Jus ad Bellum, Conscience, and the Oath of Office: The Problem of Selective Conscientious Objection in the United States Military

This paper explores an aspect of moral decision making that has not received the attention it deserves: selective conscientious objection to service in a specific war. American society in general, and the American military services in particular, distinguish clearly between persons who express a moral objection to serving in the armed forces and those who do not. Over time, federal legislation has provided for the protection of the freedom of conscience of individual citizens who refuse military service; especially those who object to the use of deadly force for political purposes. This protection has exempted such objectors from service in combat positions that require the use of deadly force, often requiring these objectors to serve the nation in a non-combatant capacity, either as members of the armed forces, or in a different capacity, performing some type of civil service to the nation. What has not been generally recognized, and has indeed continued to be punishable under the law, is the right to the selective objection to serve in the military on a conflict by conflict basis.

Recognition of a right to selective conscientious objection may have become more difficult after the adoption of the All-Volunteer Force in the United States. The logic of this argument flows from the fact that, since every member of U.S. military forces has volunteered for this duty freely (as specified in the oath of office taken by every service member upon induction) each volunteer has thus given up his or her right to object to service in a war or conflict, declared or undeclared, when he or she is so ordered by the chain of command. In other words, the decision to enlist or to accept a commission commits the person legally to serve in any way deemed proper under U.S. law. While this conclusion is entirely logical legal thinking, it does not necessarily follow that it is proper moral thinking inside the frame of reference of the idea of *jus ad bellum*—that is, under the idea that, in order to go to war, a particular war must be deemed to be just. Furthermore, what the leaders of a nation state may deem to be just may be so because their thinking is invested with personal views of what constitute the "national interest," an idea arising from the view that national policy must be driven by national interest. This idea does not carry any weight in the more stringent moral environment framed by the idea of *jus ad bellum.* Indeed, although this idea is now commonly accepted by many schools of foreign policy it was the very idea that made Machiavelli such a scandalous writer in his own time.

In the moral realm, the concept of *jus ad bellum* must meet certain specific well-known criteria. Failure to meet them would, as a minimum, constitute ample cause to doubt the legitimacy of deadly military action. Unless we adopt a legalistic and mechanistic mentality about morality it is impossible to accept that a free individual would abrogate his or her innate right to be and act as a free moral entity just by swearing an oath of induction to the state. This abrogation would negate the free moral agency expected, and even required, by members of the armed forces. The acceptance of such a mechanistic subordination of morality to legality upon induction into the military would be an affirmation of the infamous "Nuremberg Defense"—"I was just following orders."

In the light of the present conflicts which have been variously named "War on Terror," "The Long War," and various "operations" which were triggered by a diffusely defined and poorly focused moral outrage at the 9/11 Terrorist Attacks it is imperative to recognize the primacy of individual conscience. In attempting to silence all dissent the purportedly liberal democratic state runs the risk of descending to the level of those who have attacked it. The first step in such a process would be to deny individuals their moral autonomy. Even those who accept a utilitarian view of policy and who deny that the state has any claim to a moral purpose would be ill-served by attempting to claim authority over individual morality even on the somewhat pedestrian grounds that this would constitute a diminution of personal freedom. Thus, the right for selective conscientious objection, based on a careful evaluation of each war or proposed war by the moral conscience of an individual cannot be denied. This could cause potential turmoil in the military. But failure to acknowledge the primacy of conscience, particularly for a military that tries to describe itself as moral and that advocates "moral leadership" can only be done at great peril to this same moral claims.

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"I refuse to be party to an illegal and immoral war against people who did nothing to deserve our aggression. My oath of office is to protect and defend America's laws and its people. By refusing unlawful orders for an illegal war, I fulfill that oath today."
—Lieutenant Ehren K. Watada, US Army—

The Problem

This paper seeks to shed light on an aspect of moral decision-making that has not received the attention it deserves in military circles; namely, the idea of the legitimacy of *selective conscientious objection*—that is to say, not the objection to military service in the abstract as a requirement of conscience, but *the objection to serve in a specific war as a requirement of conscience.* American society in general, and the American military services in particular, distinguish clearly between persons who express a religious or moral objection to serving in the armed forces and those who do not.[1] Over time, federal legislation has provided for the protection of the freedom of conscience of individual citizens who refuse military service, especially for those who object to the use of deadly force for political purposes—a common definition of war. This protection has exempted some objectors from service in military forces or, alternatively, from service in combat positions that require the use of deadly force. However, in most cases, the nation does not exempt these citizens from national service entirely. Often, conscientious objectors will be required to serve the nation in a non-combatant capacity, either as members of the armed forces, or in a different capacity, performing some type of civil service to the nation.

