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PUBLIC WAR AND THE MORAL EQUALITY OF COMBATANTS

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Following Hugo Grotius, a distinction is developed between private and public war. It is argued that, contrary to how most contemporary critics of the moral equality of combatants construe it, the just war tradition has defended the possibility of the moral equality of combatants as an entailment of the justifiability of public war. It is shown that contemporary critics of the moral equality of combatants are denying the possibility of public war and, in most cases, offering a conception of just war as exclusively private war. The work of Jeff McMahan is used to exemplify this. Against these contemporary critics, it is argued that the reasons McMahan and others offer against the possibility of the moral equality of combatants undermine not only public war but also the possibility of fully realized and effective political authority. The conclusion is drawn that defenders of the moral equality of combatants must defend the possibility of fully realized and effective political authority over war while critics of the moral equality of combatants must either (1) reject the possibility of fully realized and effective political authority altogether, or, less radically, (2) deny the possibility of fully realized and effective political authority over war.

KEY WORDS: Public war, political authority, moral equality of combatants, Hugo Grotius, Jeff McMahan

1. Introduction: Private vs. Public War

Hugo Grotius (2005) draws a distinction that I wish to put to good use. The distinction is between two kinds of war – the private and the public.¹

Private war is war that is waged by persons who act with their own private authority to do so. In private war, people either rightly assert the legitimate authority to employ violence as private persons or they have that authority despite their failure to recognize it. Private warriors have no moral responsibility to seek approval from another person or entity prior to becoming warriors. They are moral representatives of themselves only. Their reasons for employing violence may be just or unjust, but, in either case, private warriors have the authority to use violence as private persons.

War is often thought both to be an essentially political act in the sense that its actors have an immediately political agenda, and to be composed of many discrete acts of violence carried out over time. However, the distinction between private and public war employs a concept of war that is indifferent as to the nature of the goals of its actors and to the scale and duration of violence involved. Thus, private war can be discrete acts of violence without any political goals. Perhaps the clearest example of private war is a case of private self-defense. It is generally acknowledged that an individual can defend himself against an aggressor without appealing to a higher authority. Self-defense, then, is an act

of private war. Likewise, the person who aggressively attacks the defender may also be engaged in private war inasmuch as he is acting with private authority.

However, private war need not be violence carried out by single individuals. It can be an organized effort involving multiple people. For example, a group of people who organize a defense of a household against aggressive attack can be engaged in private war. Such cases can involve people who have the private authority to forcibly defend persons and property against unjust attack. Hence, they can be acts of private war. As we will emphasize below, in principle, there is no limit to the number of people that can collectively engage in a particular private war.

Though private war needn't have a political agenda, it can. Violent acts of political rebellion, for example, could also be acts of private war inasmuch as its perpetrators act with their own private authority.

Essential to the concept of private war is an equal distribution of moral responsibility for the justice of the war among its individual participants. Since in a private war participants are acting with their own private authority, they bear moral responsibility for the justice of their actions. Just as the authority to wage war is equally distributed among its participants, so is moral responsibility for war. In a private war, it is up to its individual participants to ensure that their war is just. If the war should be unjust, blame for that injustice falls on all of its individual participants proportionate to their individual role in the war. Of course, participants in an unjust private war can be excused from blame, but they are nevertheless acting wrongly and, to avoid blame, a legitimate excuse must be forthcoming.

Public war, on the other hand, is war that is conducted under the legitimate authority of a political sovereign. It is war that utilizes the legitimate authority of a public body to employ violence. In public war, the agents of violence justly assert the authority of a political sovereign to use violence and to legitimately command its agents to carry out the violence. Public warriors are not claiming the private authority to use violence but, rather, the legitimate authority of a public body. They are representatives, not of themselves, but of some legitimate political sovereign.

Essential to the concept of public war is the dutiful obedience to authority of at least most of the war's participants. In a public war a legitimate political authority legitimately commands its subjects into war and legitimately directs them in the conduct of war. In this way, public war entails a hierarchy of authority wherein the subjects of that authority are, with some exceptions, morally bound to obey their political superiors at least in matters pertaining to war. The subjects in public war are the moral instruments of the sovereign. They may be legitimately used by the sovereign for ends that are not necessarily their own and are obligated to follow the relevant orders from their sovereign.

This means that in a public war moral responsibility for the justice of the war is unequally distributed among the war's participants. In a public war the political authority is fully morally responsible for ensuring that the war is just or not. The subjects of that authority do not share that responsibility. Rather, the subjects in a public war are primarily responsible for obeying the orders of their legitimate sovereign. This responsibility is largely indifferent to the justice of the war the subjects are being asked to participate in. Provided that the war is not obviously unjust, if subjects are ordered to engage in war by their legitimate political authority, then they are not to be held responsible for the justice (or injustice) of the war itself. In this sense then, the moral responsibilities of soldiers in a

public war are relative mainly to the commands of their legitimate sovereign, not to the justice of the war.

It follows from this unequal division of moral responsibility for the justice of war that in public warfare it is possible for combatants on opposing sides of a war to confront each other as moral equals in the sense that they are all individually fulfilling their moral obligations. In a war that is public on all sides, even if one or all sides in a conflict are engaged in an unjust war, the agents of those wars (i.e., the combatants) can still be acting morally righteously. In contemporary parlance, this is known as the moral equality of combatants. Because legitimate political authorities are responsible for ensuring that their wars are just and subjects of that authority are generally morally bound to obey their authority's orders to serve, if a political authority should wage an unjust war, subjects may nevertheless be obligated to participate in that war. The responsibility for unjust wars can fall entirely on the political authorities and not on the subjects of that authority. Hence, the moral equality of combatants is possible in public war.²

By contrast, in a private war, the moral equality of combatants cannot readily find a justification. Because in private war moral responsibility for the justice of war is equally distributed among the war's participants, participants in an unjust private war are acting contrary to their duties as private persons. Participation in an unjust private war is itself unjust. Assuming that in any war at least one side is waging an unjust war, then a war that is private on all sides entails that the participants on only the just side of the war can be acting permissibly, while all others are acting wrongly. Thus, combatants on opposing sides of a private war cannot be moral equals in the sense that they are equally acting in accordance with their duties.

