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Unjust Wars Fought Justly?

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I have reviewed this completed senior honors thesis with this student and certify that it is a project commensurate with honors level undergraduate research in this field.

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Comments (Optional):
Unjust Wars Fought Justly?

A Senior Project

May 1, 2003

David McNamara
Introduction. In this essay I will examine the possibility of an unjust war fought justly, focusing primarily on the relationship between soldiers and the leaders that govern them. At first glance, the notion of an unjust war fought justly seems inconsistent. We know that war is horrible. The costs of war are almost always great and are not worth enduring, except for the most necessary causes. Thus, we are extremely critical of leaders who rush into war, and acts of aggression are strongly discouraged.

We also have a desire to criticize the soldiers who participate in aggressive wars. It seems wrong to say that a Nazi soldier, even one that fought in strict accordance with the accepted rules of war, was justified in participating in World War II. Such a soldier may have killed Allied soldiers, who were clearly fighting on the just side of a war. There seems to be no way to defend these killings as justified. Certainly the overall immorality of the Nazi cause plays some role in the way we judge Nazi soldiers. Thus, we wish to group any action taken in support of such a wicked cause into a category of injustice.

However, some just war theorists, in particular Michael Walzer, appear to have left open the possibility that soldiers on the unjust side of a war can fight justly. This possibility results from theories dividing the “moral reality of war” into
two parts: jus ad bellum, justice in going to war, and jus in bello, justice in conducting war. Walzer explains that judgments made in these two areas "are logically independent" from one another.¹ Thus, a just war could be fought unjustly or an unjust war could be fought according to the rules of engagement.

The division of the justice of war into two separate categories has an intuitive appeal. It allows us to hold different parties responsible for the different parts of a war. This allows soldiers to see all wars, even unjust ones, as rule governed activities. With these rules, we aim to control the hell that is war, and minimize the unnecessary damage that comes from war. While I admit that the strict separation of war into jus ad bellum and jus in bello has some benefits, in this essay I will seek to expose a tension in Walzer's assertion that these two parts of war are logically independent. I begin with a brief account of jus ad bellum and jus in bello.

1. Jus ad bellum. States are judged based on the reasons they have for fighting. Thus, we say a war is either just or unjust. In The Law of Peoples, John Rawls provides a summary of the acceptable reasons for going to war. States can engage in war for individual or collective defense and to protect individuals from the most "egregious" human rights violations. According to modern just war

theory, states cannot justify wars by appealing solely to national interest. Thus, there are moral requirements for starting wars.\(^2\)

The question of what makes a war just is crucial to any complete discussion of just war theory. However, I do not want to deal with that question here. Instead, I want to focus solely on whether wars that have already been judged as unjust can be fought justly. Thus, I will proceed without adopting a particular view of jus ad bellum, and merely acknowledge that some wars can be judged as unjust. Nazi Germany seems to provide a sufficient example of a nation fighting an unjust war.

2. **Jus in bello.** Jus in bello refers to justice in war. It relates to the manner in which a war is conducted. According to Walzer, jus in bello requires us to make judgments “about the observance or violation of the customary and positive rules of engagement.”\(^3\) These rules specify who can be killed and under what circumstances they may be killed. In particular, these rules relate to the issues of noncombatant immunity and combatant vulnerability.

Noncombatant immunity plays a powerful role in Walzer’s account of jus in bello. He argues that noncombatants on all sides of any war should be immune

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\(^3\) See Walzer, *Just and Unjust Wars*, pp. 21.
from attacks, except in cases of "supreme emergency." In addition, soldiers should be willing to endure great personal risks in order to protect civilian lives. Likewise, military officials should choose strategies that minimize the loss of noncombatant lives, even if it means risking a greater number of combatant lives. 

Walzer and Rawls take two different approaches in justifying combatant vulnerability in war. According to Walzer, soldiers on either side of a war "have an equal right to kill." The idea that soldiers are mutually vulnerable to attack seems odd when you consider wars in which one side is clearly the aggressor. One might question why soldiers fighting on the just side of a war should be vulnerable to attack. Walzer accounts for the equal vulnerability of soldiers on opposing sides by claiming soldiers forfeit their rights to life and liberty in times of war. Rawls explains the mutual vulnerability of soldiers by arguing soldiers on each side have a right to self-defense, as soldiers on both sides are vulnerable to fatal attacks.