This has not always been the case. Even a cursory review of historical precedents demonstrates that the recognition of the right to follow the dictates of individual conscience has come about only gradually and against much opposition. Indeed, there have been many people

who have suffered, ridicule, abuse, and imprisonment for their pacifist beliefs in this country.[2] Due to their efforts, and those of their advocates, today the United States has a well-established mechanism that allows conscientious objectors to follow the dictates of their conscience peacefully within the laws of the nation. What has not been generally recognized, and has indeed continued to be punished under the law, is the right to *selective objection;* in other words, the right to serve in the military on a *conflict by conflict basis according to the dictates of one's conscience.* This is a difficult problem because, as defined in current law and military regulations, the granting of conscientious objector status is an all or nothing proposition; either the person is against military service in general and/or killing in war in particular, or he/she has no such objections.[3] Furthermore, objections declared *a priori* before the outbreak of conflict have a better chance of being favorably considered that those declared *a posteriori* after a conflict is in progress. In addition, little provision is made for the reality that individuals and their moral consciences change and grow so that what may have been acceptable at a previous time may well become genuinely unacceptable later.

The issue of selective conscientious objection is relatively new compared to traditional objections to service in any war or to acting as a combatant in war. These traditional forms of conscientious objection arise from stable religious or philosophical positions that form part of a person's core beliefs and life stance. Indeed, prospective conscientious objectors must demonstrate that they have held and continue to hold such stable moral positions and are not merely refusing to serve out of cowardice or self-interest.[4] In contrast, selective conscientious objection is not an objection to war as such or to killing in war; rather, it is a position taken with respect to a specific war or conflict which is deemed to be ethically unacceptable or immoral by the individual—not the state.

Historical Background

While there have always been religious conscientious objectors in the United States the issue of selective conscientious objection came to the fore in the social upheavals resulting from the Vietnam War. The growing unpopularity of the war and the questionable moral authority of the South Vietnamese Government were issues that led some to freely declare against it. Many young Americans sympathized with the emerging postcolonial national liberation movements and saw the Viet Cong as idealized "freedom fighters." Others, most notably heavyweight champion Muhammad Ali, simply had no quarrel with the Vietnamese Communists. As he famously put it: "No Viet Cong ever called me nigger."[5] Ali's case became a *cause célèbre* for anti-war activists, civil rights activists, and others opposed to the war. He was suspended from professional boxing, stripped of his titles, and sanctioned, but his case was ultimately dismissed at the Supreme Court on a technicality.[6] I suspect that such artificial dismissals on legal technicalities have provided, and continue to provide a convenient means to side-step the real issues and avoid reaching a precedent-setting decision. Although he was the most famous selective objector, Ali was not the only one. Two other plaintiffs, Guy Gillette and Louis Negre had their claims to selective conscientious objection denied by the Supreme Court of the United States.[7] In both cases the primacy and autonomy of the individual conscience was denied based on rigid views of moral choice, legal categories, and utilitarian concerns. As we shall see, utilitarian concerns loom large in the U.S. military's concern that, if approved, selective conscientious objection, may pose serious organizational problems.

Enter the All-Volunteer Force

To complicate matters, the recognition of a right to selective conscientious objection may have become more difficult after the adoption of the All-Volunteer Force in the United States in 1973. The logic of this argument flows from the fact that, since every member of U.S. military forces has volunteered for this duty freely (as specified in the oath of office taken by every service member upon induction), each volunteer has thus given up his or her right to object to service in *any war or conflict, declared or undeclared,* when he or she is so ordered to participate in it by the chain of command. In other words, the decision to enlist or to accept a commission as an officer in the armed forces of the United States commits the person legally to serve in any way deemed proper under U.S. law. The language of the current oath of enlistment and oath of office for commissioned officers is as follows:[8]

"I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God." (Title 10, US Code; Act of 5 May 1960 replacing the wording first adopted in 1789, with amendment effective 5 October 1962).