It is important to note that the distinction between private and public war is an essentially normative one. It is a distinction relying on a particular conception of political justice. Public war can only be carried out if there exists, or can exist, legitimate political authority with the authority to wage and declare war and to justly demand the service of its subjects in war. If we deny that any entity can have such authority, there can be no public war at all. Thus, the possibility of there being a public war assumes that at least some political authorities can have the authority to command the service of their subjects in war and the attendant duty of those subjects to obey.

2. Public War and the Contemporary Debate over the Moral Equality of Combatants

The distinction between public and private war is important because it helps us understand the nature and significance of some of the debates that are currently underway in the field of just war theory. As we've seen, the issue of public war is immediately relevant to the issue of the moral equality of combatants. Yet, I hope to show, the contemporary debate over the moral equality of combatants has underappreciated the role that the public conception of war has played in grounding the moral equality of combatants in the just war tradition.

Stretching back at least to St. Augustine, just wars have been conceived of, either exclusively or primarily, as public wars. According to the classical just war theory, political rulers can command their subjects into and during war. With some exceptions, subjects are morally bound to follow orders pertaining to war made by their legitimate authority. Responsibility for the justice of war falls upon the political sovereign and not, for the most

part, on the sovereign's subjects. The subjects' primary responsibilities are to obey the orders of their political authority in war, not to determine the justificatory status of the war itself and to obey only when the war is just.

An examination of the meaning of the so-called Legitimate Authority clause in the just war literature reveals this reading of the tradition. One of the most central components of the traditional understanding of the nature of the just war is the principle that just war can only be waged by agents with the legitimate authority to do so. A war cannot be just if it is waged by those who lack the authority to go to war. All of the great figures in the just war tradition have asserted a version of this principle. St. Augustine (1994, 1998), Thomas Aquinas (2002), Francisco Vitoria (1991), Francisco Suarez (1944), Hugo Grotius (2005), and Michael Walzer (1977), to name a few, all hold to some version of it.

Unfortunately, many commentators have not adequately digested the meaning of this clause. Too often, the Legitimate Authority principle is construed as a rule governing the just resort to war – the *jus ad bellum* – that has a function like any other in the theory. It is regularly listed among the rules of war as just another necessary condition for just war along with Just Cause, Proportionality, Last Resort, and (sometimes) Right Intention and Likelihood of Success.

Though in the traditional theory legitimate authority is a necessary condition for the just resort to war, the function of the Legitimate Authority principle in the theory is unlike any of the other principles of the *jus ad bellum*. The function of the Legitimate Authority principle is not only to tell us who may wage war but also to fix the scope of moral responsibility for the other rules of the just war on the agent with legitimate authority. To attribute authority to wage war to a specific entity is to attribute full moral responsibility over the decision to go to war or not as well as the methods employed in the war to that entity. If a war should be unjust, then it is the participating entity with the authority to wage war, if there is one, who is responsible for that injustice, not those who lack such authority. The Legitimate Authority principle is therefore unlike any of the other principles of just war theory and ought to be conceptually isolated from them.

Now, importantly, the traditional just war theory does not always attribute the authority to wage war to all participants in war. Rather, the tradition argues for the isolation of that authority in the hands of political sovereigns. Depending on whom in the tradition we consult, this sovereign may be either the body politic itself or the political rulers of that body. Almost universally, however, the tradition has focused on cases where the authority to wage war is vested in the hands of a specific political ruler or rulers, usually a king or a prince. For the just war tradition, these rulers have the unique authority to wage and declare war on behalf of their subjects and, therefore, it is these rulers who are primarily responsible for ensuring that the wars they wage meet the other criteria for just war. Subjects of legitimate political rulers are not responsible for ensuring that the wars the rulers wage are just. Rather, the primary responsibility of subjects is to obey the orders of their legitimate ruler to participate in wars the ruler wages and orders them to participate in. Thus, the Legitimate Authority clause in the classical theory allows for the limitation of the scope of moral responsibility for the other rules of just war to only legitimate political rulers and the denial of this moral responsibility to subjects of legitimate rulers.

As Augustine (1994: 222–3) puts the point in his *Contra Faustum* (XXII),

The natural order, which is suited to the peace of mortal things, requires that the authority and deliberation for undertaking war be under the control of a leader....

Therefore, a just man, if he should happen to serve as a soldier under a human king who is sacrilegious, could rightly wage war at the king's command, maintaining the order of civic peace, for what he is commanded to do is not contrary to the sure precepts of God, or else it is not sure whether it is or not. In this latter case, perhaps the iniquity of giving the orders will make the king guilty while the rank of a servant in the civil order will show the soldier to be innocent.

Aquinas (2002: 240) in the *Summa Theologiae* (IIaIIae: 40, *art.* 1, *corpus*), explicitly referring to Augustine, says, similarly:

Since the care of the commonwealth is entrusted to princes, it pertains to them to protect the commonwealth of the city or kingdom or province subject to them. Just as it is lawful for them to use the material sword in defense of the commonwealth against those who trouble it from within, when they punish evildoers . . . so too, it pertains to them to use the sword of war to protect the commonwealth against enemies from without Hence . . . Augustine says: 'The natural order accommodated to the peace of mortal men requires that the authority to declare and counsel war should be vested in princes'.

As for the responsibilities of soldiers, Aquinas makes it clear that they are relative principally to the orders of their legitimate prince, not to the justice of the wars the prince wages and declares. As he says at IIaIIae: 104, *art.* 5, 'a soldier must obey his commander in things pertaining to war' (69). And again at IIaIIae: 104, *art.* 2, 'a soldier who defends the king's castle completes both a work of courage by not shirking the peril of death for a good end, and a work of justice by rendering a service owed to his lord' (61).