In his essay entitled "Just War and Human Rights," Rex Martin challenges both Walzer's and Rawls's arguments for the mutual vulnerability of soldiers. He argues that Walzer gives "no plausible reason for saying that combatants have

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4 See Walzer, Just and Unjust Wars, chapter 16
5 See Walzer, Just and Unjust Wars, pp. 305, 317.
6 See Walzer, Just and Unjust Wars, pp. 41.
7 See Walzer, Just and Unjust Wars, pp. 135-136.
forfeited their right to life and liberty.\(^9\) Thus, he claims, the argument lacks the force to overcome competing claims that humans cannot be stripped of their most fundamental rights.

Martin also criticizes Rawls's approach to combatant vulnerability. He argues that while Rawls's mutual self-defense argument holds up in cases where there is no clear aggressor, it does not justify mutual vulnerability when there is a clear aggressor. Rawls fails to provide adequate reasons explaining why soldiers fighting for aggressive states should have the same right to self-defense as those fighting on the defensive side of a war. Without the same right to self-defense, they have no right to attack soldiers fighting justly, who are the moral equivalent of noncombatants. As a result, an unjust war cannot be justly fought, since any unjust war would involve strikes against individuals who are invulnerable (morally speaking) to attack. Martin contends that because Rawls's argument could apply only to wars in which there is no clear aggressor, it fails to cover all cases of war, as Rawls had intended.\(^10\)

The challenges raised by Rex Martin lead to some important questions about whether the rules of war can be said to exist separate from the justice of a particular war, and whether the arguments of Walzer and Rawls in favor of combatant vulnerability are sound. It may be possible to build from his

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\(^10\) See Rex Martin, "Just War and Human Rights." pp. 5-7
arguments toward the conclusion that an unjust war cannot be justly fought, arguing there is no way to account for the vulnerability of soldiers fighting on the just side of a war. However, one might challenge Martin’s argument by asking why soldiers on the unjust side of a war should not be able to claim that they are acting in self-defense when they cannot be held responsible for knowing whether they are fighting for a just cause. 11 I will examine this objection to Martin’s argument in the following sections.

3. Soldiers and Officials. Walzer makes a clear distinction between soldiers and officials. According to his view, soldiers are not responsible for starting wars; instead “their responsibility is limited by the range of their own activity and authority.” 12 Responsibility for adhering to the rules of jus ad bellum lies strictly in the hands of the officials and leaders that make the formal declarations to go to war. Therefore soldiers are not vulnerable to criticism for violations in going to war. However, they can be held responsible for violations of jus in bello. This account of responsibility has a strong intuitive appeal. As Walzer argues, “aggression is first of all the work of political leaders.” 13 They decide which wars to fight and make formal declarations of war. Leaders may consult military advisors or the public in order to gain approval before going to war, but an individual soldier plays little or no role in determining whether a war should be fought. By holding soldiers and leaders responsible for different parts

11 Thank you to David Reidy for drawing my attention to this objection to Martin’s argument.
12 See Walzer, Just and Unjust Wars, pp. 304.
13 See Walzer, Just and Unjust Wars, pp. 289.
of war, Walzer gives support to his claim about the logical independence of jus ad bellum and jus in bello.

Aside from playing little or no role in the formal decision to declare war, soldiers face strong pressures to obey the decisions of their leaders. Soldiers are conditioned to follow orders. As citizens of a particular state, they are socialized to have faith in their nation and its leaders. In military training, they are taught the importance of following orders, even when they conflict with one's personal judgments. In extreme cases, soldiers can be forced to fight, threatened with death if they refuse. There seem to be clear examples of times in which soldiers play little or no part in the decision to fight in a war. Here we can imagine a young man, raised to believe in the greatness of his nation, who is drafted to fight on the unjust side of a war. As a citizen of Nation X, the soldier is exposed to propaganda explaining why his nation's cause is both necessary and just. If he feels any reluctance about fighting in the war, it is overcome by his nation's strict punishments, which include death, for those who avoid military service. It would be naïve to believe that no nations place such pressure on their soldiers to fight. In such a case, it would seem unfair to hold individual soldiers accountable for the justice of the wars in which they fight.

