2-8-2013

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The Duty to Obey and the Right to Fight

Just war theory is currently dominated by two positions. The standard position, reflecting current international law and formulated in the classic work of Michael Walzer, is that combatants both on the just and the unjust side have the same moral status (i.e. the same moral rights, duties, immunities and liabilities). According to this view, provided that *jus in bello* principles are respected, all combatants have an equal right to fight, which is not affected by the justice of the cause pursued by their state. The most uncontroversial justification for the right to kill is our right to act in defence, and combatants retain this right, independently of the side for which they fight.

This view has recently been challenged by many, but most notably by Jeff McMahan. The main objection raised by these critics is that the alleged “moral equality of combatants” relies on a fallacious idea, namely the presumed symmetry between parties who find themselves in the position of having to defend themselves against each other’s use of force. This symmetry, McMahan argues, cannot be correct. How could Andy and Ben have the same right to kill each other in self-defence if Andy has unjustifiably attacked Ben, while Ben is in a position of having to kill Andy simply because this is the only way in which he can survive the unjust attack? Posing a threat of

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1 Thanks to audiences at the Institute for Advanced Studies of Hebrew University as well as at the Universities of Miami, Arizona, Pavia, York and Oxford for stimulating discussions. Special thanks are owed to Saba Bazargan, Tom Christiano, Seth Lazar, Jeff McMahan and Annie Stiltz for illuminating comments.

2 *Jus in bello* principles concern the justice of conduct within war. They establish, for example, which types of weapons may be used, who can be targeted, and under which circumstances certain amounts of force may be used. These principles are contrasted with *jus ad bellum* principles, i.e. the principles that establish whether a party has a just cause for war.

3 *Just and Unjust Wars*, p. 34-41

4 This is what explains why, according to the traditional view, combatants are liable to harm, whereas non-combatants are not (the so called “principle of discrimination”). The former but not the latter threaten others with harm.

5 McMahan, *Killing in War* (KIW). See also Coady, Fabre, McPherson, Frowe, Rodin.
harm cannot be sufficient to become liable to be killed, McMahan concludes. It is only when the threat is unjustified that liability to be killed in self-defence is triggered.

Once this idea is accepted – and it is hard to see how it could be rejected – the rejection of the moral equality of combatants seems to follow. It is not true anymore that, as long as *jus in bello* principles are respected, all combatants have “an equal right to kill,” independently from the justice of the cause for which they are fighting. Only combatants who fight for a just cause have such right. For the same reasons that Andy does not have a right to act in self-defence against Ben, combatants fighting on the unjust side, do not have a right to defend themselves against the use of force by combatants on the just side. The justice of the cause makes a difference as to whether combatants can permissibly fight.

Thus, contrary to the traditional view, combatants are not morally permitted to take part in any war they are required to fight as long as they respect the requirements of *jus in bello*. Combatants must take responsibility for their actions and investigate whether the war they are required to fight is indeed just. Only if it is, do they acquire a right to kill.

This means that when combatants have reason to believe that the war they are ordered to fight is unjust, their duty is to disobey. Moreover, when they lack sufficient reason to believe that the war is unjust, but also to believe that the war is just, combatants should presume that their duty is not to fight. This is partly because statistically it will be more likely that the war they are asked to fight is unjust; partly because in fighting they risk contributing to the killing of innocents, and their duty not to contribute to the killing of the innocent is stronger than their duty to contribute to achieving whatever aim is pursued by the war (including the aim of preventing innocents from being killed). For these reasons, we should conclude that “in conditions of uncertainty, the moral presumption is against fighting”.

I believe that both Walzer’s view and McMahan’s view capture important aspects of the correct way to think about the morality of war. McMahan is right in pointing out that the justice of the cause plays a fundamental role in determining whether combatants have a right to fight, but he seems to lose sight of the fact that combatants act as members of a political body, and that this has important normative implications with

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6 KIW, p. 143-5.
7 Following McMahan, I use the term “innocents” to refer to those who have done nothing to make themselves morally liable to military attack (KIW, p. 8).
8 KIW, p. 144.
9 Unless otherwise specified, I will assume throughout the paper that wars always have a just and an unjust side, i.e. that one side meets the requirement of *jus ad bellum* (usually a state defending itself or a state involved in humanitarian intervention) and one doesn’t (typically, an aggressing state). Of course things are normally more complicated than that: it is rarely the case that one party is completely right and one completely wrong. But for ease of exposition I will leave this complication aside in the paper. I will also bracket the problem of unjust wars that can be justified as lesser evils. The reader should assume that in talking of unjust wars (i.e. wars that lack a just cause) I refer to wars that also lack a lesser evil justification.
respect to the rights and duties they have. These rights and duties also make a difference as to whether they can permissibly fight, but receive insufficient attention in his theory.

Walzer’s view, by contrast, is sensitive to these aspects, as it is precisely by appealing to the idea that combatants are bound by ties of loyalty and political obedience to their state that he explains why they should not be expected to question the justice of the wars they are asked to fight.\(^\text{10}\) His view however, is inadequate in that it overstates the force of these considerations and completely disregards the importance of the just cause. While Walzer is certainly right in acknowledging that combatants normally operate within a structure of political responsibilities, this is not enough to conclude, as he does, that their will is never engaged in deciding whether to fight, but only in deciding how to fight. Saying that Rommel should not be considered a “willful wrongdoer, but a loyal and obedient subject and citizen” and that his obedience to Hitler wipes the crime from his hands\(^\text{11}\) is implausible for the reasons that McMahan has so powerfully articulated in his work.

Thus, it looks as if the correct account of the morality of war will have to strike a middle path between these two views: it will have to acknowledge the relevance of the just cause in establishing whether combatants possess a right to fight, while paying attention at the same time to the normative implications of the fact that combatants typically act as members of political bodies. These are the two desiderata that a plausible account will have to meet in order to overcome the problems that afflict Walzer’s and McMahan’s view respectively. Providing such an account is the aim of this paper.

I will argue that when members of a legitimate state are ordered to fight they are placed under a prima facie obligation to obey.\(^\text{12}\) This obligation does not depend for its validity on the justice of the cause being pursued. However, when the war is unjust, this obligation is likely to be overridden by a weightier obligation, namely the obligation not to contribute to the killing of innocents. Moreover, I will argue that combatants do have duty to do all they can to find out whether the war they are ordered to fight is unjust. As it will become clear, this view captures the insights of both Walzer’s and McMahan’s views, while avoiding at the same time the problems that afflict each of them.