From this conception of the division of moral responsibilities between rulers and soldiers, it follows that there can be a moral equality of combatants in war. Even where one or all sides in war are waging an unjust war, the soldiers carrying out the war can all be morally righteous. In a case of public war, the responsibility for waging an unjust war can fall only on the rulers of a community, not its subjects. This point is most clearly made by Vitoria (1991) in his *On the Law of War*. As he says, '[S]ubjects neither must nor ought to examine the causes of war, but may follow their prince into war, content with the authority of their prince and public council; so that in general, even though the war may be unjust on one side or the other, the soldiers on each side who come to fight in battle or to defend a city are all equally innocent' (321).³

Thus, the traditional just war theory conceives of just wars as public wars. Inasmuch as the traditional theory attributes the authority to wage and declare war to legitimate political sovereigns, the traditional theory holds that just wars can be essentially public acts, that is, acts committed by political communities under the authority of their political sovereigns and for which only the political sovereigns are fully morally responsible. As a consequence, the moral equality of combatants is (at least sometimes) justifiable.

The public theory of just war is not just ancient history. It has contemporary defenders; most notable among them is Walzer (1977). Walzer famously asserts the moral equality of soldiers. He tells us that soldiers on all sides in modern war are innocent regardless of the justice of their war. Soldiers are not responsible for the justice or injustice of the wars they participate in. In terms of the justice of their participation, they are all equally innocent.

Unfortunately, Walzer's justification of this claim is often misunderstood. The misunderstanding is partly a result of a lack of clarity in Walzer's presentation and partly

the result of a failure of his critics to read him carefully. The misunderstanding is over the issue of whether Walzer thinks soldiers on opposing sides are equally innocent because they are always excused from blame for participating in an unjust war or because they are morally obligated to serve their political authorities in war. If the former, soldiers would be responsible for the injustice of the wars they participate in but would not be blameworthy because they participate under exculpatory circumstances; they would be acting wrongly but not be blameworthy. If the latter, soldiers would not be responsible for the injustice (or justice) of the wars they participate in and would thus not need to be excused for anything; their participation would be what is morally required of them.

A number of the commentators on Walzer's theory have read him as merely asserting that soldiers are excused from blame when they fight in an unjust war (see Mapel 1998; Primoratz 2002; McPherson 2004). Another commentator reads Walzer as claiming that soldiers are morally permitted to serve yet argues that Walzer's defense of this claim rests on a confusion of permission and excuse (McMahan 2009: 112–3). Though, unfortunately, it is not difficult to read Walzer's view of the moral status of soldiers in war in these ways, Walzer actually asserts that soldiers are morally obligated to serve even in unjust wars as a consequence of the political obligations attendant to their membership in their particular political communities. As Walzer says, from the point of view of soldiers, war is '*morally as well as physically coercive*' (1977: 53, my emphasis). He ought to be read as asserting that soldiers are morally obligated to serve when ordered to by their political sovereign.

The claim that soldiers are morally obligated to serve in war is most clearly presented in Walzer's discussion of Erwin Rommel's decision to burn Hitler's order to execute all enemy soldiers encountered behind German lines. Walzer views Rommel's decision as praiseworthy and sees Rommel as having 'fought a bad war well, not only militarily but also morally'. As Walzer explains, this is because:

We draw a line between the war itself, for which soldiers are not responsible, and the conduct of war, for which they are responsible, at least within their own sphere of activity . . . *We draw [the line] by recognizing the nature of political obedience.* Rommel was a servant, not a ruler, of the German state; he did not choose the wars he fought but, like Prince Andrey, served his 'Tsar and country'. . . . [B]y and large we don't blame a soldier, even a general, who fights for his own government. He is not the member of a robber band, a willful wrongdoer, but a *loyal and obedient subject and citizen* . . . We allow him to say what an English soldier says in Shakespeare's *Henry V*: 'We know enough if we know we are the king's men. Our obedience to the king wipes the crime of it out of us'. . . . [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, except when the individual is the king. (38–9, my emphasis)

Walzer's view of the moral obligations of soldiers is also revealed by a careful reading of his discussion of 'the crime of war' in Chapter 2 of *Just and Unjust Wars* (see esp. 25–9). Here, Walzer argues that fighting in war is not a soldier's free choice. This is not because a soldier is always coerced into fighting by his political rulers but, more fundamentally, it is his duty to fight upon the command of his political ruler. As Walzer says, from the point of view of a soldier, fighting 'is his duty and not a free choice' (27). And, upon becoming a soldier, 'fighting becomes a legal obligation and a patriotic duty' (28).⁴

Clearly, in these passages Walzer holds that soldiers are not responsible for the justice or injustice of the wars they participate in. Rather, this responsibility falls on their

political authorities. Should soldiers follow their authorities into an unjust war, they are at least generally doing what is morally required of them as 'loyal and obedient subject[s] and citizen[s]'. In this sense, soldiers are the moral servants of their political authorities. In an unjust war, they are innocent in the strong sense that they are fulfilling their moral obligations. They are not innocent in the weaker sense that they are excused for wrongdoing or are merely permitted to serve. For Walzer, service in war is a soldier's moral obligation.

This means that Walzer offers a public theory of just war. At least when it comes to the resort to war – the rules of the *jus ad bellum* – Walzer conceives of war as an act carried out by political authorities who are solely responsible for ensuring that the war is just. Subjects of those authorities are generally morally bound to follow their authority's orders and participate in war. As he says, war is a relation 'between political entities and their human instruments' (36). This is how there can be a moral equality of combatants in war. The moral status of soldiers in war is largely indifferent to the moral status of the war itself. As Walzer says, '... the moral status of individual soldiers on both sides is very much the same: they are led to fight by their loyalty to their own states and by their lawful obedience' (127).