However, while there is reason to believe that officials bear the primary responsibility for going to war, it is not clear that they always bear sole responsibility. After all, officials do not fight wars; soldiers must comply with the
orders of their leaders for wars to take place. It is the military that ultimately fights the wars. While there is often great pressure to fight, there is reason to believe that lower-ranking military officials and soldiers are, at least, partially responsible for the wars in which they engage.

We can think of cases where a soldier plays some role in the decision to fight. Here we consider another hypothetical example. Imagine State V, which does not practice conscription, and wherein all soldiers have volunteered their services to the state. The state has an open media with the freedom to criticize the government, which allows informed citizens to make critical judgments on the state's military policies. Those who choose to enter into military service are given the option to leave at anytime, although there may be some financial and social pressures not to exit. In such a state, soldiers can abandon military service in order to avoid fighting in a war they believe to be unjust. In cases involving State V, it would be odd to say that soldiers are in no way responsible for the wars in which they fight. In such a nation, the soldiers hold a partial responsibility for choosing to enter a war. While there may not be a nation that provides the same level of freedom to its soldiers as State Y, we can think of nations wherein soldiers have, at least, partial freedom to make the decision of whether to fight (the modern-day United States may provide a sufficient example).
There may be reason to acknowledge varying levels of accountability with regard to the decision to go to war. We might acknowledge that while the primary responsibility for jus ad bellum belongs to leaders; soldiers and military officials hold a secondary responsibility. That secondary responsibility will vary from state-to-state and war-to-war, but still plays an important role in determining how we should judge those fighting on the unjust side of a war. In cases where soldiers possess a high degree of autonomy in determining which wars they will enter, it may be appropriate to condemn them for violations of jus ad bellum (or, at least, their participation in an unjust war). Thus, we might hold soldiers responsible for more than just their actions in war.

This conclusion provides a missing piece in Martin’s argument undermining the distinction between jus ad bellum and jus in bello, as it shows that there are some cases where soldiers are responsible for the decision to go to war. There appear to be two types of states in which it would be difficult to separate jus ad bellum from jus in bello. In the first group are states in which soldiers have the option to exit from military service with no serious costs and are capable of making informed moral decisions. The second group contains states where soldiers play an active role in the decision to go to war. If they are living within nations in either or both of these two groups, soldiers fighting on the unjust side of a war are morally responsible for their decision to fight.
One might argue that even if soldiers are held accountable for the decision to go to war, the distinction between jus ad bellum and jus in bello still holds. Such a person might argue that soldiers are held separately responsible for their roles as decision-makers and as fighters. If we see these roles as distinct, with separate moral obligations, it is difficult to make a logical connection between jus ad bellum and jus in bello. However, there are reasons to believe that a soldier's moral obligations cannot be separated in accordance with the distinction between these two parts of war. If we assume soldiers are single moral agents, then their actions on the battlefield are related to their original decision to go to war. When soldiers who played an active role in the decision to go to war engage in combat they act as unified moral agents, who cannot claim that they were merely performing their role as fighters. As voluntary participants in an unjust war, individual soldiers may be accurately viewed by enemy soldiers and outside parties as unjust aggressors with no moral right to self-defense. With no right to self-defense, soldiers of an unjust aggressor state have no moral basis for attacking enemy soldiers. Thus, it is impossible for these soldiers to fight an unjust war justly and the distinction between jus ad bellum and jus in bello seems undermined.\(^\text{14}\)

4. Unjust, but not responsible. While I have just presented a few arguments to the contrary, for now I will argue under the assumption that officials are solely responsible for jus ad bellum. This assumption does not solve the

\(^{14}\text{Thanks to David Reidy for helping me draw my argument back to the distinction between jus ad bellum and jus in bello.}\)
problem of whether an unjust war can be fought justly. It is one thing to say that
an individual (a soldier) is not accountable for an action (fighting on an unjust
side of a war). It is something different to say that individual is acting justly.
Take for example an insane individual who commits a murder. Because the
individual is incapable of distinguishing between right and wrong, we are
reluctant to hold them accountable for their crimes. Thus, we see their crimes as
excusable. They exist in a category separate from that of justifiable homicides
(such as murders committed in self-defense).