"I, _____ (SSAN), having been appointed an officer in the Army of the United States, as indicated above in the grade of _____ do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic, that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office upon which I am about to enter; So help me God." (DA Form 71, 1 August 1959, for officers.)

While this conclusion is entirely logical *legal thinking,* it does not necessarily follow that it is *moral thinking*—even when thinking inside the frame of reference provided by the idea of *jus ad bellum*—; that is, under the idea that, in order to go to war, a particular war must be first

be deemed a *just war.* Furthermore, what the leaders of a nation-state may deem to be just may be so because their thinking is invested with personal views and biases of what constitute the "national interest," an idea arising from the view that national policy must be driven by national interest. However, as any moral philosopher or ethicist would readily admit, *national interest per se, is not a moral category* and thus decisions based on this idea do not carry any weight in the more stringent moral environment framed by the idea of *jus ad bellum.* Indeed, although the idea that the "national interest," however defined, is now commonly accepted by many schools of foreign policy, it cannot form the basis for an ethical argument. Indeed, it was this very idea—that the state and its leader could operate independently of moral considerations—that made Machiavelli such a controversial and even scandalous writer in his own time. Writing from within the context of a Christian society (Christendom) his ideas seemed at best amoral and at worse perverse to rulers who were concerned with preserving at least the *appearance,* if not necessarily the substance, of morality and justice in the context of war and peace. The contemporary world has no need for such niceties; although it is now customary in the West to invoke some humanitarian need, or the intent to preserve human rights, as a *casus belli.* The individual conscience, on the other hand, does not necessarily embrace an amoral world view and may require moral justifications for its actions. Thus, *for the conscientious individual who places moral imperatives and personal conscience above expedient or practical considerations the problem of whether or not a given situation justifies the decision to go to war is real and cannot be wished away or subsumed under either legal argumentation or the requirements of expediency.*

Granted, in today's globalized world, where there is no longer any universally recognized religious consensus it is not possible to argue from any single moral point of view—with the

possible exception of arguing from the concept of a natural morality derived from natural law.[9] But even the existence of this concept is not generally accepted. However, for the purposes of the present inquiry we will frame the problem within the bounds of traditional, i.e. Christian, Just War Theory—particularly within the framework provided by the concept of *jus ad bellum.* This is justifiable in light of the fact that despite many attempts to secularize the ideas behind Just War Theory, they have their philosophical roots and find their justification in Christian morality.[10] According to Just War Theory, the concept of *jus ad bellum* must meet certain specific well-known criteria.[11] Failure to meet them would, as a minimum, constitute ample cause to doubt the legitimacy of deadly military action.

Unless we adopt a legalistic and mechanistic mentality about morality it is impossible to accept that a free individual would abrogate his or her innate right to be and act as a free moral entity just by swearing an oath of induction to the state. This abrogation would also negate the free moral agency expected, and even required, by members of the United States' armed forces.[12] This represents a real problem for all those who advocate a moral, or at least a legal use of military force. Indeed, adherence to the concepts embodied in "The Law of War" requires the level of moral discernment possible only through the exercise of an independent moral agency capable forming judgment based on ethical reasoning. On the other hand, the current practice of subordinating morality to legality upon induction into the military—something which at first glance would seem to be a very convenient principle, one which would also fit nicely the requirements of political expediency—would, on careful examination, be tantamount to an affirmation of the infamous "Nuremberg Defense"—Eichmann's famous "I was just following orders" excuse for mass murder. In other words, through the performance of a mechanistic ritual, the individual conscience is bound to follow the orders of the current established government—*a*

government which by its very nature and constitution is not a moral entity. These orders, provided that they are legal, are then taken as a compelling moral imperative that excuses the individual, now reduced merely to an agent for executing orders, of any moral reflection and presumably of any moral responsibility *ad bellum.* This legalistic obedience to orders is not morally acceptable in most ethical and religious systems and has been discredited by international law in specific cases. However, this assumption is still at the root of the legal view that the state is the only competent authority to decide issues of *jus ad bellum.* Such an argument may be philosophically unsustainable. This is particularly the case when the state is a self-defined secular entity.