Now, the public character of the traditional just war theory has come under considerable attack in recent years. The attack, however, has not focused on its public character directly but rather on the principle of the moral equality of combatants. The immediate target of the attack on the moral equality of combatants is the traditional theory's unwillingness to attribute complete moral responsibility for the justice or injustice of war to all soldiers. Critics have argued that soldiers should not be exempted, even partially, from this responsibility. On the contrary, the critics charge, soldiers are fully morally responsible for ensuring that they only participate in just wars. A soldier who fights in an unjust war is liable to blame for the injustice of the war. Unless his participation is exculpatory, e.g., he participates against his will or he reasonably (but falsely) believes the war is just, he is guilty of a horrendous moral crime. Therefore, the argument goes, there can be no moral equality of combatants in war. Combatants in an unjust war always have a different moral status than do combatants in a just war (see McMahan 1994, 2009; Mapel 1998; Primoratz 2002; McPherson 2004).

Whether it is recognized by these critics or not, this argument is an indirect attack on the justifiability of public war. The critics' attempt to distribute moral responsibility for war equally among all its participants entails a denial of the possibility of legitimate public war. If all participants in war are equally responsible for ensuring their war is just, then there can be no political entity that has the authority to wage and declare war for which war's participants can act as moral servants. As we have seen, public war entails an unequal distribution of moral responsibility for war – political authorities take the totality of it while subjects are largely exempt from it. In this sense, though it is not always recognized, the debate between the just war tradition and its contemporary critics is ultimately a debate about the nature and limits of legitimate political authority.

Jeff McMahan is the most forceful of these contemporary critics and is perhaps the most self-conscious of the relation of his attack to the issue of legitimate political authority. For McMahan, moral responsibility for war always distributes to all individuals engaged in war. Individuals in war may be excused from blame, but they cannot deflect responsibility simply by claiming they are servants of a legitimate political authority. Combatants participating in an unjust war are therefore committing a grave moral failing. They are

unjust purveyors of violence and death. For McMahan, this is because it is simply unjustifiable for political authorities to be responsible for waging war while their subjects, especially soldiers, are exempt from such responsibility. As McMahan says, 'No individual can transfer his rights of autonomy to the state in such a way that he ceases to be an autonomous agent and thus becomes exempt from moral constraints such as the prohibition of intentionally attacking and killing people who are innocent in the relevant sense' (2007: 54; see also 2009: 72–5, 77–9, 83, 90–1). In other words, public wars, wars that vest full moral responsibility for the justice of war in the hands of legitimate political authorities and not in the hands of its subjects, are not justifiable because the responsibility of every person to not attack and kill innocent persons cannot be alienated to another, especially to a political authority.

For McMahan, the only type of just war that can occur is a private one. He conceives of just wars as morally continuous with ordinary cases of justified self- and other-defense in domestic life. Just as an individual may justly employ proportionate violence against others who are attempting to unjustly assault him when there is no other means available to thwart their attack, so may large groups of individuals justly wage war in analogous circumstances. He states this position clearly in a number of places:

First imagine a case in which a person uses violence in self-defense; then imagine a case in which two people engage in self-defense against a threat they jointly face. Continue to imagine further cases in which increasing numbers of people act with increasing coordination to defend both themselves and each other against a common threat, or a range of threats they face together. What you are imagining is a spectrum of cases that begins with acts of individual self-defense and, as the threats become more complex and extensive, the threatened individuals more numerous, and their defensive action more integrated, eventually reaches cases involving a scale of violence that is constitutive of war. (McMahan 2004b: 75)

This is precisely how McMahan wants us to conceive of just war. He says, 'I believe that the morality of defense in war is continuous with the morality of individual self-defense. Indeed, justified warfare just *is* the collective exercise of individual rights of self- and other-defense in a coordinated manner against a common threat' (2004a: 717; see also 2009: 155–8).

If just wars are always morally reducible to the permissibility of individual self- or other-defense, then all just wars are essentially private. They rely solely on the private authority of individuals to employ violence in specified circumstances. They do not, indeed cannot, depend on the authority of a public body to employ violence and use its subjects as its moral servants. For McMahan, the just war tradition has erred in thinking otherwise.

If moral responsibility for war is distributed equally to all war's participants, then much of the content of the just war orthodoxy will have to be reformed. Among other things, as McMahan has made clear, the principle of the moral equality of combatants would have to be scrapped. Contrary to the tradition, combatants in an unjust war do not enjoy the same moral status as combatants in a just war. This is because, contrary to the tradition, responsibility for the justice of war always falls on all its participants and, therefore, the moral status of the combatant is relative only to the justice of the war he or she is participating in and not to the orders of his legitimate political authority. Combatants have no moral duty to obey their political authorities in war that trumps their duty to not engage in deliberate unjust acts of life-threatening violence against persons. Combatants are therefore always morally responsible for their decision to

participate in war. As McMahan says, '[T]hose who fight in a just, defensive war and have done nothing else to lose their rights must be innocent . . . So unjust combatants use wrongful means – the killing of people who are innocent in the relevant sense – to achieve ends that are unjust. It is hard to see how that could be morally permissible' (2007: 51).

3. Political Authority and Moral Responsibility for Public Violence

As we have seen, McMahan's denial of the possibility of the moral equality of combatants is the result, in part, of his denial of the possibility of public just war and his reduction of all just war to private war. I believe this is a profound mistake. We should not give up on public war and, with it, the moral equality of combatants. However, I will not argue for such a strong conclusion here. Rather, my reply should be seen as a preliminary one intended as a springboard to deeper reflection. I aim merely to show what is at stake in this debate between McMahan and other advocates of private war, on the one hand, and the just war tradition on the other. I suspect that once it is revealed how much is at stake, many will be inclined to reconsider the possibility of public war.

In particular, I hope to show two things. First, I hope to show that the violent exercise of all political authority, not just the violence of public war, requires an unequal distribution of moral responsibility between the authority and its agents for the justice of that violence, in the sense that the authority is fully responsible for the justice of its violence while its agents are not so responsible. Since, as I will argue, the use of violence in certain circumstances is part of the nature of political authority and without full responsibility over this violence political authority cannot effectively accomplish one of its essential social functions, this unequal distribution of moral responsibility is necessary for political authority to be fully realized and effective. If we distribute moral responsibility for the violent exercise of political authority in any other way, we will take away full authority to use violence from the political authority and, in turn, make it impossible for political authority to be effective in crucial respects. Furthermore, it follows from this that if there is or ought to be fully realized and effective political authority over war, then there can be a moral equality of combatants on the battlefield.