I will proceed in four steps. I will start by considering two recent attempts to resist McMahan’s challenge to the orthodox view by looking at the duties that combatants have qua members of political communities (sections 2 and 3). I call this “the political argument for the right to fight”.\(^\text{13}\) Since my aim in this paper is to defend a version of this argument, it will be helpful to consider the shortcomings of these two earlier views. I then introduce my own version of the political argument by addressing a powerful

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\(^\text{10}\) Just and Unjust Wars, pp. 39-40.
\(^\text{11}\) Just and Unjust Wars, p. 39.
\(^\text{12}\) In this paper I will use “duty” and “obligation” interchangeably. Also, given its currency I will use the expression “prima facie obligation”, instead of “pro-tanto obligation” (which some consider more accurate).
\(^\text{13}\) For another interesting formulation of the “political argument”, see Christopher Kutz, “The Difference Uniforms Make”, PPA. For reasons of space, I will not consider this view here.
objection that McMahan has raised against it (section 4). In answering McMahan’s objection I articulate a justification for the existence a prima facie duty to obey the order to fight, independently from the justice of the war at hand. The nature of this duty is then further clarified in sections 5 and 6, where I explain how the prima facie nature of this duty is to be understood in terms of the existence of “presumptive reasons” to obey the law. I conclude in section 7 by highlighting some of the strengths of my view.

2) David Estlund and the epistemic function of democracy

The first version of the political argument that I will consider is the one defended by David Estlund in his paper “On Following Orders in an Unjust War”. Estlund argues that combatants have a duty to obey the order to fight an unjust war when the order comes from a democratic state which is “duly looking after the question whether the war is just” (p. 213). Combatants have a duty to ascertain that this condition is in place, but once they do, they must obey the order to fight and their “participation… is sanitized because [they are] following orders” (p. 213). When this is case, “even though the victim is wronged by the unjustly warring side, the soldier on that side is nevertheless morally obligated (and so morally permitted) to follow all normally binding orders – those that would be binding at least if the war were just” (p. 215).

What this view has in common with McMahan’s approach is the idea that the right to fight is not merely conditional on jus in bello principles being respected. When combatants receive the order to fight, they should critically assess such order. Although combatants are not required to investigate the justice of the war (contra McMahan), they are required to check that their state is making an honest attempt to find out whether the war is just. Only in this case do they have a duty to obey the order.

What the theory has in common with Walzer’s view is the idea that, once it is clear that this condition is in place, combatants don’t need to worry about whether the war is in fact just. They acquire a right to fight simply because they have a moral duty to obey the order received. Thus, as long as combatants know that their state has made an honest attempt to respect jus ad bellum principles, their “participation in an unjust war is sanitized … because [they were] following orders” (p. 213).14

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14 Estlund is ambiguous about the nature of the “honest mistake standard”. At times he suggests that the standard is met when a given political institution has in fact paid due consideration to the justice of the war at hand (pp. 213, 222); at times he suggests the standard is met when that institution normally has a certain epistemic value. (For example, on p. 232 he writes that a “political system meets the honest mistake standard … [when ] it is a process in which public debate and electoral discipline give the process an adequate and generally recognizable epistemic value, that is, a tendency … to go to war only justly”). If understood in the latter way, the standard seems too weak. For the fact that that a political system normally has a certain epistemic value does not give us reasons to obey if we know that this time it has made no effort to identify the correct course of action. We could imagine, for example, that a generally reliable
Estlund defends this view by appealing to two ideas. The first is the thought that democratic political institutions perform an important epistemic function, in that they tend to track morally correct courses of action. Commands issued by democratic political institutions tend to “get things right”, and thus will require their citizens to act in certain ways only when acting in those ways is morally mandatory (or at least morally permissible). Of course saying that democratic political institutions tend to get things right is not saying that they always get things right. Inevitably there will be cases in which the decision taken following the procedures of democratic institutions will not track the morally correct outcome. And to make things worse, independently from whether in a given case a certain procedure has in fact tracked the morally correct decision, people are likely to reasonably disagree as to whether it did. But since democratically taken decisions tend to be more reliable than our individual judgment, and we are normally not in a position to determine when they aren’t, we have reasons to defer to them even when they conflict with our judgment.

The second idea invoked by Estlund in support of his view is what I will call the “public acceptability principle”: an important feature of democratic institutions is that even when individuals reasonably disagree over a certain moral issue, there is a sense in which the outcome of a democratic procedure is acceptable to all of them, for the procedure through which the issue is decided is one that can be defended to all those subject to it. To use Estlund’s case, we can reasonably disagree as to whether someone has committed a certain crime, despite the fact that we are equally competent and we have had access to the same evidence. Still, trial by jury is a procedure that can be defended to all of us as the best way to find out whether someone is guilty or innocent. This is why jailors and executioners are not permitted to follow their private judgment and let prisoners go free, provided that the latter have received a fair trial, even if a) jailors believe that the prisoners are innocent, and b) their belief is correct. Following their private judgment and letting the prisoner escape would be “implicitly making a claim to moral expertise that jailors (and executioners) could not justify to all reasonable points of view”.

For the same reason, combatants have a duty to obey the command to fight a certain war, provided that the decision to go to war has been taken democratically, even if a) they believe that the war is unjust (and therefore they will be killing innocents), and b) their belief is correct. In disobeying, a combatant would be claiming for himself a moral expertise that could not be justified to his fellow citizens, thereby placing himself above the results of the democratic process. As Estlund puts it, “[t]he justice of the war is being duly looked after by his nation, and that nation is entitled to have its will done … even political system occasionally wages war for the wrong reasons. When this is the case, it is hard to believe that we should regard the commands to fight as binding. I address this problem more extensively below, p.

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15 Estlund defends this view at length in his book Democratic Authority, 2008.
16 This idea comes from Rawls, Political Liberalism.
17 Lefkowitz, p. 223
when it is making a mistake” (p. 232). “The soldier would be wrong to substitute his own private verdict and thwart the state’s will” (p. 213).

At first sight there might seem to be a tension between these two ideas. The epistemic justification is one that naturally fits an instrumental reading of democracy: we have a duty to obey the order to fight or to execute convicted prisoners because these are the outcomes of democratic procedures, and the outcomes of democratic procedures are likely to track morally correct choices. According to this view, although the existence of our duty to obey does not depend directly on the action commanded being correct, it does depend on the epistemic virtues of the procedure that dictates that action. The public acceptability principle, on the other hand, is one that naturally fits a reading of democracy as having non-instrumental value. According to this view, obeying the outcomes of the democratic process is the only way for me to treat my fellow citizens as free and equals. Disobeying, by contrast, is a way of imposing my will on them, instead of acting within the boundaries of those reasons that they could accept.

The apparent tension, however, disappears, once we pay attention to the structure of Estlund’s view. The function of the public acceptability requirement is to exclude at the outset any procedure that cannot be publicly justified to everyone, including procedures in which experts are allowed to autonomously decide what to do. Democracy is then selected as the epistemically best among the remaining acceptable procedures. This is why epistemically good but publicly unacceptable procedures, such as those that would give jailors the right to let innocents go free or soldiers the right not to fight unjust wars, can never be allowed.