The discussion of the problem presented by the failure to recognize the legitimacy and even the necessity of the right to selective conscientious objection lead to the following conclusions:1) First, subsuming and subordinating the individual moral conscience to the decisions of a collective, impersonal, and necessarily amoral secular state does not respect the idea of the primacy of conscience as the foundation for individual human freedom as expressed through individual decision-making and purposeful action based on the moral judgment of conscience; 2) Abrogation of the validity of individual moral judgment based on an informed conscience works against the avowed necessity which the American military establishment places on the need for the judicious and purposeful use of force *in bello* as the moral situation and the legal framework provided by the Law of War and the specific rules of engagement require. In other words, *if* the judicious and purposeful use of force is taken as the foundation for the ethical (and lawful) conduct *in bello* and as a *sine qua non* for the responsible use of force, and *if* such moral judgment can only be produced by an informed moral conscience, then soldiers and officers can never be just the theoretical "instruments of the state" which is what they ideally

should be under the premises of the functional utilitarianism which governs their behavior *ad bellum.* Obviously, you cannot simultaneously have morally-informed soldiers who apply violence with purpose and discrimination *in bello* if you require them to be moral automatons *ad bellum.* This is because a practicing moral conscience cannot, by its very definition, be "turned off and on" at the convenience of the state. A working conscience, in this sense is analogous to a working intellect; that is, a person cannot anymore "turn off" his or her conscience just as she or he cannot decide "not to think." Therefore, it is logically inconsistent and practically impossible to restrict conscience to functioning *only* when judging situations *in bello* when its agency is not admitted when examining arguments *ad bellum.* Thus, just as the individual conscience must be allowed its fundamental freedom when examining the reasons and methods that are morally permissible *in bello;* it must also be able to exercise its moral function *ad bellum.*

In the light of the present conflicts which have been variously named "War on Terror," "The Long War," and various "operations" which were triggered by a diffusely defined and poorly focused moral outrage at the 9/11 Terrorist Attacks it is imperative to recognize the primacy of individual conscience to judge each specific moral situation on its own merits. In attempting to silence all dissent and even the discussion of what constitutes legitimate defensive war, the purportedly liberal democratic state runs the risk of descending to the level of those who have attacked it. The first step in such a process would be to deny individuals their moral autonomy. "Either you are with us or are with the enemy!"[13] Even those who accept a realist view of policy (using the word realist as a policy term derived from *Realpolitik*) and who deny that the state has any claim to a moral purpose would be ill-served by attempting to assert complete state authority over individual morality even on the somewhat pedestrian grounds that this would constitute a diminution of personal freedom.

An examination of the roots of personal morality, the avowed social contract in the part of the liberal democratic state to allow for freedom of conscience to its citizens, the need of military forces which claim subordination to civilian authority and moral legitimacy, all argue for a recognition of the right for selective conscientious objection, based on a careful evaluation of each war or proposed war by the moral conscience of an individual cannot be denied. Obviously, recognition of this right could cause potential turmoil within the state and even more so within the military establishment—at least until proper mechanisms are identified to deal with this. But failure to acknowledge the primacy of conscience, particularly for a military establishment that tries to describe itself as moral and that advocates "moral leadership" can only be done at great peril to its credibility and legitimacy and even more seriously, to the society it purports to serve, and to the causes it seeks to promote.

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[1] "Conscientious objection: A firm, fixed and sincere *objection to participation in war in any form* [Our emphasis.] or the bearing of arms, because of religious training and belief. Unless otherwise specified, the term 'conscientious objector' includes both 1-0 and 1-A-0 conscientious objectors." *a. Class 1-A-0 conscientious objector*. A member who, by reason of conscientious objection, sincerely objects to participation as a combatant in war in any form, but whose convictions are such as to permit military service in a noncombatant status. *B. Class 1-0 conscientious objector*. A member who, by reason of conscientious objection, sincerely objects to participation of any kind in war in any form. *Army Regulation 600-43 Personnel-General Conscientious Objection,* (Washington: Department of the Army, 2006), p. 27. http://armypubs.army.mil/epubs/pdf/r600_43.pdf Accessed 30 March 2015.

