

# Can Soldiers Refuse to Fight? The Limitations of Just War Theory

Written by Elzanne Bester

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ELZANNE BESTER, SEP 1 2019

Justin Colby deserted the US military due to his belief that the war in Iraq was unjust. “The army did a lot of good things for me. It taught me responsibility. But I won’t bite my tongue anymore and continue doing something I think is wrong.”[1] Colby is deemed a deserter, having refused to return to the war in Iraq, a war he no longer believed to be just. His case represents one of 3,101 US soldiers who refused to fight in the US Coalition in Iraq between 2005 and 2006 alone.[2] Thus representing a growing phenomenon for active military personnel as they act on their moral agency by refusing to fight. The alternative course of action is to apply for conscientious objection status. However, applicants face a steep burden of proof demonstrating “firm, fixed and sincere objection to participation in the war in any form or the bearing of arms, by reason of religious training and belief.”[3] From 2003-2005, the US approval rate was just over fifty per cent.[4] A core dilemma for combatants is that there is no option for selective conscientious objection; a refusal to fight on the grounds of “political, philosophical or sociological beliefs,”[5] permitting the unwillingness to fight on moral grounds. Due to restricted legal avenues and lack of rights associated with military refusal, combatants are left with no other choice but to desert.

By focusing on the notion of combatants’ right to refuse wars which they deem unjust, this essay will challenge the ethics of just war scholarship using a revisionist framework, effectively determining the extent to which soldiers have the right to be held morally accountable for their participation in an unjust war and, further, have the right to refuse. The first section will explore the justifications of orthodox just war theory and the reasons why combatants under just war theory are denied the right to the moral agency to determine the justness of war. The second section will examine the revisionist justification for the reconciliation of just war principles, reinstating moral agency in combatants. The third section will use the case study of the Second Gulf War, led by the US coalition, to assess, first, whether this war satisfied the just war doctrine and, second, whether soldiers had an obligation as moral agents to evaluate its failures and refuse to fight. The final section will explore the hierarchy of moral responsibility, concluding that if moral responsibility is not accounted for in the higher tiers of a military command, soldiers have a moral obligation to apply their moral agency in warfare.

### Orthodox and Revisionist Just War Theory

The Just war doctrine sets out robust constraints with the objective of preventing unjust wars and unjust conduct within them. This doctrine has created the ethical parameters around the justness of warfare, as the permissibility of conduct in combat through the two fundamental principles: ‘jus in bello’— permissible conduct in warfare—and ‘jus ad bellum’ —the ethical justification of pursuing war.[6] Such principles navigate complex moral dilemmas and effectively determine the orthodox ethics of war. Jus ad bellum requires, first, a just cause for resorting to war.[7] Second, the necessity for right intent, internationally set out by the United National Security Council as peace and security.[8] Third, last resort, being a reasonable belief that no other option is ethically feasible. Finally, proportionality, whereby the harm caused by going to war outweighs the harm of doing nothing.[9] Jus in bello distinguishes combatants from non-combatants and those hors de combat, deeming combatants morally equal in warfare and requiring the application of proportionality and discrimination as the necessary criteria to determine the permissibility of war conduct.[10] The theoretical separation of the two just war principles regulates ethical conduct regardless of whether a war is deemed just, to protect combatants and non-combatants within an armed conflict.[11]

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Further, this separation denies the moral agency of combatants, restricting their ability to assess the justness of war, focusing solely on their ethical conduct in it.

## Restricted Moral Agency

A leading proponent of the Just War theory, Michael Walzer, argues that soldiers must remain immune to moral responsibility outside the scope of *jus in bello*,<sup>[12]</sup> deeming this a necessary feature of all warfare—that combatants remain instruments of war, not the agents of them, and that moral responsibility and accountability lay with military commanders.<sup>[13]</sup> “We regard soldiers under orders as men whose acts are not entirely their own and whose liability for what they do is somehow diminished.”<sup>[14]</sup> This distinction holds that soldiers are either required to obey lawful orders or refuse those orders which violate *jus in bello*, the latter representing the mechanism by which combatants can refuse to fight—combat which breaks *jus in bello* principles. To this end, soldiers have a moral responsibility to disobey military orders which go against the *jus in bello* criteria of proportionality and discrimination. Further, Walzer holds combatants morally accountable for violations in *jus in bello*, for those who have no grounds to claim ignorance or duress.<sup>[15]</sup> This restricted moral agency prevents soldiers from assessing the justness of the war in which they fight and prevents their right of refusal on such grounds, resulting in desertion as the only recourse for combatants to apply complete moral agency.