Estlund’s view is sophisticated and provides an admirably nuanced account of the justification for our duty to obey democratic decisions. Doubts about its cogency, however, rise once we pay attention to two important concessions that he makes in discussing his jailer case. To begin with, Estlund grants that in the exceptional case in which a jailer has first-hand knowledge of the innocence of the prisoner she is guarding, she does not have a duty to keep the prisoner in jail, even if the sentence has been inflicted after evidence of her first-hand knowledge has been considered by the jury. This seems at odds with the claim that it’s wrong to act on our own judgment of what is right, when doing so goes against democratically taken decisions. After all, in the case of first-hand knowledge too would the jailer be “substituting his own private verdict and thwart the state’s will” in letting the prisoner go free. He would be claiming for herself the right to disrespect the result of the trial by jury which, ex hypothesis, is the only procedure that can be defended to all of us as the best way to decide who is innocent in the face of reasonable disagreement. If Estlund believes that in this case the jailer should nonetheless let the prisoner go free, this must be because there are cases in which getting the right result is more important than respecting the limits of public justification.

But if so, we might wonder why we should believe that we are justified in acting on our own judgment only in cases of first-hand knowledge. Why not also in cases in
which our knowledge depends on moral arguments and collection of information? Is it because only in the case of first-hand knowledge we can be sure that our views are indeed correct? This seems implausible. There are many obvious examples in which this is not the case. Indeed, one of the aims of the trial is precisely to test the often conflicting first-hand knowledge of different testimonies. More importantly, even if we were to grant that first-hand knowledge always provides us with absolute certainty, we might wonder why we should place such an unusually strict constraint on our action. We normally think that we can justifiably act as we think is correct provided that we are certain enough about the correctness of our action. I cannot think of many circumstances in which full certainty is required, if only because I cannot think of many cases in which full certainty can be achieved.\(^\text{18}\) Thus, whatever reason motivates Estlund to concede that we don’t have a duty to comply with the outcomes of a democratic procedure when we have first-hand knowledge that the procedure has failed to identify the morally correct course of actions, is also a reason to concede that we don’t have a duty to comply when we are sure enough that it has so failed. This means that once the jailer has sufficient reasons to believe that the prisoner is innocent, she is permitted, indeed required, to disobey the order to keep him in prison (unless there are strong countervailing reasons). Similarly, when combatants have sufficient reason to believe that the war they are asked to fight is unjust, they don’t have a duty to obey. They are permitted, indeed required, to disobey even if this means violating the public acceptability requirement.

Perhaps Estlund could avoid this problem by providing an explanation of why first-hand knowledge is special. Let us grant that he can do that. Would this be enough to rescue his position? I do not think so, for he makes a second important concession as to why orders coming from a democratic state which is duly investigating the justice of the war can nonetheless lack authority. “If an order to go to war … is not even close to what would be just if the facts were as the authority states them to be, or if the stated view of the justifying facts is not even close to a reasonable conclusion based on the appropriate materials, the soldier is not obligated (and probably not permitted) to carry out the order even if the procedure that produced the order meets the honest mistake standard” (p. 230).

This confirms that, at least in some occasions, the public acceptability requirement can be defeated by our duty to do what is morally right. Moreover, we might ask a similar question to the one considered in relation to the first concession made by Estlund: Why should we think that authoritative commands are no longer binding only in the case of particularly egregious mistakes, i.e. in the case of decisions that are “not even close” to the right ones? Why don’t these decisions also stop being binding in the case of less serious mistakes, provided that these mistakes are serious enough? If we are sufficiently sure that the war we are asked to fight is unjust, why should we obey simply

\(^\text{18}\) Of course there are cases in which we should be particularly careful in trusting our judgment, but even in those cases once we are sufficiently sure about it we are normally allowed to act on it.
because the decision to fight it is not excessively unreasonable? Of course a problem with this suggestion is how to determine when we can be said to be sufficiently sure that the war we are asked to fight is unjust. I will not able to address this question here.19 My point, however, is that this is the question that we should address, rather than employ Estlund’s test.

Most importantly, Estlund’s second concession seems to contradict his claim that combatants only need to check that *jus in bello principles* are respected and that a honest attempt has been made to find out about the justice of the cause. Remember that as long as combatants do that, for Estlund they need not worry about the justice of the war, because even when their killing wrongs innocent victims, the combatant doing the killing is not acting wrongly.20 It is the state, not its combatants, that is wronging the victims. Combatants’ participation is “sanitized” because they are merely following orders (as they should). 21 Estlund’s second concession, by contrast, suggests that when the decision to go to war is “not even close” to the reasonable one, combatants have no duty to obey, even if the procedure that produced the order meets the “honest mistake standard”. And Estlund acknowledges that it is perfectly possible that procedures which normally produce reasonable, if not perfectly correct, results will sometimes produce in good faith results that are not even close to the reasonable ones.

Where does this leave us? The conclusions of this section are three. First, it is hard to see how the two concessions introduced by Estlund can be squared with his general account of the duty to obey the law, if not as *ad hoc* adjustments. Second, once we accept these two concessions (as I think we should), it is not clear why they should be limited in the way Estlund suggests. Why should we think that it’s permissible to disregard authoritative commands that would lead us to committing a serious injustice only provided that either we have first-hand knowledge that a serious injustice would follow or the outcome is so unjust that it’s “not even close” to a reasonable one. I have suggested that whatever reasons could be plausibly invoked by Estlund to introducing these two exceptions is also a reason to broaden the scope of the exceptions as follows: we are permitted to disregard authoritative commands provided that we are *sufficiently* sure that obeying would lead us to commit an injustice and the injustice is sufficiently serious. Third, taking seriously Estlund’s second concession requires giving up his claim that as long as combatants have verified that their state has made an “honest attempt” to respect *jus ad bellum* principles, they can disregard the question of whether these principles are in fact met.

19 McMahan presents some convincing arguments to the effect that individuals can sometimes have a sufficient level of confidence to question the decisions made by the government (*KIW*, chs. 3. See Lefkowitz’s example).
20 See above, p. 3.
21 Estlund p. 213. In this respect Estlund’s idea is quite close to Walzer’s, that soldiers ought to be considered merely “human instruments” (p.36) in the hands of states (which in turn echoes Augustine’s claim that they are the “sword in the hand of him who uses it”).
But while the foregoing criticism gives us reasons to reject Estlund’s view, there is much to be learnt from his sophisticated attempt to formulate a “political argument” for the duty to obey the order to fight unjust wars. One idea in particular will be important for the view defended here, namely the thought that while membership in a legitimate state does give us special reasons to comply with its laws and commands, this does not give us a permission to fight any war we are asked to fight (contra Walzer). To begin with, whether or not the mistaken decisions to enter the war are the product of an “honest mistake”, i.e. whether the relevant political authority has tried to correctly assess the justice of the war, is relevant to establishing whether we have a duty to obey. Secondly, there will be cases in which the order to fight is so unjust that our duty will be to disobey, despite the fact that it comes from a legitimate political authority that is making an “honest mistake”. I have suggested that Estlund’s theory cannot provide a plausible basis for these claims. A convincing version of the “political argument” will have to do so.