Second, I hope to show that McMahan's argument against the moral equality of combatants has very troubling and far-reaching consequences. If we accept McMahan's reasons for holding that subjects of political authority are equally responsible for ensuring that the wars their authority wages are just, then not only does it follow that there can be no public just war, but, more troublingly, there can be no fully realized political authority and, in turn, political authorities will not be able to carry out effectively an important social function. The stakes in this debate are thus quite high. My conclusion is that if we believe that there can or ought to be realized and effective political authority, then we cannot accept McMahan's rationale for rejecting the moral equality of combatants.

Why Political Authority Requires an Inequality of Responsibility for Public Violence

I wish to defend the following general principle:

- (1) The existence of fully realized and effective political authority requires an unequal division of moral responsibility between the political authority and its agents over the justice of

the violent exercise of that authority in the sense that the political authority is fully responsible for its just violent exercise and its agents are not.

In other words, if there is to be realized and effective political authority at all, then when that authority violently enforces itself, it must be fully morally responsible for the justice of that violence and its agents must not be. The duty to ensure that the violent enforcement of political authority is just is the political authority's, not the agent's.

Why is (1) true? By its nature, political authority is coercive. Political authority necessarily places limits on the conduct of its subjects and the organization of the social order it has authority over. These limits are physically binding in the sense that the political authority may forcibly thwart attempts to violate them and forcibly seek to punish those who do violate them. If this force is resisted, the political authority may resort to violence to subdue and, in some cases, maim or kill the resister. In this sense, political authority is intrinsically violent; its commands are backed by the threat of violence and it is willing to employ preemptive or punitive violence against violators of its will when necessary. Without this use of violence, there is no fully actualized political authority. This is not to say that political authority necessarily has a strict monopoly on violence (though surely authorities often seek to monopolize it), but only that political authority is always backed by the threat of, and, at least occasionally, engages in, violence. It is important to emphasize that this point applies to all forms of political authority, e.g., monarchy, aristocracy, oligarchy, democracy, etc., not simply to the monarchical systems of authority that the classical just war theorists were sympathetic to. Any political authority, inasmuch as it is fully actualized, is violently coercive.

The reason this violence is part of the nature of political authority is that, without it, political authority could not realize one of its essential social and political functions. The purpose of political authority is, in part, to order our social worlds in certain ways. Unless political authorities had the brute power to create and protect this order against those who seek to upset it, they would be socially superfluous in important respects. If there was no threat of violent consequences for violating the orders of the political authority and resisting attempts by the political authority to enforce obedience to those orders, the authority would be impotent to exert effectively its will over its subjects. Of course, there can be other means of enforcing political authority aside from force and violence. Political power can be exercised in the form of charisma or the use of reasons, symbols, and rituals that subjects generally recognize as authoritative. It is even arguable that no political authority could have or maintain its authority without the effective use of these non-violent means. However, without any means of violently and coercively enforcing itself against those not compelled by its non-violent forms of power, political authority cannot be fully actualized and effective.

Since violent coercion is a necessary part of political authority, it follows that if there is legitimate political authority, then it must have the legitimate authority to employ violence on some occasions. In other words, the authority to use violence is a part of legitimate political authority. This is not to say that this use of violence is always just, however. Legitimate political authorities can use violence unjustly when, for example, the force is unnecessary, disproportionate, or employs means that are themselves abhorrent, such as torture. That being said, any legitimate authority must, nevertheless, have the authority to use violence to enforce itself on its subjects.

Now, (1) says that in order for there to be effective political authority there must be an unequal division of moral responsibility between the political authority and its agents over the justice of the violent enforcement of the will of the political authority. This division of responsibility must be unequal in the following sense: the political authority is fully responsible for ensuring that the violence used in its enforcement is just while the agents of the authority are not. The violent agents of the political authority are responsible primarily for diligently obeying the orders of their authority. In other words, an agent of violence for a political authority is not responsible for ensuring that he violently enforce *only* just orders. Rather, that is the responsibility of the political authority only. The duties of the violent agents of political authority must be relative primarily to the commands of their authority, not to the justice of the authority's commands.

This does not mean that it is never appropriate for a political authority's violent agent to disobey an order on grounds that the order is unjust. We can concede that such disobedience may at times be not only permissible, but even the duty of the agent. However, this need only be in certain extreme cases where, for instance, the order is patently unjust. Aside from such extreme cases, violent agents are morally bound to obey the orders of their authority. The division of moral responsibility between the authority and its agents need not be absolute. Sometimes, agents do wrong in following orders. But it is not always wrong to obey an order to commit violence, even extreme violence, which is unjust.

Why does political authority require this unequal division of moral responsibility? The answer is that if we distribute responsibility in other ways we will distribute authority in such a way that the ostensible political authority no longer has any unique authority over the violent enforcement of its will. And this, in turn, will make it impossible, practically speaking, for political authorities to assert effectively their authority over their subjects.

Consider, for example, an equal distribution of moral responsibility between political authorities and their agents over the just violent enforcement of the law. In such a case, the political authority and its agents are equally responsible for ensuring that only just laws are violently enforced. The political authority must be sure it issue only just commands to use violence and its agents must be sure they follow only just commands to use violence. In other words, the authority and the agent are equally responsible for assessing the authority's laws in terms of justice. Should a law be unjust, the authority should not command that it be violently enforced and, if it does command that it be violently enforced, the agent should not violently enforce it.

The problem with this is that, if true, there would no longer be a meaningful distinction between the authority and the agent with respect to the violent enforcement of political authority. The authority would have no right to order the agent to do violence and, thus, the agent would have no duty to abide by the orders of the authority to do violence. In effect, the authority over public violence itself would be equally distributed between the two. They would be each equal, independent political authorities over public violence.