## Complete Moral Agency

This theoretical separation has been challenged by just war revisionists who propose the reconciliation of just war principles to ensure soldiers retain full moral agency in warfare. “This means that we must stop reassuring soldiers that they act permissibly when they fight in an unjust war, provided that they conduct themselves honourably on the battlefield by fighting in accordance with the rules of engagement.”<sup>[16]</sup> Revisionist theorist Jeff McMahan further advances the claim of moral agency by extrapolating two core rationales. First, as soldiers, those who fight have a moral obligation to consider the justness of the war in which they fight. Second, on the grounds of *jus ad bellum*, combatants have a right to refuse to fight in a war which is deemed unjust. “Their vocation is not only morally important but also morally perilous; they must seek to understand the moral constraints by which it’s governed.”<sup>[17]</sup> By applying this moral judgement, McMahan distinguishes ‘just soldiers’ from ‘unjust soldiers’, arguing that those who fight a just war remain morally innocent.<sup>[18]</sup> McMahan further contends that the military has a moral imperative to educate combatants on the ethics of warfare, and not only train them to fight. Such moral education would equip combatants with the means to judge whether their war is just. While advocating for a higher degree of combatant education, McMahan does not deny the existing degree of capacity and rationality within soldiers to apply this moral judgement.<sup>[19]</sup>

This revisionist approach to moral agency changes the scope of their moral responsibility in warfare, encouraging a necessary degree of caution when participating in a war which cannot satisfy the *jus ad bellum* criteria. This moral agency, therefore, emancipates combatants from their status as instruments of warfare, by protecting their right to refuse to fight in an unjust war based on the *jus ad bellum* criteria, not only on the ground of violations in *jus in bello*. McMahan’s revisionist argument postulates a greater obligation to the higher moral good; being a just cause, than a combatant’s obedience to authority and adherence to the rules of engagement. “We must insist that they too recognize their own moral autonomy and abandon the comforting fiction that all responsibility for acts they do in obedience to commands lies with those who command them, so that it is only when they disobey, or when they breach the norms governing their professional action as warriors, that they become responsible for wrongdoing.”<sup>[20]</sup>

## Combatants’ Moral Inequality

Walzer provides three distinct justifications for combatant’s immunity from *jus ad bellum*, recognised through the theoretical separation of the just war principles. First, by claiming combatants to be analogous to boxers, Walzer argues that combatants retain moral equality on the battlefield. Like boxers, combatants have consented to participate in combat and thus have given up their rights to not being harmed. Further, their lack of agency to determine warfare make them equal. “These human instruments ... are ‘poor sods, just like me’, trapped in a war they didn’t make. I find in them my moral equals.”<sup>[21]</sup> Finally, due to the relative symmetry of combatants in warfare and

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the moral ambiguity of their just cause, they should be deemed moral equals. McMahan contests this consent model as, first, combatants who consent to fight, do not agree to be killed. Second, by consenting to war, combatants have not universally consented to all further warfare. Such universal consent implies a contractual commitment to combatant status without recourse to challenging their participation despite changes in the moral nature of war.[22] Therefore consent should be dynamic to represent the necessary reassessment of jus ad bellum required by combatants during war.[23] McMahan further refutes the notion of the moral equality of combatants, determining that the cause for which they fight, distinguishes just soldiers from unjust combatants, rendering those who fight in an unjust war morally unequal as they have no legitimate targets.[24] Further, while Walzer claims that “the doctrine of the moral equality of combatants holds that combatants aren’t responsible for whether their war is just,”[25] McMahan argues that moral responsibility cannot be alienated from a combatant and their ability to apply moral judgement.