3) Cheyney Ryan and the “Argument to Democratic Duty”

In this section I consider a second formulation of the “political argument”, namely the view defended by Cheyney Ryan in his “Democratic Duty and the Moral Dilemmas of Soldiers.” Although simpler in its structure, this view seems to me closer to the correct one than Estlund’s, and it is by building on the central insight of this view that I will develop my own position.

Ryan claims that combatants are under an obligation to fight wars, even when unjust, because by doing so they sustain democratic institutions that perform important tasks, most notably the task of fighting wars that are generally just. Although Ryan calls this the “Argument to Democratic Duty”, democratic procedures do not play much of a role in it.  

His point seems to be rather that political institutions are necessary to protect our lives and the lives of our loved ones, as well as important moral values. Although these institutions will sometimes go wrong, they generally wage just wars (i.e. fight for just causes justly). The reason why we have a duty to obey even when we are commanded to fight an unjust war is that this is required in order to “protect our protectors” (as Hobbes puts it), i.e. in order to support the institutions that play such a fundamental role.

Ryan does make some generic assumptions about how the decision to go to war is generally made in democratic institutions (he mentions that these institutions are likely to fight only just wars), but he does not make the duty to fight conditional on whether the

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22 The point of calling this argument “democratic” is simply to exclude its application to unjust political institutions, such as the Nazi regime (Ryan, …).
23 It’s worth noticing here that the “protective institutions” that Ryan is talking about are not simply military institutions, but also the broader political institutions of which military institutions are simply a component (p. 21).
decision was reasonable or on whether a mistake has been made honestly (p. 12), nor
does he place any weight on anything like the Estlund’s public acceptability requirement.
He simply rests his argument on a broader duty to support the state, given the crucial role
that the state has in protecting its citizens. Thus, the main consequence of adopting
Ryan’s view is that whereas for Estlund the existence of a duty to fight an unjust war will
have to be established on a case by case basis (has the state made a genuine effort to find
out whether the war is just? Is its final judgment not too unreasonable?), for Ryan the
duty binds all citizens and establishes an obligation for them to fight just wars as well as
unjust ones.24

I think this argument points in the right direction, but the obvious reply to it is that
even if we grant the existence of a duty to fight when required to by our state, this surely
must be a prima facie duty – one that can be overridden, at least in some circumstances,
by our duty not to kill innocents. Thus, while something like Ryan’s argument can
ground a duty to fight an unjust war, we should certainly expect the duty to be
overridden, at least some times, by our duty not to kill innocents.

This however, is a move that Ryan, like Estlund, wants to resist. And interestingly, like Estlund, he resorts to a parallel with the criminal justice system. He writes: “suppose that the institution of capital punishment, like a democracy’s protective
institutions, is necessary to protecting oneself and one’s loved ones. Suppose that one’s
refusal (as executioner) to execute an innocent person would jeopardize the entire
institution in ways that render oneself and one’s loved ones vulnerable to unjust attack.
Suppose for example that you know that if you fail to execute the innocent person, you
and your loved ones will be set upon by a band of criminal marauders, who are no longer
deterred by the threat of capital punishment. At the very least, there is a real dilemma
here.” (pp. 20-1). The suggestion of course is that disobeying the order to fight an unjust
war would have similar catastrophic consequences.

I find this argument implausible.25 Notice, to begin with, that even if it was
plausible, McMahan could reply that only when these catastrophic consequences are
likely to happen, should combatants obey the order to fight an unjust war. Whenever they
have reason to believe that no similar consequences would follow, they could permissibly
disobey. Indeed, they would have a duty to do so. The only way for Ryan to resist this
view is to argue that each and every case of disobedience is likely to produce these
catastrophic consequences, but surely this cannot be right. It is never the case that

24 Ryan explicitly rejects as irrelevant Estlund’s idea that the existence of a duty to fight depends on
whether the state has made an honest attempt to find out about the justice of the war. This seems too strong.
Certainly whether my state is trying to establish the justice of a war must make a difference as to my duty
to fight it. It is hard to believe that a state that normally does (or tries to do) a good job in choosing which
wars to fight, thereby has a right to obedience even when it decides to openly disregard the question of the
justice of the war it wages.
25 Incidentally, it’s curious to see the best known reductio of consequentialism (namely, the idea that
sometimes punishing the innocent would produce the best consequences) here used as an argument against
McMahan’s view.
isolated cases of disobedience jeopardize the existence of the state. Indeed, as many have noticed, even generalized disobedience does not compromise the state’s existence or its capacity to perform its tasks.26

The problem here is that Ryan, like McMahan, operates with what we might call a “teleological understanding” of the duty to obey the law – one that grounds such duty in the fact that disobedience is likely to undermine the ability of political institutions to provide those benefits that justify their existence.27 However, this is not how we should think about the justification for our duty to obey the law. Although the justification for political authority and political obligation ultimately does depend on the fact that states provide us with fundamentally important benefits, our duty to obey the law does not hinge on the question of whether disobedience would compromise their capacity to do so, but rather on the fact that when states commands us to act in certain ways they create for us a prima facie obligation to act as commanded.

To see this point, consider the practice of promising. While it is plausible to suggest that the justification of promising ultimately relies on the fact that we benefit from being able to create special bonds with other people, this is not to say that our duty to keep promises is conditional on the fact that doing so is required not to threaten the existence of the practice that secures this benefit. Our duty to keep promises rather depends on the fact that when we promise to φ we thereby create new special moral reasons for us to φ, reasons that we did not have before promising. If you fail to keep your next promise, the existence of the practice of promising will not be endangered in any way (it is only if a significant number of people failed to keep their promises that this risk would exist), and yet it seems uncontroversial that you do have a prima facie duty to keep your promise. That duty might be overridden, but cannot be ignored.28

The duty to obey the law of legitimate states is to be conceived along the same lines. As long as states have legitimate authority,29 even a relatively high level of disobedience does not compromise their capacity to perform their crucial functions. And yet, when a legitimate state requires that we φ, it places us under a prima facie duty to φ.30 This is how political authority is normally conceived. Of course, this is not to yet say that we are right in conceiving it in this way. What we need to do now is explain why states have legitimate authority and what it means to say that the duty is “prima facie”. This is the task to which I turn in the next section, in order to develop my own version of the “political argument”.

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26 Simmons, Moral Principles, 1979; Green;
27 KIW pp. 71, 75
28 Green, The Authority of the State, p. 252
29 A state has legitimacy if it has political authority – add footnote
30 Simmons, Justification and Legitimacy, p.
4) The “moral alchemy” objection

I think that Ryan is right both in grounding the duty to fight unjust wars in our membership in the state and in grounding membership in the state in the fact that states provide us with vitally important benefits, most notably security and the rule of law. Where he goes wrong is in overstating the weight of the obligation to obey the state. This obligation, like all the duties imposed by the state, is only prima facie. This means that it will have to be balanced with other obligations that we have. Thus, when a legitimate state commands its citizens to fight, they do acquire a prima facie moral obligation to do so. The fact that they are so commanded does create a moral obligation for them to fight. But when the war is unjust this obligation will be typically overridden by their obligation not to contribute to the killing of innocents. In other words, whilst Ryan is right in claiming that our membership in a legitimate state does make a difference with respect to our duty to fight an unjust war, such membership makes less of a difference than he suggests.

