their judgment. I think this challenge to the common view, which accepts such excuses for soldiers but not for political leaders, misses the mark. Whether a country goes to war depends ultimately on political leaders, since they are vested with the authority and power to make the decision. This is the source of their direct moral responsibility for an unjust war. Common just war theory would agree. On my Moral Agency View, though, the standard excuses of self-defense, patriotism and legal obligation to the state do not pre-

clude either the full noninnocence of political leaders or the partial noninnocence of combatants.

Military leaders, I contend, are much closer in moral status to political leaders than to ordinary soldiers — a stance at odds with common just war theory. Walzer claims that ‘the nature of political obedience’ absolves even generals of moral responsibility for executing an unjust war: any soldier is ‘a servant, not a ruler.... He is not ... a willful wrongdoer, but a loyal and obedient subject and citizen...’<sup>28</sup> This stark contrast between willful wrongdoing and commendable obedience seems morally specious. A division of labor that gives military leaders the task of executing wars might be indicative of or useful to a politically well-organized society. Yet military leaders, as professionals of highest standing, have practical and moral reason to be concerned about how the forces at their disposal are used. A formal separation of political and military powers of state does not and should not necessarily render military leaders unable to exert any political influence. Further, having sought and accepted their positions of leadership, they cannot claim to operate under the duress of ordinary soldiers. It is normatively implausible to regard military leaders as functionaries who are moral bystanders no matter how unjust the cause for war. Their partial noninnocence in exercising command over the fighting of an unjust war is surely greater than the partial noninnocence of ordinary soldiers doing the actual fighting.

The rejection of common just war theory’s two-level account of moral responsibility — to repeat, an account by which combatants are supposed to be morally responsible for their conduct in war but not for fighting — finds support in a brief discussion by Robert Nozick. ‘It is a soldier’s responsibility,’ Nozick argues, ‘to determine if his side’s cause is just; ... he may not shift the responsibility to his leaders, who will certainly tell him their cause is just.’<sup>29</sup> A tacit assumption of the principle of battlefield equality is that combatants have an equal right to kill because they have an equal right to self-defense in serving their own countries. However, as Nozick claims, if the attacker has no just cause for attacking in the first place, someone else’s threatening him with death does not make it morally permissible for him to attack: ‘His job is to get out of the situation; if he fails to do so he *is* at a moral disadvantage.’<sup>30</sup>

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28 Walzer, *Just and Unjust Wars*, 39

29 Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books 1974), 100

30 *Ibid.*

Nozick takes seriously the possibility of innocent, just combatants. Self-defense is no moral defense for deliberately harming persons who should not be harmed.

Although I am sympathetic to Nozick's view about the moral responsibility of combatants, I would moderate it. The fact that the selective conscientious objector may be right to recognize a moral duty not to fight implies, Nozick believes, that an acquiescent soldier may be 'punished for doing what it was his moral duty not to do....'<sup>31</sup> This language is too strong. The notion that unjust combatants deserve punishment for fighting subjects their conduct to disproportionate attention and remedy.<sup>32</sup> Combatants may bear no greater moral responsibility in fighting for their country than civilians of the country may bear for their support or indifference that helps to enable the war. In any case, since combatants fight as representatives of their country, any burdens of reparative justice would seem to fall appropriately on the state, which is to say its members collectively. Punishment would seem more appropriate to reserve for political leaders who bear ultimate moral responsibility for an unjust war or for individuals who have sanctioned or committed egregiously unjust acts in war (e.g., torture, rape). Morally culpable persons can warrant criticism and liability to unilateral harm without warranting punishment.<sup>33</sup>

My principal argument has been that we can ascribe moral responsibility to combatants who fight for an unjust cause. They should not fight. Walzer takes on a straw man when he asks how we can 'blame them for ... the wrongful character of their war.'<sup>34</sup> I grant that ordinary combatants have no influence, as soldiers, over the political decision to send their country to war. The revisionist view that combatants can be partially noninnocent does not blame them for an unjust war but would morally blame them for fighting such a war. The basic problem war presents to any prospective combatant is, as McMahan succinctly puts it, that 'one allows oneself to become an instrument for the violent pursuit of pur-

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31 Ibid.

32 For a general account of moral responsibility that rejects the importance of desert, see Erin Kelly, 'Doing without Desert,' *Pacific Philosophical Quarterly* 83 (2002) 180-205.