## Commitment to an Unjust Institution

Second, orthodox just war theory prevents soldiers’ refusal to fight on the grounds of jus ad bellum, effectively preserving their moral immunity, due to the notion of institutional commitment. Combatants retaining their moral agency would jeopardise the stability of the military institutional framework, an institution to which they have a moral duty.[26] Recognising this debate, Frowe notes that “combatants also have a moral duty to follow orders. This moral duty arises from their obligation to their institution: they have committed themselves to fight for the military, and morality requires them to fulfil this commitment.”[27] Using the analogy of the criminal justice system, Walzer renders obedience to a just institution fundamental despite isolated cases of injustice.[28] McMahan renders this analogy objectionable, as it first assumes that the institution is in and of itself, inherently just and incorruptible. Second, it assumes those in public office don’t pursue war for private or instrumental gain. Third, McMahan argues that due to the fiscal and human costs of war being significantly higher than the consequences of isolated injustices within the criminal justice system, those who participate in war should not, under the pretext of stability, obey an unjust institution without question.[29] Preventing a mechanism for combatant refusal in unjust wars reinforces the continuation of war by lowering the accountability necessary to uphold jus ad bellum. Therefore, civilian commanders, who are not accountable to either populace or those who they send to fight, have the option of determining the scope and application of jus ad bellum, with the ability to justify an unjust war. So, combatants must remain morally accountable for their participation as agents of warfare, not instruments of them.

## Moral Consistency

Finally, under jus in bello principles, Walzer reduces combatant moral agency by invoking unquestionable obedience of soldiers to their higher chains of command. This is due to their invincible ignorance; where lack of crucial information conferred to them prevents their ability to determine the justness of armed conflict. Such ignorance, therefore transfers the moral responsibility from soldiers to their superiors, according to Walzer. “The moral responsibility is clear, and it cannot be located anywhere else than in the office of commander.”[30] Jeff Montrose encapsulates this notion by noting that “Soldiers remain objectively ignorant and, as such, can only hope that their cause is formally just. In the end, they remain...immune from the guilt of an unjust war.”[31] However, despite the recognition of this debate, Montrose refutes this claim on the grounds of moral consistency, whereby a combatant’s moral responsibility under jus in bello confers the same obligation under jus ad bellum.[32] Therefore a combatant’s moral judgement and responsibility can never be replaced by the claim of ignorance. This supports the Kantian model of ethics, whereby humans remain rational actors, who cannot be degraded to instruments of warfare.[33] Jeff McMahan concurs with this notion, arguing that jus ad bellum can be determined with moral sense and education into the ethics of war, so much so that the reasonable combatant should engage with jus ad bellum regardless of their rank and has sufficient information to determine the justness of war.[34] Jeff McMahan further claims that such moral agency is feasible due to the limited amount of analytical skill or just war knowledge required to conduct this assessment of justness of war.[35] Ellner et al. further disregards the concept of invincible ignorance on similar grounds, noting that due to sufficient education and access to relevant information within the public domain, combatants on average cannot rely on the excuse of ignorance for their participation in an unjust war.[36] “We must cease to regard them as mere instruments or automata and recognise that they are morally autonomous and therefore morally responsible agents.”[37]

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By refuting the orthodox claims of moral equality, institutional commitment and invincible ignorance, McMahan revises the just war theory to provide the appropriate mechanism for individual combatants to apply complete moral agency. By conducting a practical evaluation of this theoretical debate, the next section will assess whether the war in Iraq satisfied the just war doctrine and second, whether soldiers had an obligation as moral agents to evaluate its failures and refuse to fight.