And the problem with this is that it would be impossible for the ostensible political authority to have its will, effectively and consistently, violently enforced upon its subjects. If every agent of violent law enforcement is responsible for violently enforcing only just laws, then every agent is obligated to make their own subjective judgments of the justice of the political authority's laws. Based upon their subjective judgments, agents would then be obligated to violently enforce only the laws they deem just and never to enforce violently

the laws they deem unjust. Since it can be expected that different agents will make different, perhaps radically different, judgments regarding the justice of the laws, the laws will be enforced in very different, perhaps radically different, ways at different times and in different places. This would result in a profound incapacity of the political authority to effectively enforce itself. It would also lead to an intolerable level of social chaos.

To clarify this, consider an example. Suppose a political authority that employs radically democratic procedures issues a law prohibiting the carrying of concealed firearms. Imagine that in a fully participatory referendum, the citizenry votes by an overwhelming majority to ban the carrying of concealed firearms. Thus, the political authority issues the command to all law enforcement agents that they are to stop the carrying of concealed firearms by anyone in the community suspected of doing so. Suppose, further, that a specific police officer personally views the law as unjust and even agitated and voted against its passage. Shortly after the passage of the law, however, this police officer is called upon to arrest a man who is carrying a concealed firearm. Suppose yet further that this officer has good reason to believe that this armed man will violently resist the officer's attempt to enforce the law, perhaps even open fire. In this situation, should the officer enforce the law that his political authority issues yet he deems unjust?

Suppose we hold to the view that political authorities and their agents are equally responsible for violently enforcing just laws. Our answer then would be that the police officer should never violently enforce an unjust law. Since he is convinced that the law is unjust, he would then view it as his duty not to enforce violently the order of the authority. In his mind, he would be obligated simply to let the man carrying the concealed firearm continue to break the law. But this seems deeply misguided.

The problem is that by giving full moral responsibility to the police officer to only violently enforce just laws, we take the authority to issue binding laws and to violently enforce them away from the ostensible political authority. In effect, the political authority loses the unique authority to violently enforce its will on subjects who resist it. With respect to the violent enforcement of the law, the professed authority becomes just another voice in the political discourse. Its laws are merely proposals that its agents are obligated to review and privately decide whether to enforce violently or not. The agents of the authority become not merely agents but an army of independent authorities with a veto power over the violent enforcement of the public will and an obligation to wield that power whenever the public will is unjust. The problem, in other words, is that there is no longer any political authority in the political order with the unique authority to use violence to enforce its will. That authority is itself distributed to all individuals engaged in the system of law enforcement.

This renders political authority ineffective in crucial respects because with the authority to enforce the law violently distributed to all law enforcement agents, the political authority's laws will not be effectively and consistently enforced. Which laws will be violently enforced and which will not will depend on the subjective judgment of each law enforcement agent that confronts law-breakers. Given the disparity of judgments that different agents will make, the law will be violently enforced in inconsistent and unpredictable ways. Thus, to distribute moral responsibility for violently enforcing just commands equally between political authorities and their agents is to render political authorities unable to effectively accomplish one of their essential functions.

Thus, if there is to be effective political authority we must unequally divide moral responsibility between the authority and its agents for the just violent enforcement of the

authority's commands. Specifically, we must attribute full moral responsibility to the political authority for the just violent enforcement of its commands and deny such responsibility to its agents.

It follows then that if political authority can be legitimate and its authority ought to be effective, then this unequal division of moral responsibility between political authorities and their agents is also legitimate. We cannot have fully realized and effective political authority otherwise. Unless we are willing to give up on the moral possibility of true and effective political authority, we have to admit that violent agents of political authority are not morally responsible for ensuring that they follow only just orders to use violence. That responsibility must belong only to the authority itself. Put simply, political authorities need violent instruments, i.e., individuals whose obligation is to employ violence upon the command of the political authority and who are not responsible for only obeying just commands to commit violence.

It follows further that if political authority can have the authority to wage and declare war on behalf of its subjects and that authority ought to be effective, then the agents it employs in war are not responsible for ensuring that they only participate in just wars. Their duty to serve their political authority can trump any duty they are purported to have to not engage in unjust violence, even life-threatening violence, against persons. If we asserted otherwise, then the political authority would not have fully realized and effective authority over war. Therefore, if there can be legitimate political authority with true and effective authority over war, then there can be a moral equality of combatants in war.

4. Problems for McMahan

Now, this conclusion poses a problem for McMahan and anyone who thinks that responsibility for violence, including life-threatening violence, must be distributed equally between all of its individual protagonists. As we have seen, McMahan argues that failing to hold combatants morally responsible for their participation in war because they are agents of political authority is always a mistake. For him, all combatants, even those that are agents of political authority, are morally responsible for ensuring they are participating in a just war and using just means. This is because, as we have also seen, on no occasion can a political authority have responsibility for the decision to attack and kill people while the agents of that authority are merely obligated to obey their decision. For McMahan, the duty to not attack and kill other innocent persons trumps any antecedent duty to obey the orders of a political authority.

McMahan even imagines a case where a political community engages in a fully participatory referendum on the issue of whether or not to engage in a particular war and by an overwhelming majority votes for war. Supposing that the war the public has voted to engage in is, in fact, unjust, McMahan says that it is the responsibility of soldiers in that community not to participate in the war. If they participate, they are acting unjustly. Again, this is because, for McMahan, no political authority, not even a radically democratic one, can ever morally command its subjects to engage in unjust life-threatening violence against persons. The right of persons to not be unjustly attacked and killed prohibits one's participation in an unjust war even when the war is being declared and waged by one's legitimate political authority. As he says:

If you participate in a referendum on whether to go to war, that does give you a duty that you owe to the other participants to abide by the outcome of the vote. But that duty is not absolute. It can be overridden if fulfilling it would require you to violate other, even stronger duties. And it is clear that your duty not to engage in the intentional killing of innocent people outweighs your duty to abide by the results of a referendum in which you have freely participated. Those you would wrong if you were to fulfill the duty derived from participation in the referendum would be wronged to a far greater degree than those you would wrong if you were to default on that duty. (2009: 77–8)

But if McMahan's rationale for rejecting the possibility of combatants not being responsible for the justice of the wars they are participants in were accepted, we would then have to reject the possibility of fully realized and effective political authority. His rationale applies not only to combatants in war but also to any violent agent of political authority, which would include police officers, bailiffs, corrections officers, judges, and many others. Since all these agents engage in the violent enforcement of a political authority's will against persons who, according to McMahan, have rights not to be unjustly attacked or killed that trump all political obligations to obedience, these agents must be morally obligated to only use life-threatening violence to enforce just orders. According to McMahan, this is because it is more wrong to unjustly attack or kill innocent persons than it is to disobey one's political authority. To use life-threatening violence to enforce an unjust order would be to unjustly attack and, on occasion, kill innocent people.