Consider again the case of promises. What happens when I break my promise to meet you for lunch in order to take someone injured to the hospital? The standard analysis of this case is that while the duty to keep my promise is overridden by a weightier duty, it still maintains its original force. And yet we have seen that by failing to keep my promise I do not jeopardize in any way the institution of promising. The capacity of this institution to perform its valuable functions is in no way compromised by the fact that our duty to keep our promises is sometimes justifiably overridden by other duties we have.

Are the duties imposed by the law special in this sense? They don’t seem to be. While I am driving the injured person to the hospital I can permissibly disrespect the speed limit or the traffic light to increase the chances of saving her. These are cases that no one finds mysterious. None of those who agree that we have a duty to obey the law are likely to suggest that breaking the law in this instance would threaten the ability of the state to perform its functions. So, why should there be a special problem when the same argument is applied to the duty to obey the order to fight? The answer is that indeed there is no special problem. The two cases should be treated in the same way. Just like I have some moral reasons to respect the traffic light, but these reasons can be overridden when I have stronger reasons to ignore it (as it is the case when ignoring the traffic light would reduce the chances of saving someone’s life), I have some reasons to obey the order to

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31 Of course ignoring the traffic light does not mean that I don’t have a duty to stop. It only means that I don’t have a duty to stop simply because the traffic light is red. I do have a duty to stop if driving through would create a significant risk of accidents with other vehicles. However, that duty is not one created by the state.
fight, but these reasons can be overridden when I have stronger reasons to disobey (as it is the case when obeying would be contributing to the killing of innocents).32

This view provides an elegant and intuitively straightforward formulation of the “political argument”, but is subject to the following powerful objection: how could the fact that a state commands me to fight an unjust war give me any reason to fight? Fighting an unjust war typically involves killing innocents, and killing innocents is clearly wrong – indeed, it is the paradigmatic case of malum in se. How could the fact that the state requires us to commit something wrong give us any reason, even prima facie, to do so? This view, McMahan argues, “presupposes a form of moral alchemy that is difficult to accept. How can certain people’s establishment of political relations among themselves confer on them a right to harm or kill others, when the harming or killing would be impermissible in the absence of the relevant relations?”33

The answer to this question is that the political relations that McMahan refers to are necessary in order for individuals to live together peacefully and to respect each other’s rights; for the justification of political authority, as Ryan notices, is grounded in certain important moral tasks that legitimate states perform. By performing their legislative, executive and judicial functions, legitimate states provide the level of order and coordination that is required for a minimally secure life; but states can perform these crucial moral tasks only if they have the power to impose genuine moral obligations on their subjects. Indeed, this is not so much a condition of their ability to perform the tasks above, but it is how they perform them. Some of the main problems that states are supposed to solve are coordination problems and problems relating to giving a clear content to rights and duties that would be otherwise indeterminate. The way in which states do that is by: a) altering the balance of reasons that apply to their subjects by imposing moral obligations on them (as it is sometimes put, the commands of the state provide their subjects with new content-independent reasons for action); b) backing their commands by a threat to use force to compel compliance.

I defend this view at length elsewhere,34 but the details are not important here. In order to answer the “moral alchemy” objection we only need to grasp its rationale, which can be summarized as follows: states have authority over us to the extent that they enable us to discharge some of our most important duties of justice.35 One of our most important duties is the duty not to expose those living next to us to the dangers typical of the state of nature – dangers that are principally created by coordination and assurance problems, lack of enforcement, and indeterminacy of the content of rights. We can discharge this duty only if we are subject to the authority of the state, i.e. only if we take the commands

32 Below I suggest a stronger formulation of this thesis. The laws of a legitimate state give us not only some reasons to act as we are required, but presumptive reasons to do so. See below, pp 21-2.
33 KIW, p. 82.
35 This approach to the problem of political authority is defended by Anna Stiltz (Liberal Loyalty), Tom Christiano (The Constitution of Equality) and Kit Wellman (Is there a Duty to Obey the Law?), among others, although each of these authors articulates it in different ways.
of the state as providing us with content-independent reasons for action.\textsuperscript{36} This is why when the state commands us to $\varphi$ we thereby acquire a moral obligation (i.e. new content-independent moral reasons) to $\varphi$.

But as we know, states unfortunately are not perfect. All states will make mistakes and require us to sometimes act unjustly. The crucial point, however, is that legitimate states will make mistakes (or at least, serious mistakes) in good faith – i.e. they will try to pass, and normally succeed in passing, laws that enable their citizens to act as they should (or at least as they are morally permitted to). You might think that there is a long list of profoundly unjust states that work as counterexamples to this characterization, but notice that I have been talking of legitimate states. And a necessary condition that states need to meet to be legitimate is that of being reasonably just. States that are not reasonably just cannot enjoy legitimacy precisely because the point of political authority is to enable individuals to discharge some of their most important duties of justice.

It is commonly accepted that only legitimate states can impose morally binding obligations on their subjects. However, it is also commonly accepted that unjust commands of a legitimate state do bind – i.e. they do create a prima facie obligation for us to obey, in the same way in which just commands do.\textsuperscript{37} For if only just commands did bind, the existence of the authority would make no normative difference whatsoever. The state would have no genuine normative power in that its directives would be binding only to the extent that they command us to do what we already have reason to do. If so, the authority would be redundant and would perform at most an epistemic (or evidentiary) function.\textsuperscript{38} But states can only perform their crucially important functions if they have such normative powers. A state having merely an epistemic (or evidentiary) function could not do that.\textsuperscript{39}

To be sure, legitimate states do not have the power to impose on their citizens an obligation to do anything they like, for there are things that clearly fall outside the scope of their authority. For example, they do not have the power to decide which religion we should practice or whom we should marry. But within the scope of their authority, states are allowed to make mistakes without thereby losing their capacity to impose prima facie obligations; and deciding when to resort to military force certainly does fall within the scope of state authority.

To better see this point, consider the authority that doctors normally have over the nurses in their ward. By virtue of this authority, doctors do place nurses under a prima facie moral obligation to act as they require, but this is not to say that doctors can direct

\textsuperscript{36} Wellman’s approach is particularly close to the one I defend in my own work, but there are important differences between our views. The main one is that my view grounds the duty to obey the law in a negative duty not to expose those living next to us to the dangers of the state of nature, whereas Wellman grounds the duty in a positive duty to rescue them from these dangers.

\textsuperscript{37} See, for example, Raz \textit{The Morality of Freedom}, pp. 47-8, 61 and Schauer, p. 5. As far as I know, Christopher Wellman is the only one to reject this view (2005, pp. 81-4).

\textsuperscript{38} For a classic formulation of this objection see Robert Paul Wolff, \textit{In Defence of Anarchism}.