## US Coalition in Iraq 2003

On the 20<sup>th</sup> of March, the US administration announced the commencement of Operation Iraqi Freedom in which the US-led coalition invaded Iraqi territory to disarm Iraq and oust the despot Saddam Hussein. The decision to launch a military intervention came after a final straw for some western democratic states, who believed that Saddam Hussein's regime possessed and was continuing their development of Weapons of Mass Destruction (WMD), despite the United Nations-sanctioned prohibition. The initial phases of the military operation were deemed a success, within three weeks having seized Baghdad and forced Saddam Hussein into hiding, effectively dismantling the thirty-year dictatorship in Iraq. On the 22<sup>nd</sup> of May, the UN passed Resolution 1483, which mandated the US coalition to maintain law and order within the region which was now experiencing a severe security vacuum after the toppling of Saddam Hussein's regime and his capture in December 2003.[38] The US invasion not only increased political instability and intensified uncertainty over the country's future but radicalised several insurgent groups who intensified their guerrilla warfare post-2003, with the support of fragmented and hostile regional actors. The security vacuum played a significant factor in increasing the instability within Iraq, promoting the continuation of insurgent guerrilla warfare and the creation of a civil war, a war within which the US coalition was now heavily involved.[39]

## The Unjust War in Iraq

"As the just war doctrine, forged from painful experience over the centuries, teaches, noble aspirations are not enough. War is so serious and deadly an occupation that the just war tradition sets the tests for a just war at a high level. Against those high standards, the Second Gulf War is found to be wanting." [40] Under just war theory, the US invasion of Iraq did not fulfil the necessary just war criteria of *jus ad bellum* initially or as the war continued, therefore it represented an unjust war.[41] First, on the grounds of a just cause. While there was a reasonable belief in an imminent threat of WMD in Iraq, in the case of the US, there was strategic ambiguity as to the primary cause of invasion, confusing their 'just cause.'

Further 'just cause' required justification for a pre-emptive attack on the grounds of self-defence. On this basis, the US was unable to prove an immediate or grave threat and only raised their suspicion on it. Second, with the reports from the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) showing evidence of increased cooperation of the Iraqi government, the invasion was not the last resort.[42] The criteria of right intention might be satisfied, as the coalition's intent was Iraqi disarmament of WMD and protection of civilians. However, without authorisation from the United Nations Security Council, Operation Iraqi Freedom did not have the international consensus required to satisfy the criteria of legitimate authority. Finally, the requirements of proportionality under *jus ad bellum*, which measures whether or not the good achieved will outweigh the harm caused, effectively failed, due to the lack of rigorous considerations of the potential negative consequences of the invasion.[43] Furthermore, the lack of sufficient planning of appropriate post-conflict reconciliation and institution-building meant that the coalition failed on the grounds of *jus post bellum* proportionality also.[44]

## Moral Accountability Under *Jus in Bello*

According to orthodox just war theory, assessing the justness of the US coalition military intervention remained beyond the scope of soldiers and their commitment to combat in Iraq. Their only moral obligation was to ensure that *jus in bello* was satisfied, maintaining just conduct in warfare. While failures in this moral obligation would result in their moral accountability, maintaining an unjust war was never a notion to be questioned by combatants. The extent of moral accountability for soldiers in the Iraq war was attributed to those who violated *jus in bello* principles of proportionality and non-combatant immunity. For example, in 2003, at the Abu Ghraib Confinement Facility, US soldiers committed "sadistic, blatant, and wanton criminal abuses"[45] against Iraqi detainees, exhibiting violations in

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the jus in bello criteria of non-combatant immunity. Nine army soldiers were convicted for such war crimes.[46]

## Moral Immunity

Walzer further condemned the Iraq war based on violations of jus in bello proportionality and discrimination. Such violations served as evidence of a more significant systemic issue, the continuation of an unjust war. However, based on their invincible ignorance, moral equality and institutional commitment, combatants remained morally immune to moral accountability for their participation in such a war.[47] This chasm of moral agency demonstrates a profound contradiction in just war theory, whereby, the moral restrictions placed on combatant's agency to determine jus ad bellum contradicts the expectation of combatants' ethical agency in conduct. Therefore, this theoretical separation of just war principles demonstrates moral inconsistency.