Justifiable homicides are those committed out of necessity. Those who kill
in self-defense are not acting out of aggression, as they are merely defending
their right to self-preservation. Thus, their actions are not condemned. On the
other hand, in the case of an insane individual's crime, the act is not justifiable.
The murder was not committed in self-defense, or to protect any basic human
right. The action itself is indefensible and is appropriately labeled an injustice.
However, we find it unfair to punish individuals who are incapable of
understanding why their actions are wrong. Instead, we attempt to provide them
with counseling, and keep them from being a further threat to society. Thus, we
say their crime is unjust, but excusable, and take steps to ensure it will not be
repeated.

While it may seem odd to compare the soldier fighting an unjust war to
someone who is legally insane, there are reasons to examine the analogy.
Walzer argues that the principles of jus ad bellum do not apply to soldiers. I have already discussed many of the reasons for this assertion: soldiers are socialized to follow orders and believe in their nation, they are taught to follow orders, and they may be forced to fight. Furthermore, it is often unclear which side of a war is just, as complex causes make it too difficult to determine an aggressor. Taking all of these factors into account, it begins to look as though soldiers are actually incapable of determining between right and wrong in going to war. Therefore, they seem to share a circumstance with those we judge to be legally insane, and we do not hold them accountable for violations of jus ad bellum.

On the other hand, we assume soldiers are capable of understanding the rules governing their actions in war. Therefore, soldiers and military officials can be held accountable for violations of jus in bello. As Walzer suggests, soldiers have responsibilities that are defined by “the range of their own activity and authority.”\textsuperscript{15} For example, we can examine the case of a soldier who, acting on his own, makes the decision to kill a civilian. Here the soldier could be condemned and punished for his actions (which we will assume are unjust), because he is responsible for his war crimes. However, when he kills an enemy soldier, we say his action is unjust (as he has killed an individual who was fighting for a just cause), but do not hold him accountable for the injustice.

\textsuperscript{15}See Walzer, \textit{Just and Unjust Wars}, pp. 304.
I argue that even with the separation between jus ad bellum and jus in bello, it is unlikely that an unjust war could be fought justly. Attempts to explain the paradox have, at best, shown that it is possible for an unjust war to be fought excusably. There may be an explanation of how an unjust war could be fought justly. However, it would take a powerful argument to explain how military actions taken in support of an unjust cause could be called just.

5. Implications. I now turn to the practical implications of the claim that the conduct of unjustly fighting soldiers may be excused rather than justified. Does this claim change the manner in which we should deal with individuals fighting in unjust wars? This new account of “unjust wars fought justly” seems compatible with the just war doctrines of both John Rawls and Michael Walzer.\textsuperscript{16} War theory remains divided into two parts, because we realize different parties are responsible for injustices in different parts of war. Thus, the manner in which we treat soldiers who fight unjust wars according to the rules of engagement need not deviate from that of Walzer or Rawls, with one possible exception. If we hold that the actions of all soldiers fighting in support of the unjust side of a war are unjust, there may be reasons to educate these soldiers to demonstrate

\textsuperscript{16} It would be naïve of me to assume that Walzer and Rawls do not already see accountability as playing the key role in distinguishing between jus ad bellum and jus in bello. Walzer seems reluctant to admit the possibility that an unjust war can be fought justly. When he begins to discuss the two “logically independent” parts of war, he mentions the possibility “for an unjust war to be fought strictly in accordance with the rules” (of war). Here he avoids any normative claims about the status of one who fights an unjust war according to the rules. Throughout the work, he mentions that soldiers are not accountable for justice in going to war, but never specifically says someone can fight an unjust war justly. However, I was unable to find a place in the work where he ruled out that possibility. See Just and Unjust Wars. pp. 21.
how they were misled.\textsuperscript{17} This education would need to be carried out very cautiously, if at all. It would require a victorious just nation, or an impartial outsider, to present information to the citizens of a defeated aggressor without arrogance or bias. I make this proposal with a great deal of skepticism, acknowledging that this plan for jus post bello may not be possible in the real world. There is certainly a risk that such a program would lead to further resentment between already hostile nations.