\textsuperscript{39} Raz
nurses to do anything they want. For example, a doctor could not place a nurse under a prima facie moral obligation to sing for her, as this would clearly fall outside the scope of the doctor’s authority. For the same reason, a doctor could not place a nurse under a prima facie moral obligation to intentionally kill a patient. But here’s a complication: a doctor who is genuinely trying to save a patient’s life can place a nurse under a prima facie moral obligation to give the patient a certain pill, even if the pill then turns out to kill the patient. For it falls within the scope of the doctor’s authority to place nurses under an obligation to do what doctors reasonably believe to be in the interest of their patients.

This might sound odd. Shouldn’t we rather say that nurses acquire reasons to act as directed only after they have verified that what they are required to do is indeed in the interest of the patient? No, because if that was the case, nurses could not be said to be under the doctor’s authority. The doctor’s directives would have at most an epistemic function: instead of providing nurses with practical reasons, they would simply indicate that there is reason to believe that, say, giving a certain pill to the patient is the right course of action. But a hospital in which nurses take doctors’ decisions as mere advice, rather than authoritative directives, is one in which we would not want to end up. For the efficiency of a hospital largely depends on the capacity of doctors to rely on the fact that their directives will be taken as authoritative.

Notice that none of this is supposed to suggest that authoritative directives can never be questioned. A nurse who has good reason to believe that a certain pill will kill the patient certainly has an all-things-considered duty not to give it to him (more on this below). My point here is that this duty overrides an existing prima-facie duty that she has to act as required by the doctor – a prima facie duty that is created by the exercise of the doctor’s legitimate authority, even when the doctor makes a mistake.

This dynamic, and its application to the question of the duty to obey the order to fight, will be further explored in the next section. For now, the point that should be stressed is this: McMahan is certainly right that when state A unjustly attacks state B, the citizens of B cannot become liable to be killed simply in virtue of the special political relations existing among the members of A. However, these relationships can nonetheless create some normative reasons for A’s citizens to fight, reasons which will then have to be weighed against the rights of B’s citizens not to be killed. Although the reason created by the order of a legitimate political authority cannot affect what rights other people have, it can weigh against those rights (just as a lesser-evil justification or a role-based professional duty can).

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40 Here I am assuming that the patient does not want to die.
41 Interestingly, McMahan concedes that soldiers’ professional duties can create special reasons to act and that these reasons will have to be weighed against the reasons not to fight in a war that is objectively unjust (KJW, p. 72).
5) The presumptive nature of the duty to obey

The aim of the previous section was to explain what produces the “moral alchemy” that gives legitimate states the moral power to place their subjects under a prima facie obligation to act in ways that would otherwise be morally impermissible, provided that they are acting in good faith. I have done this in two steps. First, I have suggested that the reason why legitimate states have the power to impose genuine moral obligations on us is that being under the authority of legitimate states is the only way in which we can discharge our duty not to expose those living next to us to the dangers of the state of nature. Second, I have argued that whilst only legitimate states impose moral obligations on us, they do so even when they require us to do something unjust, provided that they are acting within the scope of their authority. For if the law was binding only when it directs us to do what we already have reason to do, the law would be redundant and perform at most an epistemic function, and this would not be enough for states to be able to perform the crucially important tasks that justify their existence.

Thus, the moral alchemy that gives political authorities the moral power to impose on us a prima facie obligation to fight an unjust war is the moral alchemy that gives them the moral power to impose on us a prima facie obligation to do anything. Under the assumption that the state is legitimate, its command to fight an unjust war does not work any differently from any other command – the command to pay our taxes, to respect the speed limit or to stop at traffic light. But we have seen that a state is legitimate only if it is reasonably just. And surely a state is not reasonably just if it decides to fight unjust wars, which typically involve the killing of civilians. A reasonably just state will require that we fight an unjust war only when, in Estlund’s words, it’s making an “honest mistake”.

In other words, there is a matter of the fact as to whether my state is legitimate or not. This will depend, among other things, on whether the state is reasonably just. If the state is not reasonably just (and therefore is illegitimate), I have no prima facie duty to obey any of its laws or commands – including, of course, its command to fight an unjust war. I might have a duty to conform to some of them to the extent that I have independent moral reasons to act as they require, but not a duty to obey. If the state is reasonably just and the war I am required to fight is unjust, I have a prima facie obligation to obey, but this obligation will be typically overridden by the independent moral duty I have not to contribute to the killing of innocents. For, although the duty to obey the law is a weighty

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42 Here I assume that it falls within the scope of the authority of states to decide when resort to war is justified (in the same way in which it falls within the scope of the authority of doctors to decide when certain medicines should be administered to their patients). As far as I know, this assumption is largely uncontroversial.

43 This is what explains why, for example, German citizens had a duty to respect traffic laws or tort law under the Nazi regime. On the distinction between obeying the law and conforming to it, see Raz.
one, the negative duty not to kill innocent is likely to be weightier in most normal contexts. (More on this below.)

The further point I would like to make now is that we do have a duty to find out: a) whether our state is illegitimate; b) whether the legitimate state to which we belong is requiring us to act unjustly. This is because while states normally do a lot of good, they can also do a lot of harm. Illegitimate states, where their illegitimacy depends on the fact that they pursue unjust causes such as fighting unjust wars, typically do a lot of harm; and we have a duty to make sure that we are not accomplices in this harm. But as we have seen, legitimate states can also occasionally be responsible for causing unjust harm, although acting with the best intentions; and we also have a duty to make sure that we are not accomplices in this harm.

Of course there are different kinds of harm that a legitimate state can perpetrate. Unnecessary taxes, forms of discrimination, unjust trade policies are obvious examples. Even something as trivial as an unnecessary traffic light constitutes in a sense a form of harm, as it sets back our interests by constraining our liberty for no good reason. This last sort of injustice however, is one that we should not care too much about, given how insignificant it is in comparison to the crucially important functions that states perform. On the other end of the spectrum is the injustice that states perpetrate when they fight unjust wars, since this involves the killing of innocents. This injustice is so serious that we have a duty to do all we can to verify that we are not accomplices in it.

This suggests that, in line with McMahan’s view, individuals must indeed take responsibility for their actions, but \( \text{contra} \) McMahan in doing so they should also acknowledge that to the extent that they are acting as members of a legitimate state, special normative reasons apply to them. These reasons should be factored in into their deliberation. The crucial question now is to explain how these reasons operate in their deliberation.

Following an idea articulated independently by Tony Honoré and Frederick Schauer, I will suggest that political obligation gives us “presumptive reasons” to obey the law. This means that when the political authority requires that we \( \varphi \) we do not merely acquire new moral reasons to \( \varphi \), reasons that we did not have before the directive was issued. By requiring us to \( \varphi \) the political authority creates something stronger, i.e. a presumption that our all-things-considered duty is to \( \varphi \). This means that unless particularly strong countervailing reasons are available, we should act on the assumption that our all-things-considered duty is to \( \varphi \). However, there will be cases in which strong countervailing reasons are indeed available, and in these cases we need to be alert and be ready to reassess what our all-things-considered duty is. Depending on the circumstances, it might be that our all things considered duty is to not-\( \varphi \).