Beyond the disproportional atrocities committed, jus in bello proportionality, which dictates that "the amount of destruction permitted in pursuit of a military objective must be proportionate to the importance of the objective,"[48] failed due to the rate of civilian casualties, those innocent of and effectively hors de combat.[49] Within the first year of the war, civilian casualties amounted to 12,133, significantly increasing to 29,525 in 2006 — the estimated total civilian casualties being between 183,669 – 206,273 according to the Iraq Body Count.[50] Under the doctrine of double effect, these deaths were deemed 'tragic' yet permissible, whereby military necessity and success of the mission outweighed the collateral damage caused.[51] However, due to the Iraq war failing the just war principle of jus ad bellum, the purpose itself was not just and could not justify the rate of non-combatant deaths. Further, Walzer criticised the US coalition on its failure to ensure moral equality in combat due to the reliance of airstrikes, missiles and bombs, effectively taking US combatants out of the line of fire. Such military tactics violated the doctrine of moral equality and failed jus in bello discrimination, as "justice in war requires our side to accept risks in order to provide the highest reasonable level of protection for civilians on the other side."[52] Both cases represented systemic failures of not only jus in bello proportionality and discrimination but also represented the systemic failure of the war itself. However, due to the theoretical separation of just war principles, such failures fell outside the scope of combatant accountability — combatants, who as instruments of war and not agents of them, were immune to such moral responsibility.

## Combatant Responsibility in an Unjust War

Revisionist scholars concur with Walzer's assessment that the war in Iraq was overall unjust. However, revisionists argue that combatants were not immune to moral responsibility for their participation in an unjust war on the grounds of moral equality, institutional commitment or invincible ignorance. Considered by McMahan as unjust soldiers, US combatants had no legitimate targets and were thus morally accountable for the deaths caused.[53] Revisionist scholars further criticised US combatants' obedience to what was widely considered an unjust war, arguing that soldiers had a greater responsibility to apply moral judgement before their continued participation in the Iraq war. Such evaluation did not fall beyond the scope of a rational agent. Finally, revisionist scholars applauded those labelled deserters for their commitment to a higher moral cause and their refusal to fight in a war deemed unjust. Soldiers such as Joshua Key, who deserted to Canada after serving for eight months in Iraq, a war which he believed was wrong, claiming that "I broke the rules because I had a conscience".[54] Or, similarly, like Sergeant Kevin Benderman, who, after seeing the horrors of war, wanted to apply for conscientious objection but was instead charged with desertion.[55] Such cases, for revisionists, represented the appropriate scope of moral agency, whereby soldiers applying jus ad bellum considered the war in Iraq unjust, and, upon such grounds, refused to fight.

The just war doctrine has legitimised and institutionalised the prevention of unjust war, not only unjust conduct within them. The right of refusal reinstates a moral obligation to all who participate in warfare, one which revisionists claim is a necessary condition of just war doctrine, a doctrine whose purpose has been damaged by the separation of just war principles. Due to the war in Iraq, failing both principles of jus ad bellum and jus in bello, McMahan expands the notion of conscientious objection, to that of "selective conscientious refusal to fight." [56] It becomes a notion whereby soldiers are compelled to understand the moral constraints placed on warfare, warfare to which they are not morally immune, and must exercise their moral agency and right to refuse participation in what is deemed an unjust war. Recognising the complexities of assessing whether or not a war is just places a higher moral responsibility on

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combatants to exercise caution. To this end, May Larry argues that “soldiers, and their leaders, should be very reluctant to engage in war since it is so hard to figure out whether any given war is a just war.”[57]

## Hierarchy of Moral Responsibility

The most compelling rationale for the absence of moral agency in soldiers and the concurrent limitations in their right of refusal relies on the just war notion of institutional stability.[58] To retain democratic legitimacy, combatants must uphold their institutional commitment, as those who decide to go to war must be civilian commanders voted into political office,[59] those democratically accountable to the people. Such accountability renders them the most appropriate to determine when to go to war, a decision which cannot be made on arbitrary grounds of combatant disposition or subjective justification.[60] Adhering to orthodox just war theory, Andrew Milburn argues that as democratic representatives, Congress should hold *jus ad bellum* rights; thus, it should hold the decision-making authority of whether to go to war. However, through addressing the current failures in the execution of the *jus ad bellum* function by the legislature, Milburn proposes an institutional transfer of moral responsibility to military officers, who have sworn a higher moral oath to the constitution, not an oath of obedience to civilian commanders.[61] This moral agency, he argues, should exist to extend the checks and balances required in light of the failings of the Congress to fulfil this role.[62] Echoing Walzer’s notion of responsibility, Milburn argues that military commanders have the capacity and responsibility to advise Congress on issues pertaining to unjust warfare, and can confer valuable information on the extent to which a war may not fulfil *jus ad bellum*. Further, they have a moral obligation to speak out against the case of unjust warfare. “The military professional plays a key role as a check and balance at the indistinct juncture between policy and military strategy... when faced with a moral dilemma, the military officer not only has grounds for dissent but also, if his code of ethics and oath of office so guide, has a duty to disobey”.[63]