[2] A particularly striking case is that of Ben Salmon, a Roman Catholic, who refused to serve in WWI and wrote a very honest letter to President Woodrow Wilson explaining his reasons. His letter reads in part: the lowly Nazarene taught us the doctrine of non-resistance, and so convinced was He of the soundness of that doctrine that he sealed His belief with death on the cross. . . . This letter is not written in a contumelious spirit. But, when human law conflicts with Divine law, my duty is clear. Conscience, my infallible guide, impels me to tell you that prison, death, or both, are infinitely preferable to joining any branch of the Army." Salmon suffered greatly for his decision of conscience including, prison, solitary confinement, hard labor, and commitment to an insane asylum. His story is not atypical of conscientious objectors in the U.S.. http://www.catholicpeacefellowship.org/nextpage.asp?m=2524 Accessed 30 March 2015.

[3] AR 600-43 Conscientious Objection (21 August 2006) Section 1.5 Policy includes the following directive:

a. Personnel who qualify as conscientious objectors under this regulation will be classified as such, consistent with the effectiveness and efficiency of the Army. However, requests by personnel for qualification as a conscientious objector after entering military service will not be favorably considered when these requests are:

(4) *Based on objection to a certain war.* [Our emphasis.]

Department of the Army. *Conscientious Objection, AR 600-43*3, p. 1. http://armypubs.army.mil/epubs/pdf/r600_43.pdf Accessed 30 March 2015.

[4] "Conscientious objection: A firm, fixed and sincere objection to participation in war in any form or the bearing of arms, because of religious training and belief." AR 600-43, p. 27.

[5] "Why should they ask me to put on a uniform and go 10,000 miles from home and drop bombs and bullets on brown people in Vietnam while so-called Negro people in Louisville are treated like dogs and denied simple human rights? Man, I ain't got no quarrel with them Viet Cong. No Viet Cong ever called me nigger." http://www.bbc.com/sport/0/boxing/16146367 Accessed 30 March 2015.

[6] For a concise overview and full text of the Supreme Court decision on Muhammad Ali see http://www.aavw.org/protest/ali_alivus_abstract08.html Accessed 30 March 2015.

[7] For the text of the Gillette v. United States decision which was based on selective conscientious objection see http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=401&invol=437 Accessed 30 March 2015. For the text of the Gillette v. United States after it was consolidated with the Negre v. Larsen case see http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=401&invol=437 Accessed 30 March 2015.

[8] "US Army Center of Military History," http://www.history.army.mil/html/faq/oaths.html Accessed 26 March 2014.

[9] The concept of natural law has its roots in Graeco-Roman ideas of civic morality and later on Christian interpretations of the same. Since it is founded on premises which are part of the cultural context in which it arose it is not generally accepted in today's multicultural environment. However, many so-called human rights are derived from natural law even though this is not necessarily acknowledged. For an objective overview of the concept of natural law from the philosophical perspective see "The Natural Law Tradition in Ethics," *Stanford Encyclopedia of Philosophy*, 2011. http://plato.stanford.edu/entries/natural-law-ethics/

[10] For a thoughtful discussion of the history of the Just War Tradition, its Christian roots, and its applicability to the contemporary world see David D. Corey and J. Daryl Charles, *The Just War Tradition: An Introduction*, (Wilmington, Delaware: ISI Books, 2012).

[11] These criteria have been defined in classic Just War Theory as: just cause, right intention, proper authority and public declaration, last resort, probability of success, and proportionality. "Just war theory insists *all six* criteria must each be fulfilled for a particular declaration of war to be justified: it's all or no justification, so to speak. Just war theory is thus quite demanding, as of course it should be, given the gravity of its subject matter." "War," *Stanford Encyclopedia of Philosophy,* 2005. http://plato.stanford.edu/entries/war/ Accessed 30 March, 2015.

[12] An Army information paper written by the Center for the Army Profession and Ethic (CAPE) calls for "… Army Professionals to seek to discover the truth, decide what is right, and to demonstrate the *competence, character, and commitment* to act accordingly." Information Paper on FY 15-16 *America's Army—Our Profession* Theme, "Living the Army Ethic" written by Patrick A. Toffler and approved by COL Denton Knapp Jr. http://cape.army.mil/repository/aaop/education-and-training/CY13-AAOP-Info-Paper.pdf Accessed 30 March 2015.

[13] This is the famous ultimatum voiced by President George W. Bush to the nations of the world. Two examples of President Bush using this phrase are available at http://www.youtube.com/watch?v=-23kmhc3P8U Accessed 26 March 2014.

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