Thus, the existence of a prima facie duty to obey the law does make a significant difference as to what we ought to do. The existence of this duty, as suggested by Honoré,
shifts the burden of proof: absent the duty, I would have no reason to drive at no more than 20 miles per hour in Oxford’s city center, unless I can think of good reasons to drive so slow (perhaps I am aware that I am not a good driver, or tonight it’s particularly foggy). Whereas once the duty is in place, I have moral reasons to drive at no more than 20 miles per hour, unless I can think of good reasons why I should drive faster (as in the case when I am taking someone to the hospital).

This is not the place for an extensive defence of the model of “presumptive reasons”. Its main virtue, however, is that it provides an intuitively convincing account of the special force of authoritative directives, while avoiding at the same time a number of problems that afflict its main competitor, namely Raz’s model of “exclusionary reasons”. To see this, consider again the case of the directives issued by doctors to nurses. We have seen that if nurses were to always verify whether what doctors ask them to do is indeed in the interest of the patients, hospitals’ efficiency would be severely compromised, as such efficiency largely depends precisely on the capacity of doctors to rely on the fact that their directives will not be constantly re-assessed. For this reason, nurses should normally act on the assumption that their all-things-considered duty is to act as directed. However, the model of presumptive reasons can account for the fact that when nurses have sufficient reasons to believe that what they are asked to do will severely harm the patients (for example, when they are confident that the doctor has failed to pay sufficient attention to an allergy of the patient) their all-things-considered duty is to disobey.

The model of exclusionary reason, by contrast, cannot account for the fact that disobedience is justified in this case. For according to this model, authoritative directives in addition to giving us reasons to act as required, also give us reasons to refrain from acting on competing reasons. More precisely, as long as the directives fall within the scope of the authority, the reasons provided by them will exclude any “underlying reasons” (i.e. any reasons that the authority had the power to consider in issuing the directives) from being balanced against them. In our example, as long as doctors’ directives fall within the scope of their authority, the reasons provided to nurses by them

44 This is in line with the primary legal usage of the term “prima facie”, which denotes the amount of evidence necessary to establish the case of the plaintiff (or of the prosecution). If the plaintiff or the prosecution have brought evidence that amounts to a prima facie case, then the defendant will prevail only if she overcomes that evidence (or presents a defense); Frederick Schauer, Playing by the Rules, 1991, p. 114.


46 [Find example about soldier commanded to move track in MoF] Extensive discussions of this objection can be found in Fredrick Schauer, Playing by the Rules, esp. pp. 88–93; Noam Gur “Legal Directives in the Realm of Practical Reasons”, American Journal of Jurisprudence.
will exclude any “underlying reasons” (i.e. any reasons that doctors had the power to consider in issuing the directives) from being balanced against them.

If we believe that in cases such as the one just described, the reasons provided by the authority can be occasionally overridden by their underlying reasons (at least when the latter are particularly compelling), we should abandon the model of exclusionary reason in favour of the model of presumptive reasons. And once we adopt the latter, we should analyze the question of the duty to obey the order to fight as follows: when citizens of legitimate states are required to fight a war, they acquire a prima facie moral obligation to obey. Having this obligation is something more than simply having some moral reasons to fight. Citizens now have a presumptive duty to fight. However, this presumption can be rebutted if they have a stronger duty not to fight. Since fighting unjust wars involves killing innocent persons, the presumption is likely to be overridden in this case.47

Two clarifications are now in order. Firstly, it is worth stressing that “presumptive reasons” are normative reasons and not epistemic reasons. The point is not that since the authority is more likely to individuate morally correct courses of actions, once the authority requires that we \( \phi \), we thereby acquire presumptive reasons to believe that \( \phi \) is what we have a duty to do (reasons which can be then overridden if we have access to other epistemic reasons that rebut this presumption). As we have seen, political authorities cannot perform their functions by providing us with epistemic reasons (i.e. reasons to believe), but only by creating normative reasons (i.e. new moral reasons for action). To say that these reasons are presumptive is to say that their normative force is such as to shift the burden of proof: once the authority requires that we \( \phi \), \( \phi \)-ing becomes the default mandatory conduct. Our normative situation drastically changes because while before the order was issued we were at liberty of not \( \phi \)-ing, unless special reasons to \( \phi \) arised, we are not under a duty to \( \phi \), unless special reasons to non-\( \phi \) arise. In other words, when the authority requires that we \( \phi \), all things being equals our all-things-considered duty is to \( \phi \). But things are not always equal, and when they are not, we must be ready to reconsider what our duty is.

Secondly, I want to stress an important difference between the way in which Schauer and I characterize this presumption. According to Schauer, we should routinely obey the law while keeping an eye open to verify that our duty to obey is not being overridden. What he offers is “the idea of a casual look, a glimpse, a peek, a preliminary check, pursuant to which a decisionmaker follows the recognized rule unless some other factor overtly intrudes on her decisionmaking process. Implicit in [this view] is a phenomenology such that the decisionmaker is open to the possibility of the presumption  

47 I leave aside here complications related to the fact that segments of an unjust war can be just, and thus we might have a duty to fight those sections of the war. These complications do not affect the thrust of my view, although they will call for more complex assessments of what our all-things-considered duty is. For example, after having established that my state is pursuing an unjust cause and that, therefore, the presumption in favour of obeying the order to fight has been rebutted, I might realize that there are reasons to fight a segment of it.
being overcome, but does not actively pursue it, or can do a quick check short of a thorough inquiry”. 48

While broadly in agreement with this view, I contend that it should be amended as follows: In those areas of decision making in which we have reason to believe that: a) the authority is particularly likely to make mistakes; and b) these mistakes would lead to the perpetration of serious injustice; something more than a “glimpse” or a quick check is in order. When these two conditions are met, we have a duty to actively investigate whether there are any countervailing reasons strong enough to justify disobedience. Indeed, the amount of scrutiny that should be devoted to assess the justification of disobedience is directly proportional to the likelihood of mistakes being made by the authority and the seriousness of the injustice that would follow.

This is why above I have suggested that we have a duty to do all we can to assess the justice of any war we are asked to fight. For a) there are good reasons to believe that states are often prone to mistakes in assessing the justice of their cause (mainly because in making these assessments they are often biased in favour of their own interests), 49 and b) when unjust wars are waged, profound injustices are bound to be perpetrated (to the extent that they involve the killing of innocents). It might be objected here that requiring that we do all we can to assess the justice of the war we are asked to fight is too demanding. But this is one of those cases in which we should expect morality to be demanding. Given a) and b), our duty to make sure that we are not fighting an unjust war is certainly one of the strongest we have as moral agents.

6) An Objection

Before concluding, I must consider an objection that might be moved to the view I have outlined. I’ve repeatedly stressed that typically our duty not to contribute to the killing of innocents will override our duty to obey the order to fight an unjust war. To this it might be objected that if the state gives us genuine normative reasons to fight, surely there must be some conceivable case in which these reasons will tip the balance in favour of fighting an unjust war. If so, my view seems unacceptable: How could the duty to obey the law ever override the duty not to contribute to the killing of innocents? If, on the other hand, there is no conceivable case in which the former overrides the latter, then my view seems to be ultimately no different from McMahan’s.