To be clear, McMahan's argument only commits him to the view that responsibility for the use of *life-threatening* violence must be distributed equally between legitimate political authorities and their agents. It is only the severity of the wrong of unjustly killing, or attempting to kill, people that trumps all antecedent political obligations. An agent could still be obligated to obey orders to commit sufficiently less severe acts of unjust violence because committing them is a trivial wrong when compared to the gravity of the wrong of violating the antecedent political obligation. In other words, McMahan could hold that a legitimate political authority's violent agent ought to obey orders, regardless of their justice, to engage in relatively insignificant acts of violence such as pinching or perhaps even tackling and pinning a person, but ought to disobey all orders to engage in more severe, life-threatening acts of violence that are unjust.

However, since McMahan apparently thinks that political obligations to obey are grounded only in the fact of a political subject's having willingly taken part in a fully participatory referendum over the relevant issues, it is unclear if he believes there are any obligations to obey political authorities in non-radically democratic systems of political authority such as exist in most democratic societies including the United States. It is even unclear whether he thinks that a person who simply chooses not to vote in a participatory referendum her political society conducts has any obligation to obey the outcome of the referendum. There are independent reasons to reject this as a theory of legitimate political authority and political obligations.

Nevertheless, even if we grant McMahan's view of legitimate political authority, it would still entail that no legitimate political authority can, in fact, have a unique authority to use life-threatening violence. The authority to use life-threatening violence would always be equally distributed between the authority and its agents. This would still make it impossible for legitimate political authorities effectively to carry out one of their essential functions.

Even if we only distribute the authority to use life-threatening violence, not violence generally, equally between the authorities and their agents, the ability of legitimate political authorities effectively and consistently to enforce the law would be eliminated. On McMahan's view, in any case where a law enforcement agent believes enforcing the law will require the use of life-threatening violence, she is obligated privately to review the law in question and decide if it is just or not. If it is just, she ought to enforce it. If it is unjust, she ought not to enforce it. This means that any law-breaker that makes it clear that he will resist attempts to force him to cease breaking the law such that life-threatening violence will be required to subdue him, will thereby make the enforcement of the law contingent on the private assessments of the justice of the law by the particular law-enforcement agent he is confronted with. Given the disparity of judgments of the justice of laws that different law-enforcement agents will make, this means that different, perhaps radically different, laws will be enforced to different extents at different times and places. This will make it impossible, practically speaking, for political authorities effectively and consistently to enforce the law.⁵

Recall the case involving the police officer ordered to enforce a law against carrying concealed firearms. Given that in this case enforcing the law will require the use of life-threatening violence and the officer is convinced that the law is unjust, according to McMahan's rationale, the officer would conclude that he should not attempt to force the law-breaker to abide by it. This is because if the officer should use life-threatening violence against a person violating the law, he would, in the officer's mind anyway, be unjustly using life-threatening violence against an innocent person. For McMahan this would implicate the officer morally. He would be an unjust purveyor of violence and death. On McMahan's rationale, if an order from a political authority involves the use of life-threatening violence against persons, then it is the responsibility of the agent of the authority to ensure that the order fully complies with justice.

But, again, this would mean that the ostensible political authority in fact has no unique authority to use life-threatening violence to enforce itself on its subjects. Because the enforcement of political authority entails the threat and, on occasion, the use of violence, including life-threatening violence, the political authority must have moral responsibility for the employment of this violence, not its agents. Otherwise, there would be no effective political authority in the political order at all. In short, the problem with McMahan's view of the ethics of military service is that it entails a view of the ethics of law enforcement that takes away a crucial part of political authority and thereby makes it impossible for political authorities effectively to carry out of one their essential functions.

Thus, McMahan's attempt to limit the authority of political sovereigns by asserting that their agents are not morally bound to obey them when they are ordering life-threatening violent acts against persons has very far-reaching consequences. If there is to be fully realized and effective political authority at all, there must be occasions when the political authority can legitimately demand obedience from its agents in enforcing its authority with life-threatening violence, and those agents are to obey those orders. Assuming that there is such a thing as legitimate political authority and this authority ought to be realized and effective, McMahan's rationale for rejecting this division of moral labor must be wrong. It must be the case that, sometimes, the duty of agents of public violence to obey the orders of their political authorities trumps any duty they may have not to engage in unjust life-threatening violence.

Again, this does not commit us to the view that fully realized and effective political authority requires that there are no circumstances where an agent of political authority ought to disobey an unjust order to employ life-threatening violence. We can admit that, on occasion, they ought to disobey without threatening political authority. What we must deny, however, is that political authority can exist and be effective while the occasions on which its agents ought to disobey the authority's orders to employ life-threatening violence are coextensive with all occasions when those orders are unjust. It does not threaten the existence or effectiveness of political authority to hold that only in cases where the order to use life-threatening violence is obviously unjust must a violent agent disobey and in all other cases he ought to obey.

This is an important point as McMahan considers a case of criminal punishment to support his assertion of the limits of political authority over life-threatening violence. He considers the case of an executioner who knows, with certainty, that a prisoner set for execution is innocent and there is no possibility for the executioner to alert the authorities to the prisoner's innocence. McMahan argues that given this knowledge and the duty of the executioner not to kill innocent people unjustly, the executioner should not only refuse to execute the prisoner, but also help him escape. As McMahan says, '[The executioner's] duty not to execute an innocent person outweighs and overrides his institutional duty to perform the execution' (2009: 73).