The idea that unjust wars can be, at best, fought excusably is not likely to drastically change contemporary just war theory. The possibility that soldiers can be held accountable for the wars they fight in may have a more radical impact.

If there are instances in which soldiers fighting justly in self-defense are not vulnerable (morally speaking) to attack, then there is reason to question why nations should always give priority to protecting the lives of civilians over the lives of their own soldiers. In certain instances, both justly fighting soldiers and civilians seem to have the same right to be free from attack. Walzer needs to give a stronger argument to show why the protection of civilian lives deserves priority in these cases.\textsuperscript{18}

\textsuperscript{17} To return to insane-murderer analogy, this education could serve the same purpose as therapy.

\textsuperscript{18} Once again, thank you to David Reidy for illustrating this feature of my argument.
I am reluctant to move away from the view that soldiers are not responsible for jus ad bellum. There are practical reasons to continue to judge soldiers solely by their actions in war. By holding soldiers accountable for only their actions in war, Walzer's just war doctrine gives soldiers on both sides of war incentives to follow a clear set of rules of engagement. It seems wrongheaded to believe that we could implement a system of jus ad bellum that would stop all nations from engaging in aggressive wars, or stop soldiers from fighting in them. Holding soldiers accountable for the wars in which they fight is not likely to keep many from fighting in unjust wars. In addition, I cannot imagine how we would enforce the rules of jus ad bellum if they pertained to soldiers. We would need a plan for punishing an entire army, and a method for separating cases in which soldiers should be held accountable for the wars they fight from those in which they should not be held accountable.

For now, let us assume that there is a way to hold certain soldiers (those who fail to meet the excusing conditions) responsible for the decision to go war. This change in just war theory would become more important as more states organize themselves and their militaries in ways that allow soldiers to play an informed role in the decision to go to war. As a matter of political theory, we should encourage states to organize themselves in a manner similar to State Y, where excusing conditions do not apply and soldiers are held responsible for their decision to go to war. In such states it would be essentially impossible to fight an unjust war justly. These states would most likely be disposed toward
peace, as individuals would be reluctant to go to war unless they were
completely sure of the justice of their cause.
Unjust Wars Fought Justly?

David McNamara

Introduction

At a glance, the notion of an unjust war fought justly seems inconsistent.

It seems wrong to say that a Nazi soldier, even one that fought according to the rules of war, was justified fighting in World War II.

So Why Am I Discussing this topic?

- Some just war theorists, in particular Michael Walzer, appear to have left open the possibility that soldiers on the unjust side of a war can fight justly.

But how?!?!?!?!?!

- Walzer divides war into three "logically independent" parts:
  - Jus ad bellum- Justice in going to war
  - Jus in bello- Justice in conducting war
  - Jus post bellum- Justice of post war settlements (I will not discuss this part)

Jus ad bellum

- States are judged based on the reasons they have for fighting.
- I will proceed without adopting a particular view of jus ad bellum, and merely assert that some wars can be judged as unjust (Nazis in World War II).

Jus in bello

Noncombatant

Immunity
- Soldiers should be willing to endure greater risks in order to protect civilian lives
- Officials should choose strategies that minimize civilian casualties.

Combatant

Vulnerability
- Walzer- "soldiers forfeit their rights to life and liberty in times of war."
- John Rawls- soldiers on each side of a war are "mutually vulnerable" to attacks.
Rex Martin’s Challenges

- Walzer gives "no plausible reason for saying that combatant have forfeited their right to life and liberty."
- Rawls fails to provide adequate reason explaining why soldiers fighting on the unjust side of a war have the same right to self-defense as those on the just side.

Soldiers and Officials

- According to Walzer, officials and leaders are solely responsible for starting wars.
- Soldiers are only held responsible for violations of jus in bello.

Are leaders and officials always “solely responsible” for the decision to go to war?

- Ultimately soldiers must comply with the orders of their leaders for wars to take place, but soldiers often face a great deal of pressure to comply.
- However, we can think of some cases where soldiers play some role in their individual decision to fight.

So maybe I didn’t win you over...

- While I have just presented an argument to the contrary, let us assume that leaders and officials are always solely for jus ad bellum.
- This assumption does not solve the problem of whether an unjust war can be fought justly.

Varying levels of accountability?

A legal analogy
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