The first horn of the dilemma can be easily dealt with: there is nothing incoherent in saying that the duty not to contribute to the killing of innocents always overrides the duty to obey the law. Most of the obligations we can imagine to incur, after all, are similar to the duty to obey the law in this respect. Nurses’ duty to obey doctors is always

48 Schauer, “Rules and the Rule of Law”, 677
49 See the arguments by McMahan…
overridden by their duty not to administer medications that will kill the patients; the duty to return things I borrowed from you is always overridden by my duty not to provide you with deadly weapons (so if I know that you are planning to use the baseball bat I’m about to return you to assault someone my all-things-considered duty is not to do so); the contractual duty of a demolition company’s employee to blow a building is always overridden by the duty not to kill occupants who refuse to move. The fact that the duty to obey the doctors, to return borrowed items, or to fulfill contractual obligations is regularly overridden by the duty not to contribute to the killing of innocents does not cast any doubts on the existence of these duties. Why should it cast any doubts on the existence of a duty to obey the law of a legitimate state?

But what is the point of stressing the existence of the duty to obey the law in the context of just war theory, we might ask, if this duty is always overridden? Why not simply say that we always have duty not to fight unjust wars, as McMahan does? One reason, of course, is philosophical accuracy. One of the things we are interested in, as philosophers, is having an account of the morality of war that provides an accurate picture of the different moral reasons at stake in the decision to fight. Since McMahan’s view does not account for the fact that receiving the order to fight an unjust war by a legitimate state (acting in good faith) does give us some reasons to fight, and that these reasons will then have to be weighed against the reasons that we have not to fight, we should reject his view in favour of one that correctly represent all the reasons at stake.

This, however, is not the only reason to adopt my view. Although McMahan’s theory and the one I am suggesting do not offer different answers to the question of when we have an all-things-considered duty not to fight, they offer very different answers to the question of how we should deliberate about whether we have a duty to fight, and therefore also to the question of when we can be blamed for taking part in unjust wars. As to the question of deliberation, whereas according to McMahan, we should presume that our duty is not to fight unless we gather enough evidence in support of the conclusion that the war is just, according to my view when a legitimate state orders us to fight we should presume that our duty is to fight unless we gather enough evidence in support of the conclusion that the war is unjust. Just like nurses should disobey doctors’ directive only when they are sufficiently sure that otherwise they would seriously harm the patient, citizens should disobey the order to fight of a legitimate state only when they are sufficiently sure that the war they are asked to fight is unjust. If combatants are unable to reach a sufficient level of certainty, they should assume that their obligation is to fight.

This is because when we move from the question of what we have most reasons to do given the way things are (i.e. what is right “in the fact relative sense”) to the question of how we should act given the evidence available to us (i.e. what is right in the “evidence

50 See above, p. 2
51 [Check whether McMahan formulates his view in terms of belief-relative wrongfulness or in terms of evidence-relative wrongfulness.]
relative sense”), inevitably epistemic considerations enter into the picture. Obeying the order to fight a war is wrong in the fact-relative sense if the normative reasons that we have not to fight (grounded in the duty not to kill innocents) override the normative reasons we have to fight (grounded in our duty to obey the law); but it’s wrong in the evidence-relative sense only if, given the evidence available to us, we ought to believe that the normative reasons we have not to fight do indeed override the normative reasons we have to fight.

As we have seen, McMahan and I give very different answers to the question of when we should believe that we have such reasons. This is of crucial importance for the further question of when citizens can be blamed for fighting an unjust war. In blaming someone we should not be looking at whether what she did was wrong in the fact-relative sense, but rather at whether it was wrong in the evidence-relative sense. For we should not blame someone for doing what, given the evidence available to her, she had reason to believe was not wrong. At the very least, the agent will be excused in this case. Now, given that McMahan’s view and mine offer different answers to the question of when obeying the order to fight would be unjust in the evidence-relative sense, they also offer different answers to the question of when citizens can be blamed for accepting to fight. According to McMahan, citizens are blameworthy if they fight when there isn’t sufficient evidence in support of the conclusion that the war is just. According to my view, they are only blameworthy if they fight when there is sufficient evidence that the war is unjust. As long as they do all they can to investigate the justice of the war, they are not blameworthy for fighting while lacking sufficient evidence that the war is just. In other words, although it’s always wrong to fight an unjust war, we cannot be blamed for fighting if we did all we could to figure out whether it was unjust.

6) Conclusion

In this paper I have offered a new version of the “political argument for the right to fight.” I have suggested that legitimate states preform crucially important functions, which are necessary in order to avoid the dangers typical of the state of nature. However, states can perform these functions only if they have the moral power to impose prima facie moral obligations on their subjects, a power that does not disappear when states make honest mistakes. A prima facie obligation is always defeasible, but it does create a presumption that our all things considered duty is to act as required. This is why when a legitimate state commands us to fight, we are in very different position from the one described by McMahan. According to McMahan, we should presume that our duty is not to fight unless we are sufficiently sure that the war is just; whereas according to the view

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52 For the distinction between the “fact-relative” and the “evidence-relative” sense of right and wrong, see Parfit, *On What Matters*, p.
defended here, when a legitimate state commands us to fight we should presume that our duty is to fight unless we are sufficiently sure that the war is unjust.

However, my view sides with McMahan in arguing that we do have a duty to investigate whether the war we are asked to fight is unjust (contra Walzer and Estlund). Our duty is not only to disobey if we have sufficient reasons to believe that the war we are asked to fight is unjust, but also to do all we can to find out whether the war is unjust. Acknowledging the role played by political obligation in the moral deliberation of citizens commits us to the view that they have presumptive reasons to act as ordered; it does not commit us to the view that they should never question the order they receive. Reasonable just states are not immune from making mistakes, and in the case of war, these mistakes will normally take the form of serious injustices, as they will involve the killing of innocents. We do have a duty to make sure that we don’t play a role in these injustices.

This view accounts for the two desiderata spelled out at the outset: it is sensitive to an important dimension of our practical life, namely the obligations that we have qua members of legitimate states, while acknowledging at the same time that the justice of the cause also makes a difference as to whether we can permissibly fight. As such, it avoids the main weaknesses of the positions defended by Walzer and McMahan. In addition, the view provides an account of the two insights identified by Estlund: it explains why we are under a prima facie duty to obey the order to fight an unjust war only when the decisions to enter the war is the product of an “honest mistake” (a state that intentionally wages unjust wars would lose its legitimacy thereby losing the power to impose any moral obligation on its subjects); and it also explains why there are cases in which our all-things-considered duty is to disobey, despite the fact that the order to fight comes from a legitimate political authority that is making a “honest mistake.” In light of this, I contend that the view defended here provides a promising framework within which to think about the morality of war.