McMahan may be right that in this case the executioner has a duty to disobey his authorities. However, it is a highly unusual case. The executioner knows, with certainty, that the prisoner is innocent. In this case, the executioner's knowledge is of an empirical matter. The executioner knows, with certainty, that the prisoner did not commit the crime for which he was convicted. We can suppose he knows, with certainty, that the prisoner was not at the scene of the crime and could not have participated in it, or maybe even that the executioner witnessed the crime and saw that it was not the prisoner. This is a specific sort of knowledge that gives the executioner a strong reason to reject the justice of the execution of the prisoner and his duty to carry it out.

It would be very different, however, if the executioner viewed the execution of the prisoner as unjust because, say, he morally disagreed with the application of the death penalty to the crime that the prisoner in fact committed. Suppose the prisoner was sentenced to death for rape and the executioner thinks rapists do not deserve the death penalty, though murderers do. Suppose, further, that he is right – rapists do not deserve to die but murderers do. Should he carry out the execution? If we assume that just political procedures gave rise to the legal applicability of the death penalty to rapists and that the rapist was convicted and sentenced by just legal procedures, I think that in this case the executioner ought to carry out the execution. He owes it to his political authority despite the fact that the execution, strictly speaking, would be unjust. If true, this means that agents of political authorities can be obligated to kill people unjustly. This is because it is not the responsibility of the executioner, as an agent of deadly violence for his political authority, to carry out only just death sentences. The full responsibility for imposing just death sentences falls on the political authority itself. This is so despite the fact that on some occasions the executioner ought to refuse to carry out executions on the grounds that they are unjust.

Therefore, it is consistent with the existence of fully realized and effective political authority to hold that on some occasions agents of the authority ought to disobey orders to commit life-threatening violence but only in certain extreme cases. What the existence

of political authority depends on is that violent agents of that authority are not obligated to disobey all orders to commit violence, including life-threatening violence, that are unjust.

5. Conclusion

I have argued that traditional just war theory conceives of just war as, typically, public war, that is, as war waged under the legitimate authority of a political sovereign that has the moral authority to command its subjects into and during war and whose subjects are obligated to obey its orders. It is as a result of this view of political authority in war that the tradition has advocated for the possibility of the moral equality of combatants. Contemporary critics of the moral equality of combatants, inasmuch as they deny the authority of political sovereigns to wage war and to legitimately order their subjects into war, are rejecting the possibility of public wars and are, by and large, offering theories of private war instead. Jeff McMahan's work provides the clearest example of this.

I have shown, also, why the existence of fully realized and effective political authority requires that moral responsibility for the justice of some important kinds of political violence is unequally divided between the political authority and its agents. For this reason, the possibility of fully realized and effective political authority requires that in some cases an agent of a political authority can be obligated to commit unjust acts of violence. If we denied this, then we would deny the possibility of complete and effective political authority. Furthermore, if there is or could be legitimate political authority with authority over war, then the moral equality of combatants in war is possible.

Furthermore, I have argued that McMahan's rationale for rejecting the moral equality of combatants has troubling consequences. If, as McMahan has argued, one's duty not to engage in unjust life-threatening violence against innocent persons trumps all duties to obey the orders of one's legitimate political authority, then there can be no true and effective political authority at all.

From this vantage point, it is clear that the debate over the moral equality of combatants is centered on the possibility of the existence of fully realized and effective political authority with the authority to wage and declare war. Defenders of the moral equality of combatants face the burden of showing how there can be legitimate political authority with authority over war. At the same time, critics of the moral equality of combatants must accept either that (1) there cannot be fully actualized and effective political authority at all or, less extremely, (2) fully actualized and effective political authority is possible over some areas of social life, but not war.

In future work, I hope to show that the former strategy can be successful. Legitimate and effective political authority over war is justifiable and, as a result, so is the moral equality of combatants.⁶

NOTES

1. This distinction is developed in Book I, Chapters III, IV, and V.
2. Though Grotius defends a theory of public just war and the duty of soldiers to serve their legitimate political sovereign in war, he nevertheless denies the moral equality of soldiers. On his denial, see Grotius (2005) Book II, Chapter XXVI, Section IV. As we will see below, this denial is a departure from the traditional view of public just war. I believe, however,

his denial of the moral equality of combatants reveals a deep inconsistency in his theory. I will attempt to demonstrate this in future work.

3. Vitoria also clearly insists that political authorities have the right to wage and declare war and their subjects have the duty to obey those orders in most circumstances (see 1991: 11, 301).
4. For a more robust defense of this reading of Walzer's view of the obligations of soldiers, see Parsons (2012).
5. The rationale other critics of the moral equality of combatants have offered for their assertion of the duty of soldiers to only participate in just wars has gone much further than McMahan's. Primoratz (2002), for example, argues that a legitimate political authority's orders are not morally sufficient to absolve a soldier from the duty to not participate in an unjust war because political authorities have no authority whatsoever to order their agents to do anything unjust. Political authorities, for him, are not morally different from any other person or institution. Just as I am not obligated to follow my employer's orders to act unjustly, so I am not obligated to follow my political authority's orders to act unjustly. As he says,

[T]he fact that an individual is ordered, rather than merely invited, to join the armed forces, can't release him from the responsibility of doing his best to find out whether it would be morally right for him to do so. We are constantly enjoined to do all manner of things by other individuals, groups, and institutions – and we are always bound to do some moral thinking for ourselves and check whether we really ought, or indeed may, do their bidding. In this respect, the state has no special status that exempts its commands from independent moral evaluation. (226)

But if this were true, then not only would soldiers have no duty to engage in an unjust war declared and waged by their authority, but no agent of political authority would have an obligation to do anything unjust, violent or non-violent, their political authority orders. This would render political authority completely unrealizable. Both ostensible authorities and their agents would always be independent political authorities in themselves each charged with the duty to decide privately what should and should not be enforced, violently or non-violently, upon subjects. There would thus be no unique political authority at all at work within any political or legal institution.

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