This echoes McMahan’s revisionist claim by extending the right to determine *jus ad bellum* to military personnel while not disregarding Walzer’s notion of hierarchical responsibility. The nexus between orthodox and revisionist just war lies in the extent to which the hierarchy of responsibility exists. As Jeff Montrose postulates, “This responsibility to act according to conscience is not limited to the lowest private on the battlefield. It also applies across all levels of the military hierarchy.”[64] Concurring with this notion, Miller recognises the varying degrees of responsibility and ignorance within the military hierarchy. To this end, the degree to which military officers should be held morally responsible is higher than that of a young inexperienced combatant, due to the comparative inexperience on the part of the soldier.[65]

Upon assessing the two just war debates, this essay draws upon this hierarchy of responsibility to examine the extent to which soldiers should have the right to moral agency. To bridge the chasm of agency, this essay argues that combatants should exercise their moral agency when the moral responsibility to adhere to *jus ad bellum* is not fulfilled by their superiors. The chain of command, therefore, represents a hierarchy of decision-making and presents a legitimate mechanism by which moral agency should be executed (Refer to Figure 1: Pyramid of Moral Responsibility). A lack of moral authority demonstrated within the chain of command to apply sufficient moral agency gives combatants the right and moral obligation to execute their moral agency and determine the justness of a war. This agency brings with it a moral responsibility to refuse to fight an unjust war due to: first, the need to act as the necessary check and balance on authority; second, their right to be morally accountable for their actions; and finally, their oath to the constitution, to uphold their morality in warfare overriding obedience in it. With evident failures in moral responsibility in the higher chain of command, combatants have the right to exercise “selective conscientious refusal,”[66] on the grounds of “political, philosophical or sociological beliefs”.[67] This would reclassify deserters as moral agents, those who have seen the horrors of war, understood the unjustness of the war and exercised their right to refuse.

## Conclusion

Through a closer examination of the orthodox just war theory, this essay has criticised the separation of just war principles, effectively challenging the notions of moral equality, institutional commitment and invincible ignorance, which renders soldiers immune to moral responsibility in an unjust war. Using a revisionist theoretical framework, this essay proposed the reconciliation of the just war principles to reinstate moral agency in soldiers and their right to

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selective conscientious refusal if the war in which they fight is unjust. Under just war theory, the war in Iraq was not only unjust but also failed on the grounds of *jus in bello*. Proponents of orthodox just war theory attributed moral accountability to combatants to *jus in bello*, rendering them immune to the systemic failures of the unjust war. While revisionists held combatants morally accountable for their participation in an unjust war, effectively reinstating their moral agency. To reconcile the division in just war theory, this essay proposed a Pyramid of Moral Responsibility (Refer to Figure 1) which requires the execution of combatants' moral agency through selective conscientious refusal, thus a transfer of moral responsibility, in light of the failures of *jus ad bellum* decision-making by their superiors.

The right to complete moral agency proposed in this essay would bring evident practical concerns, as noted by Jeff McMahan.[68] However, the focus of this essay has been to address the normative concerns of orthodox just war theory and to revise the current just war theory in light of its limitations. Due to the normativity of this argument, practical limitations and issues of this theory fall beyond the scope of this essay. Further research would be required to address such practical concerns, and to address how combatants' moral agency could be legitimately executed within the military institution, whereby selective conscientious refusal would not fall prey to corruption but legally exist within an institutional framework. Despite its limitations, this essay recognises that such moral agency will fundamentally change the nature of the military, effectively making it more challenging to go to war. However, this agency, therefore, fulfils the central purpose of the just war doctrine, to ensure the necessary restrictions to prevent unjust wars.

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