33 See, e.g., Erin Kelly, 'The Burdens of Collective Liability,' in *Ethics and Foreign Intervention*, ed. Deen K. Chatterjee and Don E. Scheid (Cambridge: Cambridge University Press 2003).

34 Walzer, *Just and Unjust Wars*, 40

poses that are more than likely to be unjust.<sup>35</sup> When prospective combatants are indeed moral agents, the decision to join the military or to fight is a moral decision.

That many of us, if pressed, would not resist the social, legal and sometimes physical pressures to fight for our country is beside the point. Nozick rhetorically asks, 'Why, precisely, is one specially absolved of responsibility for actions when these are performed jointly with others from political motives under the direction or orders of political leaders?'<sup>36</sup> Common just war theory offers no answer in moral terms. The killing done by combatants for an unjust war does not have to constitute murder — there need be no attribution of criminal intent to the combatants — in order to be wrongful. Admittedly, the Moral Agency View will have little impact on the deliberative process of most combatants as long as the common view of their equal noninnocence and lack of moral blameworthiness prevails. They will continue to fight wars that morally cannot be fought. This reality should not distort our thinking about the morality of war. Practically speaking, we can hope that persons will more aggressively question morally their participation in war.

## VII Noninnocent Noncombatants

The issue of the moral responsibility of noncombatants is complicated and controversial enough to require its own, full account. But an outline of such an account belongs here since my view of the moral responsibility of combatants evokes the issue and is quite closely related. I am prepared to argue that noncombatants do not have an essentially different moral status in war than combatants. Roughly, noncombatants can be noninnocent, individually or collectively, in willfully shaping state policy that culminates in an unjust war, in backing a political regime that pursues an unjust war, in materially contributing to the war effort, or in tolerating abusive conduct in war. Consider, for example, politically influential civilians and a majority of the public in the U.S. with respect to the 2003 Iraq War and subsequent occupation of Iraq. When noncombatants help to enable an unjust war, this weakens their moral immunity to deliberate attack. The position that harming civilians might be morally permissible

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35 McMahan, 'Innocence, Self-Defense and Killing in War,' 207. He notes that this problem is particularly acute for soldiers of countries, like the United States, that have an extensive and dubious record of the use of force abroad.

36 Nozick, *Anarchy, State, and Utopia*, 100

if they are at least partially noninnocent regarding the cause for or the conduct in war is a major revision of common just war theory and runs counter to international law.

Responsibility for war, particularly in states that are democracies, is not best thought of as the exclusive business of political leaders. Where the people are represented by political leaders elected through a decent process or otherwise empowered through popular approval, combatants are battlefield emissaries of the people. War becomes the public's business: combatants have been designated to do the fighting for the body politic, which is not likely to renounce any eventual benefits war may bring. Moral responsibility cannot easily be shifted away from ordinary civilians so as to leave them innocent of unjust actions taken in their name and with their acquiescence. I am not suggesting that non-combatants can only be noninnocent under conditions of democracy, let alone ideal conditions of democracy. What is necessary is that non-combatants, at least collectively, could substantially help to determine the course of their country's affairs.

Noncombatants who help to enable an unjust war may have no stronger moral basis for complaint against being harmed, therefore, than do soldiers who fight the war. This view is not unprecedented among mainstream philosophers. George Mavrodes, for instance, expresses a similar view:

If one's cause is unjust then one ought not to kill noncombatants. But that is because of the independent moral prohibition against prosecuting such a war at all, and has nothing to do with any special immunity of noncombatants. If one's cause is just, but the slaying of noncombatants will not advance it to any marked degree, then one ought not to slay them. But this ... applies equally and in the same way to combatants.<sup>37</sup>

Implicit in Mavrodes' argument is the claim that if the cause for war on one's side is just, and attacking noncombatants would promote it, attacking them could be morally permissible. I would argue in contrast to Mavrodes, whose consequentialist orientation is evident<sup>38</sup>, that this claim is morally plausible if the noncombatants generally are noninno-

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37 Mavrodes, 'Conventions and the Morality of War,' 87. See also McMahan, who argues that 'if attacking guilty civilians would be equally effective in promoting the just cause as attacking morally innocent soldiers would be, then one has as an additional reason for attacking the civilians that this would help to free the innocent soldiers from the dangerous and morally repugnant predicament in which they have been unjustly placed' ('Innocence, Self-Defense and Killing in War,' 203).

38 See, e.g., Mavrodes, 'Conventions and the Morality of War,' 85-7.

cent. Innocence or noninnocence, and not simply the overall good that could be achieved by attacking noncombatants, matters.

To be clear, I believe that a stricter standard must be met to permit harming noninnocent noncombatants as compared to their combatant counterparts. The noninnocence of noncombatants would not by itself render them equally legitimate targets for attack. Briefly, some reasons are these. Attacking noninnocent noncombatants usually will not be the more efficacious approach to reducing the unjust harms of an unjust war or to hastening the war's end: such attacks do not directly disrupt the military capability of the unjust side. The political leadership might become less willing, if public support weakens, to continue waging the unjust war. This process usually will be too gradual and uncertain, however, to permit attacking noninnocent noncombatants, except as a last resort. Further, there will be individuals among noncombatants on the unjust side (e.g., young children, radical dissenters) who are innocent by any reasonable standard. The conventional rules of war diminish the moral force of this consideration by allowing for conduct in war that unintentionally yet foreseeably will harm large numbers of innocent noncombatants. If the rules of war were less permissive on this front, as elsewhere I argue they should be<sup>39</sup>, attacks that target even noninnocent noncombatants could be expected to pose excessive risk to innocent noncombatants as compared to attacks on noninnocent combatants. In sum, my account of the ramifications of noninnocence for noncombatants would be revisionist in theory and fairly cautious in practice.

### VIII Conclusion

We have seen that my view of the partial noninnocence of unjust combatants discourages uncritical patriotism and unreflective law-abidingness. While political leaders are morally responsible for sending their country to fight an unjust war, this does not entail that combatants are morally nonresponsible for fighting an unjust war. My Moral Agency View encourages a greater, more active sense of individual responsibility and public citizenship. The notion that combatants in effect must give up their status as morally conscientious persons is incompatible with this important aim. Combatants, the battlefield operatives who will command or do any actual killing, should come to reflect on whether the cause they would fight for is just. Political leaders should have to accept

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39 See my 'Excessive Force in War: A "Golden Rule" Test,' *Theoretical Inquiries in Law*, forthcoming.

that the persons they would send to fight are not pawns who will submit to authority with little resistance. The source of moral responsibility for political leaders and combatants lies in their moral agency — their capacity for deliberating about and refusing to do what is wrong.

A powerful example of the possibility of combatants subjecting political and military leadership decisions to moral scrutiny is the case of Courage to Refuse (O'metz Le'Sarev), the movement among reservists in the Israel Defense Forces who refuse to serve in the occupied Palestinian territories. These combatants, having demonstrated and affirmed their loyalty to the state of Israel, declare:

We ... were issued commands and directives that had nothing to do with the security of our country.... We shall not continue to fight beyond the [internationally-recognized] 1967 borders.... [We] shall continue serving in the Israel Defense Forces in any mission that serves Israel's defense. The missions of occupation and oppression do not serve this purpose — and we shall take no part in them.<sup>40</sup>

The point of this example is not to endorse without qualification the reasons and actions of the IDF 'refuseniks' but, rather, to show that principled dissent by combatants is not necessarily unreasonable, impractical or treasonous.

My emphasis in this paper on combatants paves the way for a broader account of innocence and responsibility in war. A contrast between the innocence of noncombatants and the noninnocence of combatants is central to common just war theory. I have challenged this contrast by arguing that combatants who fight a just war are innocent: they do not act wrongly. When combatants are partially noninnocent, their noninnocence is not a function of their current harmfulness per se: they bear some moral responsibility for fighting for an unjust cause. Their fighting is obviously integral to the scheme of an unjust war. The acts or omissions of noncombatants can be integral to the scheme as well. This could be the basis for extending moral responsibility for the fighting to them. Although common just war theory cuts off consideration of the noninnocence of ordinary civilians, my revisionist approach to just war theory opens up the question. It is a question we should take seriously, particularly because it could implicate so many of us who do not take ourselves to be part of the machinery of war.

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40 Courage to Refuse, 'The Combatant's Letter,' 2002, [www.couragetorefuse.org](http://www.couragetorefuse.org).